# Part III: How to Engage in Terror and Guerilla Warfare Successfully While Gaining Greater International Legitimacy

# Universal Ethical Doctrine for Waging Guerilla Warfare

In this chapter, I will propose a unique universal doctrine – based on Just War Theory and international law – to be used when waging war against terror organizations. This doctrine only addresses actions undertaken during a war (*jus in bello*) and not the actual decision to go to war (*jus ad bellum*). The form of the proposed doctrine is based on the previous sections of this book: the first part, which discussed the dilemmas facing democracies engaged in low-intensity warfare as well as the second part which was comprised of specific case studies. It is meant to be as practical and applicable as possible.

On the one hand, it is designed to afford democratic state sufficient latitude to effectively combat terror organizations, providing relevant principles to this end. These principles allow for a more extensive exercise of power than allowed by those currently enshrined in law and existing doctrines which are better suited to combat between two sovereign states. In parallel, the present doctrine is meant to help a country gain international legitimacy for its actions. Despite the relatively broad latitude in allows, the doctrine is ethical and legal, and thus allows a country to maintain its moral and democratic immunity/resilience. Thus, when combined with the existing body of international law, this doctrine can serve as a unified code of conduct for waging wars against terror organizations.

At the basis of the doctrine lies Immanuel Kant’s deontological conception of ethics. In Kant’s view, the moral value of an action is evaluated in terms of the initial moral intention of the person performing the action, as opposed to its actual results (even if the results produced or advanced the greatest common good). According to such an approach, when determining whether or not to undertake a given action, one must first evaluate its importance, function, and contribution. Thus, Kant argued that an action is moral if the *intention* of the one performing the action is good (Freeman, 2001).

We can illustrate this with an example: say that a certain action resulted in the deaths of three innocent people. To determine the morality of the action, we would need to look at the initial ethical intention, that is, the basis for performing the action, and not the result – in this case the death of non-combatants.

Another ethical foundational principle at the basis of this doctrine is universalizability. In other words, any moral judgment rendered must be applicable to all equivalent cases (Frey, 2001; Silvers, 2001). Therefore, every principle included in this doctrine must be one that can be followed by any democratic country, regardless of its democratic profile. This is so the doctrine will be applicable to any democratic country facing such a war, whatever it may be.

## Doctrine for Combatting Terror

### Principle 1: The Principle of Military Necessity

1. **Target Condition**: the action is undertaken to protect the lives of a country’s citizens from acts of terror, by virtue of a country’s right to self-defense.
2. **Relative Effectiveness Condition**: any alternative (including abstaining from action altogether) would pose a greater, concrete danger to the lives of a country’s civilians and soldiers (if they are conscripts).
3. **Minimizing Collateral Damage Condition**: When an action is undertaken, efforts should be made to minimize any harm to civilians who are not directly involved in terror, in order to protect the sanctity of life and human dignity.
4. **Universality Condition**: The justification for performing an action must be applicable to analogous cases.

*About clause 2*. If the soldiers in question serve in a conscripted army – i.e., they were obligated by law to draft (as is the case in the Israeli army, for instance), the state, having sent them into danger, must do everything in its power to protect their lives. By contrast, if the soldiers belong to a professional-volunteer army (such as the United States Armed Forces), then the fact that they have chosen this profession, knowing ahead of time the dangers it could entail, should be taken into consideration. In such a case, an action which exposes them to greater danger, if required (to minimize danger to civilians on the opposing side), is allowed.

### Principle 2: The Principle of Distinction

**(A) A Country’s Obligation to Populations Based on Territorial Affiliation and Level of Involvement in Terror**

Clauses are listed in descending level of importance.

(A.1) A state’s obligation towards people who are under its effective control and who are not involved in terrorism at all;

(A.2) A state’s obligation towards people who are *not* under its effective control and are not involved in terrorism at all;

(A.3) A state’s obligations towards people who are under its effective control and are *indirectly* involved in terrorism;

(A.4) A state’s obligation towards people who are *not* under its effective control and are *indirectly* involved in terrorism;

(A.5) A state’s obligation towards people who are under its effective control and are *directly* involved in terrorism;

(A.6) A state’s obligations towards people who are *not* under its effective control and are *directly* involved in terrorism;

A state acting to discharge its obligation to protects its citizens from acts of terror must protect human dignity by recognizing the value of human life and freedom. It must, therefore, take into account as much as possible, the distinction between different groups of people that are not its citizens or residents, and must determine the amount of culpability it bears for the fates of the people in each group.

1. **Different types of direct and indirect involvement in terrorism**

A state which wishes to discharge its duty to protect its citizens from acts of terror, while at the same time preserving human dignity, must determine the time frame in which a civilian takes direct part in combat. To do this, it must draw a distinction – before undertaking any action – between the different functions filled by people involved in terrorism, i.e., the distinction between direct and indirect involvement. This is regardless of their proximity to the area in which the action takes place.

The different types of involvement in terrorism are listed in descending order of the immediacy of the threat they pose. This distinction helps a state decide when it has moral justification for targeting a specific person in order to prevent an act of terror.

(B.1) People who pose an immediate danger (such as a terrorist wearing a suicide belt, or a member of a rocket-launching team);

(B.2) People who provide immediate assistance to people who pose an immediate danger (such as a driver, or a guide);

(B.3) People who are responsible for dispatching terrorists who pose an immediate danger;

(B.4) People who prepare and develop weaponry (such as an “engineer” who makes a suicide belt or builds a homemade rocket);

(B.5) People who provide means that are vital to carrying out a violent act (such as a “chemist,” or an intelligence operative).

(B.6) People who plan the practical details or conceive the operational idea of a violent act;

(B.7) People who give a terrorist the order to perform a violent act;

(B.8) Belonging to the political, social, or religious leadership of an organization which has a terrorist arm, *including*involvement, whether directly or indirectly, in decision-making pertaining to acts of violence;

***All of these clauses apply to direct involvement in terrorism. Any person who is not involved in terrorism in one of the aforementioned ways, is considered indirectly involved in terrorism if he or she is responsible for:***

(B.9) Developing and implementing financial channels which are not crucial to terrorism or do not assist it directly (such as an organization’s financier);

(B.10) Delivering a religious sermon, which praises suicide bombers but does not otherwise assist acts of terror;

(B.11) Disseminating pamphlets or posters which praise acts of terror but do not otherwise assist acts of terror;

(B.12) Participation in the political, social, or religious leadership of an organization with a military-terror arm, but **without** being directly or indirectly in decision-making pertaining to acts of violence.

1. **Obligations of State Towards Groups of People According to Territorial Affiliation**

A state wishing to discharge its duty to protects its citizens from acts of terror must also protect human dignity by recognizing the value of each individual human and by recognizing the sanctity and freedom of life. It must, therefore, draw a distinction between different groups of people that are not its citizens or residents, and must determine the amount of culpability it bears for each one of these groups.

(C.1\*) Minimizing damage to the citizens (and residents) of the state, including to soldiers who are not actively engaged in combat;

(C.2\*) Minimizing collateral damage to people (outside of the state’s boundaries) who are not involved in terrorism and who are under the country’s effective control;

(C.3\*) Minimizing casualties among members of the state’s armed forces (assuming it is a conscripted army) during combat;

(C.4\*) Minimizing collateral damage to people (outside of the state’s boundaries) not involved in terrorism who are *not*under the country’s effective control;

(C.5\*) Minimizing casualties to members of a state’s armed forces (in a professional-volunteer army) during combat;

(C.6\*) Minimizing collateral damage (outside of the state’s boundaries) to people indirectly involved in acts of terror;

(C.7\*) Causing harm to people (outside of the state’s boundaries) who are directly involved in acts of terror;

The prevailing conception maintains that a soldier can be subjected to harm in order to protect civilians on the opposing side. The logic is that soldiers, unlike civilians, have willingly accepted upon themselves such a risk. The present doctrine, by contrast, takes into account the fact that that terrorists intentionally hide among civilian populations creating a more complex combat situation: soldiers are far more likely to come to harm if they make efforts to minimize casualties to civilians on the other side. In such cases, this doctrine argues, the responsibility for harming civilians lies on the terrorists who have put them in danger.

Additionally, this doctrine treats a soldier as a civilian in uniform. His or her life is just as important as the lives of civilians on the opposing side and the state is obligated to make efforts to protect them. However, there is an important qualification: soldiers have the right to moral precedence over civilians of the opposing side only if they serve in a conscripted army. If, however, they serve in a professional (volunteer) army, they do not have the right to moral precedence over civilians on the other side. Such soldiers have volunteered to serve their country and understand the risks this entails.

### Principle 3: The Principle of Proportionality

A state aspiring to protect human dignity, when making a decision whether or not to undertake a certain course of action, must find a balance between defending its citizens from acts of terror and reducing collateral damage to the opposing side. It must, therefore, weigh the expected military value of an action against the possibility of collateral damage.

**Components of Military Benefit**

(C.1) The immediacy of the danger expected by an immanent terror attack (such as one posed by a team actively engaged in launching rockets at civilian targets, or a planned attack against a civilian target in the near future);

(C.2) The value of and expected long-term benefit from the action (such as an intelligence mission, an offensive campaign, or preventing an attempt to kidnap a soldier);

(C.3) What attempts have been made to achieve the same result with alternative methods?

*If the action in question targets people (such as a targeted strike), then the following parameters must also be considered:*

(C.4) The target’s level of involvement in terror activities in accordance with the Principle of Distinction (Principle 2);

(C.5) The level of danger expected by the act of terror performed by a person directly involved in terror for the long term as well as the present;

(C.6) The intelligence difficulties of finding this person (in other words, if he or she is not targeted now, how difficult will it be for intelligence to find him or her again?).

**The Possibility of Collateral Damage**

(C.7) the expected harm a military action will have on the lives of people who are not involved in terror at all, or are only involved indirectly;

(C.8) If the tactic or weapon is likely to cause extensive collateral damage, decision makers should examine whether this type of weapon or tactic has been previously used against the same population and evaluate the results.

*Considerations of military benefit versus danger of collateral damage will be calculated based on circumstances:*

(C.9) Military benefit will take precedence if at least two of the parameters of military benefit are high (C1–C6). In such a case, immediate military action is necessary, even if the values of human collateral damage are equally high.

(C.10) Danger of collateral damage will take precedence when the parameter of military benefit is less probable; in such a case, greater weight should be given to the value of the risk of collateral damage.

(C.11) The need for postponement: when the values of military-benefit parameters are low, and the value of the collateral-damage parameter is not nil, then there is no military need to undertake immediate action and the operation should be postponed.

(C.12) Need for development: military activities which will cause extensive collateral damage, should be followed by attempts to develop new weapons, tactics or procedures in order to minimize collateral damage in the future.

In order to compare military benefit to the expected level of collateral damage, other parameters must also be taken into account. Clauses C.1 through C.3 only address actions in general, regardless of the immediacy of a terror threat. An immanent act of terror is a stronger reason for undertaking certain military actions; the extent to which an action is valuable (C.3), that is, weighing the added value attained from successfully carrying out the action must be weighed against the risks the army is willing to take as well as the risk to human life on the other side. For example, if the threat is an attempt to kidnap a soldier, a commander may use heavier fire, because the kidnapping, if successful, will certainly lead to excessive demands from the terror organization (such as prisoner releases). A successful kidnapping would also encourage acts of terror and further kidnapping attempts in the future. Another example is the possibility of neutralizing a prominent leader of the military arm of a terror organization, responsible for numerous attacks in the past, and who will plan further attacks in the future – here also, a commander may use extensive force.

Thus, whereas clause C1 addresses a case of an act of terror which will *not* take place in the immediate future, C.2 addresses a case of a target with high military value whose successful neutralization will have long-terms significance. For example, preventing an attempt by terror groups to use nuclear weapons would allow for the use of heavy fire.

Likewise, an army must examine its own procedures and determine if sufficient attempts have been made to carry out the action through different means which would result in a lower level of collateral damage (C.3). Clauses C.3–C.6 address actions which are meant to target terrorists. Here the importance of carrying out an action must be evaluated based on the danger posed by the terrorist – what harm can this person cause the citizens of the state in the short and long-term and how difficult will it be to locate him or her in the future? We can once against use the example mentioned in clause C.2 – the value of the action: catching a prominent leader of the military arm of a terror organization, responsible for many terror attacks and who will plan further attacks in the future. We would also examine the difficulty, from an intelligence standpoint, of finding this person again (C.6). If it would be impossible to find this person again, or even take a long time, a commander may use heavier fire, than in a case where the person could easily be found again.

Clauses C.1–C.6 should be weighed against clauses C.7–C.8, in other words, the expected threat to civilians on the other side should be determined. Likewise, it should be examined whether the same weapons which are to be used now have been used in the past (such as a bomb with a certain blast range). That is, we should ask: has the country learned from its actions in the past or will it continue to repeat mistakes? For example, in the Second Lebanon War, the IDF acted against Hamas operatives armed with anti-tank missiles who constituted a threat to Israeli forces. The response was strong and included the use of mortar fire and phosphorous rounds in Jabalia refugee camp in Gaza. The collateral damage was greater than expected: 35 were killed and 40 wounded. The IDF, evaluated the case, reached conclusions, and articulated a stricter safety range when using phosphorous shells in an area with a high civilian density and with sensitive facilities. If an action is undertaken, and a commander decides to use phosphorous rounds, he or she must check whether this type of weapon has been used in the past and examine the results. Were they to examine the case of Jabalia, they would see that consequences were severe; shelling caused extensive collateral damage. This being case, it would have to be determined whether the current action adheres to the safety range as established by the IDF or not. In this context, it should be emphasized that the question is whether the weapon or tactic has been previously used against the *same population*; different combat zones have different conditions. For example, the Gaza Strip (the arena of conflict between Hamas and Israel) is more densely populated than South Lebanon (the arena of conflict between Hezbollah and Israel). Therefore, the safety range required for the use of phosphorous rounds in the former would not necessarily be identical to the range required when using the same weaponry in the latter.

Clauses 3.9–3.11 take into account the need to find a balance between considerations of military benefit and considerations of collateral damage.

Clause 3.12 emphasizes the need to develop innovative procedures and weapons which will provide better results in cases where collateral damage is likely.

### Principle 4: Principle of Prior Notice

When military maneuvers are carried out in areas where collateral damage to civilians not involved in terror is a possibility, timely notice about impending attacks must be delivered. This affords civilians the opportunity to distance themselves from the area. This can be accomplished by leaflets, text-messages, radio broadcasts, dialogue with local leaders etc. That being said, there are cases in which a state may consider not giving prior notice:

* For example, a country can consider not delivering notice before an action undertaken as an act of self-defense against an imminent threat posed by terrorists (such as a response to protracted rocket fire at civilian targets, constituting an immediate threat);
* Likewise, this can be considered before an attack with an especially high military value, aimed at preventing an act of terror in the short term, when commanders on the ground maintain that giving notice will ruin the element of surprise and frustrate attempts at prevention.
* Finally, not giving notice can also be considered if there is a possibility that it would actually pose a greater danger to the civilian population. For example, in the case of Sri Lanka in its war against the LTTE, prior notice could lead to civilians being taken as hostages and being used as human shields (something that could happen even without a warning). Alternatively, the LTTE would have suicide bombers hide among civilians fleeing in response to the warning.

### Principle 5: Principle of Offensive Deterrence

(5.1) **The goal**. The purpose of offensive deterrence is to prevent future terror attacks by convincing terrorists that they will suffer from a costly response, and that the state is capable of and committed to carrying out its threats.

(5.1) **Danger of collateral damage**. When carrying out a military action intended to dissuade terrorists from continuing hostile activity against the state (purely for purposes of deterrence) it is absolutely forbidden to cause harm to civilians not directly involved in the terror activity. By contrast, when undertaking an action based on considerations of military necessity (such as prevention) where the element of deterrence is merely a side-effect, civilians not directly involved in terror may be allowed to come to harm.

### Principle 6: Principle of Professional Expertise

Every military action must be carried out with the highest standards of professionalism with the purpose of preventing future terror attacks – not in order to exact revenge. Therefore, senior commanders are entrusted with clarifying to commanders on the ground the ethical dimensions of every action.

To ensure that an action is as moral as possible, it is important that all levels in the chain of command properly understand, as much as possible, the holistic conception lying at the basis of the counter-terrorism measures being implemented.

## References

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