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978-0-521-68510-8 - Moral Dilemmas of Modern War: Torture, Assassination, and Blackmail in an Age of Asymmetric Conflict

Michael L. Gross

Excerpt

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Torture, Assassination, and Blackmail in an Age of Asymmetric Conflict

Writing in 1992, just after the First Gulf War, military historian Martin van Creveld suggested that important changes in the rules of war were in the offing.¹ For the first time in many years, previously banned practices of war – assassination, hostage taking, and poison gas – were gaining a toehold of support among belligerents, and van Creveld predicted that support for these practices would grow. More than a decade later, we see that he was only partially right. Support has grown, but in a direction he did not predict. Assassination (plots to kill a head of state in the First Gulf War) has emerged as the targeted killing or extrajudicial execution of suspected terrorists. Hostage taking (attempts by Saddam Hussein to protect vital facilities by placing civilians in their midst) is now augmented with blackmail as governments fighting terrorism threaten citizens and their property with catastrophic destruction unless their government reins in terrorists. Poison gas (then used by Iraq to attack Kurdistan and Iran) is now part of a growing arsenal of nonlethal weapons (NLW) developed by the United States and its allies. Van Creveld missed torture. Although torture was a key component of established counterinsurgency warfare in many European colonies following World War II, it did not rise again to prominence until the Iraq War.

Van Creveld's predictions went astray because he focused his attention on a short-lived conventional war against a despot who was willing to sacrifice large numbers of his own civilian population to serve his megalomania. As events would develop, however, Saddam would

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fall and the war would quickly turn into an insurgency. And, in the way of many insurgencies since the Second World War, the insurgents chose guerrilla warfare and terrorism while their adversaries turned to torture, assassination, and blackmail.

Torture, assassination and blackmail are certainly not new forms of warfare. While such practices have occurred since ancient times, a growing corpus of international law works diligently to prohibit these practices today. Underlying international law is a very strong strand of what Jean Pictet calls humanitarian reasoning:

A State engaged in a conflict will seek to destroy or weaken the enemy's war potential ... in three ways: death, wound or capture ... All three are equally capable of eliminating the enemy's strength. Humanitarian reasoning is different. Humanity demands capture rather than wounds, and wounds rather than death; that non-combatants shall be spared as far as possible; that wounds inflicted be as light as possible, so that the injured can be treated and cured; that wounds cause the least possible pain; that captivity be made as endurable as possible.²

Humanitarian reasoning, or what I will refer to as simply "humanitarianism," guides combatants in their treatment of one another and of noncombatants and soldiers who are no longer a threat. It infuses the law of armed conflict (LOAC) and international humanitarian law (IHL), and is enshrined in the 1949 Geneva Conventions and the 1977 Protocols (I and II) to the Geneva Conventions. Humanitarianism prohibits torture, summary execution, and weapons that cause unnecessary suffering, while protecting noncombatants from direct attack, pillage, reprisals, indiscriminate destruction of property, and kidnapping. Newly emerging tactics that embrace enhanced interrogation techniques, such as waterboarding, forced stress positions or exposure to cold; nonlethal chemical weapons; assassination; and widespread attacks on civilians impinge directly on these long-standing prohibitions.

The baffling question is why the United States and some of its allies blatantly employ unlawful means of warfare as they wage asymmetric war against national insurgencies, international terror, rogue countries and state-sponsored guerrilla organizations. Sixty years after World War II and the great humanitarian tide of concern for basic human rights, many nations suddenly find themselves resorting to low-tech, primitive, and generally prohibited forms of warfare. Why

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have liberal democracies now abandoned some of the core principles of humanitarian law as they fight asymmetric wars?

Perhaps the answer lies in the very nature of the conflict. Unencumbered by reciprocity, that is, the ability of an adversary to respond in kind, many military organizations find torture, assassination, and blackmail useful. If they don't, then perhaps they should. According to some views, strong democratic nations are unable to vanquish the weak "because they find it extremely difficult to escalate the level of violence and brutality to that which can secure victory."³ But brutality is not always the best answer. "If barbarism is employed to achieve military victory," writes Ivan Arreguin-Toft, "any peace that follows will be fragile and costly at best."⁴ This is undoubtedly true but certainly depends upon the enemy one faces. The Israelis and Palestinians may want to do better than settle for a fragile and costly peace, but that may not be of concern to a Western country seeking to utterly destroy al-Qaeda, or to a UN multinational force hoping to crush a genocidal regime intent on exterminating its own people. A conflict that seeks political accommodation differs significantly from one that seeks to oust a regime or eliminate a terrorist organization. Different types of asymmetric war demand different tactics.

Thinking about the efficacy and ethics of what many might call restrained brutality sets up the dilemmas in this book. "The logistical parsimony of guerrilla warfare," concludes Gil Merom, "can be met with the parsimony of uninhibited violence, *at least as long as altruistic moral restraints are absent*."⁵ Herein is the rub. No democratic society can allow itself an uncontrolled descent into barbarism, but once unfettered by an asymmetry that precludes a reciprocal, in-kind violent response from the weaker party, it is tempting to think how far one might go. The dilemma is real: in some situations, military necessity may demand harsh measures that no nation would or could consider in conventional war. The prospect of success pulls powerful nations to torture, assassination, and blackmail, while deeply ingrained humanitarian norms push them away.

To both justify and restrain harsh measures, military and political leaders make a concerted effort to shoehorn new practices into international law. This does not prevent certain practices, but may contain them at the margins. Thus, torture morphs into "moderate

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physical pressure,” assassination becomes targeted killing and civilian bombing is defensible when directed against “associated” civilian targets, that is, civilians who take some part in the fighting and who bear a measure of responsibility for armed conflict. There are two complementary aspects to these tactics and practices. On one hand, civilians who suffer harm in asymmetric war somehow deserve it, having lost their immunity and protection. On the other hand, those who warrant protection find it when torture saves innocents from ticking bombs, when assassination and nonlethal chemical weapons disable combatants with few civilian casualties, and when blackmail, including terrorism, can enhance security by deterring an enemy from future hostile activity. Torture, assassination, and blackmail, in other words, target the guilty and protect the innocent.

Nevertheless, these practices rarely appear in conventional war. Facing the threat of retaliation, nations remain very wary of targeting enemy soldiers by name, using moderate physical pressure to question enemy prisoners, or attacking civilian targets no matter how much some civilians might contribute to the war effort. Faced with asymmetric war, however, nations, the smaller nonstate groups they fight, jurists, and philosophers are now ready to reconsider deeply held ideas about combatant rights, unnecessary suffering, and non-combatant immunity to lay a foundation for practices that are both militarily necessary and, they hope, humane. Articulating modes of warfare that meet these conditions raises the dilemmas underlying the chapters that follow.

The sections below will address several preliminary questions. First, What are torture, assassination, blackmail, and related practices such as terrorism and chemical warfare? What promise do they hold? Second, How are they different from the practices of conventional war? Close to unlawful, they ascribe responsibility and liability to participants, blur the edge between combatants and noncombatants, and modulate the use of lethal force. Finally, What is asymmetric war? Apart from the all-consuming war on terror, one should not ignore wars of humanitarian intervention, proxy guerrilla wars, and lingering wars of national liberation. Efforts to resolve the dilemmas posed by torture, assassination, and blackmail vary with each type of conflict.

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TORTURE, ASSASSINATION, BLACKMAIL, POISON GAS, AND
TERRORISM: A BRIEF RUNDOWN

Torture and Rendition

With the notoriety of Abu Ghraib and Guantanamo Bay, few people are unaware of torture and rendition. Each is a long-standing counterinsurgency tactic designed to deliver and hold suspects for interrogation. Interrogational torture utilizes extreme physical and psychological means to extract information from those suspected of threatening innocent civilians with immediate and catastrophic harm and/or of threatening national security and the lives of soldiers. However, interrogational torture does not aim to brutalize a civilian population into submission by singling out and persecuting political opponents of the regime.⁶ Rendition is an adjunct to interrogational torture and significantly different from extradition. Extradition is a legal process that returns criminal suspects for trial in a country where they committed crimes. Rendition, in contrast, transfers or renders to justice anyone loosely associated with terrorism from one sovereign nation to another for the purpose of interrogation. Warrants are rarely issued, suspects seldom stand trial, and many detainees often face long-term incarceration under legally amorphous rules of administrative detention.⁷

Assassination

Conventional laws of armed conflict deride fingering enemy soldiers or civilians for assassination or targeted killing. Citing ancient prohibitions against poison and treachery, many still regard assassination as a despicable form of warfare. For modern jurists, principal among them Francis Lieber, who codified the laws of war for the Union Army during the U.S. Civil War, assassination repudiates the innocence and moral equality of all combatants by naming particular individuals and hunting them down like outlaws. Lieber's firm denunciation of assassination did not make it into the Geneva Conventions, but its spirit pervades many military law manuals. This spirit, however, no longer moves state armies who face guerrilla warfare, where lack of uniforms makes it difficult to identify, much less disable, enemy combatants. In response, many state armies are investing considerable

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resources to develop the intelligence and technical means to do just as Lieber prohibited.⁸

Blackmail

Blackmail, as used here, has many guises and consists of tactics that intentionally or unintentionally harm, or threaten to harm, noncombatants. Blackmailing civilians by both sides to an asymmetric conflict is pervasive because they are generally defenseless. Blackmail may consist of tactics that are large-scale, small-scale, or intermediate in scale. Large-scale blackmail threatens citizens and their property with catastrophic destruction unless their government surrenders or reins in terrorists. Threatening civilians to establish or restore a deterrent capability was one of Israel's and Hezbollah's aims in the Second Lebanon War (2006). Small-scale blackmail extorts collaboration in return for essential services, such as medical care or travel papers. Intermediate measures impose severe restrictions on civilians by using encirclement, siege, banishment, or relocation to distance civilians from the terrorists who depend upon them for support. In many cases the threat is sufficient, but in all cases, the door often opens to implementation when blackmail fails or requires a demonstration of what victims can expect if they refuse the blackmailer's demands.

Nonlethal Warfare

Nonlethal weapons (NLWs) employ optical and acoustic means, energy wave devices, and chemical agents to cause disorientation, discomfort, severe nausea, or temporary unconsciousness to incapacitate opposing forces and minimize collateral harm to noncombatants.⁹ While some NLWs repulse an enemy and thereby avoid direct encounters, others temporarily incapacitate an enemy so that the enemy can be overwhelmed and disarmed. In both cases, NLWs provide a force continuum, allowing a wide range of options between using high explosives and doing nothing. Properly deployed, nonlethal weaponry offers advanced military organizations the possibility of temporarily incapacitating enemy forces, controlling crowds, or conducting rescue missions without the need to endanger large numbers of noncombatants. At the same time, however, some NLWs use

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restricted chemicals and all nonlethal weapons intentionally target un-uniformed combatants and noncombatants alike, a blatant violation of humanitarian law.

Terrorism

Terrorism is the flip side of torture, assassination, and blackmail. It is, as commonly portrayed, the weapon of the weaker side. Some observers continue to draw a significant distinction between terrorism and guerrilla warfare when describing the behavior of such nonstate actors as insurgent and guerrilla groups.¹⁰ While terrorism deliberately targets innocent civilian noncombatants for political gain, and thus is heinous by any understanding of humanitarianism, guerrilla warfare describes the activity of irregular combatants who wear identifying insignia and attack military targets while observing some modicum of the law of armed conflict.

This sharp distinction misses the mark for two reasons. First, it is impractical to apply in the field. Which among the myriad of Palestinian groups, for example, are terrorists and which are guerrilla fighters? Hamas, Fatah, Islamic Jihad, and others meet both criteria. Sometimes they attack civilians, sometimes they strike military targets. Second, the distinction ignores the historical development of twentieth-century guerrilla warfare. Gone are the days of Mao's three-phase program for fledgling guerrillas that exhorted them to evolve from a small group capable of harassing large conventional forces to one capable of defeating an enemy in open warfare. As guerrilla warfare moved from the countryside to the city, first in South America and Africa and later in the Middle East, terrorism, as we now define it, joined the guerrilla repertoire. This did not mark any great ideological change regarding the guilt or innocence of noncombatants, but reflected the tactical need to fight differently in urban areas. Its success remains a matter of debate, but as an emerging tactic there is no doubt that terrorism assumed an increasingly important place in nationalist guerrilla warfare, first among militants fighting for independence against France, Britain, and Portugal in the generation following the Second World War, and then among insurgents in Iraq, Israel, and Sri Lanka.¹¹ Today, terrorism together with torture, assassination, and blackmail

push beyond wars of national self-determination to infuse the war on terror, humanitarian intervention, and proxy wars waged by guerrillas acting at the behest of sovereign countries.

**TORTURE, TERROR, ASSASSINATION, AND BLACKMAIL:
 FUNDAMENTAL CHARACTERISTICS**

Torture, terror, assassination, and blackmail depart from the practice of conventional war in several important respects. They are manifestly unlawful, or nearly so, thrive in an atmosphere of limited reciprocity, make judicious use of lethal force, blur the distinction between combatant and noncombatant, presume the guilt rather than the moral innocence of most battlefield actors, and reestablish *jus ad bellum* (just cause of war) as an integral part of the war convention.

Unlawfulness

The law of armed conflict, international humanitarian law, and just war theory generally proscribe torture, terror, assassination, and blackmail. Any number of UN and Geneva Conventions outlaw terrorism.¹² The Convention Against Torture (CAT) expressly prohibits torture and ill treatment as well as rendition or deportation to nations that practice torture. Modern laws of war, as noted, have always taken a very dim view of assassinating combatants, judging it a perfidy of the worst kind. The Chemical Weapons Convention (CWC) (1993) restricts the use of chemical weapons to those riot control agents used by law enforcement officials. This severely limits, if not bans, any use of chemical nonlethal weapons in armed conflict. Finally, a wide variety of international instruments prohibit threatening civilians with harm to pressure their government to behave peaceably or to rein in others.¹³

Limited Reciprocity

In conventional war, parties to the conflict command similar means of warfare and similar levels of destructive power. This often forms the basis for mutual restraint and the impetus for agreements and long-standing conventions that regulate the development, manufacture,

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and use of various weapons (poison gas or blinding lasers, for example), and protect the rights of combatants and noncombatants alike. No such reciprocity exists in asymmetric warfare. The stronger side, that is to say the state actor or coalition of state actors, utilizes torture, assassination, and blackmail. The weaker side, the nonstate actor, employs terrorism. There are, of course, crossovers. States may terrorize and guerrillas may torture, assassinate, and blackmail. In general, however, democratic states refrain from terrorism for two reasons. First, they have more-refined means at their disposal to harm civilians. Reprisals or incidental harm to civilians during a legitimate military operation, for example, may meet legal and moral tests that terrorism does not. Second, democratic state actors remain constrained by internalized moral norms that prohibit direct and intentional attacks on noncombatants. Nonstate actors, on the other hand, lack the technological means or infrastructure to engage in widespread rendition, detention, torture, and assassination. They are compelled to fight by other means.

Because the sides command different resources and, therefore, choose different tactics as they wage asymmetric war, neither can fight like the other or respond in kind. It is not that they do not wish to follow reciprocal rules, but that they cannot. Neither side, therefore, has any immediate motive for changing the way it fights. Incommensurate abilities and tactics make it difficult to reach mutual agreement about limiting warfare. As a result, each side may choose to ignore the rules of war that gain their legitimacy from reciprocity and mutual self-interest. More precisely, new rules emerge that balance the interests of the participants in a different way. Among these is the judicious use of lethal force.

Judicious Use of Lethal Force

In contrast to conventional war, torture, terror, assassination, and blackmail place less emphasis upon overwhelming destructive power and lethal force. Torture and detention, of course, have no place for lethal force. Their purpose is to extract information. A little-noticed feature of state behavior during asymmetric conflict is the emphasis on capturing, rather than killing, enemy combatants. In conventional wars, the goal is to disable the enemy by death or injury; in

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asymmetric war, the means of disabling, particularly by the stronger side, are generally less lethal. Many more thousands sit in prison than die on the battlefield. While American forces in Iraq, for example, killed nearly 19,000 insurgents between June 2003 and September 2007, they detained close to 120,000 anti-Iraq forces.¹⁴

Assassination, on the other hand, is a lethal tactic but one that is often accurate and avoids excessive civilian casualties.¹⁵ Good intelligence, precision-guided munitions, and drones make targeted killing a discriminating tactic. At the same time, many state actors prefer arrest to assassination when this does not overly endanger their troops. This too, limits combatant and noncombatant casualties significantly.

Blackmail, if by this we mean *threats* to civilians to convince their government to take or avoid some particular action is, by its nature, nonlethal. Unfortunately, conventional deterrence of this type can fail, and when it does, it may require a show of strength. The Second Lebanon War is a good example of this phenomenon. When deterrence failed, Israel attacked civilian or mixed infrastructures with deadly force. However, by adhering to newly emerging norms that take note of civilian liability and responsibility (discussed in the following section), these attacks were directed at those civilians claimed to have aided the enemy in some substantial way.

In spite of the prevalence of suicide bombers or “ticking bombs,” (that is, any explosive device that presents a grave and immediate threat to life and limb), large numbers of casualties do not always serve the goals of terrorism. Terrorists, as Brian Jenkins famously noted, “want a lot of people watching, not a lot of people dead.”¹⁶ However, this is only true of terrorists fighting for national liberation and does not extend to inter-civilian or transnational terrorism where the number of casualties can be exceedingly high. By some accounts, the Algerian War of Independence (1954–1962) took at least 350,000 lives, but only one percent of these were French civilians killed by terrorists. Communists fighting the British in Malaya between 1948 and 1960 killed fewer than three thousand civilians during their 12-year insurrection before giving it up when it proved counterproductive. In Kenya, the Mau Mau insurgency’s (1952–1960) highly publicized attacks on British and Asian civilians took about 60 lives, but thousands more among African civilians who supported British policy.