

Democracies, insurgencies and terrorism, and peace building

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Unconventional warfare: conflict management

In the present time and foreseeable future, most warfare will not be between states but between states and non-state entities, be they insurgents, guerrillas, transnational terrorists, war lords and bandits, or some combination of these, usually helped and even sponsored by states. Of 231 armed conflicts identified by peace research data bases (Oslo, Uppsala) between 1946 and 2005, 167 have been internal conflicts and 43 interstate – the remaining 21 were colonial wars. This mode of internal warfare has been called by various names: ‘new wars’, civil wars, unconventional wars, asymmetric warfare, insurgency and counterinsurgency; I will refer to it as ‘unconventional warfare.’ Most of these armed conflicts tend to last longer than conventional wars and do not end with a unilateral military victory, but with a negotiated peace. Negotiations often take place during a ‘fight and talk’ phase of the conflict [Marshall and Gurr,2003], with several interruptions and resumptions, until persistent good faith negotiations for peace take place. The issue I discuss in this talk is peacemaking and peace building in the course of unconventional warfare.

The study of **peace processes** in unconventional warfare has identified **six pivotal variables** that impact on **success chances** [Oberschall, 2007, chapters 1 and 7]. First, peacemaking requires that both sides give up the goal of achieving unilateral military victory, and that happens when the adversaries reach a ‘mutually hurting stalemate’ [Zartman, 2001] and engage in good faith negotiations for a political settlement of the conflict. Second, good faith negotiations occur when the adversaries “recognize” one another, i.e. they accept the continued existence of their opponent and give up destroying him. Third, the adversaries do not insist on various “preconditions” that threaten the

security of the other, like renouncing violence and surrendering weapons, or refusing to negotiate with particular military, political or insurgent leaders. Fourth, negotiations are more likely to be successful when the adversaries are united rather than internally factionalized. Fifth, external state intervention that fuels the insurgency in these armed conflicts is quite common and covert, and it has to stop. On the insurgent side, a major impetus for negotiations comes when external state sponsors withdraw their support for the insurgency; on the government side, it may be when external states don't want the entire region to destabilize (avoid huge refugee flows or competitive armed interventions) and exert international pressures for peace making on the combatants. Sixth, external intervention is most effective when the adversaries are pressured by their "allies," e.g. the United States on Israel and the Arab states on the Palestinians.

Several consequences follow: **if warfare produces anarchy and a failed state**, as is and was the case in Somalia and the Congo, then there can be **no credible political solution**, there are no credible negotiating partners, no agreement can be enforced, no peace deal can be implemented [Collier et al, 2003]. The government counterinsurgency strategy for unconventional warfare should be for a military stalemate without precipitating anarchy, followed by a political settlement. Security of life and property have to be provided for success in peace building. If the government withdraws from a territory and surrenders the population to the insurgents, what follows is not peace but ethnic cleansing, refugees, war lords, criminal mafias, the killing and imprisonment of moderates, and rule by coercion. If the government wins by total repression and state terror, what results is a totalitarian state or authoritarian military regime. Stability and security will be provided not through institutions and consent, but by coercion and repression, perhaps for a time only, before yet another insurgency starts. Although there are examples in history of total repression and scorched earth practices against insurgency – the Romans, the Ottomans, among others did it [Luttwak, 2007] – democratic states in the contemporary world rightfully reject this option.

From studies of peace pacting and peace building in unconventional warfare, we know what the **contours of stable peace** are. On the political dimension, there has to be some

form of power sharing with the group(s) represented by the insurgents. It may entail constitutional changes such as federalism, autonomous territories, cultural rights, and possibly even secession and state boundary changes, e.g. the creation of two independent states in Palestine, but certainly power sharing, as in Northern Ireland. Part of the insurgent leadership has to transform into a political party that is included in power sharing. Because insurgents are seldom a united entity, transitional security has to be provided against rogue elements in the insurgent coalition that reject the peace. The armed fighters have to turn in their weapons and be integrated into civilian life (which may include police and army), and that requires some form of amnesty for political crimes committed by both sides and a justice process for other violations of law (as occurred in South Africa). Refugees and internally displaced persons should be able to return to their homes, and receive compensation for property loss. To restart the economy, from the devastation of war, an economic reconstruction program needs to be undertaken, usually funded by outsiders and international sources. And outside agencies and international bodies, including sometimes military forces, have to ensure that the terms of the peace agreement are enforced and guaranteed [Oberschall,2007, chapter 7].

The model of conflict management in unconventional warfare is derived from the study of ethnic self-determination movements and insurgencies. How far does it apply to violent conflicts by Islamic fundamentalist and jihadists, sponsored by the likes of al-Qaeda or an Islamic government (e.g. Iran) against targets located in a Western country or in the Muslim world itself, e.g. a secular Arab regime? Consider as an example that British government facing the Irish Republican Army (or the Spanish government the Basque separatist militants in ETA) is in a somewhat different conflict management dilemma when it has to deal with jihadist terrorists who don't have territorial and power sharing goals that can be negotiated in a compromise political settlement. These groups pursue the spread of a religious identity, ideology, and cultural style that is the polar opposite of their host country – what Huntington termed a “clash of civilizations.” Conflict management requires a somewhat different approach because, unlike secular ethnic movements for which it is possible to negotiate a 70/30 or 80/20 political power sharing compromise, it is not possible to negotiate a 70/30 compromise on, for example,

nudity and explicit sex (and other sins that are contrary to God's prescription for the salvation of mankind) in popular culture and mass media with religious true believers, and it is not possible from a human rights point of view in a democracy to negotiate a legal quota of 30% arranged, involuntary marriages between an underage girl and an adult man! [Oberschall, 2004]. To contain such an adversary, democratic governments have to shut off the external state and militant non-state support and sponsorship of their radical and violent religious adversary, and they have to persuade the moderate Muslim community to police the violent radicals and to cooperate with the law enforcement authorities. With this proviso, my analysis below on how democracies deal and ought to deal with unconventional violent adversaries applies to both self-determination opponents, to jihadists, and to other groups using terror and violence.

The democratic dilemma: the lesser evil

I have studied in some detail how democratic states conduct counterinsurgency: the British government in Northern Ireland 1968-1998; the French government during the Algerian war of independence 1954-1962; the Israeli-Palestinian conflict from early 1990's to the present; and the U.S. in the Afghan and Iraqi wars and the "global war on terror." From these and other case studies as well as from research by other scholars [several papers were on this topic at the 2007 annual meetings of the International Studies Association in Chicago] I conclude that democracies violate the rules of conventional war as stated in the Geneva conventions, and that they violate human rights, especially in matters of justice. **Some violations can't be avoided when democratic governments seek to contain insurgents for a political solution and stable peace. The alternative is insurgent victory, or descent of the country into anarchy.** At the same time, I want to underscore that **deviations from the Geneva conventions and normal peacetime justice have to be lawfully enacted, temporary, limited, carefully monitored to check abuses and make the security apparatus accountable.** They are a **lesser evil** [Ignatieff, 2004] compared to anarchy and insurgent victory. Properly implemented, these changes necessary for containment minimize war crimes, crimes against humanity, human rights violations, and other horrors of unconventional warfare. Properly implemented,

counterinsurgency will not impede peace making and a political solution; it will make it possible.

The controversies on strict adherence to the Geneva conventions in counterinsurgency and the partial suspension of peace time justice for detention, interrogation and prosecution of insurgents and terror suspects has been dominated on both sides by lawyers and legal theorists, i.e. government, military lawyers, and advisers on one side and the human rights NGO and international law community on the other. Jack Goldsmith, the Head of the Office of Legal Counsel in the U.S. Department of Justice, who was an inside participant when the Bush administration made its crucial war on terror decisions, writes that [Goldsmith, 2007, p.130] “lawyers weren’t necessarily expert on al Qaeda, or Islamic fundamentalism, or intelligence, or international diplomacy, or even the requirements of national security...(lawyers) dominated discussions on detention, military commissions, interrogation, Guantanamo, and other controversial terrorism policies.” All sides are mired in minute examination of treaties and laws and judicial precedents, usually of atypical cases or hypotheticals like the ‘ticking bomb’ scenario. The lawyers are divorced from the realities of actual counterinsurgency combat operations, civilian experiences in combat zones, insurgents’ actions, the actual day to day practices of seeking intelligence, tracking down insurgents, detaining and interrogating them, preventing terror attacks before they actually take place, providing security and an orderly life.

The legal debate on justifying or condemning dirty warfare and justice ranges over a wide spectrum. On one extreme, Richard Posner, a judge on the U.S. Court of Appeals for the Seventh Circuit and prolific legal scholar and author, in Not a Suicide Pact: The Constitution in a Time of National Emergency, defends preventive detention, mass wiretaps, coercive interrogation for intelligence purposes, military tribunals, and much more executive authority to deal with terrorist threats. On the other extreme, Lord Hoffman, the British law lord, argued against indefinite detention without trial of foreign terror suspects: “I do not underestimate the ability of fanatical groups of terrorist to kill and destroy, but they do not threaten the life of the nation, ...the real threat to the life of

the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.”

[<http://crookedtimber.org/2004/12/17>]. I find these legal debates unrealistic and inconclusive.

Unlike lawyers, I take a **behavioral approach** to the topic, including deviations from the laws of war and from peacetime justice. The legal approach is normative, judging behavior as conforming to legal norms and justifying exemptions in a state crisis or emergency. The behavioral approach rests on empirical study of unconventional war. It too has a moral foundation, expressed a century ago by Max Weber [1958, pp. 119, 121] : ”for the politician...the proposition holds, ‘thou shalt resist evil by force’ or else you are responsible for evil winning out...No ethics can dodge the fact that one must be willing to pay the price of using morally dubious means or at least dangerous ones – and face the possibility or even the probability of evil ramifications.”

The behavioral study of unconventional warfare

In conventional warfare, treaties and conventions that bind adversaries are symmetrical and reciprocal, as in the treatment of prisoners and the protection of civilians. Both sides benefit from compliance. In states versus insurgents, there is no symmetry and reciprocity. The insurgents have no chance of success waging conventional war against a more powerful adversary. They do not wear uniforms and carry weapons openly. They depend on the civilian population to provide food, funds, recruits, information about the security forces, and active support in retreating from attacks back into safe places or simply disappearing in the population. If they do not get cooperation from the population by persuasion, they get it with intimidation, coercion and fear. In fact, insurgents murder more civilians among their own people than the security forces kill in counterinsurgency operations. Those killed are called “collaborators” or “traitors” though they are for the most part bystanders who do not actively support the insurgents. Sometimes they torture them before they are executed, as a warning to others.

Unconventional warfare is an unsettling experience for professional armies trained to fight other professional armies. The killing of their comrades by invisible snipers, land mines, roadside bombs, attackers and suicide bombers disguised as civilians, use of civilians as shields, religious places of worship, hospitals, schools and civilian homes used for weapons caches, attacks and safe places, and the sight of atrocities against civilians it is their mission to protect puts tremendous pressure on officers and soldiers and the authorities to find effective countermeasures, at any cost. The experience of officers and men at the grassroots of combat convince many of them that the laws of war make them vulnerable while protecting the insurgents, and are not a realistic and indeed fair guide to waging unconventional war.

Authorities on counterinsurgency agree that for success – which is not military victory but containment – **deep intelligence** on the identity, location, and activities of the insurgents has to be gotten to enable the government to incapacitate the insurgents. All authorities also agree that it is the population that can provide the intelligence, and that it will provide it only if the **government provides security from the insurgents**. As one detainee told Lieutenant David Galula in the Algerian war when he was being interrogated [Galula, 2006, p.89]: “Mon Capitaine, you must understand the situation. We are not afraid of you. The most you will do is put us in jail. The fellaghas, they will cut our throats.”

Frustrated by the inability to tell insurgents from ordinary people and by the lack of cooperation on the identities and activities of the insurgents, the security forces resort to collective punishment, mass arrests, searches, detentions, coercive interrogation, internment, forced population removal into camps, and combat operations that risk high civilian casualties (collateral damage). I refer to these modes of counterinsurgency as **“dirty warfare”** and **“crisis justice”**: some of it violates the Geneva conventions and peacetime criminal justice. The reasons that democracies resort to dirty warfare and crisis justice is that the laws of war and peacetime criminal justice are seriously flawed for containing insurgency.

Flaws in the laws of war and peacetime justice applied to unconventional warfare

According to the Third Geneva Convention and Additional Protocols, the Geneva Conventions defines the right of combatants and the protection of civilians [Gutman and Rieff, 1999]. For civilians, these ban torture, hostage tacking, deportations, wanton destruction of property, summary executions and other similar actions. For civilian protection, it restricts the mode of warfare that puts then at risk, such as excessive collateral damage, and mandates proportionate rather than excessive response to armed attack. For combatants, they define lawful armed forces as those whose members wear uniforms or identifiable insignia that distinguish them from civilians at a distance, carry arms openly, and are subject to an organization that enforces compliance with the laws of war. Combatants are those who take an active part in the hostilities. If they meet these criteria, soldiers and other combatants have Prisoner of War rights, e.g. not to be subject to physical and mental torture, and the right to be repatriated without delay at the end of warfare.

Insurgents and terrorists for the most part do not wear uniforms or identifiable insignia, conceal their weapons when not in actual combat or in safe areas, and when trapped by the security forces they throw away their weapons and merge into the civilian population. Let us examine a common combat scenario: insurgents have fought the security forces from village houses, and are about to be surrounded. Villagers and insurgents pile into vehicles and trucks to escape, the villagers with their suitcases and goats, the insurgents with whatever weapons they can conceal. Under the principle of “discrimination” according to the laws of war, it is the responsibility of the combatants to distinguish between combatants and civilians, and it is permissible to target combatants only [Neier, 2006]. A field commander of the security forces (or a pilot in a fighter plane) will not be able to distinguish which vehicles carry combatants, which civilians, and which both: they all look alike, they are bunched together, they try to escape at the same speed. A strict interpretation of the laws of war will bar the security forces from targeting any and all vehicles, i.e. the insurgents will escape, regroup, and fight later somewhere else. If the security forces manage to trap the insurgents, these will throw their weapons away before

capture and pretend to be civilians. The villagers either support the insurgency or are more afraid of the insurgents than of the security forces who don't protect them from later reprisals. Here is an example. The IRA developed a routine for snipers to get away from an ambush in 2-3 minutes, with the help of neighborhood volunteers: the sniper would change clothes, be wiped clean of forensics, dump his weapon, escape in a stolen auto, then dump the get away vehicle. [Toolis, 1996, p.125-6]. Unless an insurgent is caught with a weapon that has just been fired and explosives traces are found on his hands or clothing, there is not enough evidence that will stand up in an ordinary court of law to convict him. Interrogation of bystanders will not reveal the identity of the insurgents (remember that coercive interrogation is prohibited) and short of proof, all will have to be treated as civilians. The insurgents will therefore leave the area at the first opportunity and rejoin their comrades in the insurgency. Under these circumstances, the insurgents keep escaping, regrouping and fighting. The security forces cannot weaken the insurgency for achieving a mutually hurting stalemate: strict adherence to the laws of war bloc that.

Another flaw of the Geneva conventions is the sharp legal distinction between combatant and civilian which is unrealistic from a behavior standpoint. In unconventional warfare, there are many active insurgents in non-combat roles who are part of the clandestine infrastructure of the insurgency: they shelter and supply the combatants with food, funds and other resources; provide intelligence, lookouts, messengers, weapons caches and transport, and safe places, including religious buildings, hospitals, and schools. Some activists are women, children, older people, religious leaders. Without such a supportive covert organization, insurgency is not possible. In the Geneva conventions, these activists do not carry and use weapons, and are defined as "civilians" who cannot be detained as POWs, and thus incapacitated. How can an insurgent organization be legally defined, identified and destroyed? If these activists are not combatants, and not civilians either, what is their legal status in unconventional warfare, and what crimes are they committing? Can normal peacetime justice be used in prosecuting these insurgents and activists?

The security forces suspect that at least some local people know who planted roadside bombs, where the bombs are, who collects “taxes” for the insurgents, and so on, but they know that even those who are not on the insurgents’ side are too scared to talk: they don’t want their throats cut, their homes bombed, their family members assassinated.

Witnesses are intimidated and do not come forward: eyewitnesses typically “saw nothing.” Jurors and judges are threatened and murdered. Although the security forces have some intelligence from informants, seized documents, electronic intercepts and the like, these don’t meet the standard for “probable cause” in making an arrest and for “reasonable doubt” on conviction. What is an “imminent danger” for permitting extraordinary measures is ill defined. Information from “hearsay” sources like undercover agents and intelligence reports is not permitted under rules for admissible evidence in the courts. Though worthy legal principles for ordinary crime, they raise the bar for conviction in unconventional warfare and allow the insurgents to walk through. Kevin Toolis [1996, pp39-46] describes the career of the head of the Coalisland unit of the East Tyrone Brigade of the IRA from 1987-to 1991 when he was finally killed in an ambush on his way to yet another killing. Every one in the village knew that he was a terrorist and had killed several times, including two old age pensioners. The local IRA brigade had twenty active members whose identities were an open secret within the community, and were known to the authorities. He himself had been arrested and interrogated on eight occasions under the Prevention of Terrorism Act. His home was frequently raided. But there never was sufficient evidence to convict him “beyond a reasonable doubt”. To his family and neighbors, he was not a killer but a hero.

How do the security forces respond to insurgents when the laws of war tie their hands?

Urban guerrilla warfare tends to be “hit and run” by the insurgents in the sense that they will snipe, ambush, assassinate, car bomb etc. and quickly disappear rather than stand their ground and fight it out with the security forces. That has happened on a few occasions, in Jenin on the West Bank, in 2002, in Grozny in Chechnya, in Fallujah in Iraq, in the Nahr-al Bared refugee camp in Lebanon when the insurgents holed up in a

dense civilian area (usually apartment buildings) and decided to hold it rather than escape. In the Geneva conventions this is a situation where civilian casualties by both sides ought to be minimized (minimum of collateral damage; proportionate use of force). If one interprets that literally, the insurgents should not be fighting there in the first place, and the security forces should avoid the use of heavy weapons like artillery and tanks, even mortars. What is the alternative? Sending foot patrols into narrow streets and alleys to recover the area house by house, floor by floor amounts to signing a death warrant for the attacking soldiers as they get picked off by the insurgents from behind well fortified emplacements. No commander will ever agree to do that to his men. What happens instead is that the attackers warn the civilians to evacuate the area, giving them safe passage – which also means a number of insurgents manage to escape disguised as civilians – and then they level the buildings with artillery and tanks, aerial bombardment, and other destructive weapons until all the insurgents are killed or surrender (or escape). Of course that puts the civilians who did not flee at risk as well. That is what the Israeli Defense Forces did in Jenin, the U.S. army did in Fallujah, the Russian army did in Grozny, the Lebanese army did in Nahr-al-Bared. And let us not forget that that is what also occurred in conventional warfare, e.g. the siege of Stalingrad, of Budapest, of Berlin, in World War II.

The French army in the battle of Algiers decided not to destroy the Casbah, the Arab section of the city used by the insurgents as a huge safe base to conduct terrorist attacks in the rest of the city against civilians. Algiers was after all the capital of ‘Algerie Francaise’. Instead General Massu and the paratroopers cleansed the Casbah of terrorists. They divided it into a grid saturated with checkpoints, conducted house to house searches, mass roundups and detention of suspects, without judicial formalities, interrogated suspects using torture (including electric shocks, water boarding, and executions) to make them reveal the identities of FLN insurgents, bomb makers, bomb planters, and explosives caches. In six months the insurgents and bombers in Algiers had been killed or captured and the FLN network dismantled, but at a huge price of war crimes and crimes against humanity [Horne, 1987; Behr, 1962; Vidal-Naquet, 1972].

The British army was faced with a similar problem in North Belfast and the Bogside in Londonderry, which became hotbeds of IRA activity. It conducted massive house to house searches for weapons and terrorists, and mass detentions. With scant information for identifying IRA snipers, bombers and volunteers and distinguishing them from those who were not breaking any laws, many detainees were never charged with any crimes and were later released. The rest were interned without trial. These counterinsurgency operations precipitated massive rioting, and were followed by a huge escalation of violence [Hamil, 1985, pp.56-66]. In the end the British government decided to let these districts become “no-go” neighborhoods, even though the army knew that they were being used for IRA recruitment, organization, bomb manufacture, and safe places. From the Bogside, the Derry brigade of the IRA managed to destroy the entire commercial city centre from 1971 to 1973 “which looked as if bombed from the air” [Toolis, 1996, p. 305]. In the rest of Derry, as a result of continued violence, the Catholic and Protestant populations became totally separated, by coercion and seeking security, with the exception of a few enclaves. That was the price of “no-go” districts.

In urban counterinsurgency, violations of the Geneva conventions will occur, unless one simply turns over a city to the insurgents. Clearly, the Battle of Algiers type of crimes against humanity should be avoided; clearly entire neighborhoods ought not to be reduced to ruins (and in fact were not when the insurgents surrendered). But even when the British army decided not to occupy the “no-go” districts, it does not mean that civilians are not at risk of violence: to the contrary, rioting, forceful evictions from homes, arson, ethnic cleansing, sectarian shootings, and revenge murders took place in Belfast “no-go” neighborhoods. When the security forces are unable to control these urban areas, conditions approaching anarchy are reached, as in much of Baghdad after 2005, with huge civilian casualties, refugee flows, and devastation.

The most common counterinsurgency strategy is “**search and destroy.**” Without deep intelligence about who and where the insurgents are – and which only the population knows - the typical operation finds nothing, captures a few “suspects”, and destroys a few firearms. When questioned about the insurgents, the people have seen nothing, know

nothing and tell nothing. The “suspects” are transferred for interrogation to camps where pressure on intelligence units to get some information by making the suspects talk leads to coercive interrogated and abuses, without actually yielding much that is useful. The journalist Dexter Filkins who researched how the Iraqi war was being fought at the grassroots writes that [quoted in Oberschall, 2007, p.71] “ the generals wanted a body count, and they wanted the insurgency brought under control, but they left the precise tactics to the soldiers in the field...Where is the line that separates non-lethal force that is justified from non-lethal force that is criminal?”

Elsewhere, “**clear and hold**” became a successful counterinsurgency strategy. After much bungling and excesses with “search and destroy”, the French pacification campaign in Kabylia in Algeria in 1958-60 was successful, but came too late to have an impact on the overall political settlement of the war. David Galula [2006], the French officer and pacification specialist, describes how he did it in a guerrilla embedded district. To be sure he initially resorted to collective punishment such as confining villagers to their homes and mild forms of coercive interrogation such as forcing suspects to stand for hours in uncomfortable positions. Eventually, when the villagers realized the French were there to stay, some started talking and in short order he rooted out the insurgent infrastructure from villages, i.e. villagers who organized “tax collection” for insurgents, provided information and food to them, and threatened other villagers. He held elections for a village council, opened schools, organized a paid village home guard who was responsible to keep the roads safe and prevent insurgent ambushes and road bombs. Detention camps were inspected by the Red Cross. French soldiers who were abusive were disciplined. What started as military strategy morphed into police operations and political reforms. Galula’s big headache became the higher French command which remained skeptical about pacification, a slow process with set backs, and urged coercive military methods of suppressing the rebellion.

The dilemma of counterinsurgency is that **lack of intelligence invites human rights abuses**, violations of the laws of war, and subversion of justice. Lacking “upstream” (grassroots) targeted intelligence on insurgents, the security forces cast a wide net of

surveillance, detention of suspects and indiscriminate searches. The criteria for distinguishing suspects from ordinary bystanders are set lower; anonymous uncorroborated denunciations and hearsay evidence are accepted as proof of guilt; and the presence of someone at the wrong place at the wrong time is enough for detention. These methods produce mostly false positives – people detained and charged with offenses when they are in fact innocent – and don't allow the clearing up of a false positive. Once you are caught in the counterinsurgency juggernaut, you are stuck in it.

Terror acts and terrorists have to be prevented before they occur, not prosecuted after the event. Suicide bombers can not be prosecuted (unless they fail). Successful counterinsurgency requires emergency laws on preventive detention, special courts not vulnerable to terrorists, and criminalizing membership in named insurgent organizations so that the support infrastructure for terrorism can be dismantled. In response to the second Palestinian intifada and the surge of suicide attacks in 2001 and early 2002 against Israeli civilian targets, the Israeli Defense Forces (IDF) undertook Operation Defensive Shield in April 2002. The IDF reoccupied the West Bank, saturated it with checkpoints, stationed forces in military bases, increased targeted assassinations of leaders in militant organizations, undertook preemptive arrests of terrorist suspects, coercive interrogation and other punitive and social control measures (house demolitions of suicide bombers' families). [Boaz Ganor, 2007]. The outcome was a sharp increase of thwarted suicide bombings and terror attacks, and a decrease in the number of completed suicide bombings. In 2002, 67% of 167 suicide bombings attempts were prevented, and in 2004, 90% of 130. By 2006, completed suicide bombings were down to two. No one believes that suicide bombings could have been thus contained within the bounds of the Geneva conventions and peace time justice.

To get a better idea of the practicality of applying criminal justice standards in war crimes prosecutions, consider the case of General Stanislav Galic, commander of the Bosnian Serb forces for most of the siege of Sarajevo in the Bosnian war. His forces purposely shelled the civilian population (artillery and mortars) and directed sniper fire against civilians for two years. The International Criminal Tribunal for the former

Yugoslavia (ICTY) indicted him for war crimes, crimes against humanity, and violations of the laws and customs of war (case IT-98-29-1). The ICTY maintains the highest standards of criminal justice. Galic was indicted in 1999, and his final appeal and judgment was rendered on November 30, 2006, seven years later. A total of 171 witnesses were heard. The number of exhibits amounted to 1268 items. There were 15 expert reports. During this time the court dealt with Galic in about 200 separate instances, the most important were the trial and appeal itself, but also petitions and requests by the defense. The trial took place after the hostilities ended and Galic was in detention. He had a considerable legal and research staff, and resources for mounting the defense. Even before the trial, based on war coverage and UN reports, it was obvious to all observers using common knowledge that war crimes had occurred and that soldiers under General Galic's command had committed them. Yet to prove the charges beyond a reasonable doubt in a fair criminal trial was difficult and time consuming. To expect fairness standards of the ICTY variety to be applied in hundreds of other war crimes, especially during on-going armed conflict, is to indulge in utopian fantasies. It has been estimated that there were between twenty and fifty thousand offenders of war crimes and crimes against humanity in the Yugoslav wars. The sheer volume of such offenders in unconventional warfare is a main reason for alternative justice institutions like the Truth and Reconciliation/Justice commissions in South Africa and Central America [Oberschall, 2007, pp. 215-227]. Such institutions depart considerably from ordinary peacetime justice and are negotiated as part of an overall political settlement.

Malaya: a successful example of counterinsurgency

Based on his experiences in Malaya, Robert Thompson [1966] believed that a democratic government can achieve both a **military containment and a democratic political settlement to insurgency that avoids brutal and violent repression** of the population in which the insurgency is embedded. At first, large scale military operations of the search and destroy type found few insurgents because guerrillas dispersed ahead of the soldiers, but later returned. Security forces were ambushed, roads were mined, casualties increased. The population was too scared to talk. Frustrated soldiers stole pigs and

chickens, beat up and tortured bystanders for information, and alienated the population. The insurgency grew.

The British government switched to a new two-pronged strategy. On the political side, it declared its intention of creating a free, independent, democratic and multicultural Federation of Malaya. On the military side, the authorities replaced “search and destroy” with “clear and hold.” An area would be cleared of insurgents (they usually fled), a small security force would then remain and live with the villagers, provide security in so-called strategic hamlets and obtain more and more intelligence on the insurgents, and gradually the “cleared and held” areas would expand.

At the same time the authorities enacted and implemented very tough emergency legislation, within a lawful framework, and enforced it on the insurgents, the population, and even more crucial, on the security forces: strict curfews, life imprisonment for providing supplies to insurgents, death penalty for unauthorized possession of weapons, detention for suspected terrorists and their supporters. The authorities stopped collective punishment such as fines on an entire village, prosecuted torture by the security forces, and brought suspects to trial in regular courts rather than military tribunals. In Thompson’s view, if the state does not observe lawful restraints, the conflict becomes a civil war, and not an insurgency. These measures were successful.

How can democracies minimize abuses when they depart from the laws of war and peacetime justice?

Based on the behavior of democratic governments in unconventional warfare, I have shown that some violations of the laws of war and some deviations from normal peacetime criminal justice can not be avoided. I have further argued that these violations and deviations ought to be lawfully enacted, temporary, limited, monitored for abuses, with all agents made accountable abuses and excesses. Furthermore, I contend that when thus carefully controlled, counterinsurgency will not jeopardize the peace process; to the contrary, by avoiding anarchy and a failed state, it increases the likelihood of peace making and a stable peace, compared to alternatives. The conundrum of democratic

counterinsurgency and counter-terror is how extraordinary emergency institutions can be limited in scope and policed to prevent abuses [Alt and Richardson, 2007].

Under a concept accepted in international law known as the principle of “derogation,” governments are permitted to suspend certain rights temporarily when it is necessary to meet a “public emergency threatening the life of the nation.” [Roth, 2004].

Four **restraints** operate **in a democracy** for limiting dirty warfare and crisis justice in counterinsurgency and counter-terror: 1. professionalism within the military itself; 2. checks from within the polity due to the separation of powers, an independent judiciary, limits on the authority of the executive, competitive political parties, commitment to treaties and conventions that regulate war and justice; 3. a vigorous civil society; and 4. sensitivity to international opinion. My examination of these restraints leads to the conclusion that they don’t work well in the context of a maximum security mentality unleashed by a major crisis and fueled by politicians who outbid one another on security and on achieving victory. It is all the more important what emergency measures and practices are instituted for military operation and justice in counterinsurgency and counter-terror.

Broadly speaking, there are **two types of counterinsurgency measures practiced by democratic governments**: the first was approximated by the British governments and was to my mind more successful and entailed smaller deviations from the laws of war and from peacetime justice; the second is practiced by the Bush administration, and to my mind is less successful and produces excesses and abuses. What I mean by “successful” is based on behavioral criteria: fewer civilian casualties in warfare; fewer violations of the Geneva conventions; limiting abuses to civilians and detainees (coercive interrogation, collective punishment); clear specification of who are insurgents and terrorists and what are criminal acts; fair justice in detention and prosecution (legal rights, few false positives, ability to clear oneself when not guilty); procedures for terminating emergency measures and restoring peace time justice. Success also means containing the

insurgency rather than escalation and descent into anarchy, and keeping an open door for a political settlement.

The British approach initiates all derogations from conventions and treaties and all emergency legislation and orders with acts of Parliament, in open debate, and these are periodically reviewed and modified in response to changing circumstances and to international criticism, and are monitored for abuses by parliamentary committees presided over by prestigious judges and public figures [Beckman, 2007, chapter2]. In the Northern Ireland insurgency, the British government enacted tough laws and emergency orders: the Special Powers Act was extended, the Emergency Provisions Act, The Detention of Terrorist Order, the Prevention of Terrorist Act, the Diplock Courts, and several modifications and amendments to these in response to legal and political challenges, e.g. judgments in the European Court on Human Rights on coercive interrogation. All these laws and measures derived from Acts of Parliament, applied only to Northern Ireland, and followed vigorous and informed debate. As the insurgency became contained, the initial “crisis justice” was gradually tempered, and military means were replaced by policing. Over two decades, the British government enlisted the support of the Irish government for a political solution, and the Irish government in turn closed its border to weapons smuggling by the IRA and cracked down on IRA safe places in the Republic. The British experience shows that containment followed by a political settlement can be made to work with limited violations of Geneva conventions and peacetime criminal justice.

By contrast, the Bush administration was caught unprepared for dealing with terrorism and counterinsurgency, and improvised a “global war on terror” (GWT). From November 2001 to January 2002, a small group of trusted advisers, officials and lawyers in the White House, the justice Department, and the Pentagon developed a legal strategy for crisis justice based on the contention that the President had constitutional authority in a national emergency largely unchecked by statutory law, the bill of rights in constitution, the Congress and international conventions and treaties in matters of security and war. That claimed authority gives the President and the executive branch the authority to

suspend the Geneva conventions when it so deems fit, create a new category of enemy fighters termed “enemy combatants,” detain them, suspend habeas corpus, prosecute them in military tribunals called “commissions” without congressional approval and oversight and lacking “due process” guarantees in matters of justice. The President also asserted the right to extraordinary powers of collecting intelligence without congressional oversight. The Justice department redefined torture as “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of body function, and even death” which did not meet the criteria of the U.N. Declaration of Human Rights in article 5 and other conventions and treaties signed by the U.S. There is no termination or phasing out plan for these emergency measures, and what the end of the global war on terror (GWT) might be has not been defined [Beckman, 2007, chapter 1].

The expansion of presidential powers was made possible by a compliant Republican controlled Congress and a public traumatized by the 9/11/ terrorist attacks and fearful of further terrorist attacks on U.S. soil. Institutional checks and balances failed [Oberschall, 2007, chapters 2 and 7]. There followed a series of by now well publicized abuses and excesses – Abu Ghraib, Guantanamo Bay, the justification for a war on Iraq as part of the war on terrorism, violations of some basic principles of justice, rejection of transparency and accountability to international and domestic bodies. In the end mounting U.S. casualties and public skepticism about the strategy for winning the Iraqi war emboldened the polity and civil society to demand accountability and impose restraints on the executive branch in the Iraqi war and the GWT. Yet even now U.S. counterinsurgency in Iraq, which is based on the doctrine and practice of “Force Protection” and is destructive of Iraqi civilians (much “collateral damage”) is beyond the pale of public debate and criticism.

Despite these measures, the Iraqi war has not been a military success, and the war on terror has been inconclusive. Secretary of Defense Donald Rumsfeld famously asked the following question of himself at a news conference (before he resigned): ” Are we capturing, killing, or deterring and dissuading more terrorists every day than the madrassas and radical clerics are recruiting, training, and deploying against us?” He was

unable to answer his own questions. Within the U.S., the war on terror has so far has not resulted into any arrests and prosecutions of bona fide terrorists. A New York University Law School research group tracked all 510 Department of Justice prosecutions on terrorism and terrorism related charges and found only four cases of prosecutions for “attempting to commit terrorism.” Another study tracking 6472 cases opened by the Justice department on “international terrorism” found that a majority were closed without prosecution and that most of the remaining were about immigration violations and fraud (false Social Security ID or driver’s license). Whether huge expenditures on “homeland security,” massive surveillance, border security and other similar anti-terrorist measures have deterred terrorists is not known.

Conclusion

Having researched how democratic states battle insurgents and terrorist, I have argued that for containing the insurgencies and building on that success for peace making via a political settlement of the conflict, emergency measures that violate the Geneva conventions and peacetime criminal justice are necessary. The reasons are that insurgents and terrorists operate anonymously and covertly. The authorities need deep intelligence on them, and the population in which the insurgents are embedded is the main and best source for it. Unless security is provided for that population, they will be too scared to come forth with such information, the insurgents will not be incapacitated, and the insurgency will not be contained. It is not possible to get deep intelligence, provide security, and uproot an embedded insurgency by fully adhering to the laws of war and to peacetime justice.

The emergency measures should be legally enacted, temporary, limited, transparent, monitored for abuses, and periodically reviewed, rejustified, and changed. They should be based on realistic behavioral assumptions on actual confrontations and events in the “fog of unconventional war” involving soldiers, security personnel, insurgents, interrogators, suspects, civilians, etc. and not on hypothetical, idealized and unlikely scenarios. Let me be concrete.

When considering **detention, interrogation, surveillance (DIS)** and other identification measures, the behavioral approach starts with empirical knowledge, constantly updated, on particular insurgent groups, their organizations and activities, and then fit DIS to identify and incapacitate it. Instead of debating how “reasonable search and seizure” has been defined in the constitution and the federal courts since the presidency of George Washington, and before that going back into British common law, one should determine what “reasonable” means for the particular insurgent or terrorist threat. For instance, if Muslim Arabs have gotten indoctrination and weapons training in Northern Pakistan and Afghanistan, and if terrorist cells are made up of small groups of such young men, some of whom have been recruited in an Islamist mosque community, it is reasonable to monitor electronic messages back and forth from Pakistan and Afghanistan to members of these mosque communities. On the other hand a blank check for mass electronic surveillance from all Arab and Muslim countries to all Arab and Muslim inhabitants would be “unreasonable” and an unnecessary infringement on privacy rights. Targeted searches, called profiling, that can be justified on statistical grounds are reasonable in the same way that teenage and young adult male drivers pay higher auto insurance rates because their aggregate auto crash rate is higher than it is for other drivers.

Crisis justice remains in the **criminal justice framework**, but should allow for **temporary redefinition of “reasonable doubt” and “probable cause,”** otherwise few insurgents and terrorists can be incapacitated. It means that false positives will be produced – that is innocent people who are temporarily detained- but as the security situation improves and the insurgency becomes contained, the peacetime criteria for reasonable and probable are restored and fewer false positives occur. Because emergency justice decisions get periodically reviewed, the temporary miscarriages of justice do get cleared.

What of **coercive interrogation and torture**? David Luban, professor of law at Georgetown University Law Center, commented on the U.S. torture discourse in the Washington Post, Nov. 27, 2005: “There are two torture debates going on in America

today. One is about fantasy, and the other is about reality. For viewers of TV shows...the question is about 'ticking bombs'...Real intelligence gathering is not made for TV melodrama. It consists of acquiring countless bits of information and piecing together a mosaic. So the most urgent question has nothing to do with torture and ticking bombs. It has to do with brutal tactics that fall short – but not far short – of torture employed on a fishing expedition for morsels of information that might prove useful but usually don't, according to people who have worked in military intelligence.” Note that Luban and I are not for a moment condoning torture by dictators for admission of guilt regardless of the truth. Such use should remain always unlawful in a democratic state. We are concerned with interrogation for intelligence purposes, and that at times requires coercive interrogation to complement other intelligence, as for the prevention of suicide bombing by the Israeli security forces.

My recommendation on counterinsurgency and counter-terror is **to integrate behavior knowledge and realism into the law framework for security and justice in times of emergency**. Recent anti terrorist legislation in the UK has in fact done so. These statutes have defined new terrorist crimes and anti-terrorism measures: assisting or supporting the principal, called 'accomplice liability'; funding terrorist activity; attending terrorist training places; proscribing terrorist organizations and criminalizing membership; glorification of terrorism with the intention of promoting attack; distribution of terrorist publications; closing places of worship that are centers of incitement to terrorism, deportation of clerics who incite; extending the time limit of detention without charging suspect; developing a biometric system for a national identification card. These statutory changes are based on lessons learned from actual terrorist attacks and the practical problems in terrorist investigations and prosecutions.

Citations

Art, Robert and Louise Richardson, eds. Democracy and Counterterrorism, 2007, Washington D.C. United States Institute of Peace

Beckman, James, Comparative Legal Approaches to Homeland Security and Anti-Terrorism, 2007, Burlington VT, Ashgate

Behr, Edward, The Algerian Problem, 1962, New York, Norton

Collier Paul et al, Breaking the Conflict Trap, 2003, Oxford UP

Galula, David Pacification in Algeria, 2006, Santa Monica CA, Rand Corporation

Goldsmith, Jack The Terror Presidency, 2007, New York, Norton

Ganor, Boaz, The Counter-Terrorism Puzzle, 2005, New Brunswick NJ, Transaction Books

Gutman, Roy and David Rieff, eds., Crimes of War, 1999, New York, Norton

Horne, Alistair, A Savage War of Peace, 1987

Hamill, Desmond, Pig in the Middle. The Army in Northern Ireland 1969-1985, 1986, London, Methuen

Ignatieff, Michael, The Lesser Evil. Political Ethics in an Age of Terror, 2004, Princeton, Princeton University Press

Kalyvas, Stathis, The Logic of Violence in Civil War, 2006, Cambridge UP

Luttwak, Edward, “Dead End. Counterinsurgency warfare as a military malpractice” 2007, Harper’s Magazine, February

Marshall, Monty and T. R. Gurr, “Peace and Conflict 2003” University of Maryland, CICDM. 2003

Naquet, Pierre Vidal, La Torture dans la Republique, 1972, Paris, Editions du Minuit

Neier, Aryey, “The Attack on Human Rights” 2006, New York Review of Books, November 2

Oberschall, Anthony, “Explaining Terrorism: the Contribution of Collective Action Theory” 2004 Sociological Theory, March

Oberschall, Anthony, Conflict and Peace Building in Divided Societies, 2007, Abingdon UK, Routledge

Roth, Kenneth, “The Law of War in the War on Terror” 2004, Foreign Affairs, January/February

Thompson, Robert, Defeating Communist Insurgency, 1966, New York, Praeger

Toolis, Kevin, Rebel Hearts. Journeys within the IRA's Soul, 1996, New York, St. Martin's Press

Weber, Max, From Max Weber, Essays in Sociology, 1958, Oxford Galaxy

Zartman, William, Preventive Negotiation: Avoiding Conflict Escalation, 2001, Boulder CO, Rowman and Littlefield