War

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War Crimes

The Law of Hell

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I. Is Law Silent When Arms Are Raised?

This is a chapter about war crimes and war crimes trials. In it, I sketch the history, structure, and justification of laws of war backed by criminal punishments; in the concluding section I briefly compare war crimes trials to other ways of coming to grips with war's horrors after it ends. Yet before turning to these topics, it is worth pausing to reflect on how extraordinary the entire idea of war crimes is. To conduct war crimes trials supposes that war is governed by laws, and that is by no means obvious. In Cicero's famous words, "Laws are silent when arms are raised" (*silent enim leges inter arma*).[1] Even in peaceable civil society, according to Hobbes, "A man cannot lay down the right of resisting them, that assault him by force, to take away his life."[2] As for war, "The notions of right and wrong, justice and injustice have there no place. Where there is no common power, there is no law: where no law, no injustice. Force, and fraud, are in war the two cardinal virtues."[3] General Patton wrote, "War is not a contest with gloves. It is resorted to only when laws (which are rules) have failed."[4] Today, this "all's fair in war" idea resurfaces in a T-shirt slogan: "In war, you can be right – or you can be left."

One might object to Cicero's self-defense-versus-law dichotomy that individual self-defense is part of the law, not a limit to law: all legal systems permit lethal force in response to dangerous attacks. However, soldiers'

[1] Marcus Tullius Cicero, Pro Milone 11.

[2] Thomas Hobbes, *Leviathan*, Thomas Oakeshott ed. (Oxford: Basil Blackwell 1957), p. 86, chap. 14.

[3] Ibid., p. 83, chap. 13.

[4] George S. Patton, "The Effect of Weapons on War," *Cavalry Journal* (November 1930), available at http://www.pattonhq.com/textfiles/effect.html.

violence in war vastly exceeds the contours of civilian self-defense, in several ways. First, once a state of war exists, soldiers can engage in offensive violence. Second, a soldier can kill the enemy even when he poses no immediate threat. Indeed, the soldier can attack uniformed cooks, drivers, mechanics, and bookkeepers. More generally, individual self-defense cannot accommodate any situation in which I shoot Enemy Soldier A in battle because Enemy Soldier B has shot at me.[5] The fact is that very little of war's violence counts as individual self-defense in any sense domestic law recognizes or should recognize.

Furthermore, we all understand that war harms the innocent to a degree that would be intolerable in times of peace, and that knowledge makes attempts to draw up a legal regime for war seem farcical. Even if warriors conscientiously target only active combatants, "collateral damage" – a euphemism for dead and maimed civilians – will inevitably result, in large numbers. Indeed, as war has evolved away from set-piece battles on discrete battlefields, collateral damage overwhelms military deaths in scale (so much so that today the very term "collateral damage" should be rejected as propaganda aiming to downplay civilian casualties). In World War I, fewer than 10 percent of the casualties were civilians; in World War II, 50 percent. In contemporary African conflicts, civilians represent 90 percent of the casualties.[6] The current U.S. war in Iraq has produced, by a low-end estimate, close to 60,000 civilian deaths; the high-end estimate is 10 times that.[7] U.S. military casualties, even including private military contractors, number in the low thousands, a small fraction of the "collateral" deaths.

The preponderance of civilian deaths holds under a worldwide legal regime that insists on the impermissibility of targeting civilians. But that regime itself is a historical anomaly, and the wrongfulness of targeting civilians is by no means universally acknowledged. The point of war is to cause the enemy's surrender. It may be that the best method is attacking civilian homes, fields, and workplaces. Total war simultaneously

[5] For a devastating criticism of efforts to assimilate war fighting to personal self-defense, see David Rodin, *War and Self-Defense* (Oxford: Oxford University Press, 2002), p. 128.

[6] P. W. Singer, *Children at War* (New York: Pantheon, 2005), pp. 4–5.

[7] The low-end estimate is from Iraq Body Count, available at http://www.iraqbodycount.org/. The high-end estimate is from Gilbert Burnham et al., "Mortality after the 2003 Invasion of Iraq: A Cross-Sectional Cluster Sample Survey," *The Lancet*, Oct. 6, 2006, available at http://www.thelancet.com/webfiles/images/journals/lancet/s0140673606694919.pdf. However, this high-end count estimates excess mortality over the preinvasion rate, whatever the causes.

undermines the material infrastructure of enemy troops and breaks the will of its people. That was the goal in Sherman's brutal march to the sea in the U.S. Civil War, bringing to perfection the strategy formulated by Grant, who understood that the southern armies could not be beaten on the battlefield alone.[8]

Bluntly, Sherman said, "War is hell." His aphorism can be understood in two ways, one realist and one moralist. First, if the aim of war is to force the enemy's surrender, then the "logic" of war (as strategists like to call it) rejects restraint in favor of escalation.[9] War is hell because, as in hell, the horrors know no bounds. Second, on moral grounds, escalation leading to a quick surrender may be more desirable than restraints that prolong the war. War can be foreshortened by making it as hellish as possible. So, at any rate, Sherman argued in his memoirs.

Sherman understood strategy better than theology. Hell is for the guilty, but Sherman's strategy was to plunge the innocent into hell fire, side by side with the guilty, to bring the enemy to its knees sooner rather than later. However, even if his celebrated metaphor is imperfect, his argument that hellish violence shortens wars cannot simply be dismissed. Defenders of the atomic bombing of Hiroshima and Nagasaki offered exactly the same argument. So did Churchill and Sir Arthur "Bomber" Harris when they continued carpet bombing German cities even in the endgame of the war.[10] Sherman, Churchill, and Truman all followed Clausewitz in assuming that the logic of military necessity is impervious to moral or legal restraint other than, in Clausewitz's words, "self-imposed restrictions, almost imperceptible and hardly worth mentioning, termed usages of International Law."[11]

All these points – the impossibility of treating war along the lines of legal self-defense, the destruction of the innocent inherent in war, and the terrible cogency of escalation arguments – suggest that in an activity consisting, as Chris Hedges puts it, of "organized murder,"[12] crime talk is fatuous. Paul Fussell makes this point again and again in his famous defense of dropping the A-bomb on Japan: the strictures of the moralist

[8] John Keegan, *The Mask of Command* (New York: Viking, 1987), pp. 219–20.

[9] Carl von Clausewitz, *On War*, Anatol Rapaport ed. (Harmondsworth, England: Penguin, 1968), chap. 1.

[10] Paul Fussell, "Thank God for the Atom Bomb," in *Thank God for the Atom Bomb and Other Essays* (New York: Summit Books, 1988), pp. 13–37, available at http://www.ux1.eiu.edu/~cfib/courses/Fussell.pdf. On Churchill's terror bombing, see Michael Walzer, *Just and Unjust Wars*, 3rd ed. (New York: Basic Books, 1977), pp. 261–62.

[11] Clausewitz, p. 101. Quoted in Ignatieff, *The Warrior's Honor: Ethnic War and the Modern Conscience* (New York: Henry Holt, 1997), p. 116.

[12] Chris Hedges, *War Is a Force That Gives Us Meaning* (New York: Anchor Books, 2002), p. 21.

simply have nothing to do with the lived experience of combat. Fussell heaps sarcasms on the "sensitive humanitarian" who "was not socially so unfortunate as to find himself down there with the ground forces, where he might have had to compromise the purity and clarity of his moral system by the experience of weighing his own life against someone else's."[13] Marines "sliding under fire down a shell-pocked ridge slimy with mud and liquid dysentery shit into the maggoty Japanese and USMC corpses at the bottom, vomiting as the maggots burrowed into their own foul clothing" simply cannot take seriously the notion of war as a realm governed by rules and restraints.[14] That is why combat-hardened U.S. troops preparing to invade mainland Japan "broke down and cried with relief and joy" at the news of the atomic bombs. "We were going to live. We were going to grow to adulthood after all."[15]

Fussell focuses on the soldier's elemental self-interest in living and the absurdity of expecting high-minded self-sacrifice from the soldier in hell. But more than self-interest is at work. Soldiers also emphasize that they are "assets" whose mission needs them, so saving their skins is their duty as well as their desire – military necessity as well as personal necessity.

Beneath his anger at armchair moralists, it is unclear whether Fussell means that in war everything is justified – that no violence is wrong if it contributes to victory – or that war fighters' crimes are excused because wartime puts troops under stress and duress that make moral restraint impossible. Probably the analytic distinction between justification and excuse holds no interest for Fussell. But the distinction is crucial, because *Kriegsraison* – the doctrine that all's fair in war if it contributes to victory – fundamentally threatens the coherence of declaring some deeds war crimes. "Wartime drives us mad," on the other hand, concedes that war's violence can be wrongful (though excusable).

The doctrine of *Kriegsraison* should be rejected, because victory is hardly ever an ultimate, all-justifying, necessity. To be sure, in ancient wars, being conquered sometimes meant the murder, rape, and enslavement of the entire population. Faced with a genuine existential threat of this sort, warriors could plead military necessity. Michael Walzer calls it "supreme emergency," and he believes Great Britain faced a supreme emergency in 1940 when Churchill ordered the terror bombing of German cities. But supreme emergencies are few and far between, and Walzer takes pains to "set radical limits to the notion of necessity"; in his view, the need for

[13] Fussell, pp. 34–35.
[14] Ibid., pp. 30, 35–36.
[15] Ibid., p. 28.

terror bombing had already passed by 1942.[16] The United States never faced an existential threat in its war with Japan, whose war aim was merely control of the western Pacific. It faces no existential threat in its current conflict with Al Qaeda.[17] In the grips of war fever or war panic, the costs of defeat are easily inflated into supreme emergencies, and only this gives the doctrine of *Kriegsraison* whatever plausibility it seems to have.

Fussell writes from the standpoint of the front-line rifleman, and his argument is that nobody who has not experienced the front line can understand the absurdity of moral restraint in mortal combat. But why privilege the rifleman's outlook over that of the child he shoots or the prisoner he beats to death? The fact, if it is one, that there are no moralists in foxholes no more proves the absurdity of morals than the fact that there are no atheists in foxholes proves (or disproves) the existence of God. The closest we might come to actually *justifying* unrestrained war is Sherman's moralized version of "war is hell": abandoning restraint saves lives by shortening wars. The trouble is that we have no reason for thinking this true beyond the say-so of apologists. Even Fussell never claims that the numbers add up on the atomic bombings. (It depends how quickly Japan would have surrendered without the A-bombs – and some historians believe it would have been very quickly, and that U.S. leaders knew this.)

II. The Law of War as Practical Humanitarianism

An even more fatal objection can be raised to Sherman's argument, for there is a far better way to save lives than upping the level of devastation in war fighting: You can refuse to fight. If the argument is purely a consequentialism of casualties, the correct conclusion is not *inter arma*

[16] Walzer, *Just and Unjust Wars*, pp. 255–61.

[17] As Lord Hoffman wrote in a British security detention case, chiding the Blair government for declaring an emergency that threatens the life of the nation in order to derogate from the European Convention on Human Rights,

> I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.

A and others v. Sec'y of State for the Home Department, [2004] UKHL 56, para. 95. See also Michael Walzer, "Emergency Ethics," in *Arguing about War* (New Haven, CT: Yale University Press, 2004), pp. 33–50, arguing that supreme emergency must be restricted to the rare cases when the life of the community is at stake.

leges silent. The correct conclusion is pacifism – or, at most, the near-pacifist view that lethal force is justified only when the exacting conditions for individual self-defense in peacetime civilian law are met.[18] "Nothing is justified" seems far closer to the truth of war than "everything is justified."

This should not surprise us: "war is hell" sounds like an argument for pacifism more than for total war, and Fussell's aim in much of his writing is not to debunk the theory of *jus in bello*, but to debunk those who romanticize war. Thinking that war can be a rule-governed, restrained enterprise is, in Fussell's view, a version of romanticism about war.

In this, however, he is mistaken. Henri Dunant founded the Red Cross movement in response to the horror scenes he witnessed after the 1859 battle of Solferino.[19] Francis Lieber, who drafted the first modern regulatory code for war, was a combat veteran who fought at Waterloo and was wounded at Namur. These were not armchair romantics but pragmatic reformers who saw war firsthand and aimed to mitigate its horrors through law. Call their view *practical humanitarianism*. Both historically and conceptually, I believe it lies at the basis of the laws of war.

Practical humanitarianism is compatible with many philosophical views, including both pacifism and Hobbesian amoralism. By itself, therefore, it provides no basis for deriving any particular laws of war from moral principles other than the principle of reducing war's horrors to whatever extent possible, given that wars will continue to be fought. In this sense, laws of war are largely a matter of convention: they consist of whatever restrictions practical humanitarians can induce war fighters to accept.[20]

The contemporary philosopher Jeff McMahan has done perhaps the best job of defending the claim that practical humanitarianism has no principled connection with what he calls the "deep morality" of war.[21] As a matter of deep morality McMahan criticizes and rejects many defining features of the laws of war, for example, the view that combatants on all sides of a war are morally equivalent if they fight by the rules. McMahan argues that fighters on the unjust side of a war (let us say a war of naked aggression) do wrong when they kill the enemy. After all, the aggressor

[18] I take it that this is close to the position defended by David Rodin – see *War and Self-Defense*, pp. 196–97 and also Rodin, "Problems with Preventive War," in Henry Shue, ed., *Preemption: Military Action and Moral Justification* (Oxford: Oxford University Press, 2007).

[19] On the origin and activity of the Red Cross, see the title essay in Michael Ignatieff, *The Warrior's Honor*, pp. 109–63.

[20] See George I. Mavrodes, "Conventions and the Morality of War," *Philosophy & Public Affairs* 4 (1975): 117–31.

[21] Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114 (2004): 693–733. See especially pp. 729–33.

has no moral right to be in the defender's homeland in the first place, and killing the righteous defender is no less murder because the killing follows conventional rules of combat. A burglar cannot plead self-defense if he kills the homeowner, even if the homeowner attacks him. Nevertheless (McMahan continues), telling combatants that if they kill on behalf of the unjust side they can be punished for murder might deter them from surrendering and thus "establish incentives to protract wars rather than to terminate them."[22] That is because soldiers on all sides would fear that if they lose, the victor will declare their cause unjust and punish them. So, even if the deep morality of war establishes asymmetrical responsibilities between the just and unjust sides, the laws of war should remain symmetrical.

Where do these arguments leave us? First, with the conclusion that "everything is justified" is false. Second, with the conditional conclusion that if laws of war can scale back war's horrors, they should be embraced and enforced. And third, with the conclusion that we should not expect the laws of war to track morality closely. Some moral wrongs done in war – even grievous moral wrongs, as when an aggressor kills a just defender – should not be declared war crimes.

Suppose, then, that we abandon "everything is justified." What about the alternative exoneration, that war subjects fighters to such hellish horrors that everything is excused? As I have already observed, this claim concedes that there are legal or moral war crimes – otherwise, no excuses are necessary. To be sure, those of us who have never experienced combat should take seriously Fussell's warning that we have no idea how insane combat situations are, and therefore what effect they might have on fighters' control over their own actions. At the same time, it is simply untrue that many, let alone most, soldiers shoot prisoners or helpless civilians, rape 14-year-olds, blow up religious shrines, or torture captives in prison camps. Legal excuses (mental incompetence, duress, self-defense, necessity, mistake), like their moral counterparts, are specific, fact-bound releases from rules that most warriors find possible to obey. Without a showing that most warriors commit outrages, blanket exonerations like "War makes us crazy" or "You can't know what it was like" or "When people are shooting at you you can't expect decent behavior" must be rejected.

Fussell's challenge does suggest that combat stress should mitigate punishments for some war criminals – and perhaps that the primary focus of war crimes trials should not be on the combat soldiers but on higher-ups

[22] Ibid., p. 731.

who order, condone, or enable war crimes, without the excuse that they have seen too many of their buddies eviscerated by roadside bombs to control themselves.

It seems, then, that the basic project of establishing a code of *jus in bello*, and enforcing it through legal processes, survives the fundamental Hobbesian challenge that in war right and wrong, justice and injustice, have no place.

III. A Quick Tour of the Law of War

Systematic thinking about just war is ancient, and codes of behavior for warriors date back at least to the Middle Ages. Shakespeare's *Henry V* contains a remarkable scene in which Henry and his soldiers argue fine points of the law of war, and in fact some of Henry's troops at Agincourt (1415) refused to obey his order to kill the prisoners.[23] War crimes trials date back at least to the 1474 trial of Peter von Hagenbach, the brutal governor of Breisach under Charles the Bold.

There was, however, no codified *jus in bello* until Francis Lieber drew up a code for the U.S. Army in the mid-nineteenth century, and the enterprise of regulating warfare through treaties began in earnest only with the Hague Conventions of 1899 and 1907. These agreements established rules of combat (for example, they forbid the bombardment of undefended cities) and banned certain weapons (for example, poison). Subsequent treaties establish further restrictions on modes and means of warfare, banning (for example) blinding laser weapons, bullets undetectable by X-rays, and attacks against cultural property and the environment.[24] In 1929, and again in 1949, states negotiated Geneva Conventions dealing with the treatment of sick, wounded, or captured soldiers. Two Additional Protocols of 1977 added other rules about war fighting, and today, the Geneva regime forms the core of the law of armed conflict (LOAC; sometimes called "international humanitarian law" [IHL]).[25]

[23] See Theodore Meron, *Henry's Wars and Shakespeare's Laws: Perspectives on the Law of War in the Later Middle Ages* (New York: Oxford University Press, 1993); Maurice H. Keen, *The Laws of War in the Late Middle Ages* (London: Routledge, 1965); John Keegan, *The Faces of Battle: A Study of Agincourt, Waterloo and the Somme* (New York: Vintage, 1976), pp. 107–12.

[24] For a list of treaties, see the ICRC's Web site, http://www.icrc.org/ihl.

[25] All 194 states in the world are parties to the Geneva Conventions, and more than 160 states are parties to the Additional Protocols. I shall follow standard practice and refer to the Geneva Conventions as GCs, and the Additional Protocols as AP I and AP II. The Third Geneva Convention, pertaining to POWs, is GC III or GC-PW; the Fourth, pertaining to civilians, is GC IV or GC-C.

The Geneva Conventions (GCs) establish a category of "grave breaches" and require states to punish grave breaches through their domestic criminal law. These are the war crimes. Theoretically, states may exert "universal jurisdiction" over grave breaches, meaning that any state can try offenders from any other state; in practice, it seldom happens that uninvolved third parties prosecute war crimes.

More recently, the International Criminal Court (ICC), which as of 2007 had more than one hundred states-parties, includes an extensive list of war crimes in its statute, combining elements from both Geneva law and other treaties. In some cases it criminalizes Geneva violations that the GCs themselves do not count as grave breaches and do not criminalize. Arguably, the Rome Statute of the ICC offers the definitive catalog of war crimes at the present moment.

The ICC, however, has jurisdiction only over "the most serious crimes of concern to the international community as a whole" (Article 5), and its statute limits its war-crimes jurisdiction to those "committed as part of a plan or policy or as part of a large-scale commission of such crimes" (Article 8). Under this arrangement, isolated or small-scale war crimes will continue to be prosecuted by the soldier's own state, and only major war crimes, systematically perpetrated, will fall to the ICC. In any event, the ICC has limited capacity to process cases; that, together with the difficulty of collecting evidence from war zones, virtually guarantees that low-level perpetrators will not face ICC trial.[26]

Alongside treaty provisions, LOAC includes the customary international law of war. Like all customary international law, customary LOAC consists of widespread state practices undertaken out of a sense of legal obligation (*opinio juris*), and, as in all customary international law, there is no authoritative code of what its rules are. These can be contentious, as an example illustrates. In 2005, the International Committee on the Red Cross (ICRC) – the most influential nongovernmental authority on LOAC – published a 4,500-page manual on the customary law of war. One volume articulates the rules, while two lengthier volumes exhaustively

[26] The experience of the Yugoslav tribunal indicates that there could be exceptions, however, because of the accidents of how defendants are captured. The first ICTY conviction involved a low-level perpetrator, Erdemovic, who turned himself in and pled guilty as a matter of conscience; the first contested case, that of Dusko Tadic, arose because Tadic made the mistake of vacationing in Germany. He was arrested and tried before the ICTY even though he was not a high-level perpetrator, largely because at the time he was the only defendant in custody and the evidence of his brutality was powerful.

canvass state practice and *opinio juris*. In 2007, however, the U.S. government denounced the study, claiming that ICRC used sources that really do not amount to state practice or *opinio juris*. More contentiously, the United States argued that it is illegitimate to rely on enactments by states that do not fight many wars (hinting thereby that the main source for determining the customary international law of war ought to be the United States, which fights more wars than any other state).[27]

This example illustrates one unpleasant fact about the laws of war: what they are, whose interpretation of them is authoritative, and who gets to establish them are all deeply politicized issues.[28] Sometimes, the political tug of war is between humanitarians like the ICRC and war fighting states. Even the two names for the law of war – IHL and LOAC – reflect this struggle. As a U.S. Army lawyer once explained to me, "People who talk about 'humanitarian law' are always people in the business of saving lives. We're in the business of killing."

But the politics can also run along other fault lines. In 1977, Additional Protocol I to the Geneva Conventions extended POW protections to nonuniformed guerrilla fighters, so long as they display their arms openly during combat (Article 44). The United States, with the memory of Vietnam still fresh, rejected this proposal on the basis that legitimizing nonuniformed fighters who melt back into the surrounding population would lead to more civilian casualties. Without going into the merits of this argument, the politics seem transparent: Third World countries galvanized by Vietnam preferred laws of war that legitimize guerrilla struggle, while the United States prefers laws that protect only traditional combatants. Each side desires laws that favor the kind of warfare in which it is most confident of prevailing.

Despite these political disagreements, the basics of the law of war are not controversial. They rest on three bedrock principles: necessity, discrimination, and proportionality. The principle of necessity forbids

[27] Jean-Marie Henckaerts et al., *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005). For the U.S. critique, see Letter from John B. Bellinger, III (Legal Adviser, U.S. Dep't. of State) and William J. Haynes, II (General Counsel, U.S. Dep't. of Defense) to Jakob Kellenberger (ICRC President), Nov. 3, 2006), available at http://www.defenselink.mil/home/pdf/Customary_International_Humanitiarian_Law.pdf; Jim Garamone, "DoD, State Department Criticize Red Cross Law of War Study, Armed Forces Press Service, March 8, 2007, available at http://www.defenselink.mil/news/newsarticle.aspx?id=3308.

[28] See Kenneth Anderson, "Who Owns the Rules of War?," *New York Times Magazine*, April 13, 2003, pp. 38–43.

unnecessary suffering and gratuitous violence, that is, violence not required for overpowering the enemy. (This principle must not be confused with the doctrine of *Kriegsraison*, according to which military necessity trumps the law. Instead of providing an escape hatch from legal obligation, the principle of necessity within the law of war represents an outer limit, a prohibition rather than a permission: no violence is permitted unless it is militarily necessary. That remains a very wide permission, because it includes any lawful action that confers military advantage; but the word "lawful" is crucial. Unlawful acts cannot be justified by the plea of military necessity.)[29] "Discrimination" means that "at all times a distinction shall be made between (a) combatants and civilian persons; (b) military objectives and civilian objects."[30] Noncombatants may never be targeted, and "constant care shall be taken to spare the civilian population, civilian persons and civilian objects."[31] Finally, proportionality requires that military action not cause civilian death or injury, or destruction of civilian objects, disproportionate to the value of the military objective.

IV. Demarcating War

Next consider a fundamental and uncontroversial point: that the laws of war permit violence and the destruction of innocents at a level that would be intolerable in any peacetime legal regime. They are, in lawyers' jargon, *lex specialis* – "special law."[32] Contrast, for example, the world's major human rights treaty, which requires legal protection of "the inherent right to life" and forbids arbitrary deprivation of life, with the *lex specialis* doctrine of proportionality, which permits "intentionally launching an attack in the knowledge that such attack will cause incidental loss of life . . . to civilians" unless the civilian casualties "would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."[33] The *lex specialis* is plainly more permissive than the

[29] William Gerald Downey Jr., "The Law of War and Military Necessity," *American Journal of International Law* 47 (1953): 251–62.

[30] Frederic de Mulinen, *Handbook on the Law of War for Armed Forces* (ICRC, 1987), Conduct Principle 387, p. 92.

[31] Ibid., Conduct Principle 388, p. 92.

[32] International law acknowledges that the *lex specialis* in wartime offers lower levels of protection than human rights law in peacetime. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226, at para. 25.

[33] The first is Article 6(1) of the International Covenant on Civil and Political Rights; the second is Article 8(2)(b)(iv) of the Rome Statute of the ICC (borrowing language from AP1, Article 51(5)(b)).

peacetime human rights law. There is a gap between them, and I shall refer to violence permitted under the laws of war but forbidden under peacetime law as "gap violence."

Although we most naturally think of the law of war as imposing restrictions on military violence, the flip side is that the law of war implicitly immunizes acts of gap violence – acts such as shooting a sleeping enemy or bombing a military target knowing that a large (but not disproportionate) number of civilians will be killed. Those are precisely the kind of violent acts that lawful belligerents can permissibly perform, and I shall use the phrase "belligerent immunity" as shorthand to refer to the implicit immunity that the law of war creates for gap violence.

The gap between the laws of peace and of war places, front and center, the threshold question of how to tell when a war is going on. Unless we can tell, we will not know whether the high standard of human rights protections we are entitled to expect in civilian life applies, or the lower standard in wartime. How do we distinguish the violence of crime or vendetta from genuine war, especially since organized crime and vendetta can sometimes mobilize forces as powerful as armies? Call this question of how to distinguish war from peace the *demarcation problem*.

The natural place to begin is with the theory implicit in the Geneva Conventions – or rather, the theories implicit in the GCs, because Additional Protocol I significantly modifies the original theory. As we shall see, both theories have deep deficiencies.

The most striking feature of the Third Geneva Convention (GC III) is its insistence that POWs are the moral equals of the captors' own troops: both are privileged belligerents. POWs must be "quartered under conditions as favorable as those for the forces of the Detaining Power" (Article 25), be treated with respect and honor, and indeed have their salaries paid by their captors (to be repaid by the POW's home state at war's end). GC III even specifies which enemy officers POWs must salute. POWs are clearly not treated as criminals merely because they have fought; indeed, the only war crimes they can be punished for are those that their captors would punish if their own troops committed them (Articles 87, 102). We can see from these articles that their gap violence enjoys the belligerent immunity – otherwise, POWs could be tried for murder or assault because they fought their captors.

Crucially, however, these provisions apply only in "international armed conflicts," that is, wars between states. To be sure, the GCs also contain a provision guaranteeing minimal human rights to captives in "armed

conflicts not of an international character" such as civil wars.[34] But those rights conspicuously do *not* include immunity from prosecution for gap violence. The GCs, in other words, reserve belligerent immunity for states and their armies. Medieval just war theory made legitimate authority (*auctoritas principis*) one of the criteria of permissible war, and Geneva likewise assumes that only states may fight wars in which gap violence is immunized by LOAC.

This theory obviously favors the armies of existing states, even horribly unjust ones, over rebels and insurgents; it is a *statist* theory. When the Additional Protocols were negotiated in the 1970s, former colonies and states sympathetic to them objected to a theory so deeply wedded to the international status quo. Additional Protocol I (AP I) expanded the concept of international armed conflicts to include "armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination" (Article 1(4)). (Recall that AP I also declares that guerrilla fighters are legitimate combatants.)

However, even the Additional Protocols do not offer belligerent immunity to insurgents in civil wars, except civil wars against colonial, alien, or racist regimes. In all other cases, the AP theory is no less statist than the theory it replaces. In the U.S. Civil War, this theory would have made all the Confederate troops criminals, while granting belligerent immunity to their adversaries.

To be sure, in civil wars AP II does require states to "endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict" (Article 6(5)). But this is a much weaker protection of rebel fighters than belligerent immunity: endeavoring to grant amnesty is not the same as granting amnesty, and the broadest possible amnesty for rebels may in the state's opinion be quite narrow. In any event, the very use of the word "amnesty" implies that under AP II rebel fighters enjoy no belligerent immunity, else they would need no amnesty.

One unfortunate consequence of reserving belligerent immunity in civil wars for soldiers fighting on behalf of states is the one McMahan identified: stripping belligerent immunity from rebels may deter surrender and protract civil wars. The theory also implies the bizarre result that if the rebels win, they will have to punish or amnesty their own fighters for gap violence, while soldiers of the defeated government enjoy belligerent immunity. Moreover, if the law of war does not apply in civil wars,

[34] This is "common Article 3," so called because it is common to all four GCs.

all its humanitarian restrictions disappear except the minimalist rules of common Article 3 and AP II.

Most important, the theory makes no exception for a rightful rebellion against despotism. It seems unreasonable to deny belligerent immunity to freedom fighters while granting it to a tyrant's troops. Even when both sides are bad guys, it is hard to see why only one receives belligerent immunity. The better argument was offered by Vattel in 1758:

> Civil war breaks the bonds of society and of government, or at least suspends the force and effect of them; it gives rise, within the Nation, to two independent parties, who regard each other as enemies and acknowledge no common judge. . . . They are therefore in the situation of two Nations which enter into a dispute and, being unable to agree, have recourse to arms. That being so, it is perfectly clear that the common laws of war . . . should be observed by both sides in a civil war.[35]

Suppose then, following Vattel, that we broaden the Geneva theory so that rebels in civil wars receive belligerent immunity, just as states' armies and antiracist, antiimperialist, and anticolonial forces do. Though I think Vattel's is a better theory, there is no denying that it has one unfortunate consequence: it greatly complicates the question of how to demarcate war from other violence.

The problem lies in the netherworld of failed states, private armies, and mixed motives. Most armed conflict today is "ragged war" involving warlords, adventurers battling for mineral riches against collapsing kleptocracies, ethnic and clan militias, freedom fighters who also smuggle narcotics and traffic prostitutes, and terrorists.[36] Should "rebels" like these be dignified with belligerent immunity? To restrict belligerent immunity to state armies in international armed conflicts, or even to state armies and antiracist or anticolonialist forces, can make criminals out of freedom fighters. But to grant belligerent immunity to nonstate forces can make honorable warriors out of gangsters and terrorists.

One approach would simply deny that ragged warriors deserve belligerent immunity. Warlords and narcoinsurgents are hardly what medieval theorists meant by princely authority (though they powerfully resemble medieval princes); nor are they idealistic freedom fighters. Why not treat them as mere criminals?

[35] Emer de Vattel, "The Law of Nations," Chapter XVIII, in Gregory M. Reichberg et al., eds., *The Ethics of War: Classical and Contemporary Readings* (Malden, MA, and Oxford: Blackwell, 2006), paras. 293–94, p. 516.

[36] The term "ragged war" is from the counterinsurgency specialist Leroy Thompson, quoted in Ignatieff, p. 126.

The trouble with this approach is that in weak, corrupt states warlords are sometimes the closest thing in their neighborhoods to public authority, and nationalist gangsters may actually have a valid revolutionary or irredentist political program. Their local political legitimacy, grounded in protection and patronage, may be no worse than that of the kleptocrats they replace. To deny their soldiers belligerent immunity may carry all the bad consequences of denying it in "purer" civil wars.

V. Athena's Disciples

It seems, then, that the separate sphere occupied by the law of war cannot be demarcated by either a difference in kind among the location of wars (foreign versus internal) or the authorizing authorities (state versus nonstate). How else, then, can we demarcate the domain of war from that of crime?

I believe the best answer is to look not at the nature of the fight but at the nature of the fighters, or, more precisely, of the fighting organizations. For thousands of years, warriors have considered themselves a breed apart, governed by a code of honor. In practice, this may have been laughable – Wellington famously described his own troops as "the mere scum of the earth," and why doubt him? – but the idea that warriors can be trained and disciplined away from cruelty, rape, and pillage is both definitive of war and a necessary condition for the very possibility of a law of war. The historian Steven Neff notes that ancient Greek myths distinguished between Ares, the god of mere violence, and Athena, the goddess of warfare "as an organized, disciplined, rationally conducted collective activity."[37] Other cultures registered the same distinction in their languages and religions. Warriors as the disciples of Athena fight in disciplined, rule-governed units, whose rules are the external form of a code of honor that warriors are supposed to internalize. In Michael Ignatieff's words, "Such codes may have been honored as often in the breach as in the observance, but without them war is not war – it is no more than slaughter."[38]

We have seen that the Geneva Conventions distinguish wars on the basis of whether or not they are international. But they also distinguish them

[37] Steven C. Neff, *War and the Law of Nations: A General History* (Cambridge: Cambridge University Press, 2005), p. 16.

[38] Ignatieff, "The Warrior's Honor," p. 117. I have borrowed many ideas from Ignatieff's brilliant essay. See also Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline and the Law of War* (New Brunswick, NJ: Transaction Books, 1999), p. 23.

on the basis of what kind of organizations fight them. GC III reserves privileged status to fighters who belong to regular armies, or whose organizations satisfy four criteria that make them the moral equivalent of regular armies:

> (a) that of being commanded by a person responsible for his subordinates;
> (b) that of having a fixed distinctive sign recognizable at a distance;
> (c) that of carrying arms openly;
> (d) that of conducting their operations in accordance with the laws and customs of war.[39]

Additional Protocol I states: "The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates. . . . Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict."[40]

The salient feature in both these definitions is that military forces are disciplined bodies, responsibly commanded, so that they are capable of compliance with the law of war. They belong to the sphere of Athena, not Ares. Even AP II, governing noninternational armed conflicts, applies only when the dissident forces are "under responsible command" and able "to implement this Protocol" (Article 1(1)).

Three features mark out the sphere of Athena. First, armies must maintain strict and near-absolute discipline, with clear-cut lines of authority and adequate training to ensure that fighters do not run amok. Second, armies must respect the principle of discrimination: warriors fight only warriors. Civilians, along with fighters rendered hors de combat by injury, illness, or surrender, are off limits. Third, in order to underwrite the first two requirements, combatants must distinguish themselves from noncombatants, by wearing a uniform or, in the case of guerrilla fighters, by bearing their arms openly during engagements.

The overarching idea of all these requirements is straightforward: to distinguish warriors from murderers. Only if that is possible does it make sense to think of a *lex specialis*. We would not want a *lex specialis* for murderers. Warriors are supposed to be different: they use violence in a disciplined manner, and only against those who might do them harm. Their existential position is one of mutual jeopardy, and only those who share

[39] GC III, Article 4(2).
[40] AP I, Article 43(1).

that position – other warriors – are legitimate targets. The requirement of self-identification through a uniform or other means fits in with this understanding of the warrior's vocation. Not only do warriors exist in mutual jeopardy, they show it openly.

VI. The Legal Consequences of Discipline

Two important consequences follow from the all-important ideal of military discipline, one concerning commanders and the other concerning subordinates. The first is a heightened conception of command responsibility. The need for discipline makes military organizations strictly hierarchical, and precisely because military organizations are strictly hierarchical, commanders can be held responsible if they fail to prevent or punish their forces' war crimes.

Command responsibility can be implemented in three ways. First, commanders' failure to prevent or punish can be regarded as complicity in their forces' war crimes – being an accessory to the crime either before or after the fact. That is the usual method civilian law uses for criminalizing Person A's involvement in a crime physically perpetrated by Person B. Second, the commander's failure to prevent or punish war crimes can be regarded as a self-standing crime – call it "dereliction of duty" – wholly independent of B's crime. Third, and most radically, Commander A can be held *vicariously liable* for Soldier B's war crimes.[41] This alternative is the most radical because it convicts the commander for the soldier's crimes, as though the soldier were a mere extension of the commander rather than an independent intervening decision maker.

Strikingly, military law adopted the third, radical, approach for centuries. It already appears in the American Articles of War of 1775, which held officers vicariously liable for outrages committed by their troops if they failed to punish them and make reparations.[42] Partly, no doubt, military law adopted this standard because its harshness would give officers more incentive to take it seriously. That by itself would not make vicarious

[41] These are well summarized in the ICTY decision Prosecutor v. Halilovic, ICTY Trial Chamber, Judgement of 16 November 2005, paras. 42–54, available at http://www.un.org/icty/halilovic/trialc/judgement/index.htm.

[42] American Articles of War of 1775, Article 12, reprinted in William Winthrop, *Military Law and Precedents*, vol. 2, 2nd ed. (1896), p. 1480. Indeed, a version of this principle appears in a 1439 order of France's Charles VII: Leslie Green, "Command Responsibility in International Humanitarian Law," *Transnational Law and Contemporary Problems* 5 (1995): 321.

liability fair, of course, and recently the Yugoslav Tribunal has partially abandoned it in favor of the dereliction-of-duty approach.[43] The basis for declaring vicarious liability fair lies in the demand for strict military discipline: hierarchical control in a sharply defined chain of command means that, in an important sense, the soldier is an extension of the commander's will.

The burden on commanders to control their soldiers is heavy. The ICC's statute holds commanders responsible for their forces' war crimes on a negligence standard: even if they did not know about the war crimes, they can be convicted if they "should have known that the forces were committing or about to commit such crimes" (Article 28(a)(i)).[44] Even more harshly, after World War II the United States executed the Japanese general Yamashita for his troops' atrocities even though American bombers had partly cut Yamashita off from them. Yamashita's conviction has been criticized as an injustice,[45] but it can perhaps be justified on the basis of his failure to train and discipline his troops properly when he had the chance: the wide scope of the atrocities is evidence of prior command failure, not individual soldiers run amok.

Admittedly, these are hard cases. The principle pertains most clearly in the easier cases where commanders have clearly condoned or incited war crimes. They bear responsibility for those crimes. Equally important is the nature of their duty: before the fact, commanders must prevent or repress war crimes; after the fact, they must investigate and punish them. Cover-ups and whitewashes are not merely obstruction of justice or "conduct unbecoming of an officer": under the literal legal standard, commanders become vicariously liable for subordinates' crimes if they cover them up.[46] This is an unforgiving standard (criminalizing as it does a commander's usually benign desire to protect his troops), and in real life superiors who cover up their subordinates' crimes are never convicted for those crimes, although they may be convicted of obstruction offenses. Worse, when

[43] *Halilovic*, para. 54. However, in paragraph 95, the same court suggests that commanders remain vicariously liable for their subordinates' war crimes if they fail to punish them.

[44] For criticism of the negligence standard, see Larry May, *War Crimes and Just War* (Cambridge: Cambridge University Press, 2007), pp. 264–78.

[45] See the blistering dissent of Justice Murphy in In re Yamashita, 327 U.S. 1, 26–41 (1946), who wrote, "Nothing in all history or in international law, at least as far as I am aware, justifies such a charge against a fallen commander of a defeated force. To use the very inefficiency and disorganization created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice or to military reality." *Yamashita*, at 35. See also Walzer, *Just and Unjust Wars*, pp. 319–22.

[46] Halilovic, para. 95.

crimes become known, self-protective military organizations sometimes stop their investigations at the lowest levels, jailing the corporals and shielding the officers. Abu Ghraib is a notorious recent example. But I believe the unforgiving standard is justifiable. A military commander wields an instrument with the power of life and death. Covering up his troops' murders, rapes, or tortures fuzzies up rules that should be the brightest of bright lines. The troops quickly know when a cover-up has happened, and that knowledge "undeters" violent young men, and risks turning an army into a gang of murderers, rapists, and torturers – in which case they deserve no belligerent's privilege or immunity. Vicarious liability for the commander is, in a sense, the army's price of admission to the sphere of Athena.[47]

Although for purposes of assigning command responsibility the law treats troops as instruments of their commanders' will, doing so is a legal fiction. In reality, soldiers are never mere instruments with no judgment of their own, and subordinates who commit war crimes can be held accountable for them. However, subordinate responsibility is complicated.

In part, this is for reasons Fussell makes clear: soldiers on the front line exist under incomprehensible levels of stress. Fear, rage, and vengefulness may be their constant companions, and days without sleep sap their judgment. What makes law compliance possible under such circumstances are the same discipline and drill they rely on to keep themselves alive.

What if the soldier gets an illegal order? Here, the problem is that the same deeply drilled discipline that makes compliance with the law of war possible drives the soldier to obey criminal orders. Drill is designed to make actions as mindless and automatic as possible, "to avert the onset of fear or, worse, of panic and to perceive a face of battle which, if not familiar, and certainly not friendly, need not, in the event, prove wholly petrifying."[48] A system designed to produce unthinking compliance cannot simultaneously produce freedom of conscience.

The more freedom of conscience the soldier exercises, the less effective drilled discipline will be, and loss of discipline may lead to more war crimes rather than fewer. But the less freedom of conscience the soldier exercises, the more deadly and effective criminal orders become. In such

[47] A sophisticated argument for unforgiving command responsibility is Mark Osiel, "The Banality of Good: Aligning Incentives against Mass Atrocity," *Columbia Law Review* 105 (2005): 1773–83, 1830–37.

[48] John Keegan, *The Faces of Battle*, p. 22.

circumstances, a compromise of values seems inevitable.[49] Contemporary LOAC in effect divides orders into three categories: lawful, unlawful but not obviously so, and "manifestly" unlawful. Soldiers *must* obey lawful orders and *must* disobey manifestly unlawful orders – orders that, in the language of a famous Israeli judicial decision, fly the black flag of illegality over them. If an order is illegal but not obviously so, the soldier *may* disobey without suffering punishment. But what if the soldier obeys and is charged with a war crime? Here, different legal systems strike different balances between discipline and conscience. Some reject the defense of superior orders in all cases; others reject it but permit superior orders to mitigate the punishment; others permit the defense, but only if the soldier believed the order was lawful; a few permit the defense even if the soldier did not believe the order was lawful.[50]

There may be no single right approach across societies. A country whose military has been plagued by mutinies, coup attempts, corruption, and criminality may conclude that the need for discipline is so great that obedience to orders is the paramount value. However, international tribunals from Nuremberg to Yugoslavia and Rwanda take the opposite approach. Aiming to deter fighters at all levels from organized atrocities – and, I believe, to project a liberal vision of human beings as individuals with consciences that transcend collective aims – they disallow the defense of superior orders in all cases, except as mitigations. The ICC takes an in-between position: it allows no superior orders defense for genocide or crimes against humanity but permits the defense for war crimes if the order was not manifestly unlawful and the defendant did not know it was unlawful (Article 33).

VII. Modern War Crimes Trials

When wars end, should the victors, or the international community, respond to its horrors by staging war crimes trials?

At the end of World War I, the victorious Allies proposed to try hundreds of German military and political officials for war crimes and violations of international law. The Germans, perhaps rightly, saw this as vindictiveness, nothing more, and bargained hard so that they would conduct the trials themselves. However, the Leipzig trials ended in farce as all but

[49] The best treatment of this subject I know is Osiel, *Obeying Orders*.

[50] Gary D. Solis, "Obedience of Orders and the Law of War: Judicial Application in American Forums," *American University International Law Review* 15 (2000): 481–526.

six defendants were acquitted, and the guilty received short sentences.[51] After World War II, the Allies – remembering Leipzig – tried the German military and political elite before an international military tribunal at Nuremberg. This, too, was in part vindictive, because the Nuremberg Tribunal had jurisdiction only over Axis defendants, not Allied war criminals, even though there was no doubt that the Allies too had committed major war crimes. "International," furthermore, meant only that the trial was conducted by the four leading Allied powers, and nominally supported by the remaining dozen allies.

Despite these infirmities, the Nuremberg trials managed to transcend the taint of "victor's justice," partly because the Nazi crimes were so enormous, but in no small part because of the fairness of the tribunal and the transparency of its procedures. Throughout the trial the prosecutors were terrified that acquittals would delegitimize the tribunal. Their uncertainty about the outcome underlines that these were not show trials. In the end, three defendants were acquitted of all charges, and others of some charges; and, far from delegitimizing the tribunal, the acquittals were the best possible warrant of its fairness. Today, we think of the tribunal and subsequent Nuremberg trials as the paradigm of what a civilized legal response to war's atrocities should be.

What, after all, were the alternatives to trying the top Nazis? Great Britain, concerned that Nuremberg would provide the top Nazis with a forum to rally pro-Nazi sentiment, opposed the American idea of trials, and instead wanted simply to round them up and shoot them; Stalin raised a toast to the execution of fifty thousand German officers.[52] The Nuremberg defense lawyers, on the other hand, argued that because the law under which defendants were charged did not exist at the time of their conduct, they should simply be released, notwithstanding the blood of 50 million people directly or indirectly on their hands. Both responses – liquidation and impunity – would have been backhanded admissions that "reasons of state" and *Kriegsraison* lie beyond law. Trials, in which rational debates about evidence and degrees of blameworthiness would replace summary execution and impunity, were the only device available to reject the dangerous proposition that politics and war lie beyond law. Trials, therefore, performed an overwhelmingly important expressive function. In famous words of the U.S. prosecutor Robert Jackson, "That four great

[51] Telford Taylor, *The Anatomy of the Nuremberg Trials* (New York: Alfred A. Knopf, 1992), pp. 16–18.
[52] Ibid., p. 30.

nations, flushed with victory and stung with injury, stay the hands of vengeance and voluntarily submit their captive enemies to the judgment of the law, is one of the most significant tributes that Power ever has paid to Reason."[53]

Jackson's idea stuck. In the 1990s, the United Nations Security Council created a postconflict tribunal in former Yugoslavia, and another in Rwanda. These have been followed by the Special Court for Sierra Leone, a tribunal for East Timor, and another for Cambodia. With the activation of the ICC in 2002, the proposal that wars and civil wars should end with war crimes trials seems firmly rooted in our expectations. On this view, staging war crimes trials is an expressive act planting law's flag in contested moral terrain, and nothing other than transparently fair trials can do so. This expressive justification – let us call it *norm projection* – is, in my view, the fundamental argument for international war crimes trials.[54]

Other reasons have been offered by commentators and theorists: that trials provide justice and closure for victims, that they promote social healing and reconciliation, and that they create a historical record as a hedge against future revisionists. The trouble is that none of these alternative rationales is very convincing. Social healing might be better accomplished through amnesties or truth and reconciliation commissions. Truth commissions also create a historical record, and, far from offering victims closure, the rigors of cross-examination in an adversarial trial may simply renew victims' traumas.[55] Among the standard rationales for criminal punishment, the deterrent and rehabilitative power of international trials remains unproven. Only the retributive motive for trials and punishments seems clear – and retribution is very close to norm projection. Both of them use trials for expressive or communicative purposes: to broadcast international condemnation of the crime and to dramatize the seriousness and importance of the legal norms that the criminal transgressed. For this reason, the center of attention in international tribunals has always been the trial itself more than the punishment. The trial is the

[53] Nuremberg Judgment, vol. 2, p. 98, available at http://www.yale.edu/lawweb/avalon/imt/proc/11–21-45.htm.

[54] For further defense of this view, see David Luban, "Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law," in Samantha Besson and John Tasioulas, eds., *Philosophy in International Law* (Oxford University Press, forthcoming).

[55] See Martti Koskenniemi, "Between Impunity and Show Trials," *Max Planck Yearbook of International Law* 6 (2002): 1–35.

dramatic embodiment of the all-important proposition that when arms are raised law is *not* silent.

Transforming the basic meaning of war is a long-term and perhaps utopian goal; it may take decades for humanitarian norms to take root in violence-ravaged parts of our exceedingly violent world. In the shorter run, amnesties or truth commissions may in some cases serve more pressing peacekeeping needs. Or, as in Sierra Leone, trials can be reserved for those who bear the greatest responsibility, while the soldiers (many of them children) who perpetrated atrocities on the ground suffer no punishment. There is no one-size-fits-all answer to the question of how compatible doing justice and making peace are in any given case. I believe that projecting humanitarian norms through trials is vitally important. But we must not forget that the law of war itself exists for practical humanitarian reasons, and practical humanitarians should settle for whatever mix of legal and nonlegal methods can best save lives. The point is not law for its own sake, but law as life's servant when hell is loose in the world.[56]

[56] I wish to thank Emily Crookston, Larry May, and Gary Solis for helpful comments on an earlier draft.