“The Rule of Law and the Laws that Rule: Considerations Towards a Special Status for Rebels”[[1]](#footnote-1)

Prepared for the Center for Ethics and the Rule of Law conference, Using Law to Fight Terror: Legal Approaches to Combating Violent Non-State Actors

Duncan MacIntosh

Dalhousie University

October 20, 2016

I don’t have worked out views about our themes, but in our conversation I hope we can make time to moot the following concerns:

The literature presents us with three possible approaches to so-called terrorists:

a) We should view terrorists as criminals: ideally they should be arrested for breaking laws, well-treated, and tried and sentenced fairly, quickly and transparently by either local courts or international courts. They may be killed only by legal agents (including military personnel deputized into police roles), and killed only in self-defence during attempted arrests, or, in very special cases, pre-emptively when public safety demands this. In general, methods of combatting them are not normally permitted to incur civilian casualties, not even ones regulated by necessity and proportionality.[[2]](#footnote-2)

b) We should view terrorists as privileged combatants on the model of soldiers in state to state wars: ideally they should be captured, treated well (as defined by the Geneva Convention), and released on cessation of conflict without being charged for actions that would normally count as law-breaking. They may be killed at any time if they are in theatre (broadly defined to include hiding in civilian communities), except if they are wounded, surrendering or in custody. Methods of combating them are permitted to risk civilian casualties on the principles of necessity and proportionality. (No one seems to defend this view.)

c) We should view terrorists as categorical enemies: they may be captured or killed as dictated by military expediency, they may be harshly treated in the course of interrogation, they may be held indefinitely without trial, and, if tried, tried in secret by military courts; and as a consequence of trial they may be held forever on fear that they would resume hostilities if released. All of this may require the suspension of the rule of law as standardly conceived. Again, methods of combating them are permitted to risk civilian casualties on the principles of necessity and proportionality.

The consensus in the literature for this conference is that America mistakenly began with the view that terrorists are categorical enemies, that the superior way is to see them as criminals, the view preferred by the British; and that under no circumstances should they be viewed as privileged combatants.[[3]](#footnote-3)

It has been suggested by several authors for this conference that the view that terrorists are criminals is dictated by the rule of law.[[4]](#footnote-4) For if states were to act as if terrorists were categorical enemies then states would be acting lawlessly, while if states treated terrorists as privileged combatants, states would be failing to recognize that terrorists act lawlessly; they would be giving terrorists privileges to which they should be entitled only if they are agents of a state, for states should have a monopoly on the use of violence and its deputation. Terrorists act without regard to law and so must be regulated by law.[[5]](#footnote-5) Indeed, some[[6]](#footnote-6) have gone so far as to suggest that rule of law necessarily features individual rights to private property, free speech, speedy and public trial, toleration, and democracy, things enshrined in the U.S. constitution and, more recently, things curated by the judiciary (reifying Common Law) in England.[[7]](#footnote-7)

I wish to make the following points about all of this:

i) the rule of law is only as good as the laws that rule; and extant laws or their implementation have been consistent with some peoples being marginalized and oppressed in various states by virtue of their tribe, religion, indigenous status, economic class, caste, race or gender; or by them being victim to the hazards of collateral damage as civilians in sites of armed conflict. The laws have also been consistent with the development of vast inequalities of wealth and status even in the most civil of societies, and with the alienation from the full benefits of civil society of some people and peoples in even those societies. It is understandable therefore that some people, having exhausted other means of redress and attainment of full status in their worlds, have resorted to violence. It is understandable too that some people in generally civil societies have been driven to ideologies of anger and hatred.

For the former, the rule of law has harmed them, and the unqualified enforcement of the rule of law would be to make of that rule a protection racket for the perpetuation of differential privilege; it would be to continue their oppression under the guise of the very idea of law itself. This cannot but impugn the credibility of the very idea of the rule of law.

Seen in this light, it is little matter whether the terrorists involved are treated as criminals, privileged combatants or categorical enemies. These are just different means of the enforcement of oppression; and one means can be recommended over the others only by virtue of being the lesser of evils, or by being strategically less likely to incite further conflict and more likely to recruit allies in the anti-terrorist cause.[[8]](#footnote-8)

All of these methods will leave the root problems unaddressed. If we are to address them (something we have a duty to do both for the aggrieved, and in protection of the non-aggrieved from further conflict), then whatever means of enforcing peace we chose, we must only use these means while we simultaneously agitate for improvements in the predicaments of these people, and of the people on whose behalf they fight. That is, we must not just chose a legal regime of enforcement. We must also work for universal justice and a greater equality and welfare for all peoples.[[9]](#footnote-9)

But this too should be seen as falling under the use of law to combat terrorism, since doubtless it would require reform of such laws as conduce to or permit these oppressions, or reform of the administration of already decent laws. Relatedly, it cannot be that just sovereigns exhaust their responsibilities in these conflicts merely by offering protection of the security of their own citizens.[[10]](#footnote-10) They must offer it to all parties to the conflict; and must offer relations of mutual advantage to all parties as well.

ii) Ideally this would mean reconceiving as many conflicts as possible as legitimate conflicts between oppressed and oppressor. And such conflicts can most quickly be brought to an end by making arrangements for apology, redress and repair; and by offering amnesty from prosecution for those fighting the fight of the aggrieved, and for the defenders, perhaps on the model of the resolution of the troubles in Northern Ireland, or on the model of the ending of Apartheid in South Africa, in either case thinking more in terms of healing circles than imprisonment or capital punishment.

This would be to retroactively extend to terrorists the status of privileged combatants.

This status needn’t amount to an absolute amnesty. It could instead involve trials, but with different defenses permissible, e.g., different conceptions of duress; or it could involve different sentencing guidelines.[[11]](#footnote-11) And it could yet make provision for the recognition of war crimes, defined as violence gratuitous in relation to any reasonably sought for end.

iii) If it be objected that this is to give up the idea that states should have a monopoly on violence, it may be replied that states should have that monopoly only insofar as they are just sovereigns of their own people, defined as offering arrangements of mutual advantage to all of them; and only insofar as the states are just sovereigns in relation to other states, defined as offering to each other arrangements of mutual advantage.

iv) If it be objected that this would be to incentivize violence as a means of redress, it may be replied that, more importantly, it would also be to incentivize states to drive towards arrangements offering everyone sufficient advantage as to make recourse to violence unnecessary.

When people have a grievance there are only three courses of action available: 1) suasion to the effect that they are mistaken in their grievance, that their lot is just – obviously this has not availed once people resort to terrorism; 2) violent repression – this never works in the long term and only evokes more occasions of violence; 3) repair -- fix the conditions that are the subject of the grievance. Repair is the only permanent solution, and the least violent.

v) I suggest too that demanding of states that they feature liberal democratic institutions and capitalist economies in order to count as being governed by the rule of law is either to make a fetish of those institutions, or to make a fetish of the rule of law. As President Obama pointed out in his final address to the United Nations, collectivist and communalist impulses can be distinguished from acceptance of tyranny. It would follow that either the former impulses are not inimical to the rule of law, or that, insofar as they are, the rule of law is not essential to decent civilizations.

vi) Not all terrorists are the same, and not all occasions of violent conflict are the same. Some of the people we call terrorists are better thought of as freedom fighters, some of the occasions of conflict, rebellion against oppression.

vii) What is the status of the Islamic State in this connection? If reports of its ideology are to be believed[[12]](#footnote-12), then either its defenders do not propose to offer arrangements of mutual advantage to all of their citizens and to all other just sovereigns; or they have preposterously implausible conceptions of what mutual advantage would amount to, e.g., everyone’s playing the role given them by an imagined god in highly patriarchal societies intolerant of alternative conceptions of a good life. And insofar as the Islamic State is led by, and tends to attract people irreformably damaged, people practically pleading for “death by cop”, perhaps we should oblige them. It is one thing to extend something like combatant privilege to members of legitimate interest groups. But arguably persons attracted to occasions of killing by their generalized disaffection do not count as an interested group on that account. Their existence may be evidence of failings in the society that produces them; and those failings need to be addressed. But these persons do not get to count as an interest group in the sense that their stated goals should be recognized and accommodated; for an interest in hate-killing is not a morally permissible kernel of affiliation and identity.

viii) But we must distinguish between an ideology and a person: people can change their views, and people can have motivations to holding views that have nothing to do with what logically recommends the views. (And I take it that nothing logically recommends the doctrines of the Islamic State.) These people may be reachable, moderatable; and our policies ought to incentivize this, ought to encourage moderation of virulence.[[13]](#footnote-13) The motivations of many towards the Islamic State are the conditions of injustice in which they live. So if we improve those conditions we’ll attenuate the appeal of Islamic State ideology. The alternative is to leave people vulnerable to demagoguery, Manicheanism and fanaticism as misconceived anodynes to the conditions that oppress them.

ix) I said we must try to see most conflicts as having some legitimate basis. But insofar as we do this, surely one principle in the rule of law is the idea that you don’t get to be judge in your own trial. This means that if people have a grievance against a given government, that government ought not to be the arbiter of the grievance. It may also mean that we should not just be asking whether states should permit the suing of terrorists. We should be asking whether terrorists should be permitted to sue the states against which they have grievances. Perhaps then these matters could be settled by means of suit and counter suit. And perhaps peace would be served by the creation of international legal institutions for this.

x) Since it is the morality of states that is being challenged by many so-called terrorists, the fact that terrorist actions violate the laws of states can’t be the only factor in deciding how to deal with the terrorists. And since it is precisely due to the arguably oppressive actions of a given state, or of persons within such a state, that other persons don’t have a state, or don’t have status within a state, it can hardly be argued that they don’t get to press their case simply because they don’t have a state.

xi) We need a distinction between criminality and rebellion. I propose this: criminals violate laws in order to benefit from the general effects of the laws, from the fact of the prevalence of the obedience of the laws. Thieves don’t object to laws protecting property, for example. After all, they want their own property protected. They just seek to break the laws of property in order to have more property. But rebellions seek to change the rules, not to specially benefit from the very rules they seek to change. This means their issues are not justiceable. For the issue is not whether they broke a law. The issue is, what laws should there be? And these are the sorts of things over which wars are fought. To think pure rule of law can handle this is to confuse rule of law with rule of lawyers.

xii) All the more reason, then, to see at least some terrorists not as criminals, or not as mere criminals. (In some sense all soldiers are criminals, for all violate what are normally thought of as laws – laws against killing, theft, and so on. It’s just that they are thought to have an exempting pretext for their violations.) They are soldiers in all but formal affiliation.

1. For helpful discussion my thanks students in my classes at Dalhousie University, especially Frederik Hayward and Andrew Lopez, who gave me written comments, as well as Jan Sutherland and LW. [↑](#footnote-ref-1)
2. Finkelstein, Fuller, required readings, this conference. [↑](#footnote-ref-2)
3. Finkelstein, Fuller; and several authors point out problems with the categorical enemies method, e.g., Baker, Apuzzo et al, both required readings for this conference. [↑](#footnote-ref-3)
4. Finkelstein. [↑](#footnote-ref-4)
5. Finkelstein. [↑](#footnote-ref-5)
6. Finkelstein. [↑](#footnote-ref-6)
7. Finkelstein, Wagstaff, required reading, this conference. [↑](#footnote-ref-7)
8. See Finkelstein, as well as Apuzo, Fink and Risen, Johnson Mora and Schmidt, and Andresen, all required readings, this conference. [↑](#footnote-ref-8)
9. See my “The Enemy We Dare Not Kill In The War We Must Not Lose…” paper offered for the CERL conference, The Weighing of Lives in War: Combatants and Civilians in the Jus in Bello, April 2014: <https://www.law.upenn.edu/live/files/3115-duncan-macintosh-macintoshpaper-and-extended>. [↑](#footnote-ref-9)
10. Contra Fuller. [↑](#footnote-ref-10)
11. See my “The Enemy We Dare Not Kill…”; and see Denn, required readings, this conference. [↑](#footnote-ref-11)
12. Stern and Berger, required reading, this conference; Wood, background reading, this conference. [↑](#footnote-ref-12)
13. McCants, background reading, this conference. [↑](#footnote-ref-13)