

Rules of Engagement and Abusive Citizens¹

BY AMITAI ETZIONI

The time has come to draw lessons from the war in Afghanistan. One major concern is how the U.S. military ought to deal with civilians who are sporadic combatants, and civilians who act, part of the time, as support forces for combatants (by serving as intelligence agents, manufacturing ammunition and bombs, supplying provisions and transportation, and so on). Discussion of this topic has often focused on ways to deal with those civilians after they have been caught fighting us and whether they should be treated as soldiers or as criminals, a matter that has not been resolved. (My own position is that they should be treated as a third category: as terrorists, subject to distinct rules and authority.)² This article focuses on an earlier phase: when these civilians are still acting as combatants or supporting them.

This article makes the case for a major change in the basic normative precept involved and for a new Geneva Convention, both needed in order to shift the main onus of civilian casualties where it belongs: to those who engage in combat (or help those who do) without adhering to the rules of war, which require that they separate themselves from peaceful civilians. While the U.S. and its allies should do their best to minimize collateral damage, instead of accepting the basic precept that we are the main cause of civilian casualties—highlighting our mistakes, repeatedly apologizing, and seeking to make amends—we should stress that insurgents who violate the rules of war are the main source of these regrettable casualties.

We entered the war in Afghanistan with—and still labor under—an obsolete concept. This is hardly a rare phenomenon; the development of normative and legal dictates often lags behind changes in the facts on the ground. This time, the normative precept we labor under is that all civilians are innocent, peaceful people, women and children, farmers working their fields, people doing their thing at their desks and in their homes, who should be spared when armies collide. Normatively, respecting civilian life is associated with the concept of human rights, first among which is the right to life. This normative precept reflects the horror and guilt that followed WWII, in which the Nazis deliberately targeted civilian populations, especially during the London Blitz, and the U.S. and its allies deliberately fire-bombed Dresden, killing at least 25,000 civilians,

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started a firestorm in Tokyo that killed more than 80,000 civilians, and dropped atomic bombs on Hiroshima and Nagasaki.

The 1977 Protocols I and II to the Geneva Conventions, which reaffirmed several protections for civilians in armed conflicts, reflect this precept, as did the 1899 and 1907 Hague Conventions as well as modern-day customary international law. However, these agreements and legal instruments largely assume that war takes place among nations, using troops that distinguish themselves from the civilian population through, for example, “the generally accepted practice of...the wearing of the uniform” (Protocol I, Article 44.7). The requirement that military personnel be identifiable as should be military encampments and vehicles, may sound like a minor, merely technical, matter. However, it is essential if civilians are to be spared. The fact that some civilians

deliberately conceal their role as fighters was faced long before the war in Afghanistan, in numerous insurgencies and most notably in Vietnam. However, these facts have not resulted in a normative and legal reconceptualization. We therefore find ourselves engaged in Afghanistan in an asymmetric war between largely conventional troops and irregulars, trying to heed concepts meant for conventional warfare and often unwittingly reinforcing them rather than seeking to modify them. Indeed, obsolete precepts concerning civilian casualties led to a change in the rules of engagement in Afghanistan that sought to treat the problem by imposing new restrictions on our troops, thus further reinforcing the idea that we are the main source of the casualties and ignoring the fact that if the Taliban fighters separated themselves from the population, collateral



Sergeant Matthew C. Moeller, United States Army

A U.S. Army soldier battles insurgents in Barge Matal, Nuristan province, Afghanistan, in July 2009.

damage from our actions would be minimized overnight.

This article turns next to explore the reasons for the development of the more restrictive rules of engagement and follows with a suggestion of a normative and legal precept adapted to the war against irregulars.

Brief Overview of Rules of Engagement in Afghanistan, 2001-2011

When General Stanley McChrystal took command in Afghanistan in June 2009, he tightened the rules of engagement covering whether and how U.S. forces could fire upon an enemy, enter Afghan homes, and use certain munitions. The new rules limit the use of indirect fires and air-to-ground munitions against residential compounds containing enemy personnel, and required that entry into Afghan homes should always be accomplished by Afghan National Security Forces.³ Given that the rules significantly increase the risks to our troops, General McChrystal framed them as “courageous restraint.”⁴ In 2010, when General David Petraeus assumed command of the U.S. forces in Afghanistan, he reaffirmed the stricter rules of engagement.

The tighter rules are part of a counterinsurgency (COIN) strategy that seeks to win the “hearts and minds” of the Afghan populace. COIN contains many other elements besides the changed rules of engagement, including building a stable and representative Afghan government and providing villagers with schools, clinics, roads, wells, and jobs. COIN seeks to cut off guerilla fighters from the local population in order to prevent them from “obtaining supplies and melting into the population.”⁵ The term “winning hearts and minds” was coined in the 1950s by the British High Commissioner in Malaya (Gerald

Templer) during counterinsurgency efforts there against communist anti-colonial guerilla fighters.⁶ In the post-WWII era, winning hearts and minds was “considered as the equivalent response...to the famous phrase of Mao Zedong...who believed that the communist guerilla fighter had to move within the population like ‘a fish in the water.’”⁷

Reducing civilian casualties is considered a key element of this strategy. Such restraint was urged even if it came at the expense of the military’s ability to operate. General McChrystal, for instance, testified before the Senate Armed Services Committee that, “Our willingness to operate in ways that minimize casualties or damage [in Afghanistan], even when doing so makes our task more difficult, is essential to our credibility. I cannot overstate my commitment to the importance of this concept.”⁸

The questions that arise are: how did the stricter rules affect the level of our casualties and our troops’ ability to fight? Did they reduce civilian casualties? And did they help change the hearts and minds of the population? The answers to these questions are not clear-cut and require a rigorous study by the U.S. military. However, one can gain some preliminary impressions from the limited available evidence.

As far as the effects on our troops are concerned, the stricter rules came “with costs, including a perception now frequently heard among troops that the effort to limit risks to civilians has swung too far, and endangers the lives of Afghan and Western soldiers caught in firefights with insurgents who need not observe any rules.”⁹ An army major pointed out that before the new rules of engagement (ROE) were put into place, skirmishes typically lasted roughly a half-hour, with Taliban

fighters ambushing U.S. patrols and then fleeing as soldiers responded. Now, however, with Taliban fighters less concerned about American response to their attacks, firefights often last hours, costing American lives because “the United States’ material advantages are not robustly applied” and U.S. troops often limit themselves to rifle-on-rifle fights.¹⁰ One Marine commented, “The rules of engagement are meant to placate Karzai’s government at our expense. They say it’s about winning the hearts and minds, but it’s not working. We’re not putting fear into the enemy, only our troops.”¹¹ This view was echoed by Jeff Addicott, former senior legal adviser to the U.S. Army Special Forces, who observed, “We have hamstrung our military with unrealistic ROEs. . . In many ways our military is frozen in fear of violating absurd self-imposed rules on the battlefield. How can you tell if it’s a teenager or a man, a farmer or an enemy when you’re fighting an insurgency?”¹² Another soldier commented that the “rules of engagement put soldiers’ lives in even greater danger” and that “[e]very real soldier will tell you the same thing.”¹³

A Marine infantry lieutenant confessed that he had all but stopped requesting air support during firefights because he wound up wasting too much time on the radio trying to justify his request, and pilots either never arrived, arrived too late, or were hesitant about dropping their ordnance.¹⁴ A reporter noted that tighter restrictions on the use of firepower have “led to situations many soldiers describe as absurd, including decisions by patrol leaders to have fellow soldiers move briefly out into the open to draw fire once aircraft arrive, so the pilots might be cleared to participate in the fight.”¹⁵ A noncommissioned officer related several examples of missions undermined by the rules of engagement. During an overnight

mission, his unit had requested that a 155mm howitzer illumination round be fired to reveal the location of the enemy. This request was rejected “on the grounds that it may cause collateral damage,” despite the extreme unlikelihood of anyone being hit by the illumination round’s canister.¹⁶ On another occasion, the same unit suffered casualties from an IED and saw two suspects running from the scene and entering a home. When the unit, which is “no longer allowed to search homes without Afghan National Security Forces present,” asked Afghan police to search the house, they declined, saying that the people in the house were “good people.”¹⁷ And on yet another mission, the unit came under attack by small arms fire and rocket-propelled grenades and requested artillery support, which was denied due to fear of collateral damage and concern for civilian structures.

Situations such as these have caused significant resentment among U.S. soldiers.¹⁸ Soldiers often found it difficult to understand the logic behind the rules of engagement, viewing the Afghan resentment towards their use of force to be a form of ungratefulness given that U.S. personnel were risking their lives to help the Afghans.¹⁹ U.S. military officials have sought to reassure the troops by explaining that they continue to have the right to self-defense and can forgo the stringent rules when they are in imminent danger of being overrun by the enemy. “As you and our Afghan partners on the ground get into tough situations, we must employ all assets to ensure your safety,” General Petraeus assured troops when he assumed command.²⁰ Similarly, General McChrystal emphasized that the tactical directive urging that troops show greater restraint “does not prevent commanders from protecting the lives of their men and women

as a matter of self-defense where it is determined no other options... are available to counter the threat."²¹ General McChrystal has also contended that the shift towards greater restraint was a grassroots movement that was being adopted by low-level officers long before he issued directives urging them to limit their activities.²² However, many troops remain worried that the military will "Monday-morning quarterback" their instantaneous combat decisions.²³ Indeed, following an assessment of how U.S. troops were taking to the new rules of engagement, Sarah Sewall, the then-Director of Harvard's Carr Center for Human Rights, argued that the regulations left troops terrified of crossing the line and demoralized when similarly-worried commanders refused to approve requested air strikes.²⁴

Concern over soldiers' ability to defend themselves reached such a pitch that the House passed a provision in the 2012 defense authorization bill that directed the Secretary of Defense to "ensure that the rules of engagement applicable to members of the armed forces assigned to duty in any hostile fire area...fully protect the members' right to bear arms; and authorize the members to fully defend themselves from hostile actions."²⁵ Representative John Mica (R-Fl), who proposed the provision, noted that when he visited Afghanistan, the troops asked him, "Please change the rules of engagement and allow us to adequately defend ourselves."²⁶ Ultimately, the version of the defense authorization bill that passed the Senate did not contain Mica's provision due to the same concern that had informed opposition to the provision in the



Staff Sgt. Brian Ferguson, U.S. Air Force

U.S. Army Sgt. 1st Class Manuel Delarosa finds a pair of shoes for a young girl while helping Afghan National Security Forces distribute winter supplies in Safidar village, Afghanistan, on Feb. 1, 2011.

House: reluctance to substitute congressional judgment for that of military leaders.²⁷ Representative Robert Andrews (D-NJ), for example, expressed concern that the amendment would “supplant the judgment of th[e] commander in the field with the judgment we are making here thousands of miles away.”²⁸ Representative Adam Smith (D-WA) similarly objected; “I want our trained commanders in the field to make the decision on what the rules of engagement should be in any given environment, not the United States Congress.”²⁹ Nobody denied that the stricter rules raised important concerns, but many felt that Congress was not the place to solve them.³⁰

Difficulties arise in assessing the effects of the stricter rules on U.S. military casualties. They have increased since General McChrystal introduced the rules in mid-2009, but it is difficult to determine to what degree higher casualty levels are due to the changed rules. On the one hand, U.S. troop deaths surged to record numbers in July and August 2009, soon after the rules were implemented. However, this surge can be attributed in large part to other factors, such as the Taliban’s usage of larger roadside bombs beginning in that year and a major military offensive in the south.³¹ And while the number of troop deaths recorded in 2009 (311) was roughly double those recorded in 2008 (155),³² the number of U.S. troops deployed to Afghanistan also roughly doubled during 2009.³³

While the stricter rules of engagement are reported to have resulted in fewer civilian casualties in Afghanistan being caused by U.S. or coalition forces (especially by airstrikes), there has not been an *overall* decrease in civilian casualties in Afghanistan since 2009—in fact, they have increased. According to the

Congressional Research Service, there were 2,118 civilian deaths in 2008; 2,412 in 2009; 2,777 in 2010; and 3,021 in 2011.³⁴ This is due to a significant extent to increased casualties caused by the Taliban and other insurgents.³⁵ However, it is difficult for the Afghan population, subject to conflicting reports by American and Taliban sources, to sort out what and who caused these casualties.

Most relevant to assessment of COIN is the fact that the Afghan government and public continued to grow increasingly hostile to the U.S. in the period after which the stricter rules were introduced.³⁶ In recent months, tolerance for the U.S. military presence has plummeted particularly dramatically.³⁷ The reasons are many, including the burning of Korans, videos showing American soldiers urinating on corpses of Taliban killed in action, and a rampage by a single American soldier. Beyond these, there is a more basic sense of alienation that is due to the very presence of foreign troops in one’s country; the obvious affluence of the foreigners compared to the Afghan populace’s high level of poverty and deprivation; profound differences in belief, especially about the role of women; and a deep resentment of American efforts to change most aspects of Afghan life, including by promoting Western forms of politics, seeking to foster national commitments in a country in which the first loyalty is to one’s ethnic group, and promoting secular education and free media (that broadcast material many Afghans consider deeply offensive). The surge in production of opiates, corruption, and lawlessness, and the return of pedophilia as well as continued support for warlords—all since the American occupation—also breed resentment among some Afghans (while others benefit from them).

There are very few conflicts in which efforts to win hearts and minds have been effective. The British counterinsurgency in Malaya during the 1950s is often cited as a model for current COIN efforts, but in that case the guerillas were almost exclusively members of an ethnic minority (Malayans of Chinese descent) and were “directed by a Marxist-Leninist movement that was isolated from the wider population and without any support bases outside Malaya.”³⁸ The British thus could count on the support of the majority of the population, while the insurgents did not receive the support of the “great Maoist backup,” as historian Jacques Droz put it.³⁹ There was not a neighboring country like Pakistan that provided a safety zone for insurgent leaders and a place for insurgents to train, rest, reorganize, and gain supplies. Moreover, historian Karl Hack has contended that it was not actually General Templer’s emphasis on hearts and minds from 1952 onward that was primarily responsible for the Malayan insurgency’s defeat, but rather the population control and guerilla fighter isolation policies implemented under General Briggs between 1950 and 1952. Thus, it was the “use of sheer force together with th[e] strategy of deportation [of millions of Malayans] that broke the back of the insurgency, not a joyful and pleasant ‘winning of hearts and minds’ campaign.”⁴⁰

In short, although civilian casualties surely feed the Afghan people’s mounting resentment against the foreign forces, there is considerable reason to hold that even if these were greatly reduced, we would be unable to win the hearts and minds of most of the population. Moreover, if the rules of war were adapted to asymmetric warfare, and the relevant normative and legal precepts were

modified accordingly, these changes might well change whom the population considers to be the main culprit for civilian casualties.

Abusive Civilians

The distinct normative precept that is needed can be introduced via a mental experiment. Assume two armies fighting each other, a red and a blue army. The red army has some infantry in the front lines, trucks and drivers that deliver ammunition and food, a HQ in the back, and some storage areas. All the fighters wear uniforms and all the cars, buildings, etc., are marked clearly indicating that they are part of the red army. Under these circumstances, the blue army would be free to bomb, strafe or otherwise kill all these soldiers and destroy their assets, well in line with what people would consider legitimate conduct and well within the rules of war, as expressed in the Geneva Conventions and the Rome Statute (which established the International Criminal Court).

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Now assume that the red army fighters removed their uniforms and wore civilian clothes, repainted their trucks and barracks, etc., to look like civilian cars and residences—but otherwise kept fighting just as they did before. Their acts would make it much more difficult for the blue army to spare the peaceful civilians and their assets—while the red

“army” would gain great strategic and tactical benefits from this move. Indeed, further analysis may well show that such a change (especially when the response is stricter engagement rules for our military) is one major reason the war in Afghanistan lasted so long, caused numerous casualties, and is far from over. Various insurgency groups, in effect, go further. They use civilians as human shields, store their ammunition in mosques, mount anti-aircraft guns on the roofs of schools, use ambulances to transport suicide bombers, and house missiles in private homes. Morally, one can readily see that the red army bears primary responsibility for the collateral damage caused by its actions, and it is difficult to see why one would hold that the red army fighters are as a result entitled to extra rights and protections. This is true even if the red army is only a part-time army. (I know, from personal experience. The first year I served in the Palmach, we would work two weeks each month in a kibbutz that provided us with room and board, including for the other two weeks each month, in which we would train and fight.)⁴¹

Abusive civilians are citizens who misuse their civilian status by violating the rules of war while seeking to benefit from them, demanding that those whom they challenge abide by these rules. I call them “abusive civilians” as opposed to “abusive combatants” so as to emphasize the particular way in which they are violating the rules and moral norms of war. There are many varieties of abuse that a combatant might engage in, for example, waving a flag of surrender and then launching a surprise attack on those who, in good faith, come to negotiate. By using the term “civilian,” my intent is not to suggest that these fighters are somehow akin to civilians but, rather, to specify the particular type of abuse they

commit, namely masquerading as civilians as opposed to clearly identifying themselves as a party to the conflict. An additional distinction must be drawn between two kinds of abusive civilians—those who engage to fight but pose as civilians and those who appear as civilians and carry out a more logistical role by providing aid and assistance to the fighters. As it stands presently, Additional Protocol I of 1977 qualifies fighters out-of-uniform as lawful if they openly display their arms en route to an attack. However in countries in which most adult males carry guns, this is not a legitimate marker. It would be in areas where there is a ban on carrying arms by civilians.

Advancing this normative precept (and its legal implications) requires several major efforts.

(a) On the international level, public intellectuals and legal scholars have to formulate the kind of brief of which this article is but a very limited and preliminary start. Advancing such a brief requires raising awareness of the issue and seeking a new shared understanding of what is legitimate civilian conduct.

(b) We need a change in language. Currently, practically all reports—whether official or in the media—about collateral damage refer to “civilians” and “fighters” (or militants), which revalidates the obsolete notion that civilians are, on the face of it, innocents and constitute illegitimate targets. Making a distinction between two kinds of civilians—between peaceful and abusive civilians—moves the language in the right direction. Furthermore, it should be noted that current language implies that one can readily tell peaceful and abusive civilians apart, while the opposite is true. In large parts of the areas involved, most men carry arms and wear the same clothing, headgear, and beards, whether

they are herding sheep, farming, or fighting. Hence, flat statements such as X civilians and Y militants were killed are often based on one taking the word of the locals or uncritically accepting reports by foreign media, which are often wildly off the mark.⁴² Above all, such statements presume that it was possible to distinguish peaceful and abusive civilians before the engagement, which is often not the case. Each post hoc report should made it clear how similar the “civilians” and “fighters” were found to be and that, even after the fact, under non-combat conditions and with no time pressures, it is difficult to tell who is who because of the illegitimate way in which the insurgents fight.

What would a new Geneva Convention, dealing with asymmetric war, look like? (I write “look like” because the following lines serve merely as a very preliminary outline for a framework that must be fleshed out. They

aim to suggest an approach rather than provide a developed draft.) The suggested convention assumes that all means for a peaceful resolution of a conflict have been exhausted and that a military engagement is unavoidable. This prerequisite is essential precisely because one must assume that war cannot be kept “surgical” and that peaceful civilians will be hurt, which is one reason armed conflicts should be avoided whenever possible.

However, if fight we must, it should be understood that (a) civilians who bear arms of any kind must avoid areas declared “controlled arms zones” (which can include whole regions and even a country), or they will be considered fighters. It might be objected that this is too heavy-handed, as it would open up any person within the zone who displayed a weapon to attack. However, as long as people are made clearly aware that carrying weapons is prohibited and are given adequate opportunity to leave their arms behind—like Americans in an airport - it is not clear why such an approach should be ruled out. Our side need not wait until our troops are first shot at to warn and then neutralize such fighters. This does not mean that these are free-fire zones, in which we are free to shoot to kill at will but merely that rules which we help establish will apply. Others might object that even civilians need weapons to protect themselves from fighters, but this would not be true in a totally demilitarized zone where civilian and fighter alike would be forced to disarm or face attack. In that sense these zones are not different from fenced-in areas, in which for security reasons—and for the protection of civilians—we allow in only those who do not carry arms or meet other requirements, similar to current procedures for airplanes, many public buildings, and of course military bases even in the United



Taliban police patrolling the streets of Herat in a pickup truck, 15 July 2001.

States itself. Only in this case, the areas might well be larger.

Finally, it might be argued that there is no way to provide those residing within such a zone with fair warning that they must disarm or leave. However, the military has considerable experience with such communications efforts, often dropping leaflets or setting up phone banks in advance of bombings or to notify fighters of opportunities to surrender and reintegrate into society.

Such declarations of controlled arms zones can draw on distinctions already drawn between “theaters of war” and other zones. For instance, the ACLU argues that the U.S.’s targeted killings in Pakistan and Yemen are illegal because those countries fall outside the congressionally approved combat areas of Iraq and Afghanistan. According to Ben Wizner, Litigation Director for the ACLU’s National Security Project, “Outside the theater of war, the use of lethal force is lawful only as a last resort to counter an imminent threat of deadly attack.”⁴³ It follows that in declared controlled arms zones, different rules of engagements, can be applied. These zones need not be designated by Congress any more than when we announce that parts of the desert in Nevada—or an island in Puerto Rico—are closed to the public because they are being used for target practice, only in the case at hand we allow civilian traffic as long as the civilians do not carry arms (bombs included). Also, because when terrorists attack there typically is no warning time, as there often is when conventional attacks are in the making, all terrorists should be treated as though they pose an imminent danger.⁴⁴ And hence controlled arms zones can be declared any place and any time there is compelling evidence that terrorists or insurgents frequent them. However when these

are parts of independent nations (e.g. Pakistan) as distinct from parts of a nation for whose security we are responsible (e.g. Afghanistan, at least until 2014), our first step is to seek for the responsible government to take the needed action and for us to act only with its consent or after it has repeatedly failed to discharge its duties.

At sea, when dealing with pirates who terrorize the waterways, a 250-yard buffer—or some other such zone—could be declared around ships on the high seas. Those who approach ships might be asked to stop to be identified and, if need be, searched. If they do not stop, those who protect the ships will be free to fire across their bow, and if those who are closing in on the ship still do not stop, they will be neutralized. The same holds for cars approaching our checkpoints or buildings in areas designated as combat zones.

(b) Civilians who used arms but returned to civilian pursuits are still to be treated as fighters. As long as we must fight, if shepherds at the side of the road plant IEDs and return to herding their sheep, we cannot spare them any more than soldiers of an enemy army who are taking a break, and if farmers pull out their AK-47s to shoot at us and then return to their hoes, we cannot treat them as if they were part of a Rockwell painting.

(c) Civilians who voluntarily house or serve as sources of intelligence or transport for fighters are fair targets, just as they would be if they wore uniforms. (Whether a population voluntarily services insurgents may not always be easy to determine, but one should note that with rare exceptions—such as when women and children are used as human shields—people have a choice.) There are some, not many, who contend that individuals providing logistical support, even if they were in uniform,

would not be subject to attack under the present laws of war. However, it is hard to think of a major conflict where those who build the bombs or deliver them to the front line and so on would be considered off-limits. The International Committee for the Red Cross, for example, has been particularly constrained on this point, arguing that there are very narrow conditions under which a person qualifies as “directly participating in hostilities” and is, thus, subject to attack.⁴⁵ However, this interpretation has seemingly gained little traction.⁴⁶

There are too many possible permutations for orders to cover all situations, and therefore those in the field should be given the authority to determine what is to be done, with the full knowledge that they will not be second-guessed by those in the rear.

(d) Facilities used for housing insurgents, supplying them, etc., are also fair targets, whether or not the insurgents are in them at the time.

(e) When fighters are caught who do not carry markers that allow one to separate them from peaceful civilians, they may be detained as long as they continue to pose danger to us or to others. However, instead of undetermined holding, their status should be reviewed once every year or two by a panel of three military offices.⁴⁷

(f) Special efforts should be made to minimize collateral damage even though its main cause is the insurgency (see below).

(g) Civilian populations should not be intentionally targeted, for instance in order to break the fighting spirit of the other side.⁴⁸

These very preliminary guidelines aim to nurture a dialogue on these points, and must be significantly extended and elaborated upon before they might serve as a new Geneva-like convention. I write “Geneva-like” because the

Geneva Conventions are agreements among nations. However, it is the hallmark of abusive civilians that they often do not represent a government and are not controlled by it. Hence, one cannot, most of the time, have an agreement between the government of the nations involved and the insurgent groups about the rules of the conflict. However, the nations of the world can agree with each other on the new normative precepts and the legal points sketched above, and issue a declaration to this effect. These could then serve in cases of international conflicts as normative and legal guidelines.

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These suggested guidelines, and the normative concepts that underlie them, draw on existing international humanitarian law, in particular the 1977 Additional Protocol I of the Geneva Conventions as well as the Rome Statute, although specific rules of engagement promulgated by a given military can quite readily be much stricter than these laws imply or otherwise vary from them.

Protocol I, which contains the most substantive guidelines for the protection of civilians, applies to international conflicts. The conflict in Afghanistan is now internal in nature (the Afghan government is engaged in armed conflict against insurgents with the support of the international community), and in any case the U.S. has not ratified Protocol I. However, many of Protocol I’s articles are recognized as rules of customary international humanitarian law (IHL) applicable to both

international and non-international armed conflicts and valid for all states, whether or not they have ratified the protocol.⁴⁹

Under the provisions of Protocol I, it is a war crime to engage in “total war,” one that fails to distinguish between civilian and military targets. Indiscriminate attacks that are not “directed at a specific military objective” (Article 51.4 of Protocol I, Rule 12 of customary IHL) are prohibited. Under Article 51.5, types of attacks considered to be indiscriminate include: (a) “attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects” and (b) “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which

would be excessive in relation to the concrete and direct military advantage anticipated.”⁵⁰

Further, militaries must, where possible, “avoid locating military objectives within or near densely populated areas” (Article 58 of Protocol I, Rule 23 of customary IHL). This should be fully required from civilian combatants as well. “Indiscriminate” needs to be redefined so it is understood to mean that when the rules of distinction are violated, discriminate counter-acts are rendered largely impossible by those who did not separate themselves and their assets. That is, indiscriminate can be caused by both sides. The requirement that civilian casualties not be “clearly excessive” can continue to be honored. (While Protocol I of the Geneva Convention and Rule 14 of customary IHL use the term “excessive,” Article 8.2.b.iv of the Rome Statute restricts the jurisdiction of the International Criminal Court to cases in which civilian casualties and damage to civilian objects are “clearly excessive.”)



LIFE: Joe Penner

Former Taliban fighters line up to hand over their rifles to the Government of the Islamic Republic of Afghanistan during a reintegration ceremony at the provincial governor's compound.

Article 57.2 (reflected in Rule 15 of customary IHL) requires that military forces planning an attack “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects...but are military objectives” and “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects.” Once an attack has been planned, militaries must make efforts to remove civilians and civilian objects under their control from the vicinity of military operations (Article 58 of Protocol I, Rule 24 of customary IHL) and, where possible, “give effective advance warning” of attacks that may impact the civilian population (Article 57.2 of Protocol I, Rule 20 of customary IHL).

Articles 43 and 44 of Protocol I grant combatant and prisoner of war status to guerrilla forces under the command of a central authority, provided that they do not hide their allegiance, but distinguish themselves as combatants when possible and at the very least carry their arms openly when engaging with the enemy or preparing to attack; Article 37 expressly prohibits combatants from feigning to be civilians.

The main articles that must be modified are Article 50.3 of Protocol I, which holds that the presence of combatants within the civilian population “does not deprive the population of its civilian character,” and Article 50.1 of Protocol I, which stipulates that in cases of doubt whether a person is a civilian, the military must consider that person a civilian. Also problematic is the fact that civilians retain immunity from attack until they take a “direct part” in hostilities (Article 51.3 of Protocol I, Rule 6 of customary IHL), at which point they

become lawful targets of attack—but only for the duration of their participation. Thus, the Geneva Conventions encourage a “revolving door” by which civilians regain the benefit of immunity from attack as soon as they put down their arms and no longer pose an imminent threat. That said, this interpretation of “direct part” in hostilities is put forward primarily by the Red Cross and has not been accepted by most governments of the world.

In contrast, the new declaration should call more attention to Article 51.7 of Protocol I and Article 8.2.b.xxiii of the Rome Statute, which outlaw combatants from using the presence of civilians to render areas “immune from military operations.” Article 51.7 (reflected in Rule 97 of customary IHL) particularly emphasizes that combatants may not use civilians as human shields in order to protect themselves or military targets from attacks.

Much work remains here to be done by public intellectuals and legal scholars. The main approach, though, seems clear: people who abuse their civilian status must not profit from many of the rights that go with it.

Oversight and Moral Equivalency

The fact that abusive civilians, along with insurgents, are the main culprits for civilian casualties does not mean that the military should not seek to limit these casualties while emphasizing that there is only so much that it can do so long as the other side is not doing its share. The following lines merely seek to illustrate what is being done and what can be done to curb collateral damage.

The criteria are reported to include the reliability of the intelligence that identified the target and the number and status of presumed civilians in the area. The less reliable the information and the greater the potential collateral

damage, the more people review the information and the higher the rank of the those in the military who approve the strike—all the way up to the Commander-in-Chief. Strikes also are examined after they occur in cases when we have erred. Thus, in effect, abusive civilians benefit from an extensive review before targeted killing takes place.

One should note that just as the matrix (the decision-making apparatus used by the military) can be too lax, it can also be too restrictive. In several cases, the delay in making the decision or the strictness of the criteria employed allowed abusive civilians of considerable rank and power to escape.

What about freedom fighters? And private contractors who carry out military missions? If they act like abusive citizens, are they too to be blamed as the major source of the resulting casualties—and treated accordingly? Much more license must be granted to those who rise against a tyrannical regime than to those who could challenge a government in the ballot box but chose to raise their arms against it. Some might argue that such a moralization of the rules of war would allow any party to claim the moral high ground and use it as an excuse for disregarding the rules of war. However, simply because some group claims to have justice on its side does not make this case and need not influence how their actions are assessed in terms of international law and core values. There is a profound difference between those who used violence when they tried to overthrow Hitler and those who sought to kill the democratically-elected Yitzhak Rabin—between those who took up arms against Stalin, and the assassin who killed JFK.

However, freedom fighters too must follow the rules of war by separating themselves from the civilian population, carrying

identifying markers, and taking responsibility for the casualties that follow when they do not follow these rules. **PRISM**

NOTES

¹ I am indebted to D. Alexandra Appel for extensive research assistance on this article and to Peter Raven-Hansen for comments on a previous draft.

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⁵ "Winning Hearts and Minds': Historical Origins of the Concept and Its Current Implementation in Afghanistan," *Cahier de la recherche doctrinale* (November, 2011), 18, http://www.cdef.terre.defense.gouv.fr/publications/cahiers_drex/cahier_recherche/gagner_coeurs_us.pdf.

⁶ *Ibid.* at 26.

⁷ *Ibid.* at 18.

⁸ Stanley McChrystal, *My Share of the Task: A Memoir* (Portfolio/Penguin, 2013), 289-290.

⁹ C.J. Chivers, "General Faces Unease Among His Own Troops, Too," *The New York Times*, June 22, 2010, <http://www.nytimes.com/2010/06/23/world/asia/23troops.html?pagewanted=all>.

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¹¹ Sara Carter, "Marine's career threatened by controversial rules of engagement," *The Washington Examiner*, January 23, 2012, <http://washingtonexaminer.com/news/world/2012/01/marines-career-threatened-controversial-rules-engagement/167369>.

¹² *Ibid.*

¹³ Michael Hastings, "The Runaway General," *Rolling Stone*, June 22, 2010, <http://www.rollingstone.com/politics/news/the-runaway-general-20100622?page=4>.

¹⁴ C.J. Chivers, "General Faces Unease."

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¹⁶ George Will, "No bluffing in Afghanistan," *Orlando Sentinel*, June 21, 2010, http://articles.orlandosentinel.com/2010-06-21/news/os-ed-george-will-062010-20100621-7_1_unit-collateral-damage-afghan-national-security-forces.

¹⁷ Ibid.

¹⁸ C. J. Chivers, "General Faces Unease."

¹⁹ Stanley McChrystal, *My Share of the Task: A Memoir* (Portfolio/Penguin, 2013), 369.

²⁰ Laura King, "Afghans see change in U.S. command as a threat to safety," *Los Angeles Times*, July 5, 2010, <http://articles.latimes.com/2010/jul/05/world/la-fg-0705-afghan-war-rules-20100705>.

²¹ Stanley McChrystal, *My Share of the Task: A Memoir* (Portfolio/Penguin, 2013), 312.

²² Ibid.

²³ Sara Carter, "Marine's career threatened."

²⁴ Fred Kaplan, *The Insurgents: David Petraeus and the Plot to Change the American Way of War* (New York: Simon & Schuster, 2013), 328.

²⁵ Nathan Hodge, "The Second Amendment for Troops?" *The Wall Street Journal*, May 26, 2011, <http://blogs.wsj.com/washwire/2011/05/26/the-second-amendment-for-troops/>. See also text of H.R. 1540, Section 1087, 112th Congress, 1st session, available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr1540eh/pdf/BILLS-112hr1540eh.pdf>.

²⁶ Rep. John L. Mica e-newsletter, May 26, 2011, <http://mica.house.gov/news/email/show.aspx?ID=JJ444735PXMDNPUFF4NZMEYMM>.

²⁷ The conference report for the defense authorization bill noted that "the conferees... acknowledge that military commanders may restrict service members' ability to carry or employ weapons to achieve mission success. The conferees encourage the Secretary of Defense...to ensure that members of the armed forces serving in hostile fire areas have the means to exercise self defense to the maximum extent practicable and consistent with their mission," implying a reluctance to substitute congressional judgment for that of military commanders and the Secretary of Defense. See National Defense Authorization Act for Fiscal Year 2012: Conference Report, "Joint Explanatory Statement of the Committee of Conference," 112th Congress, 1st Session, http://www.rules.house.gov/Media/file/PDF_112_1/legislativetext/HR1540conf.pdf, 192.

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²⁹ Adam Smith, transcript of House proceedings, May 25, 2011, <http://www.c-spanvideo.org/appearance/600019929>.

³⁰ For more discussion, see Arthur Berney, Stephen Dycus, and Peter Raven-Hansen, *National Security Law*, 5th edition (New York: Wolters Kluwer Law & Business, 2011): 77-82.

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³² Susan Chesser, *Afghanistan Casualties: Military Forces and Civilians*, CRS Report R41084 (Washington, DC: Congressional Research Service, December 6, 2012), available at <http://www.fas.org/spp/crs/natsec/R41084.pdf>, 1.

³³ See Figure 1.1 in Ian Livingston and Michael O'Hanlon, "Afghanistan Index," (Washington, DC: Brookings Institution, May 16, 2012) available at <http://www.brookings.edu/~media/Files/Programs/FP/afghanistan%20index/index.pdf>.

³⁴ See Table 4 in Susan Chesser, "Afghanistan Casualties," 3.

³⁵ Ibid.

³⁶ See "Afghanistan: Where Things Stand—Afghan Views Worsen as Setbacks Counter U.S. Progress in Helmand," poll by ABC News/BBC/ARD/*The Washington Post*, December 6, 2010, <http://www.langerresearch.com/uploads/1116a1Afghanistan.pdf>.

³⁷ See, e.g., "Among Afghans, tolerance of U.S. presence takes hit," *The Seattle Times*, March 13, 2012, http://seattletimes.nwsource.com/html/nation-world/2017741622_afghan14.html.

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³⁹ "Winning Hearts and Minds," Cited in *Cahier de la recherche doctrinale*, 30. See also Gérard Chaliand, *Le Nouvel Art de la Guerre* (L'Archipel, 2008).

⁴⁰ "Winning Hearts and Minds," *Cahier de la recherche doctrinale*, 31. See also Karl Hack, "The Malayan Emergency as Counter-Insurgency Paradigm," *Journal of Strategic Studies* 32.3 (June 2009), 383-414.

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⁴³ "ACLU Statement on Killing of Anwar Al-Aulaqi," ACLU, September 30, 2010, <http://www.aclu.org/national-security/aclu-statement-killing-anwar-al-aulaqi>.

⁴⁴ I am indebted for this observation to Peter Raven-Hansen. See also Chapters 8 and 9 in William Banks, Arthur Berney, Stephen Dycus, and Peter Raven-Hansen, *National Security Law*, 5th edition (New York: Wolters Kluwer Law & Business, 2011).

⁴⁵ Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities Under Humanitarian International Law* (Geneva: International Committee of the Red Cross, 2009)

⁴⁶ This point was brought to my attention by TKTK in his comments on an earlier draft.

⁴⁷ For more discussion of issues facing abusive civilians after capture, see Amitai Etzioni, "Terrorists: Neither Soldiers nor Criminals," *Military Review* 89, no. 4 (2009), 108-118. See also Benjamin Wittes, *Law and the Long War* (New York: The Penguin Press, 2008).

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⁴⁹ Rebecca Barber, "The Proportionality Equation: Balancing Military Objectives with Civilian Lives in the Armed Conflict in Afghanistan," *Journal of Conflict and Security Law* 15, no. 3 (2010), 474. For the International Red Cross's list of rules that summarize customary international humanitarian law, including many of the standards established in Protocol I, see Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I*, International Committee of the Red Cross, 2005, <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

⁵⁰ See also Rules 1, 7, and 14 of customary IHL. Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*.

⁵¹ See, e.g., Laura Dickinson, *Outsourcing War and Peace: Preserving Public Values in a World of Privatized Foreign Affairs* (New Haven: Yale UP, 2011).

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