

Changing Interests and Persistent Rules: The Protection of Non-Combatants in War

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ABSTRACT

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Discrimination to protect non-combatants in the conduct of war is one of the oldest principles in the law of armed conflict. Over the past two centuries, however, political and technological changes have altered the underlying incentives for states to accept the broadest notions of “protected classes” in the conduct of war. Experience in the enforcement of the laws of armed conflict suggests that too great a disjunction between rules and interests will lead to erosion of the rules. In this paper I look at the disjunction between the rules of armed conflict and the underlying interests of states that have put civilian and other protected populations increasingly at risk in war. I suggest four approaches to the law of armed conflict that can help us understand the different kinds of motivations and interests that states can bring to this issue. With a better understanding of the underlying motivations and interests of states it will be more likely that we can create effective rules for the protection of civilians and for the control of the means and methods of war.

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“You see me here ... a poor, lame, decrepit mortal. I am not a man of blood; and God is my witness that in all my wars I have never been the aggressor, and that my enemies have always been the authors of their own calamity.” During this peaceful conversation the streets of Aleppo streamed with blood, and re-echoed with the cries of mothers and children, with the shrieks of violated virgins. The plunder that was abandoned to his soldiers might stimulate their avarice; but their cruelty was enforced by the peremptory command of producing an adequate number of heads, which, according to his custom, were curiously piled in columns and pyramids.

Speech of Timur the Mongol before the religious leaders of Aleppo, as described by Gibbon in *The Decline and Fall of the Roman Empire*.¹

The practice of warfare has changed significantly since Timur the Mongol set out to conquer the world. While the complete elimination of war remains an elusive goal in international relations, the intervening centuries have seen the development of a set of humanitarian rules to control the excesses of combat that go beyond the ‘legitimate’ purposes of military action. Discrimination to protect non-combatants in the conduct of war is one of the oldest of these principles in the law of armed conflict. Still, we are too often forced to watch the perpetration of widespread and systematic indecencies such as we have seen in Rwanda and the former Yugoslavia. Meanwhile, human beings have continued to emulate Timur in rationalizing, justifying, and minimizing the horror of their own behaviors. The interpretation of moral and legal norms remains a relatively elastic process in the international system.

Dismayed by this state of affairs, a number of states and activist groups have increased the pressure for an extension of the norms associated with the international law of armed conflict in order to grant further protections to non-combatants. These efforts have been made more difficult by political and technological changes of the past two centuries that have eroded the underlying incentives for states to accept the broadest notions of non-

¹ Gibbon, *The History of the Decline and Fall of the Roman Empire*, 1974[1776], v. II, chapter 65, p. 1243.

combatant immunity in the conduct of war. I will argue here that recognition of these changes in interests is critical to building more effective protections for civilians in war.

The enumeration of legal rules about the means and methods of war is not the same as the actual *control* of armed conflict. As Timur's speech suggests, rules and norms can be subverted in practice when they are either interpreted to permit behaviors that were meant to be proscribed, or are simply ignored. To be effective, rules must be at least minimally commensurate with the constellation of interests in the international system.

In this paper I propose a new model for thinking about the different kinds of interests that underlie the law of armed conflict and for identifying the types of rules that are most likely to be effective given those interests. The starting point for this study is a consideration of two parallel histories: the history of the principles and rules promulgated as international law in this area, and the history of the practices which reflect the interests of states in following the enumerated rules.

The Development of Principles

There are two central principles that define the law of armed conflict: discrimination and proportionality. In its strongest form, the principle of discrimination holds that non-combatants should be completely immune from the effects of combat. At a minimum, it holds that non-combatants should not be the subject of an attack. In this minimal view the rule of "double-effects" allows injury to non-combatants if it is the by-product of an attack on a legitimate military target. In between the extremes, the principle of proportionality comes into play. The proportionality principle holds that the nature of a military attack – both in terms of tactics and the fundamental nature of the weapons involved – must be commensurate with the military goal being pursued. If some degree of injury to non-combatants is unavoidable in a legitimate military attack, the proportionality principle requires that such injury be proportional to the value of the military goal.

While antecedents can be found back into ancient times,² the main development of the principle of non-combatant immunity is usually traced to

² See, for example, Ober, "Classical Greek Times" in Howard *et al.* *The Laws of War*, 1994, Walzer, *Just and Unjust Wars*, 1992[1977], pp. 225-227.

the Middle Ages where it has both religious and secular roots. Theologically, non-combatant immunity emerged from the concept of the “just war.” Augustine and Aquinas, the two most important theologians in the development of just war doctrine, both emphasized that the wrongs of war must be proportional to the right goals being pursued.³ More narrowly, twelfth century canonists advanced a doctrine called the “Peace of God” which initially proscribed attacks on clergy and other religious workers. Later, it was expanded to include women, children, the aged, the poor, merchants, travelers, and agricultural workers.⁴

On the more secular side, the early Middle Ages also saw the rise of the code of chivalry. This was a set of principles for combat among Christian nobles. The Chivalric code imposed strict rules about who could participate in combat and how they should behave. Legitimate participation in combat was a “privilege” reserved in principle to those who could afford the necessary and expensive accoutrements. Non-combatants were by definition not eligible to participate in conflict and were not appropriate targets. There was a certain sense of *noblesse oblige* which created a duty for knights to protect their inferiors. Although, as I will discuss later, if any of their inferiors did get involved in combat, they were treated quite ruthlessly.⁵

Modern international law emerges in the late sixteenth and early seventeenth century with the work of the Spaniard Francisco de Vitoria and the Dutchman Hugo Grotius. Both of these writers articulated a more secular notion of international law that is grounded in natural law rather than in shared religious values. Emerging international law also began to focus more clearly on the state as the principal actor in international relations. Non-combatant immunity was advanced as a basic principle of law by both Vitoria and Grotius.⁶

The work of Vitoria and Grotius, as well as a number of writers who followed them, created a body of both descriptive and prescriptive scholarly opinion about the customary rules of “civilized” warfare. But these writings were not official state documents, let alone robust agreements between sovereign states. The first state sponsored document outlining the laws of

³ Ramsey, *War and the Christian Conscience*, 1961, chapter 3.

⁴ See Johnson, *Just War Tradition and the Restraint of War*, 1981, pp. 124ff.

⁵ Johnson, *Just War Tradition and the Restraint of War*, 1981, p. 140.

⁶ See McElroy, *Morality and American Foreign Policy*, 1992, pp. 150-151.

land warfare was the Lieber Code, which was drafted by Francis Lieber at the request of Abraham Lincoln and which became *General Orders 100* for the Union armies during the American Civil War.

The Lieber Code drew a clear distinction between combatants and non-combatants (Article 155). The rules clearly state that “the unarmed citizen is to be spared in person, property, and honour as much as the exigencies of war will admit” (Article 22). Nonetheless, retaliation against innocent civilians was explicitly allowed (Article 28) – not as revenge, but as a means of “protective retribution” to punish and thus discourage partisan activity by civilians. A citizen of a hostile state is seen as an enemy and “as such is subjected to the hardships of war” (Article 16). Article 15 of the Lieber code acknowledges the doctrine of double effects by allowing for “all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war.” There is no mention of proportionality.

The Lieber Code was influential in other states as well. The German army incorporated it into its rules of conduct for the war of 1870.⁷ In 1874, at the bequest of the Czar, an international conference was held in Brussels that used the Lieber Code as the basis for an attempt at a general codification of the rules and customs of land warfare. While not formally adopted by the participating states, the Brussels Declaration included several regulations meant to benefit civilians, such as a requirement for warning before bombardment – unless the bombardment was part of an assault;⁸ treating captured peaceful civilians better than prisoners of war; and protections of private property. It also specified a definition of combatants and non-combatants more carefully than Lieber had done.⁹

Meanwhile, two other important state-sponsored documents came into being in this period. The St. Petersburg Declaration of 1863 was less important for what it did – outlawing explosive bullets – than for its statement of the basic principle “that the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of society”. The 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field generalized a large set of

⁷ van Dongen, *The Protection of Civilian Populations in Time of Armed Conflict*, 1991, p. 21.

⁸ By “an assault” the drafters meant a direct attack by troops.

⁹ See van Dongen, *The Protection of Civilian Populations in Time of Armed Conflict*, 1991, pp. 21-27.

bilateral treaties that had been entered into by European governments, as well as a number of customary practices to regulate the treatment of wounded soldiers.

The Hague Conventions of 1899 and 1907 included several important provisions that attempted to restrict tactics and technologies. They offered relatively few specific protections for civilians, but reaffirmed some of the important principles limiting war to armed forces and prohibiting pillage.¹⁰ Article 46 of the 1899 Convention II was taken directly from the Brussels Declaration:

Family honor and rights, and the lives and property of persons, as well as their religious convictions and their practice must be respected. Private property cannot be confiscated.¹¹

Article 3 of the 1907 Convention was also an important extension of the law in that it created a financial obligation for belligerents to pay compensation for all acts committed by their armed forces that violated the Convention.¹²

After the horrific experiences of World War I, which demonstrated again the vulnerability of civilians to new means and methods of warfare, there were several attempts to extend legal protections for civilians in times of war. The International Committee of the Red Cross and the International Law Association drew up several draft conventions to protect civilian populations, but none of these gained significant support from states. New Hague regulations on the use of aerial bombardment were drawn up, but also failed to draw sufficient support to enter into force. All of these efforts reinforced the notion of non-combatant immunity and attempted to draw more specific obligations from this principle.

Attempts to ameliorate the condition of injured and captured soldiers continued to gain more support from states than general protections for the civilian population. The 1929 Geneva Convention Relative to the Treatment of Prisoners of War was widely accepted, and on the suggestion of the Red

¹⁰ 1899 *Hague Convention II with Respect to the Laws and Customs of War on Land*, Articles 28, 47.

¹¹ 1899 *Hague Convention II with Respect to the Laws and Customs of War on Land*, Article 44. This had been Article 38 of the Brussels Declaration.

¹² 1907 *Hague Convention IV Respecting the Laws and Customs of War on Land* Article 3.

Cross, many governments agreed to apply these rules to interned civilians in occupied territories as well.¹³

Not all of the problems in developing treaty instruments protecting non-combatants were due to government foot-dragging. Part of the problem in the interwar years was the relatively greater attention paid to disarmament and to the effort to outlaw war altogether. After all, if war could be outlawed and general disarmament achieved, there would be no need for the protection of civilian populations. World War II, of course, significantly dampened that hope, but even after the horrors of that conflict, there remained some concern that work on the law of armed conflict would show a lack of faith in the ability of the new United Nations system to keep the peace.¹⁴

Nonetheless, some of the lessons of World War II had been learned, and the desire to redress the obvious problems faced by civilians in modern wars motivated significant international efforts. The Fourth Geneva Convention of 1949 addressed the problem of protecting civilian populations in time of war. It is significantly limited, however, by its focus on civilians who fall under the governing power of an adversary state. It pointedly does not address the issue of general protection of civilians from the ravages of combat. Draft articles that sought to protect all civilians from the perils of military activities were completely eliminated during the conference.¹⁵ Instead, the 1949 Convention, like the twelfth century Peace of God, continues to focus on specific protected classes of people, including children, women, the aged, the wounded and sick.

The 1949 agreement can be seen as the start of a long series of more formal discussions between states and non-governmental actors seeking to create a robust set of international agreements that would finally bring direct and explicit protections to civilian populations. These efforts culminated in the 1977 Additional Protocols to the Geneva conventions. The 1977 Additional Protocol I directly expresses the obligations of states toward civilian populations in time of war.¹⁶ It is a strong expression of the concept

¹³ Van Dongen, *The Protection of Civilian Populations in Time of Armed Conflict*, 1991, p. 86.

¹⁴ Van Dongen, *The Protection of Civilian Populations in Time of Armed Conflict*, 1991, p. 97.

Kalshoven, *Constraints on the Waging of War*, 1987, p. 17.

¹⁵ van Dongen, *The Protection of Civilian Populations in Time of Armed Conflict*, 1991, p. 122n79.

¹⁶ See in particular 1977 Additional Protocol I, Part IV. The other parts of Protocol I are general provisions, and rules pertaining to protected classes of people. Protocol II

of non-combatant immunity. Attacks against civilians or civilian objects are completely proscribed. For the first time, the use of blockades or other means to purposely bring starvation to civilians is expressly prohibited.¹⁷ In addition, the principle of proportionality is codified in the requirement that the indirect effects of military actions on civilians be limited.

In terms of *principles*, the development of the humanitarian law of armed conflict as it applies to the protection of non-combatants has been relatively straightforward and for the most part unidirectional. There was some retrenchment from the initial Peace of God movement, but particularly in the modern period since the promulgation of the Lieber Code, the rules have been consistently strengthened. The creation of legal rules, however, is not the same as the effective control of armed conflict. The history of the *practices* of armed conflict over the past seven hundred years has not been as straightforward.

The History of Practices

In the early Middle Ages the protection of non-combatants could be sustained by state interests because non-combatants were largely irrelevant to the conflicts of those times.¹⁸ The peasant's life was the same regardless of who the ruler was. Competing kings and princes were interested in holding castles and towns, but didn't require the direct military services of their populations. As long as common townspeople and peasants did not directly participate in war they could be ignored. Of course, on those occasions when they did take up arms, they were slaughtered without mercy.¹⁹

Though it continued to be advanced as a principle, the notion of non-combatant immunity was significantly eroded in practice during the later Middle Ages. The anarchy of the Hundred Years War created an environment in which many bands of mercenaries and small armies only tangentially connected to political authority required larger and larger amounts of plunder

focuses on internal conflicts. For commentary on the Protocols see Bothe, et. al, *New Rules for Victims of Armed Conflicts*, 1982.

¹⁷ 1977 Additional Protocol I, Art. 54. Notably, Art. 54, part 5 makes the exception that states may take defensive actions that cause their own populations to starve.

¹⁸ Howard, *War in European History*, 1976, pp. 1-7.

¹⁹ Stacey, "Age of Chivalry" in Howard *et al.* 1994. p. 30.

to keep themselves fed and armed.²⁰ While other facets of the chivalric code – especially those that applied to the treatment of like-ranked nobles – survived through most of the Middle Ages, civilian populations increasingly found themselves at the mercy of marauding armies that were more interested in rape and pillage than in any particular geographic or political loyalties.²¹

The chivalric basis of the law of armed conflict was also challenged by the rise of groups and even other societies that were unwilling to accept that organized violence was not a legitimate option for them. When peasants did have the temerity to rise up against the established order, there was little concern for moderation in the effort to destroy them. Martin Luther, in his famous essay on “the murdering, robbing hordes,” called for the brutal suppression of peasant revolts, with little apparent concern for the niceties of just war theory: “rebellion is intolerable,” and “let everyone who can smite, slay, and stab, secretly or openly.”²² Likewise, both the chivalric and the religious principles of proper conduct in war were explicitly limited to conflicts between Christians. The crusades and other battles with the Islamic states taught a new kind of unlimited war. Thus, by the seventeenth century the conduct of war had changed decisively from the practices that the chivalric code and early just war theory envisioned. Early seventeenth century armies wrecked far more havoc on civilians than on competing armies.²³ The civilian population of Germany was especially devastated in the Thirty Years War.²⁴

Thomas Hobbes argued that the individual had more to fear from anarchy than from the strong state. The transition from the incoherent boundaries of the late Middle Ages to the more stabilized state system after the Peace of Westphalia in 1648 would seem to bear him out. With the stabilization of the state system, the practice of warfare became far more limited and its impact on civilian populations was significantly reduced. This development actually had less to do with the strength of states in a Hobbesian

²⁰ Stacey, “Age of Chivalry” in Howard *et al.* 1994. p.32. See also Weltman, *World Politics and the Evolution of War*, 1995.

²¹ Stacey. “Age of Chivalry” in Howard *et al.* 1994, Howard, *War in European History*, 1976, p. 37.

²² Luther, “Against the Robbing and Murdering Hordes of Peasants.” 1525, pp 85-88.

²³ Weltman, *World Politics and the Evolution of War*, 1995, p. 15.

²⁴ The population of Germany declined by about one third from 1618 to 1650. Of course many of these deaths were of combatants, and large numbers died from plagues carried by soldiers and exacerbated by war-related famines. Asch, *The Thirty Years War*, 1997, p. 185, Thiebault, *German Villages in Crisis*, 1995, pp. 165-189.

sense than with their relative weaknesses. States were strong enough to maintain reasonable order within their territories, but still faced structural weaknesses in their military institutions.

Because of technological developments in weaponry that now favored large armies of footsoldiers, the armies of this period were largely composed of conscripts. The fundamental constraint that late seventeenth and eighteenth century armies faced was desertion. Soldiers had to be constantly supervised. Thus, the dominant military tactics were based on large masses of soldiers fighting set piece battles with very limited maneuvers. Armies could not be fed off the land because soldiers sent out to scavenge food from the local population were unlikely to return. Armies had to be fed from central supply depots – a fact which further limited the freedom to maneuver. Civilians who did not find themselves directly in the path of these slow moving armies could largely escape the effects of war.

This relatively benign state of affairs came to an end as the state system evolved into the nation-state system.²⁵ The political innovations of the French Revolution created citizens who were less likely to desert at the first opportunity. The subsequent successes of Napoleon were in many ways due to his superior ability to maneuver – to send smaller units out for probing raids, for diversions, and for flanking actions without fear that they would simply run away. Civilians were now more likely to be impacted both because the battlefield expanded, and because the army could again live off the land. Moreover, citizens now had a partisan stake in the outcome of conflicts. It was more difficult for them to be perceived as neutrals who were irrelevant to the outcome of a conflict.

The potential for carnage and for devastation of the civilian population was exemplified by the American Civil War – a conflict with relatively dedicated and motivated soldiers and civilians on both sides. The Lieber Code attempted to moderate some of the worst excesses, but as we have seen, it still allowed wide latitude for collateral injury to civilians, for the taking of property, and for “protective retribution” against innocent civilians. Its effectiveness in protecting civilians was further limited by the nature of the conflict. Foreshadowing some of the severe problems of the twentieth century, the Union side in the Civil War viewed that conflict as the suppression of an internal rebellion, rather than as a war between equal

²⁵ Howard, *War in European History*, 1976, pp. 94-115.

sovereign states. Thus, civilians who supported the Confederacy were often viewed as traitors who were subject to criminal sanctions.

The Civil War also saw important innovations in strategic thinking about the relationship between economic infrastructure and fighting forces. The new thinking was epitomized by General William Sherman who emphasized a strategy of attacking the economic backbone of the Confederate forces, rather than directly engaging the Confederate Army in its fortified positions.²⁶ The burning of Atlanta and the March to the Sea were only the most dramatic elements in the general destruction wrought against the South. By some estimates, two-thirds of all assessed wealth in the South was destroyed in the Civil War.²⁷

Sherman's approach has continued to define war in the twentieth century. Though American civilians have themselves been relatively protected from war by the geographic isolation of the United States, a quick review of the civilian casualty figures in the major American Wars of this century shows the increasing impact of modern war on civilians:

Table One: Civilian Casualties	
War	Civilian casualties as a percent of total casualties²⁸
WWI	5%
WWII	50%
Korea	60%
Vietnam	70%

These trends in the practices of states demonstrate that progressively developing norms and even formal legal regulation are not enough to protect non-combatants in war. Indeed, we are now faced with a set of changing interests that will only make the protection of civilians more difficult.

²⁶ See Royster, *The Destructive War*, 1991.

²⁷ McPherson, "From Limited War to Total War in America" in Förster and Nagler, *On the Road to Total War*, 1997, p. 295.

²⁸ Gehring, "Protection of Civilian Infrastructures," 1978, p. 91n.

Changing Interests

Even as the informal principles and formal rules have been strengthened, the technological and political forces unleashed in the Napoleonic era have continued to undermine the protection of non-combatants to this day. Changes over time, – both in the technology of warfighting and in the nature of citizenship – have reduced considerably the ability of civilians to remain irrelevant to the process of war.

The increasing destructiveness of modern weaponry and its impact on discrimination does not require much discussion. The range and explosive power of modern armaments dramatically increases the vulnerability of non-combatants.²⁹ Furthermore, the new weapons technologies affect the civilians whose work is critical to the production of war materiel. In the modern age, victory in war involves the engagement of a large portion of the state's economy. It is difficult to distinguish between "civilians" and "combatants" if the work of the former is increasingly necessary to support the latter. Why should the bombardier in the plane be a legitimate target, while the worker who designs the software that makes the bomb accurate is protected as a non-combatant by international norms? If powerful computers are a strategic export subject to restraints for national security reasons, why should the computer industry not be a strategic target?³⁰

There is also a "technology" of politics that diminishes the interest of states in granting protected status to non-combatants. All states need to find sources of legitimacy. Two of the most powerful tools of legitimation in the past two hundred years have been nationalism and democracy.³¹ Each of these can cause problems for the notion of non-combatant immunity. The

²⁹ The impact of modern weapons may be moderated at some point by increasing precision, but the effectiveness of precision weapons remains a question, and their use is still limited to a handful of technologically advanced states.

³⁰ Walzer draws a distinction between workers who produce objects for fighting and those who produce goods that everyone (including soldiers) uses. I don't see that this distinction gets us very far in a modern integrated economy where many companies make both military and non-military goods. Indeed, Walzer's logic is inadequate for him to be able to reject attacking civilians in all cases. He holds that in "supreme emergencies" it might be justified. Walzer, *Just and Unjust Wars*, 1992[1977], pp. 145-6, and Chapter 16.

³¹ Gaubatz, "The Hobbesian Problem and the Microfoundations of International Relations Theory." 1997.

rise of nationalism as a tool for political legitimation can lead to wars that are directed against non-combatants (as in the Holocaust and the recent pogroms in Central Africa), or that pit mobilized ethnic groups against each other (as in the Bosnia imbroglio or the partition process in India). These ethnic conflicts have regularly pitted civilians against armies or against themselves.

Even democracy – much praised of late for its pacifying influences³² – can weaken the incentives for non-combatant immunity. When wars were contests of power between kings, civilians had little say in the process of deciding to wage war. Ironically, the rising expense of war was one of the factors that increased the power of wealthy town burghers and was critical in encouraging the process of democratization.³³ But if citizens become increasingly responsible for the decision to embark on war, why should they be immune to the privations of war? Here there is irony in the Kantian position that citizens who suffer the real costs of war will be less likely to wage war.³⁴ If this is the case, why should not warfighting be aimed at convincing everyday citizens that the costs of war outweigh the benefits? It was this logic that led to the large-scale attacks by both sides on civilians in World War II.³⁵ Returning to the Civil War case, General Sherman expressed it directly in a letter to Ulysses S. Grant in 1862:

We cannot change the hearts of the people of the South, but we can make war so terrible that they will realize the fact that however brave and galant and devoted to their country, they are still mortal.³⁶

In a world in which states increasingly depend on their civilians for the material and moral support necessary to wage war, there will be increasing temptations to make those civilians the objects of attack.

³² See, for example, Russett, *Controlling the Sword*, 1990.

³³ See, for example, Schultz and Weingast, “The Democratic Advantage” 1996.

³⁴ Kant, *Perpetual Peace*, 1949[1795], p. 438.

³⁵ Ultimately, this strategy proved relatively ineffective. Increasing civilian costs seemed to strengthen civilian resolve rather than weaken it, and the resources would probably have been better spent on further attacks against strategic targets. But, the logic of making democratic civilians the objects of attack is not unreasonable in these terms, even if morally reprehensible.

³⁶ Quoted in Hagerman, “Union Generalship, Political Leadership, and Total War Strategy” in Förster and Nagler, *On the Road to Total War*, 1997. p. 164.

Most of the major wars of the twentieth century have been of two types, both of which significantly increase the involvement of, and thus the risks to civilians: insurgencies or total wars. Clausewitz anticipated both of these kinds of wars, calling them “people’s wars” and “absolute wars.”³⁷ In a “people’s war” the whole nation takes up arms, and so more citizens are subject to attack. Absolute war – which is primarily a theoretical construct, although he asserts that Napoleon achieved it – is war without limits that involves every element of society and in which the goal is the complete destruction of enemy forces.

In the parallel histories of the principles and practices relating to non-combatant immunity we see a disjunction between the advancement of ever-stronger principles designed to protect non-combatants and a history of practices that belie these evolving norms. The norms have been most effective when they have been consistent with the underlying interests of states – as in the early Middle Ages and the eighteenth century. Effective enforcement requires an adequate degree of commensurability between rules and interests. To understand the nature of this commensurability, it is useful to think of the law of armed conflict in terms of four distinct approaches.

Four Approaches to the Law of Armed Conflict

Attempts to regulate the conduct of war can be understood in terms of four distinct conceptual approaches to the law of armed conflict. These four approaches are not exclusive, nor are they necessarily tied to specific treaties. Indeed, many treaties contain mixtures of the different approaches. But each of the approaches arises from different motivations and has distinctive requirements for implementation and enforcement. Understanding the basic differences between these four approaches and their specific requirements for effectiveness can help us assess the contemporary strengths and weaknesses of the international law of armed conflict and the potential for extending it into new areas such as the regulation of land mines, or for making stronger connections to concepts of international criminality.

The four approaches can be roughly divided into two approaches that seek traditional constraints on conduct and two that seek progressive

³⁷ Clausewitz, *On War*. 1976[1832] Book VI, Chapter 26, Book I, Chapter 1, and Book VIII, Chapter 2.

constraints. The two traditional approaches begin from the perspective of military necessity and try to control the excesses of war and ameliorate the position of victims of war without fundamentally altering the effectiveness of states in war. The progressive approaches refuse to be limited by arguments about military necessity. They attempt to impose constraints that change the basic level of violence within war.

The **Hague Approach** to the regulation of armed conflict is named after the original 1899 and 1907 Hague Conventions that set out a series of rules on the means and methods of war. The essence of the Hague approach is *military necessity*. Legal rules are promulgated to help limit the excesses of war. States agree to prohibit actions that increase injury and suffering, but which do not contribute to military goals. The essence of the 1899 Hague Convention in this regard is Article 23e of Convention II, in which it is “especially prohibited to... employ arms, projectiles, or material of a nature to cause superfluous injury.”

The Hague approach works by clarifying the meaning of military necessity across the military organizations from different states. Such clarification makes it easier to determine when violations have taken place. It also encourages states to develop internal rules and training methods that are commensurate with international standards. This clarification helps to mitigate against the kinds of excesses that occur through the passions of war, and to encourage uniform standards of professionalization in military services.

The **Geneva Approach** also arises from the central concept of military necessity. But its focus is on discrimination and the protection of innocent victims of war. Women, children, prisoners of war, the shipwrecked, and the wounded are explicitly set out in the Geneva Conventions as protected classes. These protected persons cannot be made the object of attack and signatories to the conventions must take proactive steps to help limit the effects of war on these groups. Under the Geneva approach, states attempt to create procedures for the amelioration of the condition of the protected classes. Again, military necessity is at the root of this approach: injuring the protected classes cannot be seen as militarily necessary. Thus, the task of the Geneva approach is to design procedures that can coordinate actions to help the victims of war within an environment of minimal trust and communication.

Turning from the traditional approaches to the progressive approaches, the third approach is what I have called the **Arms Control Approach**. This

effort emphasizes reducing or controlling the level of violence in war. Under the arms control approach even technologies and tactics of war that are deemed militarily useful can be restricted through international agreement. Because the law of armed conflict operates in an environment without hierarchical enforcement and in which many other norms of trust and peaceful interaction have broken down, the arms control approach requires carefully balanced rules so that each side feels equally advantaged or disadvantaged by the restrictions. Continuous monitoring and verification will also be required if there is a significant break-out advantage to disregarding the rules.

Finally, what I call the **Just War Approach** is concerned with advantaging one side over the other. Many writers for example, have argued that the laws of armed conflict should apply differentially to aggressive versus defensive states.³⁸ But, of course, as the example of Timur the Mongol suggests, few states are going to voluntarily accept placement in the disadvantaged category. More broadly, the parties in negotiations about the law of armed conflict are always thinking about the effects of proposed rules on their own ability to prevail in war. The second Lateran Council's famous, though ineffective, prohibition on the cross-bow was less concerned about grievous injuries than about the ability of people who could afford armor losing their advantages over people who could not.³⁹ There is a constant tug of war in negotiations about the law of armed conflict between technologically advanced states that want to restrict crude weapons and irregular warfare, and poorer states that want to control advanced weaponry. The regulations developed by the just war approach are particularly difficult to enforce because they require some kind of power to force them onto the disadvantaged party.

Each of these approaches is a legitimate perspective on the law of armed conflict. Effective rules can be drafted under each approach. But, it is critical to recognize that each has distinctive requirements in terms of the mechanisms for implementation and enforcement.

³⁸ See Walzer, *Just and Unjust Wars*, 1992[1977], pp. 225-232, 251-268.

³⁹ Johnson, *Just War Tradition and the Restraint of War*, 1981, pp. 128-9.

The Enforcement Issue

The difficulty of enforcing specific kinds of rules largely corresponds to the order in which I have presented them. Hague rules are the easiest to implement and enforce, followed by Geneva rules, then arms control rules, and finally just war rules, which are the hardest to enforce. The nature of the enforcement problems for each of the approaches can be broadly understood in game-theoretic terms.

The traditional approaches largely involve coordination problems. If states basically agree that a given set of weapons or tactics are not militarily productive, or that certain humanitarian procedures can be implemented without significantly impacting military effectiveness, then an agreement about international rules is fairly straightforward. The international agreement helps spell out the rules more precisely, helps the parties identify violations of the rules, and in the case of humanitarian procedures makes those behaviors unambiguous on the battlefield. Hague rules are easier to enforce since they primarily involve appropriate military training within states and effective command and control. Once the rules are agreed upon, relatively little coordination is required on the battlefield. The Geneva approach is slightly more complex, since it requires coordination during war. Neutral institutions such as the International Committee of the Red Cross can be extremely helpful in facilitating effective humanitarian procedures.

The arms control approach has more of the characteristics of a prisoners' dilemma. When the law of armed conflict is used for achieving arms control goals, military advantages can be obtained by violating the rules. This means that enforcement will require either a clear deterrent capability or some mechanism for punishment. In this regard, it is critical to remember that in times of war – especially “total” war – many of the traditional tools of punishment and deterrence in international relations are no longer available. It is also useful to create verification institutions that can facilitate communication and give the parties a neutral source to confirm cooperation and to make the nature of violations clear.

The just war approach is most accurately characterized as a deadlock game. One side gains from compliance with the rules, while the other side is disadvantaged. The side that wants to enforce the rules has to have some kind of leverage that will make the other side willing to comply despite the disadvantages it entails. Third parties may be able to play a significant role in

this regard, which makes this approach more likely to work for relatively small and limited wars.

Disjunction between the rules and the appropriate approach to a particular problem occur for two basic reasons. In the first place, changes over time can alter the nature of military necessity and make rules that could be sustained at one point under the rubric of the Hague or Geneva approach look more like arms control or just war rules. In the second place, there is always a temptation to adopt Hague or Geneva type rules to solve just war or arms control problems. If for either of these reasons the rules are too divorced from underlying interests, the law of armed conflict will be less effective.

As we have seen historically, the promulgation of legal principles is not the same as the effective control of armed conflict. Legal principles are only effective if they are followed. They will only be followed if the underlying interests of states are concordant with the rules. For the arms control and just war approaches, underlying interests will only be concordant with the rules when there is some effective and material enforcement capability.

The Protection of Civilians

The 1977 Additional Protocols notwithstanding, the treatment of civilians *per se* has traditionally been a Hague rather than a Geneva issue. Until 1977, the Geneva approach has focused on specific classes of victims such as prisoners of war, children, refugees, and the wounded. Civilians come under the Hague approach to the degree that their injury is not militarily necessary. As a Hague concern, the key to strengthening protection for civilians is the professionalization of military organizations. Soldiers have to understand their duties, and the chain of command has to be set up to enforce discipline and to place sanctions on those activities that do not accord with military interests.

I have argued here, however, that the underlying interests that have worked to exempt civilians from the ravages of war may no longer be adequate to sustain the rules in the event of a serious military conflict. As exemplified in the 1977 Additional Protocols, the recent trend has been to make the protection of civilians a Geneva issue – to extend the same kinds of protections that applied to protected classes to all civilians. This too is likely

to be inadequate since there is a material difference in the role played by the traditional Geneva classes of protected persons and the average citizens of a modern state. If, in fact, there are military incentives for attacks on civilians and civilian infrastructure, then the rules to protect civilians are more likely to be effective if they are created with this reality in mind. This suggests that the protection of civilians will require progressive rather than traditional approaches to the law of armed conflict. Elements of both the arms control approach and the just war approach will be necessary if civilians are to be more effectively protected in future conflicts.

When both sides in a conflict care about their civilians, but would benefit from attacks on enemy civilians, the incentives take the form of a prisoners' dilemma game, and the arms control approach will be most appropriate. In this environment, both sides are tempted to attack civilians, but prefer no attacks on civilians of either side to mutual attacks on civilians. The protection of civilians as an arms control type issue will require arms control type enforcement mechanisms. But this is difficult since the protection of civilians involves the methods of warfare more often than the means. Where means can be restricted, such as with the proposed ban on land mines, civilians can be protected with production and development restrictions and procedures for international verification before war breaks out.⁴⁰

When Civilians can only be protected through restrictions on the methods of warfare, we have two enforcement choices. First, we can rely on the strength of moral norms. Moral norms have played a significant role in shaping the rules of warfare. There is no doubt that what Michael Walzer calls "the war convention" has worked to restrain war at some level.⁴¹ Strengthening these norms is the appropriate work of moral philosophers and law of war activists. But the breeches of the war convention have also been many and serious. The rules of war have been strongest when they are at least minimally commensurate with underlying interests. The key to protecting civilians in future conflicts has to be the construction of institutional solutions that enhance the interests of states in following the norms of non-combatant immunity.

⁴⁰ In the case of land mines, this will be a difficult enforcement problem since they are technologically simple devices that could be easily produced after war starts.

⁴¹ Walzer, *Just and Unjust Wars*, 1992[1977]. McElroy, *Morality and American Foreign Policy*, 1991, Chapter Six.

Building such institutions is difficult, of course, since war is an environment of minimal order. The arms control model, as well as general insights from the dynamics of prisoners' dilemmas suggest a few possibilities that deserve attention.

In the first place, effective access to information and communication is critical for achieving cooperative solutions under the prisoners dilemma. Giving inspection and verification powers to the United Nations and non-governmental organizations like the International Committee of the Red Cross and the Red Crescent Society could help to provide a channel for communications and for neutral assessments of compliance with the rules.

Verification before war breaks out is critical. While there are no weapons to inspect when methods rather than means are the issue, training manuals and training procedures can be evaluated. Commanding officers should clearly understand the rules and their obligations under international law. Military organizations should be able to demonstrate that they have procedures in place for teaching decision-makers how to evaluate proportionality issues involving civilians.

Making the international war crimes tribunal a more permanent and more effective international agency would contribute to this process, though its serious limitations must be acknowledged. Criminal prosecution following a war makes the assumption that states that are interested in regulation continue to exercise significant power in the international system, and that the victors in war are willing to cooperate with such criminal prosecutions.

It may also be important to rethink the issue of reprisals. Moving the issue of civilian immunities from the Hague to the Geneva approach as in the 1977 Additional Protocol has had the effect of banning reprisals – which are allowed under the Hague, but not the Geneva approach.⁴² But if the underlying incentives are of the prisoners' dilemma type, then deterrence may be an important enforcement mechanism. The threat of reprisal has proven important in restraining war in several cases.⁴³ Of course, we would hope that

⁴² See 1977 Additional Protocol I, Articles 51 –54. Even in the process of adopting the Additional Protocol several states, including the United States, expressed doubts that the prohibition on reprisals could be sustained in the face of massive and continuing attacks on a state's civilian population.

⁴³ Bothe, et. al. *New Rules for Victims of Armed Conflicts*, 1982, p. 315.

states would avoid such reprisals. If resorted to in extreme circumstances they should follow the customary law requirements that they be proportional and clearly designed to return to a state in which civilians are not the object of attack.⁴⁴ This final requirement is particularly difficult to achieve. It is important to remember that while *deterrent* threats can be effective, most actual attempts at reprisal have been ineffective and have led to undesired escalation.⁴⁵

Of course, the possibility of reprisal would never be an effective deterrent with states that do not really care about their civilians. That possibility brings us to the Just War approach. There are a number of states – including some of those that are the most likely to be involved in future wars – in which the governments do not exhibit particular concern for the well-being of their civilians. When the subject of land mines came up in the discussions leading to the 1980 Geneva Convention on Certain Conventional Weapons, for example, the Yugoslavian delegates refused to accept a provision for reporting the location of land mines to an occupying power.⁴⁶ Even though the impact of such mines would be felt primarily by their own civilians, they viewed it as treason that anyone would cooperate in this manner with the occupying forces. When one side does not care about its own citizens, the just war model will be the only effective approach to the protection of civilians in war.

Under the just war approach, the rules would be designed to give an advantage to those governments that care about noncombatants over those that do not. The enforcement mechanisms would have to be coercive. Governments that do not abide by the rules would be subject to sanctions by other states, and notions of criminality would be invoked. Obviously this approach would have little effect on those states that reject the legitimacy of international rules in the first place, or in conflicts that pit large and powerful states against each other in ways that are likely to realign the entire

⁴⁴ It is encouraging that though available for Hague type rules, reprisals are rarely resorted to: "Neither in the history of the Second World War, nor of subsequent armed conflicts, was there found so much as a single instance of a retaliatory act, resorted to in the sphere of the 'law of the Hague.'" Kalshoven, *Beligerent Reprisals*, 1971, p. 376.

⁴⁵ Kalshoven, *Beligerent Reprisals*, 1971.

⁴⁶ U.S. Department of State, Report of the United States Delegation to the United Nations Conference on Prohibitions or Restriction of Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, First Session, 1979, p. 6.

international system. This approach would be most effective in cases involving smaller states on whom sanctions and punishments could tip the balance between choosing to follow or ignore the rules.

Conclusion

Ironically, the political changes that created popular control over government and increased dramatically the involvement of everyday citizens in the life of the state have also increased the vulnerability of those citizens to the dangers that states face in the international system. Add dramatic technological changes to the political revolutions of the past two-hundred years, and the result is a dangerous gap between a set of norms originally developed during the Middle Ages and the interests of modern nation states.

The normative basis of the law of armed conflict may be strong enough to sustain it in many kinds of conflicts despite the gap between interests and principles. Military actions designed to punish tin-horn dictators with relatively primitive and unintegrated economies, and who have little popular support will probably not engage significant temptations for attacks that impact civilians. But large wars between countries with ideologically committed populations and modern integrated economies pose significantly greater dangers.

Likewise, it is clear that there are political leaders who have relatively little concern about the impact of war on civilians. It is just such leaders who are most likely to get involved in war. The law of armed conflict needs to be designed in a manner that takes the existence of such states and their leaders into account.

An inscription on the tomb of Timur the Mongol reads “If I were alive you would tremble.” Alas, the spirit of Timur is still among us in all those who believe that power is best amassed through fear and force. These modern Timurs have terrible new weapons at their disposal. The prevention of humanitarian disasters requires us to be honest about the nature of these leaders and to adopt rules that will have commensurate mechanisms of enforcement. Failing this, we will create rules that either apply only among states that are unlikely to resolve their disputes through violence anyway; or that are doomed to irrelevance once the transition is made from a state of peace to a state of war.

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