

After the Civilian

Compassion in a changing politico-military context

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Abstract: This paper looks at political, military and technological challenges to the rule against targeting civilians in war. Neither the concept nor the reality of the civilian offer the clarity once assumed. The paper argues that the category of the civilian is now collapsing and that new expressions of practical compassion in armed conflict must rise to take its place. Religions have a role to play in promoting the restraint of violence although that role will be more one of motivation than overtly religious argument.

We are losing our best rule for restraint in armed conflict. We are losing it at a time when we need it most and when there is no replacement for it. It is the rule against targeting civilians. War is large-scale lethal political violence by or against the state, or between groups seeking or challenging the power to rule. War kills people as a means and not as an end. (If killing people is the *goal* then it is not war but genocide). The civilians rule is an attempt to restrain war by limiting those whose lives may be taken as a means to the achievement of political ends. The rule gives us the simplest definition of terrorism. Terrorism is targeting civilians. (If the killing of civilians is the *means* by which ends are achieved then it is not war but terrorism). The civilians rule is now challenged by changes in the nature of combatants, civilians and of war itself.

The emergence of the civilian

The call for restraint in war may be as old as war itself and the wish that some be spared its violence has many roots and manifestations. In many cultures, women and children may have been the first categories of people to be spared violence. In the West the rule against targeting civilians evolved within an approach to the ethics and law of armed conflict called the Just War approach. Christian in origin, Just War has been the dominant Western approach to issues of morality and military force. James Turner Johnson has suggested that the ideas and arguments of the Just War approach are 'the only way actually open for persons in our culture to think about morality and war'¹. Paul Ramsey draws the conclusion: 'If we live in a post-Christian

¹ James Turner Johnson, *Can Modern War Be Just?* (Yale University Press, 1984), 29.

age, it is not surprising that we also live in a post-Just War age'.² However there is now a need for novel and evolving approaches to the restraint of armed conflict as changes in the politics, technology and culture of war present challenges in a diverse and decentralized world.

No rule against targeting civilians is to be found in the writings of medieval Just War thinkers such as Augustine or Aquinas. Instead there is a focus on intention which rules out cruelty or wanton destruction. However, in Aquinas's natural law approach to ethics, there is a focus on rules which left its imprint on the Just War approach. In the modern era in Europe, compassion yielded to rights and a religious concern with intention gave way to the law's concern with acts. The wars of religion in Europe (1524-1648) saw increased ferocity and heightened calls for restraint but they also changed the nature of calls for moderation in war. Religious argument was ejected from political and legal discourse in post-Reformation Europe. This can be seen in the work of the jurist Hugo Grotius (1583-1645) who, although motivated by his faith to seek restraint in warfare, compiles every possible argument for moderation except denominational religion.³ In his endeavour to restrain the behaviour of states in war, Grotius combines appeals to legal, ethical, and religious norms, to civilisation and humanitarianism, to charity, gender, and innocence, and to honour, reputation and utility. The appeals to Christianity in his great work *De Jure Belli ac Pacis* of 1625 are deliberately general and vague, avoiding reference to any Christian thinkers beyond the earliest centuries of that religion as religion was the one subject on which the warring Europeans could not agree.⁴ Grotius recognised that religiously-motivated people in a political debate are tempted to make a 'big-picture' argument, making reference to their starting premises or ultimate ends, while successful political argument in a diverse society makes reference to neither. The political mode of argument is a 'next-step' argument, making reference to the immediate options and not to basic assumptions and final goals, allowing people to support the next step for their own reasons. Achievement in politics requires coalitions and alliances to be built among people who do not agree on everything, indeed who may not agree on much beyond the immediate next step. In working together towards shared aims, it is not only pointless to spell out basic convictions and ultimate ends but counterproductive as the more we make clear our values, assumptions and aims, the narrower is the group of people who can agree with us.

Landmarks in the codification of restraint as international humanitarian law were the Hague Conventions of 1899 and 1907 which outlawed poisoned weapons and

² Paul Ramsey, *War and the Christian Conscience* (Duke University Press, 1961), xxiii.

³ Hugo Grotius, *De Jure Belli ac Pacis* (The Rights of War and Peace) trans A.C. Campbell, downloaded from <http://oll.libertyfund.org/titles/grotius-the-rights-of-war-and-peace-1901-ed>.

⁴ Colm McKeogh, 'Grotius and the Civilian' in E. Charters, E. Rosenhaft, & H. Smith (Eds.), *Civilians and War in Europe, 1618-1815* (Liverpool University Press, 2012).

weapons that cause unnecessary suffering.⁵ They also sought to protect civilians in war, requiring that distinction be made between civilian and military objects and that civilians not be the object of attack. The wars of the twentieth century in Europe yielded further rules to prevent repetition of their most appalling features. The use of gas in the first World War led to the 1925 Geneva protocol banning it and the devastating targeting of civilians in the second World War (by aerial bombing including fire-storming and atomic bombs) led to the Geneva Conventions of 1949, which included a new convention on civilians.⁶

The call for respect for civilian status came to be the centrepiece of efforts for restraint in the post-1945 era. The rule has passed into customary international humanitarian law and has been authoritatively stated as follows:

The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.⁷

Civilians and civilian objects are not to be targeted: only combatant personnel and objectives may be targeted in armed conflict. Civilians may only be harmed *indirectly* as a known and predicted side-effect of an attack on a military objective.

Why did the civilian come to be the centre of twentieth century attempts to restrain violence? There are many reasons, practical and theoretical. Although its origins were in compassion and the wish to minimise human suffering, the distinction between combatant and civilian in armed conflict was strengthened by the many ways in which it could be justified and defended. Utilitarian arguments have been put forward in support of the immunity of civilians from targeting in war.⁸ Arguments have been made in terms of justice and the right treatment of people.⁹ The US Catholic bishops gave religious resonance to the civilians rule (which they describe as 'one of the central moral principles of a Christian ethic of war'¹⁰) by connecting it to the concept of innocence when they declared that 'Nothing, however, can justify direct attack on innocent human life in or out of warfare.'¹¹ No single line of reasoning explains the civilians rule but all add to its force. Many factors served to strengthen the rule against attacking the civilian population which

⁵ Geoffrey Best, *Humanity and Warfare* (Weidenfeld & Nicolson, 1980), 133.

⁶ Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Available at <https://ihl-databases.icrc.org/ihl/INTRO/280?OpenDocument>; Convention (IV) relative to the Protection of Civilian Persons in Time of War. Available at <https://ihl-databases.icrc.org/ihl/INTRO/380>.

⁷ https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter2_rule7#Fn_28_17.

⁸ William H. Shaw, *Utilitarianism and the Ethics of War* (Routledge, 2016).

⁹ Colm McKeogh, *Innocent Civilians: the morality of killing in war* (Palgrave, 2002).

¹⁰ *The Challenge of Peace: God's Promise and Our Response*, A Pastoral Letter on War and Peace by the National Conference of Catholic Bishops (May 3, 1983), para. 184, downloaded from <http://www.usccb.org/upload/challenge-peace-gods-promise-our-response-1983.pdf> (15.1.2107).

¹¹ *Challenge of Peace*, para.286.

is more vulnerable, in part because they are unarmed and untrained, but also because it contains the aged and children. The civilian population is easier to target as it is bigger, static or slower moving, and its whereabouts are more easily-known. Less skill or courage is required to kill civilians and so it can seem cruel, cowardly or unsoldierly. It may be thought unmanly, inhumane or impious. Finally it must be added that the nature of the rule makes it easily transformable into law. It is the principle of Just War theory that has most effectively been transformed into a rule of international humanitarian law because it has been uniquely clear in its concepts, operationalization and consequences.

The challenge to the civilian

As an expression of the desire for restraint in war, the call for protected status for the civilian relies on a conceptual and practical distinction between civilian and combatant. The protection of civilians was feasible when they could be distinguished at all times from combatants. To be lawful, the Geneva Conventions required combatants, *inter alia*, to wear uniforms or at least to carry arms openly and display a distinctive insignia. The distinction between combatant and civilian had a firm basis in reality in the age of formal armed forces. In the latter half of the twentieth century, the nature of armed conflict began to change with wars of decolonisation and national liberation (conflicts of a type that came to be called asymmetric war) which presented a challenge to the rule on civilians. The 1977 first Additional Protocol to the Geneva Conventions attempted to accommodate the change and shore up the concepts of combatant and civilian by accepting that irregular fighters can move from one category to the other within the course of a day. They may be targeted when they directly participate in hostilities.¹²

For political, cultural, and technological reasons, the category of the civilian is now under even greater stress and so too is the structure of power and ideas that gave rise to its prominence in law and custom. The status of the civilian is collapsing because of the changing nature of warfare, the practical and conceptual difficulties in differentiating civilian from combatant now, and the end of the world order that gave protected status to the civilian in law. The attacks of 9/11 and the ensuing 'War on Terror' have changed the politico-military context of armed conflict. They have changed war, the way that we think about war and the ethics of warfare in ways that threaten the status of the civilian and indeed the very concept of the civilian. The multi-sided conflicts in Iraq and Syria display a fearful asymmetry in contemporary war. These changes are not likely to be reversed and ethics must respond to the changed reality of armed conflict. These challenges can be grouped under three headings.

1. War/peace distinction

¹² Geoffrey Best, *War and Law since 1945* (Clarendon Press, 1994), 255.

There has been an expansion of the concept of war, a militarization of foreign policy and a weakening of the war/peace distinction that have damaged the rule against targeting civilians. A significant step in the blurring of the war/peace distinction came when the attacks of 9/11 were described not as a crime but as an act of war and the response to it was described as a war rather than as a criminal investigation seeking to culminate in apprehension and prosecution.¹³ To prosecute that war, the Bush Administration concentrated war powers in the presidency and sought to project American power globally with lessened regard for limitations of sovereignty or the restraints of international law.¹⁴ The result has been a militarization of foreign policy that turns state action against non-state actors into an unending low-level armed conflict that is novel in many regards. Mikhail Gorbachev talks starkly of the 'militarisation of politics'.¹⁵

Definitions of war and peace blurred as the War on Terror was waged on a global battlefield with no front lines, vague boundaries of conflict, no beginning or end to hostilities and a confusion of combatant and non-combatant. The War on Terror was novel in its lack of location in time or space.¹⁶ The USA claims that it has been in a continuous, global armed conflict with the Taliban, Al Qaeda, and associated forces since 9/11. Barack Obama became the first US President to serve two terms with his country at war throughout but he may not be the last. The expansion of the concept of war has seen a weakening of respect for state sovereignty. Since 2001, the United States has conducted 'targeted killing' operations outside the war zones of Afghanistan and Iraq, mainly in Pakistan, Yemen and Somalia even though there is no state of armed conflict between the United States and Pakistan, Yemen, or Somalia.

The civilians rule has also been challenged by the USA's adversaries in its War on Terror. Groups such as ISIS have pursued illegal goals, including population displacement, homogenization and genocide. Their targeting choices have breached the laws of armed conflict and they have directed attacks at civilians. In the wars of decolonisation and national liberation, there were pragmatic reasons for irregular combatants to show restraint in warfare. Adherence to international humanitarian law served political and propaganda purposes. In the latter half of the twentieth

¹³ Richard Falk 'Why Drones are more Dangerous than Nuclear Weapons' in Marjorie Cohn (ed), *Drones and Targeted Killing: Legal, Moral and Political Issues* (Olive Branch, 2015), 33.

¹⁴ Falk, 34.

¹⁵ Peter Walker, 'Mikhail Gorbachev says it looks like the world is preparing for war', *The Independent* (17 January 2017), <http://www.independent.co.uk/news/world/americas/mikhail-gorbachev-ussr-last-soviet-premier-russia-world-prepare-war-syria-donald-trump-middle-east-a7548646.html>.

¹⁶ S. Ackerman, 'Pentagon wants to declare more parts of world as temporary battlefields' *The Guardian* (13 March 2017), <https://www.theguardian.com/us-news/2017/mar/13/pentagon-military-commanders-temporary-battlefields-white-house>; Pardiss Kebriaei, 'Al-Aulaqi v. Obama: Targeted Killing Goes to Court' in Cohn (ed), 196.

¹⁶ David Kennedy, *Of War and Law* (Princeton University Press, 2006).

century both states and non-state groups would often claim compliance to international humanitarian law and ethical principles. That legal, state-like behaviour on the part of non-state groups could be part of the non-state group's propaganda, used to underpin their claim to status of a government or new state.¹⁷ In the twenty-first century, the contrary has been the case with breaches of international humanitarian law committed for political and propaganda reasons. Non-state groups such as ISIS have abandoned restraint in warfare and used their disregard for it to shock, terrorize and propagandize. Ethics have been weaponized as the breach of legal and ethical norms has become part of a group's strategy.

2. Combatancy

The second change brought about by the War on Terror concerns combatants. The attempt to protect civilians in war relies on the distinction between civilians and combatants and a very different attitude to the lives of each. If combatants become more difficult to identify then the concept and reality of the civilian is weakened. The distinction is also weakened if the lives of combatants come to be valued more highly and the lives of civilians more lowly. In the War on Terror, all of these changes have occurred.

In that war the USA has faced an adversary of unconventional combatants who do not wear uniform or insignia, who hide among the civilian population and who may locate combatant personnel and assets in civilian facilities including schools and hospitals. The unclear nature of these combatants (and the war-like nature of the campaign against non-state groups) are reflected in the novel situation of the detainees at Guantánamo where people engaged in or associated with combatancy have been indefinitely detained as prisoners of war in an unending conflict.

The state party to this armed conflict has also blurred the combatant/civilian distinction through a humanisation of the combatant that undercuts the status of the civilian, and through its use of drones, private security contractors and local militia groups. The civilians rule requires enemy civilian losses to be minimized even at cost of own combatants' lives. Combatants are treated as instruments whereas civilians are treated as people.¹⁸ As Michael Walzer writes, 'even if the target is very important and the number of innocent people threatened relatively small, [military planners] must risk soldiers before they kill civilians.'¹⁹ The rule is undermined by the humanisation of the combatant, encompassing an awareness of the personal harm done to them by the trauma of combat and an increased reluctance to risk the lives of one's own soldiers. In human terms, of course, the claim that the life of a civilian and the life of a combatant are of equal worth can hardly be criticized but, if

¹⁷ David Kennedy, *Of War and Law* (Princeton University Press, 2006).

¹⁸ McKeogh, *Innocent Civilians*.

¹⁹ Michael Walzer, *Just and Unjust Wars* (Basic, 2006), 157.

the combatant is no longer more likely to be sacrificed to the cause than the civilian, then the principle of civilian immunity has been negated.

Private military contractors and non-state militia blur the combatants/civilians distinction by being neither one nor the other. A soldier flies to Iraq as a soldier but a contractor flies as a civilian. Once there contractors remain outside the military chain of command. They can conceal themselves in the civilian population using clothes and vehicles indistinguishable from those of civilians. The use of contractors makes it more difficult to distinguish and protect civilians by making it more difficult to distinguish combatants.²⁰ The use of contractors will not decline as they serve political and propaganda ends of the state. They can be used by states to achieve the ends of war without deploying military forces. Troop numbers can be lowered and the appearance of low-level involvement can be maintained. The death toll can seem lower when the deaths of soldiers are tallied but not contractors. Local militia, which can be used by a state because they have local resources or knowledge that the regular armed forces lack, also blur the combatant/civilian distinction.

The most provocative symbol of the change in the nature of armed conflict, and the challenge to so many of its rules, is the weaponized drone. Drones or Unmanned Aerial Vehicles (UAV) have challenged so many rules of conduct in foreign policy and armed conflict, from the sovereignty of states to the status of civilians. They are operated by another novel combatant. In the USA agencies other than the armed forces have conducted lethal operations with weaponized drones. The USAF has carried out lethal drone operations but so too has the CIA. The Predators in the CIA programme were piloted by civilians, both intelligence officers and private contractors (sometimes military and intelligence retirees).²¹ These novel operators were not trained in or bound by the Uniform Code of Military Justice. They could live among the civilian population while participating in combat through their remote operation of weaponized drones. Indeed drone pilots could move effortlessly from civilian to military life throughout the course of a day yet drone operators were combatants and, as such, legitimate targets for fighters of the opposing side. US General Stanley McChrystal has acknowledged that drone pilots are 'legitimate targets' and may legitimately be targeted within their home countries.²² Their remoteness from the combat zone and their living in civil society makes targeting done operators difficult; importantly, it puts the civilians around them at grave risk in any attempt to target them.

²⁰ Erik Prince, *Civilian Warriors: The Inside Story of Blackwater and the Unsung Heroes of the War on Terror* (Penguin, 2013).

²¹ Jane Mayer, 'The Predator War' in Cohn (ed), 65.

²² Richard Norton-Taylor and Alice Ross, 'RAF base may be legitimate target for Isis, says ex-Nato commander,' *The Guardian* (November 25 2015), <http://www.theguardian.com/uknews/2015/nov/25/raf-base-may-be-legitimate-target-isis-ex-nato-commander>.

Finally, cyberwar and 'fifth-dimension operations' will cloud the delineation of combatancy even further. Who are the fighters in a cyberwar when keystrokes on a computer may trigger attacks against infrastructure, telecommunications and electricity networks with potentially fatal consequences? Against whom may force (including lethal force) be deployed in order to resist it? When can they be targeted? When does the attack take place? When they breach a firewall? When they plant malware? When they activate it?

3. Targeting

The third set of challenges to the civilians rule posed by the War on Terror concerns the targets. Who are the targets of violence in this militarized politics? Who are the targets of the unconventional fighters, special forces, drone operators, non-state militia and private military contractors? The War on Terror has seen a new approach to the delineation of targets. The precision of drones and special forces on the ground have allowed violence to be focused so that it is akin to assassination. The Obama Administration has drawn up 'kill lists' of people they believe represent threats to the USA. With no defined battlefield, these high-value targets have been killed wherever they were found. Assassinations have included US citizens. The Obama Administration has also used drones for 'signature strikes' in which the decision to attack is based on observed patterns of behaviour which are deemed to indicate militant activity rather than on knowledge of the individual's involvement in the armed conflict. At best these are not high-value targets but unknown low-level supporters killed because of location, direction of travel and/or mode of transport. At worst, the USA has been targeting, not combatants, but combat-aged males. Drone technology has prompted a broadened ascription of combatant status as they allow the targeting of people who are not engaged in hostilities at that time or posing an imminent threat and who are not in a country where the drone user is at war. With drones, assassination has become a means of war. This has led to criticisms that many drone killings are indistinguishable from extra-judicial executions which are prohibited by both international human rights law and the international law of war.²³

The impact of drones is immense with one legal expert commenting that 'drone warfare is, and is likely to become, more destructive of international law and world order than is nuclear warfare'.²⁴ However drone technology is cheaper than nuclear weaponry and many countries will obtain drone technology and develop 'kill lists' of persons they believe represent threats. The militarization of foreign policy will spread and many other states will conduct unending low-level armed conflicts.

²³ Falk.

²⁴ Falk, 45.

The civilians rule, which is undermined by an increased respect for the lives of one's own combatants, is also diminished by a decreased respect for the lives of civilian populations. Enemy civilians may be targeted as a more vulnerable or effective object of attack than enemy combatants. One's own civilians may be used as shields and sacrificed to save the lives of the more valuable combatants. The civilian population may be disrespected by combatants who believe that the population in general is aiding their enemy or is hostile to them. Attacks by fighters in civilian dress or unmarked vehicles puts the population at heightened risk from regular combatant forces. It can lead to a perception of the whole people as implicated in the armed conflict, as part of the problem, or as a resource used by the enemy.

After the Civilian

What can be done in the face of these challenges? Can the established concepts and rules be maintained in the new politico-military context? Can these changes be countered in order to maintain the combatant/civilian distinction? Can private military contractors and militia be abolished or regulated by a requirement to be readily identifiable as combatants (including through visual identifiers) and subject to military codes of justice and international rules of armed conflict and combatancy? Can drone operators be made into regular combatants? Transferring control of drones from CIA to USAF and Joint Special Operations Command has already occurred. Requiring drone pilots to live full-time in military facilities when actively fighting, and moving bases closer to the theatre of operations, would raise barriers to these soldiers slipping from military to civilian worlds and back in a single day.

In all, however, the conclusion must be that the blurring of the combatant/civilian distinction has too many facets and causes for it to be reversed. Furthermore the protected status of the civilian was a product of a post-1945 liberal world order that is now fragmenting in the face of relative decline and democratic disillusionment. The Universal Declaration of Human Rights of 1948 promised (among other things) the right to life, the right not to be tortured, and the right to seek asylum from persecution. The Geneva Conventions of 1949 sought to protect civilians in war, and to guarantee the right of medical staff in war zones to work freely. The 1951 Refugee Convention addressed the rights of individuals seeking asylum and the duties of countries to grant it.²⁵ The 1984 Convention against Torture prohibited torture absolutely.²⁶ Now many of the countries that took the lead in creating this liberal world order have turned against it, both in government policy and popular support. Seeking election to the US Presidency, Donald Trump, when asked about a

²⁵ The Convention Relating to the Status of Refugees, <http://www.unhcr.org/1951-refugee-convention.html>.

²⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

technique of torture for the purposes of interrogation called waterboarding, replied 'I'd do much worse... Don't tell me it doesn't work, torture works... believe me, it works.'²⁷ As President, he called for the targeting of militants' families.²⁸ The change of heart is reflected in government policy with some Western countries now more concerned to keep asylum seekers out rather than honour their obligations to offer refuge. The change in attitude is found in the populations too. A survey carried out in 2016 by the Red Cross showed less acceptance of the rules of war among the populations of the five countries with permanent seats on the UN Security Council.²⁹ Less than half of those surveyed thought it was wrong to attack densely populated areas, knowing that civilians would be killed. More than a quarter accepted that depriving civilians of food, water and medicine was an inevitable part of war. This changing attitude to civilians was part of a general shift in attitude to the rules of war with thirty-six per cent of respondents accepting the torture of captured enemy fighters in order to gain information.

Rather than try to undo the many changes that have challenged the immunity of civilians from targeting, we must look to the end of the civilian. When the rule against targeting civilians collapses, another component of international humanitarian law and codes of military conduct is greatly altered too. This is the rule of proportionality which seeks to regulate collateral harm to civilians. It is stated as follows:

Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.³⁰

Direct harm to civilians is prohibited by the civilians rule; indirect harm to civilians is limited by the proportionality rule. It seeks to limit indirect harm to civilians to a level in keeping with the expected military advantage from the attack. Only harm to civilians is limited; harm to combatants is not limited (the harm done to enemy combatants need not be proportionate to the likely military benefit as combatants are treated as instruments while civilians must never be treated as instruments). The proportionality rule does not permit the life of even one civilian to be directly taken in order to save the life of fighters, however many in number. The proportionality

²⁷ Imogen Foulkes, 'Are we heading towards a "post human rights world"?' <http://www.bbc.com/news/world-europe-38368848>.

²⁸ Missy Ryan, 'After reports of civilian deaths, U.S. military struggles to defend air operations in war against militants', *The Washington Post* (10 April 2017), https://www.washingtonpost.com/world/national-security/after-reports-of-civilian-deaths-us-military-struggles-to-defend-air-operations-in-war-against-militants/2017/04/10/838e950a-1893-11e7-855e-4824bbb5d748_story.html?hpid=hp_hp-top-table-main_pentagon835p%3Ahomepage%2Fstory&utm_term=.a4ed7d745e05.

²⁹ Foulkes.

³⁰ Rule 14. Proportionality in Attack, ICRC (3.1.17), available at http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14.

rule thus relies on the status of the civilian and collapses with it. The valuing of the life of a combatant as a human life (equivalent to, or more valuable than, the life of a civilian) destroys the requirement of proportionality as it currently stands. As well as change in the status of the civilian, we are also seeing change in the status of the combatant: no longer are they seen as an instrument. If it is no longer the case that combatants may only be treated as instruments and civilians may never be treated as instruments (if both are of human worth but both may be targeted to achieve political ends) then the nature of legal warfare is greatly changed.

The changing politico-military context

Conflicts in the near future are less likely to be regulated by a set of global rules for a number of reasons. First, the nature of conflict has changed. The ends may be subversion rather than domination, the creating of chaos rather than the taking of territory. The means may include military, technological, information, diplomatic, economic, cultural, criminal, and other tools that are deployed toward one set of strategic objectives. Existing rules strain to regulate such activities.

Second, authority at the global level is weaker. The international system no longer exerts the same pressure to conform. The world order is changing. In the USA (and the UK before that), the world had, not only a global power, but a global system-making power, a power that achieved its goals in part through the exercise of power (including force of arms) and in part through taking a leading role in the creation and enforcement of international rules-based systems. The USA will no longer be the global system-making power to the extent that it has been and decades will pass before any other power can assume that role. US power will decline culturally, economically, and militarily and US leadership will also decline. The result will be a shift in the balance of global governance from international rules-based systems to the unilateral exercise of power by states.

Third, not only does the international system exert less pressure to conform, but states and non-state groups are less susceptible to global pressures. National leaders are more willing to break from international conventions. Non-state groups that do not seek to become states are less susceptible to pressure to act like a state. ISIS does not seek to establish a sovereign state in order to join the international system of states as an equal.

For these reasons, rules will play a lesser role in future conflicts and power a greater one. Less will be done at the global level and more at the regional level to moderate war. We are in a time of change in the global order, as the post-1945 liberal international rules-based system declines and its successor is yet to emerge into view. At such a time, Henry Kissinger argues:

Restraints disappear, and the field is open to the most expansive claims and the most implacable actors. Chaos follows until a new system of order is established.³¹

In the post-unipolar world, there will no longer be one set of rules. There will be regional and national interpretations of acceptable ways to use political violence. Centralized enforcement is weakening (Burundi and South Africa wish to quit the International Criminal Court and other countries may follow³²). The treatment of the population will depend on the ethics of the fighters. Both state and non-state actors will increasingly bring their own conceptions of the justified use of violence for political ends. Some conflicts see the population treated very badly; some could see it treated well. The armed conflicts in Iraq and Syria have been catastrophic for the populations there as what was once held to be unethical as well as illegal became the norm: torture, deprivation, siege, and the targeting of medical and humanitarian staff and facilities have been used in these armed conflicts. In contrast, in a future war on the Korean peninsula, South Korea and the USA may seek to treat the population of North Korea well. Using their technological superiority, they may seek to minimise casualties, both civilian and military, and target only the command infrastructure and the political and military leadership of the North. In an armed conflict across the Taiwan Strait, China may have incentives to do the same. There remain pragmatic, political and ethical reasons for maximising restraint in warfare.

Conclusion: compassion in armed conflict

At this time of change in armed conflict, the rules to restrain violence must also change. All rules go out of date. Reality changes and they become inoperable or they no longer serve their end. This is the case with the rule against targeting civilians. New concepts of war and terror are needed in the post-civilian era. Legitimate political violence will remain violence used as a last resort and as a proportionate means to the achievement of political ends. Violence that is not motivated by the achievement of political ends, or that is disproportionate, or that is not a last resort, is terroristic. However it is the case that, if the determination of the rightness of violence is based only on an assessment of proportionality, then nothing is ruled out and even terror can be justified, as Grotius pointed out:

Sometimes, where very important advantages may attend striking a terror, by preventing the same crimes in future from being committed, it may be proper to exercise the right of rigour in its full extent. But an obstinate resistance, which can be considered as nothing but the faithful discharge of a trust, can

³¹ Henry Kissinger, *World Order: Reflections on the Character of Nations and the Course of History* (Penguin, 2014), 66.

³² Karen Allen, 'Is this the end for the International Criminal Court?', BBC News, 24 October 2016 . <http://www.bbc.com/news/world-africa-37750978>.

never come within the description of such delinquencies, as justify extreme rigour.³³

We need new methods to reduce the harm done by armed conflict, and to offer some protection to those people who are more vulnerable, defenceless, harmless, who bear little or no responsibility for the decision to use violence, or whose incapacitation or death would add little to their adversary's chance of victory.

It is possible to make moral decisions without rules; indeed in times of rapid change in means and context, we must make moral decisions without rules. The demise of a key rule of international humanitarian law must not mean an end to restraint in armed conflict. We can look to conscience and fundamental values to inform choices as regards the use of armed force. However it is always very difficult to assess the costs and benefits of resort to armed conflict or armed resistance. It is made more difficult by the fact that one is assessing, not a huge and complex set of costs and benefits, but *probable* costs and *possible* benefits. War is not a single event but a chain of events, a set of connected links intended to lead to a future outcome. In the wars of the twenty-first century, the chain may be longer and the links less clearly connected.

With no longer any black-and-white distinction between civilians and combatants, a fundamentally different idea of proportionality will operate in war. Calculations of proportionality will become even more complex when civilians can be sacrificed to save combatants. They will also be difficult to make in asymmetric and multi-lateral armed conflicts for two reasons. One is to do with the nature of the conflict itself and the second is to do with authority that makes the assessment. Such a proportionality rule would have to look at the likelihood that the aim of the war will be achieved. It must assess the chance of success (a no-hope war cannot be justified as it will do harm but achieve no good). However, as war is a long chain of events, hope or a refusal to acknowledge reality can cause a doomed conflict to continue. In asymmetric or non-state conflicts, that chain is longer and less connected and the chances of success are more difficult to assess and to assess impartially. There may be goals than victory, such as the desire to protest, to hurt, and to avenge. The alternative to violence is not peace but continued injustice, surrender, conquest or flight. Success is difficult to assess when there are no decisive battles and the chain of cause and effect leading to ends is much longer.

The second reason why proportionality assessments will be so difficult to make is to do with authority that makes the assessment. The assessment of proportionality and chance of success may be made by a non-state violent group which lacks the

³³ Grotius, Book 3, Chapter XI. The Right of Killing Enemies, in Just War, to be Tempered with Moderation and Humanity, paras. XV and XVI downloaded from <http://oll.libertyfund.org/titles/grotius-the-rights-of-war-and-peace-1901-ed>.

resources of a state and may be more under the control of a single leader with the lower levels of leadership having little standing. Independent and impartial assessment may be less welcome. A dispassionate assessment may be more difficult for a non-state group which has no reason to exist other than its cause.

We cannot know what rules will emerge in future to restrain war. New ideas about restraint in war will develop based on experience and new guidelines will be formulated. Many different arguments for moderation must be put forward. The new ideas may struggle to gain the status of rules of international humanitarian law in an era of rejection of universal norms and global governance and a vigorous assertion of national or religious distinctiveness. Nonetheless the cause of compassion in warfare must be promoted as well as the commitment to acknowledge the humanity of all in war, both the perpetrators of violence and its victims. Value must be the lives of adversaries. If no value is given to their lives, then war will be massacre. If value is given to their deaths, then war will be genocide. Each group may bring its own ethics to armed conflict but each must be challenged to account for its resort to violence and its targeting choices.

In the new political military context, very basic questions are raised starkly. What is the value of human life? Do we value that lives of our adversaries? How much do we value them? Answers to such fundamental questions have often come from religions. Faiths may also find common ground in questioning violence and promoting compassion. Judaism, Christianity, and Islam have much in common as creationist, moral and historic faiths. As creationist faiths they have a respect for this world as God's creation. As historic faiths, they care for what happens in this world. As moral faiths, they are concerned with how we act. The mainstream of Christianity and Islam agree that not all violence is good and not all violence is bad. Both distinguish between good and bad uses of violence and seek to restrain the bad. The concepts of jihad and Just War assert a duty to improve human society. Religions can accentuate the better parts of us (our compassion, solidarity, perseverance, hope and concern for justice) and work against our worse features (our ego, pride, hatred, envy, cruelty, stupidity and vanity). At this time of heightened risk of unrestrained warfare, there is a need for religions to work to increase human dignity and to decrease human suffering.

However, although religions will motivate the quest for restraint in war in the new politico-military context, as they have done in past eras, the arguments for moderation must be political. In some regions and conflicts, the appeal to religion may work but at other times and places, overt appeals to religion will be counterproductive. Faith may be the motivation for political action towards new rules of restraint in armed conflict but that contribution to the political debate is best expressed politically and not religiously. To be most effective, arguments for restraint in war, even when religiously motivated, must be politically expressed.

They must focus on the next step and not the big picture so that diverse alliances may argue effectively for new rules of practical compassion to restrain war in the post-civilian era.

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