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Terrorism, Resistance, and the Idea of "Unlawful Combatancy"

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The Trouble with Terror: Liberty, Security, and the Response to Terrorism, Tamar Meisels (Cambridge: Cambridge University Press, 2008), 250 pp., $85 cloth, $26 paper.

Terrorism and Counter-Terrorism: Ethics and Liberal Democracy, Seumas Miller (Oxford: Blackwell, 2009), 232 pp., $75 cloth, $28 paper.

The Provisional Irish Republican Army and the Morality of Terrorism, Timothy Shanahan (Edinburgh: Edinburgh University Press, 2009), 256 pp., $115 cloth, $38 paper.

> "There is no such thing as political murder, political bombing, or political violence. There is only criminal murder, criminal bombing, and criminal violence. . . ."
>
> —Margaret Thatcher[1]

When faced with security threats from terrorism and other forms of nonstate political violence, how should liberal-democratic states respond? Should they operate entirely through the police and courts, categorizing their enemies as "criminals" and seeking to deal with the threat through investigation, arrest, and prosecution? Or can they deploy military force and tactics?

The answers to these questions will depend partly on the nature of the groups with which states are confronted and the contexts in which they operate. As Timothy Shanahan recounts in *The Provisional Irish Republican Army and the Morality of Terrorism*, during the 1970s and 1980s in Northern Ireland the British government tried variants of the military approach at different times, but generally sought to contain security measures within the framework of criminalization

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(especially from 1976 onward, when the "special category" status granted to "politically motivated prisoners" in Northern Ireland since 1972 was withdrawn[2]). This was intended partly to reinforce the message that the Provisional IRA was not the legitimate "army" that it claimed to be, a desire manifest in the refusal in the early 1980s to concede a return to political status in the face of the IRA hunger strikes.[3] On the other hand, as both Shanahan and Seumas Miller note, the paramilitary tactics deployed by republicans occasionally goaded state forces into responding in kind.[4] The result was that, at times, the policy of the United Kingdom in Northern Ireland looked like something of a hybrid: the "terrorists" could be prosecuted under domestic *criminal* law for any violent acts, facing the charge of murder whether they killed civilians, soldiers, or police; while the use of internment (introduced in 1971 but abandoned in 1975) and of such military techniques as ambush and, allegedly, assassination (during the 1980s) drew on the repertoire of tactics legally justifiable only in war.

Recent work on the law and morality of counterterrorism focuses on this kind of hybrid approach, contesting the meaning and applicability of "unlawful combatancy" as a category in the ethics and law of war. In *The Trouble with Terror*, Tamar Meisels defends the thesis that "irregular belligerents, whether 'terrorists' or otherwise, are 'unlawful combatants' and as such are ineligible either for the immunities guaranteed to soldiers by international conventions of war or for the protections of the criminal justice system."[5] Meisels takes the more recent experience of Israeli security forces in their encounters with Palestinian threats as her political focus. The practice that best exemplifies the kind of approach toward terrorists that she advocates is the use of "targeted killing" by Israel against senior Palestinian "militants," particularly between the start of the Second Intifada in September 2000 and the end of 2005, during which period at least 187 suspects were killed.[6]

By contrast, in *Terrorism and Counter-Terrorism,* Seumas Miller disputes this construction of unlawful combatancy as a legal or moral category, arguing that terrorists "should not be subjected to a hybrid framework under which they are both ordinary criminals and simultaneously military combatants"; and he rejects the "imposition of a selective framework by means of which terrorists get the worst of both worlds" as "morally objectionable."[7] Thus, while he accepts "unlawful combatant" as a term that usefully describes the status of terrorists operating in de facto theaters of war, he nevertheless argues that the temptation to mix and match different moral and legal norms should be resisted.[8]

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There are significant differences in the style and method in each of the three books. Meisels develops her position through a series of polemical, but nevertheless sophisticated and sometimes persuasive, addresses to various interlocutors (those engaged in the "apologetics of terrorism" and those seeking to obscure the meaning of "terrorism" as a moral term, for instance). Like Meisels's, Miller's approach is thematic, addressing questions of how to define terrorism, whether it can ever be justified, and, finally, whether terrorism should be fought through the police or the military, and whether to contemplate the use of interrogative torture. But his tone is more cautiously analytical throughout, eschewing any obvious sense of partisanship. Finally, Shanahan applies the tools of moral analysis to a specific historical case, a novel and promising approach. Thus, each book offers a distinctive and important contribution to a range of debates on the ethics of terrorism and counterterrorism. In this essay, however, I will focus more specifically on the construal, particularly by Meisels and Miller, of the "unlawful combatant" category—a pivotal concept—and I will refer to Shanahan's book inter alia by way of illustration.

Unlawful Combatants: Having Your Cake and Eating it?

For Meisels, such groups as Hamas and Fatah, just like al-Qaeda, fail to meet the requirements for either of the conventional frameworks through which liberal-democratic states regulate their engagement with security threats: lawful combatant or ordinary criminal. Yet while their members enjoy the rights and immunities of neither they nevertheless suffer the liabilities of both. Were they ordinary criminals, they would be treated as "suspects," suffering arrest where possible while enjoying the presumption of innocence until they faced trial. Only upon conviction could they be penalized, and then only in proportion to their proven criminal record and within limits set out in criminal law.[9] It certainly would not be permissible for state forces to encounter them with the intentional purpose of killing them in *preference* to arrest and trial, unless they presented an imminent threat to innocents that could be eliminated in no other way.[10] But members of Hamas and Fatah present a different kind of threat than ordinary criminals, according to Meisels: "terrorists, or guerrillas," she suggests, "operate within the military rather than the civil sphere and are therefore not entitled to the protection of the due process of law."[11] Because they present a de facto military threat, these individuals qualify as combatants of *some* kind.[12] Consequently, Meisels follows Daniel Statman in

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arguing that they are subject to the "common moral and legal view according to which the killing of enemy combatants in wartime is allowed even if they are not posing a direct and imminent threat."[13] On the other hand, the same individuals fail to meet the requirements of *lawful* combatancy and therefore should not benefit from the rights and immunities it offers, in particular the right to be treated as a prisoner of war upon capture.[14]

Although the international law of armed conflict does not specify a category of "unlawful combatant," Meisels argues that one can be deduced negatively from the Hague Convention (1907) and the Geneva Convention (1949). (In this, she follows the same legal logic as the authors of the U.S. Military Commissions Act of 2006.) According to the Conventions, captives merit prisoner-of-war status under three conditions: first, by clearly identifying themselves as combatants, both by wearing insignia visible at a distance and by carrying their arms openly; second, by their adherence to the laws and customs of war; and third, by acting within an established chain of command (or under the leadership of a state, according to the Military Commissions Act). If a group of insurgents routinely targeted civilians, falling foul of the second requirement, it would merit the "terrorist" label in addition to that of unlawful combatant;[15] but even if the group observed a strict rule of combatant-noncombatant discrimination, she maintains, it would still fail to achieve the status of lawful combatancy if it did not meet the first requirement in particular. For Meisels, therefore, the unlawful combatant category extends beyond terrorists as such to embrace all irregular armed forces.

The refusal to use proper insignia presents two moral problems in wars between irregular and regular forces. First, by failing to identify themselves as potentially threatening to their adversaries, irregular soldiers engage in "perfidy"—that is, they fail to observe what George Fletcher calls the "subtle principle of reciprocity" involved in the law of war and, hence, the rules of fair play vis-à-vis soldiers on the other side.[16] The most important problem, however, is that by failing to mark a visual distinction between combatants and noncombatants on their own side, irregulars threaten to undermine "the very basis of humanitarian laws of war."[17] Meisels draws support from Michael Walzer's account in *Just and Unjust Wars* to argue that, however just their cause and however legitimate their claim to represent the interests of those on whose behalf they fight, irregulars make it difficult for their enemies to fight discriminately, increasing the chance of civilian casualties on their own side.[18] For this reason, Meisels argues that the distinction between lawful and unlawful combatants "is inherently tied to the more basic differentiation between

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combatants and civilians and is essential for protecting the latter." It is therefore "a morally worthy distinction, which ought to be specified in law and upheld in practice rather than remaining in a permanent state of legal limbo."[19]

For both reasons, irregular combatants "possess no war rights," as Walzer states, "even if their cause is just."[20] Failing to meet the requirements of Hague and Geneva law, irregulars cannot claim the right to be treated as prisoners of war upon capture. This is why, in effect, they suffer the same liabilities as ordinary criminals alongside those of ordinary combatants: if captured rather than killed, they will be tried and punished and should have no expectations that they will be released if their "war" ends before their sentence.[21]

Theaters of War and Civilian Life

Whereas Meisels locates terrorists and other irregulars in a single legal space falling somewhere between combatancy and ordinary crime, Seumas Miller argues that in different circumstances, different terrorist acts should be treated using different legal and ethical frameworks. They should be approached *either* "simply as crimes committed by criminals who are not also military combatants" *or* as "acts of war that are also war crimes." Crucially, he maintains that the same actions should never be dealt with using both frameworks at once or using a selective hybrid of the two.[22]

The main criterion for deciding whether the terrorist actor should be treated as a combatant or as a "noncombatant" criminal ("roughly speaking, civilian"[23]) is the context within which the terrorist acts occur. There are three possibilities: first, "well-ordered (non-totalitarian) nation-states in peacetime and, specifically, well-ordered, liberal-democratic states at peace"; second, "theatres of war, i.e. battlefields, in the context of wars between states"; and, third, "theatres of war in the context of wars involving non-state actors, e.g., a civil war or armed insurgency between a government's security forces and some other armed and organized military force, or a contested foreign occupancy."[24] All else being equal, Miller argues, terrorists in type one contexts should be treated as noncombatant criminals, while those in type three situations are to be treated as combatants of some kind. Where they are engaged in terrorism as a routine part of their organization's practice, they will be unlawful "terrorist-combatants."[25]

For liberal democracies and other well-ordered societies at peace, Miller argues, the proper agency for dealing with terrorist threats will be the police. The actions of the police should always be governed by their duty to protect legally enshrined

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rights and, as such, policies should be subject to stringent "in-principle limits." When pursuing individuals categorized as criminal suspects, their primary objective will generally be to gather intelligence and evidence; thus, if rights infringements must occur, they will most likely affect those concerning privacy. But the right to life of citizens must remain sacrosanct. A targeted killing or "shoot-to-kill" policy is therefore not permissible in this framework. There may be some occasions when police officers find that killing known or suspected terrorists is justifiable, even obligatory, but only in circumstances similar to those in which ordinary criminals could also be killed—that is, where there is an imminent and manifest threat to innocent lives and no other, less drastic tactic offers a commensurable hope of protecting them. Thus, whether the suspect is a terrorist or a maniac without political motive, the justification for police action is the same one of self-defense or other-defense; neither situation requires any additional rights borrowed from the norms of armed conflict.

The most troublesome case, however, is that in which a domestic terrorist group presents itself in a form that the state reasonably wishes to treat as criminal but where its persistence increasingly demands a defensive response tantamount to military engagement, as when the United Kingdom used ambush tactics against the IRA that were really suited only to theaters of war. In such "contradictory" situations, Miller argues, the terrorists are "ordinary criminals" from a legal point of view, and the state describes them as such "because it regards itself as the legal authority applying the terrorism-as-crime framework to criminals." But at the same time, "the terrorists are acting as enemy combatants" against whom lethal ambushes increasingly appear justified as a defensive response.[26] Timothy Shanahan makes a similar point in relation to the United Kingdom's security practices during the 1980s, citing the IRA's self-description as an "army" engaged in war, as opposed to those of its apologists who complained of mistreatment and violation of rights when British soldiers were deployed in preventive, "shoot-to-kill" confrontations.[27] Miller's analysis and the sharp differentiation he makes between the "terrorism-as-crime" and "terrorism-as-war" frameworks clarifies the reasons why shoot-to-kill policies of this kind are so troubling from a moral and legal perspective. Whatever is done, he insists, must fall within one framework or the other: the same individual can at one time be treated consistently only as *either* a criminal in the ordinary sense *or* a (terrorist, unlawful) combatant.[28]

Where internecine warfare or civil wars occur and the government "has lost, or is in danger of losing, control over the contested area," then the government

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may be forced to adopt a war footing and the "terrorism-as-war" framework can be applied. In these circumstances the terrorists occupy a position distinct from both the "noncombatant" terrorists of the terrorism-as-crime framework and the lawful combatants of regular war. Miller states four conditions that have to obtain before the terrorism-as-war framework can be justified: first, it must be evident that the terrorism-as-crime framework "cannot adequately contain serious and ongoing terrorist attacks"; second, there must be a reasonable expectation that the application of the "terrorism-as-war" alternative is likely to succeed; third, it must be apparent that the application of the terrorism-as-war framework will prove proportionate in relation to the threat it heads off; and, finally, it must be applied in a clearly circumscribed theater of war and for a limited time.[29] Once invoked, the terrorism-as-war paradigm will permit targeted killing along with other conventional military tactics to be deployed against terrorists.

Miller's separation of the terrorism-as-crime and terrorism-as-war frameworks and his arguments for caution and restraint when contemplating the possibility of shifting from one footing to the other in real contexts are carefully argued and persuasive. Nevertheless, there is one matter, which I believe is important here, to which neither Miller nor Meisels gives sufficient attention. This is the question of whether irregular combatants or terrorists should be regarded as having a legal right to use force against regular soldiers who have been deployed against them.

The *Jus in Bello* vs. the *Jus ad Bellum*

Meisels's account of unlawful combatancy is intended partly as a critical response to Karma Nabulsi's *Traditions of War* (1999), which similarly links the *jus in bello* principle of discrimination to the distinction between lawful and unlawful combatants but which challenges the validity of both.[30] Nabulsi argues that by displacing the substantive moral concerns of the *jus ad bellum*, the Grotian focus on the constraining influence of the *jus in bello* sustains a bias in the contemporary law of war against irregular forces and, hence, against all nonstate resistance movements, including those fighting with popular support and for just causes. Meisels retorts by emphasizing the increased risks that irregular combat inflicts on surrounding civilian populations, and argues that despite the disadvantages for guerrillas of all kinds, the *jus in bello* and the unlawful combatant category offer better protections to the weak and vulnerable than any more permissive approach toward nonstate resistance movements. But there is a problem in this

part of her argument, one that becomes clearer once we consider the options that Meisels's framework offers to nonstate combatants and their ability to prosecute wars discriminately and legally.

Meisels claims that unlawful combatancy is purely a question of "status" and does not, in and of itself, entail a crime. She follows George Fletcher in differentiating between the commission of prosecutable crimes and the failure to achieve lawful combatant status: "The basic difference is that the violation of the first kind of rule generates liability and punishment. The breach of the second kind simply means the actor does not secure the legal results she desires." Failing to become a lawful combatant on this account is much like failing to become a qualified pharmacist or lawyer: one attempts to perform the functions of that role and one fails to do so, but it is not necessarily, Meisels argues, a prosecutable offense.[31]

What needs emphasizing here—but which remains implicit in Meisels's and Miller's discussion—is the fact that some kinds of action are morally and legally permissible only when one has already fulfilled the requirements for status. If I pretended to be a pharmacist even though I had none of the requisite knowledge or qualifications, then I could presumably find myself on the wrong side of the law were I to fill prescriptions (even if I just happened to dispense the correct drugs). Similarly, if I failed to achieve the legal status of "combatant" and yet carried a gun and fired it at soldiers, killing some of them, then it is doubtful that my actions would be regarded as legally permissible acts of combatancy; rather, they would presumably qualify as ordinary crimes of murder. The point here is that the *jus in bello* principle of discrimination is two-edged, entailing both a prohibition *and* a permission: it *prohibits* the direct targeting of noncombatants, but it also *permits* the targeting of combatants. There is no need to explain how a particular individual or group becomes bound by the prohibition, of course, since this rule remains in force in or out of war: Deliberately killing noncombatants is simply murder, no matter what the context. But what about soldiers? Is it *not* murder for a civilian to kill a soldier? Outside of recognized states of war, soldiers normally have the same immunities from harm as anyone else; it is only in recognized states of war that they suffer a loss of immunity.[32] Moreover, their immunity is lost not just to anyone; civilians on the opposing side are prohibited from attacking them, much as civilians are on their own side. This, indeed, would seem to be the key point about those who engage in combat without obtaining the proper, "lawful" status: If you're not a lawful combatant yourself, then you do not have the right to

kill soldiers; they are not liable *qua combatants* to be harmed by you. Thus, it does not matter whether you are attacking soldiers or civilians, since you are permitted to do neither.[33]

Meisels's argument that unlawful combatants suffer the liabilities but not the privileges of both combatants *and* criminals seems, therefore, to render irregular forces legally and morally *incapable* of fighting within the terms of the *jus in bello*. As I will argue more fully below, this has consequences for her argument that the full *jus in bello*, including the requirement of wearing insignia, is necessary for the better protection of civilians. At times, Miller's analysis seems to imply that irregular, "unlawful" combatants should be given the targeting rights of regular combatants and, hence, immunity from prosecution for violence conducted within the usual terms of the *jus in bello*. He explicitly assumes, for instance, that "a liberal-democratic nation-state can engage in wars with non-state actors, e.g., a civil war, a revolutionary war or a war against an armed, organized, belligerent, external, non-state entity."[34] Moreover, he maintains that the fact

> that international law admits only of combatants and civilians, and defines combatants in such a way that they must bear arms openly, provides very weak grounds for refraining from regarding terrorists as combatants in contexts of internecine war, such as the Israeli-Palestinian conflict. Surely, persons who are trained in military techniques, are armed, and are engaged in killing combatants (as well as civilians) for military and political purposes are, for all intents and purposes, combatants, notwithstanding the fact that they do not wear uniforms and do not bear arms openly.[35]

Miller seems to complicate the issue, however, by stating that as unlawful combatants engaged in deliberate harm to innocent civilians,[36] terrorists will be both "military combatants" *and* "subject to a criminal justice process analogous to that to which ordinary criminals are subject" once identified as unlawful combatants "by an appropriately instituted judicial body."[37] It is therefore unclear whether he means that this kind of combatant has the right to use *discriminate* force—that is, to target state combatants and kill them without incurring legal liability for the criminal charge of murder. If not, then the terrorist's status does not seem very different from the hybrid status ascribed to him by Meisels. On the other hand, Miller also states that even "terrorist-combatants" must be treated as POWs upon capture "until such time as they are determined to be terrorists by a properly constituted judicial body." But once defined as an unlawful combatant because, for example, they are members of al-Qaeda, they must then be tried for "specific terrorist act(s), that is, for committing a particular species of war crimes"[38]—a

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position that seems to leave room to consider allowing irregular forces to operate discriminately within the terms of *jus in bello*. On either reading, if Miller's account is understood to imply that once the terrorism-as-war framework is invoked by the relevant state it automatically grants to the nonstate belligerents the right to use discriminate force, then I think this proposition needs some further elaboration and justification.

Combatant Status and Irregular Soldiers

The problem I highlight in both Meisels's and Miller's accounts of "unlawful" combatancy is that they give insufficient attention to the question of whether and how nonstate forces could sometimes fulfil the requirements of the *jus in bello*. Both theorists focus primarily on those cases that they believe necessarily fail to do so: for Miller, this is primarily the class of "terrorist-combatants"—irregular combatants who also routinely violate the immunity of innocent civilians through direct targeting; Meisels's argument is more sweeping, claiming that *all* irregular forces—non-terrorist guerrillas as well as those who target noncombatants—fall outside the category to which the permissive clauses of the *jus in bello* apply. None, therefore, can fight in such a way as to meet the requirements of the law of war because none have the right to kill anyone, not even lawful combatants. In contrast, I wish to argue that we can outline the rationale for granting such a right and the circumstances in which it might be justifiable to do so. The rationale flows from problems likely to arise from the application of Meisels's conception of unlawful combatancy alongside the *jus in bello*. Far from supporting the *jus in bello* in its protection of civilian life as she claims, I argue it may in fact diminish discrimination in warfare. Let me outline the reasons why I think this is the case.

First of all, as Meisels acknowledges, the principle of discrimination is at least partly conventional in nature and does not necessarily map directly onto the substantive justice of a conflict. As Jeff McMahan has shown, the principle of moral equality between soldiers at its heart will sometimes exclude the non-innocent from targeting while pushing the more innocent (conscripts, for instance) into the line of fire.[39] The reason why, in spite of this, the *jus in bello* is justified morally as a framework for conventional wars is that it is likely to prevent such wars from becoming even more indiscriminate and more widely destructive than they might be otherwise. It does so by specifying groups that can be treated as legally liable to attack (that is, normally regular military forces), and by providing them with the

opportunity to arm and train accordingly.[40] But when applied in its strict form to conflicts involving irregulars who fail to wear insignia or carry arms openly, I argue, the strict conception of the *jus in bello* defended by Meisels is unlikely to have the same effect as it does in conventional wars.

In regular wars, combatants have an incentive to observe the discrimination requirement because to violate it entails liability for prosecution as a war criminal. Leaving aside the question of morality as such, it is therefore rational, all else being equal, for regular soldiers to direct fire against one another and to avoid the legal and moral risks of attacking civilians directly. But in nonstate conflicts as interpreted by Meisels only regular soldiers have this incentive structure, because only regulars have the right to target enemy "combatants." Their irregular counterparts, by contrast, have no right to target anyone. Purely from a legal point of view, therefore, there is no disadvantage for irregulars in targeting civilians rather than soldiers should it prove tactically expedient to do so. Therefore, far from creating incentives for discrimination, the *jus in bello* institutes a "may as well be hung for a sheep as for a lamb" rationale for irregulars. I therefore challenge Meisels's claim that the stringent application of her unlawful combatant category to irregulars will *increase* discrimination and the protection of civilians; on the contrary, by refusing them combatancy rights, it is likely to have the opposite effect.

Moreover, excluding irregulars from the permissive clauses of the laws of war presents a further danger. The *jus in bello*, as Meisels accepts, comprises a set of conventional rules by which those fighting on either side accept reciprocal duties and liabilities as a means of deflecting the violence of war away from civilian life. This is accepted despite the fact that the moral responsibility for the injustices that made war necessary sometimes lie with certain civilians rather than any of the soldiers. But if one side in a conflict is effectively excluded from the beneficial clauses of the convention, it is hard to see how it would necessarily be bound by its restrictions. If it finds itself excluded from the convention, a nonstate group fighting for a just cause with wide popular support might revert to the deeper moral perspective explored by McMahan—and in a different way by Miller—arguing that targeting should follow the lines of moral responsibility and not the line conventionally drawn between civilians and military personnel. Hence, if McMahan is right in arguing that some civilians might sometimes bear sufficient responsibility as causes of conflict to be *morally* liable to attack—a view in harmony with Miller's argument about the possible targeting of some nonviolent civilian rights violators—then there may even be a case for guerrillas to

direct force against them in preference to attacking (relatively innocent) soldiers.[41] So here we have gone one step further: in these circumstances, not only would the *jus in bello* have failed to disincentivize indiscriminate targeting, but by excluding one side in a conflict it could provide them with a justification for falling back on the "deep morality"[42] of war and the perspective of the *jus ad bellum* and for rethinking the terms of engagement entirely.

My point in following through these steps is not to try to justify the use of civilian targeting, but to show why I think it is necessary to adapt the terms of the *jus in bello* to conflicts between states and irregular, nonstate forces. This is where I disagree strongly, therefore, with Meisels in her argument that the unlawful combatant category with its double liabilities (to be prosecuted as criminals and, where possible, killed as combatants) should be specified in international law. On the contrary, I would suggest that it is necessary to specify ways to adapt the *jus in bello* to asymmetric conflicts in such a way as to reward irregulars for discriminate uses of force by granting them the rights of combatants, and without the liabilities of criminals. This can be done, of course, while maintaining the existing provision for punishing indiscriminate uses of force as war crimes.

On the face it, the idea that combatancy rights should be extended to non-uniformed irregulars[43] and even terrorists might seem to concede too much from the perspective of states. But there are several reasons for thinking that this could be advantageous to states in some conflicts. First of all, conferring lawful combatant status on nonstate fighters offers to widen the repertoire of legitimate military actions available to states in much the same way that Meisels's "unlawful combatant" approach does. Targeted killing and the use of ambush tactics are both permissible against combatants, whether the combatants are lawful or not. Similarly, once captured, as lawful combatants irregulars can be held as prisoners of war for the duration of the conflict. Second, giving combatancy rights to the irregulars could be described as restoring a form of "fair play" in asymmetric conflicts (a principle that Meisels invokes to different effect[44]), and could therefore help to legitimate military actions taken by states in defense of their citizens. Third, and most compelling, is that by making attacks on civilians *disadvantageous* to irregulars as compared with attacks on soldiers—that is, by attaching to these the penalty suitable to war crimes—a disincentive is attached to indiscriminate actions that does not arise for attempts to attack soldiers. This renders the likely effects of the *jus in bello* consistent with the purposes for which it was invented—namely, to draw the violence of war as far as possible onto those selected by each society

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to represent its interests in combat and, thus, to deflect it away from domestic civilian life.

To conclude, as Miller argues, liberal-democratic states should stick to the terrorism-as-crime framework for as long as possible, avoiding the terrorism-as-war framework unless and until the scale and frequency of attacks demand it. But if it really becomes necessary to shift from one footing to the other, it is essential to limit the war to actions directed at combatants as far as possible. Only a balanced application of the *jus in bello* is likely to achieve this.

NOTES

[1] Margaret Thatcher speaking in reference to the IRA hunger strikes in 1981 quoted in Timothy Shanahan, *The Provisional Irish Republican Army and the Morality of Terrorism* (Edinburgh: Edinburgh University Press, 2009), p. 172.
[2] Richard English, *Armed Struggle: The History of the IRA* (London: Pan Books, 2004), pp. 187–89.
[3] Hence Margaret Thatcher's declaration: "Crime is crime is crime: It is not political, it is crime." Shanahan, *The Provisional Irish Republican Army*, p. 172; see also pp. 190–91.
[4] Ibid., pp. 190–91; and Seumas Miller, *Terrorism and Counter-Terrorism: Ethics and Liberal Democracy* (Oxford: Blackwell, 2009), p. 136.
[5] Tamar Meisels, *The Trouble with Terror: Liberty, Security, and the Response to Terrorism* (Cambridge: Cambridge University Press, 2008), p. 91.
[6] Ibid., p. 114 and chap. 5.
[7] Miller, *Terrorism and Counter-Terrorism*, p. 85.
[8] Ibid., pp. 84, 86, 123, 134.
[9] See, e.g., ibid., p. 133.
[10] See ibid., pp. 99–102.
[11] Meisels, *The Trouble with Terror*, p. 115. Daniel Statman frames his defense of targeted killing in the terms of military engagement without elaborating a special unlawful combatant category to do so. See Daniel Statman, "Targeted Killing," *Theoretical Inquiries in Law* 5, no. 1 (2004), pp. 179–98, at pp. 181–88. Both Meisels and Statman respond to Michael Gross's critique, "Fighting by Other Means in the Mideast: A Critical Analysis of Israel's Assassination Policy," *Political Studies* 51 (2003), pp. 350–68.
[12] Meisels, *The Trouble with Terror*, p. 136.
[13] Ibid., p. 117; and Statman, "Targeted Killing," p. 195. Meisels cites the opinion of Israeli Supreme Court Justice Aharon Barak for legal reasoning concerning the status of "civilians who are unlawful combatants"; see Meisels, *The Trouble with Terror*, p. 142.
[14] See, for instance, Meisels, *The Trouble with Terror*, p. 164: "The lawless status of irregular combatants ought to be legally distinguished from their lawful counterparts by explicitly denying irregular combatants the conventional rights of soldiers."
[15] Meisels defines "terrorism" as the deliberate violation of noncombatant and civilian immunities for political purposes, generally involving an element of terror (*The Trouble with Terror*, chap. 1). Miller argues that terrorism should imply forms of violence that "ought to be criminalised" when "committed in order to terrorize a third party and in the service of military or political ends." Not all targeting of noncombatants, as he argues in *Terrorism and Counter-Terrorism* (chap. 3 and p. 83), would necessarily fall within the category, as some might conceivably be justified legally. On definition, see pp. 58, 83, chap. 2, and throughout. Compare Christopher Finlay, "How to Do Things with the Word 'Terrorist,'" *Review of International Studies* 35, no. 4 (2009), pp. 751–74.
[16] George Fletcher, *Romantics at War: Glory and Guilt in the Age of Terrorism* (Princeton: Princeton University Press, 2002), p. 107. Quoted in Meisels, *The Trouble with Terror*, p. 105.
[17] Meisels, *The Trouble with Terror*, p. 104.
[18] Ibid. Compare Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed. (New York: Basic Books, 2006), chap. 11.
[19] Meisels, *The Trouble with Terror*, p. 124.
[20] Walzer, *Just and Unjust Wars*, p. 183.
[21] Notwithstanding the experience of political inmates in Northern Ireland under the Good Friday Agreement.
[22] Miller, *Terrorism and Counter-Terrorism*, p. 85.
[23] Ibid., p. 86.

[24] Ibid., p. 85.
[25] Ibid., p. 84.
[26] Ibid., pp. 135–37.
[27] See Shanahan, *The Provisional Irish Republican Army*, pp. 191–92.
[28] Miller, *Terrorism and Counter-Terrorism*, pp. 135–37.
[29] Ibid., p. 117.
[30] Karma Nabulsi, *Traditions of War: Occupation, Resistance and the Law* (New York: Oxford University Press, 1999).
[31] Fletcher, *Romantics at War*, p. 109; and Meisels, *The Trouble with Terror*, p. 110.
[32] See Christopher Finlay, "Legitimacy and Non-State Political Violence," *Journal of Political Philosophy* (forthcoming). On problems with applying *jus in bello* standards to terrorists and other nonstate groups, see Robert E. Goodin, *What's Wrong with Terrorism?* (Oxford: Polity Press, 2006), pp. 15–16.
[33] This problem is particularly pertinent to the claims the PIRA made about being an army, as I argue in "Legitimacy and Non-State Political Violence." See, for instance, Shanahan, *The Provisional Irish Republican Army*, pp. 172, 190–91. On the liabilities in law of those who are regarded as "civilians" but who are captured having engaged in military activities, see Knut Dörmann, "The Legal Situation of 'Unlawful/Unprivileged Combatants,'" *International Review of the Red Cross* 85 (2003), pp. 45–74.
[34] Miller, *Terrorism and Counter-Terrorism*, p. 118, as reflected in the Protocols I & II Additional to the Geneva Conventions, 1977, on which, see Leslie C. Green, *The Contemporary Law of Armed Conflict*, 3rd ed. (Manchester: Manchester University Press, 2008), chaps. 3, 6.
[35] Miller, *Terrorism and Counter-Terrorism*, p. 141. There is some support for this view too in Walzer, *Just and Unjust Wars*, p. 185.
[36] Miller argues in *Terrorism and Counter-Terrorism*, chap. 3, that sometimes civilians merit attack morally, as when they engage in even nonviolent rights violations and where the only means of preventing them from taking innocent lives or their equivalent is to use force against them. Such acts, Miller maintains, are not necessarily "terrorist" acts.
[37] Ibid., p. 84.
[38] Ibid., p. 123.
[39] Jeff McMahan, *Killing in War* (New York: Oxford University Press, 2009).
[40] On the rationale for maintaining the laws of war despite tensions between the law and deeper morality of war, see Jeff McMahan, "The Morality of War and the Law of War," in David Rodin and Henry Shue, eds., *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (New York: Oxford University Press, 2008).
[41] McMahan, *Killing in War*, sects. 5.4, 5.5; and Miller, *Terrorism and Counter-Terrorism*, chap. 3.
[42] Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114 (2004), pp. 693–733, at p. 730.
[43] As Miller perhaps implies, *Terrorism and Counter-Terrorism*, p. 141.
[44] See, e.g., Meisels, *The Trouble with Terror*, p. 106.