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NEW RULES FOR WAR?

Joel Rosenthal

I n launching a campaign to disarm and liberate Iraq, the United States has crossed, some say hurdled across, two thresholds—one strategic, the other diplomatic. Strategically, the United States delivered on its promise to act in self-defense, absent an actual or even imminent armed attack, against threats from weapons of mass destruction. Diplomatically, the United States demonstrated its willingness to act decisively and unilaterally, if necessary, in the face of strong opposition from its allies. Some saw these crossings as courageous leadership, but others saw them as reckless. My purpose is not to rehearse the familiar pros and cons of preemption and unilateralism but rather to suggest that a fuller, moral accounting is needed of these concepts and some of the side issues they raise—thus the question mark in the title of this article.

My answer is that we do not need new rules, as some have suggested. The old rules are fine. They give us all the normative guidance we need. But that said, these old rules and the principles they instantiate do need to be considered in light of new circumstances—specifically the challenge presented by a nonstate actor with an avowed goal of violating just about any rule that we hold dear. With that in mind, it is imperative to review our record of the past year and to "think forward."

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In pursuing this war on terrorism from Afghanistan to Iraq and in shadowy places less often mentioned, what have Americans gained? What have we lost as a country that likes to think of itself as a moral nation? Do we have sufficient normative or ethical guideposts to direct us as we move forward in this new war against terrorists? What areas might need more work, more reflection, even some rethinking? My perspective may differ from what members of the military and national security communities usually hear. My world is one of ethicists, philosophers, students, diplomats, journalists, business executives, and leaders of nongovernmental organizations—only occasionally military officers. But the questions raised in my world desperately need the perspective that military experiences and point of view can offer.

This is what my world tells me. That moral climate for the use of military force is defined by two factors. The first is radical asymmetry in political, economic, and military power between the United States and the rest of the world; the second is a robust resort to moralism, high moral rhetoric, and the moral motivation that accompanies ideological struggle. These overarching factors, asymmetry and moralism, dominate our political discourse and frame our understanding of the challenges we are facing. From them emerge six specific issues of real ethical concern. Just war principles and current law of armed conflict help to address them, but both sources leave a good deal of room for interpretation. Ultimately, these six issues require moral reasoning and reflection.

- "War" as the model for the struggle against terrorism

- The relevance of the concepts of prevention, preemption, and deterrence

- The combatant/noncombatant distinction in the Iraq conflict

- "Shock and awe"

- Hidden costs of the war in Iraq and the war on terrorism

- Postconflict responsibilities in Iraq.

ASYMMETRY AND MORALISM

There is a tendency to think that everything changed on 11 September 2001, that as of 8:48 AM Eastern Daylight Time, the old rules no longer applied. Let me offer a different interpretation. For all that indeed did change on that day, it may be more important that so much remained the same. From 1991 to 2001, American-led interventions from the Persian Gulf to the Balkans confirmed that in both geopolitical and strictly military terms, American power far outstripped that of any rival. This nation, while drawing down from Cold War levels, was still developing its capacity to deliver lethal force around the world.

Now there was some debate about how this power should be projected, and it even rose to the level of presidential politics in the year 2000. Candidate George W. Bush's foreign policy platform was dismissive of nation building and highly critical of the platform of his opponent, Al Gore, of "forward engagement," emphasizing as it did the need to create the conditions of a stable world order by committing resources to address a variety of emerging global issues.

Yet for all of this debate on the margins, the unshakable fact remains that the decade 1991 to 2001 was characterized by a United States that was feeling its way regarding how to use its military power and newfound technological capability in a world transformed by the end of the Cold War, a world without the Soviet Union. What is more, it became apparent during this decade that "soft" and "hard" power advantages enjoyed by the United States might actually lower the threshold for the use of military force. Long-range bombing with precision-guided munitions was making the use of force more accurate, more lethal, and much cheaper. By "cheaper" I do not mean cost per weapon but efficiency in terms of doing more with fewer personnel and less equipment. Perhaps most important of all, war was becoming less expensive in terms of casualties. The specter of low casualties, even *no* casualties, seemed to make war a palatable option in ways previously unknown. We do it because we can. The costs seem acceptable. Even collateral damage seems low as weapons get better and as "targeteers" and strategists find clever alternatives.

What does this mean for us today in the war against Iraq? How much of the decision to take the war to Iraq was influenced by this ten-year background of asymmetry? Did the United States decide to remove Saddam Hussein literally because it could? Major combat casualties for coalition forces were relatively low, as predicted and hoped for. The job was exceedingly well done. But as all know, intelligence about weapons of mass destruction and al-Qaʻida connections to Iraq was vague at best. The war was launched because, as President Bush put it, "in a world where terrorists can get their hands on weapons of mass destruction, the risk of inaction is greater than the risk of action."

The risk of action, however, is low in today's world of asymmetric American power and is likely to continue to be low. Could it be that Saddam Hussein's Iraq was in some manner a target of convenience, an identifiable target that could be defeated while the criminal network of Bin Laden continued to threaten?

The administration has hinted that the war in Iraq was meant to have a demonstration effect. In a speech about counterterrorism policy given on 30 October 2003, National Security Advisor Condoleezza Rice put it this way: "Until September 11 the terrorists faced no sustained systematic global response. They became emboldened, and the result was more terror and more victims. U.S. policy was not working with North Korea. No, it was not working with Iran.

No, having Iraq for twelve years defy United Nations on seventeen different reso-
lutions—it wasn't working. We had to confront that."

With this in mind, we must ask ourselves: Have radical asymmetry and mili-
tary capability made it too easy in a way to militarize certain intractable prob-
lems in a good-faith effort to solve them? As the cliché goes, if you have a
hammer, every problem looks like a nail. The U.S. military is so good—let us
give it the opportunity to do what it does so well. Let's define the problem in
such a way that it can.

This is a tentative conclusion, not a firm one, raised not for purposes of polit-
ical judgment or partisan politics but simply to understand the logic of the ac-
tion. Has the slide down the slope of asymmetric war now led Americans to
think of force as a way to send a message or demonstrate resolve? Do we now en-
gage in wars of choice rather than wars of strict necessity? The threshold of will-
ingness to use force seems to have dropped because the cost has remained low.
But what happens when the costs rise? What happens when long-range bombing
is not enough to do the job, when ground troops are necessary? What about the
specter of guerilla warfare, as now faced by the army of occupation in Iraq? Here
we see the other side of asymmetry. Here we see foes unrestrained, anxious to use
the weight of U.S. power and the moral standards of Americans against them.

There is political as well as military asymmetry. American frustrations with
the United Nations Security Council, understandable as they are, led them to a
worrisome place. I have heard on more than one occasion the exhortation,
"Lead, follow, or get out of the way." That sounds inspiring at first, but is it the
way to proceed? Besides its obvious arrogance in belittling the legitimate inter-
ests of others, would it not seem more logical to persuade and gain consensus
where possible? Does it not make sense to search for congruences of interest in
good old-fashioned win-win propositions where possible? Does it not make
sense to seek cooperation in a war against terrorism that by its very definition is
global in scope? Now there is enough cynicism to go around, and it is right to re-
ject the expedient, self-serving behavior of those who seek only to obstruct, with
arrogance and in bold self-interest. But we are speaking here of the general rule
that the United States, the world's greatest single power, should adopt.

The world stood united on 12 September 2001. A global consensus condemn-
ing terrorism emerged. There was much resolution expressed to fight it. NATO
invoked Article V—an unprecedented act. We must face the fact that somehow,
though global consensus condemning terrorism still holds, global resolve on
fighting it has cracked.

The second big-picture factor relates to the very ways in which we think,
speak, write, and communicate about the war of terrorism. Using language laced
with terms like "good," "evil," and "evildoers," President Bush has framed the

war on terrorism in distinctly moral terms. To some degree, this has been quite refreshing and positive. The president has erased lingering notions of moral equivalence, the corrupt idea that one man's terrorist is another man's freedom fighter. The president has made it clear that the random killing of innocent people is simply wrong. He has made it crystal clear that suicide bombers are not martyrs. They do not die persecuted for their faith; they die misguided killers of innocent bystanders. They die with hatred and death in their hearts, not love and life.

The president has also made it clear that it is justifiable and right to rid the world of those who would do such deeds, and he takes it as his responsibility as defender of the free world to do so. But for all of the good President Bush and the U.S. government have done in pursuing what might be called this politics of moral certainty, dangers come with it. We should be mindful that for all of our rightness in fighting the evil of terrorism, such a fight does not come without a cost. We should not become intoxicated with our own goodness.

In just war tradition, we are speaking of the problem of "dirty hands." Even in pursuit of just causes, hard trade-offs are sometimes called for. We must not be cavalier about them. World War II was a good war, and yet beyond the sacrifices of American soldiers, it cost us—I emphasize, *us*—the cataclysm of Hiroshima. The Cold War was a good war too, yet it cost very uneasy compromises with dictators and authoritarians who were less than virtuous in many ways. Similarly, today, in our good war on terrorism, we must remain aware that it will demand unpleasant compromises. These compromises include dealing again with many an unsavory character abroad, as well as compromises with civil liberties at home. Will we look the other way concerning specific human rights abuses if doing so will help us in this good war on terror? The answer is likely yes. Will we grant restrictions on civil liberties? The answer is already yes. We have taken other steps too, including preemptive military action. That by definition is a difficult trade-off.

So in our struggle against evil and evildoers, let us not be too easy on ourselves, or self-righteous. The great American theologian of the World War II and Cold War generations, Reinhold Niebuhr, wrote of this theme in his 1944 book, *The Children of Light and the Children of Darkness.* Niebuhr was just as fearful of the so-called children of light as of the children of darkness. His "children of light" are those who believe in universal reason. Truths are clear to them, and they believe their ideals can be harnessed and then realized. Their idealism and good intentions can lead, innocently, to misfortune. The "children of darkness" are motivated primarily by self-interest, and as such they have a better sense of the interests and claims of others. They understand human nature and politics as an inevitable clash of interests. The children of darkness seek to negotiate difference rather than transcend it. They understand the need to confront evil

without being able to eradicate it entirely. They understand the tragedy of human existence and the limits that humans face.

What we have seen since 2001 in the very person of President Bush is a radical transformation of a realist into an idealist, a child of darkness transformed into a child of light. With the war on terror, the president has put faces on evil—the faces of Bin Laden and Hussein—and he now seeks to remove them and their colleagues from the earth. While such a removal of these players may be necessary and proper and just, we must ask: Where will we go from here? Can evil really be eradicated? Can we purify the world? Can it be done by military force? *Should* it be done by military force?

ISSUES FOR MORAL REASONING AND REFLECTION

Now let us take up the six specific issues of real ethical concern that arise from this background, these overarching factors. The first is the concept of "war" itself.

War as a Model

Following the attack of 11 September, President Bush declared a new war, the war on terror. That statement was universally accepted, yet it was unclear at the time just what sort of war this would be. Would it be a traditional war, with military campaigns and the taking of territories? That might be the case in the early stages, especially in rooting out the Taliban in Afghanistan. It was universally understood that this new war would also be unconventional in many ways. The new war was being waged against an enemy that was not a state. The enemy would not provide any of the legitimacy, accountability, or reciprocity implicit in the competent authority of a state. The enemy would not abide by the law of armed conflict; if anything, the enemy would seek to use the moral sensibilities of the West as a weakness to be exploited. While there was much talk of assigning responsibility to states—"Stand with the civilized world, or stand with the terrorists"*—the fact remained that the enemy was essentially a nonstate criminal network. Strategists spoke of the need to use all tools in the tool kit, including financial and diplomatic pressure, and various carrots and sticks to break down and destroy terrorist networks. Yet for all of this mobilization of resources, after the Afghanistan campaign in 2002 (and before the invasion and liberation of Iraq) it was unclear whether this war on terrorism was in fact an ongoing "hot war," a military campaign. Alternatively, was it a cold war, in which society would mobilize for an all-out effort in which military engagement is mostly subterranean, sporadic, even peripheral, merely part of a larger struggle?

Was President Bush using, in the tradition of William James, a rhetorical device to rally support? Was he in fact asking for a moral equivalent of war, a

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*"Radio Address of the President to the Nation," 6 October 2001, available at www.whitehouse.gov/news/releases/2001/10/20011006.html.

complete commitment, such as we have seen in the so-called war on poverty, war on crime, war on drugs? The decision for war in Iraq suggests that he had something else in mind—deliberate, classic militarization.

The alternative and perhaps complementary model would be the criminal-justice approach. The criminal-justice approach is not necessarily limited to the serving of warrants and the arresting of criminals—it can also be a robust and deliberate use of force, targeted at specific perpetrators. Terrorists are murderers and outlaws. They work in criminal gangs and networks, much like international organized crime. In this way of thinking about combating terrorism the focus is not necessarily the taking down of states but the taking down of networks. States as part of these networks might become subject to preemption, lethal force, and deception, but the most important targets are tightly restricted to terrorists and their immediate networks. States continue to be held responsible for what happens within them; however, they may lose legitimacy and be subject to intervention in the pursuit of vital threats.

Here we return to the question of new rules for a new war. Are we at war? Are we at peace? Or are we somewhere in between? In Iraq we are still clearly at war. Roadside bombs and the other violence of every day's news clearly attest to that. In the broader struggle with terrorism, we are still at war against those whose avowed mission is the infliction of death and destruction upon us. But should we complement our traditional pursuit of this war with a criminal justice approach that recognizes the ongoing need for policing? Can we graft the criminal-justice approach to the realist model of international relations that we have been following so faithfully? After all, the liberations of Afghanistan and Iraq did not end terrorism. There will be no surrender or peace treaty with terrorists. The war against them will go on, just as the war against crime in America continues in perpetuity. The war analogy takes us only so far, absent the criminal-justice dimension. At some point, we come back to the persistent criminal threat and the need for cooperation in meeting it. We would do well to think about rules with this in mind.

Prevention, Preemption, and Deterrence

Deterrence has not been much discussed regarding this war on terror. Cold War assumptions about deterrence were born of nuclear strategy and the doctrine of mutual assured destruction. But Cold War deterrence was based on symmetry, on expected and credible threats. Nuclear deterrence had a logic and structure of its own, even if it also contained moral perversities and paradoxes. Credible and reliable threats, as immoral as they might be, maximized the possibilities for peace and thus, it was argued, could be seen as serving a greater good. Can any such idea of deterrence be helpful as we think strategically about combating

terrorism, the ultimate asymmetric war? There can be no balance of terror against suicide bombers. There is no structure of expected reciprocal behavior.

On first glance, it would seem that deterrence is a nonstarter in this situation. Prevention and preemption seem the likelier alternatives. But pause here a moment—is there *no* way to deter terrorists? Some terrorists, to be sure, cannot be deterred. The truly criminal cannot be satisfied or scared or deterred; they have no demand that can be met, they seek only destruction. Yet some terrorists do have political agendas. They do have goals and aspirations. Can and should we consider potential deterrent strategies? Can we threaten punishments—swift, sure, and credible—that will dissuade them? Here we focus on networks and infrastructures again, but where do we go with that? Should we think of the removal of Saddam as the first step in the creation of a new deterrent strategy, a willingness to take down states that might harbor terrorist threats? If so, will that logic hold up? Can we continue to deliver such swift, sure, and credible punishments, worldwide and in perpetuity? Can we then assume all the moral responsibilities for rebuilding that doing so would entail? In targeting terrorist networks, what becomes fair game? How far out do we draw that circle? Can we threaten nonlethal punishments against people near and dear to terrorists? Is that ethical? Will this type of deterrence work? If it might, what would its moral status be? This leads to my third point: Who is a combatant and who a noncombatant in this new war?

The Combatant/Noncombatant Distinction

It is easy to assign combatant status to avowed, "card carrying" members of al-Qaʻida. Few in the West regretted the killing in November 2002 of known al-Qaʻida operatives in the Yemeni desert by a Predator drone firing a Hellfire missile. This case may be indicative of the future of this new war, and as such it raises important questions about rules. Among those questions is who decides what and who are legitimate targets for such attacks, and based on what criteria and what information? Who else might be present; in the Yemen case, who else might have been in the car that was destroyed? Who decides what level of collateral damage is acceptable, and what is the review procedure for such decisions? Apparently the Predator in the 2002 attack fell under the jurisdiction of the Central Intelligence Agency, not the Defense Department; if so, does that affect thinking about rules of engagement and the law of armed conflict? Should it matter?

Much of the war on terrorism is likely to be on the model of this episode. Here we have legitimate targets operating in places that do not look like battlefields among people who may not be combatants. Not every terrorist is an al-Qaʻida member. Not everyone riding in a car with a terrorist is a guilty party. How will we sort out such things in the future, given the known limits of our intelligence?

As Americans, we are unlikely to adopt an attitude of shooting first and asking questions later. What, then, should be the standard? Similarly, the way in which we treat prisoners is vitally important. The legal status of captured al-Qaʿida and Taliban militants is now being sorted out in the courts. While the executive branch is not arguing for totally new rules since there are some wartime precedents, it is certainly seeking new powers for dealing with these prisoners. In this connection, the administration would like to see new rules for this new war.

The combatant/noncombatant distinction is not one-dimensional, of course. This distinction is becoming blurred on our side as well, as private contractors gain more prominent roles in military operations. There are private security guards, maintenance workers, and so on, who might find themselves in harm's way, but there is also an intriguing new category of combatants in Afghanistan—veterans of military special operations units working as contractors for the CIA. Such operatives have been killed in Afghanistan. Under what rules do such operatives work? What is their status? What kind of normative guidance should they be given for their fight on the margins and in the shadows? Many aspects of this new war are being put into their hands.

"Shock and Awe"

Is "shock and awe" consistent with the American way of war? Perhaps so, but if so, we need to be extremely careful. I have no doubt that great care was taken in target selection for the campaign against Baghdad and the other bombing during the invasion of Iraq. I have little doubt that the targets were lawful and that extraordinary care was taken at every level to use the advantages of precision guided munitions to deliver weapons in a manner consistent with just war principles and the law of armed conflict. I also understand the psychological intent of the campaign to encourage capitulation by conveying the impression of overwhelming force.

Yet we also must understand how others see a campaign like this. Our hope was surely to avoid bloodshed through a spectacular demonstration. But that may not be how others see such tactics. Many see it as crude intimidation—a brutal attempt to instill, and rule by, fear. Many see it as maximizing conflict, not minimizing it—as inflaming it, not containing it. Many see "shock and awe" as excessive, especially when combined with biblical images and rhetoric. Again, can and should we clarify our own thinking on this? Are such demonstration effects justifiable? Do they give credence to the charge that we seek to rule through fear? What clarifications are needed so that such actions are not misrepresented or misunderstood?

HIDDEN COSTS

How should we calculate the costs of the war in Iraq and the war on terrorism? Here I am not talking about easily identifiable and quantitative costs—to date, the eighty-seven billion dollars for reconstruction on top of the Pentagon budget and new initiatives for homeland defense. Neither am I talking about mounting casualties. Instead, I'm talking about more subtle costs: damage to the goodwill and cooperation of many former allies; the opportunity costs in terms of resources (military, economic, and political) of liberating and reconstructing Iraq, while other terrorist threats elsewhere remain; costs to Iraqi society itself, even though it has gained so much from the liberation (there has been surprisingly little discussion of Iraqi casualties, civilian or military, during the war and in the struggle for self-rule).

Then there is the hidden cost to the American military itself. We know the numbers killed and wounded, but we do not know how many will not return home the same, who will pay a cost psychologically and physically. Is the present high suicide rate a warning sign? If nothing else, I am sure that it is a reminder of a true hidden cost of war. The decision to use military force will always involve a cost-benefit analysis. In this era of asymmetry and high moral conviction, it might be prudent to think hard, to dig deeply into these not so visible and not so easily quantifiable costs of war.

Postconflict Responsibilities

Liberators have a deep and profound commitment for what comes next. As Thomas L. Friedman put it in his *New York Times* column, "If you break it, you own it."* We removed the government in Iraq. We have responsibility for addressing the current situation, which is of our own making. We cannot walk away. This is a moral commitment precisely because of our direct involvement. But as we turn over control to the Iraqis themselves, will we build partnerships that are true partnerships? Or will we put in place proxies to support our own design? Will we build genuine democracy in Iraq? Or will we place a premium in getting out fast? I have no doubt that our aspirations for an Iraqi democracy are genuine and sincere. And we have raised the stakes on ourselves by placing this war in the context of democracy promotion.

But let us remember, the purpose of the war was to remove a threat—Saddam Hussein and his regime. Removal and building are two separate items. The rebuilding of Iraq should be an opportunity to think about this relationship between taking down and building up. Can we do this over the long haul and in different circumstances? If so, do we have the means, not only the force structure but also the know-how and the strategy? Should it be an integral part of our

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*Thomas L. Friedman, "Present at . . . What?" Editorial Desk, *New York Times,* 12 February 2003, p. A37.

strategy? Should we not think of just war doctrine in three parts, the justice *of* war, justice *in* war, and now a new category, justice *after* war? If so, what should be our criteria? Basic security and human rights are obvious places to start. But where do we go from there? What other minimums need to be met, and how would progress be measured?

Thus a broad overview of a layman ethicist's questions, comments, and concerns. Military people represent a core constituency in the debate over how these concerns will be resolved. Military people serve a civilian command authority, by which many of these issues are decided, but the fact remains that they offer advice, and in command positions they interpret the policies and orders they are given. They stand at the intersection of just war thinking and the implementation of the laws of war.

That intersection is the space where we reflect together on who we are and, perhaps more importantly, who we want to be. It is the space where we think through what is right, what is desirable, what is good. It is where we subject strong moral sentiments and intuitions to analytical thought and rigor, where we reflect on our own experiences in the light of the experiences and thoughts of others—and sometimes change our minds.