

# Dædalus

Journal of the American Academy of Arts & Sciences

Winter 2017

## The Changing Rules of War

Scott D. Sagan, guest editor

with Laura Ford Savarese & John Fabian Witt

Joseph H. Felter & Jacob N. Shapiro

Allen S. Weiner · Tanisha M. Fazal

Mark S. Martins & Jacob Bronsther

Leslie Vinjamuri · Seth Lazar

Antonia Chayes & Janne E. Nolan

Paul H. Wise



Back From the  
0781C

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The States Parties to this Convention undertake to eliminate racial discrimination in all its forms and to recognize, respect and ensure to all persons within their jurisdiction the enjoyment of the rights and freedoms set forth in this Convention without distinction as to race, colour or national or ethnic origin.



### Article 3, Geneva Conventions of August 12, 1949

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

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- (b) taking of hostages;

- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
  - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
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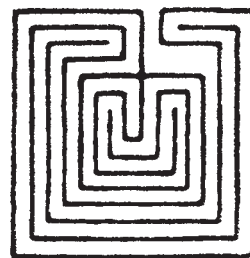
1. You will be disciplined if you do not comply with camp rules.
2. You are required to comply with the requests and orders of the guard force.
3. You must submit your person and property to search upon request of any guard.
4. You will not molest another Detainee, a visitor, a guard, or a staff member. Molestation includes name-calling, taunting, using provoking or threatening words, exposing your genitals, fighting, throwing objects, spitting, or otherwise insulting any person.
5. You will not possess anything that was not provided to you, or authorized for you, by a member of the camp staff. This includes the possession, alteration, or modification of any object that you could use as a weapon or key, or which is being used for some purpose other than as intended.
6. You may not damage, destroy or tamper with any object, property, or security device. For example, you may not break cameras, toilets, cell glass, drinking fountains, overhead lights, or sprinkler systems, or dislodge ventilation ducts or plumbing or sewage pipes. You may not climb on any fence, wall, or camp structure.
7. You must be respectful of the peace and quiet of the camp. You must not play loud music (from the door), talk loudly, or otherwise disturb others to participate in, any activity. There is no yelling or shouting. You are not permitted to communicate with another Detainee by any means (wing, P.O., telephone, etc.).
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14. When instructed to do so by the guard, you must stand behind the black line (or one meter from the door), raise your arms to shoulder height, and turn your palms toward the guard. You must remain in this position until instructed by the guard. This applies to any inmate, including staff members.
15. You will not engage in any shuffling procedures.
16. You may use your mat and sheet to cover your entire body while in your cell or bay with your arms raised. You may use a sheet or blanket. Guard force will not be notified of any shuffling or movement.

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# Dædalus

Journal of the American Academy of Arts & Sciences



“The Changing Rules of War”

Volume 146, Number 1; Winter 2017

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*Inside front cover*: A bulletin board with a posting of the Geneva Convention rights for detainees hangs in an exercise yard at the Camp 5 high-security detention center at the Guantanamo Bay U.S. Naval Base in Cuba. © 2008 Randall Mikkelsen/Getty Images

# The Changing Rules of War

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# Dædalus

Journal of the American Academy of Arts & Sciences



The labyrinth designed by Dædalus for King Minos of Crete, on a silver tetradrachma from Cnossos, Crete, c. 350–300 BC (35 mm, Cabinet des Médailles, Bibliothèque Nationale, Paris). “Such was the work, so intricate the place, / That scarce the workman all its turns cou’d trace; / And Dædalus was puzzled how to find / The secret ways of what himself design’d.” – Ovid, *Metamorphoses*, Book 8

Dædalus was founded in 1955 and established as a quarterly in 1958. The journal’s namesake was renowned in ancient Greece as an inventor, scientist, and unriddler of riddles. Its emblem, a maze seen from above, symbolizes the aspiration of its founders to “lift each of us above his cell in the labyrinth of learning in order that he may see the entire structure as if from above, where each separate part loses its comfortable separateness.”

The American Academy of Arts & Sciences, like its journal, brings together distinguished individuals from every field of human endeavor. It was chartered in 1780 as a forum “to cultivate every art and science which may tend to advance the interest, honour, dignity, and happiness of a free, independent, and virtuous people.” Now in its third century, the Academy, with its more than five thousand members, continues to provide intellectual leadership to meet the critical challenges facing our world.

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*Just War Theory & the Conduct of*

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*Rebellion, War Aims & the Laws of War*

© Tanisha M. Fazal

Editorial offices: *Dædalus*, American Academy of  
Arts & Sciences, 136 Irving Street, Cambridge MA  
02138. Phone: 617 576 5085. Fax: 617 576 5088.  
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# The Changing Rules of War

Scott D. Sagan

SCOTT D. SAGAN, a Fellow of the American Academy since 2008, is the Caroline S. G. Munro Professor of Political Science, the Mimi and Peter Haas University Fellow in Undergraduate Education, and Senior Fellow at the Center for International Security and Cooperation and the Freeman Spogli Institute at Stanford University. His books include *Moving Targets: Nuclear Weapons and National Security* (1989), *The Limits of Safety: Organizations, Accidents, and Nuclear Weapons* (1993), and *The Spread of Nuclear Weapons: An Enduring Debate* (with Kenneth N. Waltz, 2012). He leads the Academy's project on New Dilemmas in Ethics, Technology, and War.

In his historic May 2016 speech in Hiroshima, President Barack Obama highlighted the need to strengthen the institutions that govern, however imperfectly, the initiation, conduct, and aftermath of war. The speech marked the first time a sitting American president had visited Hiroshima, a city the United States destroyed in August 1945 with a single atomic bomb, killing well over one hundred thousand men, women, and children. Obama ended his speech with a call for new institutions to address the destructive power of nuclear weapons:

The wars of the modern age teach us this truth. Hiroshima teaches this truth. Technological progress without an equivalent progress in human institutions can doom us. The scientific revolution that led to the splitting of an atom requires a moral revolution as well.<sup>1</sup>

The Fall 2016 issue of *Dædalus* on “Ethics, Technology & War” focused on how different technological developments have influenced ethics and the conduct of war in the past and how they might change the conduct of war in the future. This Winter 2017 issue of *Dædalus* on “The Changing Rules of War” presents a collection of essays about the evolution of just war doctrine, the laws of armed conflict, the rules of engagement, war crimes tribunals, and other domestic and international organizational procedures that together constitute the “human institutions” that Barack Obama highlighted at Hiroshima. The American Academy of Arts and Sciences has convened an interdisciplinary group of scholars and practitioners both to look back at the history of these institutions and to identify reforms that might strengthen them in the future.

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The issue begins with two essays that discuss the evolution of the rules of war in the United States and highlight what combat was like before such laws and norms began to influence the conduct of war. Laura Ford Savarese and John Fabian Witt first analyze how U.S. political and military leaders have over time promoted adherence to specific laws of armed conflict for strategic reasons, and how such laws have later constrained U.S. military conduct in ways that were not anticipated when the laws were originally formulated. The laws of armed conflict, they argue, may have been created to serve particular strategic interests, but the power of such law is clearest when it legitimizes certain actions (and delegitimizes others) and influences behavior apart from the narrow self-interest of its creators. I contribute the second essay, describing “The Face of Battle without the Rules of War.” This essay analyzes a stunning set of drawings by Red Horse, a Lakota warrior, portraying his experiences during the 1876 Battle of the Little Bighorn against George Armstrong Custer and the U.S. Seventh Cavalry. Seeing the brutality of combat in the nineteenth-century Great Sioux War in graphic detail helps us understand both what has changed today, because of adherence to the laws of armed combat, and what is the same, because these rules are not always followed in the crucible of war.

The following three essays discuss the rules of war in modern asymmetric conflicts, especially wars between states and nonstate actors. Joseph H. Felter and Jacob N. Shapiro analyze the effects of the U.S. military adoption of the doctrine of “courageous restraint” during the wars in Afghanistan and Iraq. They present evidence demonstrating that U.S. efforts to reduce the deaths of noncombatants during these counterinsurgency campaigns had positive tactical and strategic effects, for example, by increasing the information pro-

vided to U.S. and allied forces by the local population about insurgents placing improvised explosive devices (IEDs). (As an illustration, the photograph on the inside back cover shows three U.S. Marine Corps soldiers investigating a possible IED while on a patrol in Helmand province, Afghanistan, in February 2010.) Allen S. Weiner’s essay focuses on the rights and responsibilities of the fighters in nonstate groups commonly involved in modern wars. Weiner argues that such individuals, often called “unprivileged belligerents” today, should be granted war rights, but that such fighters must not violate the laws of war, for example, by intentionally targeting civilians or using human shields. In the next essay, Tanisha M. Fazal focuses on when and why some rebel groups, one type of nonstate actor, choose to follow international humanitarian law regarding appropriate behavior during combat operations. She presents evidence demonstrating that leaders of secessionist rebel groups, who seek to establish an independent state, are more likely than leaders of other kinds of rebel groups to comply with the rules of war. She argues that to such rebel leaders, signaling compliance with international law is a means to win international recognition and legitimacy. Fazal’s essay on contemporary rebels thus resonates with historical themes raised in the Savarese and Witt essay; after all, the American founding fathers were leaders of a violent rebellion against the British Empire seeking international recognition and legitimacy for their cause.

The next two essays discuss one of the major challenges of *jus post bellum*: namely, the problems associated with transitional justice and the prosecution of war criminals. Playing off Justice Robert H. Jackson’s famous assertion at Nuremberg that the World War II victors had “stayed the hand of vengeance,” Mark S. Martins and Jacob Bronsther address the critics of contemporary war crimes trials in their es-

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say, “Stay the Hand of Justice? Evaluating Claims that War Crimes Trials Do More Harm than Good.”<sup>2</sup> Martins and Brons-ther argue that, when carried out within established rules and procedures, “war crimes prosecutions are a legitimate, and sometimes necessary, response to egregious and widespread violations of the laws of war.” (The photograph on the inside front cover shows a bulletin board with a posting of the Geneva Convention rights and rules for detainees in an exercise yard at the Camp 5 high-security detention center at the Guantanamo Bay U.S. Naval Base in Cuba.)

Leslie Vinjamuri then analyzes the contemporary history of efforts by the International Criminal Court and other legal institutions to balance demands for justice after wars with the need for peace and reconciliation. She notes that when international tribunals prosecute groups or individuals who have committed atrocities, powerful spoilers can emerge, leading to organized violence and even renewed war. When international tribunals fail to prosecute such groups or individuals, however, they are often accused of hypocrisy. Vinjamuri proposes a set of criteria for acceptable “transitional justice compromises” that might be more effective than what exists today.

The final three essays present major critiques of contemporary just war doctrine, which is the intellectual apparatus upon which many of the institutions and rules that influence war today have been built. Over the past two decades, analytic philosophers have developed a detailed critique of traditional principles of noncombatant immunity, proportionality, and the moral equivalence of soldiers, leading to a body of thought known as “revisionist just war theory.” Seth Lazar’s essay clearly explains the main features of the revisionist school of just war theorists, provides a spirited critique of revisionism for presenting “a disturbing vision of the morality of war,” out-

lines an original defense of the principle of noncombatant immunity, and discusses the continuing challenge of justifying the killing of soldiers, or what he calls the problem of “combatant nonimmunity.” Antonia Chayes and Janne E. Nolan follow with an explanation of a pattern of failures by the United States to take seriously the difficult task of ending wars and transitioning to peaceful, indigenous governance when planning to initiate conflicts. Their essay focuses primarily on the recent U.S. and allied war in Afghanistan and the 2003 invasion of Iraq and its aftermath, but they identify this failure as permeating American history. Paul H. Wise concludes the issue with an innovative and important study of the “indirect costs of war,” focusing especially on the rise in neonatal deaths in societies that have suffered from civil or interstate wars. Wise argues, from the perspective of a pediatrician, that we have improved both our ability to measure the indirect costs of war and our ability to prevent or mitigate this human toll of conflict. But political leaders and just war theorists alike have not taken such long-term human costs into account when discussing the concept of “proportionality” or making decisions about initiating a conflict or continuing a war once it has started.

**T**his American Academy of Arts and Sciences initiative has brought together a remarkable and diverse group of scholars and practitioners to address emerging dilemmas of technology, ethics, and war. I am grateful to have had the opportunity to direct the project and interact over the course of two years with leading just war thinkers of all kinds: political scientists and philosophers, lawyers and historians, medical doctors, politicians and soldiers, a pilot and a poet. As a group, we have encouraged each other to sharpen our ideas and present rigorous logic and accurate empirical analysis of contemporary chal-

lenges. We have not, as a group, tried to develop a consensus position about specific military technologies appearing on the horizon nor about whether recent or current conflicts have been just or unjust wars (and just or unjust for whom).

In lieu of conclusions, however, I do want to make four personal observations about the current state of thinking about just and unjust wars, thoughts that have been inspired by reading and editing the contributions of the authors in these two *Dædalus* issues. First, I have become much more aware of how the laws of armed conflict, even if they were created in part for strategic reasons by the most powerful actors in the international system, nonetheless come to constrain the actions of those powerful actors over time. Yet, as emphasized in the Felter and Shapiro essay on “Limiting Civilian Casualties as a Part of a Winning Strategy,” in counter-insurgency and counterterrorism operations today, it is often only the soldiers of powerful states that seek to follow ethical principles and the laws of armed conflict. They do so both because they think it is the morally right thing to do and because they think it will help them win (or at least borrow) the hearts and minds of the people. Thucydides, the great Athenian political theorist and general, presented his severe “realist” vision about the absence of morality in war in the Melian Dialogue when he wrote that “right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must.”<sup>3</sup> But if it is only the strong today who seek to follow ethical rules and the laws of armed conflict, and the weak who engage in the deliberate killing of civilians, Thucydides’s dictum has been turned on its head. The weak do what they can; the strong suffer what they must.

Second, I think it is important to consider that this “suffering” by strong actors who

seek to follow just war doctrine principles in combat is a good thing even in conditions in which it does not contribute to tactical success or a war-winning strategy. It is always easier for soldiers to “suffer what they must” by following the rules of war when that suffering contributes to tactical or strategic victory. It is harder, but no less important, for soldiers to follow just war doctrine principles to reduce risks to civilians even when such acts are not expected to make a positive contribution to victory. Under all conditions, we should want our soldiers to take some risks and to have what Michael Walzer has called “a positive commitment to save civilian lives”:

Not merely to apply the proportionality rule and kill no more civilians than is militarily necessary – that rule applies to soldiers as well; no one can be killed for trivial purposes. Civilians have a right to something more. And if saving civilian lives means risking soldiers’ lives, the risk must be accepted.<sup>4</sup>

The requirements of “constant care” and “feasible precautions” are enshrined in the Geneva Conventions, Protocol I, Article 57, though there is no explicit reference to accepting risks that this might entail: “In the conduct of military operations, *constant care* shall be taken to spare the civilian population, civilians, and civilian objects. . . . Those who plan or decide upon an attack shall . . . *take all feasible precautions* in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects [emphasis added].”<sup>5</sup>

Third, I have come to believe that we should not, in civilian society, ask our soldiers to hold all the burden of risk that comes with efforts to protect enemy or neutral or friendly civilians. If just soldiers should accept at least some risk of their own lives to protect the lives of innocent civilians in combat zones, then our society

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should also accept at least some risk of not winning the war, or of having to fight longer, to protect the lives of those innocent civilians. In the long process of strengthening the human institutions that govern the conduct of war, there will be times when soldiers and statesmen following the rules will suffer tactical setbacks at the hands of the less scrupulous. We should accept that possibility. But this does not mean that adherence to just war doctrine and the laws of armed conflict should be abandoned, for if we look at the face of battle without the rules of war, we see a descent into moral brutality.

Finally, the kind of “progress in human institutions” that Obama called for to match the modern revolution in military technology will never come about unless

soldiers, statesmen, scholars, and citizens alike are all engaged in the debate. “War is too important to be left to the generals,” George Clemenceau famously noted during World War I. In the complex and dangerous world we live in, just war doctrine is too important to be left to the philosophers and political theorists. I hope the informative and provocative essays in these two special issues of *Daedalus* inspire much more innovative research and writing about ethics, technology, and war in many different academic disciplines, across professions, and among the informed public. Welcome to the debate. I encourage readers to be more than witnesses to the “moral revolution” that President Obama called for in Hiroshima. Join it.

#### ENDNOTES

- <sup>1</sup> “Text of President Obama’s Speech in Hiroshima, Japan,” *The New York Times*, May 27, 2016, [http://www.nytimes.com/2016/05/28/world/asia/text-of-president-obamas-speech-in-hiroshima-japan.html?\\_r=0](http://www.nytimes.com/2016/05/28/world/asia/text-of-president-obamas-speech-in-hiroshima-japan.html?_r=0).
- <sup>2</sup> International Military Tribunal, “Second Day, Wednesday, 21 November 1945, Morning Session,” in *Trial of the Major War Criminals before the International Military Tribunal, Volume II: Proceedings 14 November 1945 – 30 November 1945* [Official text in the English language] (Nuremberg: International Military Tribunal, 1947), 99, [https://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_Vol-II.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-II.pdf).
- <sup>3</sup> Thucydides, “Chapter XVII: Sixteenth Year of the War, The Melian Conference, Fate of Melos,” *History of the Peloponnesian War*, <https://www.mtholyoke.edu/acad/intrel/melian.htm>.
- <sup>4</sup> Michael Walzer, *Just and Unjust War: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977), 156.
- <sup>5</sup> Adam Roberts and Richard Guelff, eds., *Documents on the Laws of War*, 3rd ed. (Oxford, United Kingdom: Oxford University Press, 2010), 452 – 453.

# Strategy & Entailments: The Enduring Role of Law in the U.S. Armed Forces

*Laura Ford Savarese & John Fabian Witt*

*Abstract: This essay aims to redescribe key moments in the history of American military engagements to account for a persistent role that law has played in these conflicts. The law of war tradition has persisted since the War of Independence, we argue, because of an internal dynamic that makes it both strategically useful and costly for the United States to commit itself to rule-bound warfare. Invoking the laws of war to advance the strategic interests of the United States, American soldiers and statesmen have found, entails consequences beyond their control, making reversals in position more costly and enabling critiques in the language of the law. These entailments, we argue, are built into the enduring strategic value of the laws of war. The law has remained useful not because it can claim perfect neutrality, but because it has force independent of the interests for which it is mobilized.*

LAURA FORD SAVARESE is a J.D. and Ph.D. student at Yale Law School and the Yale Department of History. She earned her A.B. from Harvard College and completed an M.St. as a Henry Fellow at Oxford University.

JOHN FABIAN WITT, a Fellow of the American Academy since 2014, is the Allen H. Duffy Class of 1960 Professor of Law at Yale Law School. He is the author of *Lincoln's Code: The Laws of War in American History* (2012), *Patriots and Cosmopolitans: Hidden Histories of American Law* (2007), and *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (2004).

Law has had a central place in the American military since the War of Independence. But law's persistence has been shadowed by an equally durable critique. Time and again, from the eighteenth century to the present, critics have charged that American soldiers and statesmen invoke the law not as a neutral adjudicator among the contending sides, but as a tactic – a weapon, even – in the advancement of U.S. interests. And Americans have admitted as much. From George Washington's strategic adoption of the legal standards that attached to independent states to the use of law as a nonlethal weapons system in today's counterinsurgency efforts to win hearts and minds, Americans have been remarkably candid about the strategic uses of law.

The difficulty with strategic deployment of the law to advance one's interests, of course, is that it threatens to undo the law's value. When critics today talk about "lawfare," for example, they suggest implicitly that the claims being made in the name of the law lack the neutral status on which the law's legitimacy relies.

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But it is a mistake to think that strategic invocations of the law reveal it to be an empty vessel for the assertion of naked power, and it is a mistake to think that the law requires perfect neutrality for its legitimacy. What is striking is not that the turn to law is based in strategic interests. Of course it is. We should expect nothing different in the domain of armed conflict – or indeed, in any domain. People turn to law for the purpose of advancing projects. But as elsewhere, law in armed conflict is not undone by its inextricable entanglement with power and interest. To the contrary, what makes law strategically valuable is that it entails consequences beyond the control of the parties that invoke it. Paradoxically, this absence of control is critical to the utility of the law, for the gap between law and interest leaves the law in a position to legitimate and empower those who can successfully mobilize it. In turn, this gap has given law an enduring appeal for American soldiers and statesmen in some of their most important endeavors.

Engagement with the law was apparent in the very first days of an American military. The Second Continental Congress, in its first steps after the outbreak of hostilities in 1775, cited the laws of civilized warfare as a cause for war against Great Britain and as a binding code for the belligerents' conduct.<sup>1</sup> The Congress then asserted its control over the armed forces by enacting the Articles of War to govern the newly created Continental Army. In commissioning General George Washington as commander-in-chief, the Congress instructed him to “regulate [his] conduct in every respect by the rules and discipline of war.”<sup>2</sup> Washington, in turn, relied on the law both to set the terms of his engagements with the British and to articulate and enforce the obligations of subordinates under his command. He protested the British command's treatment of captured American

soldiers as traitors rather than prisoners of war. (The British decision to treat the rebellion as a crime instead of as a war, he complained to his British counterpart, deprived American officers of the “Benefit of those Military Rules” that, as he wrote, “we have shewn on our part the Strongest Disposition to observe.”)<sup>3</sup> Similarly, every soldier under Washington's command had to sign the Congress's Articles of War.<sup>4</sup> Washington repeatedly issued orders prohibiting “the infamous practice of Plundering” and urged the Congress to heighten punishments for the offense, for which 194 soldiers were court-martialed and convicted during the war.<sup>5</sup> It is not too much to say that law suffused Washington's entire approach to waging war.

Washington's strategy on the battlefield was to lay claim to the nation-state status that the laws of warfare helped to construct. Washington's mission, and formidable challenge, was to create a disciplined, professional force of long-term regulars, officered by gentlemen trained in the European canons of military science, and capable of outclassing its British counterpart in pitched battle. Washington self-consciously sought out set-piece battles, the archetype of eighteenth-century rule-bound warfare.<sup>6</sup> The Continental Army won few of these engagements. But in the struggle to gain recognition in the family of civilized nations, Washington's commitment to rule-bound warfare paid dividends. The Americans, William Pitt told the House of Lords in 1777, proved they were “not a wild and lawless banditti.”<sup>7</sup>

Rules of war also governed the Americans' administration of justice against the enemy. The trial and execution of Major John André, the British officer who famously conspired with Benedict Arnold to deliver West Point to the British, demonstrated Washington's commitment to the sterner dictates of the laws of war. A Board of General Officers convened by Washington de-

cided that André “ought to be considered as a spy from the enemy,” and therefore, “agreeable to the law and usage of nations . . . he ought to suffer death.”<sup>8</sup> André’s case marked an early instance of military tribunals being tasked with enforcing the laws of war. André was one of at least twenty British and Loyalist spies tried and executed during the Revolutionary War, most of whom were convicted by courts-martial.<sup>9</sup>

The Revolutionary War also laid the basis for a system of formal training in the laws and science of war. Reliance on foreign engineers, artillerymen, and tacticians during the war convinced men like Washington, Henry Knox, Alexander Hamilton, and Thomas Jefferson of the need for a national institution to train “a body of scientific officers and engineers, adequate to any emergency.”<sup>10</sup> In 1802, Congress authorized President Jefferson to establish a military academy for engineers at West Point.<sup>11</sup> Sylvanus Thayer, who became superintendent in 1817, designed a curriculum premised upon the Enlightenment theory of warfare as a rational science.<sup>12</sup> In the 1820s, Thayer added international law to the curriculum. Emmerich de Vattel’s classic treatise *The Law of Nations* served initially as the standard text until Thayer replaced it with the first volume of James Kent’s *Commentaries on American Law*, the leading antebellum work on international law and the law of war at sea.<sup>13</sup> The 1806 Articles of War and the 1821 *General Regulations for the Army*, a set of Vattelian military bylaws compiled by Brigadier General Winfield Scott, served as soldiers’ guides for professional and ethical conduct, incorporating rules of international law such as the prohibition of plunder and the humane treatment of prisoners of war.<sup>14</sup>

Sea captains in the early republic also learned the laws of naval warfare. At a time when commerce raiding dominated maritime warfare, the complexities of the law of prize – generally concerning the capture of

enemy ships and goods in wartime – dictated important decisions made by naval captains.<sup>15</sup> As Justice Joseph Story of the U.S. Supreme Court noted in an 1814 prize case, irregular conduct at sea could easily “involve the nation . . . in serious controversies not only with public enemies, but also with neutrals and allies.”<sup>16</sup> The federal judiciary policed the actions of naval commanders and privateers for violations of U.S. policy and international law,<sup>17</sup> applying the international law of prize directly as a rule of decision without deference to a captain’s judgment and holding captains personally liable for illegal seizures.<sup>18</sup>

The military’s commitment to rule-bound warfare did not, however, go untested. The laws of war, by some accounts, ceased to apply in frontier conflicts with Native Americans.<sup>19</sup> Yet even here, the laws of war were not foreign to conflicts with Indians. To the contrary, the laws of war supplied a rationale for campaigns of destruction against enemies whose own mode of warfare diverged from the rules accepted by European nations.<sup>20</sup> Even Andrew Jackson (though hardly an embodiment of legal restraint) implicitly relied on a deeply embedded logic of the law. Jackson saw enemy violations of the laws of war as triggers for stern retaliation and preemptive defense: the *lex talionis*, or an eye for an eye.<sup>21</sup> The “cruelty and murders” committed by Creeks against white settlers, Jackson wrote, justified “laying waste” to “their villages, burning their homes, killing their warriors and leading into Captivity their wives and Children.”<sup>22</sup> Jackson offered a similar rationale for his unauthorized invasion of Spanish Florida in the First Seminole War and his execution of two British citizens, “the principal authors of the hostilities of the ferocious savages,” whose mode of fighting “was in open violation of the laws of war and of nations.”<sup>23</sup>

Jackson’s campaigns refute the notion that legal rules were extraneous to the In-

dian wars. But his conduct raises another perhaps far more troubling possibility for the law in the American military. In Jackson's hands, the law revealed itself to be not a source of restraint, but a tool for advancing the strategic interests of the United States.

A close association between law and interest had existed since at least the War of Independence. That was one reason why Washington had adopted the formal rules of eighteenth-century warfare. But the risk that interest might delegitimize the law emerged as a crisis with the outbreak of the Civil War.

We can see the basic outlines of the problem in the creation of the military commissions system in the war's early weeks. In 1861, the Office of Judge Advocate was headed by John Fitzgerald Lee, cousin to the Confederate general Robert E. Lee.<sup>24</sup> Lee could hardly have been more inimical to President Lincoln's war strategy: he denied the legality of the Union's interference with slavery and its blockade of the South. Furthermore, he believed that military commissions, which would soon become an essential part of the American military effort, violated the Constitution's jury trial and federal court provisions.<sup>25</sup> Secretary of War Edwin Stanton disagreed; he summarily discharged Lee. In September 1862, Lincoln appointed Joseph Holt as Judge Advocate General, a position newly created by Congress to oversee all courts-martial and military commissions.<sup>26</sup> Three weeks later, Lincoln suspended the writ of habeas corpus nationwide and authorized the trial by military commission of not only "rebels and insurgents," but also anyone "affording aid and comfort" to the enemy.<sup>27</sup> Armed with vast prosecutorial authority and a cadre of young lawyers committed to the Union cause, the new Judge Advocate General transformed the office into an aggressive advocate for the power of the United States military in wartime. But in doing so,

he raised a question that remains with us today: in the hands of the American military, is law little more than a convenient means to multiply the force of arms?

Sometimes the advancement of Union interests through the laws of war arose out of the law's value as a pragmatic tool for international cooperation. When U.S. Navy Captain Charles Wilkes seized two Confederate commissioners aboard a British steamer known as the *Trent* in November 1861, for example, he very nearly touched off a war. British officials were outraged at Wilkes's violation of the British vessel's rights on the high seas, but American audiences were thrilled at a much-needed success in the grim early months of the war. Secretary of State William Seward found in the law a perfect face-saving solution. He defended Wilkes's right to stop and search neutral vessels, but he identified what some have called a "technical wrong" as reason to turn the commissioners over to the British.<sup>28</sup> Some have viewed such maneuvering as proof of the futility of international law, but the *Trent* affair demonstrated the value of the law of war in offering ways to resolve controversy. Strategic deployment of the law helped Lincoln and Seward manage conflicts with Britain.

At other times, the Union's invocation of the laws of war advanced its interests over those of its enemy. Consider Lincoln and Seward's legal rationale for the blockade of southern ports.<sup>29</sup> The blockade, as an act of war, presupposed the Confederacy's status as an independent belligerent nation. At the same time, however, the Union committed to treat Confederate privateers as pirates. This policy presupposed that the Confederacy was a conspiracy of criminal traitors rather than a legitimate belligerent state. As if this contradiction were not bad enough, a series of Union positions adopted during the war on the capture of neutral cargoes represented embarrassing reversals from the United States' support for

neutral shipping rights in the War of 1812, not to mention its recent defense of privateering after the European powers had sought to prohibit the practice in 1856.<sup>30</sup> Lincoln and Seward's reading of the laws of war in this regard was thus patently self-serving. Charles Francis Adams would later complain that these sorts of contradictions brought the "law into contempt" and revealed the "quite unintelligible and somewhat ludicrous state of what is termed Law, of the international variety."<sup>31</sup>

Critics be damned, the Union continued to press arguments on the laws of war that served its interests against the South. The Lieber Code, published as General Orders No. 100 of the Union Army in April and May of 1863, adopted aggressive positions on the permissibility of certain forms of force, especially in the emancipation of slaves held by the enemy.<sup>32</sup> Holt's judge advocates put the Lieber Code to use and developed secret and self-serving interpretations of congressional legislation on military detention and the writ of habeas corpus.<sup>33</sup> (By the end of the war, Holt's judge advocates charged more than one thousand people in military commissions with violating the laws of war.)<sup>34</sup> In the summer of 1863, the Supreme Court endorsed the basic structure of the blockade strategy in *The Prize Cases*.<sup>35</sup> The next year, in the case of *Clement Vallandigham*, it let stand the Union's military commissions strategy.<sup>36</sup>

Northern victory seemed to vindicate the aggressive approach adopted by the Union war effort and by Holt's judge advocates. And yet the aggressive efforts to push legal doctrine were not without costs. Invoking the law, it turned out, was not free.

Critical accounts of the laws of war in U.S. history point to ways in which the law served not as a source of restraint, but instead as a convenient means by which to legitimate the use of force and advance the strategic interests of the United States.<sup>37</sup>

The Civil War and the World Wars of the twentieth century provide powerful test cases for this account.

From early in the war, Lincoln and his Cabinet found that law talk, even strategic law talk, imposed costs. When the Union tried to prosecute Confederate privateers in New York, defense lawyers pointed out that down the hall in that very courthouse, Union lawyers in prize cases were arguing that the conflict rose to the level of a war in which a blockade might lawfully be imposed, even as the privateer prosecutions presupposed the opposite. The jury in the privateering case refused to convict. Piracy prosecutions had proven difficult to reconcile with the Union's commitment to the international laws of war.<sup>38</sup>

A number of features in the Union's legal strategy came back to haunt the war effort. Some were minor: a mistake in the Lieber Code, for example, produced embarrassment when the Confederacy was able to engage in what would otherwise have been unlawful paroles of captured Union prisoners during the Gettysburg campaign.<sup>39</sup> But other feedback effects were more serious. Having treated members of the Confederate armed forces as soldiers, it was much more costly to insist after the war that Confederate officials were not entitled to immunity from prosecution. To be sure, the United States indicted Jefferson Davis for treason, imprisoning him at Fort Monroe for two years. But prosecuting him in front of a jury had simply become too difficult, in substantial part because the Union had treated him as a head of state for four years.<sup>40</sup> Consider, too, the miserable prisoner of war camps at places like Andersonville in the South and Elmira in the North. These camps, where some fifty thousand men died during the war, were a product of the Union's insistence on the lawful combatant status of black soldiers.<sup>41</sup> Indeed, in the largest sense, the failures of Reconstruction were already embedded in the war ef-



fort thanks to the Union's legal treatment of the South. By committing to view the South as a legitimate belligerent with all that this entailed, the Union made it more difficult to engage in the systematic rebuilding of Southern social life and the Southern economy after the war was over.<sup>42</sup>

In the Civil War years, a pattern emerged. Engagement with the laws of war inevitably came in the pursuit of interests and strategies. But such engagements brought entailments and consequences: feedback effects that exacted costs of their own. In the decades after the great struggle over slavery, that same pattern reappeared. In truth, it continues to reappear to this day.

As the United States began to establish a global presence, for example, its traditional defense of neutral rights and private property on the seas made the new hard-line positions of men like Alfred Thayer Mahan, the prominent advocate of American sea power, much more difficult to maintain. Mahan opposed not only the immunity of private property, but even the protection of neutral ships' cargoes, a view at odds with the United States' earlier legal and diplomatic position.<sup>43</sup> When the United States fought a brutal counterinsurgency in the Philippines at the turn of the century, the laws of war crafted to help the Union win the Civil War traveled to the far reaches of the Pacific. Those laws did not prevent American soldiers from resorting to torture to interrogate Filipino insurgents, but they did produce convictions in courts-martial of American soldiers and officers.<sup>44</sup> To be sure, the punishments were shockingly minor,<sup>45</sup> but the law against torture and the courts-martial helped galvanize domestic opponents of the conflict and imposed nontrivial political costs on the Roosevelt administration.

World War II presented perhaps the most serious test since the Civil War of the law's capacity to constrain the conduct of the U.S. military. By some accounts, the

war offered further evidence that American military leaders invoke the law's dictates merely for strategic purposes.<sup>46</sup> Certainly, the rules of warfare codified at The Hague and Geneva Conferences and published in field manuals around the world proved unable to prevent unprecedented levels of destruction. One need only think of the crippling economic blockades, the submarine attacks on merchant shipping, and of course the saturation bombing of cities from the air to see that the war's participants seemed to abandon the law's core prohibition on the killing of civilians. Allied air attacks alone killed an estimated 300,000 to 500,000 civilians in Germany and 330,000 civilians in Japan.<sup>47</sup> In the words of War Secretary Henry Stimson, the use of atomic bombs in Japan offered "final proof that war is death."<sup>48</sup>

Stimson's stern realism, though, like that of William Tecumseh Sherman before him, did not imply a rejection of legal restraints on warfare. Allied interpretations of the laws of armed conflict provided license for the bombings of Dresden, Tokyo, Hiroshima, and Nagasaki. But those laws and their traditions also attached lasting consequences to these acts. The laws of war offered noncombatants shockingly little protection. But they nevertheless shaped the course of the conflict and its aftermath in certain important respects, not least by providing a vocabulary of critique.

At the start of World War II, the American military command purported to recognize certain core principles governing aerial bombardment.<sup>49</sup> Many European strategists of the interwar period, however, believed that the advent of air power had signaled the end of legal constraints on warfare.<sup>50</sup> Indeed, international efforts to codify the laws of war had largely failed to develop explicit, binding rules to restrict aerial bombardment of cities and industry, except by analogy to land and naval warfare. Amendments to the Hague Conven-



tions on land and naval warfare in 1907 prohibited “the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended.”<sup>51</sup> The rules left considerable latitude, however, for states to expand the definition of legitimate military targets such that most urban areas could be deemed “defended.”<sup>52</sup> More stringent rules for air warfare had been drafted by the Hague Commission in 1923 and by the League of Nations in 1938, but they were never ratified.<sup>53</sup>

In the early years of the war, architects of the American bombing campaign relied on the principles and categories of the laws of war in evaluating their strategic options. U.S. Army Air Force leaders, for example, cited the law’s considerations when they chose to adhere to a strategy of daytime “precision” airstrikes on military targets in Germany and the Pacific.<sup>54</sup> The American approach was self-consciously distinct from the less discriminate strategy undertaken by the Royal Air Force Bomber Command over German cities after the blitz.<sup>55</sup> To be sure, the American low-altitude strategy gave way as the war progressed. The Casablanca Directive, issued in February 1943, defined the objective of the Allied Combined Bomber Offensive in Europe as the “destruction and dislocation of the German Military, industrial, and economic system and the undermining of the morale of the German people to the point where their capacity for armed resistance is fatally weakened.”<sup>56</sup> American armed forces made a similar move in the Pacific theater in the spring of 1945 when they shifted from precision raids to a ferocious campaign of low-altitude nighttime firebombing of Japanese cities under General Curtis LeMay.<sup>57</sup> But the slide from discrimination to destruction should not blind us to the constitutive role the law played. Disregard of legal principles under great pressure does not render those principles irrelevant. To the contrary, virtually all agree that the basic values and

norms of the law helped shape the United States’ approach to the bombing question in the first year of the war.

Indeed, the tradition of law in war led officials to counsel restraint on important occasions. Both Henry Stimson and Robert A. Lovett, assistant secretary of war for air,<sup>58</sup> urged that the United States pursue “only precision bombing in Japan,” rather than area bombing.<sup>59</sup> Stimson also successfully opposed the atomic bombing of Kyoto, a city that military leaders initially ranked as a first-choice target.<sup>60</sup> Even if he were motivated by a personal attachment to the city, Stimson made his case by invoking values embedded in the rules of war – the protected status of civilians and cultural sites.<sup>61</sup>

After the war, the costs of the most aggressive bombing campaigns revealed themselves once more. At Nuremberg, the strategic aerial bombardment of German civilians became a vast embarrassment for the Allies. German defendants accused of killing civilians asserted the defense that “every Allied nation brought about the death of noncombatants through...bombing.”<sup>62</sup> In Tokyo, Justice Pal of India dissented from the convictions of Japanese war criminals, insisting that in view of the bombing campaigns over Japanese cities, the war crime proceedings were nothing more than victor’s justice.<sup>63</sup> A court in Tokyo even concluded in 1963 that the Americans’ atomic bomb attacks violated the international laws of war.<sup>64</sup>

Here then were real and enduring entailments of the laws of war for the U.S. military. Small consolation for those killed at Hiroshima, Nagasaki, and Tokyo, no doubt – but real costs, nonetheless, that continue to shape America’s reputation around the world. Since World War II, military and political leaders in the United States have had to find a limiting principle with which to distinguish American tactics from the war crimes of the Germans and Japanese. Le-

May himself was famously reported as saying, “I suppose if I had lost the war, I would have been tried as a war criminal.”<sup>65</sup> Perhaps he would have. But the fact that the victor needed to explain and defend its actions in the wake of the war demonstrated that the laws of war served not simply as a license for violent exertions of state power, but also as a source of critique, and even, sometimes, a source for practical judgments in desperate times.

In our own time, one of the most striking developments for the role of law in the U.S. military has been the vast expansion of the sheer number of lawyers in the military, combined with the self-conscious deployment of law as a tactical nonlethal weapons system in counterinsurgency campaigns. The increase in lawyers has been a long time in coming. Under Holt, the Judge Advocate’s Corps reached thirty-three officers by the Civil War’s end. In 1916, Congress greatly increased the number of lawyers in the Judge Advocate’s Corps and the Officers’ Reserve Corps in response to the growing number of courts-martial and pressing wartime legal problems. Over the course of World War II, the military’s legal force expanded from four hundred to over two thousand.<sup>66</sup> In the war’s wake, reforms to the Uniform Code of Military Justice produced ever more demand for lawyers. Today, estimates from inside the Department of Defense calculate that the Pentagon employs a total of ten thousand lawyers: far more than are employed by even the largest law firms in the world. In the early twenty-first century, the American military is quite plausibly the largest employer of lawyers on the planet.<sup>67</sup>

In no small part, this vast expansion in lawyers highlights the place of law in many of the new strategic projects of the twenty-first-century American military. In conflicts since the Vietnam War, military lawyers have gained a more formal and direct

role in shaping the conduct of military operations, a process concomitant with the development of operational law. In the aftermath of the My Lai massacre, blamed upon failings in military discipline and law of war training, the Defense Department established a Law of War Program that tasked judge advocates with overseeing military operations’ compliance with the law of war.<sup>68</sup> Judge advocates have drafted the rules of engagement for operations since Grenada and the Gulf War and produced the *Operational Law Handbook* for resolving legal questions in the field.<sup>69</sup> In counterterrorism operations today, lawyers perform critical roles in the selection of targets for drone strikes. They serve as advisors in evaluating the compliance of targeting decisions with the obligations of proportionality and discrimination.<sup>70</sup> And they have played, and continue to play, increasingly important roles in counterinsurgency efforts to win hearts and minds – efforts that took off under the aegis of General David Petraeus in Iraq and General Stanley McChrystal in Afghanistan.<sup>71</sup> The move to law in our own time has struck many observers as unprecedented. But while there are surely new features of the experience, what is *not* new is the basic dilemma: the U.S. military invokes the law to advance its interests, but the law’s capacity to advance those projects is undermined to the extent that the law does no more than advance the interests of those who invoke it. Once again, what saves the law from defeating itself is that its internal structure and logic entail feedback effects and loops. Consider the judge advocates who have defended Al Qaeda in the military commissions or criticized the use of torture in interrogations; acting in no small part on the basis of professional norms inculcated by the law, they have made life substantially more difficult for the military prosecutors.<sup>72</sup> Consider the difficulties faced by the Guan-

tanamo military commissions more generally; they have been badly undercut by legal process. Indeed, much of the United States' post-9/11 campaign has produced global pushback mobilized around legal categories like the rule of proportionality in targeting or the norm against torture in detention. Harms to American reputation around the world have been made salient by the law. As legal scholars David Cole and Jack Goldsmith have both shown in their separate accounts of national security law in the post-9/11 era, the combined effects of civil society institutions, alongside the judiciary and the bar, have served meaningfully to constrain the executive branch in general and the military in particular.<sup>73</sup> The social cost of refusing to comply with the rules of war – rules that are now thoroughly institutionalized within the professional military – is perhaps the best measure of the law's effectiveness in shaping wartime conduct.

At the close of *Just and Unjust Wars*, Michael Walzer takes up the example of Arthur Harris, known as “Bomber” Harris for his role in overseeing the British strategic aerial bombardment efforts of World War II. By the end of the war, Harris had been re-

sponsible for a bombing campaign of terrible ferocity toward civilians and civilian infrastructure. In Walzer's account, Harris was dishonored – denied a peerage because of the moral obloquy of his country.<sup>74</sup>

One might quibble with Walzer; the dishonoring of Bomber Harris also reflected a judgment that strategic aerial bombardment did poorly in advancing the British war effort.<sup>75</sup> But if that is so, then the dishonoring of U.S. Attorney General Alberto Gonzalez did the dishonoring of Bomber Harris one better. For when Gonzalez retired in 2007, he began an unprecedented year-long odyssey of looking for a job; the United States' chief lawyer could barely find decent work. Gonzalez was, as he put it, “one of the many casualties, of the war on terror.”<sup>76</sup> And even if we discount his hyperbolic language, even if we acknowledge his other troubles as attorney general, the point remains. Gonzalez's open dismissal of the legal rules arising out of armed conflict earned him a social stigma that was hard to shed. It was a lesson that Lincoln would have recognized in his own day as in ours. The law has constitutive force independent of the projects of those who mobilize it. That is its power, and that is its risk.

#### ENDNOTES

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- <sup>14</sup> United States War Department, *An Act for Establishing Rules and Articles for the Government of the Armies of the United States* (Albany, N.Y.: Websters and Skinners, 1812); and United States War Department, *General Regulations for the Army; or, Military Institutes* (Philadelphia: M. Carey & Sons, 1821), 139.
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- <sup>17</sup> See Jay M. Siegel, *Origins of the Navy Judge Advocate General’s Corps: A History of Legal Administration in the United States Navy, 1775 to 1967* (Washington, D.C.: U.S. Government Printing Office, 1997); Henry J. Bourguignon, *The First Federal Court: The Federal Appellate Prize Court of the American Revolution, 1775–1787* (Philadelphia: American Philosophical Society, 1977); and David Sloss, “Judicial Foreign Policy: Lessons from the 1790s,” *Saint Louis University Law Journal* 53 (2008): 145–196.
- <sup>18</sup> See, for example, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 125 (1800).
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- <sup>20</sup> See, for example, “From George Washington to Major General John Sullivan, 31 May 1779,” *The Papers of George Washington, Revolutionary War Series: Volume 20*, ed. Edward G. Lengel (Charlottesville: University of Virginia Press, 2010), 716, 718.
- <sup>21</sup> “Andrew Jackson to David Holmes, April 18, 1814,” *The Correspondence of Andrew Jackson*, vol. 1, ed. John Spencer Bassett (Washington, D.C.: Carnegie Institution of Washington, 1926–1933), 505.
- <sup>22</sup> “Andrew Jackson to Governor Willie Blount, June 4, 1812,” *The Papers of Andrew Jackson*, vol. 2, ed. Harold C. Syrett et al. (Knoxville: University of Tennessee Press, 1980–2007), 300; and “An-



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- <sup>23</sup> Jackson’s Memorial to the Senate, 23 February 1820, *Annals of Congress*, 15th Cong., 2nd sess., appendix, 2318.
- <sup>24</sup> William McKee Dunn, *A Sketch of the History and Duties of the Judge Advocate General’s Department* (Washington, D.C.: Government Printing Office, 1878), 1, 3–4.
- <sup>25</sup> Joshua E. Kastenberg, *Law in War, War as Law: Brigadier General Joseph Holt and the Judge Advocate General’s Department in the Civil War and Early Reconstruction, 1861–1865* (Durham, N.C.: Carolina Academic Press, 2011), 44, 46, 49.
- <sup>26</sup> *Act of July 17, 1862*, § 5, 12 Stat. 598.
- <sup>27</sup> United States War Department, *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*, vol. 2, series 3 (Washington, D.C.: Government Printing Office, 1880–1901), 587.
- <sup>28</sup> Treasury Secretary Salmon Chase quoted in Witt, *Lincoln’s Code*, 168.
- <sup>29</sup> See Abraham Lincoln, “Proclamation of a Blockade, April 19, 1861,” in *The Complete Works of Abraham Lincoln*, vol. 4, ed. Roy P. Basler (New Brunswick, N.J.: Rutgers University Press, 1953), 338–339.
- <sup>30</sup> *Declaration of Paris*, April 16, 1856, [http://avalon.law.yale.edu/19th\\_century/decparis.asp](http://avalon.law.yale.edu/19th_century/decparis.asp).
- <sup>31</sup> Quoted in Witt, *Lincoln’s Code*, 168.
- <sup>32</sup> United States War Department, *Instructions for the Government of Armies of the United States in the Field* (1863), General Orders No. 100, reprinted in Witt, *Lincoln’s Code*, 374–394. The reprinted version corrects errors that have crept into most of the publicly available versions of the Lieber Code.
- <sup>33</sup> See Witt, *Lincoln’s Code*, 266.
- <sup>34</sup> Gideon Hart, “Military Commissions and the Lieber Code: Toward a New Understanding of the Jurisdictional Foundations of Military Commissions,” *Military Law Review* 203 (2010): 41–43.
- <sup>35</sup> *The Prize Cases*, 67 U.S. 635 (1863).
- <sup>36</sup> *Ex parte Vallandigham*, 68 U.S. 243, 248–249 & nn.1–2 (1864).
- <sup>37</sup> See, for example, Chris Jochnick and Roger Normand, “The Legitimation of Violence: A Critical History of the Laws of War,” *Harvard International Law Journal* 35 (1994): 49–95.
- <sup>38</sup> See Stephen Neff, *Justice in Blue and Gray* (Cambridge, Mass.: Harvard University Press, 2010), 20.
- <sup>39</sup> See Witt, *Lincoln’s Code*, 255–256.
- <sup>40</sup> See *ibid.*, 317–323.
- <sup>41</sup> On the Union’s refusal to enter into discriminatory prisoner exchanges, see *ibid.*, 256–263.
- <sup>42</sup> See *ibid.*, 321–324.
- <sup>43</sup> Alfred T. Mahan, *The Influence of Sea Power Upon History, 1660–1783* (Boston: Little, Brown, 1890), 539–540; Robert Seager II and Doris D. Maguire, eds., *Letters and Papers of Alfred Thayer Mahan*, vol. 3 (Annapolis, Md.: Naval Institute Press, 1975), 112, 113, 157; and Robert Seager II and Doris D. Maguire, *Letters and Papers of Alfred Thayer Mahan*, vol. 2 (Annapolis, Md.: Naval Institute Press, 1975), 638.
- <sup>44</sup> Paul A. Kramer, “The Water Cure: Debating Torture and Counterinsurgency – A Century Ago,” *The New Yorker*, February 25, 2008, 84.
- <sup>45</sup> *Ibid.*, 41–42.
- <sup>46</sup> See Jochnick and Normand, “The Legitimation of Violence,” 77.
- <sup>47</sup> *The United States Strategic Bombing Survey: Summary Report (European War)* (Washington, D.C.: Government Printing Office, 1945), 15; and *The United States Strategic Bombing Survey: Summary Report (Pacific War)* (Washington, D.C.: Government Printing Office, 1946), 20.



- <sup>48</sup> Henry L. Stimson, “The Decision to Use the Atomic Bomb,” *Harper’s Magazine* (February 1947), 97.
- <sup>49</sup> Franklin D. Roosevelt, “An Appeal to Great Britain, France, Italy, Germany, and Poland to Refrain from Air Bombing of Civilians,” September 1, 1939, <http://www.presidency.ucsb.edu/ws/?pid=15797>.
- <sup>50</sup> See, for example, Giulio Douhet, *The Command of the Air* (New York: Coward-McCann, 1942); J. M. Spaight, “Non-Combatants and Air Attack,” *Air Law Review* 9 (1938): 372, 373; J. M. Spaight, *Air Power and War Rights*, 3rd ed. (London: Longmans, Green & Co., 1947); and Hamilton Desaussure, “The Laws of Air Warfare: Are There Any?” *The International Lawyer* 5 (July 1971): 289–290.
- <sup>51</sup> *Convention (IV) Respecting the Laws and Customs of War on Land*, art. 25, The Hague, October 18, 1907.
- <sup>52</sup> *Convention (IX) Concerning Bombardment by Naval Forces in Time of War*, art. 2, The Hague, October 18, 1907; and *Convention (IV)*, art. 27.
- <sup>53</sup> *Draft Rules of Aerial Warfare*, The Hague, February 1923, art. 22; and *Protection of Civilian Populations Against Bombing From the Air in Case of War*, League of Nations, September 30, 1938.
- <sup>54</sup> See Stephen L. McFarland, *America’s Pursuit of Precision Bombing, 1910–1945* (Washington, D.C.: Smithsonian Institution Press, 1995); *The United States Strategic Bombing Survey: Summary Report (European War)*, 5; and Jefferson D. Reynolds, “Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground,” *Air Force Law Review* 56 (2005): 14.
- <sup>55</sup> See Max Hastings, *Bomber Command: The Myths and Reality of the Strategic Bombing Offensive 1939–1945* (New York: The Dial Press, 1979).
- <sup>56</sup> *The United States Strategic Bombing Survey: Summary Report (European War)*, 7.
- <sup>57</sup> *The United States Strategic Bombing Survey: Summary Report (Pacific War)*, 16.
- <sup>58</sup> See Jonathan Foster Fanton, “Robert A. Lovett: The War Years” (Ph.D. diss., Yale University, 1978).
- <sup>59</sup> “1 June 1945,” *Henry L. Stimson Diary* (New Haven, Conn.: Manuscripts and Archives, Yale University Library).
- <sup>60</sup> Memorandum from Major J. A. Derry and Dr. N. F. Ramsey to General L. R. Groves, “Summary of Target Committee Meetings on 10 and 11 May 1945,” May 12, 1945, <http://nsarchive.gwu.edu/NSAEBB/NSAEBB162/6.pdf>.
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- <sup>64</sup> *Ryuichi Shimoda et al. v. the State*, District Court of Tokyo (Dec. 7, 1963). See also Richard A. Falk, “The Shimoda Case: A Legal Appraisal of the Atomic Attacks Upon Hiroshima and Nagasaki,” *The American Journal of International Law* 59 (October 1965): 759–793.
- <sup>65</sup> Quoted in Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (New York: Cambridge University Press, 2010), 254.
- <sup>66</sup> United States Army, *The Army Lawyer: A History of the Judge Advocate General’s Corps, 1775–1975* (Washington, D.C.: Government Printing Office, 1975), 54, 84, 107, 186.
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- <sup>68</sup> United States Department of Defense, “DoD Law of War Program,” Dir. 5100.77 (November 5, 1974). See also Frederic L. Borch, *Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti* (Washington, D.C.: Center of Military History, 2001), 31.
- <sup>69</sup> See Borch, *Judge Advocates in Combat*, x; and International and Operational Law Department, *Operational Law Handbook* (Charlottesville, Va.: Judge Advocate General’s Legal Center and School, 2014).
- <sup>70</sup> Laura A. Dickinson, “Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance,” *American Journal of International Law* 104 (1) (2010): 16.
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- <sup>74</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed. (New York: Basic Books, 2006), 325.
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Laura Ford  
Savarese &  
John Fabian  
Witt





# The Face of Battle without the Rules of War: Lessons from Red Horse & the Battle of the Little Bighorn

Scott D. Sagan

*Abstract: This essay analyzes the extraordinary drawings of Red Horse, a Minneconjou warrior who fought at the 1876 Battle of the Little Bighorn, to provide insights into what warfare was like without just war doctrine or the laws of armed conflict to place constraints on violence. The artist's candid vision of the battle and its aftermath portrays the indiscriminant brutality of the Great Sioux War, the disrespect given to a hated enemy, and the lingering desire for revenge. But the drawings also reveal the pride of victory and the trauma of defeat. In addition to providing a window into the past, the Red Horse drawings provide a lens to help us understand the atrocities committed by the Islamic State and Al Qaeda today and a mirror that can help us more clearly see ourselves.*

SCOTT D. SAGAN, a Fellow of the American Academy since 2008, is the Caroline S.G. Munro Professor of Political Science, the Mimi and Peter Haas University Fellow in Undergraduate Education, and Senior Fellow at the Center for International Security and Cooperation and the Freeman Spogli Institute at Stanford University. His books include *Moving Targets: Nuclear Weapons and National Security* (1989), *The Limits of Safety: Organizations, Accidents, and Nuclear Weapons* (1993), and *The Spread of Nuclear Weapons: An Enduring Debate* (with Kenneth N. Waltz, 2012). He leads the Academy's project on New Dilemmas in Ethics, Technology, and War.

We live in a time of terror. Jailers for Islamic State (IS) routinely behead their prisoners, IS fighters force captured Yazidi women to become sex slaves, and Al Qaeda and IS terrorists have attacked the Twin Towers in New York, a sports stadium in Paris, a nightclub in Orlando, a museum and beach resort hotel in Tunisia, and many other restaurants, cafes, and markets in other countries, with the intention to kill as many innocent civilians as possible. Such acts of indiscriminant violence shock our moral sensibilities, but they should not be entirely surprising: indiscriminate violence has been commonplace in wartime throughout much of history. Indeed, flagrant and indiscriminate brutality has often been the norm. It is the modern practice of restraint in war – fighting according to ethical and legal rules that seek to spare civilians and protect prisoners – that is, from a historical perspective, highly unusual.

In *The Art of War*, Sun Tzu wrote that it is vitally important to “know your enemy and know yourself.”

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This essay uses the art of war, quite literally, to reflect on both the horrors of combat and the importance of the rules of war. The drawings of Red Horse, a Minneconjou warrior who fought against George Armstrong Custer and the Seventh Cavalry at the Battle of the Little Bighorn, enable us to see the battle through Lakota eyes. The Little Bighorn battle was part of the 1876 counterinsurgency conflict we now call the Great Sioux War. Given that the U.S. Army is once again engaged in counterinsurgency campaigns against the Taliban in Afghanistan and against the Islamic State in Syria and Iraq, it behooves us to study these extraordinary drawings carefully. For they provide both a window through which we can see more clearly the beliefs of an enemy from the past and also a mirror with which we can more clearly see ourselves today.

On March 15, 1877, newspapers across the United States reported the news that Red Horse, a Minneconjou Lakota chief, had surrendered to reservation authorities at the Cheyenne Agency. Red Horse spoke no English, but presented his recollections of the battle through Plains Sign Language, coded hand signals that Native Americans on the Great Plains had developed to communicate across tribal lines. Red Horse confirmed the public's worst fears about the fate of the final still-missing members of George Custer's Seventh Cavalry from the Battle of the Little Bighorn: "No Prisoners Taken" was the simple sub-headline of *The New York Times* that echoed across the nation.<sup>1</sup>

Five years later, in 1881, at the request of the Agency doctor Charles McChesney, Red Horse again presented his recollections in Plains Sign Language (Figure 1).<sup>2</sup> This time, however, Red Horse's eyewitness testimony was supplemented by forty-two drawings depicting what he had seen on the battlefield. These drawings provided a check on the accuracy of the inter-

pretation of Red Horse's Plains Sign Language testimony and were commissioned primarily to help researchers understand and preserve the language. But I think it is also fair to say that the drawings are the real Red Horse testimony, more direct, more eloquent, and more moving than any translation of Plains Sign Language could be.

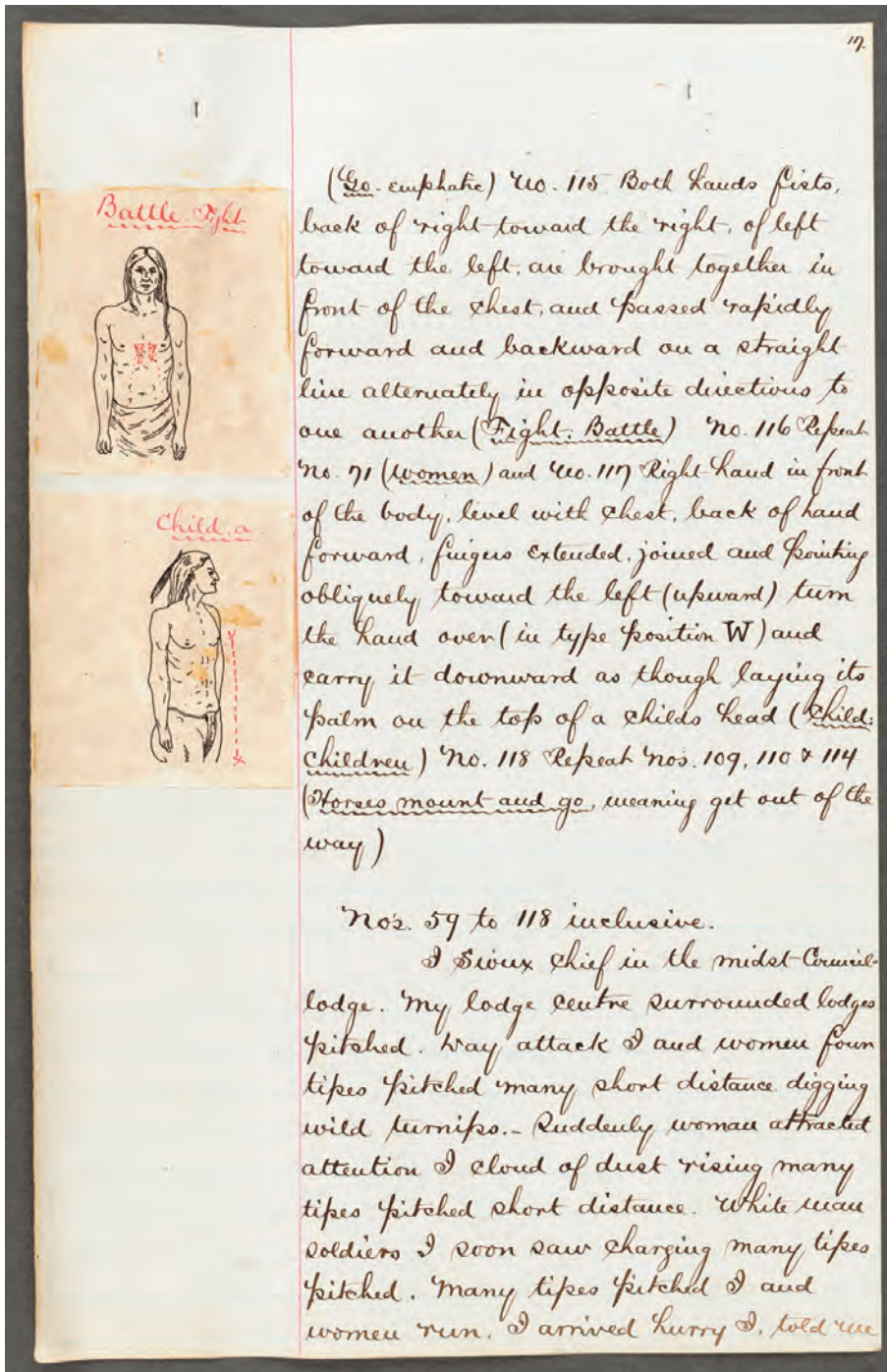
The forty-two Red Horse drawings are stored in the archives of the Smithsonian's National Museum of Natural History. They are rarely displayed in the public. Indeed, they were last put on display in their entirety at the National Portrait Gallery on the centennial celebration of the battle in 1976.

Anthropologists have identified many causes of the high "visual literacy" and "recall" among Native Americans of this period: Lakota rules about recording acts of bravery, such as "counting coup" (physically touching an enemy), required having an eye witness; the Lakota being raised in a dangerous wilderness where every sound and every movement in the distance could signal danger; and in general, the lack of written language, which forced individuals to remember what they saw to better pass it on through oral history. Whatever mix of these reasons for Red Horse, we should admire his keen memory and eye for accurate and telling detail.

Red Horse was gathering turnips with women just outside the Sioux and Cheyenne village on the Little Bighorn River and had a close-up look when the forces of Custer's second-in-command, Major Marcus Reno, attacked. The charging horses, galloping in columns of two, are bluish-gray in the front row and sorrel in the back. This color coordination was not a figment of Red Horse's imagination. George Custer had earlier issued a controversial "coloring of the horses" order to the Seventh Cavalry, forcing soldiers to trade horses with each other so that each troop "company" rode mounts

Figure 1

Red Horse's Account of the Battle of the Little Big Horn, Montana, June 25th, 1896 in *Gesture-signs, to illustrate the Syntax of the Sign-language of the N.A. Indians* by Charles E. McChesney



of a uniform color. This order angered the cavalymen, who had trained their favorite horses. In issuing this order, George Custer was, like so many soldiers before and since, fighting the last war: "Coloring the horses" had provided some benefits for command and control on the mass army battlefields of the Civil War, but it served little if any strategic purpose when attacking native villages in the Great Plains. It was, however, aesthetically pleasing on the parade ground. The policy "bordered on the ornamental," Custer acknowledged in his 1874 book, *My Life on the Plains*: "It was surprising to witness what a great improvement in the handsome appearance of the command was effected by this measure."<sup>3</sup>

Red Horse must have been impressed by the color-coordinated columns of horses charging down the valley of the Little Big-horn that afternoon, for he carefully recorded the color coordination, although he would not have understood its purpose (see Figure 2). But he did notice that officers were permitted to ride their favorite horses regardless of whether they matched the others, an exception to the "coloring the horses" policy.<sup>4</sup> Notice the soldier on the upper-right with an officer's epaulet on his shoulder, riding a different colored horse from the rest of the attacking column.

Red Horse's drawing of the fighting on Last Stand Hill displays Native American warriors shooting bullets and arrows at the fleeing cavalymen, and some are "counting coup" by touching a soldier, pulling him off his horse, or stabbing him with a spear (Figure 3). The color coordination of the Seventh Cavalry horses in their attack columns can still be seen, but it is starting to break down in the chaos of combat. What was also puzzling to Red Horse, according to the English translation of his 1881 Plains Sign Language testimony, was that "among the soldiers were white men who were not soldiers." Notice the body on the lower right in Figure 3. He is wear-

ing a plaid shirt and does not have a stripe on his trousers. This is likely a depiction of one of the three civilians killed with Custer's troops on Last Stand Hill. Boston Custer, George's eighteen-year-old brother, was a civilian forager with the Seventh Cavalry and Henry Armstrong "Autie" Reed, George's teenage nephew, had come along for the ride. Their bodies were later found about one hundred yards from Custer's. The Lakota and Cheyenne had stripped most of the cavalry uniforms off the soldiers, taken scalps, and then mutilated the bodies, including severing heads and limbs from the bodies. But they had only "slightly mutilated" Boston Custer and Autie Reed's civilian clothing had been left on his body.<sup>5</sup>

There are two exceptions to the accuracy of Red Horse's drawings, one I can explain, the other still a mystery. The one I cannot explain is why Red Horse depicts one of the troopers carrying a saber in one of the drawings of the Reno attack on the village. All sources report that the officers of the Seventh Cavalry had left their sabers behind for the campaign, and Red Horse does not draw a single other sword in his related pictures. Perhaps one officer did carry a saber, or perhaps Red Horse was confused by the Springfield rifle scabbards, which looked like scabbards for sabers and which are clearly depicted in some of the drawings.

The other historical inaccuracy in the drawings I can explain. Notice how the flags are all inverted. Why? Keep in mind that Red Horse sees himself a POW, a prisoner of war, drawing for his captors. The inverted flags, I believe, are a coded signal of disrespect, a hidden protest, a covert act of defiance, subtle enough that white men wouldn't notice it or perhaps would chalk it up to the primitive understanding of a savage Indian.<sup>6</sup> Lest you think I am reading too much into this detail, note that Red Horse was not the only Native American to display an inverted U.S. flag.



Figure 2  
Untitled Red Horse Drawing of the Reno Attack



Graphite, colored pencil, and ink. 61 x 92 cm. Source : The Red Horse Pictographic Account of the Battle of the Little Bighorn, 1881. NAA MS 2367A, 08568000. National Anthropological Archives, Smithsonian Institution.



Figure 3  
Untitled Red Horse Drawing of His View of Native Americans Fighting Custer's Troops at the Little Bighorn, 1881



Graphite, colored pencil, and ink. 61 x 92 cm. Source : The Red Horse Pictographic Account of the Battle of the Little Bighorn, 1881. NAA MS 2367A, 08569200, National Anthropological Archives, Smithsonian Institution.

This is a photo of an Osage lodge at their reservation in Oklahoma in the 1890s (Figure 4). The Osage had served as Custer's scouts in the 1868 campaign against the Cheyenne, leading to the Battle of the Washita. They certainly knew the proper way to fly an American flag. Yet, despite their service, the Osage were removed from their traditional homes in Arkansas and Missouri and forced to move to the dry Oklahoma reservation. The photo depicts Osage men standing in quiet defiance in front of the new tribal lodge in Oklahoma.<sup>7</sup> The tradition of displaying inverted American flags in protest and defiance was passed down from generation to generation, as seen in the 1972 photographs of the American Indian Movement's (AIM) occupation of the Bureau of Indian Affairs headquarters in Washington, D.C. (Figure 5), and the 1973 AIM occupation of the Wounded Knee massacre site, where the Seventh Cavalry killed more than two hundred Lakota Sioux men, women, and children in 1890 (Figure 6).

Contrast this with Red Horse's drawing of the dead horses (Figure 7). We know that they are the Seventh Cavalry horses both because of their large size and because their tails are not tied, unlike the tails of the ponies ridden by Native American warriors. The horses are not mutilated. They are not the enemy. Red Horse has no reason to hate or disrespect them. In contrast to the inverted flags carried by the soldiers on Last Stand Hill, here, amid the horses, the Seventh Cavalry guidon is displayed properly, a sign of respect, with a red "spirit line" as a staff, showing that the Lakota now owned the flag. The once vivid colors of the bay, blue, and sorrel horses are now washed out in the sad stillness of death. The ghostly white pallor is their only color coordination. They are still displayed in parallel lines, but no longer charging across the valley in combat columns; instead the horses all look upward toward the sky, floating in a final formation of death.

Red Horse's striking drawings are the candid, uncensored views of a Sioux warrior. They are brutally honest and they are honest about brutality. Later ledger art about the Little Bighorn was often created for the white tourist market and was therefore self-censored.

Like this painting attributed to Stephen Standing Bear from the early 1900s (Figure 8).<sup>8</sup> It displays no dismembered or scalped bodies and features George Custer in a buckskin jacket, with the flag flying upright in the middle of Last Stand Hill, guns blazing away, dying with his boots on.

The only problems are that Custer was not wearing his buckskin jacket on that blazing hot afternoon, had cut his hair short before the campaign, and almost certainly was not the last man standing on Last Stand Hill. (Indeed, Red Horse and the other Native Americans at the Little Bighorn did not even know until afterward that it was Custer who had led the attack against their village.)

In contrast, Red Horse graphically portrays the brutality of the battle and shows no remorse about killing the enemy soldiers attacking his village, testifying in sign language in 1881 that "the women and children were in danger of being taken prisoners," which further enraged the warriors. "These soldiers became foolish, many throwing away their guns and raising their hands and saying, 'Sioux pity us, take us prisoners,'" Red Horse notes in his translated testimony. "The Sioux did not take a single soldier prisoner, but killed all of them." Black Elk, a sixteen-year-old Oglala Lakota warrior, wrote later about taking a trooper's bloody scalp back to the village and presenting it to his now proud mother who gave "a big tremolo just for me when she saw my first scalp."<sup>9</sup>

Before the battle, Sitting Bull, the medicine man and spiritual leader of the Lakota, had told his followers of a vision that came



*Figure 4*  
Osage Illoshka Lodge with Inverted American Flag, Pawhuska, Oklahoma Territory, 1890 – 1895



George W. Parsons, photographer. Source: GM 4326.4217, Gilcrease Museum, Tulsa, Oklahoma.



Figure 5  
American Indian Movement Occupies the Bureau of Indian Affairs, Washington D.C., 1972



Source : Pictorial Parade/ Getty Images.



Figure 6  
Inverted U.S. flag outside a Church Occupied by Members of the American Indian Movement, March 1973



Occupied church built on the site of the 1890 massacre at Wounded Knee. Source: AP Photo/Jim Mone.

Figure 7  
Untitled Red Horse Drawing of Dead Cavalry Horses, 1881



Graphite, colored pencil, and ink. 61 x 92 cm. Source: The Red Horse Pictographic Account of the Battle of the Little Bighorn, 1881. NAA MS 2367A, 08569000, National Anthropological Archives, Smithsonian Institution.



*Figure 8*  
The Battle of the Little Big Horn by Standing Bear, c. 1890 – 1908



Muslin, graphite, and watercolors. 42 x 156 cm. Source : Courtesy of the Karl-May-Museum, Radebeul, Germany.

to him in a trance during the June 1876 Sun Dance ceremony: soldiers were falling from the sky, like so many grasshoppers, upside down with their hats falling off. Sitting Bull heard a voice saying “these have no ears . . . these, they will die, but you must take none of their possessions from them.”<sup>10</sup> The Lakota had warned the white men not to enter their territory or attack their villages, but the white men did not listen, they had no ears.

Sitting Bull’s prophecy both provided a warning that the white men would attack soon and gave the warriors confidence in their ability to defeat the Seventh Cavalry. Red Horse is here showing Lakota and Cheyenne warriors engaged in deadly hand-to-hand combat up on the ridges above the Little Bighorn (Figure 9). Dying in combat was an honor in Lakota society and Red Horse encouraged his fellow warriors to keep that in mind. According to the later testimony of Moving Robe Woman, above the “whooping and shouting” that day, she heard Red Horse shout “there is never a better time to die.”<sup>11</sup> One important warrior wearing a long eagle-feather war bonnet is grabbing a soldier’s hair, about to take a scalp. And notice the dead soldiers falling upside down from the sky, with their hats falling off, in the upper right-hand corner.

The fluid movement of the dead soldiers in this drawing leads me to believe Red Horse is recording his memory of Reno’s cavalymen killed as they crossed the Little Bighorn in their hasty retreat, which he witnessed. It was easy killing Reno’s panicked cavalymen. It was like hunting buffalo, another warrior, Thunder Bear, later recalled.<sup>12</sup> The soldiers, all scalped and without arms, like fish swimming upstream, with one black campaign hat, marking each body like a gravestone, and red undulating “spirit lines” showing for the Lakota whose side the spirits were on that day on the banks of the Little Bighorn (Figure

10). Red Horse once again provides a visual reference to Sitting Bull’s vision. Note that with only a few exceptions, these dead soldiers have no ears. They didn’t listen.

The phrase “they had no ears” has another more personal connection to the fate of George Armstrong Custer at the Little Bighorn. After the 1868 Washita campaign, Custer had smoked a ceremonial peace pipe with Cheyenne chief Medicine Arrows and had, according to Cheyenne oral history, promised not to go to war against the Cheyenne again; in response, Custer was told that he and his men would be killed if he broke his promise.<sup>13</sup> According to Kate Bighead, a Cheyenne witness at the Little Bighorn, two Southern Cheyenne women had found Custer’s body at the top of Last Stand Hill after the fighting ceased. There they stopped two Lakota warriors who were about to take his scalp and mutilate his body, saying “‘he is a relative of ours,’ but telling no more about him. So the Sioux men cut off only one joint of his finger. The women then pushed the point of a sewing awl into each of his ears, into his head. This was done to improve his hearing, as it seems [he] had not heard what our chiefs in the South said when he smoked the pipe with them.”<sup>14</sup>

Kate Bighead held back the most gruesome part of the story in her oral history. For Custer and the Seventh Cavalry had killed many women and children in their 1868 attack on the Northern Cheyenne at the Washita River; and afterward, the officers sexually abused the female hostages, including Custer, who raped a young Cheyenne woman named Monahsetah.<sup>15</sup> It appears that the Cheyenne women, when they stopped the Lakota warriors from scalping Custer, were seeking revenge and wanted to mutilate the body themselves; for George Armstrong Custer’s body was found not only with his ear drums pierced by sewing awls, but also with an arrow stuck up his penis.<sup>16</sup>

Scott D.  
Sagan



*Figure 9*  
Untitled Red Horse Drawing of Lakota and Cheyenne Warriors Fighting Custer's Horse Columns



Graphite, colored pencil, and ink. 61 x 92 cm. Source : The Red Horse Pictographic Account of the Battle of the Little Bighorn, 1881. NAA MS 2367A, 08583500, National Anthropological Archives, Smithsonian Institution.

Figure 10  
Untitled Red Horse Drawing of Dead Cavalry, 1881



Graphite, colored pencil, and ink. 61 x 92 cm. Source: The Red Horse Pictographic Account of the Battle of the Little Bighorn, 1881. NAA MS 2367A. 08570500. National Anthropological Archives, Smithsonian Institution.



While the Red Horse drawings are candid in their portrayal of the brutality of war in 1876, there is something also profoundly human in the artist's vision, despite the fact, or perhaps even because of the fact, that the behavior portrayed is often inhumane. Red Horse's drawings display the common human feeling of the pride of victory. The village on the Little Bighorn quickly dispersed as bands of warriors, and their women and children, fled what he called "the walking soldiers" (General Terry's infantry arriving from the North).

Look at their proud display of colorful shields and bonnets – the heraldry of a victory parade (Figure 11). The warriors would soon be marking their shirts with symbols of each coup counted, symbols of honor and accomplishment not unlike the medals officers wear today. And look at the bounty they took away: the larger U.S. Army horses amid the smaller Indian ponies, the saddles, and the new guns (contrasted with warriors armed with only some guns amid many spears, clubs, and bows and arrows in the earlier pictures). They have made the rifles their own, decorating the gunstocks with swirls of colorful paint. Most of the soldiers' cavalry hats remain scattered among the dead. But one warrior rides off (upper left), proudly wearing a white man's hat to shield his eyes from the glare of the sun.

These portraits serve as a haunting reminder of the tremendous human suffering after war, among both the victors and the vanquished. While Red Horse's drawings do not display remorse over killing the white soldiers who had attacked his village, his final words in the 1877 Plains Sign Language testimony do hint at a kind of unspoken sadness, perhaps even trauma, not unlike the experience of many American warriors today when looking back at their combat experience. "I don't like to talk about that fight," Red Horse said. "If I hear any of my people talking about it I always move away."

The Red Horse drawings present the face of battle without the rules of war. His graphic depictions of the mutilated bodies of the U.S. Army soldiers show the horrific consequences of our all-too-human feelings of revenge and hatred. In an era in which the Islamic State beheads its enemies and mistreats its prisoners, it is important to keep in mind that mistreatment of prisoners and mutilation and the taking of body parts was once common practice.

In the aftermath of King Phillip's War, New England puritans placed the heads of Native Americans on the walls of their stockades.<sup>17</sup> The First and Third Colorado regiments of United States Volunteers killed over two hundred Cheyenne men, women, and children in the November 1864 Sand Creek Massacre, taking body parts and scalps and waving them for cheering crowds in their victory parade back into Denver.<sup>18</sup> According to Seventh Cavalry officer Sergeant John Ryan, to inspire his men at the start of Reno's charge on the Little Bighorn, Lieutenant Charles Varnum shouted out "Thirty days furlough to the man who gets the first scalp."<sup>19</sup> Lieutenant W. S. Edgerly also later testified under oath at Reno's trial that he saw a Seventh Cavalry soldier at the battle carrying "the scalp of an Indian in his hand that he had just taken."<sup>20</sup> And Buffalo Bill Cody famously killed and scalped the young Cheyenne warrior, Yellow Hair, in a battle in July 1876 to avenge for the killings at the Little Bighorn; he reenacted his "first scalp for Custer" story during his Wild West Show for years afterward.<sup>21</sup>

The practice of scalping or taking body parts of an enemy as a visceral token of victory was recorded as early as Herodotus, and is occasionally witnessed today, even in the U.S. Army. For example, the ringleader of the Maywand "Kill Team," a group of U.S. soldiers stationed near Kandahar who murdered Afghan civilians for sport in 2010, carried home body parts of his victims, including fingers and a tooth,

*Figure 11*  
Untitled Red Horse Drawing of Native American Warriors Leaving the Battle of the Little Bighorn, 1881



Graphite, colored pencil, and ink. 61 x 92 cm. Source: The Red Horse Pictographic Account of the Battle of the Little Bighorn, 1881. NAA MS 2367A, 08570700, National Anthropological Archives, Smithsonian Institution.



as trophies.<sup>22</sup> We should be ashamed that this incident occurred, but gratified that eleven American soldiers were put on trial by the U.S. military, and that the Maywand “Kill Team” leader, Staff Sergeant Calvin Gibbs, was convicted of murder and is spending his life in a military prison for the war crimes he committed.

General George C. Marshall, on his first assignment fresh out of the Virginia Military Institute, told a fellow officer: “Once an army is involved in war, there is a beast in every fighting man which begins tugging at its chains. And a good officer must learn early on how to keep the beast under control, both in his men and himself.”<sup>23</sup>

The Geneva Conventions and the laws of armed conflict are major achievements, a triumph of international institutions and a rare victory for the better angels of our nature. The Red Horse drawings portray what combat is like without the effects of just war doctrine and laws of war. They should remind us of the continual need to “stay the hand of vengeance” in war, as Justice Robert H. Jackson put it at the Nuremberg Trials. It is necessary to fight effectively, but also to fight well, both to defeat the beast in our enemies and control the beast within ourselves.

#### ENDNOTES

- <sup>1</sup> “The Custer Massacre: An Indian Chief’s Account of It,” *The New York Times*, March 15, 1877.
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- <sup>4</sup> Gary Paul Johnston, James A. Fischer, and Harold A. Geer, *Custer’s Horses* (Prescott, Ariz.: Wolfe Publishing, 2000), 81.
- <sup>5</sup> The other civilian killed on the battlefield was the *Bismark Tribune* reporter Mark Kellogg, but his body was found in the Deep Ravine, not on top of Last Stand Hill. Richard G. Hardoff, *The Custer Battle Casualties* (El Segundo, Calif.: Upton and Sons, 1991), 121–122.
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- <sup>15</sup> The best source on Monasetah is Peter Harrison (with Gary Leonard, ed.), *Monasetah: The Life of a Custer Captive* (Southampton, United Kingdom: Chetwynd Press, 2015). See also T. J. Stiles, *Custer's Trials: A Life on the Frontier of a New America* (New York: Knopf, 2015), 327; and Louise Barnett, *Touched by Fire: The Life, Death, and Mythic Afterlife of George Armstrong Custer* (Lincoln: University of Nebraska Press, 2006), 194–197.
- <sup>16</sup> Hardoff, *The Custer Battle Casualties*, 21.
- <sup>17</sup> Jill Lapore, *The Name of War: King Phillip's War and the Origins of American Identity* (New York: Knopf, 1998), 178.
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# Limiting Civilian Casualties as Part of a Winning Strategy: The Case of Courageous Restraint

*Joseph H. Felter & Jacob N. Shapiro*

*Abstract: Military commanders in wartime have moral obligations to abide by international norms and humanitarian laws governing their treatment of noncombatants. How much risk to their own forces they must take to limit harm to civilians in the course of military operations, however, is unclear. The principle of proportionality in the law of armed conflict all but necessitates that they make a utilitarian calculation: potential harm to civilians must always be balanced against military value when considering actions that could hurt innocents. In asymmetric conflicts, such as most counterinsurgencies, information flows, collaboration, and ultimately the support of the local population can be key to achieving strategic objectives. Thus, limiting casualties to noncombatants and other actions that alienate the population in these types of conflicts is a key part of a winning strategy. The concept of “courageous restraint” was created to express this principle to NATO and U.S. forces fighting in Afghanistan.*

JOSEPH H. FELTER is Senior Research Scholar at the Center for International Security and Cooperation, Research Fellow at the Hoover Institution at Stanford University, and Codirector of the Empirical Studies of Conflict Project.

JACOB N. SHAPIRO is Professor of Politics and International Affairs at Princeton University and Codirector of the Empirical Studies of Conflict Project.

(\* See endnotes for complete contributor biographies.)

How much risk combat troops must accept in order to avoid harming civilians has long been central to moral and legal arguments about just conduct during war, or *jus in bello*. In his seminal book *Just and Unjust Wars*, Michael Walzer argues that it is a state’s duty to accept greater risks for its own military forces as a means to limit harm to noncombatants in the course of armed conflict. He provides a vignette from a World War I British soldier’s memoir for context in supporting this assertion. In this particular incident, Walzer describes a dilemma faced by British troops as they attempt to clear a French town of German soldiers hiding among some of its dwellings. When entering a home, the British soldiers had the choice of whether or not to shout a warning before throwing a grenade down the cellar stairs. This warning would alert civilian noncombatants that may be hiding there and give them the opportunity to make the British soldiers

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poised to engage with lethal force aware of their presence. Alternatively, however, this effort to safeguard civilians would also place the entering British troops at greater risk by giving any German soldiers that might also be hiding there the opportunity to attack first. The soldier who wrote the memoir admitted that attacking first would have felt like murder to him if it resulted in the death of an innocent French family member. According to Walzer's subsequent analysis, soldiers in such cases are in fact obliged to assume increased risk and – in an effort to limit the expected costs in terms of civilian casualties – issue a verbal warning prior to engaging with a grenade.<sup>1</sup>

This World War I example rests on a moral argument. From a utilitarian perspective, however, if the British troops opted to make themselves safer by throwing the grenade without warning, it would matter little for the ultimate outcome of the conflict. While the resulting French civilian casualties would be tragic, might weigh heavily on the consciences of those responsible, and could potentially encourage in-kind retaliation from the Germans, they would be of little military consequence. In conventional interstate conflict, civilian casualties do little to inhibit the ability of military forces to mass firepower on enemy objectives, seize terrain, and ultimately achieve victory at the strategic level.

Asymmetric intrastate conflicts are different. In conflicts like those in Afghanistan, Colombia, Iraq, Northern Nigeria, Pakistan, and the Philippines, to name just a few, information flows, collaboration, and ultimately support of the local population are key to achieving strategic objectives. Limiting casualties to noncombatants and other actions that alienate the population have clear military value in such conflicts. But while military commanders in all types of war have moral obligations to abide by international norms and humanitarian laws governing their treatment of noncomba-

tants, just how much risk to their own forces they must take on in the process is never completely clear. Indeed, the principle of proportionality in the law of armed conflict all but necessitates that they make a utilitarian calculation: potential harm to civilians must always be balanced against military value when considering actions that could hurt innocents. And if minimizing civilian casualties helps advance strategic goals in certain conflicts, then the standards for protection might be much higher.

These were the challenges that the International Security Assistance Force (ISAF) was grappling with in Afghanistan in 2009. Protecting civilian lives had clear military value at a time when ISAF and the government of Afghanistan were competing with the Taliban for the allegiance and support of the population. Standards of action that entailed protections for civilians, which were appropriate for interstate wars, and met requirements under international law were not necessarily protective enough. That observation prompted senior leaders within the organization to call for greater restraint when engaging an enemy that operated in close proximity to the civilian population. This increased emphasis on limiting civilian casualties, what became known as *courageous restraint*, was deemed critical to achieving strategic success.

In this essay, we first describe the genesis of courageous restraint in Afghanistan and discuss the arguments made for it on moral and legal grounds, as well as in terms of the expected impact on the success of ISAF's campaign. We then highlight the challenges it faced in execution at the tactical level. We conclude with a discussion of the enduring lessons that can be learned from ISAF's experience implementing courageous restraint and its implications for the preparation and execution of future conflict.

In late spring 2009, nearly a decade after the U.S.-led invasion of Afghanistan top-

pled the Taliban and drove Al Qaeda from its former safe havens, the United States remained at war and, by most measurable standards, the war was not going well. According to NATO/ISAF statistics, there was a 156 percent increase in attacks on Afghan government infrastructure for the period of January to May 2009 compared with January to May 2008; a 152 percent increase in complex attacks (those involving more than one means of attack, such as small arms plus IED, or more than twenty insurgents); and an increase of between 21 and 78 percent in total attacks across the five Regional Commands within Afghanistan.<sup>2</sup> Newly elected President Barrack Obama considered Afghanistan a war of necessity, not of choice like Iraq, but his administration, like much of the U.S. public, was not willing to expend American blood and resources indefinitely in pursuit of their campaign's objectives.

In a very visible manifestation of the dissatisfaction with the status quo, Secretary of Defense Robert Gates called for the resignation of General David McKiernan, commander of U.S. and Coalition Forces in Afghanistan, in early May 2009, citing the need for "fresh thinking" and "fresh eyes" on Afghanistan.<sup>3</sup> Lieutenant General Stanley McChrystal, the storied Army Ranger and Special Operations Forces commander who led the Joint Special Operations Command (JSOC) from 2004 to 2008, was tapped as McKiernan's replacement and leader of the new direction in Afghanistan. Shortly after taking command, he called for a comprehensive assessment of ISAF's mission, objectives, and strategy.

Based on the findings of the June 2009 assessment, General McChrystal requested an additional forty thousand troops to "surge" to Afghanistan later that year and help provide much needed physical security to facilitate the broader aspects of a comprehensive counterinsurgency campaign plan. Perhaps even more significant

than calling for a troop increase, General McChrystal determined that ISAF needed to fundamentally change how it operated in Afghanistan down to the level of how soldiers and small units interacted with the populations living where they were deployed. Specifically, he was concerned with the impact of the mounting civilian casualties that ISAF was responsible for and his command's relationship with the population it was ostensibly deployed to protect. Reflecting on this assessment, General McChrystal recalls, "I quickly came to the conclusion – and had been talking about this for years – if we didn't change the Afghan people's perceptions about our use of power, then we were going to lose them."<sup>4</sup>

On July 2, 2009, General McChrystal issued a revised tactical directive for ISAF. The directive outlined policies for the employment of air delivered munitions, indirect fires (such as artillery and mortars), and other weapon systems, intending to reduce ISAF-caused civilian casualties and other collateral damage.<sup>5</sup> The principles and command intent laid out in this document would make up the foundation of the Commander of International Security Assistance Force's (COMISAF) calls for restraint and tactical patience when determining how much force to employ in certain battlefield conditions.

The tactical directive remains a classified document, but portions of it have been released in an effort to educate a wider audience. The carefully worded and personally authored passages provide both insight and clarity on why General McChrystal, as COMISAF, was determined to limit the civilian casualties caused by ISAF and his intent for how ISAF troops were expected to exercise the restraint required to achieve these ends.

This was not a case in which the commander was inherently conservative about using force. General McChrystal commanded elite counter-terrorist operatives

in JSOC at the height of the conflict in Iraq. In this role, he maintained a near singular focus on killing and capturing high-value targets and weakening terrorist networks through attrition of key leaders and individuals. But conditions in Afghanistan in 2009 and his role as the theater commander obliged him to expand, if not shift, his emphasis. To ensure that ISAF's tactical and operational actions supported the overarching strategy he was responsible for pursuing, he wrote:

We must fight the insurgents, and will use the tools at our disposal to both defeat the enemy and protect our forces. We will not win based on the number of Taliban killed, but instead on our ability to separate insurgents from the center of gravity – the people. That means we must respect and protect the population from coercion and violence – and operate in a manner which will win their support. . . . I recognize that the carefully controlled and disciplined employment of force entails risk to our troops – and we must work to mitigate that risk wherever possible. But excessive use of force resulting in an alienated population produces far greater risks. We must understand this reality at every level in our force. I expect leaders at all levels to scrutinize and limit the use of force like close air support (CAS) against residential compounds and other locations likely to produce civilian casualties in accordance with this guidance. Commanders must weigh the gain of using CAS against the cost of civilian casualties, which in the long run make mission success more difficult and turn the Afghan people against us.<sup>6</sup>

In addition to modifications of the tactical directive, ISAF also issued new counterinsurgency guidance,<sup>7</sup> a revision of its standard operating procedures (SOP) for the escalation of force,<sup>8</sup> and a tactical driving directive, all of which shared a common theme of directing ISAF members to operate in a way that protects the popula-

tion and limits civilian casualties and collateral damage. The revised tactical directive and these additional documents provided the basis for the concept of courageous restraint.

COMISAF guidance and intent were emphatic. ISAF soldiers are expected to operate in ways consistent with protecting the population and limiting civilian casualties. None of these directives explicitly denied ISAF soldiers the ability to defend themselves, but they set explicit and implicit expectations that ISAF troops would exercise restraint on the battlefield when civilian lives were potentially in danger. They acknowledged that exercising this restraint might require commanders and individual soldiers to accept an increased degree of risk as part of their effort to reduce casualties to the civilian population.

There was consensus between the COMISAF and a number of senior leaders that soldiers exhibiting courageous restraint should be recognized for their actions. The ISAF Counterinsurgency Advisory and Assistance Team (CAAT) responsible for helping communicate COMISAF intent to ISAF troops in the field described this interest: “We routinely and systematically recognize valor, courage, and effectiveness during kinetic combat operations. . . . In a COIN [counterinsurgency] campaign, however, it is critical to also recognize that sometimes the most effective bullet is the bullet not fired.”<sup>9</sup> Nick Carter, a British major general and commander of Regional Command South, which included the volatile provinces of both Kandahar and Helmand at the time, went as far as advocating for the creation of a medal recognizing ISAF soldiers and marines for exercising restraint when appropriate on the battlefield. According to Carter, restraint and tactical patience should be viewed as an “act of discipline and courage not much different than those seen in combat actions.”<sup>10</sup> Broader support for establishing a special award for



courageous restraint never gained traction within ISAF, but the increased emphasis by the COMISAF and senior leaders within the command on reducing civilian casualties was palpable and could be felt down to the lowest echelons in the field.

Why did the COMISAF demand that ISAF troops exercise courageous restraint? For one, protecting the population by exercising restraint in combat and assuming risks to avoid civilian casualties is consistent with international law. Additional Protocol I of the Geneva Conventions, adopted in 1977, lays out the signatories' obligations with respect to protecting victims of international armed conflicts.<sup>11</sup> Article 51, "Protection of the Civilian Population," describes types of indiscriminate attacks prohibited by the treaty, including, for example:

- 1) An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects.
- 2) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>12</sup>

Article 57, "Precautions in Attack," further requires that "in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects." This article explicitly mandates that combatants:

- 1) Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects.
- 2) Take all feasible precautions in the choice of means and methods of attack with a view

to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.

- 3) Refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>13</sup>

Succinctly, failing to distinguish between civilian and military targets is a war crime as defined under the provisions of Protocol I. For most of the war, ISAF units took great pains to follow the standards of distinction and proportionality enshrined in the 1977 Conventions. By mid-2009, however, a bias toward greater caution and a high threshold of military advantage to justify actions that risked civilian lives was seen as ensuring compliance with the law of armed conflict.

Beyond the moral and legal incentives outlined above, however, exercising restraint in asymmetric conflicts can be strategic; it has become a key component of successful counterinsurgency, such as in Afghanistan. Looking back on this time, General McChrystal explained: "So what we were trying to do was tell people – and I was trying to communicate it in a way that emphasized that the only thing that matters here is winning. Now, the only way we win is not by killing more Taliban, but by convincing people of the efficacy of our strategy, and of our commitment to their protection. I still passionately believe that this is absolutely the right answer."<sup>14</sup> General McChrystal's perspective is grounded both in concerns about how the Afghan population perceived ISAF and in a long tradition of scholarship and practice that identified gaining cooperation from non-combatants as a critical part of winning a counterinsurgency campaign. Insurgent leaders – from Mao Tse-tung (1937) to Che

Guevara (1960) to Marighella (1969) – emphasize the criticality of earning popular support so as to ensure insurgents can operate undetected by government forces. This view was echoed by a large group of Western counterinsurgency theorists who fought against communist insurgents in the postcolonial period, including Roger Trinquier, Robert Taber, David Galula, David Clutterbuck, E. P. Thompson, and Frank Kitson. Recent work by American counterinsurgency practitioners drawing lessons from Vietnam and Iraq, including Kalev Sepp, David Petraeus, Robert Cassidy, and H. R. McMaster, emphasize the importance of earning good will and avoiding actions that discourage cooperative non-combatant behavior because civilians can provide valuable intelligence.

A compelling example of the tangible returns that can be gained from displaying restraint and tactical patience can be seen in the experience of a U.S. Marine unit operating in the Garmsir District of the volatile Helmand Province in January 2010. In this case, the 2nd Battalion, 2nd Marines were confronted by a large and overtly angry crowd of local Afghans enraged by the rumor that members of the U.S. military had defaced a Koran. It escalated and the visibly frustrated locals began to throw rocks and bricks, many of which struck the young Marines that had formed a perimeter surrounded by the rioting Afghans. A number of Marines suffered concussions and other serious injuries; however, while justified by their rules of engagement, no Marines responded through an escalation of force. Eventually, word that the Koran burning was in fact a rumor planted by the Taliban subdued the crowd and they dispersed without further incident. The courageous restraint exercised by these disciplined Marines and their small unit leadership prevented a dangerous situation from escalating to something much worse and avoided inflicting casualties on

the civilian population. Of note, this Marine unit was among the most successful in the theater at locating IEDs and detonating them (so they no longer presented a risk) in the months following the crowd incident, largely owing to the battalion's ability to get tips from local Afghans regarding the locations of these bombs. Thus, as the unit's commanders acknowledged, building a strong relationship with the local Afghans provided their best protection.<sup>15</sup>

There are many anecdotal accounts of ISAF members attributing the importance of their relationship with the local population with facilitating information sharing and other forms of collaboration to tactical and operational level success. Measuring attacks that did not occur (dogs that do not bark) is difficult, but quantitative tools provide some options. By using the fine-grained administrative data collected in the wars in Afghanistan and Iraq, we can assess the impact of inadvertent killings of civilians by both sides, the tragic side-effects of conflict, on subsequent violence and other outcomes. In prior work, we and our colleagues have found substantial econometric evidence that harming civilians can hurt counterinsurgent efforts.

In Iraq, insurgent attacks increased modestly for a one- to two-week period following Coalition-caused civilian casualties; the median Coalition-caused incident led to approximately two additional attacks over the next two weeks in the average district.<sup>16</sup> Moving up to the province level, the next higher geographic unit, the flow of information to Coalition forces on tip lines also dropped following such casualties for a one-week period. In 2007 and early 2008, the median Coalition-caused civilian incident led to approximately 1.6 fewer tips in the following week.<sup>17</sup> Afghan public opinion in 2012 was significantly more favorable to the Taliban relative to ISAF for people who reported suffering harm from ISAF operations.<sup>18</sup> And in all three cases, the ef-

fects were asymmetric: government forces and their allies paid a greater penalty for causing the same level of harm as the Taliban did, though both sides paid a cost for harming civilians in terms of attitudes, information flow, and subsequent attacks.

Similar effects on insurgent attacks were seen in Afghanistan. In April 2010, members of the ISAF CAAT conducted an empirical study of the impact of civilian casualties on future insurgent-initiated violence. The comprehensive study – later briefed to the COMISAF and ISAF senior leaders – found evidence that civilian deaths caused by ISAF led to increased attacks against Coalition Forces that persisted for fourteen weeks. Interestingly, civilian casualties increased violence directed against ISAF whether the Taliban or Coalition was responsible for the casualties, though the impact was much larger for ISAF-caused incidents.<sup>19</sup>

It is not surprising that civilian casualties alienated the population, shifted support away from ISAF, and contributed to an increase in violent attacks directed at coalition forces. And compelling empirical evidence of this causal relationship further validated ISAF's emphasis on restraint. General McChrystal reflected: "That really affected me. Because I remember the takeaway from that [CAAT Civcas Brief] was, no matter who causes violence in an area – you do it or the enemy – it makes the area less secure and less stable over time. Get down the violence, period, and then you can start other things."<sup>20</sup>

Despite the moral, legal, and strategic justification for courageous restraint, it met significant resistance from many of the individual soldiers and marines in the field who were asked to use it, at least as interpreted by their immediate chain of command. Small unit combat in the restive areas of Helmand, Kandahar, the Korengal Valley, and other hot spots remained, as it has throughout his-

tory, a kill-or-be-killed exercise in survival from the perspectives of those closest to the fighting. It was difficult to convince these forces that accepting risk in a combat situation – deliberately jeopardizing the lives and safety of one's own forces – may be the optimal response in strategic terms. Neutralizing imminent lethal threats to yourself and fellow comrades using the most effective weapons systems and firepower available is a near reflexive action for combatants struggling to survive and triumph in the heat of battle with all the fear and visceral emotions that accompany it. Exercising restraint may very well be a morally correct and strategic response, but is exceptionally challenging to implement for those expected to pay the devastating human costs that can result from showing restraint.

A U.S. Army Ranger company commander described an incident involving another company in his battalion that underscored the reality troops faced when operating in compliance with aspects of the tactical directive:

They were on target and began taking fire from a two-story compound. One of the Rangers was seriously wounded. The Platoon maneuvered and suppressed the target but based on the thickness of the walls were unable to neutralize the threat. They fired 40mm, M320 rounds, M240L, and multiple M3 Carl Gustaf rounds without any success.<sup>21</sup> They then requested permission to utilize a Hellfire (air to ground missile) from a support Apache (attack helicopter), and were denied. They were told to withdraw and return to base. These types of missions were the hardest to explain to the guys who were risking all and feeling that they weren't always supported based on the need to prevent the strategic negative.<sup>22</sup>

Another experienced U.S. Army Ranger commander, deployed to Afghanistan in 2010, believed a major aspect driving the Rangers to comply with the directives was



fear that their actions would be responsible for getting their unit in trouble with the senior ISAF leadership: “We did not want to be responsible for shutting down the Task Force [special operations unit]. My Rangers understood the importance [of the tactical directive], but having been on a few hundred raids, I saw that no matter how well we did we were horrible at the IO [information operations] fight and that once we left the target anything could be said and a Presidential Inquiry from Karzai typically just reinforced the negative story.”<sup>23</sup>

Civilian casualties were at times difficult to avoid in the course of operations, even when the restraint and tactical patience called for from the updated ISAF directives were followed. A special operations mission in Ghazni province in 2010 represents one particularly extreme example. The Rangers maneuvering during this raid came under fire from a compound on the target and they responded with well-aimed fire at the combatants engaging them. In the course of this engagement, some of the small arms rounds fired by the Rangers passed through the torso of the enemy combatant and struck a woman behind him not visible to the Rangers. An official inquiry conducted by the Ranger unit supported the information and images collected on target. A subsequent Afghan presidential inquiry, however, concluded instead that the U.S. military members were not provoked or in any danger when they killed multiple women and children and even claimed that there were not any Taliban at the residence where the civilians were killed. This type of misinformation from the Afghan government at that time was a most frustrating aspect and challenge to the implementation of the tactical directives for ISAF forces.<sup>24</sup>

A significant challenge in garnering support for courageous restraint was overcoming the inertia and default behavior within the ranks when U.S. forces made

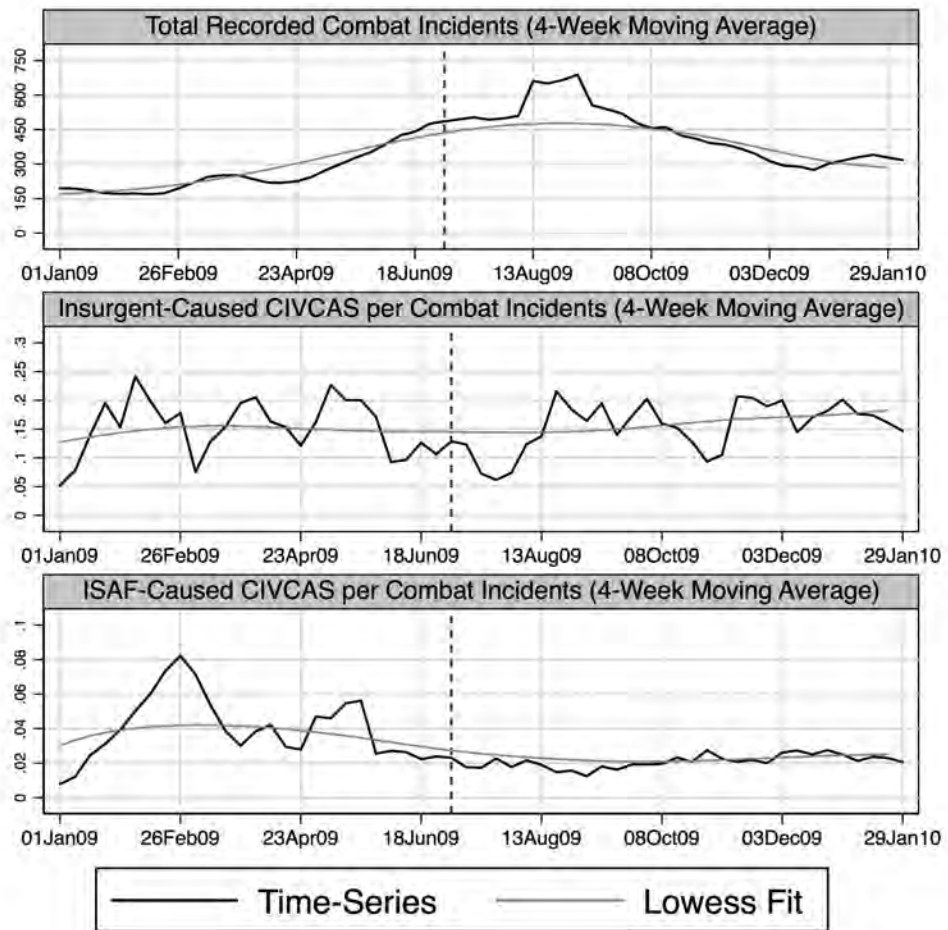
contact with the enemy. Traditionally, soldiers were rewarded for aggressive actions on the battlefield that inflicted casualties or damage on the enemy. A U.S. infantry officer serving in Afghanistan at the time recounted: “The first tactical directives were the hardest to embrace, because we had gone from total freedom of maneuver in Iraq and in the early years in Afghanistan to a more constrained MO in the later years in Afghanistan. Eventually, we figured out that Afghanistan in the 2010s was more politically sensitive, and we adjusted our attitudes and tactics accordingly.”<sup>25</sup> Additionally, the notion that restraint on the battlefield should be recognized and rewarded was not consistent with how soldiers were trained and largely not how they had operated in previous tours to date. Choosing to avoid kinetic engagements with the enemy under some conditions to avoid civilian casualties and support strategic objectives is a tough sell for troops at the tactical level.

General McChrystal described how ISAF troops that were able to work closely with the local population were much more inclined to appreciate the critical importance of protecting civilians than were those that had little real contact with Afghans: “When these people were in an area for a long time, and they got enough interaction with the local population so that they could see the complexity of that situation, they’re the ones who get it.”<sup>26</sup>

The command emphasis on reducing civilian casualties had a significant impact on the number of civilian casualties attributed to progovernment forces. In the year following General McChrystal’s command directives, there was a 28 percent reduction in casualties attributed to American, NATO, and Afghan forces; deaths from aerial attacks fell by more than one-third.<sup>27</sup>

Figure 1 shows the time-series of combat incidents and two measures of civilian

The Case of *Courageous Restraint* Figure 1  
 Time-Series of Combat Incidents and Two Measures of Civilian Casualties



Source: Figure generated from data used in Luke N. Condra, Joseph H. Felter, Radha K. Iyengar, and Jacob N. Shapiro, “The Effect of Civilian Casualties in Afghanistan and Iraq,” NBER Working Paper #16152 (Cambridge, Mass.: National Bureau of Economic Research, 2010). Combat incidents data tracked by ISAF were extracted from the Combined Information Data Network Exchange database, <https://www.issinc.com/cidne/>. Civilian casualty incidents were recorded by the ISAF Civilian Casualty Tracking Cell.

casualties, as recorded by the ISAF Civilian Casualty Tracking Cell, from January 2009 through January 2010. The top panel shows the four-week moving average of combat incidents per week: combat violence rises throughout summer 2009 and then begins to dip in the fall and into the winter. The middle panel shows the four-

week moving average of insurgent-caused civilian casualties (killed plus wounded) per combat incident. This is a measure of how much risk civilians faced from insurgents given the intensity of combat. Throughout the period, there were approximately 0.15 civilian casualties caused by insurgents per combat incident. The

bottom panel shows the four-week moving average of ISAF-caused civilian casualties (killed plus wounded) per combat incident. This is a measure of how much risk civilians faced from ISAF given the intensity of combat. Prior to General McChrystal's revised tactical directive, ISAF forces caused approximately 0.04 civilian casualties per combat incident. Afterward, that number dropped in half, to 0.02.

These data highlight two important patterns. First and foremost, civilians were at much greater risk from insurgents in 2009. Second, the risk to civilians from ISAF-given levels of combat dropped substantially starting in late May 2009, when the COMISAF began emphasizing civilian casualties as a threat to accomplishing the mission. The courageous restraint concept was clearly being adopted by ISAF personnel.

But these measures not only protected civilians; the restrictions on the application of firepower protected the Taliban as well. This was likely a contributing factor in the dramatic overall increase in civilian deaths during the year that courageous restraint was implemented given that the large majority of civilian deaths recorded were attributed to actions initiated by the Taliban. Additionally, in some instances, the increased restrictions on the use of firepower disappointed ISAF partners in the Afghan National Security Force who depended on U.S. firepower as a key combat multiplier and thus were not always supportive of ISAF units' decisions to restrict their employment of these resources even when available.<sup>28</sup>

General David Petraeus took command of ISAF in a subdued ceremony on July 4, 2010, following the abrupt departure of General McChrystal in the wake of the publication of an article in *Rolling Stone* magazine in which his subordinates were quoted making disparaging remarks about senior U.S. political leaders. Critics of courageous re-

straint were hopeful that the new COMISAF would revise or even retract some of his predecessor's policies and address a directive that some perceived as overly restrictive of their right to defend themselves. A senior British noncommissioned officer in Sangin, Helmand Province, lamented at the time: "Our hands are tied the way we are asked to do courageous restraint. I agree with it to the extent that previously too many civilians were killed but we have got people shooting us and we are not allowed to shoot back. Courageous restraint is a lot easier to say than to implement."<sup>29</sup>

General Petraeus literally "wrote the book" on population centric counterinsurgency, however, and the emphasis he placed in principle on limiting civilian casualties reflected more continuities than differences with that of his predecessor.<sup>30</sup> But the new COMISAF appreciated the misgivings voiced from soldiers in the field and amplified up the chain of command and, in some cases, all the way to their representatives in Congress. He was concerned that his predecessor's policies on tactical level restraint and restrictions on employment of force had gone too far. He implemented key revisions to the explicit content as well as interpretation of COMISAF guidance to ISAF troops operating in the field.<sup>31</sup>

Comparing the updated tactical directive that General Petraeus issued in July 2010 with McChrystal's 2009 version, it is clear that General Petraeus's directive strived to alter the risk relationship/balance between Afghan civilians and the U.S. military.<sup>32</sup> The 2009 directive acknowledged that "the carefully controlled and disciplined use of force entails risk to our troops"<sup>33</sup> and that the imperative to protect forces may at some level, in some conditions, be subordinate to protecting civilian populations. General Petraeus's revision of the tactical directive one year later explicitly put protection of Afghan civilians and protection of service members as

Joseph H.  
Felter &  
Jacob N.  
Shapiro



equal moral imperatives. Importantly, he adds additional emphasis that no members of ISAF would be denied the right to defend themselves, nor could any subordinate commander make further restrictions to his guidance.

General Petraeus emphasized, however, that he expected ISAF troops to display what he termed “tactical patience” in their operations, which was largely consistent with the intent of courageous restraint. General Petraeus admonished coalition forces in his revised directive: “We must continue – indeed, redouble – our efforts to reduce the loss of innocent civilian life to an absolute minimum. Every Afghan civilian death diminishes our cause.”<sup>34</sup> Thus, the war effort at ISAF continued with a COMISAF committed to limiting civilian casualties from ISAF operations. While courageous restraint du jour left with General McChrystal, the de facto emphasis on being prepared to assume risk to avoid civilian casualties endured and was largely consistent with the ongoing comprehensive population-centric counterinsurgency strategy pursued.

Exercising restraint and limiting non-combatant casualties is nearly always justified on moral grounds and according to the applicable international law and conventions. The aggregate returns on accepting risks at the tactical level, however, vary based on the characteristics of the conflict.

Enforcing policies that call for discriminate use of firepower and exercising restraint in its application can be a net gain for states combating insurgency and other internal threats. The anticipated gains from such restraint, however, will vary, and developing an appreciation of where and under what conditions these gains are most significant is important to understand. General McChrystal, in his 2009 tactical directive, acknowledges that the document outlined his intent but would

have to be interpreted by junior leaders and individual soldiers in the context of the situation and local conditions at hand. “I cannot prescribe the appropriate use of force for every condition that a complex battlefield will produce, so I expect our forces to internalize and operate in accordance with my intent. Following this intent requires a cultural shift within our forces – and complete understanding at every level – down to the most junior soldiers. I expect leaders to ensure this is clearly communicated and continually reinforced.”<sup>35</sup> When soldiers, marines, and other combatants are asked why they performed in a certain way in the heat of combat, they are likely to respond: “I did what we were trained to do.” In the stress, uncertainty, and ambiguity of combat, individuals’ behavior defaults to how they were trained. It’s critical to continue to invest in the quality of junior leaders and training of all combatants and ensure that their preparation and training provides a base to draw on when making these split-second life and death decisions both for themselves, the enemy they are attempting to engage, and the noncombatants potentially caught in the crossfire.

“Right now we’re losing the tactical-level fight in the chase for a strategic victory. How long can that be sustained?”<sup>36</sup> The exasperated U.S. military officer making these remarks in the spring of 2010 cast doubt on the tactical restraint and emphasis on reducing civilian casualties that ISAF was promoting at this time. To him, no strategic goal was worth, or could survive, continual tactical failure. But asking ISAF troops to embrace and display courageous restraint was made with clear strategic objectives in mind. Sun Tzu allegedly warned, “Strategy without tactics is the slowest route to victory. Tactics without strategy is the noise before defeat.”<sup>37</sup> This ancient dictum still applies today in that tactical gains are irrelevant unless they are accompanied by an

overarching strategy that links the outcome of individual engagements to achieving a larger political goal.

We recognize that striking the balance between fostering conditions necessary to make gains at the strategic level and achieving tactical objectives, including force protection, is difficult, and ultimately believe the answer is conditional. In cases of asymmetric counterinsurgency, popular support and willingness to share information can be significantly impacted by perceptions and judgments shaped by tactical level actions and activities. Thus, tactics that are effective in the moment of an engagement, such as the employment of artillery or large volumes of heavy weapons fire, can undermine overarching strategic ends in ways not experienced in symmetric conflict, where support and information from the population are less consequential. If victory is defined in comprehensive terms, the route to achieve it must reflect the concerns that courageous restraint was designed and intended to address.

Protecting the population as a means to garner greater popular support and accepting increased risk to forces in order to limit casualties to noncombatants pays off in some cases under some conditions and less so in others. Courageous restraint was always intended to be interpreted in case-and-situation-specific contexts. As General McChrystal acknowledged, "I wrote [the tactical directive] not to prescribe tactical decisions for sergeants and junior officers closest to the fight, but to help them understand the underlying logic of the approach I was asking them to employ."<sup>38</sup> The potential returns on exercising restraint and tactical patience on the battlefield must be recognized and anticipated by military leaders at the small unit level.

Measures intended to minimize civilian casualties such as courageous restraint can be a strategic net gain for forces combating insurgencies and in other conflicts

where information and support from the civilian population are critical enablers for success. Voluntarily displaying such restraint is a challenging concept to internalize, however, especially for troops who expect to make contact with a deadly enemy and are trained and conditioned to decisively bring to bear the superior combat power they possess. The near-term risks and costs of exercising this restraint are very clear to soldiers exercising it, whereas its anticipated strategic benefits in the longer term are far less compelling at the tactical level – especially in the heat of the moment in combat. For commanders and soldiers in the field, the optimal level of restraint – if any – in a given situation will vary based on a multitude of dynamic factors and conditions.

Investments in education and training, as well as in quality leadership down to the small unit level, can increase combatants' capacity to make decisions tailored to the prevailing tactical *and* strategic conditions. In the heat of combat, however, the decisions that impact the lives of soldiers and noncombatants alike and that can influence the strategic direction of a military campaign are complex dilemmas often only made clear in hindsight, if ever.

Ultimately, third-party counterinsurgency campaigns such as the U.S.-led effort in Afghanistan can only be as effective and legitimate as the governments they support. Limiting harm to civilians in areas where government authority is contested is not only a moral imperative but also an important component of any comprehensive strategy to achieve victory in these conflicts. It can provide near-term tactical advantages and buttress efforts to convince civilians to support the government. When the incumbent government is viewed as corrupt, unrepresentative, or otherwise illegitimate, however, even the most discriminate military forces of the state and its allies will be constrained in their abili-

ty to gain the support from the population needed to roll back insurgent threats, much less to sustain that support and prevent a return to violence. For many military forc-

es engaged in the complex struggle to combat insurgent threats, this is the essence of the challenge.

#### ENDNOTES

- \* JOSEPH H. FELTER is Senior Research Scholar at the Center for International Security and Cooperation, Research Fellow at the Hoover Institution at Stanford University, and Codirector of the Empirical Studies of Conflict Project. He is a retired U.S. Army Special Forces Colonel who led the International Security and Assistance Force, Counterinsurgency Advisory and Assistance Team in Afghanistan. He has published articles in journals such as the *Journal of Political Economy*, *Journal of Conflict Resolution*, *American Economic Review*, *Foreign Policy*, and *Foreign Affairs*.
- JACOB N. SHAPIRO is Professor of Politics and International Affairs at Princeton University and Codirector of the Empirical Studies of Conflict Project. He is the author of *The Terrorist's Dilemma: Managing Violent Covert Organizations* (2013) and coauthor of *Foundations of the Islamic State: Management, Money, and Terror in Iraq* (2016). His research has been published in a variety of academic and policy journals. Shapiro received the 2016 Karl Deutsch Award from ISA given to the scholar younger than forty or within ten years of earning a Ph.D. who has made the most significant contribution to the study of international relations.
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- <sup>20</sup> Felter telephone interview with General (ret.) Stanley McChrystal, May 24, 2015.
- <sup>21</sup> These weapon systems refer to rapid-fire grenades, heavy machine guns, and a Swedish-made recoilless rifle similar to a bazooka, respectively.
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- <sup>23</sup> Interview with SOF Major and former Ranger Company Commander, May 28, 2015.
- <sup>24</sup> Vignette provided by a U.S. Army Ranger officer during an interview with Felter on May 28, 2015.
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# Just War Theory & the Conduct of Asymmetric Warfare

*Allen S. Weiner*

*Abstract: A central element of the dominant view of just war theory is the moral equality of soldiers: combatants have equal rights to wage war against one another and are entitled to certain protections if captured, without regard to which side's cause of war is just. But whether and how this principle should apply in asymmetric armed conflicts between states and nonstate groups is profoundly unsettled. I argue that we should confer war rights on fighters for nonstate groups when they are engaged in violence that has risen to the level of armed conflict, and when the state against which the war is being waged is not entitled to assert its monopoly on the legitimate exercise of force, either because 1) the nonstate group has established sufficient control over territory to assert its own governing authority; or 2) because the group is located abroad. Conferring war rights on nonstate fighters does not, however, permit them to engage in acts that violate the laws of war. Fighters who commit such violations are individually subject to prosecution without regard to their group's entitlement to war rights.*

ALLEN S. WEINER is Senior Lecturer in Law, Director of the Program in International and Comparative Law, and Codirector of the Center on International Conflict and Negotiation at Stanford Law School. He is the author of *International Law* (6th edition, 2011) and the articles "Ending Wars, Doing Justice: Colombia, Transitional Justice, and the International Criminal Court" (2016) and "Hamdan, Terror, War" (2007). He has written for *Stanford Law Review*, *American Journal of International Law*, *Dynamics of Asymmetric Conflict*, *The New York Times*, and *The Washington Post*, among other publications.

The notion of the moral equality of soldiers arises from traditional just war theory's embrace of a "dualism of our moral perceptions," under which we distinguish between the justice of recourse to force (*jus ad bellum*) and the justice of the conduct of war itself (*jus in bello*). This separation means that an unjust war of aggression can be fought by just means, and a just war of self-defense can be fought unjustly. Because soldiers fight largely out of a sense of loyalty and accept their particular side's representations about the justice of its cause, the moral status of individual combatants, in the words of Michael Walzer, "is very much the same.... They face one another as moral equals." It follows that soldiers, regardless of which side they fight for, have equal moral standing to invoke the special rights that apply in wartime. To put it plainly, soldiers in wartime possess "the equal right to kill."<sup>1</sup>

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The international law of armed conflict reflects the principle of the moral equality of soldiers. Under the law, soldiers may claim entitlements to two key clusters of rights. First, soldiers in wartime – at least those participating in an international armed conflict between states – possess the “combatant’s privilege,” or the right to kill and wound enemy soldiers and to destroy enemy military property without criminal liability.<sup>2</sup> As Telford Taylor, who served as the chief prosecutor before the U.S. military tribunals at Nuremberg, explained: “War consists largely of acts that would be criminal if performed in time of peace. . . . Such conduct is not regarded as criminal if it takes place in the course of war, because the law lays a blanket of immunity over the warriors.”<sup>3</sup> Second, combatants in wartime who fall into the hands of their enemy benefit from certain forms of humane treatment if they cease to take part in hostilities, either because they are sick or injured or because they have surrendered. They may not be killed, tortured, or otherwise subjected to “inhuman treatment.”<sup>4</sup> And they are entitled to what is referred to as “benevolent quarantine,” that is, they are entitled to be treated as prisoners of war, a status that entails an elaborate set of rules regarding their rights and treatment.<sup>5</sup> These rights – the right to kill enemy soldiers and to destroy permissible enemy targets with immunity from criminal liability, together with the right to some basic form of benevolent quarantine – are what I have in mind in this essay in referring to “war rights” of combatants.<sup>6</sup>

Unsurprisingly, the war rights of soldiers come with a corresponding set of liabilities. The corollary of the combatant’s privilege is that a soldier, during wartime, may be targeted and killed at any time, even if he poses no immediate threat to the person targeting him. The corollary of the right of benevolent quarantine is that soldiers may be detained as prisoners of war, without being

charged or convicted of any crime, to prevent them from returning to the fight. Prisoners of war may be detained for an indeterminate, even indefinite, period of time, and have a right to be set free only upon a cessation of hostilities.

Under the law of armed conflict, however, soldiers possess war rights only in the context of international armed conflict: namely, a war between two or more states. The 1949 Geneva Conventions regulating armed conflict and Additional Protocol I of 1977 each apply only in the case of armed conflict between states that are parties to the Conventions.<sup>7</sup> Although Additional Protocol II of 1977 represented a novel, albeit modest, attempt to expand the law of armed conflict in “armed conflicts not of an international character,” that Protocol does not confer “combatant” status on fighters for nonstate groups and does not articulate war rights, at least not in the sense used in this essay, for participants in such conflicts. The prevailing view is that international law is largely silent on the status of fighters in asymmetric conflicts, by which I mean conflicts between a state and a nonstate group, which lawyers refer to as “noninternational armed conflicts” (NIACs).

To be sure, the law of armed conflict does have some application to fighters in NIAC, and extends both protections and restrictions. Common Article 3 of the 1949 Geneva Conventions (the sole provision of the 1949 Conventions that applies to noninternational armed conflict) and Protocol II provide that fighters who have surrendered or are wounded and are no longer taking part in active hostilities are entitled to humane treatment.<sup>8</sup> Protocol II also establishes some limited humanitarian protections for persons “deprived of their liberty for reasons related to the armed conflict,” although it does not extend benevolent quarantine rights to fighters in NIAC. And Protocol II and customary international law impose restrictions on the means and methods

of waging a noninternational armed conflict that bind both government forces and nonstate fighters alike.

But international law does not confer war rights on fighters in noninternational armed conflict equivalent to the combatant's privilege.<sup>9</sup> There is no provision that prohibits a government from prosecuting the nonstate side's fighters for acts that would fall under the combatant's privilege in an international armed conflict.<sup>10</sup> While the lack of a combatant's privilege in noninternational armed conflict may once have been merely an esoteric point of the law of armed conflict, it has emerged as a significant concern in the post-9/11 world. Since then, the United States has entered into an asymmetric armed conflict with Al Qaeda, the Taliban, and associated forces,<sup>11</sup> a war in the course of which the United States has been unwilling to recognize any war rights on the part of its adversaries. The United States has refused to allow enemy fighters to claim that their violent activities are privileged, even when they engage in traditional, nonterrorist forms of armed combat. Thus, some of those charged by military commissions at Guantánamo Bay have been charged with such offenses as "murder by an unprivileged belligerent,"<sup>12</sup> "attempted murder by an unprivileged belligerent,"<sup>13</sup> or conspiracy to commit "murder by an unprivileged belligerent,"<sup>14</sup> even though the accusations against them describe engagement in, or preparations for, conventional combat with members of U.S. or coalition armed forces.

Nor does the law of armed conflict confer rights of benevolent quarantine on fighters in noninternational armed conflict. Although persons detained during such conflicts are due basic humane treatment, such as the provision of food, water, and health care, they may not invoke the carefully regulated regime of rights and protections that governs the treatment of prisoners of war in international armed conflict. Soon after

detainees captured during Operation Enduring Freedom, the post-9/11 use of force led by the United States in Afghanistan, were transferred to the U.S. naval facility at Guantánamo Bay, the United States took the categorical view that no members of Al Qaeda were entitled to prisoner of war status because Al Qaeda is not a state, and its fighters consequently could not claim war rights under the Geneva Conventions. They were held in conditions incompatible with the requirements of the Geneva Convention on Prisoners of War. In addition, captured fighters in a NIAC are subject to criminal prosecution for "offenses related to the armed conflict"; instead of Telford's "blanket of immunity," such detainees are provided with only limited procedural protections regarding the independence and impartiality of the courts before which they may be tried.<sup>15</sup>

Thus, in contrast to international armed conflict, in which soldiers face one another as moral equals, in noninternational armed conflict international law institutionalizes a profound asymmetry between the war rights of state and nonstate fighters. For even as states deny rights derived from the law of armed conflict to nonstate groups in asymmetric conflicts, they invoke war rights for themselves under that very body of law.

In the course of its post-9/11 armed conflict against Al Qaeda, the Taliban, and associated forces, for example, the United States has exercised many of the extraordinary authorities that are available only during times of war.<sup>16</sup> U.S. forces have claimed and exercised the right – on the basis of law of war principles – to kill enemy fighters in Afghanistan, Pakistan, Yemen, Somalia, Syria, and Iraq. In addition to targeting, U.S. forces in Afghanistan have routinely detained Taliban fighters; the "laws and customs of war" provided the stated authority to detain such individuals on the battlefield.<sup>17</sup>

The exercise of war rights by the United States against nonstate groups is not solely a post-9/11 phenomenon. The United States has effectively invoked such rights in a variety of other contexts, including the attacks against targets in Sudan and Afghanistan following the 1988 bombings of American embassies in Tanzania and Kenya by Al Qaeda affiliates. The U.S. personnel who killed Al Qaeda members or destroyed property in Afghanistan and Sudan undoubtedly acted on the assumption that they were not murderers, but rather were engaged in behavior protected by the combatant's privilege.

Nor is the United States by any means the only country to claim wartime rights against nonstate groups without recognizing reciprocal rights on the part of the adversary. Illustrative contemporary cases include Turkey's use of force against Kurdistan Workers' Party (PKK) fighters in Turkey and Syria, Ukraine's treatment of separatist forces in Eastern Ukraine, the Colombian government's refusal to accord prisoner of war status to FARC (Revolutionary Armed Forces of Colombia) fighters during Colombia's civil war, and Israel's conflict with Hamas in the Gaza Strip.

The failure of the law of armed conflict to recognize the moral equality of soldiers in the context of asymmetric conflicts is particularly striking given that noninternational armed conflicts are much more prevalent than wars between states, and have been increasing as a proportion of wars since the end of World War II.<sup>18</sup> While it may not be surprising that states do not find it in their interest to accord war rights to the nonstate groups that take up arms against them, the increasing prevalence of asymmetric warfare calls on us to examine if nonstate groups *should* have war rights, as a matter of just war theory. The remainder of this essay examines whether, and under what circumstances, nonstate fighters should be accorded

war rights – both the combatant's privilege and the right to benevolent quarantine – when engaged in a noninternational armed conflict.

What do the philosophers say about the war rights of nonstate groups? Despite the prevalence of noninternational armed conflict, much of just war writing does not explicitly address asymmetric conflicts and whether the rules that apply in such wars comport with or differ from those that pertain in wars between states.<sup>19</sup> Some more recent work does address the subject, but presents quite fragmented views. Still other theorists who begin from a cosmopolitan perspective, like Cécile Fabre, reject the notion that the rights of individuals, including their rights during wartime, derive from their membership in a group of any kind, be it a state or nonstate group.<sup>20</sup> For cosmopolitans, the question of whether the war rights of nonstate fighters differ from those of members of the armed forces of a state is, accordingly, a *non sequitur*.

Among those just war theorists who have considered whether, and under what circumstances, nonstate armed groups should be able to claim war rights, several approaches have emerged. One line of thought seeks to update the requirement from traditional just war theory that war, in order to be justified, must be authorized by a "legitimate authority," which in early writings on the topic was understood to be limited to the sovereign. This strand of just war theory affirms the relevance of the "legitimate authority" requirement, but rejects its state-centric provenance and revises it to recognize entities other than states that might qualify. Adherents to this view will ask whether a "community"<sup>21</sup> or "political society"<sup>22</sup> exists that is entitled to seek self-governance, and which in turn may claim the right to have recourse to political violence. Assuming a group qualifies as a political community, a closely related



question is whether those who have taken up arms genuinely represent that community, or are merely taking up violence in its name.<sup>23</sup> Under this “consent principle,” a warring group will satisfy the legitimate authority requirement only if it has been authorized to wage war “by those on whose behalf the war is fought.”<sup>24</sup> Some theorists add prudential considerations, such as whether the nonstate armed group has reasonable prospects of success; others note that even though states may not be the only entities that can be legitimate authorities, in practice they are more likely to satisfy the requirement than nonstate groups.<sup>25</sup>

A second approach tends to link a nonstate group’s entitlement to wage war to the character, and sometimes even the justice, of its cause for waging war. A first line of demarcation is to extend war rights only to nonstate groups acting on the basis of *political* motivations, as opposed to other violent groups (like organized crime groups).<sup>26</sup> A second proposed limitation is to deny the entitlement to wage war to groups (whether they are states or nonstate groups) that cannot “pass basic moral tests”: an organization that is “sufficiently evil...cannot represent a political community; its members can act only in their private capacity.”<sup>27</sup> Revisionist theorists generally adopt this perspective and accord war rights only to those whose *ad bellum* cause for war is just; unjust combatants cannot claim war rights regardless of whether the entity for which they are fighting is a state or a nonstate group. And the cosmopolitans are explicit: the question of whether a group may claim war rights depends on whether its rights are being violated, and not the characteristics of the group; indeed, some cosmopolitans argue that even individuals may claim the right to wage war in certain circumstances.<sup>28</sup>

A third position – one espoused more by lawyers than just war theorists – links entitlement to war rights to the means a non-

state group uses to wage war. Under this view, even if a fighting force is representative of a political community, and even if it is fighting for a just cause, the group’s eligibility for war rights depends on whether it complies with *jus in bello* principles. More precisely, adherents of this view believe that warring groups that might otherwise have a just entitlement to war rights forfeit those rights if they violate the laws of armed conflict; for example, if they intentionally target civilians, or if they fail to distinguish themselves from the civilian population. A related position is that armed groups may not claim war rights if they do not meet the standards the law of war uses to define who qualifies as a member of the armed forces of a state: namely, operating under a responsible command; having a fixed distinctive sign recognizable at a distance; carrying arms openly; and conducting operations in accordance with the laws and customs of war.<sup>29</sup>

The principles that underlie the moral equivalence of soldiers in wartime seem to me to be *prima facie* applicable in nonstate conflicts. War, even asymmetric war, is a collective, not an individual, endeavor. Soldiers in such conflicts fight largely out of a sense of loyalty to their side, and they rely heavily on the group’s judgment about the justice of their cause. But not every nonstate group that takes up arms should be able to claim war rights. The challenge is to determine in which asymmetric conflicts the moral equivalence of soldiers should be recognized. In my view, none of the prevailing just war theory approaches captures the correct standard, particularly if our goal is to identify a morally defensible standard that can be sensibly and realistically administered in practice. The difficulty with grounding war rights in a principle of legitimate authority is that virtually any nonstate group that takes up arms will claim to represent a political commu-

nity and to have been authorized to fight on its behalf; in the absence of formal governing institutions possessed by states, it will be difficult to evaluate that claim. Similar difficulties arise in linking war rights to the morality of the reasons for having recourse to armed conflict: virtually any warring nonstate group will claim, and probably even believe, that it is fighting for a just cause. As for a test based on compliance with the law of war, the record of a nonstate armed group is likely to be mixed, at best; there is no clear-cut standard for judging what portion of – or the extent to which – a group must fight in violation of the laws of war before that group collectively forfeits war rights, much less for ascertaining what proportion of that force is in fact violating the laws of war.

Administrability matters. Although some argue that it is for the law of war, and not just war theory, to concern itself with compliance and enforceability,<sup>30</sup> a moral framework that effectively delegates to nonstate groups themselves the authority to judge whether they possess war rights fails to provide viable criteria for making moral judgments about the real world. Worse, such a framework runs the risk of perversely turning the goal of revisionist just war theorists on its head by encouraging more wars, including more unjust ones. I accordingly side with those who favor moral norms that are “implementable and action-guiding” in the real world.<sup>31</sup>

Judgments about the war rights of nonstate groups should therefore not necessarily focus on the motivations and characteristics of the group. Rather, the first test I suggest for whether a nonstate group may claim war rights is the (relatively) objective question of whether a state of “armed conflict” exists. International law has a settled set of criteria for deciding whether political violence has risen to the level of noninternational “armed conflict,” as opposed to “mere banditry or an unorga-

nized and short-term insurrection.”<sup>32</sup> Violence amounts to armed conflict when it reaches a high level of intensity,<sup>33</sup> when it is protracted,<sup>34</sup> and when the nonstate group qualifies as a “party” to armed conflict, meaning that it possesses organized armed forces under a command structure with the capacity to sustain military operations.<sup>35</sup> Perhaps the most significant test is whether the government “is obliged to have recourse to [its] regular military forces,” rather than its police, to counter the security challenge presented by the insurgent group.<sup>36</sup> Application of these criteria will not always be clear-cut, but whether they are met in any given case is a question of fact, not a matter of self-judgment by the nonstate party about its motives or character. Nor will the question of whether a state of armed conflict exists be determined by the policy preferences of the state party to the conflict, which might be expected to deny that status to its nonstate opponent for fear of conferring an unwelcome form of legitimacy on the group. The facts on the ground, not the pronouncements of the parties, will determine whether a state of armed conflict exists.

In applying this test, it is particularly important to look at the conduct as well as the legal claims of the government that is engaged in political violence against a nonstate group. Where the government itself claims war rights, that is, the right to kill nonstate fighters on the battlefield rather than arresting them and trying them for crimes, or to detain them for the duration of a conflict without charge, this creates a presumption that the opposing force is entitled to claim reciprocal war rights. This reflects the basic assumption of moral equality that undergirds the war convention in the context of interstate wars. In other words, where a government claims to be “at war” with a nonstate group – as the Sri Lankan government did when it declared war against the Tamil Tigers or

as Turkey has effectively done in launching airstrikes against Turkish PKK fighters – it presumptively triggers the reciprocal application of war rights on the part of the opposing nonstate group. Subject to the limitations of the second test set out below, once we have crossed the threshold from an ordinary legal situation into the extraordinary state of armed conflict, both parties to the conflict should have war rights.

But crossing the threshold into a state of armed conflict is not itself sufficient to confer war rights on nonstate groups. The second test I propose would limit the extension of war rights to nonstate groups involved in armed conflicts that take place in a geographic space where the government may not rightfully claim the authority to exercise the state's ordinary monopoly on the use of force. The test arises from the premise that an essential authority of the state is its monopoly on the legitimate use of force within its territory. From this flows the state's authority to make its law applicable to violence that takes place in its territory and to criminalize violence that occurs there, including violence directed against the state itself. This explains why the United States retains the right to prosecute members of extremist militias like the Symbionese Liberation Army or the Hutaree Militia in Michigan – even if those groups advocate violent resistance to the United States government – and why Germany retained the right to prosecute members of the Red Army Faction for violent acts against state officials.

In some cases, a nonstate group's security challenge to the state may be so serious that the state can no longer rely on its ordinary police forces and must have recourse to its security forces to suppress violence, as in the case of pervasive violence by organized crime groups in Mexico. While violence in such a case may cross the thresh-

old of armed conflict, it does not necessarily mean that the threatened state may no longer rightfully assert its monopoly on the legitimate use of force. Rather, it is only when a group waging war against a state can plausibly claim that it has supplanted the state's functions in exercising the legitimate monopoly of violence that the state forfeits its exclusive right to resort to force. But the loss of a *capacity* to suppress violence does not itself signify the loss of a *right* to suppress violence. Instead of examining solely the nonstate group's motivations, the justness of its cause, or its representative character, this test for the acquisition of war rights focuses on the extent to which the group exercises governance functions. Fighters for nonstate groups that have not plausibly asserted a right to govern and to exercise a monopoly of force in part of a state's territory need not be accorded war rights. They are challengers to the state's legitimate monopoly on the use of force and may appropriately be prosecuted for murder if they kill members of the state's security forces.

These tests seek to balance the war rights of nonstate groups with legitimate state concerns about losing the ability to exercise the law enforcement sanction to control political violence. Efforts to extend the law of war to asymmetric conflicts have traditionally confronted concerns that doing so would undermine the state's domestic authority. The authoritative commentary to the 1949 Geneva Conventions seeks to assuage these concerns by reassuring states that Common Article 3, the only article applicable to noninternational armed conflicts, "does not limit in any way the Government's right to suppress a rebellion by all the means – including arms – provided by its own laws; nor does it in any way affect that Government's right to prosecute, try and sentence its adversaries, according to its own laws."<sup>37</sup>



The supposition underlying the law of war is that a nonstate group should not be able to claim war rights – which derive from international law – against the state it is fighting where the state’s domestic law still applies. In certain contexts, however, we should depart from the presumption that a state faced with violence retains its monopoly on the use of force and its entitlement to rely on its domestic law to deny war rights to nonstate armed groups. That is why the second test of when a nonstate group acquires war rights asks whether that group operates in a realm where the opposing state’s purported right to the monopoly on the use of force does not apply; that is, whether the state is engaged in armed conflict in an “other-governed space.” Two such other-governed spaces are particularly salient.

First, when a group exercises sufficient control over territory within a state, the presumption of the state’s monopoly of control ceases to be justifiable. A useful guideline in this regard is the threshold for application of Additional Protocol II to the 1977 Geneva Conventions, which is triggered when dissident armed forces “exercise such control over a part of [a state’s] territory as to enable them to carry out sustained and concerted military operations”<sup>38</sup> – although Protocol II does not afford war rights to such dissident forces. This standard echoes the test under the old law of neutrality for determining when a nonstate group acquired the rights of belligerents: “Among the tests [for recognizing belligerent rights], are the existence of a *de facto* political organization of the insurgents, sufficient in character, population, and resources to constitute it, if left to itself, a State among nations, reasonably capable of discharging the duties of a State.”<sup>39</sup> Where a nonstate group exercises “*de facto* authority over persons within a determinate territory,”<sup>40</sup> the state waging war against that group lacks not only the

capacity, but also the right, to claim a monopoly on the use of force in the zone of war. Linking a nonstate group’s war rights to its governing functions derives not only from the opposing government’s loss of a legitimate basis for applying its domestic criminal law, but from a separate moral foundation: it comports with just war approaches that confer war rights on groups that represent and have the consent of the political communities on behalf of which they are fighting. If armed conflict takes place between two armed groups, neither of which may claim the right to rely on its domestic authority to govern the other, the fighters for the warring factions should be treated as moral equals, and each should be entitled to claim war rights.

Second, the presumption that a state is entitled to exercise a monopoly over the use of force on its territory, and may consequently make its law applicable to violence that occurs there, should not apply in *transnational* armed conflicts between states and nonstate groups that take place outside the state’s territory. The war the United States today is waging against Al Qaeda, the Taliban, and associated forces entails the use of armed force against nonstate groups located not only in Afghanistan and Iraq, where the United States operates with the consent of the territorial state, but also in Pakistan, Somalia, Yemen, and Syria. In at least some of these settings, the United States asserts that it is exercising self-defense rights under international law because the territorial government “is unwilling or unable to prevent the use of its territory for such attacks.”<sup>41</sup> The United States is using force in such contexts in an other-governed space; in such a setting, concerns that according war rights to a nonstate group would improperly displace the warring state’s monopoly on the legitimate use of force do not apply.

Thus, where political violence has crossed the threshold of armed conflict, and in circumstances where the state’s ordinary right

to exercise its monopoly on the legitimate use of force does not apply, a state invoking war rights may not claim the right to regulate violence by nonstate groups under its domestic law. In such circumstances, as in armed conflict between states, the state's regular domestic authority ceases to apply, and fighters for the nonstate groups should be entitled to war rights.

The tests I propose for conferring war rights on nonstate groups do not address the concern raised by some theorists, international lawyers, and military personnel that nonstate groups should not be entitled to claim war rights if their members do not conduct their military operations in accordance with the laws of war. Soldiers, in particular, might object that even if the goal of extending the principle of reciprocity to asymmetric armed conflicts is morally defensible, war rights should not be conferred on those who do not fight according to fundamental law of war principles that reciprocally bind soldiers: namely, that soldiers must distinguish themselves from the civilian population, must direct their operations only at military targets, and may not launch attacks that cause disproportionate harm to civilians.

These are valid concerns. But conferring war rights on a nonstate group in an other-governed space during times of armed conflict does not alter the duties that bind the nonstate fighters. Acts that violate the laws of war, including the intentional targeting of civilians or using civilians as shields, would not be privileged, even if the group whose fighters commit such acts is otherwise entitled to war rights with respect to operations that comply with *jus in bello* rules. Recognizing rights under the law of war for nonstate groups does not entitle such groups to kill the very noncombatants the law of war is meant to protect. Fighters who target civilians violate international humanitarian law and are subject

to prosecution as war criminals. Similarly, members of a nonstate armed group who do not distinguish themselves from civilians and carry their arms openly forfeit their war rights, and may be prosecuted as unprivileged belligerents.

As such, those who carry out what might properly be described as acts of terrorism – the intentional killing of civilians for political purposes – would not be entitled to invoke war rights even if such rights are extended to the nonstate group to which they belong. But the mere fact that a nonstate group has engaged in armed conflict against a government – which officials in many governments reflexively label as terrorism, without regard to the means of warfare employed by the nonstate group – should not deprive a group waging war in an other-governed space from the reciprocal entitlement to war rights. Similarly, the fact that some, or even many, of the members of an organized armed group do not distinguish themselves from the civilian population, or may engage in prohibited means of waging war, does not mean that the group as a whole forfeits its war rights – just as the fact that members of state armed forces sometimes violate *jus in bello* rules, sometimes extensively, does not mean that the country's armed forces, in their entirety, lose their war rights. Rather, we treat those who have intentionally targeted civilians or committed other grave violations of the law of armed conflict as war criminals. The same approach should apply to nonstate armed groups if some of their members violate the rules governing the conduct of war. But those members of such a group who do comply with *jus in bello* rules should retain the combatant's privilege and the right to benevolent quarantine.

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- <sup>1</sup> Michael Walzer, *Just and Unjust Wars*, 4th ed. (New York: Basic Books, 2006), 47, 127.
- <sup>2</sup> Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge: Cambridge University Press, 2010), 42.
- <sup>3</sup> Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Chicago: Quadrangle Books, 1970), 19.
- <sup>4</sup> *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949*, Articles 12 and 50, hosted at the International Committee of the Red Cross, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=4825657B0C7E6BF0C12563CD002D6B0B>.
- <sup>5</sup> Brian Orend, *The Morality of War*, 2nd ed. (New York: Broadview Press, 2013), 116 – 119.
- <sup>6</sup> There are important revisionist alternatives to the traditional just war view that reject the notion of the moral equality of soldiers. Jeff McMahan, for instance, believes that those fighting a just war, such as a war of self-defense against aggression, do not make themselves liable to being attacked by engaging in armed conflict. See Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009).
- <sup>7</sup> *Geneva Convention (I)*, Article 2, "Application of the Convention," <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=41229BA1D6F7E573C12563CD00519E4A>; and *Protocol Additional to the Geneva Conventions of 12 August 1949, and Related to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977*, Article 1, hosted at the International Committee of the Red Cross, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?documentId=6C86520D7EFAD527C12563CD0051D63C&action=OpenDocument>.
- <sup>8</sup> *Article 3 Common to the Geneva Conventions; Protocol Additional to the Geneva Conventions of 12 August 1949, and Related to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977*, Article 4, "Fundamental Guarantees," hosted at the International Committee for the Red Cross, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=F9CBD575D47CA6C8C12563CD0051E783>.
- <sup>9</sup> The one notable qualification is the inclusion within the scope of Additional Protocol I of "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination"; anticolonial fighters in such conflicts qualify as combatants and presumably possess war rights. *Protocol I*, Article 1, "General Principles and Scope of Action," <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?documentId=6C86520D7EFAD527C12563CD0051D63C&action=OpenDocument>.
- <sup>10</sup> *Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949*, Article 99, "Essential Rules. I. General Principles," hosted at the International Committee of the Red Cross, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=57CAB484520D699FC12563CD0051B2E2>.
- <sup>11</sup> Stephen W. Preston, "The Legal Framework for the United States' Use of Military Force Since 9/11," remarks at the Annual Meeting of the American Society of International Law, Washington, D.C., April 10, 2015, <http://www.defense.gov/News/Speeches/Speech-View/Article/606662/the-legal-framework-for-the-united-states-use-of-military-force-since-911>.
- <sup>12</sup> *United States v. Khadr*, U.S. Military Commission Referred Charges (April 5, 2007), para. 23.
- <sup>13</sup> *United States v. Hicks*, U.S. Military Commission Charge Sheet (June 10, 2004), para. 21. The initial 2004 charge against Hicks for attempted murder by an unprivileged belligerent stated that he "attempted to murder divers [*sic*] persons by directing small arms fire, explosives, and other means intended to kill American . . . and other Coalition forces, while he did not

enjoy combat immunity.” This charge ultimately was not referred by the convening authority for trial by a military commission. Allen S. Weiner

<sup>14</sup> *United States v. al Sharbi*, U.S. Military Commission Charge Sheet (Nov. 4, 2005), para. 13. The reference to murder by an unprivileged belligerent was removed from subsequent charges, but al Sharbi was charged with conspiracy to commit murder in violation of the law of war for the same acts for which he was initially charged with murder by an unprivileged belligerent: namely, building explosive devices “in order to attack United States and Coalition forces” in Afghanistan. See also *United States v. al Sharbi*, U.S. Military Commission Sworn Charges (January 12, 2009).

<sup>15</sup> *Protocol II*, Article 6, “Penal Prosecutions,” <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=DDA40E6D88861483C12563CD0051E7F2>.

<sup>16</sup> Allen S. Weiner, “Law, Just War, and the International Fight Against Terrorism: Is It War?” in *Intervention, Terrorism, and Torture: Challenges to Just War Theory in the 21st Century*, ed. Steven P. Lee (Dordrecht, The Netherlands: Springer Press, 2007), 137–153, 139.

<sup>17</sup> See Detainee Review Procedures at Bagram Theater Internment Facility (BTIF), Afghanistan, quoted in *Department of Defense Law of War Manual* (Washington, D.C.: United States Department of Defense, June 2015), 488.

<sup>18</sup> Lotta Themnér and Peter Wallensteen, “Armed Conflict, 1946–2010,” *Journal of Peace Research* 48 (2011): 525–536.

<sup>19</sup> Jonathan Parry, “Civil War and Revolution,” in *Oxford Handbook of Ethics and War*, ed. Seth Lazar and Helen Frowe (Oxford: Oxford University Press, 2015).

<sup>20</sup> Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012).

<sup>21</sup> Christopher J. Finlay, “Legitimacy and Non-State Political Violence,” *Journal of Political Philosophy* 18 (3) (2010), 287–312.

<sup>22</sup> Yitzhak Benbaji, “Legitimate Authority in War,” in *Oxford Handbook of Ethics and War*, ed. Seth Lazar and Helen Frowe (Oxford: Oxford University Press, 2015).

<sup>23</sup> Finlay, “Legitimacy and Non-State Political Violence,” 304–309.

<sup>24</sup> Parry, “Civil War and Revolution,” 8.

<sup>25</sup> Benbaji, “Legitimate Authority in War.”

<sup>26</sup> Christopher Kutz, “The Difference Uniforms Make,” *Philosophy and Public Affairs* 33 (2) (2005): 148–180, 176–177.

<sup>27</sup> Benbaji, “Legitimate Authority in War,” 4.

<sup>28</sup> Fabre, *Cosmopolitan War*, 145–148.

<sup>29</sup> Jens David Ohlin, “The Combatant’s Privilege in Asymmetric and Covert Conflicts,” *Yale Journal of International Law* 40 (2015): 337–393.

<sup>30</sup> Benbaji, “Legitimate Authority in War,” 11.

<sup>31</sup> Parry, “Civil War and Revolution,” 3.

<sup>32</sup> Jean S. Pictet, *Commentary, III Geneva Convention* (Geneva: International Committee of the Red Cross, 1960), 50.

<sup>33</sup> International Committee of the Red Cross, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?* (Geneva: International Committee of the Red Cross, March 2008), 3.

<sup>34</sup> International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, October 2, 1995, para. 70.

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# Rebellion, War Aims & the Laws of War

*Tanisha M. Fazal*

*Abstract: Most wars today are civil wars, but we have little understanding of the conditions under which rebel groups might comply with the laws of war. I ask three questions in this essay: What do the laws of war require of rebels, or armed nonstate actors (ANSAs)? To what extent are rebels aware of the laws of war? Under what conditions do rebel groups comply with international humanitarian law? I argue that the war aims of rebel groups are key to understanding their relationship with the laws of war. In particular, secessionist rebel groups – those that seek a new, independent state – are especially likely to comply with the laws of war as a means to signal their capacity and willingness to be good citizens of the international community to which they seek admission.*

The body of codified laws of war was written by states, principally to govern their conduct during wars with each other. But most wars today occur within, rather than between, states. The shift from interstate war to civil war raises a host of questions about how and whether the existing framework of international humanitarian law (IHL) – also referred to here as the laws of war – constrains states fighting civil wars and, particularly, the rebel groups they fight. In this essay, I focus on the laws of war from the perspective of rebel groups, asking: What do the laws of war require of rebels, or armed nonstate actors (ANSAs)? To what extent are rebels aware of the laws of war? Under what conditions do rebel groups comply with international humanitarian law?

The answers to these questions share a common theme: the political aims of rebel groups condition their view of the laws of war. Groups such as the Kurds, who seek to join the international community of states, strategically use their compliance with the laws of war to demonstrate their capacity and willingness to be good citizens of that community. For example, the Kurdish People's Protection Units (YPG), which have been supported by the West in ef-

TANISHA M. FAZAL is Associate Professor of Political Science and Peace Studies at the University of Notre Dame. She is also Associate Director of the Notre Dame International Security Center and an Adjunct Scholar at the Modern War Institute at West Point. She is the author of *State Death: The Politics and Geography of Conquest, Annexation, and Occupation* (2007).

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forts to expel the Islamic State from Syria and Iraq, publicly decried Islamic State targeting of civilians during the 2015 battle for Kobane.<sup>1</sup> Groups such as Al Qaeda in the Islamic Maghreb, by contrast, are invested in overturning the existing system and, as such, are unlikely to adhere to the current regime of international humanitarian law. Thus, it should be less surprising – but no less horrifying – to witness their destruction of precious cultural artifacts and the brutal treatment of the civilian populations within their reach.

The framers of international humanitarian law have been unsurprisingly reluctant to conclude formal agreements with rebel groups. These groups, after all, challenge the bedrock of the international legal system: state sovereignty. But given the twin trends of a relative increase in civil wars and certain types of rebel groups seeking to engage with the laws of war, there is an argument to be made that IHL ought to lay out more explicit rules governing rebel group behavior if it is to maintain its relevance.

Which rebel groups might be receptive to such overtures? To answer this question, I first discuss the status rebel groups hold in the existing framework of international humanitarian law. Second, I assess rebel groups' knowledge base of the laws of war. Third, and most important, I argue that rebel groups whose political aims require the support of the international community (defined here as the set of actors committed to the principles embodied in the UN Charter) are most likely to abide by its rules regarding wartime conduct.

The regulation of civil wars, or noninternational armed conflicts, has been among the most controversial issues in writing international humanitarian law. Prior to the formation of the modern state system, the laws of war were used partially to distinguish legitimate belligerents, such as kings, from brigands and pirates. In the eigh-

teenth century, for example, only sovereign monarchs had the right to wage war and to claim the right of trial by combat.<sup>2</sup>

Once the laws of war began to be codified in multilateral treaties in the mid-nineteenth century, some of the framers of these laws pushed – albeit with limited success – to extend their scope and applicability to civil wars. The Martens Clause, included in the Second 1899 and Fourth 1907 Hague Conventions, dealt with any controversy about the scope and applicability of the Conventions by generally extending “the principles of international law” to any conflicts not addressed specifically by the Conventions. Article 3 common to the four 1949 Geneva Conventions, often referred to as a “Convention in miniature,” more specifically extends certain protections to noninternational armed conflicts. State parties to the 1949 Geneva Conventions are obliged to refrain from abusing civilian populations under their control; they are also obliged to care for the wounded and sick, including from the opposing force. Finally, the two 1977 Protocols Additional to the 1949 Geneva Conventions were meant to govern civil wars more extensively. But the Additional Protocols differentiated national liberation movements (decolonization, addressed in Protocol I) from noninternational armed conflicts (civil wars, addressed in Protocol II) and accepted the legitimacy of the former much more so than the latter. When it came to the issues of scope and applicability, the main challenge of the Additional Protocols was to navigate the tension of placing some obligations of restraint on states while avoiding any conferral of legitimacy upon armed nonstate actors.

This cursory treatment of civil wars in major IHL treaties is at least partly a function of who made the laws. States – the framers, ratifiers, and legal subjects of these agreements – have had little desire to legitimize domestic challengers. Some

of the more recent laws of war have revealed chinks in the armor of state sovereignty. A heated debate during one of the *travaux préparatoires* (preparatory works) for the 1977 Additional Protocols centered on whether, how, and which national liberation movements and/or armed nonstate actors could be included in the discussion. The debate concluded with an agreement that certain groups could be present and speak, but could not vote.<sup>3</sup> Delegations from groups such as the People's Movement for the Liberation of Angola and the Palestine Liberation Organization were admitted on these grounds. Protocol I also allowed armed groups to deposit with the Swiss government their intention to comply, but only a very few armed groups have taken advantage of this procedure.

Some have argued that one problem with codified international humanitarian law is that it has not included rebel groups or their concerns in its design.<sup>4</sup> Rebel groups are technically bound to comply with the laws of war via one of two routes: if state ratification applies to all armed groups within the state; or if rebellion is deemed illegal and is expected to be addressed as a matter of domestic law. The first of these routes is fairly attenuated, and the second turns a blind eye to the increasingly international nature of many of today's civil wars. But insofar as, for example, combatant status is only applicable to state – and not rebel – forces in a noninternational armed conflict, then it would seem that codified international humanitarian law places few obligations on rebel groups.<sup>5</sup>

For all that the framers of IHL sought to preclude rebel group participation, certain groups are surprisingly knowledgeable about the laws of war. In 1991, the leftist National Democratic Front of the Philippines publicly committed to adhere to the 1949 Geneva Conventions as well as Additional Protocol II.<sup>6</sup> A few years earlier,

the secessionist Ogaden National Liberation Front in Ethiopia similarly committed to refrain from targeting civilians and abusing prisoners of war and more generally to “willingly comply with international norms of battlefield combat.”<sup>7</sup> And in 2009, the separatist Karen National Union in Burma stated their “commitment to adhere to the international conventions against the use of child soldiers.”<sup>8</sup>

Rebel groups gain knowledge of the laws of war via defectors from the state military, outside consultants, and nongovernmental organizations (NGOs) focused on international humanitarian law. Per the 1949 Geneva Conventions, state militaries are obliged to train their forces in international humanitarian law. Defectors from state militaries to rebel groups bring this training with them and, sometimes, share it with their new comrades. The original founders of the Free Syrian Army assured the international community that government military defectors were operating in accordance with rules of engagement and prior training they received in the Syrian armed forces.<sup>9</sup> It is not known how common this transmission route for IHL to rebel groups is, but it is worth speculating about the types of defectors and rebel groups where we might be most likely to observe this phenomenon. For example, the types of defectors attracted by the possibility of plunder might be less likely to hold high military rank or have served for very long; they might also be defecting from poorly organized and poorly trained militaries. Thus, these defectors' training in and transmission of IHL should be relatively minimal. By contrast, defectors attracted by nationalist causes, such as East Timor's Xanana Gusmão – who served in Portugal's colonial army prior to 1975 – might be of higher rank and have a longer record of military and public service. Rebels that seek to overthrow the central government – via coups or more prolonged efforts – also are likely to be led by military



defectors with long-standing ties to the state military. Defectors from Romania's armed forces were critical to the overthrow of Nikolai Ceaușescu in 1989, and the opposition was much less likely to target civilians than forces that remained loyal to the Ceaușescu regime. These latter types of defectors ought to be more likely to share the basic laws of war with their new comrades as they switch their allegiance.

A second source of knowledge of international humanitarian law for rebel groups is outside consultants. The practice of rebels – and, particularly, petitioners for sovereignty and recognition – hiring outside consultants is long-standing in international politics. For example, the Polynesian royal family hired Western consultants in the nineteenth century to help them negotiate with U.S. and European powers.<sup>10</sup> More recently, the emergence of organizations such as Independent Diplomat, which represents a number of non-state actors and seeks to “promote greater inclusiveness in diplomacy,” has signaled a shift from the occasional use of ad hoc consultants to formal organizations that offer diplomatic services on a more regular basis.

Groups should seek advice from NGOs such as Independent Diplomat when engagement with states aside from the central government they are fighting is key to their political success, and they recognize that they require outside input in order to execute an effective diplomacy. It ought not to be surprising, then, that a survey of Independent Diplomat's client list reveals a majority of secessionists, from the Polisario Front to Kosovo to Somaliland. Also included are the Syrian Coalition and the Turkish Republic of Northern Cyprus.

Outside consultants can also take the form of military advisors from states supporting rebel groups. Rebels seeking external patronage certainly do what they can to orient themselves toward poten-

tial patrons. For example, the Mujahedin-e-Khalq (MEK) presented itself as “a democratic organization that seeks to bring down Iranian tyrants, both secular and religious” as part of a strategy to lobby the U.S. government to remove the MEK from the Foreign and Terrorist Organization list.<sup>11</sup> Insofar as external patrons also care about IHL, this preference might influence rebel group behavior.<sup>12</sup> Military training provided by third party states also could include training in IHL.

A third transmission route of IHL to rebel groups is via NGOs explicitly focused on the laws of war. The International Committee of the Red Cross (ICRC) is the most prominent of these groups. The ICRC includes as one of its current strategic objectives “further develop[ing] methods and tools for engaging non-State armed groups, in particular relating to their compliance with IHL.”<sup>13</sup> To this end, the ICRC conducts training sessions with armed nonstate actors, provides them the opportunity to issue unilateral declarations or conclude agreements to abide by IHL, and has created a “Unit for Relations with Arms Carriers” charged with engaging armed nonstate actors with respect to international humanitarian law.<sup>14</sup> The ICRC is, however, limited in its engagement with armed nonstate actors by its state-based model; if a state opposes ICRC engagement with armed nonstate actors within its borders, it can deny the ICRC access.

In the same spirit of the ICRC's efforts, the United Nations has begun to create a series of “Action Plans” with rebel groups. Action Plans are created with groups identified as having violated the laws of war regarding children, often via the use of child soldiers, and are “written, signed commitments between the United Nations and those parties who are listed as having committed grave violations against children.”<sup>15</sup> To date, the UN has agreed to Action Plans with at least a dozen groups, in-

cluding the Moro Islamic Liberation Front in the Philippines and the Unified Communist Party of Nepal.

Finally, a new set of humanitarian NGOs has focused, either principally or secondarily, on training armed nonstate actors in international humanitarian law and persuading them to comply with the laws of war. An excellent example of this type of NGO is Geneva Call, which offers “Deeds of Commitment” that rebel groups can sign. Signing groups pledge not to use antipersonnel landmines, child soldiers, and/or sexual violence in wartime. As part of their meetings with armed nonstate actors, Geneva Call offers training in international humanitarian law, including monitoring and verification for groups that have signed one or more Deed of Commitment. Unlike organizations such as the ICRC or the United Nations, Geneva Call focuses on armed nonstate actors exclusively – Geneva Call’s organizational structure means that it is also less vulnerable to state-imposed constraints. One recent analysis of the signatories to Geneva Call’s best-known Deed of Commitment – the Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and Cooperation in Mine Action – has found that legitimacy-seeking groups – those that seek external and internal approval of their right to rule – are the most likely to sign the Landmine Ban Deed of Commitment.<sup>16</sup> Here we begin to bridge the gap between knowledge of IHL and action based on that knowledge. As with the alternative routes to knowledge of IHL, it appears that groups that need support from the international community might be especially likely to signal their intention to abide by IHL.

War aims ought to condition rebel compliance with international humanitarian law. I distinguish four “ideal types” of rebels, according to their war aims. Ideal types are not ideal in the sense that they side-

line many other factors, which in this case include: the possibilities of mixed types; groups changing type over time; the influence of foreign fighters; and other war aims that might be excluded from this list. The argument laid out below, based on ideal types, is thus a first step in understanding the relationship between rebel war aims and compliance with the laws of war.

The first ideal type I consider is center-seeking rebels – those that seek to overthrow and replace the government. Recent examples include rebels in Libya, who succeeded in overthrowing Gaddafi, and “moderate” rebels in Syria, who have not (at least as of this writing) succeeded in overthrowing Bashar al-Assad. Historical examples include the Cuban revolutionaries of the 1950s and the Sandinistas in Nicaragua in the 1970s. A second ideal type is secessionists: groups trying to carve out their own, independent state. Successful secessionist wars have led to the creation of states like Bangladesh, East Timor, and even the United States. Unsuccessful secessionist rebel groups include the Chechens and the U.S. Confederacy. Third, there may also be a category of rebel groups whose principal war aim is plunder and, in particular, profit from trade in illegal goods, such as gems or drugs. Groups driven primarily by profit are difficult to identify, but could include the Revolutionary United Front in Sierra Leone and the National Patriotic Front of Liberation in Liberia. Finally, religionist rebel groups, the fourth ideal type, aim to evangelize, proselytize, and either convert or cleanse those who cannot be converted. While religionist rebel groups, such as the Lord’s Resistance Army, Boko Haram, and the Islamic State, may seem to represent a new phenomenon, there are in fact many historical examples, from the Yellow Cliff rebels in 1866 China to the Brazilian Canudos at the turn of the twentieth century.

Each type of rebel group has different incentives to comply with the laws of war.

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Many of these incentives are independent of the law, and might naturally generate behavior that is either consistent or inconsistent with it. Other incentives are more directly tied to the laws of war – via the international community that espouses it – and speak to cases in which rebels seek to send specific signals to third-party observers. Either path suggests that rebels' relationship with the laws of war is strategic. Observed compliance is not induced by the law per se, but is instead either coincidence or a means to an end. An optimistic view of the future of the laws of war in the civil war context would suggest that this is precisely how the law will become strong. Compliance may eventually be motivated by the law itself.

In assessing the relationships that different rebel groups might have with the laws of war, I will focus on the prohibition on civilian targeting, widely considered to be at the heart of international humanitarian law today. Rebels that seek to overthrow and replace a central government have mixed incentives with respect to civilian targeting. With the exception of rebels perpetrating military coups, center-seeking rebels require the support of the civilian population, especially if they employ guerrilla warfare. Conventional wisdom suggests that, because guerrillas must rely on civilians for food, cover, and comfort, they will not bite the hand that feeds them. But another perspective points to the fact that weak rebels in particular have few tools aside from coercion to gain the allegiance of a civilian population.<sup>17</sup> What is more, the fear of infiltration and betrayal is constant for center-seeking rebels, who might lack the ethnic cues and social networks that differentiate secessionist rebels from their opponents.<sup>18</sup> Civilian targeting is one strategy to distinguish friend from foe, or at least to send signals of the group's capacity to make this distinction and thus deter any potential government collaborators or defectors. Al-

geria's Groupe Islamique Armé (GIA) operated via this logic in the late 1990s; in one particularly brutal incident, GIA guerrillas "beheaded five local girls (some of whom dated militiamen) and threw their heads on the doorsteps of the houses of people who were suspected of intending to defect."<sup>19</sup> We should expect, then, that center-seeking rebels will sometimes engage in civilian targeting, but perhaps especially so at the beginning of their life cycle, when they are weak and deploy force to coerce civilians to aid their cause.

Secessionist rebel groups face a very different set of incentives. From a military perspective, the civilians within easiest reach of secessionists are those who are meant to make up the population of their new state; targeting them would be counterproductive. One exception is noncoethnics residing in territory claimed by the secessionists, and whom secessionists might want to evict from the area. For example, during the Croatian war for independence, secessionist rebels targeted Serbian civilians, homes, and churches throughout Slavonia, especially in Krajina. Consistent, however, with the notion that secessionists seek to portray themselves as good citizens of the international community, Croatian officials then publicly disavowed and condemned these practices.<sup>20</sup> It is also possible that secessionists might want to target civilians over the putative border, but doing so would be militarily risky. Secessionist movements tend to emerge in areas of ethnic concentration. If secessionists were to target civilians outside their region, they would leave their own population vulnerable to counterattack.

Secessionists also have few political incentives to target civilians. More than any other type of rebel group, secessionists must gain the support of the international community if they are to realize their political aims. While center-seeking rebel groups might welcome – even depend

on – external support, most countries today have a policy of recognizing states, not governments. When a new government takes control of an existing and previously recognized state, past recognition of the state continues even if the new government is unsavory and diplomatic relations are severed.

To recognize an entirely new state is a much more difficult matter. There is no default of recognition for militarily victorious secessionists, as there is for center-seeking rebels. As a matter of policy, states tend to require at a minimum that secessionists demonstrate control over a specific population and territory, convene a government, and be able to engage in relations with other states; in some cases, aspiring states must also show themselves to be democratic and respectful of human rights.<sup>21</sup> As a matter of practice, states tend not to recognize new secessionist movements as states without the support of their regional security organizations and, importantly, the great powers.<sup>22</sup> Because the checklist for receiving recognition as a new state is much longer than that for receiving recognition as the new government of a previously recognized state, secessionist movements have strong incentives to pay attention to the desires of the international community empowered to admit them to the club of states.

Noncombatant immunity and adherence to international humanitarian law more generally are principles closely associated with the international community. Secessionists sensitive to this dynamic will understand the negative reputational repercussions of targeting civilians, and how these could damage their long-term political goals. This was certainly the case for the Chechen separatist movement following its 2004 attack on a Russian school, after which international opinion turned squarely against the Chechens.<sup>23</sup>

In contrast to center-seeking rebels and secessionists, maintaining control over the

resources they plan to plunder and access to black markets is central to the political aims of rebel groups driven by trade in illicit goods. These groups are often quite shadowy, and so we know less about them compared to other types of rebels, but they are typically presumed to attract soldiers with little allegiance to a cause and few scruples about abusing civilians within reach. For example, significant violence against civilians in Latin America since 2000 has been perpetrated by Colombian rebel groups and the Mexican cartel Los Zetas, both of which engage heavily in illegal drug trading.<sup>24</sup> For resource-based rebels, the motive to target civilians is to ensure their complicity in maintaining the illegal trade of whatever good is being sold. The opportunity to target civilians lies with the typically undisciplined and mercenary nature of the foot soldiers of these groups;<sup>25</sup> with little to restrain them and an absence of a higher calling, these groups are more likely to engage in civilian targeting compared with center-seeking or secessionist rebels. Much of this same logic can be applied to groups dependent on external financial support: if they do not rely on the civilian population for aid and comfort, the civilian population tends to be that much more vulnerable to being targeted by rebels.

Finally, consider religionist rebel groups. Note that a group may be religious but not “religionist.” For example, the Moro Islamic Liberation Front has a strong Islamic identity, but its aim has been, at different times, secessionism or autonomy. It has never sought to overthrow the existing system of sovereign states. Religionist groups, by contrast, view the divine as the main source of sovereignty. They seek to remake the existing political order into a religious one, and thus hold few to no allegiances to the existing system of state sovereignty.

How religionist groups treat civilians will depend in part on their religious in-



terpretations. Of late, religionist groups have grabbed headlines in part because of their systematic abuse of civilian populations. The Lord's Resistance Army systematically targeted schools and hospitals in northern Uganda and abducted hundreds of children to serve as soldiers and sex slaves.<sup>26</sup> Boko Haram has routinely attacked civilian locations with no military objective or utility, such as markets, transport hubs, restaurants, and places of worship.<sup>27</sup> The Islamic State has committed widespread and systematic violations of international humanitarian law and gross human rights violations in areas under its control, including unlawful killings, abductions, rape, and possibly genocide.<sup>28</sup> These religionist groups exhibit a zealotry that is used to justify persecution of non-believers and abuse of civilian believers, with the end goal of creating a new type of religious sovereignty.

To summarize, among these four types of rebel groups we should expect to observe the highest levels of civilian targeting from resource-based and religionist groups, a medium level of civilian targeting from center-seeking groups, and the lowest level of civilian targeting from secessionist groups. Existing scholarship supports the claim that secessionists will be less likely to target civilians than non-secessionists. In one study, I found secessionists to be 30 percent less likely to target civilians than nonsecessionists; secessionists are also less likely to use terrorism in civil war compared with rebel groups with other types of war aims.<sup>29</sup>

For many of the same reasons that they are unlikely to target civilians, secessionists are also less likely to violate other laws of war, such as those protecting culturally significant property. Given that secessionists tend to operate in the territory they seek to govern, the cultural property most accessible to them is likely to be culturally valuable to the secessionists, and

thus they would be incentivized to protect rather than destroy it. What is more, given that the international community has very clearly expressed opposition to the destruction of cultural property through, for example, the 1954 Hague Convention on the Protection of Cultural Property, any secessionists that attack the cultural property of others would damage their reputation with the international community whose support they require to attain their political goals. In this vein, Tuareg separatists in Northern Mali have denounced attacks on Timbuktu's Sufi shrines perpetrated by nearby armed groups like Ansar Dine.<sup>30</sup> Similarly, secessionists appear to be half as likely as nonsecessionists to employ child soldiers, and also particularly likely to be responsive to international pressure to stop using child soldiers.<sup>31</sup>

Much of the behavior described above is based on military strategic incentives, rather than the law itself. Secessionists are unlikely to target civilians in part because they want to protect, and not damage, the people who would compose the population of their new state. Because they could ransom them, resource rebels might be especially unlikely to kill prisoners-of-war. Any such coordination with the behavior dictated by the laws of war could not necessarily be called compliance, because it is not the law that is inducing this behavior. What independent power, then, might the laws of war exert over rebel groups?

Codified laws of war could affect rebel group behavior in at least three ways. First, compliance with the laws of war is largely reciprocal. If governments – especially those that are signatories to the second 1977 Additional Protocol common to the 1949 Geneva Conventions – comply with their commitments regarding treatment of rebel groups, rebel groups might be likely to reciprocate. Colombia is a party to both treaties, and during peace negotiations taking

place between 1998 and 2002, the FARC publicly announced that “commanders and combatants shall study and put into practice rules of international humanitarian law applicable to the conditions of our revolutionary war.”<sup>32</sup> Although the FARC has not always lived up to this promise, they announced in 2012 that they would stop kidnapping and would release hostages – civilians, soldiers, and policemen – some of whom have been held since the 1990s.<sup>33</sup>

Unfortunately, however, these examples are few and far between. Governments are very likely to engage in civilian targeting in civil war and, once they do, rebels are three times more likely to target civilians than if they had not suffered civilian targeting themselves.<sup>34</sup> But reciprocity is not guaranteed. Sometimes rebels exercise and publicize restraint to contrast with government violations, which leads to a second type of possible relationship between rebel group behavior and the laws of war.<sup>35</sup> During the Eritrean war of independence, the Eritrean People’s Liberation Front was praised for providing relatively decent conditions to surrendering Ethiopian troops, despite the fact that rebel prisoners were generally mistreated and abused at the hands of the Ethiopian government.<sup>36</sup>

Similarly, among rebel groups, secessionists are especially likely to engage explicitly with the laws of war. As argued above, secessionists must persuade the international community to let them into the club of states, and the international community is clearly committed to the laws of war. Secessionists might therefore view positive engagement with the laws of war as one strategy to increase their odds of success.<sup>37</sup> Secessionists dominate among the small group of rebels that has deposited intentions to comply with the 1949 Geneva Conventions with the Swiss Government; likewise, they appear to be most likely to have participated in international humanitarian law-making conventions.

The laws of war were not designed with rebel groups in mind. Individual states have committed to adhere to the laws of war in their own conduct of civil war, but there have been few opportunities for rebel groups to bind themselves in turn. Nonetheless, rebel groups may be increasingly aware of the laws of war, and one type, secessionists, appear to be especially likely to comply with the laws of war.

For those invested in the project of international humanitarian law, this state of affairs suggests at least two parallel (but not mutually exclusive) ways forward. First, international humanitarian lawmakers could take on the challenging task of developing laws that explicitly apply to – and create incentives for compliance by – non-secessionist rebel groups. Here, one strategy could be to encourage a revision of recognition policies for new governments of existing states such that recognition is tied to compliance with the laws of war on the part of center-seeking rebels.

Second, efforts could be made to strengthen secessionists’ commitment to international humanitarian law. If secessionists are more compliant with the laws of war than nonsecessionists, and there is a desire to observe more compliance along these lines, then compliance ought to be publicized and rewarded, just as noncompliance is sanctioned and punished. For example, compliant rebels could be assigned combatant status, and thus receive the protections accorded to prisoners of war. Human rights groups may have been reluctant to praise compliance for fear of future noncompliance that could undermine their credibility. But this reticence may be worth rethinking, as both NGOs and the media could play a role in rewarding compliance.

Recent history, however, has not followed this path. Secessionists compliant with international humanitarian law have not been rewarded for good behavior, and secessionists violating the laws of war have often es-

caped punishment. What is more, even though secessionists are decreasingly likely to use major violence to press their political claims, recent scholarship has shown nonviolence to be comparatively *unsuccessful* for secessionists.<sup>38</sup> There is therefore a gap between how the international community tells secessionists to behave, and how the international community itself behaves with regard to secessionists.

Bridging this gap may well be the most productive track for those who seek to strengthen the reach of the laws of war in the context of civil war. Organizations

such as the ICRC may be beginning to question the viability of their state-based model in a world of civil wars by, for example, creating an office dedicated to working with armed nonstate actors. Future initiatives could be more focused on secessionists, taking advantage of the international community's preexisting leverage with this group of rebels. But any change along these lines will require navigating the tension between protecting state sovereignty on the one hand and compliance with the laws of war on the other.

#### ENDNOTES

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# Stay the Hand of Justice? Evaluating Claims that War Crimes Trials Do More Harm than Good

*Mark S. Martins & Jacob Bronsther*

*Abstract: An enduring dilemma in war is whether and how to punish those responsible for war crimes. In this essay, we analyze the most frequent criticisms made by war crimes trial skeptics, including the claims that such trials endanger prospects for peace by encouraging enemies to continue fighting, that they achieve only “victors’ justice” rather than real justice, and that, in any event, they are unnecessary due to the existence of more effective and less costly alternatives. We conclude, in accordance with a “moderate retributivism,” that when carried out consistently with established law and procedure, and when not dramatically outweighed by concerns that trials will exacerbate ongoing or future conflicts, prosecutions are a legitimate, and sometimes necessary, response to violations of the laws of war and international criminal law more broadly.*

MARK S. MARTINS is a Brigadier General in the U.S. Army and has been Chief Prosecutor under the Military Commissions Act since 2011. The views expressed in this article are his own, and should not be attributed to the U.S. Department of Defense or to the U.S. Army.

JACOB BRONSTHER is a Ph.D. candidate studying criminal law theory in the Department of Law at the London School of Economics and Political Science. He is a lawyer and Fulbright Scholar.

At St. James’s Palace in London during January of 1942, representatives of the governments whose countries had been occupied or were under assault from Germany met to consider fundamental questions that world war and Hitler’s still waxing aggression had pressed upon them. To the threshold *jus ad bellum* inquiry of whether fighting the war was justified, they responded without equivocation. The Nazis’ advancing columns on three continents and regime of terror against diverse civilian populations left them no choice but to take up arms. To the *jus in bello* question of whether their own modes of fighting should be constrained by morality and law, the response at St. James’s Palace was, again, unequivocal. Although the desperate struggles to come would severely test the Allies’ unilateral commitment to restraints on warfare, the representative from occupied Belgium expressed the common sentiment that “no matter how severe the necessities of war may be,

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civilized nations have, nevertheless, recognized and proclaimed rules which every belligerent ought to obey.”<sup>1</sup>

Perhaps more remarkable at this dire point in the conflict was how the Allies answered the emergent *jus post bellum* question of what should be done with those responsible for the aggression, imprisonments, mass expulsions, hostage executions, and massacres that had brought so many disparate peoples under attack together in solidarity. It was the signature contribution of the Declaration of St. James’s Palace that “in order to avoid the repression of these acts of violence simply by acts of vengeance on the part of the general public,” the assembled nations “would place among their principal war aims the punishment, through the channel of organised justice, of those guilty of or responsible for these crimes, whether they have ordered them, perpetrated them or participated in them.”<sup>2</sup> The war we have waged reluctantly but necessarily is a just war, they declared, and despite the depravity of our enemies, we will aspire to fight it humanely. Moreover, once we have prevailed, we will punish war criminals *through the channel of organized justice*. While there would yet be formidable opponents of such an approach – among them British Prime Minister Winston Churchill, who preferred summary execution of the war’s masterminds upon capture,<sup>3</sup> and United States Supreme Court Chief Justice Harlan Fiske Stone, who derided postwar prosecution as a “lynching party”<sup>4</sup> – the unequivocal and unified early commitment at St. James’s Palace to holding war crimes trials furnished enough momentum to carry the day over doubters of the concept once the conflict had formally ended.

Supreme Court Justice Robert Jackson, chief prosecutor for the United States in the trial of major war criminals before the International Military Tribunal at Nuremberg, would come to echo the Declaration

of St. James’s Palace in his opening statement: “That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.”<sup>5</sup> Whether that trial, and the many thousands of others held following World War II, truly held vengeance at bay and paid tribute to reason is surely one of the essential tests of their worth. But there is no dispute that trials of alleged war criminals were widely supported in the immediate aftermath of the war, even if they had their prominent detractors. Stay the hand of vengeance? Emphatically yes. But not the hand of justice. And failing to hold trials of those responsible for war crimes would offend justice, this response insisted.

Such momentum for war crimes trials is rare. Consider the international response half a century later to atrocities occurring on some of the same European lands once again engulfed in armed conflict. In May 1992, Bosnian Serb President Radovan Karadžić presided over the execution of thousands of civilians near the town of Brčko in Bosnia-Herzegovina,<sup>6</sup> only fifty miles from Sabac in Western Serbia, where in October 1941, German Field Marshal Wilhelm List ordered the execution of thousands of concentration camp prisoners.<sup>7</sup> Brčko and Sabac are fifty miles apart in the former Yugoslavia, sordidly linked by the programs of organized mass murder each hosted, fifty years apart. Yet international alarm over the late twentieth-century Brčko massacre and related war crimes only slowly developed into resolve to hold offenders accountable.

When concerted action finally came, war crimes trials were seen by many as doing more harm than good. In August of 1995, United States diplomat Richard Holbrooke confronted harsh questioning over whether the indictment of Karadžić and other se-

nior figures by the International Criminal Tribunal for the Former Yugoslavia would harm prospects for peace. “Do you think it’s helpful to call [Karadžić] a war criminal?” Holbrooke recalled one aggressive journalist baiting him. “Do you think it’s helpful in the negotiations?” Recalling “the days of [Nazi extermination camp overseer Heinrich] Himmler,” Holbrooke responded that “a crime against humanity of the sort that we have rarely seen in Europe” was “simply a fact and it has to be dealt with. I’m not going to cut a deal that absolves the people responsible for this.”<sup>8</sup>

Even if his private views may have been more pragmatic, Holbrooke’s public response – both uncompromising and righteous – has much to commend it. But without more, the simple and intuitive moral position that we should implement war crimes trials often fails to convince the distracted policy-makers responsible for facilitating such processes, particularly when sophisticated rationales are cited for foregoing the trouble. This essay aims to clarify this dilemma by identifying and responding to some of the most frequent criticisms made by skeptics of war crimes trials, defined here as trials for violations of the law of war or international criminal law more broadly, whether in courts of domestic, international, or hybrid administration. Analysis of these criticisms will suggest a framework for weighing, in a given instance, the challenge to legitimacy that all war crimes courts undergo. While none of the criticisms represents a definitive trump against the general category of war crimes trials, each gives us pause. Through evaluation of their merits, accordingly, we are better poised to determine, on a case-by-case basis, whether the intuitive view favoring trial and punishment of war criminals, shared by those at St. James’s Palace, ought to be implemented in the contemporary world. In the final section, we develop a “moderate retributivism” to help

guide this balancing analysis, concluding that when they are carried out in accordance with established law and procedure, and when not dramatically outweighed by concerns that trials will exacerbate ongoing or future conflicts, war crimes prosecutions are a legitimate response to atrocities.

Implied in the skepticism that Holbrooke encountered is the claim that war crimes trials encourage leaders to continue fighting. If losing a war means you will be prosecuted – goes the argument – then you will be less likely to accept defeat. Put differently, the first criticism we will consider is the view that war crimes trials create perverse incentives for leaders to commit *further* war crimes, or at least prolong conflict, so as to ward off defeat and avoid prosecution.

This claim is difficult to evaluate, and what little empirical study there has been proves neither that fear of punishment reduces criminal behavior nor that war criminals are fearless of prosecution. The claim involves an unknowable counterfactual: how would things be different if there were no threat of trial? We are not, however, entirely in the dark. While based on a plausible psychological premise – that cornered humans fight more desperately – the claim causes less concern when considered in the context of war criminals’ actual incentive structures. As law professors Julian Ku and Jide Nzelibe explain, the effect of a new formal sanction (such as the threat of war crimes prosecution) depends upon the set of preexisting formal and informal sanctions (like the possibility of death by a vigilante mob).<sup>9</sup> The severity of preexisting sanctions could well overwhelm the new formal one, which will thus only marginally impact decision-making. It is not enough, in other words, to know that war crimes trials might incentivize further fighting. We need to know how strong that incentive is, exactly, and how it compares to preexisting incentives.



For various reasons, war crimes prosecutions in recent decades have generally been directed against individuals engaged in civil conflicts in weak or failing states and perceived to be committing atrocities with impunity.<sup>10</sup> To examine the pre-existing sanctions faced by war criminals, Ku and Nzelibe look at the consequences faced by leaders of African coups and coup plots in such states from 1955 to 2003. Of the 279 leaders of *failed* coups, 35 percent were executed, murdered, or died in prison, 22 percent were imprisoned, 16 percent were arrested without any clear outcomes, and 5 percent were exiled or tried in absentia.<sup>11</sup> There were no such consequences, meanwhile, for successful coup leaders. The point is that the preexisting incentives for war criminals to continue fighting and to win are profound. In addition to avoiding grave personal outcomes, they also include the possibility of achieving the often-desperate political objectives the war criminals set out to attain. It is not as if the threat of prosecution is the only consequence to losing a war. That such a threat provides an additional incentive to continue fighting tells us little about its ultimate significance to a leader's unique cost-benefit analysis.

The incentives claim, furthermore, depends upon the premise that military victory means immunity from prosecution, as a matter of law and/or politics. This premise, though, is not ironclad. The Prosecutor of the International Criminal Court (ICC), for instance, has targeted sitting leaders, indicting Omar al-Bashir, president of Sudan, for alleged war crimes, crimes against humanity, and genocide in Darfur. While al-Bashir has evaded arrest thus far, the case – along with the (failed) prosecution of Uhuru Kenyatta, the current Kenyan president, for alleged crimes against humanity perpetrated during postelection violence in 2007–2008 – creates at least some uncertainty about the victory-

means-immunity premise. Consider as well that, while still influential in Chile as “senator for life,” Augusto Pinochet was arrested in London in 1998 to enforce an indictment for human rights violations issued by a Spanish court in accordance with the principle of universal jurisdiction.

Another uncertain premise to the claim that war crimes trials incentivize further fighting is that perpetrators, when threatened with prosecution, actually have the power to continue the conflict. We might say that the more fragile the peace, or the greater the possibility of a fragile peace, the more salient the worry about incentives. Most notably, leaders of the Lord's Resistance Army have in recent years insisted that the 2005 International Criminal Court warrants for their arrest be lifted before signing a peace deal with Uganda, with the understanding that they retained the capacity to continue fighting. In many conflicts, however, peace is not so fragile. The conflict may be completely over, as it was when the Nuremberg trials were held, and as it is today during the trials of Khmer Rouge leaders in the hybrid national-international Extraordinary Chambers in the Courts of Cambodia. Or the conflict might be ongoing, but with a likely outcome that is not fragile, such that there is no actual concern that war crimes trials might exacerbate the conflict unnaturally. This could be the case in the war with Al Qaeda and associated groups.

More fundamentally, the incentives claim is vulnerable to an internal critique. The claim is based on the counterintuitive incentives created by the threat of prosecution; that is, to continue fighting and to commit further war crimes, *assuming a war crime has already been committed*. Given its deeper assumption about the powerful incentive to avoid prosecution, however, the claim's own logic also implies that war crimes trials tend to effectively deter leaders from committing war crimes in the

first place. As this tendency is itself one of the major justifications for such trials, the claim is, to some extent at least, inherently self-defeating. Though incentives either way are difficult to prove, surely any concern about war crimes trials creating perverse incentives to keep fighting must be at least weighed against the concern that not putting war criminals on trial would signal to future offenders that they can commit atrocities with impunity.

That war crimes trials achieve only “victors’ justice” rather than real justice is, of course, very nearly the same claim made by Chief Justice Stone when he denigrated the Nuremberg Trial of Major War Criminals as “Jackson’s high-grade lynching party.”<sup>12</sup> To assess this claim we need to determine whether war crimes trials meet the two basic requirements of a legitimate prosecution. The first such requirement is that the criminal law applied be legitimate. Following legal philosopher Lon Fuller’s conception of legality, we might ask, at a minimum, whether the law is part of a set of *rules* – rather than *ad hoc* commands – that are clear, public, prospective, consistent, stable, and that do not make impossible demands.<sup>13</sup> The second basic requirement is that the process be adequate: that the law be administered to defendants reasonably and fairly.

While any prosecution could do better by either metric – for example, the law applied could always be clearer, and jurors could always be more impartial – the more a trial meets these twin demands, the safer the conclusion that a defendant has been held to account legitimately through law, rather than through brute force. That said, it is not all a matter of degree, and if a trial fails to meet either requirement conspicuously, we can deem any resulting punishment as manifestly outside the bounds of law.

How do war crimes trials fare on these two metrics? Do they apply well-made, le-

gitimate law, in accordance with Fuller’s theory? And do they administer that law fairly, providing adequate process to defendants? We will examine two common criticisms regarding the former before returning to the latter.

One criticism is that the law applied by war crimes trials is too unsettled and thus fails to measure up to Fuller’s ideal. For example, war crimes prosecutions from Nuremberg to the present day have been roiled by the dispute over whether joining a conspiracy to commit war crimes is itself an offense distinct from any other completed criminal act. The absence of a settled answer makes a prosecution for mere conspiracy illegitimate, argue the critics, because without a stable definition of the crime, those with the greatest power can simply choose to punish what they want. At the Nuremberg trials, this criticism played out dramatically, as judges rejected charges brought under what they saw to be a new offense, created post-conflict, of conspiracy to commit war crimes. According to the French judge on the International Military Tribunal at Nuremberg in 1945, “the danger of such incriminations is that the door is opened to arbitrariness. The accusation of conspiracy is indeed a weapon preferred by tyrants. When Hitler wanted to strike at his political opponents, he accused them of having conspired against him.”<sup>14</sup> Moreover, because the common law tradition in Britain and the United States of criminalizing conspiracy lacked a clear parallel in either Romano-Germanic or international law, to convict defeated German captives for merely having entered into an agreement – without needing to establish their individual responsibility for some actual completed murder or other offense carried out by the criminal enterprise – would defy the principle of *nullum crimen sine lege*. This Latin maxim, literally translated as “no crime without law,” is

the universal attribute of justice also expressed in the prohibition on *ex post facto* laws in the United States Constitution.

Whether conspiracy to commit war crimes is a violation of the law of war was still a matter of dispute in 2006. That year, the United States Supreme Court considered the charge of conspiracy against Salim Hamdan, accused before a military commission for having agreed to join Al Qaeda and provide security and other services to Osama Bin Laden in Afghanistan. Although he was serving Bin Laden during a period of deadly Al Qaeda attacks in the Arabian Peninsula and the United States, no specific foreknowledge or advance contribution to those attacks was alleged against Hamdan himself.

Ruling on other grounds that the military commission lacked the authority to proceed, the Supreme Court divided on whether conspiracy as charged against Hamdan was a crime under the law of war, with no position supported by a majority of the justices.<sup>15</sup> Hamdan's later trial by a second military commission resulted in his acquittal of not only conspiracy, but also the distinct but related charge of "providing material support for terrorism." A reviewing federal appeals court would eventually declare this an unconstitutional *ex post facto* charge.<sup>16</sup>

While the modern echoes of Nuremberg's conspiracy dispute are cautionary, the "unsettled" criticism itself merits skeptical evaluation. Judges at Nuremberg, for instance, ultimately based joint liability upon war crimes with settled prewar existences. The legal adviser to Attorney General Francis Biddle, appointed by President Truman to sit in judgment at Nuremberg, explained that whereas Anglo-American conspiracy is "not embraced within the ordinary concept of crimes punishable as violations of the laws of war," another available theory of prosecution was well settled: "The theory of multiple liability for criminal acts executed pursuant

to a common plan presents no comparable problem, being common to all developed penal systems and easily included within the scope of the laws of war."<sup>17</sup>

In 124 prosecutions involving major war criminals and lesser German defendants, judges at Nuremberg recognized the concept of group criminality, but they opted to convict only when the defendant in the dock individually participated in a common plan proven to have resulted in actual atrocities.<sup>18</sup>

This approach is in full use today. The doctrines now applied by international criminal courts, "joint criminal enterprise" and "co-perpetration," while different in important ways, both rely on this theory of liability stemming from participation in a common plan. The most recent U.S. court to consider the question has also recognized the settled character of conspiracy as a theory of liability for completed crimes under the law of war.<sup>19</sup> In the seventy years since World War II, then, not a long period of time from the perspective of law, courts have clarified what was before ambiguous, narrowing the debate dramatically, and thereby constraining and guiding conspiracy prosecutions.

Legislatures, too, can ameliorate the criticism by codifying offenses, thus enabling prosecutors to bring charges confidently as the law becomes more firmly settled, so long as legislative enactment postdates the alleged criminal conduct. And should courts feel that a particular conviction was based upon an *ex post facto* law, they can vacate the conviction, as happened with Hamdan, even as they provide guidance in opinions to bring further stability and consistency to the rules. Beyond conspiracy, this narrative applies as well to crimes against "peace" and "humanity," offenses with undoubtedly controversial prewar legal statuses that were also charged at Nuremberg. For a defendant *today* could not reasonably claim that these offenses

represented legal novelties, given their incorporation post-Nuremberg into various domestic statutes and international treaties, and also into customary international law. In sum, if aspects of the law of war are unsettled, the judicial, legislative, and prosecutorial institutions responsible for the law's maintenance can act – and are acting – to resolve the situation.

Another criticism about the law applied in war tribunals is that it traditionally has been military law, elements of which are inherently unbounded and thus pose a threat to civilian-led liberal democracies. Military law, at first blush, fails as a basis for legitimate criminal prosecutions in at least two ways. First, it has historically grown out of the need of military authority to impose some semblance of order upon an inherently unruly battlefield, and such subordination to a single commander's direction seems the antithesis of the impersonal, stable, and transparent structure of rules that Fuller envisions.

Because the military, by necessity, emphasizes “security and order of the group [over] value and integrity of the individual,” Supreme Court Justice Hugo Black maintained that military law thereby also “emphasizes the iron hand of discipline more than it does the even scales of justice.”<sup>20</sup> Furthermore, Black argued, military tribunals are typically ad hoc bodies appointed by a military officer from among his subordinates. They have always been subject to varying degrees of “command influence.”<sup>21</sup>

Such influence, critics in this vein insist, precludes military law from ever truly being law, as it fails to provide an independent and comprehensive constraint upon its administrators. A prosecution for alleged war crimes on the basis of military law is thus merely an extension of the commander's will. It is the “rule of man,” rather than the rule of law.

Second, military law's unbounded nature stems not only from the tradition of command influence and control, say the critics, but also from the limitless character of war itself. Prussian general and military theorist Carl von Clausewitz defined war as “an act of force to compel our enemy to do our will” and reflected that “to introduce the principle of moderation into the theory of war itself would always lead to logical absurdity.”<sup>22</sup> Rather, “there is no logical limit” to the application of force, for in war “a reciprocal action is started” between the opponents “which must lead, in theory, to extremes.”<sup>23</sup>

The brutality of real-world hostilities has validated Clausewitz's theory again and again. Some have noted that war's tendency toward extremes – and the calls for military authority such conditions can bring – poses a dire threat to civil liberties. English jurist William Blackstone warned in 1769 that martial law was “in truth and reality no law, but something to be indulged rather than allowed as a law,” concluding that “therefore it ought not to be permitted in time of peace.”<sup>24</sup> And Justice Jackson, before serving as chief prosecutor at Nuremberg, wrote that “the very essence of the military job is to marshal physical force, to remove every obstacle to its effectiveness,” and that such measures “will not, and often should not, be held within the limits that bind civil authority in peace.”<sup>25</sup> A commander's orders in war, Jackson cautioned, thus “may have a certain authority as military commands, although they may be very bad as...law.”<sup>26</sup>

The law applied in war crimes trials, however, has developed so as to incorporate constraints upon these otherwise unbounded influences. Tribunals created out of commanders' inherent authority have been replaced by war crimes forums established pursuant to international treaties and domestic statutes, thus surmounting military law with law made by the peoples' civilian



representatives. The threshold of necessity for resorting to such forums, at least for the prosecution of true war crimes, as opposed to crimes against humanity and genocide, is that the crimes will have been committed during genuine hostilities, a context characterized by more than mere sporadic attacks and consisting of protracted armed violence of a nature, scope, and intensity that a state is compelled to employ its military forces in order to protect its people.<sup>27</sup>

Substantial protections against unbridled military authority are now expressly contained in law. Under the Geneva Conventions, punishment may be meted out for war crimes only if there has been a trial by “a regularly constituted court affording all of the judicial guarantees recognized as indispensable by civilized peoples.”<sup>28</sup> In addition to the safeguards against *ex post facto* laws and group criminal liability already mentioned, these guarantees include the presumption of innocence, the right to be tried in one’s presence, the right to notice of particular charges, and the prohibition against compelling an accused to testify against himself.<sup>29</sup> Furthermore, under the Military Commissions Act of 2009, defendants in the U.S. military commissions have the right to appeal any final judgment in federal civilian court.<sup>30</sup>

Conceding truth in prior ages to the axiom *inter arma silent legis* (“in times of war, the law falls silent”), the late Chief Justice William H. Rehnquist found reason to doubt the axiom’s veracity today: “There is every reason to think that the historic trend against the least justified of the curtailments of civil liberty in wartime will continue in the future.... The laws will thus not be silent in time of war, but they will speak with a somewhat different voice.”<sup>31</sup> Without disdaining the recurrent criticisms of war crimes trials grounded in their martial tradition – for vigilance regarding “military necessity” remains ever-prudent, especially in contexts where the

application of domestic and international law is absent or insincere – it is wise to remember Rehnquist’s longer perspective when evaluating such criticisms.

One might accept the legitimacy of the substantive law applied in war crimes trials but nonetheless reject the adequacy of the process provided to defendants in particular prosecutions. Consider the 2015 trial in Libya of Saif al-Islam Gaddafi, the son of deposed leader Muammar Gaddafi, and eight other members of the former regime for war crimes linked to the 2011 revolution. The procedural failings, according to the United Nations, included witness intimidation, lack of access to lawyers, and failure to present witnesses and documents in open court. At its most skeptical, though, this procedural criticism applies to trials less overtly unfair. It acknowledges the various fairness guarantees contained in law and even concedes that certain procedural protections may be both legally required and formally complied with, while nevertheless maintaining that the resulting trials fail to achieve impartial justice because of flaws or corruption in how the law is administered.

Before his captors could impose the death penalty announced for him in 1946, Nazi leader and Gestapo founder Herman Goering committed suicide by ingesting cyanide. Prior to taking his own life, Goering had repeatedly objected that his Nuremberg trial was nothing more than *siegerjustiz* (“victors’ justice”). The objection was not that he was deprived of legal process, for he had prominently received an attorney and an elaborate public hearing; rather, he claimed that the trial was a show intended to disseminate the victors’ propaganda while disguising his foreordained execution, a sentence compelled merely by his being a defeated German leader.<sup>32</sup>

We hear echoes of Goering’s objection in claims made today that detainees of the

United States in its war against Al Qaeda cannot receive truly fair trials because they are mostly Arabs, Muslims, or both, and in any event have been predetermined to be enemies. Moreover, just as Nuremberg critics scoffed at the prospect of war crimes prosecutions by the Soviets, whose own unpunished transgressions included the mass execution of Polish nationals during 1940 in the Katyn Forest, critics of military commission trials at Guantanamo complain that they punish the “enemy” while conveniently overlooking allegations of torture and evidence of mistreatment by persons acting on behalf of the United States.

While such criticisms are fundamental, there is little to be gained in evaluating the extreme claim that *no* victor is capable of administering a war crimes trial fairly. To insist that, as an analytical truth, any such process is dominated by prejudice or partiality is to leave no room for further appraisal. A more tempered skepticism is warranted, one capable of distinguishing between separate prosecutive efforts.

William Shawcross, the son of Britain’s chief prosecutor at Nuremberg and author of a book inspired by his father’s work, points to the zealous advocacy of Goering’s attorney, to the prosecution’s burden of proof, and to the acquittals of three out of twenty-three codefendants in arguing that the Nazi leader’s trial was conducted fairly. Shawcross further argues that defendants at Nuremberg were accorded fewer rights, privileges, and entitlements than an accused receives before a United States military commission today, particularly in light of Congress strengthening the process therein with the Military Commissions Acts of 2006 and 2009. Whereas at Nuremberg, defendants “could be tried in absentia, had no right against self-incrimination, and had no right to challenge the judges,” each of these protections is present at Guantanamo.<sup>33</sup> The procedural pro-

tections at the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and the ICC are similarly robust by comparison with Nuremberg.

But as important as the legal rights that are formally required by statute, Shawcross and others note, is the legitimacy that comes from their dynamic and determined application. Modern trials have benefited from well-qualified and fully resourced defense teams and from extensive government pretrial disclosures of the evidence in the case. These practices have enabled the accused and their counsel to prepare to confront the charges. Moreover, the delays in reaching trial, both at the U.S. military commissions and at the international tribunals, with each prosecutorial move met with vigorous and not infrequently effective defense tactics, undercut any notion that the captors are rushing to judgment over their vanquished enemies, however frustrating such delays are to family members of the victims.

While no practice can assure legitimacy, some skeptics may be mollified by the openness of the proceedings. The U.S. military commissions, for instance, are watched by an international corps of news reporters as well as by members of the public in Guantanamo and at closed-circuit television sites in the continental United States. And still other modern-day checks and balances assist in holding the U.S. government itself accountable to law, even as it prosecutes alleged Al Qaeda members. These include congressional oversight committees, executive branch inspectors general and judge advocates, and powerful human rights organizations.<sup>34</sup>

Measures promoting transparency and government accountability may or may not be sufficient to surmount the “victors’ justice” criticism in a given trial, particularly one involving a defendant claiming national or sectarian bias by those judging him. Writing of domestic criminal trials,

the Supreme Court has discerned that “the people of an open society do not demand infallibility of their institutions, but it is difficult for them to accept what they are prohibited from observing.”<sup>35</sup> With war crimes prosecutions facing even greater barriers to acceptance among foreign and international audiences, transparent and accountable processes are surely *necessary* for widespread confidence in trials to be achieved, even if such processes are not *sufficient* in themselves to satisfy all observers that real justice is being done.

Risks that war crimes trials will do harm seem less acceptable the less necessary they are to achieve some worthy end. It is thus a critical claim against such trials that “restorative justice” mechanisms, civilian prosecutions, or other alternatives have rendered them unnecessary by providing better methods of healing society’s wounds, holding offenders accountable, and preventing future offenses.

Concerns that prosecuting the likes of Radovan Karadžić might spoil efforts to end a war are compounded if, as legal scholar Kent Greenawalt has written, the “time, expense, and procedural safeguards” of war crimes trials also result in relatively few offenders actually being identified.<sup>36</sup> Proponents of truth and reconciliation commissions claim that they are an attractive alternative to traditional prosecutions because, as Greenawalt continues, “each [instance of] testimony by a victim and each identification of an offender achieves some portion of the justice of a criminal trial and conviction.”<sup>37</sup> In the aggregate, these small portions of justice collectively outweigh that achieved by a few war crimes prosecutions, enabling the parties to a conflict to acknowledge what happened, become reconciled to it and to each other, and move forward within a restored peace. Furthermore, such critics often argue, war crimes trials tend to mischaracterize the collective,

possibly even bureaucratic nature of mass atrocities by placing blame solely upon particular individuals, and thereby absolving the wider community or organization.

The claim by proponents of exclusively civilian prosecutions of offenders, meanwhile, is that war crimes trials are unnecessary because well-established domestic charges and judicial forums can convict and punish with little of the cost, legal uncertainty, and delay attendant to pressing law of war charges before ad hoc tribunals. To advocate ending military commissions, one group cites the hundreds of civilian prosecutions for terrorism offenses in U.S. federal courts since the 9/11 attacks.<sup>38</sup> Another argues that civilian prosecutions are both fairer and more effective at holding offenders accountable.<sup>39</sup> We thus need not offer amnesty to offenders – the perceived cost of truth and reconciliation commissions – in order to heal society and restore the peace. And we can do without war crimes trials altogether.

Still other alternatives to war crimes trials emphasize the supposedly superior incapacitation that comes from *targeting* or simply *detaining* threats, rather than *prosecuting* them. Whereas conducting a trial provides a platform for the spewing of odious beliefs by accused persons or their attorneys and risks acquittal and even subsequent release, say the proponents of this approach, the attacking of one’s enemies in war is a long-standing and justified alternative. Law of war detention, too, serves the purpose of taking detainees off the battlefield while also making detainees available to be interviewed, thus furnishing intelligence that can guide further operations to disrupt attacks and dismantle enemy networks. So long as the targeting and detention are lawful, say the advocates for targeting and detention, why bother with war crimes trials?

Each of these proposed alternatives is a strange ally of the others. Each also merits

critical evaluation as to whether it actually provides a full alternative, rendering war crimes trials unnecessary. Truth commissions and related processes that stress reconciliation over accountability have helped certain societies, in particular South Africa, move beyond civil conflicts. As a general matter, though, they are subject to doubts about whether they can achieve their ambitious stated aims, including whether victims' narratives and perpetrators' confessions will actually document and provide catharsis in the aftermath of widespread crime, and whether seeking to move forward without punishment of offenders may actually undermine rather than bolster public trust in government. Even with the South African Truth and Reconciliation Commission, given its limited mandate to examine "gross human rights violations," the tactical and negotiated nature of much testimony, and the lack of funds available to pay reparations, its success at healing the wounds of apartheid was surely a matter of degree.<sup>40</sup> The logic of such commissions, furthermore, applies more straightforwardly to civil conflicts, where parties must learn to live and govern together after the conflict's end; their role as a response to war crimes in noncivil conflicts, by comparison, is less assured. As a moral matter, finally, restorative justice often will offend even the moderate retributivism described in the following section by failing to censure even the most egregious offenders. Restorative justice, in other words, is at best an incomplete solution when pursued independent of some component of punishment, and a system that lacks any possibility for retribution is no true candidate for displacing war crimes trials altogether. To anticipate a reply, even with "collective" war crimes, retributive justice, with its focus on punishing individual wrongdoing, would at a minimum license prosecuting commanders and senior officials who ordered subordinates to commit atrocities. More generally – and

nonexclusively – it would also license prosecuting individuals who freely volunteered into organizations or units dedicated to, or known for, war crimes.

Advocates for using only civilian prosecutions cite diverse rationales, but in defending a deservedly proud tradition of law enforcement and nonmilitary criminal justice, they fail to make the case that war crimes trials are unneeded. In the experience of the United States, for example, federal civilian agents and prosecutors can and do disrupt and punish a wide variety of terrorist and other organized threats – including through the charging of precursor crimes such as identity fraud or immigration violations – and the legitimacy of a federal court conviction is usually unquestioned. But federal civilian courts' exclusion of reliable and lawfully collected hearsay statements seems unwise when witnesses inhabit the same ungoverned regions where war crimes were hatched and are thus unavailable for trial. The requirement that statements by an accused be preceded by warnings of the rights to remain silent and to have an attorney also makes little sense in a situation of genuine overseas hostilities. And of the twenty federal court prosecutions since 9/11 of Al Qaeda members who were captured overseas and were also triable for war crimes – a more pertinent data point than the hundreds of purely domestic prosecutions – all but one came into our custody through law enforcement cooperation with foreign governments who declined to prosecute.<sup>41</sup> This is hardly a convincing record for banning trials that feature sensible and fair evidentiary rules suited to punishing members of irregular hostile groups, who plan attacks from difficult-to-reach sanctuaries in increasing numbers.

Furthermore, it matters why we punish offenders. War crimes trials can more fully express a war criminal's wrongdoing by punishing him not only for, say, killing in-



nocent people, as a civilian court might, but also for committing the distinct legal and moral wrong of killing innocent people *as a means of war*. In addition to wronging his immediate victims, he also acts to make war in general more brutal and horrible. A war crimes tribunal, established for its distinct purpose, with a charge sheet specifying war crimes rather than civilian crimes, and with members of the military possibly taking part as judges, prosecutors, and jurors, can assist in expressing this conviction, even as civilian condemnation also finds an appropriate voice.

Proponents of simply targeting and detaining such threats fare no better in rendering war crimes trials unnecessary.<sup>42</sup> Although targeted and proportional attacks on enemies during hostilities are permitted under the law of war, and although humane detention of combatants is also lawful for the duration of an armed conflict, these modes of incapacitating terrorist threats are only legitimate insofar as they can be established to be *necessary*. Military and intelligence operations in the sovereign territory of foreign states are unjustified except in the narrow and urgent circumstance where a host nation is truly unwilling or unable to eliminate the threat. And detention until the end of the war becomes, in reality, punishment without trial when the war extends indefinitely for many years and even decades.

**A**nalysis of these and other skeptical claims suggests that the legitimacy of war crimes trials must be evaluated case by case. None of the claims is a clear trump. While each criticism gives us pause, their relevance will vary, as we have seen. But how do we assess their ultimate impact, and determine the legitimacy of a given tribunal, or the wisdom of instituting war crimes trials in a particular *ad bellum*, *in bello*, or *post bellum* context?

Reflection upon the claims and criticisms highlighted in the foregoing pages suggests that a purposive analysis may prove useful. That means inquiring into the purposes of war crimes trials, and then assessing whether a particular tribunal realizes them, or would realize them, sufficiently. Upon such inquiry, it becomes apparent that war crimes trials have both backward- and forward-looking purposes. They have the backward-looking aim of delivering retribution “through the channel of organized justice,” in addition to various forward-looking aims such as deterring future war crimes – in a particular conflict or more generally – and promoting the rule of law.

We can recast the claims and criticisms in these terms. The claims that war crimes trials apply arbitrary, unsettled, or unbounded law, that they deliver sham process, that they punish individuals for communal crimes, and that alternatives can deliver punishment more swiftly or reliably are all claims that war crimes trials fail to realize their backward-looking purpose of holding offenders accountable for their past wrongdoing in accordance with law. Meanwhile, the claims that war crimes trials incentivize further fighting, imperil peace agreements, and prevent communal reconciliation are claims that they fail to realize their forward-looking purposes.

The two types of aims can dovetail, as Robert Jackson expressed in his opening statement at the Nuremberg trials. By “stay[ing] the hand of vengeance” and delivering “a just and measured retribution” to Nazi leaders through law, Jackson argued, the Tribunal could advance the forward-looking aim of preventing future war crimes as it “put the forces of international law, its precepts, its prohibitions and, most of all, its sanctions, on the side of peace.”<sup>43</sup> Assessment of prosecutions that advance both aims simultaneously – as many now view the Nuremberg trials to have done – will generally be positive.

The two types of aims, however, are incommensurable, meaning that there is no deeper concern or value that can cash out conflicts between the two, and they will not always harmonize.<sup>44</sup> Their relationship, indeed, is notoriously complex and contentious. Some argue that the central aim of punishment is, and must be, forward-looking deterrence, but that, for reasons of efficiency and fairness, we should only punish the morally culpable.<sup>45</sup> Others start in the other direction, arguing that an offender's retributive guilt makes him *liable* for punishment, which should then be delivered if and only if justified by consequentialist considerations.<sup>46</sup> Some retributivists, though, take a much harder line in accordance with Kant, arguing that punishment – like, say, people's right to equal treatment – is justified “because, and only because” it is deserved, irrespective of any consequentialist benefits that may result.<sup>47</sup> While lacking the space to fully engage with this debate, we posit a “moderate retributivism,” whereby *some* positive value accrues in delivering proportionate censure and hard treatment to an offender, regardless of the consequences.<sup>48</sup> While this value will not always be sufficiently high, in and of itself, to justify punishment, the scale of wrongdoing involved with many international criminal violations is so profound that the retributive imperative to punish will be substantial even on this moderate view. But how substantial? How does it measure up to our forward-looking concerns, which remain independently relevant on this theory, when they push hard in the other direction?<sup>49</sup> In particular, what if prosecuting alleged war criminals would make peace less likely?

When presented with this dilemma, Holbrooke – in the example of whether Karadžić should have been prosecuted – can be said to have publicly taken a rigid, even Kantian line in support of retributive justice. Holbrooke's view was that the atrocities in the Balkans were so extreme

that worrying about whether prosecutions would jeopardize peace was inappropriate. Kant wrote famously in *Philosophy of Law*:

Even if a civil society resolved to dissolve itself with the consent of all its members – as might be supposed in the case of a people inhabiting an island resolving to separate and scatter themselves throughout the whole world – the last murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds, and that blood-guiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of justice.<sup>50</sup>

Kant explains here that the justification of retributive justice does not depend upon its good, forward-looking consequences. In his hypothetical, since the island society is disbanding, no good consequences will follow from the execution; in particular, it will deter no future murderer. And yet, on his view, as a matter of justice, the execution must still take place.

The “hypothetical” that Holbrooke confronted exposes, no less starkly, the irrelevance of consequences to retributive justice. Indeed, the issue was not that prosecuting Karadžić and others might fail to generate positive consequences, but rather that such prosecution risked hugely negative consequences, namely, the continuance of a nasty war. Holbrooke's “hypothetical” was this: should the community of nations prosecute a guilty murderer – indeed, a guilty mass murderer – if, by doing so, it risks dissolution of a fragile emerging peace settlement and the death of many of its members' citizens? By answering in the affirmative, Holbrooke championed, in the strongest possible terms, a moral duty to hold individuals legally accountable for their wrongdoing.

The appraisal of war crimes trials with inherent forward-looking risks, howev-

er, cannot end so neatly for at least two reasons. First, keeping in mind for an instant just the backward-looking criticisms, only a tribunal that applies well-made legal rules with due process could ever carry out a duty to prosecute, and these challenges alone are so formidable that resulting trials will evade neat assessments even without the possibility of dire future consequences. Second, keeping in mind also the forward-looking criticisms, even if we assume what a moderate retributivism denies – that delivering retributive justice is always a full-blown duty – we must understand that duties can sometimes be overridden, possibly by other duties – maybe the duty to maintain social order – and that the decision to set up institutions capable of prosecuting war crimes is ultimately a matter of political judgment by leaders with the power to do so.

While, in the moderate retributivist view, there ought to be a strong presumption in favor of prosecution in the case of mass international crimes, there are thus no clean answers. As political scientist Gary Bass has written, “It is important to remember that legal justice is one political good among many – like peace, stability, democracy, and distributive justice.”<sup>51</sup> Bass here echoes Alexander Hamilton, who writes in *The Federalist Papers: No. 47*, “In seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth.”<sup>52</sup> The

pragmatism of this perspective dilutes Holbrooke’s certitude appropriately, yet in examining alternatives to prosecutions with forward-looking costs, it is crucial to critically evaluate the details of, and the costs inherent to, the alternatives themselves. We must seek to consider the preferred course of action described or implied by each critic, making reasonable assumptions to fill often prevalent gaps. Precisely what kind of substitute response is envisioned? To whom are those championing such a response accountable? And does the cost-benefit analysis proposed or suggested really incorporate all relevant costs and benefits that will be borne by the entire population?

For the question, ultimately, cannot be whether to stay the hand of *justice*. That hand carries scales, and the scales of justice must always be permitted to do their work, here by weighing the prosecution of mass murderers against the pursuit of other goods. The decision to prosecute is not always straightforward and is never without price. But when carried out consistently with established law and procedure, and when not dramatically outweighed by forward-looking concerns, war crimes prosecutions are a legitimate, and sometimes necessary, response to egregious and widespread violations of the laws of war. This is so because all nations rely upon enforcement of these laws for their security, even as enforcement also confirms our individual and collective humanity.

#### ENDNOTES

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- <sup>1</sup> Hubert Pierlot, “The Inter-Allied Conference, January 13, 1942,” *Bulletin of International News* 19 (2) (January 1942): 52, <http://www.jstor.org/stable/25643188>. Hubert Pierlot, the prime minister of Belgium, made this statement upon signing the Declaration of St. James’s Palace, in London, January 13, 1942.
- <sup>2</sup> Inter-Allied Information Committee, *Punishment for War Crimes: The Declaration and Related Documents* (London: Her Majesty’s Stationary Office, 1942).
- <sup>3</sup> Hartley Shawcross, *Life Sentence: The Memoirs of Hartley Shawcross* (London: Constable, 1995), 87. Shawcross reflects upon Churchill’s preference for summary justice.
- <sup>4</sup> Harlan Fiske Stone quoted in Alpheus Thomas Mason, *Harlan Fiske Stone: Pillar of the Law* (New York: The Viking Press, 1956), 716.
- <sup>5</sup> Robert H. Jackson, Chief Prosecutor for the United States of America, “Opening Statement Before the International Military Tribunal (November 21, 1945),” in *Trial of the Major War Criminals Before the International Military Tribunal*, vol. 2 (Nuremberg: Secretariat of the Tribunal, 1947), 98 – 99.
- <sup>6</sup> United Nations Security Council, *Bosnia and Herzegovina* (S/RES/798), December 18, 1992, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N92/828/82/img/N9282882.pdf>.
- <sup>7</sup> *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 11 (Washington, D.C.: U.S. Government Printing Office, 1950), 757, 971 – 72, 1264 – 1274, [http://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_war-criminals\\_Vol-XI.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XI.pdf).
- <sup>8</sup> Richard Holbrooke, *To End a War* (New York: Modern Library, 1999), 90.
- <sup>9</sup> Julian Ku and Jide Nzalibe, “Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?” *Washington University Law Review* 84 (2006): 777 – 833.
- <sup>10</sup> *Ibid.*, 785 – 786.
- <sup>11</sup> *Ibid.*, 804.
- <sup>12</sup> Mason, *Harlan Fiske Stone: Pillar of the Law*, 716.
- <sup>13</sup> Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), 33 – 38.
- <sup>14</sup> Donnedieu de Vabres quoted in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 15 (Washington D.C.: U.S. Government Printing Office, 1949), 1077, [http://www.loc.gov/rr/frd/Military\\_Law/NTs\\_war-criminals.html](http://www.loc.gov/rr/frd/Military_Law/NTs_war-criminals.html).
- <sup>15</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 595 – 613 (2006).
- <sup>16</sup> *Al Bahlul v. United States*, 767 F.3d 1, 27 – 29 (D.C. Cir. 2014).
- <sup>17</sup> Memorandum from Herbert Wechsler, Assistant Attorney General, War Division, United States Department of Justice, to the Attorney General, December 29, 1944, located in the National Archives at College Park, Maryland. Wechsler comments on the “Bernays Plan” to try Nazi war criminals.
- <sup>18</sup> *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 11.
- <sup>19</sup> *Al Bahlul v. United States*, 767 F.3d 1, 27 – 29 (D.C. Cir. 2014).
- <sup>20</sup> *Reid v. Covert*, 354 U.S. 1, 38 – 41 (1957).
- <sup>21</sup> *Ibid.*
- <sup>22</sup> Carl von Clausewitz, *On War*, ed. and trans. Michael Howard and Peter Paret (Princeton, N.J.: Princeton University Press, 1976), 76.
- <sup>23</sup> *Ibid.*
- <sup>24</sup> William Blackstone, “Of the Military and Maritime States,” in *Commentaries on the Laws of England: The Rights of Persons* (Oxford: Clarendon Press, 1765), book I, chap. 13.
- <sup>25</sup> *Korematsu v. United States*, 323 U.S. 214, 244 (1944) (Justice Jackson dissenting).
- <sup>26</sup> *Ibid.*



- <sup>27</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (International Criminal Tribunal for the Former Yugoslavia, October 2, 1995); and *United States v. Hamdan* (Military Commission, 2008) (panel instruction).
- <sup>28</sup> *Geneva Convention Relative to the Treatment of Prisoners of War*, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 3.
- <sup>29</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, Article 6, December 7, 1978, 1125 U.N.T.S. 609.
- <sup>30</sup> 10 U.S.C. § 950g.
- <sup>31</sup> William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (New York: Alfred A. Knopf, 1998), 224 – 225.
- <sup>32</sup> Gustave M. Gilbert, *Nuremberg Diary* (Boston: Da Capo Press, 1995), 12 – 13, 32, 419.
- <sup>33</sup> William Shawcross, *Justice and the Enemy: Nuremberg, 9/11, and the Trial of Khalid Sheikh Mohammed* (New York: Public Affairs, 2011), 101.
- <sup>34</sup> Jack Goldsmith, *Power and Constraint* (New York: W.W. Norton and Company, 2012).
- <sup>35</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980).
- <sup>36</sup> Kent Greenawalt, “Amnesty’s Justice,” in *Truth v. Justice: The Morality of Truth Commissions*, ed. Robert I. Rotberg and Dennis Thompson (Princeton, N.J.: Princeton University Press, 2010), 202.
- <sup>37</sup> *Ibid.*, 197.
- <sup>38</sup> “Facts and Figures: Military Commissions v. Federal Courts,” Human Rights Watch, <http://www.hrw.org/features/guantanamo-facts-figures> (last modified December 23, 2011).
- <sup>39</sup> “Terrorism Cases Should Be Tried in Federal Court,” American Civil Liberties Union, <https://www.aclu.org/terrorism-cases-should-be-tried-federal-court>.
- <sup>40</sup> See Elizabeth Stanley, “Evaluating the Truth and Reconciliation Commission,” *Journal of Modern African Studies* 39 (2001): 525 – 546.
- <sup>41</sup> The twenty cases are as follows: 1. *The United States v. Mohammed Mansour Jabarah* (S.D.N.Y. 2002); 2. *Nalfi* (S.D.N.Y. 2003); 3. *Afridi* (S.D. Ca. 2004); 4. *Zayed* (E.D.N.Y. 2005); 5. *Moayed* (E.D.N.Y. 2005); 6. *Syed* (S.D. Ca. 2006); 7. *Kassir* (S.D.N.Y. 2009); 8. *Delaema* (D.D.C. 2009); 9. *Siddiqui* (S.D.N.Y. 2010); 10. *Ghailani* (S.D.N.Y. 2010); 11. *Warsame* (S.D.N.Y. 2011); 12. *Issa* (S.D.N.Y. 2011); 13. *Ghath* (S.D.N.Y. 2014); 14. *Hamza* (S.D.N.Y. 2014); 15. *Babar* (D.Conn. 2014); 16. *Bary* (S.D.N.Y. 2014); 17. *Fawwaz* (S.D.N.Y. 2014); 18. *Naseer* (E.D.N.Y. 2015); 19. *Hamidullin* (E.D. Va. 2015); 20. *Saddiq* (E.D.N.Y. 2015). The United States gained custody of four of these persons from the United Kingdom (14 – 18), two from Hong Kong (3, 6), two from Germany (5, 6), one from Canada (1), one from The Netherlands (8), one from the Czech Republic (7), one from Ghana (12), one from Kenya (2), one from Jordan (13), and one from Saudi Arabia (20). Only three came from portions of Southwest Asia containing large regions of ungoverned space (Afghanistan: 9, 19; Pakistan: 10; and international waters near the Arabian Peninsula: 11); and these required close coordination with U.S. military forces and nonstandard law enforcement detention. A comparison of these prosecutions with the fifteen thus far tried or arraigned by military commission is instructive, though beyond the scope of this essay. The fifteen military commissions prosecutions: 1. *The United States v. David Matthew Hicks* (2007); 2. *Hamdan* (2008); 3. *Bahlul* (2008); 4. *Qosi* (2010); 5. *Khadr* (2010); 6. *Noor* (2011); 7. *Khan* (2012); 8. *Darbi* (2014); 9. *Nashiri* (ongoing); 10. *K. S. Mohammed* (ongoing); 11. *Khallad* (ongoing); 12. *Ramzi* (ongoing); 13. *Hawsawi* (ongoing); 14. *Ammar* (ongoing); 15. *Hadi* (ongoing).
- <sup>42</sup> Goldsmith, *Power and Constraint*, 144.
- <sup>43</sup> *Trials of the Major War Criminals Before the International Military Tribunal*, vol. 2, 99 – 101.
- <sup>44</sup> See Nicola Lacey, *State Punishment: Political Principles and Community Values* (London: Routledge, 1988), 49, 55 – 56.

- 45 See H. L. A. Hart, "Prolegomenon to the Principles of Punishment," in *Punishment and Responsibility* (Oxford: Clarendon Press, 1968); and John Rawls, "Two Concepts of Rules," *The Philosophical Review* 64 (1955): 3–32. Mark S.  
Martins  
& Jacob  
Bronsther
- 46 See, for example, Andrew von Hirsch, *Censure and Sanctions* (Oxford: Clarendon Press, 1993).
- 47 Michael S. Moore, "The Moral Worth of Retribution," in *New Essays in Moral Psychology*, ed. Ferdinand Shoeman (Cambridge: Cambridge University Press 1987), 179.
- 48 See Jeffrie G. Murphy, "Retributivism and the State's Interest in Punishment," in *Criminal Justice: Nomos XXVII*, ed. J. Roland Pennock and John W. Chapman (New York: New York University Press, 1985); Ramon M. Lemos, "A Defense of Retributivism," *The Southern Journal of Philosophy* 15 (1977): 62–63; Michael Philips, "The Justification of Punishment and the Justification of Political Authority," *Law and Philosophy* 5 (1986): 401–410; Larry Alexander, Kimberly Kessler Ferzan, and Stephen Morse, *Crime and Culpability: A Theory of Criminal Law* (New York: Cambridge University Press, 2009), 7–10; and Alec Whalen, "Retributive Justice," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Stanford, Calif.: Stanford University Center for the Study of Language and Information, 2015), <http://plato.stanford.edu/archives/sum2015/entries/justice-retributive/>.
- 49 While maybe inelegant, it is not necessarily objectionable that a political practice has independent justificatory principles, which can conflict in certain circumstances. The principles underlying free speech, for instance – like the value of personal expression and the contribution free speech makes to a healthy democracy – will sometimes clash. Consider the cases of antidemocratic speech, such as hate speech or demagoguery. Where a practice has multiple justificatory principles, it is enough that each provides independent reasons in support of that practice, and that, as a general matter, they are not contradictory.
- 50 Immanuel Kant, *The Philosophy of Law*, trans. William Hastie (Edinburgh: T. T. Clark, 1887), 198.
- 51 Gary Bass, "Jus Post Bellum," *Philosophy and Public Affairs* 32 (2004): 405.
- 52 Alexander Hamilton, "The Command of the Military and Naval Forces, and the Pardoning Power of the Executive," in James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers*, ed. Isaac Kramnick (New York: Penguin, 1987), 423.

# The Distant Promise of a Negotiated Justice

*Leslie Vinjamuri*

*Abstract: A basic dilemma for political transitions and peace talks, whether to hold perpetrators of mass atrocities accountable or to negotiate a deal, has once again become the source of intense political controversy. Originally seen as containing a pathbreaking and innovative solution to this problem, a peace deal designed to bring an end to the war between the government of Colombia and the FARC was instrumentalized by former President Uribe to mobilize popular support and was struck down when it was put to the public for a vote. Elsewhere, political realities have impinged on efforts to hold trials, provoking a backlash by powerful individuals determined to spoil the peace rather than sacrifice their personal freedom. But when international criminal tribunals fail to prosecute powerful spoilers, they have been condemned for their hypocrisy or charged with being selective in their pursuit of justice. One measure to address the basic accountability dilemma would be to accept transitional justice compromises that hold a reasonable prospect of delivering peace and that have a strong base of support among those individuals and communities most affected by political violence. Transitional justice strategies should be guided by a do-no-harm principle.*

LESLIE VINJAMURI is Associate Professor of International Relations and Director of the Centre on Conflict, Rights and Justice at SOAS, University of London. She is the coeditor of *Human Rights Futures* (2017) and has published in such journals as *International Security*, *Ethics and International Affairs*, *Annual Review of Political Science*, and *International Journal of Transitional Justice*. She is a trustee of Chatham House, the Royal Institute of International Affairs, and is on the Advisory Board of LSE IDEAS.

Fourteen years ago, in the pages of this journal, Jack Goldsmith and Stephen Krasner wrote about the limits of an idealism that would disassociate the search for justice from sovereignty, national security, and power politics.<sup>1</sup> In that same year, Jack Snyder and I wrote that holding war crime trials in states with powerful spoilers and weak institutions risked provoking a backlash.<sup>2</sup> These warnings, grounded in a logic that stressed the consequences of political action, built on the work of Samuel Huntington, who, in his book *Third Wave*, identified the potential for a backlash if war crimes trials were held in countries where the military retained significant power.<sup>3</sup>

Despite these cautionary notes, the effort to build and consolidate institutions around a rules-based logic designed to secure the prospect of criminal accountability for international crimes has forged ahead:

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many of the rules and procedures that govern the International Criminal Court (ICC) have been formalized; important principles such as complementarity and the interests of justice have been given more clarity; and practices for guiding preliminary examinations have been formalized. Since 2002, the Court has opened ten formal investigations (“situations”), and begun at least as many preliminary investigations. It has publicly issued thirty-nine arrest warrants or summonses to appear (and potentially more under seal), including against heads of state. Far beyond the remit of the ICC, the tide of justice has also been rising. Legal challenges against high profile amnesties in Latin America succeeded, opening the door to human rights trials for atrocities committed under military dictatorships in Argentina and Chile. Mixed and ad hoc tribunals have also contributed to what leading human rights scholar Kathryn Sikkink has called a “justice cascade.”<sup>4</sup>

The ICC has played a critical role in altering expectations for international justice among elites, civil society organizations, and the perpetrators of mass atrocities, even in highly unstable and violent contexts. Peace negotiators and international diplomats think differently about peace talks today than they did two decades ago. Formal amnesties that explicitly refer to international crimes are now widely acknowledged to be off the table.

There has also been considerable effort to clarify formal rules governing possible exceptions to ICC justice, namely those pertaining to deferrals, complementarity, and the decision to abstain from proceedings if they do not serve the interests of justice. Once merely words on a piece of paper, these rules have received considerable attention.<sup>5</sup> Rather than making exceptions on an ad hoc basis, the ICC has sought to design rules to govern exceptions.

Some of these rules are based on a logic of consequences. The Security Council can

defer a case for a twelve-month (renewable) period if it agrees there is a threat to peace and security. But most of the rules that the ICC draws on to govern exceptions follow a different logic. Consequentialism doesn’t underpin the complementarity principle, which dictates that the ICC will only consider cases when a country is not willing or able to hold individual perpetrators accountable at home. The ICC can also decide that a case is inadmissible if it is not in the interests of justice to pursue it. The “interests of justice” have been interpreted to refer to the interests of victims, not the consequences for peace. But the meaning of the interests of justice remains the source of considerable debate. Some argue that this should include a consideration of the interests of society at large, which would provide one route for the prosecutor’s office to formally consider the impact of justice on peace.

One result of the effort to further clarify and confirm the rules has been to narrow the scope for exceptions to be granted. The bar for sidestepping international justice is now far higher. To some, it may seem that little if any room has been left for compromise and negotiation in the face of difficult trade-offs.

This sea change in the institutions, laws, and rules designed to ensure accountability has yet to produce similar changes on the ground. The gap between principle and practice is pronounced. Enforcement and compliance are subject to politics, power, and sovereignty.<sup>6</sup> Public officials have proved reluctant to subject themselves to international scrutiny. Liberal democracies, where the rule of law and human rights principles are well established, may support international justice for others, but prefer to deal with accountability issues at home. After the United States was reported to have bombed a hospital in Afghanistan populated by Médecins sans Frontières (MSF) workers and civilians, MSF demand-



ed that an international commission conduct investigations.<sup>7</sup> Instead, the Pentagon proceeded with an internal investigation.<sup>8</sup> When domestic procedures fall short of international expectations, democracies have asserted their sovereignty. The United States deflected international and domestic demands for trials of individuals responsible for the CIA's torture program.<sup>9</sup> In 2014, the Senate conducted a formal investigation of the program resulting in the publication of a report, but there has been little follow-up since.<sup>10</sup>

Elsewhere, a backlash against international efforts to investigate state elites has taken root. The decision by South Africa to withdraw from the ICC came within months of a visit by the President of Sudan. During this visit, South Africa came under intense pressure to send President Bashir to The Hague and was condemned for refusing to do so. Nonstate actors that cooperate with investigators and tribunal officials have risked their personal and organizational security. Refugees that cooperated with the ICC's investigations of atrocities in Darfur were expelled. Similarly, witnesses that were called to the ICC from Kenya were intimidated. State elites also waged an aggressive campaign against the Court. Kenya's elites put up the fiercest protests of all, successfully forging a cross-ethnic alliance designed to secure the presidency on the back of an anti-ICC campaign. They then proceeded to build a cross-Africa protest coalition using the vehicle of the African Union to protest against the ICC's targeting of sitting heads of state.

The impasse between principle and politics has created a political environment marked by uncertainty. Although the ICC has formalized rules to govern exceptions, exceptions to the rules have, in practice,

more often been driven by politics that take place beyond the ICC. In many cases, the ability of spoilers to block the ICC's efforts to conduct investigations and to prevent arrests has been the ticket to a free pass. This political reality raises a crucial question: are there circumstances under which transitional justice deals should be accepted for principled and pragmatic reasons, and if there are, who should decide this?

The announcement of a peace deal between FARC rebels and the government of Colombia brought this dilemma to the fore.<sup>11</sup> The arrangement turned on the negotiation of a transitional justice deal, the "special jurisdiction for peace." FARC rebels would be offered lighter sentences, including an element of community service, in exchange for a confession of their wrongdoings. The Colombian deal was subject to three checks: the Constitutional Court, a public referendum, and the International Criminal Court. Colombia had been under preliminary examination by the ICC since 2006. Ultimately, it was electoral politics and a national plebiscite, not the ICC, that jettisoned the deal.

In this essay, I demonstrate how a backlash against international justice has created a gap between principles and practice. Powerful state actors have sought to limit the scope of justice, sometimes by rewriting the rules or seeking to displace the authority of existing institutions with alternatives that they can more effectively control. Sequencing and negotiation are two frameworks that have shaped thinking about how to address this dilemma. Sequencing proposals assume that the timing and phasing of peace and justice strategies can help resolve the tension between principle and practice, in part by helping to overcome the tension between securing peace and promoting justice. A second framework stresses the importance of negotiating transitional justice deals. One key question in considering these frame-

works is what ethical standards should be used to determine the role for justice and accountability in any given situation.

I advance three arguments about the optimal role of investigations and war crimes trials in transitional contexts. First, a do-no-harm principle should guide decisions about justice and accountability, especially in transitional contexts. Second, proposals that recognize the need for compromise must not be ruled out. Sequencing is an inadequate framework for dealing with the need for justice and accountability in transitional contexts because it emphasizes the need to adjust the timing of established frameworks, but not the content. In fact, compromise on the substance and form of justice and accountability measures is often necessary. Third, the international community and especially the ICC should recognize the legitimacy of transitional justice compromises, especially when domestic support for these deals extends beyond their direct beneficiaries to include those most affected by political violence.

Historically, trials have been rare and, until recently, the assumption that peace must precede the pursuit of justice and that victorious powers would determine the course of justice has been unchallenged. Political elites also preferred to defer justice until after war's end to prevent a possible retaliation against their own prisoners of war.<sup>12</sup> Political considerations have also shaped the trajectory of ongoing justice initiatives. After 1945, American leaders were determined to build a strong multilateral alliance system with Western Europe to counter Soviet power. Over time, American leaders feared that antagonizing West Germany would undermine their broader strategic objectives. By the mid-1950s, the United States concluded its trials of German war criminals and put in place a clemency program that led to the early release of large numbers of them.<sup>13</sup>

Elites facing internal political transitions have made similar calculations. Transitions away from authoritarianism have rarely included trials of high-ranking officials. In Brazil, an amnesty was used to secure the military's buy-in as part of the transition. Argentina quickly backtracked after an initial attempt to put military leaders on trial. To prevent a military coup, it too adopted an amnesty.<sup>14</sup> General Pinochet approved his own amnesty as part of Chile's transition away from military rule. Amnesty also has a long history throughout Africa.<sup>15</sup> Even in South Africa, where the truth and reconciliation commission quickly gained global recognition, the transition hinged on a deal that the Amnesty Committee was obliged to grant amnesty if certain criteria were fulfilled, most especially that an individual perpetrator confessed his crimes, including a full disclosure of all relevant facts.

Transitions in Latin America spurred new legal thinking. The idea that there was a moral and legal duty to prosecute certain international crimes regardless of the constraints of sovereignty, conflict, or political transition quickly gained traction.<sup>16</sup> In the summer of 1992, war crimes in the Balkans, and especially the discovery of detention camps, inspired a coalition of journalists and human rights advocates to demand prosecutions for the perpetrators of these mass atrocities.<sup>17</sup>

In the spring of 1993, the United Nations Security Council passed a resolution to create the International Tribunal for the former Yugoslavia (ICTY) to prosecute international crimes in the former Yugoslavia. One year later, a similar ad hoc tribunal was created to prosecute perpetrators of the atrocities in the Rwandan genocide. By 1998, the Rome Statute created the basis for an institutionalized set of rules and procedures for criminal accountability and within a few years, the ICC had received the necessary sixty ratifications. In 2002, it

became the first permanent international war crimes court.

The surge of advocacy and institutions for accountability signaled a principled commitment to justice by a highly motivated and mobilized network of advocates in both the private and public sphere that extended across many states, predominantly but not exclusively in Europe, Latin America, and North America. Advocates have been optimistic that this would have positive effects for justice, accountability, and even peace. Perhaps the most enthusiastic and optimistic of the leading international NGOs, Human Rights Watch, has argued for the power of arrest warrants and trials to stigmatize targeted individuals.<sup>18</sup>

But the surge in principled advocacy has not been matched by a change in political realities. Consequently, the gap between principle and practice has widened. In the 1990s, the use of amnesty increased as did the number of civil wars, many of which were resolved through negotiation rather than military victories on the battlefield.<sup>19</sup> Increasingly, though, international peace negotiators now opt for a “strategic silence” in peace talks and peace agreements. The normative prohibition on amnesties has created a precarious balance between justice and peace. Amnesties for international crimes (genocide, crimes against humanity, and war crimes) are less common, but this has not translated into a commitment by belligerents to cooperate in prosecuting these crimes.<sup>20</sup>

In the face of concrete justice initiatives, the targets of international justice have sought to deflect or reject investigations or arrests from taking place inside their borders. Even when governments have formally agreed to cooperate with the ICC, their actual behavior has sometimes oscillated. Uganda invited the ICC to investigate war crimes committed by Lord’s Resistance Army (LRA) rebels, but with the caveat

that it would not cooperate with ICC proceedings against state actors.<sup>21</sup> When faced with the quandary that ICC arrest warrants might impede the success of peace talks in Juba, the government did an about-face, asserting that it preferred that the Court drop its case and allow talks with the LRA to proceed unhindered.<sup>22</sup>

One of the most commonly cited success stories for justice intervention is the case of Charles Taylor, former president of Liberia. An arrest warrant against Taylor issued by the Special Court for Sierra Leone was unsealed on the first day of peace talks on the Liberian war. Taylor left the peace talks and was later prosecuted and convicted for war crimes at a trial in The Hague. But although Taylor left the peace talks, what is usually left out of this story are the circumstances under which he agreed to go. Taylor left not with the assumption that he would be prosecuted, but rather under the belief that he would be protected. After returning to Monrovia, he later went to Nigeria for what was intimated to him to be an indefinite asylum.<sup>23</sup> Taylor’s trial and subsequent conviction most likely made other leaders wary and less willing to step aside when faced with the prospect of an arrest.<sup>24</sup>

The backlash against international justice has been especially intense in those places where the ICC was never welcome in the first place. Security Council referrals of nonmembers have not been well received. Nor have investigations initiated by the prosecutor, as Kenya has shown. In these situations, uncompromising justice meted out against powerful spoilers has neither neutralized its targets nor weakened the resolve of their allies. Elites that have come under the purview of the ICC have adopted an array of tactics designed to court allies and undermine investigations. Sudan’s President Bashir decided to stand for reelection when he learned that there was an arrest warrant against him, effectively jettisoning his previous plan to retire.<sup>25</sup> First,

though, he forced the exit of leading international humanitarian organizations that he suspected of assisting ICC investigators by giving evidence against him. The arrest warrant against Libya's leader, Muammar Gaddafi, also failed to diminish his determination to fight. At the same time, the one-sided nature of ICC investigations in Libya may have bolstered the confidence of rebel fighters whose crimes were effectively ignored by the Court.<sup>26</sup>

In Kenya, the ICC had an even greater impact, effectively inspiring two of its targets to form a coalition and campaign for the presidency on an anti-ICC platform. The Kenyatta-Ruto campaign cast the ICC as an instrument of Western imperialism, making the ICC one of the key election issues. After successfully taking the presidency and vice presidency, Kenyatta and Ruto went on to challenge the legitimacy of the ICC and undermine its case against them, primarily by intimidating witnesses. This strategy worked. In December 2014, Chief Prosecutor Bensouda declared that the ICC lacked sufficient evidence and so could not proceed with the case against President Kenyatta.

States have also been reluctant to support justice in the absence of either a transition plan or successful peace talks. For a full year, the U.S. government refused to support a call by European leaders to refer Syria to the ICC. European leaders had committed to a unified effort, but privately, some European governments acknowledged that they took comfort knowing they could name and shame Syria and talk about justice, but be secure in the reality that in the absence of U.S. support, peace diplomacy could proceed without risk of interference. The U.S. position changed only after a second round of peace talks failed. The release of photographic evidence documenting mass atrocities in Syria spurred the U.S. government to support a French-led initiative to draft a resolution calling for Syria's referral to the ICC.

The resolution was vetoed by Russia and China.

One strategy to move beyond this impasse is to agree to a set of rules or ideals for closing the gap between principle and practice. This raises a prior question: what is the ethical standard for agreeing to such a principle? I recommend that a do-no-harm standard should guide decisions about international justice. In the contemporary political, legal, and normative environment, this standard balances what is practically achievable with optimal results. By this standard, the pursuit of justice should not impede the prospects for achieving peace. Compromises of justice intended to save lives by ending war are acceptable. Similarly, amnesty would be acceptable if it helps secure a democratic transition, away from authoritarian rule that is associated with human rights abuses. In practice, the application of a do-no-harm standard might guard against unenforceable arrest warrants targeted against powerful spoilers, especially sitting heads of state, but it would not preclude efforts to collect evidence and document crimes either by NGOs like the Commission for International Justice and Accountability, by the UN Commission of Inquiry, which has documented human rights abuses in states such as North Korea, or by the International Criminal Court.<sup>27</sup>

Positive effects, a second possible standard, sets a higher bar. By this standard, justice should be pursued only when it will have positive effects for peace, democracy, and human rights.<sup>28</sup> A positive effects standard would consider the immediate impact on a particular situation, but also balance this with the medium- and long-term effects of justice and accountability. One potentially positive effect of trading off justice in the short-term might be to secure a peace deal that empowers a reform coalition's institution-building efforts in the



long run. In an ideal world, the threat to prosecute and the promise to strike a transitional justice deal would be harnessed as part of a transitional strategy. In the existing normative, legal, and institutional environment, applying this standard is more difficult than it used to be, but still possible. For many observers, Colombia's peace deal seemed to strike an important compromise, inserting accountability into the peace process but accepting a deal that offered the prospect of ending a war that had run for more than fifty years.

A third standard, last resort, requires that all alternative policy instruments be deployed to avoid the resort to war (or to bring a halt to the continuation of war). This would include amnesties or safe exits. A promise of amnesty could be paired with a threat to prosecute if perpetrators failed to abandon their war-fighting aims. If the strategic use of amnesty or safe exits fails to secure peace, then a last resort standard would allow for the pursuit of justice regardless the consequences. In the aftermath of the second round of failed peace talks at Geneva, and prompted by the release of photographic evidence documenting mass atrocities in Syria, the United States decided to back a French-led initiative to draft a resolution calling for Syria's referral to the ICC.<sup>29</sup>

If an offer of amnesty enabled peace, though, a last resort standard would permit this exception. But if a safe exit were as likely to secure peace as an amnesty, then this would be preferable on moral as well as legal grounds. Unlike an amnesty, a safe exit offers no formal legal protection, but it has a similar ability to solve a short-term political problem by removing powerful spoilers. Human rights advocates accept the practice of safe exits, but have rejected amnesty for international crimes. During the NATO bombing of Libya, former President of the Open Society Foundations Aryeh Neier suggested the possibility of a safe exit deal

for Gaddafi, but rejected offering amnesty.<sup>30</sup> In 2015, four years after the war in Syria began, Kenneth Roth, director of Human Rights Watch, argued that while amnesty must remain off the table, a safe exit could be arranged for Assad.<sup>31</sup>

In practice, the last resort standard will be difficult to implement. Policy instruments, like an amnesty or safe exit, that fail to work at one point may be successful at a later point when the facts on the ground change. Peace talks failed in Bosnia in 1993, but succeeded in 1995. If an arrest warrant against Milosevic had been issued in 1993 on the basis that it was a last resort, this may have undermined the success of the peace talks, in which Milosevic represented the Serbs and that resulted in the signing of the 1995 Dayton peace accords.

In the case of Syria, if the proposed Security Council Resolution had passed, this may have added an additional complication to efforts to deal with the conflict in Syria. Within months of this vote, the U.S. focus shifted to combatting the rise of the Islamic State. And in late September 2015, Russia entered the war as an ally of President Assad.

In recent years, practitioners, advocates, and scholars have debated the optimal sequencing of international justice. This debate gained momentum surrounding the intervention in Libya. The juxtaposition of a Security Council referral of Libya to the ICC and, weeks later, NATO's military intervention instigated intense debate and division among human rights organizations about the role of the ICC in ongoing conflict. The ICC's role in Libya, especially its decision to issue an arrest warrant against Gaddafi during NATO's air campaign, once again raised the question whether the threat to prosecute had a substantially negative effect on efforts to end the fighting. The African Union felt its own efforts to negotiate a settlement were hampered by the ICC arrest warrant. The de-

cision by the ICC not to investigate rebel crimes was seen by some analysts as altering the dynamics of the conflict by emboldening rebel fighters.<sup>32</sup>

Sequencing proposals fall into three broad categories. First, proponents of a rights-first strategy call for integrating human rights and justice concerns into the front line of peace and security diplomacy and humanitarian initiatives. This strategy embodies a critique of the pragmatism of negotiations or humanitarian initiatives that have either taken human rights concerns off the table to secure access or negotiate a deal, or deferred them until peace and security goals are achieved.

Second, peace-first proposals essentially recommend that human rights and accountability concerns be deferred until peace has been secured either through the use of military force or through negotiations. Historically, amnesty has been an instrument that is integral to the peace-first approach. More recently, because of the normative prohibition against amnesty for genocide, crimes against humanity, and war crimes, negotiators have generally adopted either a “strategic silence” for international crimes, or an amnesty that in theory does not apply to international crimes, but in practice might.

Third, separate tracks – the antisequencing proposal – rejects a focus on the strategic consequences of investments in peace and justice. Louise Arbour, former chief prosecutor of the ICTY and former high commissioner for human rights at the United Nations, coined this term after NATO’s war in Libya had ended. In a speech during her tenure as president of Crisis Group, Arbour called for separate tracks arguing that the inevitable conflicts that arose between separate tracks should be resolved through ongoing compromise.<sup>33</sup> Justice proponents and practitioners must not make exceptions in order to achieve peace and, similarly, peace practitioners must set aside any

consideration of how their efforts will affect the prospects for justice. Only when the trade-offs are inevitable should they be negotiated, although proponents of this view have given few guidelines for how to approach these trade-offs. International justice and peace talks are two separate tracks that must be pursued independently and without consideration of the other. Separate tracks rejects a strategic approach to the pursuit of justice whereby threats to investigate or prosecute are matched by a promise of a safe exit or even amnesty if perpetrators of atrocities agree to stop fighting. It calls for preserving the independence of international tribunals from political influence both in practice and in institutional form.

Sequencing proposals are primarily concerned with timing and give inadequate consideration to the need for compromise and for deals. For this reason, they are ultimately inadequate for dealing with the real challenge of transitional justice. In many cases, the more preferable deals consist of arrangements that are outside the bounds of narrowly conceived criminal justice standards. Still, three proposals in particular should be given serious consideration.

First, since the likelihood of bringing perpetrators to justice and securing a conviction during ongoing violent conflict is low, while the prospect that trials can derail peace talks is significant, the focus in this period should be limited to evidence collection. Ideally, this evidence should be collected in a fashion that allows it to be useable in trials, should these be pursued at a later date. Commissions that are established to collect facts should be given sufficient time to complete their work.

Second, preliminary examinations by the ICC have the potential to cast the shadow of justice on violent conflict situations. Ideally, such investigations should help steer parties toward a resolution of conflict that

recognizes a role for accountability that is stabilizing and acceptable to the relevant parties. However, the utility of preliminary examinations will necessarily be qualified by a number of factors, including the timing and nature of the communications that the ICC delivers to relevant parties to peace talks, the timing of decisions about whether to proceed with formal investigations, and the criteria through which ultimate decisions are made on final arrangements. Preliminary examinations are potentially very significant beyond the specific events they consider because they send a more general signal about how the Court is likely to decide on matters of peace and justice.

Third, diplomatic threats to prosecute specific individuals for war crimes may be paired with promises, should behavior change. This could be useful during violent conflict situations. Arrest warrants lack the flexibility of diplomacy and narrow the scope for bargaining, thereby removing the incentive that perpetrators of atrocities have to cooperate. Little if any precedent exists to suggest these provide a constructive way forward that meets a do-no-harm standard.

Existing debate about sequencing among practitioners of international justice have ultimately been inadequate, failing to provide a solution to some of the most intractable peace and justice dilemmas. Instead, the international community, including the ICC, should recognize the legitimacy of transitional justice compromises when they demonstrate a measure of domestic support that extends beyond those who directly benefit and especially when those most affected by violence support the deal.

Innovative solutions designed to bridge a gap between accountability and impunity and hold off ICC investigations not only face external scrutiny, but they may also struggle to survive the political maelstrom of electoral democracy. On September 24,

2015, President Santos of Colombia and the FARC rebel leader Timoleón Jiménez announced a major breakthrough in peace talks that sought to bring an end to a fifty-year-old conflict.<sup>34</sup> After three years of talks, a solution to one of the most sensitive issues, whether rebel fighters would face trial or receive an amnesty for their violent crimes, was agreed upon. Colombia had been under preliminary examination by the International Criminal Court since 2006. Public opinion in Colombia, stoked by former President Uribe, also opposed a blanket amnesty. Negotiators anticipated the public referendum and Colombia's Constitutional Court as two highly consequential checks on a peace deal. They understood that the prospect of securing a deal would plummet if they announced a blanket amnesty for the FARC. Equally, a peace agreement with uncompromising justice for the FARC stood little chance of success.

The deal that Colombia's leaders sought to deliver reflected these conflicting pressures, striking a cautious balance between peace and justice. It proposed a truth commission for high-ranking individual perpetrators. Those that confess their crimes were to receive alternative sentencing, including tasks as varied as community service or even academic study, while others would face full criminal trials. The deal was widely praised by international leaders. In 2015, the ICC issued a statement acknowledging the deal and expressing its tentative support.<sup>35</sup> Its reaction to Colombia's deal reflected a heightened sensitivity to the precarious balance between the requirements of peace and the demand for justice. As one Court official remarked, "we do not want to be seen to be a spoiler to peace."<sup>36</sup>

Despite widespread international support, the deal failed to survive, albeit by a narrow margin, in a public referendum. Human Rights Watch opposed the deal (as did a few notable individual human rights ad-

vocates) and were quick to claim that the “no” vote was a vote against the transitional justice deal.<sup>37</sup> And yet in those regions most affected by the violence, the public voted yes to peace, but turnout was low, in part because of the adverse conditions created by Hurricane Matthew.

Transitional justice deals must satisfy belligerent parties, especially those with the power to spoil a deal, if they are to succeed. But the international community increasingly plays an important role in stabilizing these deals. Since 2002, the default position in the international community has been to assume that the rules for international justice and, by default, the exceptions to those rules are governed by the International Criminal Court. Decisions about whether to acknowledge and accept these deals should be based on a calculation of whether they are likely to stick, and also whether there is a broader basis for assuming the legitimacy of such deals. This decision should not be left solely in the hands of the ICC, in part because the ICC remains highly constrained by a fairly narrow set of rules for exercising this judgment, but also because those rules remain vague, undefined, and, to a large extent, opaque.

The case of Colombia shows that transitional justice remains intensely political. The prospect that an uncompromising peace deal will succeed is slight. But the decision to subject a negotiated deal to a public referendum laid bare the opportunity for political elites to turn transitional justice into an instrument that could be used to gain advantage in electoral politics. The optimal mechanisms for evaluating the legitimacy of exceptions must extend beyond the consequentialist logic of political realists but not so far that it risks undermining the prospects for peace and for progress.

It remains to be seen what criteria the ICC will use to evaluate and decide on fu-

ture transitional justice deals. Technically, the ICC decides on the basis of the principle of complementarity and also the interest of justice, as mentioned in Article 53 of the Rome Statute.<sup>38</sup> Complementarity, the principle that states that the ICC will only take on cases that are not genuinely investigated or prosecuted domestically, has now been interpreted as requiring that a state that wishes to pursue justice itself must hold criminal trials of individuals accused of international crimes, rather than seeking any alternative form of accountability.<sup>39</sup>

The interests of justice, the second possible avenue through which the ICC can recognize the legitimacy of transitional justice deals, remains the subject of continued debate among transitional justice scholars and advocates primarily because it is not well defined or understood. The policy paper issued by the prosecutor’s office maintains that the interest of justice refers to the interests of victims, and that the interest of peace is not part of the interests of justice but is the preserve of the Security Council.

Formal arrangements for bringing perpetrators of mass atrocities to account have enshrined and protected the principle of accountability and yet, in practice, powerful spoilers continue to present an obstacle to the realization of this principle. This has resulted in uncertainty and ambiguity about when the rules will be applied. And yet no revision to the current rules seems to be on the horizon. The referral of Libya to the International Criminal Court and the ensuing proximity between justice, humanitarian intervention, regime change, and the Security Council created a watershed moment for proponents of international justice, but the thinking it generated has not yet led to a new consensus on the role of justice in conflict and transition.

The current framework for securing international justice has proven inadequate.

*Leslie  
Vinjamuri*



It has gone a considerable distance toward changing expectations, disseminating norms, and consolidating institutional frameworks for justice. But in the most intractable cases of authoritarianism, conflict, and transition, there has been little justice. Where the ICC has pressed ahead, this has inspired a concerted backlash.

The structure of international justice has also inspired allegations of hypocrisy. Liberal democracies of the West remain beyond the purview of international justice, for the most part. Allegations of torture by U.S. officials have been investigated but not prosecuted. The ICC focuses disproportionately on Africa, while the scale of mass atrocities in Syria grows daily. Each of these individual critiques of justice can be answered, but taken together,

the overall picture for international justice is dissatisfying. Two measures for building on existing institutions should be embraced: first, one that recognizes the legitimacy of negotiated transitional justice compromises, especially in contexts where this is important for securing a democratic transition or strengthening the prospect for peace; and second, one that defers arrest warrants for sitting heads of state until a strategy for ending violent conflict has been implemented. The legitimacy of transitional justice compromises should be based on its overall benefit for society, and on evidence of domestic approval beyond a narrow self-interested elite, especially where this includes those most affected by violence.

#### ENDNOTES

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# Evaluating the Revisionist Critique of Just War Theory

Seth Lazar

*Abstract: Modern analytical just war theory starts with Michael Walzer's defense of key tenets of the laws of war in his Just and Unjust Wars. Walzer advocates noncombatant immunity, proportionality, and combatant equality: combatants in war must target only combatants; unintentional harms that they inflict on noncombatants must be proportionate to the military objective secured; and combatants who abide by these principles fight permissibly, regardless of their aims. In recent years, the revisionist school of just war theory, led by Jeff McMahan, has radically undermined Walzer's defense of these principles. This essay situates Walzer's and the revisionists' arguments, before illustrating the disturbing vision of the morality of war that results from revisionist premises. It concludes by showing how broadly Walzerian conclusions can be defended using more reliable foundations.*

SETH LAZAR is a Senior Research Fellow at the Australian National University's School of Philosophy. He is the author of *Sparing Civilians* (2015) and coeditor of *The Morality of Defensive War* (2014) and the *Oxford Handbook of Ethics of War* (2016). He has published in such journals as *Ethics*, *Philosophy & Public Affairs*, and *Australasian Journal of Philosophy*.

Some dismiss the very idea of just war theory. Of those, some deny that morality applies in war; for others, morality always applies, everywhere, and it could never license the horrors of war. The first group are sometimes called realists, the second: pacifists. Just war theory seeks a middle path: to justify war, but also to limit it. Wherever there have been wars, lawyers, theologians, and philosophers have sought to walk this line. Though most commonly associated with the Christian tradition, different iterations of just war theory are part of every culture.<sup>1</sup> In this essay, I will focus on contemporary just war theory in the works of Anglophone analytical philosophers: I'll call this *analytical just war theory*. And I will focus on the debate between the most prominent contemporary just war theorist, Michael Walzer, and his critics. Narrower still, I will focus on one question in that debate: how ought we to fight?

The "ought" in that question is unqualified. Our topic is neither the laws of war nor a side's rules of engagement. Our focus instead is on the categorical



moral ought – the one that admits of no exceptions. How, *morally*, ought we to fight? Some may struggle to understand this question, arguing that there are no moral truths, or that morality itself is conventional or culturally relative. But war is a tough arena for skeptics and relativists. Is there any question that it is wrong to intentionally kill children to coerce their government into political or territorial concessions? Though we cannot make much progress by focusing on such easy cases alone, we also cannot vindicate the deep moral revulsion that such scenarios inspire without acknowledging some objectivity in the morality of war.

So how do we argue about the morality of war? Most analytical just war theorists adopt Rawls's method of "reflective equilibrium."<sup>2</sup> In this approach, we develop moral arguments by taking our considered judgments about the permissibility of actions in particular cases and trying to identify the underlying principles that unify them.<sup>3</sup> We then take those principles and test how they apply to other cases, real or hypothetical. If the principles generate conclusions that conflict with our considered judgments about those cases, then we must revise either the principles or our judgments. As our project evolves, and we revise our principles in light of our judgments and our judgments in light of our principles, we approach reflective equilibrium (the underlying standard of epistemic justification is coherentist).

In this essay, I focus only on how we ought to fight, not on when. Narrower still, I focus on three candidate principles that purport to govern the conduct of hostilities. *Noncombatant immunity* states that intentionally killing noncombatants is impermissible.<sup>4</sup> The principle of *proportionality* dictates that the unintentional killing of noncombatants is permissible only if it is proportionate to the goals the attack is intended to achieve. And *combatant equality*

applies these principles and others governing conduct in war identically to all combatants, regardless of what they are fighting for. These principles divide the possible victims of war into two classes: combatants and noncombatants. Combatants may be killed without restraint.<sup>5</sup> But noncombatants may be killed only unintentionally, and even then, only if the harm that they suffer is proportionate to the intended goals of the attack. Obviously, then, knowing what makes one a combatant is crucial. For the purposes of this essay, I understand these categories as they are understood in international law. Combatants are members of the armed forces of a group that is at war and nonmembers who directly participate in hostilities. Noncombatants are not combatants. These are deceptively simple categories; hard cases abound. But the three principles on which I will focus raise challenging enough philosophical problems, even when considering only the clear-cut cases.

Noncombatant immunity, proportionality, and combatant equality each have deep philosophical roots. But they have been most clearly articulated and espoused in twentieth-century international law, specifically Additional Protocol I to the Geneva Conventions, 1977. For noncombatant immunity, see, for example, the "Basic Rule," Article 48, which states: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."<sup>6</sup> For proportionality, see Article 51, which prohibits "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage an-

ticipated.”<sup>7</sup> For combatant equality, see Article 43 (among other sections), which defines who may be considered a combatant before explicitly stating that “combatants... have the right to participate directly in hostilities.”<sup>8</sup> The preamble, meanwhile, makes clear that these principles apply “without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.”<sup>9</sup> The contemporary just war debate began with an attempt to vindicate these legal and customary norms, in a book published the same year as the first additional protocol.

Michael Walzer’s *Just and Unjust Wars* was influential in numerous academic disciplines, as well as in public policy and military education; its uptake in analytical just war theory is only one dimension of that influence. *Just and Unjust Wars* takes on realists and pacifists, addresses questions of resort, conduct, and aftermath, and explores topics that have since been largely (and inexplicably) neglected, including the ethics of sieges, reprisals, and maintaining neutrality while other states make war. Non-combatant immunity, proportionality, and combatant equality are only part of his theory, but are at the heart of the “war convention” that Walzer sought to vindicate: “the set of articulated norms, customs, professional codes, legal precepts, religious and philosophical principles, and reciprocal arrangements that shape our judgements of military conduct.”<sup>10</sup>

A single argument underpins non-combatant immunity and combatant equality and lays the foundations for proportionality. The basic idea is simple. Individual human beings enjoy fundamental rights to life and liberty, which prohibit others from using or harming them in certain ways. Fighting wars means depriving others of life and liberty, so it can be permissible only if each of the victims has “through some act of his

own . . . surrendered or lost his rights.”<sup>11</sup> Walzer then claims that “simply by fighting,” all combatants “have lost their title to life and liberty.”<sup>12</sup> He makes two arguments. First: simply by posing a threat to me, a person alienates himself from me, and from our common humanity, and so himself becomes a legitimate target of lethal force.<sup>13</sup> Second: by participating in the armed forces, a combatant has “allowed himself to be made into a dangerous man,” and thus surrenders his rights.<sup>14</sup> Besides combatants, “everyone else retains his rights.”<sup>15</sup> Noncombatants are “men and women with rights, and . . . they cannot be used for some military purpose, even if it is a legitimate purpose.”<sup>16</sup>

Since noncombatants retain their rights, they are not legitimate objects of attack. This vindicates noncombatant immunity. Conversely, all combatants lose their rights, regardless of what they are fighting for; thus, if a force attacks only enemy combatants, they will fight legitimately, because they will not violate anyone’s rights. This gives us combatant equality.

Proportionality requires a little more work. Walzer says that individual non-combatants have rights not to be used to advance military goals. But their rights do not protect them as fully against being harmed in the course of one side achieving its military objectives. His argument for proportionality is grounded in compromise: wars cannot be fought without unintentionally killing noncombatants; so if we resist pacifism, we must allow for some unintended killing of noncombatants, as long as it is proportionate to the intended objective. Indeed, besides merely being proportionate, an attack must also minimize risk to noncombatants, at least when weighed against the military objective and the additional risks placed upon the combatants themselves.

In *Just and Unjust Wars*, Walzer offers some supplementary arguments for these

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core principles of just conduct in war. He notes that combatants on both sides of most conflicts have very similar experiences. They tend to believe they are justified in fighting, and indeed fight for good reasons: loyalty, a belief that their country is under threat, and trust in their leaders, to name a few.<sup>17</sup> Where these reasons are absent, combatants often fight under duress. In either case, they fight because they think they have to. When they share so many similar motivations, it would be hypocritical of either side's soldiers to blame the other side for fighting. Additionally, since from each soldier's perspective luck determines whether his war is just, we might think it unfair to make unjust combatants alone bear the results.<sup>18</sup> In later works, Walzer also argues that the distinctly collective nature of participation in the military knits combatants together; regardless of what they do as individuals, the mere fact of their membership in a collective actively engaged in hostilities makes them liable to harm in a way that is not true for nonmembers.<sup>19</sup>

In *Just and Unjust Wars*, Walzer seeks both to interpret and to vindicate the war convention. It would therefore be misleading to reduce his contribution to a series of arguments that stand or fall on their merits. If those arguments fail, then his attempt to justify the war convention fails. But his interpretation of that convention might still ring true, such that we had better find some argument that vindicates it, lest our theory be radically out of step with common sense about war.

And yet, Walzer's arguments must be tested like any others.<sup>20</sup> Analytical just war theorists have powerful objections to Walzer's positions on noncombatant immunity and combatant equality; proportionality is also controversial, though less so. The most influential proponent of the revisionist critique of Walzer has been the

philosopher Jeff McMahan, but similar arguments have been advanced by others.<sup>21</sup>

The simplest and most telling objection against combatant equality brings it into conflict with proportionality.<sup>22</sup> As unintended noncombatant deaths are permissible only if proportionate to the military objective sought, that means that the objective is *worth* some amount of innocent suffering. But what is a military objective worth? Daesh's capture of Raqqa or Mosul plausibly count as "military objectives." How many innocent deaths was achieving those goals worth? How many innocent deaths would be proportionate to the Lord's Resistance Army driving African Union forces out of South Sudan?

In each case, the answer is obvious: none. Proportionality is about weighing the evil inflicted against the evil averted.<sup>23</sup> But the military success of unjust combatants does not avert evil; it is itself evil. Evil inflicted intentionally can only add to, not counterbalance, unintended evils. Thus, combatant equality cannot be true. All war involves unintended innocent deaths. If these deaths cannot be justified, then fighting is wrong. And if you advance only wrongful aims, then you achieve no good that can justify these deaths. The laws of war cannot be directly grounded in objective moral norms.<sup>24</sup>

The revisionists did not stop there. They developed further arguments against combatant equality, which also undermine noncombatant immunity. They first accept Walzer's premise that, in war, combatants may intentionally kill all and only those who have "surrendered or lost" their rights to life and liberty. These rights connect directly to our possession of moral status, indeed, might even be constitutive of it. We cannot surrender or lose these rights except by doing something that warrants such a severe fate. But Walzer's account of how these rights are lost is not plausible, they maintain. He argues that combatants lose their rights because they

threaten the lives of others. Their dangerousness grounds their liability. But merely posing a threat to others – even a lethal threat – is not sufficient to warrant surrender of one’s fundamental rights, because there can be very good reasons to threaten another’s life.

Allied soldiers landing on the shores of Normandy during World War II were fighting against genocide and imperialist expansion; their adversaries were defending those iniquitous ends.<sup>25</sup> Why should the Allies lose their rights, only by doing what they are clearly morally permitted, perhaps even required, to do? Why would the soldiers of the Peshmerga, fighting to rescue Yazidi Christians from genocidal attacks by Daesh, lose their rights not to be killed by their quasi-fascist adversaries? In no other sphere of human activity does posing a threat in pursuit of a just aim, a threat against those actively trying to thwart that just aim, vitiate one’s rights against being harmed by those very people. Merely posing a threat to another’s life cannot justify the loss of one’s rights. Combatants fighting for just aims retain their rights to life and liberty. So combatant equality is false: just combatants are permitted to kill unjust combatants, but not vice versa.

Posing a threat oneself is not sufficient to become liable to be killed. Nor is it necessary. Revisionists argue that liability to be killed, in war as elsewhere, is grounded not in posing a threat, but in one’s *responsibility* for a *wrongful* threat. As such, the U.S. president is responsible for a drone strike that he orders, even though he does not personally fire the weapon. Similarly, from his villa in Abbottabad, Bin Laden could not pose any threats himself. But he may have been responsible for many.

This argument undermines noncombatant immunity.<sup>26</sup> Noncombatants play an important role in the resort to military force. In modern industrialized coun-

tries, as much as 25 percent of the population works in war-related industries.<sup>27</sup> Further, we provide the belligerents with crucial financial and other services; we support and sustain the soldiers who do the fighting; we pay our taxes and in democracies we vote, providing the economic and political resources without which war would be impossible. Noncombatants’ contributions to the state’s capacity over time give it the strength and support to concentrate on war. If the state’s war is unjust, then many noncombatants are responsible for contributing to wrongful threats. They are therefore permissible targets. So, by these lights, noncombatant immunity, too, is false.<sup>28</sup>

Most revisionists accept proportionality. But the same techniques used against combatant equality and noncombatant immunity place its application to war in doubt. First, note that the licence to unintentionally kill innocent people in war is far more permissive than would ever be plausible outside of war. Outside of war we almost never contemplate knowingly killing innocent people as a side effect of pursuing our legitimate objectives.<sup>29</sup> What, then, explains the additional leeway granted in war?

Moreover, many philosophers think that the purported moral distinction between intended and unintended killing is illusory.<sup>30</sup> Even supposing we set their worries aside, whose intentions matter in war? The one who pulls the trigger? Her immediate superior, who ordered the shot? The commander who ordered the attack? The politician who ordered the advance? Are intentions relevant if war-making is such a corporate effort?

Perhaps even these questions have answers. Still, Walzer’s argument for proportionality is brief. If proportionality were not true, we could never fight justified wars. But why treat that as an argument for proportionality, rather than the first step toward



pacifism? We need some other argument against pacifism than that it would make war impermissible!

So, combatant equality is doubly false. Combatants who unintentionally kill non-combatants in the pursuit of unjust aims cannot satisfy proportionality. But their intentional killing is also wrongful, as long as they target combatants fighting for just aims, who retain their rights to life – in the relevant sense, those just combatants are innocent. Noncombatant immunity is false because noncombatants, like combatants, can be responsible for contributing to wrongful threats to others' lives, and so can themselves become liable to be killed. Proportionality is more widely endorsed, but many think it rests on a spurious distinction between intended and unintended killing, and that Walzer's argument for it begs the question against pacifism.

Thus far the revisionist critique of Walzer appears successful. So we have two options: argue that the war convention is mistaken, and combatant equality, noncombatant immunity, and proportionality are all false at the level of objective morality; or we can advance new arguments in support of those principles. I think that we should devote all our intellectual resources to the latter goal, accepting the former only if all else fails.

Combatant equality one can take or leave; it is already pragmatically justified by the fact that combatants will almost always believe that they are fighting for just aims, so any constraints applied to those fighting unjustly would simply be ignored. But giving up on noncombatant immunity and proportionality is giving up on a lot.

If we reject these two principles, then we could go one of two ways. We could argue that intentional and unintentional killing of noncombatants is no worse than killing combatants, or that killing combatants

is no better than killing noncombatants. The first path leads to unrestrained warfare, the second to pacifism.

But can we really believe that it is wrong for the Peshmerga to fight against Daesh, defending Yazidis against genocide, just because they will inevitably kill some innocent people along the way? And can we really accept that when Daesh kills Yazidi noncombatants, their actions are no worse than when they kill the Peshmerga fighters? Can we endorse the reasoning behind arguments that there is no such thing as an "innocent civilian" in Gaza, because the Palestinians elected Hamas?<sup>31</sup> Or the terrorists' parallel arguments for the permissibility of targeting citizens of Western countries because they are responsible for their governments' foreign policies?<sup>32</sup> These costs are too great to bear. We cannot simply accede to aggression. And we must not fight without restraint.

In what remains of this essay, I cannot vindicate the war convention. But I can sketch the most promising direction of travel.

We start with what should be a truism. Every person's innocent happiness makes the world a better place. More generally, our flourishing contributes value to the universe. And we always have some reason to make the world a better place. But that is not all we have reason to do. To see this, let us briefly contrast moral value with economic value.

Imagine you are a manufacturer. Your factory has a number of different machines on your assembly line. Each contributes to your overall productivity, and each generates expenses. You care about each machine only insofar as it affects your profits. If one becomes a net cost, then you will shut it off without compunction. If you can realize more profit by taking one machine apart, and using it as spares for another, then you will do so.

If ethics were like business, then we would maximize value like profits, and treat people like machines. We would harm one person just in case doing so would deliver a marginally greater benefit to another. This treats her as a mere *site* of value, because her weight in our deliberations is exhausted by the value that is instantiated in her life. Following this logic, we would even, for example, harvest an unwilling victim's organs to save the lives of others. This treats him as a *tool* for realizing value, broken down for spare parts like a machine.<sup>33</sup>

Ethics is not like business. People are not mere sites or tools for the realization of value. Recognizing this amounts to recognizing that people have *moral status*. Why do we have moral status? Explaining this is no easy task. I think it is grounded in our rational capacity to make our own choices, for our own reasons. But even if we disagree about what grounds moral status, we can agree on its normative implications. And, like Walzer, we can most fruitfully understand those in terms of individual rights.

Our fundamental human rights to life and liberty protect us against being treated as mere sites or tools for the realization of value. To sacrifice my interests for the greater good, or to use me as a means to advance the greater good, is not merely to harm me (subtracting that much value from the world) but to infringe my rights. That your action infringes my rights constitutes an additional reason against harming me, over and above the disvalue realized by doing so. This means you cannot justify harming me, just in case you could thereby do marginally more good. This is the difference between people and machines: machines do not have rights, so the executive can shut them down or use them for spare parts to maximize profits.

We can understand these rights in different ways. I want to insist only on three points. First, our fundamental rights should

have neither trivial nor absolute weight. They are not mere tie-breakers. But nor must we respect them though the heavens should fall. Their weight should be between those two extremes.

Second, the weight of a right can vary depending on how it is infringed. It is harder to justify infringing people's rights as a means to advance your goals than to justify harming them incidentally in the course of pursuing your goals. In the former case, you use the victim as a tool, like the executive breaking up the machine for parts. In the latter case, you are no better off for the victim's presence than you would have been had he not been there. His death (for example) is a regrettable, but unavoidable, side effect of achieving your goals. In this case, you treat him as a mere site for the realization of value. Just as it is worse to use someone than to harm him incidentally when you are aiming at the good, the same is true when aiming at the bad. All the killing done by Daesh fighters is deeply morally odious. But publicly beheading a victim to coerce his government is worse than, for example, killing a passerby in the blast when an improvised explosive device is triggered by an enemy vehicle.

Third, even one's most fundamental rights can be lost. Most analytical just war theorists agree that if you are sufficiently responsible for an unjustified threat that is serious enough to make killing proportionate, and if killing you is necessary, then you can be liable to be killed: that is, you "lose or surrender" your right not to be killed. In such cases, sacrificing you or using you as a tool to advance the good of others can be permissible.

One can be responsible for a threat in virtue of posing it oneself, or contributing to it, or even failing to prevent it. So liability can potentially extend not only to the soldier who pulls the trigger, but to the commander who orders him to do so, and to the politicians who give the command-

ers their orders, and perhaps even to the citizens who elect the politicians.

Unlike some other analytical just war theorists, however, I think that for you to be liable to be killed, you have to have done, or failed to do, something significant – something to which the loss of your fundamental rights is an appropriate response. Perhaps your causal contribution was itself significant (for example, the threat would not have occurred without your order). Or perhaps you are blameworthy for contributing as you did.

**T**he result: not all killings are equally seriously wrong. This is essential to any attempt to walk the line between realism and pacifism. When killing for just aims, killing those with rights is worse than killing those who have lost them; killing people as a means is worse than killing them as a side effect. When killing for unjust aims, all the killing one does is wrong, but still, some wrongful killing is worse than others.

But how do these categories map onto the combatant/noncombatant divide so essential to the war convention? Imperfectly, we must admit. Walzer was right that almost all noncombatants retain their rights to life. Here I disagree with the revisionists, who think that one can be liable by virtue of minimal responsibility for a wrongful threat.<sup>34</sup> If that were right, then all the noncombatants whose voluntary actions foreseeably contribute to their state's capacity to wage unjust wars would be liable to be killed. Few adults would escape liability on these grounds.

This is not the place for a detailed investigation into responsibility and liability. But nor is one necessary. I doubt whether any theoretical account, or any intuitions about hypothetical cases, could be as robust as my intuitions about the actual case of war. Ordinary voters and taxpayers are not liable to be killed, even when their militaries foreseeably fight unjust wars. Kill-

ing them intentionally does wrong them – egregiously. For example, British and American citizens who voted for the governments that fought an unjust war in Iraq in 2003, and paid the taxes that funded that war, were not liable to be killed in order to avert the unjust threats that the war involved.

The best theoretical explanation for this judgment is the one alluded to above: that there must be some fit between one's behavior and the fate of becoming liable to be killed. But once we concede that point, then we must also concede that for many combatants in war, even those fighting for the unjust side, this fit is absent.<sup>35</sup> This is obviously true of combatants on the just side – those fighting for just aims do nothing to lose or surrender their rights. But against both Walzer and the revisionists, it is true also for many combatants on the unjust side. Many of them neither pose threats themselves, nor contribute to threats posed by their comrades. Many make no difference at all; some are a positive hindrance. As Walzer notes, many serve for good reasons – out of loyalty and a belief that their cause is just. A grisly death no more fits their behavior than it does that of many noncombatants. What's more, in all conflicts this clean division between the “just side” and the “unjust side” falls apart. Many combatants fighting for the ostensibly just side contribute to subsidiary unjust aims and operations and so lose their rights to life; many fighting for the ostensibly unjust side contribute to subsidiary just aims and operations, and so retain those rights.

If almost all noncombatants retain their rights to life in war, then many combatants, even on the unjust side, will keep the same rights. So, to deny pacifism, we must reject Walzer's dictum that legitimate acts of war respect the rights of those against whom they are directed. In passing, this makes perfect sense. The contrary idea is

one of a “morally pure” war, in which nobody’s rights are intentionally violated. Such an ideal is unattainable in the real world. If just wars could be fought by intentionally killing only those who are liable to be killed, then wars would not be such tragic affairs.

So, noncombatants may not be intentionally attacked, because they retain their rights to life. My basis for noncombatant immunity is therefore the same as Walzer’s. Killing them unintentionally can be permissible even when intentional killing is not, because we enjoy stronger protections against being harmed as a means, than against being harmed incidentally in the course of achieving some end. Walzer’s pragmatic argument for proportionality is unnecessary: this distinction (or something close to it) is central to plausible theories of normative ethics.

Combatant equality is trickier. Noncombatant immunity applies to soldiers on both sides. But proportionality does not apply in quite the same way, since it gives a necessary condition for unintentional killing to be permissible. But unjust combatants cannot kill permissibly in the pursuit of unjust aims, whether unintentionally or otherwise. Still, the basic distinction that proportionality describes applies to unjust combatants as well, and if they are going to fight, they had better kill noncombatants unintentionally than kill them as a means. So something close to combatant equality is true: just combatants should respect the rules of war because only by doing so can they fight justly; unjust combatants should respect those rules because they thereby minimize the wrongfulness of their actions.<sup>36</sup>

However, there is still more work to do. As argued above, many combatants, even on the unjust side, retain their rights not to be killed. So if my justification for noncombatant immunity is not to entail pacifism, we must explain how attacking nonliable combatants can be permissible, with-

out thereby justifying attacks on nonliable noncombatants. We need to show that killing innocent noncombatants is worse than killing innocent combatants. I defend this principle at length elsewhere.<sup>37</sup> Here I will just allude to three arguments in its favor.

First, the fact that noncombatants are so much likelier than combatants to retain their rights to life itself makes killing innocent noncombatants worse than killing innocent combatants, because it is, other things equal, worse to kill someone more riskily than less riskily. Intentionally killing civilians amounts to taking a very great risk of killing an innocent person; intentionally killing combatants takes a lesser risk. Riskier killings are worse than less risky ones, because they display a greater readiness to treat one’s target as a site or tool for the realization of one’s ends, and because they more seriously undermine our interest in security.

Second, noncombatants are more vulnerable and defenseless than are combatants. They are likelier to suffer more severe harm from any given threat that they face; and they are less able to remediate the risks imposed on them. We have basic duties to protect those who are most vulnerable (as long as they are not liable to suffer some harm), and attacking the vulnerable not only violates their ordinary rights to life and liberty, but breaches these additional duties of care. Additionally, when we attack the defenseless, we deprive them of control over some of their most important interests. We render them dependent on us or on their defenders. This additional harm compounds the wrongfulness of killing them: whenever you kill a defenseless person, you have not merely killed him or her, but disempowered him or her as well.

Third, even combatants who pose only justified threats typically enjoy weaker protections against intentional harm than do noncombatants, even though neither are liable to be killed. This is because most



combatants have no control over whether the threats they pose are just. Everything from their perspective could have been identical, but they would have been killing unjustly. So, though they are not liable to be killed, because they contribute only to just threats, this is a matter of luck. We owe more to those who respect our rights robustly (such as noncombatants who do not pose threats) than to those who respect our rights only through luck.

These are just sketches of the necessary direction of travel. The strategy is to show that even though Walzer was wrong to think that *only* noncombatants retain their rights to life in war, his revisionist critics are wrong to think that just com-

batants enjoy undiminished moral protections against harm, and that all unjust combatants are liable to be killed. Matters are much messier than either side supposed. The real challenge is not to explain why noncombatants are immune from intentional attack in war, that part is relatively easy: they retain their rights to life. Instead, it is to explain why killing unjust combatants is permissible, given that many of them also are not liable to be killed. The task is less one of explaining noncombatant immunity, but of explaining combatant nonimmunity. If we cannot do this, then there may ultimately be no stopping point short of endorsing pacifism.

#### ENDNOTES

Author's Note: Particular thanks to Nancy Sherman, Steve Woodside, and Scott Sagan for their comments on this essay.

- <sup>1</sup> For comprehensive historical sources, see Gregory M. Reichberg, Henrik Syse, and Endre Begby, *The Ethics of War: Classic and Contemporary Readings* (Oxford: Blackwell, 2006).
- <sup>2</sup> John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1999), 42 – 45.
- <sup>3</sup> As I understand reflective equilibrium, each of us needs to make use of our own judgments about cases, rather than conduct surveys. Of course, if your considered judgments are radically out of step with everyone else's, then that gives you *some* reason to revise them.
- <sup>4</sup> For simplicity throughout, I focus on killing, but everything I say applies to other harms as well.
- <sup>5</sup> Other principles prohibit harming combatants in particular ways; for example, with poisonous gas.
- <sup>6</sup> International Committee of the Red Cross, Article 48, "Basic Rule," *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, hosted at the International Committee of the Red Cross, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=8A9E7E14C63C7F30C12563CD0051DC5C>. This basic principle is reiterated in various pieces of international law.
- <sup>7</sup> International Committee of the Red Cross, Article 51, "Protection of the Civilian Population," *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, hosted at the International Committee of the Red Cross, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=4BEBD9920AE0AEAEAC12563CD0051DC9E>.
- <sup>8</sup> International Committee of the Red Cross, Article 43, "Armed Forces," *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, hosted at the International Committee of the Red Cross, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=AF64638EB5530E58C12563CD0051DB93>.
- <sup>9</sup> International Committee of the Red Cross, "Preamble," *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8

June 1977, hosted at the International Committee of the Red Cross, [https://ihl-databases.icrc.org/](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079?) Seth Lazar

- <sup>10</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 2006), 44.
- <sup>11</sup> *Ibid.*, 135.
- <sup>12</sup> *Ibid.*, 136.
- <sup>13</sup> *Ibid.*, 142.
- <sup>14</sup> *Ibid.*, 145.
- <sup>15</sup> *Ibid.*, 136.
- <sup>16</sup> *Ibid.*, 137. Controversially, Walzer thought that noncombatant immunity could not be absolute: in “supreme emergencies” it might be permissible to intentionally attack noncombatants. See *ibid.*, 251ff.
- <sup>17</sup> *Ibid.*, 127.
- <sup>18</sup> Seth Lazar, “Responsibility, Risk, and Killing in Self-Defense,” *Ethics* 119 (4) (2009): 699 – 728.
- <sup>19</sup> Michael Walzer, “Terrorism and Just War,” *Philosophia* 34 (1) (2006): 3 – 12.
- <sup>20</sup> By this I mean: verify whether the underlying principles have tenable implications when extended to other actual and hypothetical cases besides those Walzer considers.
- <sup>21</sup> Jeff McMahan, “Innocence, Self-Defense and Killing in War,” *Journal of Political Philosophy* 2 (3) (1994): 193 – 221; and Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009).
- <sup>22</sup> McMahan, “Innocence, Self-Defense and Killing in War.”
- <sup>23</sup> Steven Lee, *Ethics and War: An Introduction* (New York: Cambridge University Press, 2012).
- <sup>24</sup> They might still be indirectly grounded, since these rules, for example, minimize wrongful killing overall. See Janina Dill and Henry Shue, “Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption,” *Ethics & International Affairs* 26 (3) (2012): 311 – 333.
- <sup>25</sup> They also had other reasons to fight: for example, to defend their comrades-in-arms. I discuss such reasons in Seth Lazar, “Associative Duties and the Ethics of Killing in War,” *Journal of Practical Ethics* 1 (1) (2013): 3 – 48.
- <sup>26</sup> McMahan, “Innocence, Self-Defense and Killing in War”; and Helen Frowe, *Defensive Killing* (Oxford: Oxford University Press, 2014).
- <sup>27</sup> Alexander Downes, “Desperate Times, Desperate Measures: The Causes of Civilian Victimization in War,” *International Security* 30 (4) (2006): 152 – 195, 157 – 158. See also Michael Gross, *Moral Dilemmas of Modern War: Torture, Assassination and Blackmail in an Age of Asymmetric Conflict* (Cambridge: Cambridge University Press, 2010), 159; and Benjamin Valentino, Paul Huth, and Sarah Croco, “Bear Any Burden? How Democracies Minimize the Costs of War,” *The Journal of Politics* 72 (2) (2010): 351, 528 – 544.
- <sup>28</sup> Some think that noncombatants’ responsibilities are especially salient in asymmetric conflicts, in which they are often crucial to the combatants’ ability to fight. See, for example, Gross, *Moral Dilemmas of Modern War*.
- <sup>29</sup> We often permit practices that will predictably lead to accidents, but that’s different from knowingly inflicting such casualties. Mass vaccination programs might be another example, though in those we run risks, rather than knowingly killing innocent people; the number risked is almost always very small relative to those benefited; and vaccinations are in the *ex ante* interest of all those who receive them, even those who end up, *ex post*, being harmed. Thanks again to Scott Sagan here.
- <sup>30</sup> See, for example, Kai Draper, *War and Individual Rights: The Foundations of Just War Theory* (New York: Oxford University Press, 2016).

- <sup>31</sup> Giora Eiland, "In Gaza, There Is No Such Thing as 'Innocent Civilians,'" Ynetnews.com, May 8, 2014, <http://www.ynetnews.com/articles/0,7340,L-4554583,00.html>.
- <sup>32</sup> Osama Bin Laden, "Letter to America," *The Guardian*, November 24, 2002, <http://www.theguardian.com/world/2002/nov/24/theobserver>.
- <sup>33</sup> The central idea here is obviously Kantian, but it finds its clearest modern expression in Warren S. Quinn, "Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing," *Philosophical Review* 89 (1989): 287 – 312.
- <sup>34</sup> McMahan, *Killing in War*.
- <sup>35</sup> I argue for this point at length in Seth Lazar, "The Responsibility Dilemma for *Killing in War*: A Review Essay," *Philosophy & Public Affairs* 38 (2) (2010): 180 – 213.
- <sup>36</sup> For a detailed development of this idea, see Adil Ahmad Haque, *Law and Morality at War* (Oxford: Oxford University Press, forthcoming).
- <sup>37</sup> Seth Lazar, *Sparing Civilians* (Oxford: Oxford University Press, 2015).

# What Comes Next

*Antonia Chayes & Janne E. Nolan*

*Abstract: Wars do not end when the last shot is fired. War planning has failed to demonstrate an understanding that victory requires consolidation and the emergence of a more healthy society. The most prominent recent example is the Second Iraq War, but the failure reaches back to the American Civil War. This essay is less concerned with the moral obligation to reconstruct after war than the practical necessity of jus post bellum. In order to learn how to achieve such a consolidation of military victory, a shift in mindset is required from both civil and military policy-makers and planners. A change in practice is required at the very beginning of planning for war. "Whole of government" has been an empty phrase, but experience dictates that an unprecedented degree of domestic and international cooperation is required.*

ANTONIA CHAYES is Professor of Practice of International Politics and Law at Tufts University. She is the author of *Borderless Wars: Civil Military Disorder and Legal Uncertainty* (2015), *Imagine Coexistence: Restoring Humanity After Violent Ethnic Conflict* (with Martha L. Minow, 2003), and *Planning for Intervention, International Cooperation in Conflict* (with Abram Chayes, 1999).

JANNE E. NOLAN is Research Professor of International Affairs at the George Washington University. She is the author of *Tyranny of Consensus: Discourse and Dissent in American National Security* (2013), *An Elusive Consensus: Nuclear Weapons and American Security after the Cold War* (1999), and *Trappings of Power: Ballistic Missiles in the Third World* (1991).

Assessing the probability of success of a military intervention is not just a matter of force calculations or relative firepower. Wars do not end after the victor fires the last shot or launches a final air strike. Nor do wars end with a cease-fire and rarely even with a peace agreement.<sup>1</sup> The notion of war termination as synonymous with conquest or territorial subjugation is no longer acceptable from either a strategic or moral perspective. As human rights and humanitarian law expert Gabriella Blum has stated:

As for the goals of war, the restorative tradition of Just War Theory viewed war as legitimate only if it promoted the peace, and peace was largely synonymous with stability. War was thus a mechanism to restore a disturbed *status quo*, leaving much of the pre-existing state order intact. The goals of contemporary wars, conversely, are often long-term change. Rather than restoring the pre-existing order, eliminating contemporary threats is often perceived as requiring a transformation in the political, social, civic, and economic structures of the territorial state from which the threat had materialized in the first place.<sup>2</sup>

How can victory be declared before the transformed state undergoes some measure of recovery and gains



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acceptance into the community of nations? It seems only common sense, particularly in the interdependent world of the twenty-first century, that planning for intervention would include the essential steps to be taken when hostilities end. Yet repeatedly, the United States and its allies have failed to plan for the reconstruction phase after conflict, or help the populace achieve the society they hope will emerge when the violence ends. This essay will describe how and why the failure to plan for and engage in restoring war-torn societies not only raises deep moral issues, but also represents a fundamental strategic mistake, often with lasting and tragic international consequences.

Michael Walzer articulates the moral obligations of war termination in his formulation of *jus post bellum*:

The argument about endings is similar to the argument about risk: once we have acted in ways that have significant negative consequences for other people (even if there are also positive consequences), we cannot just walk away. Imagine a humanitarian intervention that ends with the massacres stopped and the murderous regime overthrown; but the country is devastated, the economy in ruins, the people hungry and afraid; there is neither law nor order nor any effective authority. The forces that intervened did well, but they are not finished. How can this be?<sup>3</sup>

The ability to analyze and plan for a *post bellum* environment is not simple from either a moral or strategic perspective. Nor is it a linear progression from the end of hostilities. Startling changes have occurred in the development of norms about how the international community should think about and act in postwar environments, especially if the objective of intervention was to end violence and contain its spread. An interesting historical trajectory seems to have developed in both normative and strategic rationales guiding the outcome of wars: from a) to the victor goes the spoils

(as *The Iliad* chronicles the Trojan Wars); to b) the vanquished pays the victor; to c) the vanquished neither pays an indemnity nor sacrifices territory, thus maintaining the status quo ante; to d) the victor pays the vanquished. But there is neither consistency nor contextual clarity to this historical trajectory.

Moreover, logic should compel policymakers to analyze the consequences not only of intervention, but also of decisions to provide military assistance or, in certain cases, to do nothing. In the world of widespread terrorism, even withholding assistance requires consequential thinking. If a nation collapses into chaos, spewing refugees and migrants throughout the world, what strategic or ethical analysis might have prompted governments to plan for or hedge against such destabilizing consequences?

The responsibility to protect (R2P) doctrine catalyzed the beginnings of a normative transition, but there is little agreement on new approaches. In 2001, the International Commission on Intervention and State Sovereignty formulated far-reaching claims for protecting individuals' human security and human rights against state aggression, not only during conflict, but thereafter as well. The Commission's conclusions were accepted by the High Level Panel on Threats, Challenges and Change in 2004, but the World Summit Outcome of 2005, while endorsing the concept of R2P, did not mention an obligation to rebuild.

Walzer's elegant concept of *jus post bellum* has deep resonance, but how can it work in specific cases? It is not difficult to find ethical and policy reasons to restore damaged physical infrastructure or to provide basic humanitarian aid. But as the victors, or the broader international community, contemplate "nation building," other competing strategic and moral issues invariably intrude.

Applying Walzer's *post bellum* imperative, international affairs scholar Gary Bass

has argued that a moral obligation to reconstruct political institutions after intervention exists only in the case of previously genocidal governments.<sup>4</sup> “Not all postwar reconstruction will be unselfish nation-building; it will just as often involve plunder or economic domination, or worse.”<sup>5</sup> Drawing on historical examples, Bass continues: “If one’s goals are mere self-defense, the paradigmatic case of just war, then there is little justification for reshaping a defeated society. One does not have to completely change an enemy country’s domestic arrangements in order to make sure it will not attack again.”<sup>6</sup> Although a serious attempt to flesh out the obligations of *jus post bellum*, his views represent the thinking of one scholar, not accepted doctrine. In a similar vein, just war theorist Brian Orend has set out a series of guidelines for required and permissible nation-building activities.<sup>7</sup> He makes specific recommendations, including demilitarization, punishment of war criminals, and various forms of governance. Because his prescriptions are not related to particular contexts nor linked to specific priorities of a host nation, they risk lacking the kind of local legitimacy that others have emphasized as essential.<sup>8</sup>

These efforts do serve to highlight that moral and strategic issues intersect at all stages of deliberation about intervention. They indicate that neither the United States nor the international community working collectively have made the ongoing investments needed to anticipate and plan for the possible contingencies that arise after violent conflict ends or to adapt to changes on the ground. Nor have they developed policies that generate local participation in a process of rebuilding a stable postwar society.

For all of the twenty-first-century rhetoric about “whole of government” and the emphasis on collective action, the United States’ security strategy primarily empha-

sizes technological and military superiority to bring about decisive outcomes. Civilian-military planning capability is rudimentary. While American allies may not suffer from such “military myopia,” they have also failed to institutionalize planning for the aftermath of war. Over-reliance on military superiority is a distorting lens, while the diplomats’ tendency to deal only with the government in power further constrains policy options. The impetus to think through the risks and possibilities for the aftermath of conflict is lacking. These weaknesses present grave strategic and ethical problems.

Neither the United States nor the United Nations lack institutional systems for complex planning and analysis of outcomes, but available tools are underdeveloped and underutilized.<sup>9</sup> Initiatives such as PDD-56 during the Clinton administration were formulated to train civil and military officials to plan jointly for unexpected security emergencies but, like many other such efforts, it ended up marginalized, under-resourced, and, in effect, abandoned.<sup>10</sup>

The dominant mindset leads to linear thinking and the narrowing of available options. Recently, in Iraq and Afghanistan, for example, once the decision to intervene was made, the main focus of policy debate was on the number and type of forces to deploy. Lacking was discursive civil-military dialogue about what sort of state was envisaged after conflict ended.<sup>11</sup> When nonintervention is the policy, the discussion may not go beyond whether to offer or withhold military assistance or to provide military training. The examples hereafter are mere snapshots of failure to analyze *post bellum* implications, but many others can be cited for failure to analyze what might be done to help prevent destabilization or escalating violence.

The failure to accurately predict the risks and consequences of U.S. military inter-

vention in Iraq in 2003 is the iconic case. The fractious and highly partisan disputes that persist today about the decision to invade Iraq helped create an impression that it was an anomaly, arising from the heightened sense of vulnerability after 9/11, presidential inexperience, faulty intelligence, and senior advisers with special agendas. The truth is more complex and reveals unaddressed systemic weaknesses.

The Iraq invasion was a war of choice. Its principal rationale was the fear that Saddam Hussein was rapidly developing weapons of mass destruction (WMD), posing an imminent threat to U.S. security. Although the United States obtained an initial Security Council Resolution warning Iraq to discontinue efforts to develop WMD, the decision to invade in March 2003 was made without the step of returning to the Security Council for further action, in turn limiting initial support from natural U.S. allies.<sup>12</sup> The international perception of lawlessness colored interpretations of the morality of U.S. and British actions thereafter. Among mistakes chronicled in retrospect were the misinterpretation or misuse of intelligence about Iraqi WMD and the discrediting of on-site reports by the International Atomic Energy Agency inspectors just prior to the planned invasion.<sup>13</sup>

The decision to invade Iraq was stimulated by the efforts of analysts who had been advocating for attack options against Iraq for many years.<sup>14</sup> September 11 provided the pretext and motivation to help convince President Bush's sympathetic administration of the danger Iraq posed. In addition to war planning by the military, Secretary of Defense Donald Rumsfeld created an Office of Special Plans (OSP) that began to plan a government to replace Saddam Hussein's dictatorship. These deliberations did not include the State Department, whose experts were engaged in parallel preinvasion contingency efforts that would be ignored. The OSP planning

process included certain Iraqi exile groups also recruited to staff the Free Iraqi Force that the OSP conceived and the Department of Defense (DoD) trained. The exiles were in part responsible for the unrealistically optimistic assumptions about the postwar environment that infused DoD processes.<sup>15</sup>

The governing premise was that a swift and decisive victory could be achieved by using advanced military technologies while allowing for limited troop deployments and minimal casualties. Desert Storm in 1991 had offered a preview of the kinds of precision strikes and advanced, networked command and control systems that the new secretary of defense was actively promoting in his policy of "defense transformation." Little effort was expended on the need for diplomacy or cumbersome post-conflict multinational missions: George H. W. Bush's Chairman of the Joint Chiefs of Staff quipped that he "wished to lead the U.S. Army not the Salvation Army."<sup>16</sup>

Despite efforts by the State Department, the Agency for International Development, and other civilian agencies to caution about risks, the prevailing assumption in the Office of the Secretary of Defense – shared by the White House – was that the military operation would be both decisive and celebrated by the Iraqi people, with a seamless transition to democracy to follow. Iraq would then serve as a model of democracy for the region, spurring other states to emulate its example. But no inter-agency or intergovernmental process was developed to vet these assumptions, which were based more on hope than fact. Skeptics from other agencies were marginalized, excluded, or even dismissed.<sup>17</sup> The decisions that followed the rapid defeat of Iraq's military were haphazard and plagued by inadequate resources.<sup>18</sup>

The DoD hastily established the Office of Reconstruction and Humanitarian Assistance (ORHA) to devise and implement

post-conflict plans, but it remained uninformed of military war plans.<sup>19</sup> And even before ORHA got its footing, it was replaced by another ad hoc entity, the Coalition Provisional Authority (CPA). Although supported by the UN Security Council Resolution, the mission of the CPA was neither carefully planned nor adequately staffed, with many inexperienced appointees. With little knowledge of Iraq, the CPA implemented a series of sweeping decisions, including firing all Ba'athist personnel. This left the army and most government departments leaderless and unable to pick up the reins of government, and created a large population of former military and government personnel who could not find employment, contributing to their recruitment into insurgency groups like Al Qaeda in Iraq and later ISIS.<sup>20</sup> As Jeremy Greenstock, former British Ambassador to the United Nations, stated:

The administration of Iraq never recovered [from the failure to plan]. It was a vacuum in security that became irremediable, at least until the surge of 2007. And to that extent, four years were not only wasted, but allowed to take on the most terrible cost because of that lack of planning, lack of resources put in on the ground. And I see that lack of planning as residing in the responsibility of the Pentagon, which had taken charge, the office of the secretary of defense, with the authority of the vice president and the president, obviously, standing over that department of government."<sup>21</sup>

Although the military had assumed that the postwar situation was not its responsibility,<sup>22</sup> the Army and Marine Corps were left in control.<sup>23</sup> The immediate collapse of legitimate authority in Iraq left the United States with an unforeseen political and security vacuum.

After the 2006 midterm elections, and in response to a steadily deteriorating security situation, the president replaced

Secretary Rumsfeld and some of the military leadership identified with the failed strategy in Iraq. The administration adopted a counterinsurgency strategy and deployed 28,000 soldiers in support of this mission.<sup>24</sup> The emphasis on maximum lethality was to be replaced by an effort to build relationships and develop support among the Iraqi people.

Both supporters and critics of the "surge" strategy agree that domestic violence decreased after the surge, but disagree fundamentally about the reasons or the sustainability of that apparent success. And while hard-working, courageous coalition soldiers demonstrated skill and resilience in engaging with Iraqi citizens, no amount of goodwill garnered in local areas could compensate for the continued sectarianism abetted by the widely perceived illegitimacy of the U.S.-backed Maliki regime.

In the absence of focus on a political settlement in the interests of all Iraqi people, the agreement reached under the Bush administration for a timeline for U.S. withdrawal at the end of 2011, subsequently implemented by President Obama, only paved the way for a return to sectarian conflict. This and other elements of political failure throughout the region came to a climax with the sweeping victory for ISIL in 2014 that routed Iraqi troops and captured millions of dollars of Western-provided weapons and materiel. The humiliating defeat of the Iraqi forces the United States had spent over a decade training prompted Secretary of Defense Ash Carter to declare that the Iraqis had "shown no will to fight."<sup>25</sup> Yet as Middle East expert Emma Sky observed from her years spent working with coalition forces on the ground, the most important missed opportunities in Iraq were profoundly political. Perhaps the pivotal failure came after the 2010 elections when the United States chose to continue backing Al Maliki. "If you were Sunni [after Al Maliki reassumed power]," she observed, "you



made the unfortunate decision that supporting ISIS was a better option.”<sup>26</sup>

The United States and its allies failed to realize that when a government lacks the support of a large swath of its population, relapse into conflict not only can be expected, but is virtually inevitable. The assumptions underlying the intervention in Iraq were never tested for such basic realities, however. The necessity for a long-term commitment was never recognized; and if it were, that course likely would have proven unacceptable both to the Iraqis and to the American people and their allies. Even the success of the Marines in Anbar in 2007–2008 and the personal cooperation of General Petraeus and Ambassador Crocker that effected greater inclusiveness proved short-lived. Continued support for the Maliki government, even after his (marginal) political defeat, assured that sectarian strife would reemerge. Although the United States tried to make amends in brokering the election of Haider Abadi in 2014, it had lost much of its leverage once most forces were gone and ISIS had taken over large areas of the country. Charles Freeman, a former ambassador to Saudi Arabia, commented: “We invaded not Iraq but the Iraq of our dreams, a country that didn’t exist, that we didn’t understand. And it is therefore not surprising that we knocked the Kaleidoscope into a new pattern that we found surprising. The ignorant are always surprised.”<sup>27</sup>

**H**ow and why the United States could so dramatically misread the nature of the threat from Iraq or the potential for Iraqi resistance to intervention after the fact illustrates an extreme but hardly unique episode of U.S. decision-making. It is not obvious why the most highly advanced industrial country, commanding unparalleled access to vast sources of global intelligence and information, seems so often to both a) miscalculate the realities of its international security actions and b) fail to fully consider and

plan for the consequences of those actions. The United States suffers from a tendency to misconstrue success on the battlefield with the achievement of strategic objectives. The premises guiding U.S. strategic planning all too frequently prove to be at odds with the actual nature of the challenges involved – the “facts on the ground.” The instances in which the United States has failed to accurately identify the issues it faced or clung to a flawed strategy despite mounting evidence of failure are far too numerous to ascribe to a single administration, political party, or group of influential advisers.

Moreover, one can reach back in history – to the U.S. Civil War – to find the lack of planning for what would occur after war ended.<sup>28</sup> Even Desert Storm, which is remembered in popular narrative as a swift and decisive technological victory over a powerful Iraqi army, in reality left a host of unresolved political and military challenges that required constant U.S. intervention thereafter. As one commentator put it: “the end game of Desert Storm looks less like the relatively tidy conclusion of World War II, and more like the other messy, post–Cold War peacekeeping, counterinsurgency, and counterterrorism missions that would come after 1991.”<sup>29</sup>

Yet even the aftermath of World War II was far less than a “tidy conclusion,” although it turned out well. Considerable trial and error over time preceded the successful recovery. Before the end of the war, Secretary of the Treasury Henry Morgenthau, Jr., had formulated a plan to prevent Germany from ever reasserting power over Europe.<sup>30</sup> Germany would be partitioned and demilitarized, stripped of its industry, leaving behind an agrarian economy.<sup>31</sup> Despite the history of World War I reparations – discussed below – coupled with strong disagreement from Secretary of State Hull<sup>32</sup> and Secretary of War Stimson,<sup>33</sup> this plan captured Franklin Delano Roosevelt’s interest. Presented at the Quebec meeting of FDR and Winston Chur-

chill in 1943,<sup>34</sup> it was sharply disputed by Churchill there; and finally FDR did reject the plan.<sup>35</sup> The Western European countries came to understand that they could not rebuild a viable economic system for Europe without Germany.<sup>36</sup> Under the Truman administration, the economic realities of postwar Europe began to take shape, despite the earlier hesitation. In his famous Harvard commencement address in 1947, Secretary of State George Marshall outlined a plan to aid the recovery of Germany and Europe with investment by the United States and Europe itself.<sup>37</sup> The plan, which came to be the European Recovery Program, had a tremendous effect within the first fifteen months and made the German *Wirtschaftswunder* possible.<sup>38</sup>

Often claimed as a major cause of the rise of Hitler and World War II, failure to think through how best to deal with postwar Germany was not just a U.S. failure, but the combined failure of a successful wartime coalition. In fact, Woodrow Wilson had argued against indemnity at the Paris Peace Conference,<sup>39</sup> but ultimately went along with the other victorious nations, who insisted on their “pound of flesh.” But the process of assessing costs proved to be a nearly impossible task.<sup>40</sup> France had suffered the most direct damage, yet Britain had spent the most to win. Concerns did surface about Germany’s ability to pay. If reparations were set too high, the German economy might collapse, damaging British exports; if set too low, Germany would recover more quickly, worrying the French, who feared German ability to transform economic power into military force. “Getting clear numbers was not easy...because it was in almost everyone’s interest to exaggerate and obfuscate.”<sup>41</sup> The concern for postwar recoveries and maintaining a balance of power that hampered Germany had to be tempered against fears of creating a vacuum that Bolshevism would fill.<sup>42</sup>

Perhaps most important was the fact that Germans did not accept the reality of defeat, leaving a strong sense of injustice about the war’s aftermath.<sup>43</sup> They believed they had fought to a draw: “The High Command had not informed the nation of the plight of the armies, and the German countryside was almost completely untouched by war.”<sup>44</sup> Both the reparation terms and “war guilt” clause were resented by the Germans. They perceived that the Paris Peace Conference provided a blank check drawn from their economy. In fact, the treaty was unworkable: both too mild and too severe.<sup>45</sup> Germany’s economic infrastructure was not dismembered, and the harshness in some of the territorial and financial provisions remained unenforced. “‘Severity’ included what Lloyd George called the ‘pinpricks’ that unnecessarily humiliated Germany – the clauses dealing with ‘war guilt’ and war crimes, hurt German pride.”<sup>46</sup> Even though later mitigated, the reparations helped lead to economic and political disorder in Germany, contributing to the burdened Weimar government’s failure and the rise of Hitler.

It can be argued that World War I failures did lead to better – though still imperfect – actions after World War II. Yet these lessons on the need for intensive postwar planning with deep contextual understanding of facts on the ground have not seemed to endure. The Vietnam War illustrates both a misconception of the nature of the people and the conflict throughout the war, and undue reliance on American superiority in military technology. Robert Komer’s devastating analysis, discussed below, underscores the inability of both U.S. civilian and military bureaucracies to adapt.<sup>47</sup> Iraq and Afghanistan serve to illustrate how these failures persist.

American and Western leaders, having toppled the Taliban government in 2001, sought to build a stable democracy in Af-

ghanistan. Until 2006, the efforts to reconstruct a government supported by its people seemed to be gradually progressing.<sup>48</sup> Democratic processes, including widespread participation in developing a constitution, were initiated, and the 2004 elections of both the president and legislature were initially viewed as fair. While there had been some advance planning to establish democratic processes, an ongoing civil-military dialogue that would enable the International Security Assistance Force (ISAF) – the NATO military coalition led by the United States – the United Nations, and allied embassies to adapt to changing circumstances on the ground was lacking.<sup>49</sup> Many civilians assisting in the institutional rebuilding process were sensitive to local needs and preferences, but these did not filter upward.<sup>50</sup> As international security scholar Dipali Mukhopadhyay points out: “Inquiry into those patches of territory beyond the *de facto* writ of a limited state is an essential pursuit, but so, too, is inquiry into the processes by which that state constructs, expands, and maintains its limited writ where it can.”<sup>51</sup>

The tendency of the U.S. State Department to deal with government officials rather than ordinary citizens was a shortcoming that was manipulated by those very officials. This tendency to insulate diplomats from the local population is not new.<sup>52</sup> Institution-building remained an abstraction, separate from the actual governing process. Seemingly unaware, the United States and its allies were nurturing a kleptocratic central government that was losing popular support.<sup>53</sup> ISAF and diplomats were aware of poor governance, but they attributed problems to inexperience and weakness. Analyst Sarah Chayes concluded that after living and working in Afghanistan for ten years, the government was neither inept nor weak. Rather, it was well designed for a different purpose: an effective criminal syndicate whose

goals were to make sure the money flowed upward to the leaders, not downward for the benefit of the population. “Governing” she writes, “the exercise that attracted so much international attention – was really just a front activity.”<sup>54</sup> Members of the kleptocratic network syphoned off billions in donated funds and bribes exhort-ed from ordinary people for their personal gain. Inextricably associated with the corrupt leadership, including after the fraudulent election of 2009, Western nations were perceived as responsible for Afghan government behavior. Western representatives had become so remote from the people – with some local exceptions – that they failed to understand that the Taliban could once again insert itself into the population and undermine all of the efforts so painstakingly made after their defeat. Ordinary Afghans were left with a Hobson’s choice: a government that fails to serve their needs and oppresses and steals from them, and fundamentalist, militant Islamic groups who may seem more just, but from whose strictures and arbitrary punishments the people were glad to escape in 2001.

ISAF focused on security issues, with sincere efforts to follow their interpretation of counterinsurgency doctrine. They assumed that once a stable security environment was achieved, good quality governance could follow. But the nature of the governance was precisely what fed insecurity.<sup>55</sup> Unsurprisingly, the growing insurgency led to tougher military tactics, often harming innocent civilians, destroying their livelihood, and alienating them further. When he took command of ISAF in 2010, General Petraeus, who managed to convince the president of the value of counterinsurgency in Iraq, pivoted away from that doctrine to focus on more kinetic action to counter a rising insurgency in Afghanistan.

The country continues to spiral out of control today, with increasing Taliban incursions, notwithstanding all the funds

and efforts spent to build a stable post-conflict democracy that could prosper in the international community. When it was necessary to change a failing approach and to understand conditions on the ground, the United States proved unable to make major strategic adjustments.

Explanations offered by scholars, analysts, and memoirists for the failures to take into account long-term impacts of a military intervention are not satisfactory, although they yield partial insights. Even when they offer explanations of the failures of strategic thinking, they generally do not address the moral or legal aspects of military planning that includes the post-conflict environment.

One cannot situate a post-conflict obligation in international legal requirements, although there are rules that govern occupation from the nineteenth century. Humanitarian concern is certainly found in many of the treaties that pertain to the laws of war. The Fourth Geneva Convention increased the duties of occupiers developed in the Hague Regulations of 1899 and 1907 by specifically placing limits on occupation forces to ensure that they treat occupied people in a humane manner, do not pillage resources, and do not assume sovereignty of the occupied nation. But the Convention does not create an obligation for the occupier to reconstruct.<sup>56</sup>

Nor does Chapter VII of the UN charter provide guidance. Articles 41 and 42 provide broad leeway for Security Council action to “maintain and restore,” but they are permissive, imposing no obligation. Many Security Council resolutions prescribe post-conflict reconstruction, even in cases of unauthorized intervention.<sup>57</sup> Yet while developing elaborate administrative structures, they do not use the language of obligation. They may address prevention of recurrence, but not as a matter of legal obligation. And as we know, im-

plementation on the ground too often falls short of aspirations because of a lack of clear and binding commitment that turns these resolutions into effective and sustained actions.

The absence of a legal obligation to reconstruct a war-torn society may have made it easier to ignore any moral imperative, but the moral dimension remains. Legality helps to entrench developing norms, but a moral obligation often precedes its expression as a matter of law. Moreover, the lack of a legal obligation is no reason for the failure of strategic planning to assure societal reconstruction as an essential part of military victory to prevent conflict recurrence or state disintegration.

Political scientists have examined strategic military and post-conflict failures in an attempt to find common patterns across many cases. For example, Risa Brooks has examined the Iraq case and several others, arguing that the success or failure of a military operation and its aftermath depend on several repeated factors, which she has charted. These include the balance of power between civil and military leaders, civil-military dialogue in sharing information about alternative military strategies, and the effectiveness of structures in place for assessing and evaluating alternative strategies and the authorization process.<sup>58</sup> She argues that the effectiveness of each factor is determined by the balance of power between the military and political apparatus and the level of divergence in preferences between these two groups. She maintains that the most effective relationship for strategic assessment will be one in which the political body is dominant over the military, with little preferential divergence between them. In such cases, information sharing works well, as neither political nor military leaders have the incentive to hide or distort information.<sup>59</sup> In his study of civil-military relations, Peter Feaver, by contrast, has relied on an agen-



cy relationship between civilian and military, insisting that an effective relationship places military as the agent of political master, and deviations help explain successes and failures of strategic analysis.<sup>60</sup>

“The tyranny of consensus” analyzes how the structure of American governance makes it difficult to achieve consensus about complex national security issues. The United States’ political system of checks and balances, originally designed to prevent tyranny, including tyranny of the majority, struggles to formulate coherent and adaptive policies. Coordination of a deliberately divided and restrained government depends on a degree of consensus that is difficult to achieve. Garnering support for sustained international commitments, to approve budgets at the level needed to fund those commitments or to mobilize sentiment in favor of committing American lives to support protracted foreign interventions, imposes high demands on leaders to frame issues in ways that the American public – and powerful elites – find compelling. More often than not, the need for a persuasive domestic narrative leans toward a simplified underestimation of the longer-term costs, caricaturing the challenges and appealing to the notion that the contemplated war will be swift and decisive, and require minimum American sacrifice. Otherwise there might be even greater friction between Congress and the executive branch.

Once consensus is achieved for a particular strategy, altering its content or direction in response to new circumstances can prove even more daunting. Long-standing and systemic tensions in American democracy exist between the need for open discourse and the requirements of a disciplined decision-process, both of which are essential to govern effectively. “One result of these inherent tensions is that mindsets about the way the world is organized and about where and how the United States must defend its ‘vital interests’ have tend-

ed to linger well after the underlying rationales and guiding assumptions proved inaccurate and inappropriate for redressing contemporary challenges.”<sup>61</sup>

In *Bureaucracy Does Its Thing*, Robert Komer ascribes strategic mistakes in Vietnam more to bureaucratic politics – how both civilians and militaries cling to entrenched repertoires – much as political scientist Graham Allison also argues in his seminal book *The Cuban Missile Crisis*.<sup>62</sup> Komer describes the frustration of trying to change the military approach of maximizing American force advantages against North Vietnam. The strategy was not only failing to win the war, but alienating the very people the United States was trying to protect. Along with Komer and others, Marine General Charles Krulak argued that “pacification” – enlisting the populace by being responsive to their needs (a predecessor to counterinsurgency) – would be a more effective U.S. strategy. General William Westmoreland insisted that such a strategy be secondary to the overwhelming force required to win and argued that pacification had to be led by the South Vietnamese. Although Komer denied there was ever a policy confrontation between counterinsurgency and traditional war-fighting approaches, he observed that “almost every element which might logically be regarded as part of a counterinsurgency-oriented strategy was called for repeatedly and tried (often several times) on at least a small scale. Compared to the conventional . . . military effort, however, [those efforts] were always ‘small potatoes.’”<sup>63</sup> Thus, a disastrous policy continued until the United States withdrew in defeat, with no opportunity to help shape the state that emerged.

International law scholar Michael Glennon, in *National Security and Double Government*, goes beyond bureaucratic inertia. He argues that U.S. national security policy formulation is dominated by two separate

sets of institutions: the “dignified” constitutional or Madisonian accountable institutions on the one hand, and “efficient” and unaccountable institutions on the other. Reaching back to the nineteenth-century English scholar Walter Bagehot and his theory of “double government,” Glennon states:

U.S. national security policy is defined by the network of executive officials who manage the departments and agencies responsible for protecting U.S. national security and . . . operate largely removed from public view and from constitutional constraints. The public believes that the constitutionally established institutions control national security policy, but that view is mistaken. Judicial review is negligible; Congressional oversight is dysfunctional; and presidential control is nominal.<sup>64</sup>

He suggests that this “Trumanite network is as little inclined to stake out new policies as it is to abandon old ones. The Trumanites’ *grundnorm* is stability, the ultimate objective preservation of the status quo.”<sup>65</sup> His examples are persuasive, shedding light on the surprising consistency in national security policy from the George W. Bush to Obama administrations despite their deep ideological differences. His analysis offers another perspective into institutional biases that might account for the United States’ persistent unwillingness or inability to anticipate and understand the facts on the ground, or international consequences after the use of force. But, as we argue, none of these explanations fully account for so many historical mistakes, nor do they point a way forward.

Devising strategies for addressing twenty-first-century global security challenges requires that leaders contemplating intervention accept and understand that post-conflict reconstruction is a strategic necessity that warrants full attention, certainly no less so than coordinated targeting plans or

military training. The few examples cited demonstrate a much larger pattern of failure of civilian leadership to think through the consequences of the use of military force. Moreover, they indicate that when post-conflict action is taken, it is more for the benefit of interveners than for the host nation, lacking sensitivity to the context and the aspirations of the host nation. Serious flaws in planning assumptions and common practices tend to undermine the entire effort to rebuild.

Failure to understand what can be made of the *post bellum* environment suggests that there cannot be *jus ad bellum* without *jus post bellum*. Up to now, there has been too little recognition of the need to mesh military and political objectives in conflict and post-conflict planning. Nor have there been serious and sustained efforts to develop civil-military planning processes and systems to evaluate, implement, and adapt any post-conflict plans.

As local conflicts seem inexorably to develop into transnational and even global security threats, it should be clear that there must be an ongoing dialogue between the international participants and the host country at all levels. It is not beyond the capability of major powers to require a systematic civil-military planning process that examines the steps beyond military intervention and their relative costs. The international community needs to invest more in training and mentoring citizens and civil servants of host countries to help develop their skills to build political and economic systems that perform for their people and are widely perceived as legitimate. Such investments may seem daunting and the challenges intractable. But, in the end, engaging in serious post-conflict planning will prove less costly in resources and human sacrifice than maintaining an occupation force for years beyond local tolerance or sustainability.

Antonia  
Chayes  
& Janne E.  
Nolan

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- <sup>2</sup> Gabriella Blum, "The Fog of Victory," *The European Journal of International Law* 24 (1) (2013): 392.
- <sup>3</sup> Michael Walzer, *Arguing about War* (New Haven, Conn.: Yale University Press, 2004), 20–21.
- <sup>4</sup> Gary J. Bass, "Jus Post Bellum," *Philosophy & Public Affairs* 32 (4) (2004): 396–403. See also Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 2006), 86.
- <sup>5</sup> Bass, "Jus Post Bellum," 391.
- <sup>6</sup> *Ibid.*, 393–394.
- <sup>7</sup> Brian Orend, "Jus Post Bellum: The Perspective of a Just-War Theorist," *Leiden Journal of International Law* 20 (3) (2007): 579–581.
- <sup>8</sup> See Susan L. Woodward, "National versus International Legitimacy in State Building Operations," *Critique Internationale* 3 (28) (2005): 1; and Astri Suhrke, *When More is Less: The International Project in Afghanistan* (New York: Columbia University Press, 2011).
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- <sup>11</sup> Thomas Ricks, *Fiasco: The American Military Adventure in Iraq* (New York: Penguin Press, 2006); and Emma Sky, *The Unraveling: High Hopes and Missed Opportunities in Iraq* (New York: Public Affairs, 2015).
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- <sup>14</sup> Joyce Battle, "The Iraq War – Part I: The U.S. Prepares for Conflict, 2001," *National Security Archive Electronic Briefing Book No. 326*, ed. John Prados and Christopher Ames (Washington, D.C.: George Washington University, September 22, 2010), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB326/index.htm>.
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- <sup>16</sup> Cindy Williams, *Holding the Line: U.S. Defense Alternatives for the Early 21st Century* (Cambridge, Mass.: The MIT Press, 2001), 39.
- <sup>17</sup> Ewen MacAskill, "U.S. Sacks Its Woman in Baghdad," *The Guardian*, May 11, 2003. See also George Packer, *Assassins' Gate: America in Iraq* (New York: Farrar, Straus and Giroux, 2005).
- <sup>18</sup> Ricks, *Fiasco*, 158–165.
- <sup>19</sup> Nora Bensahel, Olga Oliker, Keith Crane, et al., *After Saddam: Prewar Planning and the Occupation of Iraq* (Washington, D.C.: RAND Corporation, 2008), xxii.
- <sup>20</sup> Ricks, *Fiasco*, 158–165.
- <sup>21</sup> Quoted in Cullen Murphy and Todd S. Purdum, "Farewell to All That: An Oral History of the Bush White House," *Vanity Fair*, February 2009, <http://www.vanityfair.com/news/2009/02/bush-oral-history200902>.
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- <sup>55</sup> *Ibid.*, 43.
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- <sup>64</sup> Michael J. Glennon, “National Security and Double Government,” *Harvard National Security Journal* (5) (1) (2014): 114, <http://harvardnsj.org/wp-content/uploads/2014/01/Glennon-Final.pdf>. See also Michael J. Glennon, *National Security and Double Government* (New York: Oxford University Press, 2015).
- <sup>65</sup> *Ibid.*, 25.

# The Epidemiologic Challenge to the Conduct of Just War: Confronting Indirect Civilian Casualties of War

*Paul H. Wise*

*Abstract: Most civilian casualties in war are not the result of direct exposure to bombs and bullets; they are due to the destruction of the essentials of daily living, including food, water, shelter, and health care. These “indirect” effects are too often invisible and not adequately assessed nor addressed by just war principles or global humanitarian response. This essay suggests that while the neglect of indirect effects has been longstanding, recent technical advances make such neglect increasingly unacceptable: 1) our ability to measure indirect effects has improved dramatically and 2) our ability to prevent or mitigate the indirect human toll of war has made unprecedented progress. Together, these advances underscore the importance of addressing more fully the challenge of indirect effects both in the application of just war principles as well as their tragic human cost in areas of conflict around the world.*

PAUL H. WISE is the Richard E. Behrman Professor of Child Health and Society and Professor of Pediatrics and Health Policy at the Stanford University School of Medicine, and Senior Fellow at the Freeman Spogli Institute for International Studies at Stanford University. He is the author, with Gary Darmstadt, of the recent articles “Confronting Stillbirths and Newborn Deaths in Areas of Conflict and Political Instability: A Neglected Global Imperative” (2015) and “Strategic Governance: Addressing Neonatal Mortality in Situations of Political Instability and Weak Governance” (2015).

Health workers are the ultimate inheritors of failed social order. Sooner or later, a breakdown in the bonds that define collective peace, indeed that ensure social justice, will find tragic expression in the clinic, on the ward, or in the morgue. This reality has always given health workers the opportunity, if not the responsibility, to provide a human narrative of suffering in addition to the technical requirements of care and comfort. Yet, for the most part, this narrative has not been adequately crafted or at least advanced in the deliberation of what has always been the most extreme challenge for health workers: the human consequences of war.

This discussion attempts to translate a health worker’s narrative of war into a format that directly addresses the moral framework that justifies and constrains a just war. This narrative is told not by anecdote but by epidemiology, a story whose contours are shaped not by individual histories but by

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patterns of illness and death in large civilian populations. While these patterns have been noted since at least the time of Thucydides, there have been two essentially technical developments that challenge traditional appraisals of just war: 1) our ability to count the dead and injured has improved dramatically and 2) our capacity to intervene and prevent the medical consequences of war has advanced at an unprecedented rate. Technical progress permits more capable documentation, revealing a reality that was long sensed but rarely quantified. Technical progress has also generated an expanding capability to uncouple what war ultimately conveys to human suffering. This discussion suggests that together, these dual technical capabilities – documentation and efficacy – not only permit but compel a more comprehensive accounting of war’s human impact. My argument is that while technical innovation has clearly altered both the power and precision of the tools of war, it has also altered our understanding of the human impact of war and, significantly, the moral requirements for its mitigation in the real world.

The central human consequence of war has always been violent death. The destruction of human life through direct exposure to combat has long been the dominant preoccupation of both generals and philosophers. However, war also generates death, illness, and hardship through the destruction of the means of human survival. As noted in the U.S. Army’s *Civilian Casualty Mitigation Manual*: “In addition to the inherent risks from combat, a society disrupted by armed conflict will have other vulnerabilities, particularly if large numbers of civilians lack food, water, shelter, medical care, and security. Disease, starvation, dehydration, and the climate may be more threatening to civilians than casualties from Army operations.”<sup>1</sup> The fact

that this manual exists is in itself worthy of note. However, its inclusion of these “indirect” mechanisms of impact also underscores the relevance of events that lie more distally along the causal chain between war and human suffering.<sup>2</sup>

If the protection of innocent life is a fundamental ambition of a just war, it is useful to first consider the fate of the modern embodiment of innocence, the newborn infant, in societies plagued by war. Table 1 presents 2013 neonatal mortality data for the twenty countries in the world with the highest neonatal mortality rates (NMRs). Neonatal mortality (defined as the number of deaths of live-born children at less than twenty-eight completed days after birth divided by the number of live births occurring in the same population over the same time period) remains a critical threat accounting for almost three million deaths annually, which in turn represents nearly half (44 percent) of all deaths of children under five globally. Angola and Somalia are estimated to have the highest NMRs in the world at forty-seven and forty-six deaths per thousand live births, respectively. For context, Japan has an NMR of one and the United States has an NMR of four deaths per thousand live births. Also presented in Table 1 are the percentile ranks of each country in a measure of political stability and the absence of violence/terrorism. The data suggest that while Lesotho and Equatorial Guinea fall near the middle of all countries globally, the remaining countries in the table are characterized by profound political instability and violence, much of which is the product of current or recent violent conflict.<sup>3</sup>

Specific estimates of the indirect effects of war have varied.<sup>4</sup> (Table 2 summarizes estimates of recent conflicts for which any data are available.) Much of this variation has been due to the difficulties in ascertaining mortality and morbidity data in areas of poor security and highly mobile popu-

Table 1

Percentile Rank, by Country, of Neonatal Mortality Rates, Total Number of Neonatal Deaths, and Political Stability and Absence of Violence/Terrorism

Paul H.  
Wise

Country	Neonatal Mortality Rate (per Thousand Live Births)	Total Number of Neonatal Deaths	Political Stability & Absence of Violence/Terrorism (Percentile Rank: 0 – 100)
Angola	47	43,000	34
Somalia	46	21,000	1
Sierra Leone	44	9,000	41
Guinea-Bissau	44	3,000	17
Lesotho	44	9,000	58
Central African Republic	43	7,000	3
Pakistan	42	194,000	1
Mali	40	28,000	6
Chad	40	23,000	15
Zimbabwe	39	17,000	25
Democratic Republic of the Congo	38	105,000	2
Côte d'Ivoire	38	28,000	17
Nigeria	37	262,000	4
Afghanistan	36	37,000	1
Mauritania	35	4,000	18
Equatorial Guinea	33	1,000	50
Guinea	33	14,000	11
South Sudan	31	16,000	5
Sudan	30	37,000	3
Burundi	30	13,000	10

Countries profiled are those with the highest neonatal mortality rates worldwide as of 2013. Percentile rank (column 4) spans 0 – 100 with a lower rank representing lower political stability and the presence of violence/terrorism. Source: The World Bank, "Worldwide Governance Indicators," <http://info.worldbank.org/governance/wgi/index.aspx#home> (accessed October 22, 2015).



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Table 2  
Estimates of Indirect Deaths for Select Conflicts

Country	Indirect Deaths as Percentage of Total Excess Deaths	Ratio of Indirect to Direct Deaths	Total Conflict Deaths (Direct and Indirect)
Angola, 1975 – 2002 <sup>5</sup>	89	8.1	1,500,000
Burundi, 1993 – 2000 <sup>6</sup>	78	3.5	300,000
Congo-Brazzaville, Pool Region, 2003 <sup>7</sup>	83	4.8	n/a
Darfur, Sudan, 2003 – 2005 <sup>8</sup>	69	2.3	142,000
Democratic Republic of the Congo, 1998 – 2002 <sup>9</sup>	90+	9.0	3,300,000
East Timor, 1974 – 1999 <sup>10</sup>	82	4.6	103,000
Iraq, 1991 (Gulf War) <sup>11</sup>	77	3.3	144,500
Iraq, 1990 – 1998 (Sanctions and Gulf War) <sup>12</sup>	95	9.5	450,000*
Iraq, † 2003 – 2004 <sup>13</sup>	85	5.7	98,000
2003 – 2006 <sup>14</sup>	60	1.5	433,000
2003 – 2011 <sup>15</sup>	30	0.43	461,000
Liberia, 1989 – 1996 <sup>16</sup>	86	6.1	175,000
Northern Uganda, 2005 <sup>17</sup>	85	5.6	26,000
Sierra Leone, 1991 – 2002 <sup>18</sup>	94	15.7	462,000
South Sudan, 1999 – 2005 <sup>19</sup>	90+	9.0	427,000

\* Children only

† Only studies that report nonviolent, indirect, excess mortality are included

There remain no reliable data for calculating indirect effects of the war in Afghanistan. Source: The table is a modified representation of Box 2.3 in The Geneva Declaration Secretariat, *Global Burden of Armed Violence* (Geneva: Geneva Declaration Secretariat, 2008), 40, <http://www.genevadeclaration.org/fileadmin/docs/Global-Burden-of-Armed-Violence-full-report.pdf>.

lations.<sup>20</sup> Significant numbers of indirect deaths have been documented in a variety of settings, including in Iraq, Darfur, Afghanistan, Angola, the Democratic Republic of the Congo, Kosovo, and Guatemala. One summary study reported that the indirect health consequences of civil wars between 1991 and 1997 throughout the world were twice that associated with direct, combat-related effects. A report published by the Geneva Declaration Secretariat suggested that for every violent death resulting from war between 2004 and 2007, four died from war-associated elevations in malnutrition and disease.<sup>21</sup> Global health scholar Amy Hagopian and her colleagues reported that approximately one-third of all deaths in Iraq were due to indirect causes.<sup>22</sup> Prior studies have also suggested significantly elevated rates of indirect deaths, although the precise proportion varied with different methodologies and points in time.<sup>23</sup> In Kosovo, overall mortality more than doubled during the height of the fighting, but most of this increase was due to direct, traumatic injury.<sup>24</sup> Beyond mortality considerations, indirect effects can include substantial numbers of disabilities, developmental disorders in children, and of special concern, long-standing mental health conditions. There is substantial evidence that the exposure to combat and displacement can generate severe emotional disturbances in all age groups, but particularly children. Both the severity and chronicity of these exposures are important. Posttraumatic stress disorder (PTSD) is all too common, particularly when children witness the death of a parent or loved one.<sup>25</sup> The failure to provide normalizing or therapeutic environments, such as access to schools or mental health services, only exacerbates long-term mental health effects.

However, recent studies have underscored the complexity of estimating indirect effects.<sup>26</sup> Some analyses suggest that young child mortality can actually decline

during periods of conflict, reflecting a continuation of long-term trends in improving child survival;<sup>27</sup> though these declines were generally less steep than during the years prior to war. The variation in these estimates likely involves the inherent difficulties of accurate data ascertainment in war zones. Security can be poor and there may be a variety of disincentives to participating in a survey or responding faithfully to questions. Populations exposed to war are often highly mobile and disparities in who emigrates can result in nonrepresentative skewing of the residual populations available for surveys. In addition, exposures to violence can vary even among communities in close proximity. Therefore, a reliance on national or regional mortality figures can obscure the impact of war confined to a relatively small area.

In many ways, the variation in the estimates of indirect effects reflects less the failures than the advances in the field. The growing sophistication of the methods being employed is increasingly documenting inherent differences in how indirect effects occur in different areas of conflict. It seems clear, for example, that the impact of conflict in very-low-resource settings such as the Democratic Republic of the Congo may have very different indirect effects than in mid- to high-income locations, such as Bosnia or Kosovo. In this manner, the estimation of indirect effects is coming into line with the estimation of direct effects. Both clearly suffer from difficult logistical and political obstacles, and yet these efforts to quantify the human cost of war have improved significantly and remain essential.

Sanctions can represent a special case of warfare in which all the effects on civilians are indirect. Not all sanction regimes may be considered a type of warfare. However, it seems a bias in definition not to recognize state-enforced, crossborder deprivation resulting in mass death in an enemy popu-

lation as somehow evading the moral logic of just war theory. Ethicist Joy Gordon has documented in great detail the devastating impact of international sanctions against Iraq from 1990 – 2003.<sup>28</sup> Ineffective and at times corrupt oversight by United Nations personnel coupled with a blinkered U.S. fixation on weakening the Iraqi regime to create a catastrophic collapse of the Iraqi nutritional and health infrastructure, resulting in what may have been up to hundreds of thousands of excess childhood deaths. Other sanctions regimes, such as that imposed against the Mugabe regime in Zimbabwe, have also generated tragic indirect effects, despite attempts to devise mechanisms to protect the interests of civilian populations.<sup>29</sup>

In general, war generates significant elevations in indirect mortality and disability above prior baselines or trends. One review has suggested that a useful rule of thumb is that indirect deaths will generally total approximately twice that of direct deaths.<sup>30</sup> While this may be helpful in underscoring the importance of indirect effects, this kind of generalization may obscure very real differences in these effects based upon the setting, timing, and nature of combat operations. Nevertheless, I can only imagine the indirect effects occurring in Syria, Iraq, and South Sudan as I write this essay. The key point being that it should not be left up to the imagination; the capabilities to document and address these horrors exist now.

The indirect effects of war are not new. They have likely existed whenever and wherever wars have been fought. The histories of the Mongol invasions, the Thirty Years War, and the Siege of Leningrad all tell dramatic stories of indirect civilian suffering and death. But my argument regarding the importance of indirect effects is based not on its modern origins but rather its modern neglect. Norms regarding the conduct of war have changed and

our capabilities to publicly account for the indirect effects of war have advanced substantially. Even if one does not accept arguments regarding changing norms or technical innovation, the continued marginalization of the indirect effects of war is still, nevertheless, unjust – a point that seems worth making in this forum.

Accordingly, my intent in elevating the nature and scale of indirect effects is not to critique or revise just war theory. Rather, my argument is aimed at extracting from just war theory more explicit guidance as to how the indirect effects of war can be avoided or at least minimized. What follows is an outline of the elements that seem most relevant in just war theory to a physician compelled to advance an epidemiologic narrative challenging current approaches to justice in war.

If just war theory must respond to the reality of war, then just war theory must respond to the indirect effects of war. While just war traditions have long acknowledged the existence of indirect effects, it seems fair to say that the moral and practical implications of these indirect effects have not received the critical scrutiny they deserve.

The principles of *jus ad bellum* speak to the “why” of war and provide an architecture for ensuring that the reasons for going to war are just. Of special interest to those concerned with indirect effects is the requirement that the initiation of war must be based on a reasonable expectation that the aims of the war can be achieved successfully (the principle of success) and that the violence employed is proportional to the established threat (the principle of proportionality). An appreciation of potential indirect effects could prove a particularly important factor in considering the dimensions of proportionality. There seems to be little rational justification for confining the human cost of war to direct effects alone.

The assessment of success and proportionality can prove more complex, however, when war's objectives are explicitly based on humanitarian concerns, such as in Kosovo or Libya. Just war theory is intended to justify war as much as confine it. When war is justified on the basis of humanitarian intervention, of "saving innocent lives," some predictive comparison must be made between the human impact of intervention – both direct and indirect – and that likely to occur were the intervention not undertaken. In this manner, a consideration of indirect effects can either create incentives to initiate or refrain from war. Philosopher Steven Lee has suggested that this dual capacity informs the analysis of proportionality as weighing the "created evil" generated by a violent intervention against the "resisted evil" that the intervention intends to avert.<sup>31</sup> Both considerations should involve some prediction of indirect effects. This predictive imperative cannot be dismissed by the mere assertion that the intention of the intervention was inherently well-meaning or just. As Lee states: "Proportionality limits what a state can do in the name of a just cause."

The principles of *jus in bello* provide guidance as to "how" wars should be fought. Central to these principles is the distinction between combatants and noncombatants. Although concern for civilians is predominantly expressed as protections against direct exposure to combat, some recognition of the potential for indirect effects is included in Additional Protocol I (1977) of the Geneva Conventions, advocating the "protection of objects indispensable to the survival of the civilian population."<sup>32</sup>

However, these protections for "objects indispensable" to civilian survival are not absolute. Rather, they are defined by military context, as neither international law nor just war tradition demands that a legitimate military target not be attacked merely because it may injure or kill non-

combatants or destroy essential civilian infrastructure.<sup>33</sup> The insistence is that the expected damage to civilians or civilian infrastructure not be intentional but rather occur as a side effect, even if such an effect were clearly foreseen. This logical framing, known generally as the doctrine of the "double effect," has roots in Catholic moral theology and underscores the moral pivot on intentionality, rather than the foreseen consequences of any given act of war that had been deemed militarily useful.<sup>34</sup> The practical utility of this doctrine can be questioned on the grounds that it is too easy to justify high civilian casualties because they were not intended. Michael Walzer has argued for a more stringent set of criteria that includes not only that a combatant not intend to harm non-combatants but that the combatant take positive steps to actually minimize civilian casualties.<sup>35</sup> This "double intention" framework endorses a "positive commitment to save civilian lives" even if it requires combatants to assume a greater risk of harm to themselves.

This affirmative position extending civilian protection is generally consistent with a relatively new willingness to justify the use of force for explicit humanitarian purposes, such as in Kosovo and Libya. Justifying the use of force on humanitarian grounds, primarily an argument rooted in *jus ad bellum* considerations, places added pressure on the protection of civilians during the *jus in bello* conduct of war operations. It is difficult to maintain the legitimacy of war initiated for humanitarian purposes while causing widespread direct or indirect casualties in the very populations one sought to protect. This highlights the elasticity in the relationship between the direct and indirect effects of any given combat operation. For direct effects, the precision of the attack is the predominant consideration; for indirect effects, the nature of the target is as important as the precision of the attack. A



highly precise assault on an enemy power station may not directly injure any civilians, but could easily cause substantial indirect mortality through reduced hospital capacity and diminished water and food supplies.<sup>36</sup>

In addition to these moral considerations, the protection of civilian populations has become an important instrumental concern – about winning the war – in some armed conflicts. Both direct and indirect effects can translate into deeply felt grievance. Standard counterinsurgency doctrine has made the protection of civilian populations an explicit strategic objective.<sup>37</sup> Moreover, the direct provision of public goods, such as health care, has also been embraced as a means of generating tactical support and political legitimacy for combatant forces. While the emphasis and precise tactical expression of this concern for civilian casualties has differed over time and setting, the explicit goal of minimizing both direct and indirect civilian effects has remained a core principle of counterinsurgency doctrine. This has perhaps been most apparent in Afghanistan, where U.S. forces have routinely accepted greater risk to themselves in order to avoid civilian casualties, basically embracing Walzer’s double intention framework.

However, regardless of whether the protection of civilians is justified on moral or instrumental grounds – indeed, regardless of whether civilian casualties were intended or not – a response to the needs of civilians experiencing both direct and indirect casualties remains essential. Even if permissible under just war principles, civilian suffering need not evade the assignment of responsibility, a level of accountability that may demand mitigation and, at times, reparation.<sup>38</sup>

*Jus post bellum* is concerned with the transition from a just war to a just peace. While *post bellum* issues have generally concen-

trated on the machinery of armistice, the restoration of sovereignty, reparations, and trials, the focus of concern here is to define or at least recognize the requirement inherent in a just peace to prevent continued war-related civilian death and suffering after the guns fall silent.

Theorists from Augustine (“the aim of a just war is a just peace”) to Walzer (“implicit in the theory of just war is a theory of just peace”) have recognized the essential relationship between *ad bellum* justification and *post bellum* performance. However, the prevention of indirect effects as a necessary element of a just peace has not been explicitly addressed, or at least not been emphasized sufficiently. This requirement seems especially vital when the initiation of hostilities is justified on humanitarian grounds. As was noted for the *in bello* conduct of a war rooted in humanitarian rescue, the prescription for the *post bellum* peace of such a war must also ensure that the health and well-being of civilian populations are a central priority.

In this context, great care should be taken when humanitarian justifications demand regime change but, in reality, also imply the destruction of the state. This is because even a murderous or potentially murderous regime may sit atop a functioning state apparatus that ensures the maintenance of daily life for much of the civilian population. Recent U.S. and allied interventions have found it far easier to eliminate a regime than to protect its civilians in the aftermath. The regimes of Saddam Hussein in Iraq and Gaddafi in Libya, while predatory and oppressive, also made general provisions for food and water supplies, public health, and hospitals. Although no one would suggest that these services were adequate or efficient, they did exist and generated health outcomes that were at least as good as surrounding states.<sup>39</sup> Protecting civilian objects during combat operations is critical, but so are the financial

and administrative means of keeping these objects functioning once the fighting ends. The human toll resulting from the neglect of these just peace requirements can vary, particularly in response to the prewar level of health and essential services. While the wars in Iraq and Libya have resulted in catastrophic indirect suffering, the war in Afghanistan since 2001, despite its bitter and protracted nature, may have been associated with generally improved health outcomes, particularly for women and children.<sup>40</sup> This may reflect skewed reporting or the extremely poor health status of the Afghan people prior to the U.S. invasion, but it may also be a testament to the efforts of Afghan, U.S., and coalition partners, as well as a number of nongovernmental organizations, to enhance health, education, and related services.

If a regime must be destroyed, there must be a concurrent obligation to protect or replace those functions of the state that assure the essentials of daily life. This is most apparent when victors become occupiers. Under this condition, just war theory most clearly shares provisions with what has come to be known as “human security,” including the availability of adequate food, shelter, and access to health care. In some sense, just war traditions respond to the “freedom from fear” while human security principles include the additional element of the “freedom from want.” Here, indirect effects blend into issues of development and good governance, provinces that one might suggest extend beyond the dimensions of just war. However, a pragmatic consideration of the indirect effects of war can blur the accepted boundaries between the logic of war and human rights, particularly when war is justified on humanitarian grounds. Efforts to integrate, if not reconcile, these concerns have emerged, including international law scholar Ruti Teitel’s articulation of “humanity law,” which could provide a conceptual basis for exploring the relation-

ships between the direct and indirect effects of war.<sup>41</sup> Regardless of conceptual clarity, the reality of civilian life and civilian death in the aftermath of war demands that the victors and occupiers assume some meaningful responsibility for assuring the availability, if not the direct provision, of life’s necessities. A just peace can never be indifferent to the preventable death of a three-year-old from pneumonia or a woman in childbirth when these deaths are the result of a catastrophic disruption of civilian life by war.

In many respects, just war requires attribution, an imperative that has traditionally been more clearly delineated in relation to the direct effects of combat. This has, in part, been due less to the theoretical challenges indirect effects can generate than to the difficulties inherent in defining indirect effects in the real world. Although never easy in a conflict zone, direct deaths to civilians living next to a rail station that was the target of a specific air strike can be defined and counted. But how does one define and count the indirect effects of this attack, such as the death of a child from pneumonia who did not receive life-saving medication six months after the attack because of a disrupted supply chain that had been dependent on a functioning rail station?

Distinctions between *jus ad bellum*, *jus in bello*, and *jus post bellum* phases have provided the core framework for assessing the justice of war. However, the protracted nature of some recent conflicts and the persistence of their destructive epidemiologies raise some troubling questions regarding the utility of these distinctions under certain war conditions. For example, it is not clear what *post bellum* means in the Eastern Democratic Republic of the Congo or in Gaza. Cease-fires come and go. The prospect of peace agreements come and go. While the staccato of active fighting subsides and renews, the indirect ef-

fects drone on. Periods without active combat are always better than periods with active combat. However, the protracted and intermittent nature of a conflict and the blurred distinctions between prewar, war, and postwar phases make the application of traditional just war theory to the indirect effects of war somewhat more difficult. There is a risk that an insistence on analytic templates based on wars with a definitive beginning and end, such as World War II, can relegate the civilian cost of lengthy, churning conflicts to the periphery of just war relevance or even capability.

There is a need to find ways to delimit the indirect effects in order to navigate the margins of where the human costs of unjust war give way to the human costs of unjust peace. Humanitarian strategies are helpful, as they are in all wars. Yet a critical reading of just war criteria seems most essential when war-fighting and peacemaking defy traditional boundaries, when conflict is prolonged and conceptually muddled. This may be of special concern when standoff weapons, such as high-altitude bombing or the use of armed drones, allow one side to extend combat operations over long periods of time without significant risk to their soldiers. The indirect effects of this protracted violence, in terms of both injury and mental well-being, can be profound. The failure to critically implement just war criteria when war phases are confused can create an analytic vacuum that can too often permit the chronicity of damage and time itself to obscure bonds of responsibility and permit the indirect effects of war to recede from public view.

In many respects, the relative lack of attention to the indirect effects of war reflects a discomfort with the indistinct boundaries that have traditionally characterized indirect effects. This implies a need for both definition and metrics. A lazy definition of indirect effects that includes all adverse human outcomes subsequent to violent con-

flict provides virtually no limits and therefore little help in navigating the intersection of indirect effects with the rules of just war. It seems essential to fix some endpoint that demarcates the termination of the period within which excess adverse health outcomes can be considered the indirect effects of war. A simple temporal definition, such as one year after the cessation of hostilities, is a possible endpoint, though this seems inherently arbitrary and morally ungrounded.

An alternative approach would be to implement a political limit to the war-related period of casualty accounting. One could demarcate the terminal boundary as the moment a functional, sovereign state has been restored. This would conform more directly to the dictates of moral responsibility and would insist upon the inclusion of an occupation or ongoing political chaos as falling within the boundaries of indirect effect accounting. Beyond issues of demarcation, there has also been a tendency to succumb to the perception that indirect effects are, in fact, impossible to quantify. This is a technical challenge that requires close examination, particularly in light of recent advances in epidemiologic and demographic measurement in field settings.

In addition to the challenge of defining and measuring indirect effects, there has also been a tendency to diminish the relevance of indirect effects because the assumed repertoire of effective responses is considered relatively limited. In some measure, the most prominent traditional approach to reducing indirect effects has been sanctioned escape. In sieges, non-combatants have “a right to be refugees” and an attacking army should provide a mechanism for civilians exiting a besieged city or active combat zone. This provision has deep historical roots, having been outlined by Maimonides and later by Grotius. While protected escape remains an important consideration, our technical abil-

ity to prevent indirect effects has grown enormously, a level of technical advancement that has been so profound that it has the ability to reshape traditional applications of just war theory to current and future conflicts around the world.

In the context of just war, technical innovation means more than the creation of more powerful and precise munitions. It also means an enhanced capacity to measure and reduce the human impact of war. Innovation in these two technical domains – measurement and mitigation – has been sufficient to rethink the application of just war theory to the indirect effects of war.

The primary basis of estimating the indirect effects of war has been to measure those health outcomes that would not have occurred if war were not present. As one report stated, “measuring war related deaths involves comparing the number of deaths that occurred due to a conflict against the counterfactual scenario of peace.”<sup>42</sup> The indirect component comprises those deaths not due to direct combat-related injury. This approach often means that indirect effects are expressed in some form as “excess” outcomes defined by some comparative simulation. These excess outcomes are calculated as the difference between, for example, an expected number of deaths based on peacetime mortality rates and the actual observed numbers of deaths during the war-defined study period, be it *in bello* or *post bellum* in nature. Again, indirect effects relate those excess outcomes not due to direct, traumatic causes. One should note, however, that this calculation of excess adverse outcomes does not compare the predicted effects of intervention with the counterfactual of not intervening, a comparison essential to proportionality considerations.

Advances in epidemiology and the technological means of collecting health data have generated a range of new opportunities to assess the immediate and protracted

effects of war. The delineation of baseline prewar rates can be problematic, particularly when prewar periods are characterized by substantial instability, as in the Democratic Republic of the Congo, or the imposition of sanctions, as in Iraq. However, enhanced sampling frameworks and statistical adjustment procedures have provided new quantitative insights into patterns of mortality, injury, illness, and displacement. Mobile technology has been used creatively to enhance both the accuracy and reach of survey protocols. The utility of these new analytic methodologies should not be obscured by the political controversies they may generate when high civilian mortality is associated with specific, and particularly U.S., interventions.<sup>43</sup>

This field is still young and these new technical strategies are creating an unprecedented capacity to assess the impact of war in even remote communities. With adequate support and continued critical analysis, the technical ability to define and document indirect effects will continue to strengthen. There is also the prospect that with more extensive experience, the science of indirect effects will be able to provide reliable predictive capabilities for making both *ad bellum* and *in bello* judgments. With continued progress in the field, there will be little justification for the contention that indirect effects are vague or unknowable, a perception that is inherently exculpatory, unburdening armed actors of responsibility for indirect effects.

More striking than the growth in our ability to measure indirect effects has been dramatic advances in our technical capacity to prevent them. Simply put, in most areas plagued by war and chronic conflict, the causes of death associated with the indirect effects of war look almost identical to those associated with peace. What changes, and what generates the excess mortality, are the absolute rates of these causes. For example, during the periods of intense



conflict in the Democratic Republic of the Congo and Darfur, direct trauma-related mortality accounted for less than 20 percent of all excess deaths among children under five years of age.<sup>44</sup> The leading causes of excess death were fever/malaria, neonatal (newborn) illnesses, measles, diarrhea, and acute respiratory infection: precisely the same spectrum of mortality that usually kills children in this age group in low-resource areas of the world.

However, what is critical to remember is that modern medicine and public health have developed highly efficacious interventions that can prevent either the occurrence or the severity of these causes of illness and death. Malaria can be prevented through the use of bed nets and mosquito control and mortality largely prevented by early diagnosis and treatment. Measles can be prevented by a safe and highly effective vaccine. Death from diarrhea and acute respiratory infections can be prevented through vaccines and treatment. Neonatal conditions present a more complex challenge, but effective interventions exist for reducing mortality from complicated births, early infections, and prematurity. A major evidence-based assessment of the technical capacity to prevent mortality among young children suggested that more than two-thirds of this under-five mortality is preventable with extant interventions.<sup>45</sup>

As technical efficacy grows, so too does the burden on society to provide it equitably to all those in need. This is why health insurance is more important today than it was in the nineteenth century. To be sure, the different general justice schemas vary as to how the provision of efficacious health care should be treated.<sup>46</sup> But common to all these approaches is some recognition of the interaction between the efficacy of health interventions and the justice requirements of provision. Accordingly, the

dynamic character of technical capability must at some level impart a dynamic character to the requirements of justice, and ultimately the requirements of just war.

The death of any child is always a tragedy; the death of any child from preventable causes is always unjust. This is, of course, as true in peacetime as it is in war. My argument is that the dramatic growth in our ability to prevent death and disability from the indirect effects of war generates not only humanitarian impulses but also just war demands for the provision of this capability to populations affected by war.<sup>47</sup> The scale of these demands is currently at the highest levels since the end of World War II. There are, of course, global mechanisms to provide succor and health services to war-ravaged communities. The United Nations High Commissioner for Refugees (UNHCR) and a variety of nongovernmental organizations have as their central mandate the provision of food, shelter, and health care to such populations. However, the support they receive – both financial and logistical – is woefully inadequate, in part contributing to the mass migration from conflict zones currently underway.<sup>48</sup> Worse still is the archaic global architecture for humanitarian response to war, which has remained relatively unchanged since World War II. The average length of stay in an UNHCR camp is now approaching twenty years and the funding mechanisms used to support displaced and war-ravaged populations are both intermittent and haphazard. Just war considerations seem largely disconnected from these funding mechanisms even though virtually all these humanitarian needs have been generated by the indirect effects of war. A new architecture is needed urgently and, as this discussion argues, the application of just war logic and accountability could help create the necessary moral imperatives and applied financial mechanisms for a new global commitment to address the human cost of war.

The mitigation of indirect effects has moral meaning. If innocence has any meaning, the epidemiology reveals that the victims are those with the most striking moral claims. If the scale of suffering has any meaning, epidemiology demands that indirect effects not be ignored. If the failure to act when capability exists has any meaning, the science of indirect effects testifies to a damning global complacency. There remain both conceptual and technical challenges in crafting a full embrace of the in-

direct effects of war. But these tasks do not seem the critical obstacles. Rather, the obstacles lie in the apparent utility of diminishing war's true human cost and the maddening acquiescence of our moral frameworks that gives license to this evasion. The essential challenge lies in renegotiating the tension between the exercise of power and the claims of the vulnerable, a tension from which, not coincidentally, both epidemiology and just war theory were born.<sup>49</sup>

#### ENDNOTES

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