

ADDRESS

THE PARADOX OF POWER: THE CHANGING NORMS OF THE MODERN BATTLEFIELD

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ABSTRACT

We live in a paradox of power: our capabilities of inflicting destruction through military means are unparalleled in human history; yet, for liberal democracies, contemporary military practices are the most restrained they have ever been, at least as far as effects of military operations on civilians go.

This Article describes the ways in which laws, norms, and technology have come together to produce the paradox of power. It begins with the observation that the international laws that govern resort to force by states (the *jus ad bellum*) have had only limited effect on states' initiation or continuation of war, including by liberal democracies. Yet, the international laws that govern the conduct of war (the *jus in bello*), in combination with prevailing norms and advanced technology, have had substantial effects on how liberal democracies fight their wars. The combination of ongoing, open-ended wars that are harder to fight while complying with contemporary norms of warfare produce a set of unique challenges for liberal democracies.

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This Article considers possible trends that might change the paradox of power, as well as the longer-term implications of the current state of affairs. Ultimately, this Article reiterates the importance of asking questions about *why* we go to war, restoring the *jus ad bellum* question, even if we have been able to make significant progress on the *jus in bello*.

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I. INTRODUCTION

Our present-day power of destruction is unparalleled in human history. Our weapons can reach farther into enemy territory more quickly and wreak more havoc than ever before. Not a single square inch of territory on the surface of the earth is untouchable. No defense offers an impermeable shield against attack. At least two of the nuclear powers—the United States and Russia—have the capacity to destroy the planet a thousand times over. And while that fact has been true for the past several decades, today, advanced liberal democracies—among many other actors, both state and nonstate—possess an array of weapons that allows them to strike more swiftly, more widely, and with greater devastation than was possible in the past when military campaigns entailed arduous naval or land journeys. Even if our militaries are not omnipotent in the sense of always being able to wipe out enemies at any place at any given time, they are all-powerful in terms of their ultimate destructive capabilities. If taking out enemies was the only thing we cared about, we could probably do it. In this sense, we are very close to being omnipotent.

With the modern capacity for devastation firmly in mind, it seems like a miracle that contemporary wars leave something other than annihilation in their wake. In fact, contemporary wars fought by liberal democracies, as destructive to lives and things as they are, are overall much less devastating, especially in terms of their immediate human toll, than past wars. The greater military

force that we possess now does not necessarily manifest itself into greater relative destruction. To the contrary.

We thus live in a paradox of power: our means and methods of war have become both more devastating (in potential) and less devastating (in practice). And this phenomenon is not merely a matter of mutual and reciprocal restraint among superpowers who can destroy each other but self-restraint by powerful, advanced militaries against far weaker enemies as well. Much greater care is taken by liberal democracies in contemporary armed conflicts to spare civilians from the effects of military hostilities than in any other time in recent history. Greater care, or at least, attention, is given to private property, the environment, and other protected objects. Devastation that is wrought upon nonmilitary targets is never celebrated but instead routinely explained and excused. Humanitarian assistance is extended to civilians on the enemy's side, both directly and indirectly, and the fate of those civilians is a constant and central factor in military planning, operations, and justifications.

In fact, the fate of populations in conflict zones is now part of what defines a successful military campaign. This is true for both the initiation of war and its justification under the international law of the *jus ad bellum* as well as for the prosecution of war under the legal regime of the *jus in bello*. Whatever our own self-defense interest is, and however else we define the goals of today's wars, we often claim to also have the best interests of the local population on the enemy's side in mind. At the very least, we claim that we are not at war with "them," only with a rogue leadership or militant group. Whether or not our campaign is considered successful and legitimate under a *jus ad bellum* review hinges, in part, on whether we can prove this rhetorical commitment in practice. On the *jus in bello* front, the same values that demand more other-regarding definitions of what a successful military campaign is designed to achieve also constrain how that campaign can be prosecuted. Any success in weakening enemy forces is offset, to some degree, once civilians suffer too.

The security of the individuals and societies affected by war has come to shape both the goals of the wars we fight and the means with which we fight them. As a consequence, military victory today is both much more challenging to define—in the sense of what it demands from us and what it invites us to do—and much more difficult to achieve.

The paradox of the modern liberal-democratic military power that is at once both omnipotent and restrained invites an explanation. For it is through an explanation, or through several possible explanations, that we can identify the relevant forces at

play—those that invite greater destruction and those that counsel greater restraint. Identifying these forces might allow us, in turn, to offer not only an interpretive analysis of what *is*—of how wars are fought today—but also some tentative predictions about the likely trends for the conduct of wars in the near future.

Political science accounts already offer a range of explanations for the changing character of war in recent decades. These accounts tend to focus on geostrategic and structural factors: Cold War politics and nuclear weapons, polarity of powers, states vs. nonstate actors, territorial and extraterritorial wars, etc. In this Article, I wish to complement these accounts by elaborating on an often-overlooked layer of the law: its interactions with social and cultural norms as well as technology. Adding this tripartite layer, I believe, will open up additional explanations for what is and for what might be.

I limit my inquiry here to the changing norms of conducting hostilities once an armed conflict exists. Elsewhere, I have discussed the evolution of the normative regime that governs the initiation of hostilities from the Just War Theory tradition to the United Nations Charter and contemporary practice.¹ Just War Theory sanctioned war for a wide array of reasons and goals. Empire expansion, religious conversion, debt collection, dynastic succession, dispute resolution, and even punishment were all tolerated under the ethical regime of past centuries. War, in this framework, was seen as a legitimate tool to serve these and other ends, at least under certain circumstances. The 1945 U.N. Charter,² in turn, promised a progressive move towards the abolition of unilateral wars (those not sanctioned by the Security Council) for all purposes but for clear cases of self-defense. Yet, for practical purposes, self-defense has turned out to be a sufficiently flexible and subjective framework to allow for and invite a wide range of wars for a wide range of goals. Moreover, as liberal values now demand that the goals of war be articulated not only in self-regarding terms but also in other-regarding terms—“it’s good for them, too”—an ever-widening range of goals complement whatever self-serving security interests might have motivated a given military campaign in the first place. To give one concrete example, the war in Afghanistan in 2001 was fought ostensibly to reduce or eliminate the threat emanating from the country at the

1. See generally Gabriella Blum, *Prizeless Wars, Invisible Victories: The Modern Goals of Armed Conflict*, 49 ARIZ. ST. L.J. 633 (2017).

2. The 1945 Charter built on the earlier prohibition of war as an instrument of national policy, which was laid down by the 1928 Kellogg-Briand Pact. See generally OONA HATHAWAY & SCOTT SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* x–xv, 331 (2017).

hands of Al Qaeda and associated forces of transnational terrorism. But “the metrics of success,” as promulgated by both the U.S. government and various think tanks, which were designed to set specific goals and to tell us whether the U.S.-led coalition was winning, included not only the fight against Al Qaeda and Taliban forces but also improved child literacy, greater agricultural production, and the development of a market economy. All those metrics were thought to augment our own self-interest in security and also to be good for “them”—the Afghan people. And because both the negative goal of eliminating terrorism-related threats and the positive goals of improving Afghan society and its economy lacked a clear, definable point of achievement, both invited the present phenomenon of never-ending war.

For all its aspirations, contemporary *jus ad bellum* has had only limited success, both conceptually and practically. While it is nearly impossible to provide the counterfactual account of what our political and military experience would have looked like in the absence of the U.N. Charter, it is nonetheless evident that international law and international institutions have not been able to significantly constrain the initiation of wars, not even those fought by liberal democracies. In many ways, present-day liberal democracies have as much room to initiate hostilities as nations did in the days of Just War Theory, even if the stated justifications for doing so have changed.

But what about the role played by international law when it comes to the *ways* in which we fight our wars? Here, I shall claim that the story of law and norms is a happier one. Indeed, if one examines present day warfare against past practices, one finds that it looks dramatically different; and this difference, I claim, can be at least correlated with the ways in which law, norms, and technology have progressed.

As I am interested in the role that law, and particularly international law, has played in shaping state behavior, I limit my argument to wars fought by liberal democracies. As a matter of self-identity, liberal democracies are committed to the rule of law (including international law) and to liberal values of individual rights and justice. These are the principles that play an important part in my narrative about the evolution of warfare. These principles become further entrenched through public opinion and political and legal institutions that check wartime conduct—all of which are more likely to operate effectively within liberal democracies. This is not to suggest, of course, that liberal democracies always live up to their ideals, only that they set certain expectations that are often anchored in law and norms and which are therefore interesting to study if one is interested in the

ability of law to shape behavior.

Some notable political scientists have already pointed to the role of law and norms in affecting how liberal democracies fight. Azar Gat, for instance, argues that liberal conceptions of national defense favor pacifism and appeasement that render liberal democracies more vulnerable to enemies who are determined to pursue their cause free from such ideological constraints.³ “[S]elf-imposed restrictions on violence against civilian population,” argues Gat, have “rendered their often-successful military operations futile.”⁴

Gat never defines what “successful military operations” look like. And while for Gat law and norms are a constraining force, in my own narrative, they are constitutive of force, part of what defines a successful military operation, on both the *ad bellum* and *in bello* levels.

My study is not an empirical one. I do not count bodies or compare the order of battle. The examples, numbers, and anecdotes I offer here can be countered by others. My aim is to paint a picture, describe a general spirit, that I hope resonates with the reader and that allows us both to account for existing phenomena and possibly imagine future possibilities for the employment of military power by liberal democracies.

I begin my argument, in Part II, with a narrative of the evolution of the *jus in bello*; proceed in Part III with a discussion of the developments in modern technologies of warfare; and in Part IV, turn to the influence of social and political norms. The discrete discussion of the forces at play—law, technology, and norms—is, of course, artificial. These are not wholly distinct phenomena, nor is it possible to draw a unidirectional causal link from one to another. Law and norms do not exist or evolve in a vacuum. They shape and are shaped by the geostrategic, economic, technological, social, and cultural world in which they operate. Consider, for example, the *jus in bello* rules of distinction and proportionality that demand fighting forces aim their fire only at legitimate military targets and minimize any harm they might inadvertently inflict on civilians and civilian objects.⁵ Was it the rules that drove

3. AZAR GAT, WAR AND STRATEGY IN THE MODERN WORLD: FROM BLITZKRIEG TO UNCONVENTIONAL TERRORISM 95 (2018) [hereinafter GAT, WAR AND STRATEGY]; see also AZAR GAT, VICTORIOUS AND VULNERABLE: WHY DEMOCRACY WON IN THE 20TH CENTURY AND HOW IT IS STILL IMPERILED 77, 114–16 (2010) [hereinafter GAT, VICTORIOUS AND VULNERABLE].

4. GAT, WAR AND STRATEGY, *supra* note 3, at 99.

5. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), arts. 51, 52, 57,

advanced militaries to develop more precise weapons that could better discriminate between military and civilian targets? Or was it the availability of such weapons to advanced militaries that invited a stricter application of the proportionality test? Was it the legal rule of proportionality that generated an expectation of minimal civilian casualties in the course of attacks, or did liberal norms of individual rights drive the law to begin with?⁶

The point is that law, technology, and norms interact with and affect one another. And my claim, in broad brushstrokes, will be that international law and norms have very much affected how states fight, if not when they fight. And my claim, in broad brushstrokes, contends that even if the *jus ad bellum* as it currently stands cannot pose meaningful constraints on the initiation of conflict, the *jus in bello*, as it has been applied, shaped, and developed in recent decades, in conjunction with norms and technology, is increasingly influential in regulating and limiting the destructiveness of war. In other words, international law and norms have very much affected how *and when* states fight. For this reason, whatever liberal democracies define as their goals of war or their metrics of success, they are far more restricted in employing military power to achieve them. In Part IV, I examine the possible implications of this conclusion for future warfare.

II. THE JUS IN BELLO

In his 2000 centennial article in the American Journal of International Law, Professor and Judge Theodor Meron celebrated *The Humanization of Humanitarian Law*. Meron described a process through which the growth of international human rights law, the creation of international processes of state accountability, and other legal and political developments have transformed the law of war.⁷ If, as he stipulated, laws regulating armed conflict were once “paradigmatically interstate” and largely “driven by reciprocity,” the past century and a half has witnessed an important evolution in which humanitarian concerns have moved from the margins of states’ interest toward the center of international attention.⁸ Citing legal trends such as increased

opened for signature Dec. 12, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter AP I].

6. See Amanda Alexander, *A Short History of International Humanitarian Law*, 26 EUR. J. INT’L L. 109, 126–30 (2015); Boyd van Dijk, *Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions*, 112 AM. J. INT’L L. 553, 575–79 (2018).

7. Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 245 (2000).

8. *Id.* at 243–44.

limitations on reprisals, from the 1929 Geneva Convention's protections for POW's to the "complete prohibition of reprisals in Additional Protocol I" in 1977, as well as the broader influence of international human rights jurisprudence on international humanitarian law, Meron argued that we have witnessed "tremendous progress in the humanization of the law of war."⁹

Meron was undoubtedly correct in his description, and the trend he was describing at the beginning of the 21st century has continued with full force since he wrote. If the laws of war traditionally intended to mediate between the necessities of war and humanitarian concerns for those affected by them, the former was a repeat winner for most of history. In the words of Amanda Alexander, "[t]he majority of rules that referred to military necessity or contained 'as far as possible clauses' did not function to safeguard the minimum standard of civilization. Rather, they existed to cover up the inability or unwillingness to achieve this objective."¹⁰ It is important to recall that Meron's term of reference—international humanitarian law—is itself a relatively recent phenomenon. Prior to the 1970s, even the International Committee of the Red Cross (ICRC) did not recognize a general body of humanitarian constraints on the conduct of wars and instead distinguished between "Geneva law," a body of law espoused by the Geneva Conventions of the 19th and 20th centuries that centered on the humanitarian importance of protecting victims of war, and "Hague law," espoused by the 1899 and 1907 Hague Conventions that governed the means and methods of warfare. As Geneva law expanded over several iterations, the Hague law remained stagnant, standing in constant peril of encroaching on the sovereign prerogative to maximize military necessity interests. Though the term "international humanitarian law" (IHL) is now understood to encompass both the Hague and Geneva traditions, such an enlarged conception of humanitarian law marked a significant departure from traditional understandings of the laws of war.¹¹

The rise of IHL as the predominant frame of reference for the regulation of armed conflict marked far more than a semantic shift. It was an expression of a broader evolution from earlier notions of constraints set as a matter of honor or chivalry, as well as religious teachings or natural law—each of which were limited in their scope of application and in their obligatory force—to laws

9. *Id.* at 249, 275.

10. Alexander, *supra* note 6, at 115 (quoting 2 GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 11 (1968)).

11. *Id.* at 122–23.

that are binding, unconditioned by reciprocity, and not limited to a single class, religion, or race. The fact that IHL emphasized the humanitarian goals of the *jus in bello* also signified the move, at least in aspiration, from the sovereign or state as the bearer of rights to a more cosmopolitan vision of the laws of war, one more concerned with the rights and welfare of individuals.¹² This is how humanitarian value came to replace war in explaining what the *jus* was about. That the U.S. military still prefers the terms “Laws of War,” or “LOAC—Laws of Armed Conflict” may be an important exception, but the fact that it is an exception is no less important.

Embodying much of these humanitarian developments was the adoption in 1977 of the two Additional Protocols to the Geneva Conventions. The first Protocol (AP I) dealt mostly with international armed conflicts, though its obligations explicitly extend to certain types of intrastate conflicts that were particularly salient in the era of decolonization, including “conflicts in which peoples” wage war against colonial domination, racist regimes, and foreign occupations.¹³ AP I codified and introduced numerous restrictions on warfare, with its most important contribution pertaining to the principles of distinction and proportionality.¹⁴ Existing treaty law prior to AP I enumerated certain restrictions on attacking undefended towns, villages, dwellings, and buildings;¹⁵ prohibited attacks on civilians who are in the hands of an enemy power or in territory occupied by it;¹⁶ and ordered respect for certain types of civilian objects (e.g., hospitals, places of worship, etc.).¹⁷ AP I sought to make the protection of civilians and civilian objects a general rule, unlimited by geography, strategic location or importance, or classification

12. See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 70–73 (4th ed. 2005) (describing the shifting rhetoric of justice regarding humanitarian intervention).

13. AP I, *supra* note 5, art. 1. Additional Protocol II (AP II) addressed non-international armed conflicts, but it was greatly limited in practice because it applied only under strict terms to cases in which a government was fighting a nonstate armed group that controlled territory. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

14. AP I, *supra* note 5. AP I also greatly expanded the protection that should be accorded to irregular forces—an expansion that was rejected by some states and that was the primary reason for the United States’ ongoing refusal to ratify the treaty. Michael A. Newton, *Exceptional Engagement: Protocol I and a World United Against Terrorism*, 45 *TEX. INT’L L.J.* 323, 329–30, 346 (2009).

15. Annex to the Convention on the Laws and Customs of War on Land (Hague, IV) art. 25, Oct. 18, 1907, 539 U.S.T. 631 [hereinafter Hague IV].

16. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

17. *Id.* arts. 14, 16–18, 20, 23; Hague IV, *supra* note 15, art. 27.

within the categories of “civilian[s]” or “civilian objects.” The new codified rules on distinction required armed forces to direct their fire only at combatants and military targets and never at civilians or civilian targets, regardless of where those civilians or objects were or why they were being targeted.¹⁸ They also prohibited indiscriminate attacks in which such a distinction is impossible to maintain. They granted special protections to the environment and to objects indispensable to the civilian population. And they further enhanced existing protections for hospitals, cultural objects, and places of worship.

The principle of proportionality, as stipulated by AP I, prohibited “[a]n 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.”¹⁹ A corollary obligation was the duty to employ precautions in conducting attacks in order to minimize any incidental harm to civilians and civilian objects.²⁰ More broadly, the Protocol required that, in conducting military operations, parties must take constant care to spare the civilian population, individual civilians, and civilian objects. Civilians—rather than soldiers—have thus taken center stage in the laws that govern the conduct of hostilities.

No less dramatic than the rules on distinction and proportionality was the Protocol’s proscription of the practice of *reprisals*—the quid pro quo violation of the laws of war in response to a prior violation by the enemy.²¹ Throughout history, reprisals were thought to be an effective and legitimate mechanism of enforcement, providing both the incentive and the sanction for violations of the laws of war. As IHL has evolved—from the 1949 Geneva Conventions to the Protocol—it has sought to limit reprisals and make compliance with legal restrictions an absolute duty, regardless of whether one’s enemy violates the laws of war. One reason to abolish reprisals was to prevent nations from using “reprisal” as an excuse to engage in proscribed conduct. But another reason was much more individual-rights oriented: the rationale that the protections and immunities granted by IHL belonged to the individual who possesses them not to the state to

18. AP I, *supra* note 5, art. 48 (establishing the basic rule of “distinguish[ing] between the civilian population and combatants and between civilian objects and military objectives”); *id.* art. 52 (requiring that the destruction of an object serve a military objective, but the object must be defined as a military object in any case).

19. *Id.* art. 51(5)(b).

20. *Id.* art. 57.

21. *Id.* art. 20.

trade or bargain.²²

Had it existed at the time, there is no question that AP I's rules on targeting and its ban on reprisals would have prohibited the German blitz on London during 1940–1941 that left tens of thousands of civilians dead, as well as the British-American bombing of Dresden in February 1944, which killed thousands of civilians in just forty-eight hours. The Protocol would certainly have also forbidden the American firebombing of Tokyo on the nights of March 9–10, 1945, which killed over 80,000 people, mostly civilians, in addition to the hundreds of thousands of other civilians who perished in the extensive fire bombings of other cities throughout Japan. The massive and widespread attacks on civilians by all warring parties throughout World War II was, unsurprisingly, a motivating experience for the codification of the norms of distinction and protection in AP I.²³

But how much more could the new codified law do to constrain warfare? This question was and still is up for debate. Even after adoption, Article 48—which established the general principle of distinction—was viewed with some skepticism. The delegate from India, for instance, cautioned that:

[T]his article will apply within the capability and practical possibility of each party to the conflict. As the capability of the parties to distinguish will depend upon the means and methods available to each party generally or at a particular moment, this article does not require a party to do something which is not within its means or its capability.²⁴

More broadly, some delegates, with reference to Article 51's, elaboration on the principles of distinction and proportionality, warned that “this provision should not be such as to inhibit the capacity for defence of a State which has to counter aggression.”²⁵

Wariness of the Protocol's enhanced restrictions was also evident from the rate of ratification: when adopted, AP I was signed by close to fifty countries, including the United States. But formal ratification—the process by which a state announces its intention to be fully bound by the terms of the treaty—was slow.

22. See Ruti G. Teitel, *Humanity's Law: Rule of Law for the New Global Politics*, 35 CORNELL INT'L L.J. 355, 362–63 (2002); van Dijk, *supra* note 6, at 578–79.

23. See INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶¶ 1826–30 (Yves Sandoz, et al. eds., Martinus Nijhoff 1987).

24. *Id.* ¶ 1871 (quoting 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS GENEVA (1974-1977), at 188, CDDH/SR.41 (1978)).

25. *Id.* ¶ 1949.

The United States has never ratified it, and international lawyers have regularly expressed skepticism regarding the Protocol's expansion of civilian protections.²⁶ A 1987 U.S. State Department report on AP I stated:

The Joint Chiefs of Staff have conducted a detailed review of the Protocol and have concluded that it is militarily unacceptable for many reasons. Among these are that the Protocol grants guerrillas a legal status that often is superior to that accorded to regular forces. It also unreasonably restricts attacks against certain objects that traditionally have been considered legitimate military targets. It fails to improve substantially the compliance and verification mechanisms of the 1949 Geneva Conventions and eliminates an important sanction against violations of those Conventions. Weighing all aspects of the Protocol, the Joint Chiefs of Staff found it to be too ambiguous and complicated to use as a practical guide for military operations and recommended against ratification by the United States.²⁷

Indeed, this skepticism, especially prevalent among American international lawyers, persisted even as they defended the wartime conduct of the U.S.-led coalition against Iraq in the first Gulf War in 1991.²⁸

In the following years, however, as the world's attention shifted from traditional interstate wars to disastrous ethnic conflicts in Yugoslavia and Rwanda, questions of international law became increasingly relevant, particularly as the international community weighed its military options. Following the conclusion of both conflicts, and the intervention in Bosnia and failure to intervene in Rwanda, the U.N. Security Council (UNSC) took an unprecedented step. Invoking its powers under Chapter VII of the U.N. Charter, the UNSC ordered the establishment of two international criminal tribunals to adjudicate the crimes committed in both of these theaters. The operation of the International Criminal Tribunal for Yugoslavia (ICTY) and the

26. Alexander, *supra* note 6, at 127.

27. Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977, S. TREATY DOC. No. 100-2, at ix (1987).

28. Alexander, *supra* note 6, at 128–30. For a review of criticism of the ICRC's reference to AP I in its call to parties in the Gulf War to abide by the laws of war, see also Adam Roberts, *The Laws of War in the 1990–91 Gulf Conflict*, 18 INT'L SECURITY 134, 147–49 (1994) (“This and other ICRC statements could be criticized, especially for their emphasis on provisions of 1977 Geneva Protocol I, not technically in force in the conflict.”). Roberts then goes on to suggest that reference to other sources of law that did apply as a matter of treaty law or that were uncontestedly customary would have been more compelling. *Id.* at 148.

International Criminal Tribunal for Rwanda (ICTR) turned the plight of victims of war from an abstract concern to a high-stakes inquiry with tangible consequences for those subject to prosecution and punishment. The regulation of warfare had evolved into something more than a set of rules applying to states fighting other states, while providing states with significant degrees of freedom of operation. The humanitarian mission of international humanitarian law moved front and center, pushing back against military necessity as the primary interest of the laws of war.

By the end of the decade, just as Meron was publishing his article, AP I was becoming the centerpiece of the newly minted term “International Humanitarian Law.” Many of AP I’s provisions became widely endorsed as expressing customary law and thus binding on all nations, regardless of formal ratification of the treaty itself. Most of the Protocol’s stricter protections for civilians, once hotly debated and at least partially dismissed, now came to be viewed by lawyers as mandatory.²⁹ International lawyers began insisting on increased compliance in application of the principles of distinction and proportionality. For many international lawyers, relying on the words of AP I, even the NATO bombing of Kosovo, a seventy-eight-day campaign of aerial bombardment that left 500 civilians dead—a small fraction of the casualty ratio of previous wars—was a disproportionate, possibly criminal, use of military force.³⁰ Whether or not these lawyers were correct in their legal assertion, the fact that so many voiced it is itself significant. In this spirit, the prosecutor of the ICTY examined the possible criminal implications of ten specific NATO attacks, each of which left more than ten Serbian civilians dead (though ultimately finding no criminal liability).³¹

The greater insistence on stricter compliance with the principles of distinction and proportionality became the hallmark of IHL in the twenty-first century. And scrutinized militaries—even those who have not accepted the full text of AP I as binding upon them—routinely challenge asserted facts but only rarely contest asserted legal standards.

29. While there are still some debates over the customary status of certain provisions of the Protocol, these debates, as far as they pertain to the protection of civilians and civilian objects, are less material in my mind than the broad consensus over most of the Protocol’s provisions.

30. International Criminal Tribunal for the Former Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, ¶ 2, ICTY Doc. PR/P.I.S./510-E (June 13, 2000), <http://www.icty.org/x/file/Press/nato061300.pdf> [<https://perma.cc/Z2TZ-GRUZ>].

31. *Id.*, at ¶¶ 53, 90.

Consider the following instances of both internal and external review of wartime conduct. Each entails heartbreaking, infuriating, disgusting facts of war. Today, none of the reviews or criticisms seem surprising or puzzling; we have become accustomed to knowing more about the horrors of war in real or near-real time, and we have become accustomed to the domestic and transnational uproar that follows them. And yet, these modes of critical review of particular incidents were far from routine just a few decades ago.

In 2009, a U.N. fact-finding mission on the Gaza Conflict (known as the “Goldstone Commission”) issued its report on the Israeli military operation in Gaza during the previous summer.³² The three-week-long operation, conducted in densely-populated areas, left around 1,200 Palestinians dead, roughly half of whom were civilians.³³ One of many operations scrutinized by the Goldstone Commission was an Israeli attack on and around the al-Wafa hospital, which included the use of white phosphorous shells.³⁴ The attacks caused heavy damage to the building. Two staff nurses were also killed by Israeli sniper fire inside the hospital. Though the Israeli Defense Forces issued multiple warnings to the hospital, the Commission found these warnings ineffective.³⁵ The Commission concluded that “[e]ven if there was some degree of armed resistance in the area (which the Mission cannot confirm), commanders in deploying such weaponry must take into account all the facts and circumstances.”³⁶ The Commission then found that Israel violated both the rules granting immunity to hospitals and the rules on proportionality in

32. U.N. Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict, ¶¶ 1–2, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009) [hereinafter Gaza Report]. The Report was met with mixed reactions, ranging from wholesale endorsement to flat out rejection, and some of its broader conclusions were later retracted by its lead author, Richard Goldstone. Richard Goldstone, Opinion, *Reconsidering the Goldstone Report on Israel and War Crimes*, WASH. POST (Apr. 1, 2011), https://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html?noredirect=on&utm_term=.ccf177a18b7a [https://perma.cc/68XB-KCST].

33. See Gaza Report, *supra* note 32, ¶¶ 350–61. Numbers and identities of casualties are highly contested.

34. White phosphorus shells are not illegal per se under international law. Thomas Gibbons-Neff, *U.S.-led Forces Appear to Be Using White Phosphorus in Populated Areas in Iraq and Syria*, WASH. POST (June 9, 2017), https://www.washingtonpost.com/news/check-point/wp/2017/06/09/u-s-led-forces-appear-to-be-using-white-phosphorous-in-populated-areas-in-iraq-and-syria/?utm_term=.31445a422436 [https://perma.cc/5WFY-QVVP] (explaining that international humanitarian law stipulates that countries must take even more care when using white phosphorous).

35. Gaza Report, *supra* note 32, ¶¶ 628–36, 642, 649.

36. *Id.* ¶ 648.

attacks.³⁷ A detailed rebuttal of the Goldstone report by the Israeli Ministry of Foreign Affairs did not address the specific assertions of the Commission regarding the al-Wafa attack, but stated that the IDF adhered to the rules of IHL throughout the war.”³⁸

An American attack in the Laghman Province in Afghanistan that left seven women and girls dead set the stage for a scathing 2014 Amnesty International report on the lack of accountability for civilian casualties resulting from international military operations in the country.³⁹ Other attacks described in the report, gut-wrenching in their description of the suffering endured by civilians, inflicted both higher and lower numbers of civilian casualties. The authors of the report reiterate the international legal rules on distinction and proportionality to support their criticisms of coalition warfare. A response from the U.S.-led forces in Kabul stated that Coalition forces remain “committed to protecting the Afghan people” and that there has been a 77% reduction in civilian casualties resulting from Coalition operations in comparison to the previous year.⁴⁰ Challenging facts—not legal standards—the statement further claimed that the international force “thoroughly investigates all credible reports” of such casualties when possible.⁴¹

In November 2015, Canadian Air Forces bombed ISIS targets in Mosul, Iraq. Media reports alleged that the strikes inflicted civilian casualties. In early 2016, a Canadian Armed Forces spokesperson stated, “The CAF extensively reviews all completed airstrikes as part of standard operating procedure and the review of this airstrike did not reveal any information to suggest that civilians had been harmed or killed.”⁴²

37. *Id.* ¶¶ 624–25, 629, 652.

38. The Israeli response only included general claims about the legality of the use of phosphorous shells under international law. *See* STATE OF ISR., THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS 145–51 (2009), https://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/GazaOperation%20w%20Links.pdf [<https://perma.cc/YH2E-A7JY>]; *see also* STATE OF ISR., GAZA OPERATION INVESTIGATIONS: AN UPDATE 32–33 (2010), https://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/GazaOperationInvestigationsUpdate.pdf [<https://perma.cc/2R2A-HBH7>].

39. Amnesty Int’l, *Left in the Dark: Failures of Accountability for Civilian Casualties Caused by International Military Operations in Afghanistan*, 7–9, AI Index ASA 11/006/2014 (2014).

40. Pamela Constable, *Amnesty International Accuses U.S., NATO of Human Rights Abuses in Afghanistan*, WASH. POST (Aug. 11, 2014), https://www.washingtonpost.com/world/asia_pacific/amnesty-international-accuses-us-nato-of-human-rights-abuses-in-afghanistan/2014/08/11/e9a2aa02-214c-11e4-8593-da634b334390_story.html?utm_term=.abe5c971a2ee [<https://perma.cc/YD7J-FUZJ>].

41. *Id.*

42. Tim Naumetz, *No Evidence CF-18 Strikes Killed Civilians, Says Canadian*

In 2018, the New Zealand government announced that it would launch a governmental inquiry commission into allegations, first raised in a book by investigative journalists,⁴³ that Canadian Special Aerial Service killed five civilians, including a three-year-old girl, and injured fifteen others, in a 2010 raid on three villages in Afghanistan.⁴⁴ The authors further claimed that the military subsequently covered up the attack and its consequences. The New Zealand Attorney General stated that “the inquiry would seek to establish the facts in connection with the allegations, examine the treatment by [New Zealand Defence Force] of reports of civilian casualties following the operation, and assess the conduct of the NZDF forces, including compliance with the applicable rules of engagement and international humanitarian law”⁴⁵

There is, of course, power in the cumulative narrative of discrete events, in which civilians suffer. And the demands by the U.N. Goldstone Commission, Amnesty International, or investigative journalists that militaries must investigate alleged violations of the laws of war is completely warranted. What is striking about some of the discrete incidents described in these reports is that they would probably not have been considered violations of the rules on distinction and proportionality, as stipulated by AP I at the time of its adoption.⁴⁶ Additional actors, both governmental and nongovernmental, domestic and international, are now voicing their criticisms with reference to the rules, raising the bar for compliance and demanding accountability. And states, for the most part, do not argue with the legal assertions behind allegations of violations of the laws of war (i.e., how the rules apply to discrete incidents) as much as they do with their factual accuracy and the circumstances that might excuse them.

The increased demandingness of IHL, in both formal

Armed Forces, HILL TIMES (Jan. 25, 2016), <https://www.hilltimes.com/2016/01/25/no-evidence-cf-18-strikes-killed-civilians-says-canadian-armed-forces/49118> [<https://perma.cc/H3LR-ZVVT>] (suggesting that reports claimed up to five civilians dead from the strike).

43. NICKY HAGER & JON STEPHENSON, *HIT & RUN: THE NEW ZEALAND SAS IN AFGHANISTAN AND THE MEANING OF HONOUR* 99–108 (2017).

44. David Fisher, *Secrecy Debate over Hit & Run Inquiry into NZSAS Raid in Afghanistan*, NZ HERALD (Nov. 21, 2018, 5:00 AM), https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12163332 [<https://perma.cc/XZ5Y-DU5E>]; David Parker, *Approval for Inquiry into Operation Burnham*, BEEHIVE.GOV.T.NZ (Apr. 11, 2018), <https://www.beehive.govt.nz/release/approval-inquiry-operation-burnham> [<https://perma.cc/8KU8-J3RL>].

45. Parker, *supra* note 44.

46. I bracket here, without further knowledge, the possibility of any of these incidents involving a deliberate attack on civilians.

promulgation and interpretation, has been the logical, indeed obvious, outcome of the infusion of IHL with principles drawn from two closely related bodies of law—international human rights law (IHRL) and international criminal law (ICL).

The evolution of human rights norms in the post-World War II era, described by some as a true “revolution,” or in legal historian Samuel Moyn’s words, “the last utopia,”⁴⁷ was not initially thought to regulate war, and certainly not how states were to treat enemy citizens in enemy territory. Rather, IHRL developed as a reaction to traditional notions of sovereignty, which left the domestic affairs of any state immune from external criticism or outside intervention. IHRL’s focus was on how governments treated their own citizens, and it was mostly thought to govern in peacetime, not times of armed conflict.

Beginning in the late 1960s, however, instruments of IHRL have specifically addressed times of conflict. Over the last few decades, there has been a growing trend towards viewing IHL and IHRL as converging, synchronic, and complementary bodies of law.⁴⁸ The consequence of this convergence is more straightforward in territorial non-international armed conflicts in which a government is fighting its own citizens to whom it owes the protections of both IHL and IHRL. Yet, in some versions of the convergence view, the protections of IHRL extend even to transnational conflicts in which a government exercises power—even if not complete control—over foreign territory and foreign nationals.⁴⁹ In this paradigm, it is the exercise of power over an individual, rather than that individual’s nationality, that generates a state’s responsibility. Individual humanity thus replaces national affiliation as the basis for claims and rights, even in times of war.

The growing influence of the convergence view is clearly exemplified by the increased willingness of international, regional, and domestic courts, as well as certain U.N. Treaty Bodies, to address and review wartime conduct through the lens of international human rights law. The fact that, today, there exist more tribunals competent to consider IHRL claims than IHL claims contributes to this trend. Those tribunals’ jurisprudence, in

47. SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 9 (2010).

48. See Noam Lubell, *Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate*, 40 *ISR. L. REV.* 648, 650 (2007); Naz K. Modirzadeh, *The Dark Sides of Convergence: A Pro-civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict*, 86 *INT’L L. STUD.* 349, 358 (2010).

49. See Modirzadeh, *supra* note 48, at 363.

turn, shapes how the governments subject to their jurisdiction can use the powers given to them under IHL. Several regional human rights courts have each dealt with questions of IHL to varying degrees. With their mandates firmly established within the world of human rights law, these courts were presented with—and have shown themselves ready to address—claims arising out of armed conflicts.⁵⁰

Prominent among these tribunals has been the European Court of Human Rights (ECtHR), entrusted with overseeing compliance by member states with the European Convention on Human Rights (ECHR). The ECHR does not provide for the direct application of IHL, and the Court has generally refrained from adjudicating cases on the basis of the laws of war. Still, the ECtHR has consistently adjudicated claims arising out of armed hostilities—in Northern Cyprus, Chechnya, Afghanistan, and Iraq—through the framework of human rights arguments.⁵¹ The resulting jurisprudence has affected not only the development and elucidation of IHRL but indirectly, also IHL.

The ECtHR's case law on Chechnya is particularly instructive. A series of petitions required the Court to examine the Russian military's decade-long campaign in Chechnya during the Second Chechen War (1999–2009). Allegations against Russian soldiers involved a wide range of serious human rights abuses, including extrajudicial killings, torture, enforced disappearances, and indiscriminate use of deadly force. As of 2011, the ECtHR has handed down an estimated 120 decisions, finding violations of the ECHR in all but three.⁵² Many of these decisions pertained to clear situations of hostilities that would have otherwise triggered the application of IHL, yet the Court insisted on evaluating these cases “against a normal legal background.” Thus in *Isayeva v. Russia*, a case involving the “aerial bombardment of a village followed by the bombardment of escaping civilians,” the Court held that the Russian Government had violated two provisions of the ECHR, emphasizing the right to life and the right to an effective remedy.⁵³ In the process, it employed a more restrictive test of

50. See Françoise J. Hampson, *Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law*, 87 INT'L L. STUD. 187, 189 (2011).

51. Andrea Gioia, *The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict*, in 19 INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 201, 205, 209 (Orna Ben-Naftali ed., 2011).

52. Julia Lapitskaya, Note, *ECHR, Russia, and Chechnya: Two Is Not Company and Three Is Definitely a Crowd*, 43 N.Y.U. J. INT'L L. & POL. 479, 522 (2011).

53. *Isayeva v. Russia*, App. No. 57950/00, 41 Eur. H.R. Rep. 838, 843–44 (2005); Gioia,

proportionality, finding that the Russian authorities did not sufficiently protect the right to life of those civilians it killed or injured in the course of its clashes with the militants.⁵⁴

More recently, the ECtHR was willing to consider IHL-based claims where the parties themselves had raised them. In several cases pertaining to the United Kingdom's military conduct in Iraq and Afghanistan, the Court was faced with the question of the relationship between IHRL, which would have placed more significant constraints on the ability of British forces to detain enemy combatants, and IHL, which is more permissive.⁵⁵ The Court rejected the British claim that these cases must be governed by IHL alone and instead ruled that both legal regimes continue to apply concomitantly.⁵⁶ Importantly, the Court held the U.K. bound by the terms of the European Convention in an armed conflict with foreign enemies outside of British (or European territory), opening the door to a stream of litigation over British belligerent activities in both U.K. domestic courts and the European Court itself.⁵⁷ This suggested rejection of IHL itself as an empowering source for detention marks a departure from decades of accepted interpretation and practice of IHL. And any legislation introduced by state parties to the ECHR to authorize such detention would itself, presumably, be subject to review by European Court under the terms of that convention.

The bottom line for the convergence of IHL and IHRL, as promoted by both international and regional tribunals, is that wartime regulation and conduct is now scrutinized with a significantly greater emphasis on universal commitments to individual human rights and dignity. Of course, not all liberal democracies are subject to the jurisdiction of these tribunals (notably, the United States is not a party to any agreement establishing a regional court and is only limitedly subject to the

supra note 51, at 227.

54. *Isayeva*, 41 Eur. H.R. Rep. at 832–33, 838; Gioia, *supra* note 51, at 227.

55. *Hassan v. United Kingdom*, App. No. 19750/09, Eur. Ct. H.R. 19–20, 41, 50, 52–54 (2014), <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22%3A%22hassan%20v.%20united%20kingdom%22%2C%22documentcollectionid%22%3A%22GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22itemid%22%3A%22001-146501%22%7D> [https://perma.cc/UH36-YA8A]; see also Cedric de Koker, Note, *Hassan v. United Kingdom: The Interaction of Human Rights Law and International Humanitarian Law with Regard to the Deprivation of Liberty in Armed Conflicts*, 31 *UTRECHT J. INT'L & EUR. L.* 90, 91 (2015) (Neth.).

56. Koker, *supra* note 55, at 92–93.

57. *Id.* More specifically, the Court suggested that for purposes of the prolonged detention of enemy combatants, a state would not be able to rely on any inherent powers of detention presumably granted by IHL, and would instead need some domestic authorization (e.g., a legislative act of parliament). *Id.* at 92.

International Court of Justice; it has also explicitly rejected the convergence view), and this jurisprudence could always be dismissed as more aspirational than real—dramatic but ultimately toothless remonstrances. Russia, for instance, paid the compensation sums it was ordered to pay by the Court in its rulings in the Chechnya cases but fell short of full compliance with the spirit of the ruling,⁵⁸ and the United Kingdom has failed to comply with other rulings (on matters not touching on wartime conduct) by the ECtHR.⁵⁹

Still, regional tribunals are expected to continue to review wartime conduct and expand this body of decisional law. And this transnational jurisprudence often informs the work of domestic courts, both within a particular region and outside of it, in their review of wartime conduct by their own armed forces. In turn, judicial identification of the legal limits on the conduct of warfare invites activists to push for greater application of IHRL through both the courts and public advocacy.⁶⁰ Scholars, likewise, often rely on the resulting case law in their commentary and explication of relevant IHL.⁶¹ Ultimately, there is likely to be an effect on public perception and expectations, at least among elites, about how legitimate warfare is shaped accordingly.

New technology also provides new opportunities for stakeholders to try and shape the laws and norms of warfare. In October 2018, the Human Rights Committee—the monitoring body entrusted with overseeing compliance with the International Covenant on Civil and Political Rights—published its General Comment on the relationship between autonomous weapons systems and the right to life under the Covenant.⁶² In it, the

58. Lapitskaya, *supra* note 52, at 527 (noting that Russia waited until days before the deadline to pay and refused to reopen the cases at issue).

59. See Vaughne Miller, *European Court of Human Rights Rulings: Are There Options for Governments?*, House of Commons Library, Standard Note, SN/IA/5941, at 10, 14–16 (Apr. 18, 2011), researchbriefings.files.parliament.uk/documents/SN05941/SN05941.pdf [https://perma.cc/5JM3-EQQG]; see also ALICE DONALD ET AL., EQUAL. & HUMAN RIGHTS COMM'N, THE UK AND THE EUROPEAN COURT OF HUMAN RIGHTS 83, 145, 148 (2012), https://www.equalityhumanrights.com/sites/default/files/83_european_court_of_human_rights.pdf [https://perma.cc/WFP5-CY94].

60. See Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 115, 131–32 (2010).

61. See, e.g., Dominic McGoldrick, *Human Rights and Humanitarian Law in the UK Courts*, 40 ISR. L. REV. 527 (2007) (examining the ways in which U.K. courts have interpreted the joint applicability of IHL and IHRL in cases stemming from detention carried out by U.K. forces in the Iraq War); see also Koker, *supra* note 55, at 90–94 (analyzing the ECtHR's analysis of the concurrent application of IHL and IHRL regarding detention by the U.K. in Iraq).

62. Human Rights Comm., General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, ¶ 65, U.N. Doc.

Committee states, “For example, the development of autonomous weapon systems lacking in human compassion and judgement raises difficult legal and ethical questions concerning the right to life, including questions relating to legal responsibility for their use.”⁶³ For the Committee, compassion thus became an element of possible legal assessment, even though, for better or worse, it is not a recognized legal standard under either IHL or IHRL.

The project of IHRL-infused IHL is thus hard to dismiss as mere aspirational rhetoric. It has induced a paradigm shift in how the *jus in bello* is understood and applied. This aspect of the law of war has been detached from nationality and geography. Instead, it is a law that focuses on protecting civilians, and to a lesser degree also combatants, regardless of their citizenship or current location.⁶⁴ In the “convergence” paradigm, the fact that someone is an “enemy” is less important than the fact that someone is a someone. Enemy civilians, even if less empowered than a state’s own citizens to make legal demands of rights and protections, have standing to make far more substantial demands than ever before. Enemy combatants are subject to various forms of force (including deliberate lethal force), but these must be limited in means and scope and are subject to scrutiny by bodies entrusted with protecting and vindicating human rights. The result is a regulatory regime that is significantly more rights-protective than traditional notions of the law of war because it is predicated on skepticism as to the traditional understanding of war as an inter-collective struggle in which affiliation determines rights.

If the “convergence” between IHRL and IHL marks one significant aspect of the humanization of IHL, the project of ICL constitutes another. The revival of the ICL project—at first, measured and constricted, and then, bold and expansive—has played a significant role in increasing accountability for perpetrators of the world’s worst crimes. In the process, it has also shaped the content and application of IHL. Often in tandem with IHRL, ICL has shifted attention from the abstract, self-serving

CCPR/C/GC/36 (Oct. 30, 2018), https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf [<https://perma.cc/5G6N-ESKL>].

63. *Id.*

64. See Shlomo Avineri et al., *Israel: Civilians & Combatants: An Exchange*, N.Y. REV. BOOKS (Aug. 13, 2009), <https://www.nybooks.com/articles/2009/08/13/israel-civilians-combatants-an-exchange> [<https://perma.cc/F2DM-SCEA>]; Asa Kasher et al., *Israel & the Rules of War: An Exchange*, N.Y. REV. BOOKS (June 11, 2009), <https://www.nybooks.com/articles/2009/06/11/israel-the-rules-of-war-an-exchange> [<https://perma.cc/K433-T2GU>]; Avishai Margalit & Michael Walzer, *Israel: Civilians and Combatants*, N.Y. REV. BOOKS (May 14, 2009), <https://www.nybooks.com/articles/2009/08/13/israel-civilians-combatants-an-exchange> [<https://perma.cc/FT89-8KY5>].

concept of “military necessity” onto the plight of victims and the atrocities committed in its name. This shift has also changed the stakes for the violators and potential violators of IHL in creating new mechanisms for accountability and punishment.

The Rome Statute on the International Criminal Court (ICC) now has 123 parties, giving the ICC prosecutor the power to pursue cases involving nationals of these countries or perpetrators of crimes in their territory.⁶⁵ Alongside genocide, crimes against humanity, and aggression (which states must opt into specifically), the Rome Statute includes a long list of war crimes—in both IACs and NIACs—for which individuals can be held accountable. Though the ICC defers to national tribunals, under the principle of complementarity, it will adjudicate claims where the national jurisdiction is unable or unwilling to serve justice.

The success of the ICC in promoting accountability is difficult to gauge empirically. The number of prosecutions of war crimes remains embarrassingly small and is largely confined to those committed on the African continent. Yet, the success of the ICC project cannot and should not be measured solely by counting up investigations, indictments, or verdicts. The shadow of the ICC, as well as of universal jurisdiction more broadly, has raised the stakes for military (mis)conduct, even for those liberal democracies whose officials are still highly unlikely to face charges in foreign jurisdictions or at the ICC. It is exactly the kind of shadow that the ICC’s first prosecutor was hoping for when he proclaimed that the ICC would be most successful if it never had to try any case (suggesting national courts would do all the necessary work).⁶⁶ Though national prosecutions are also still few and far between, greater effort has been made to institute procedures for the investigation of war crimes and to ensure compliance with IHL domestically. Israel, for instance, established a dedicated Inquiry Commission to study and make recommendations precisely on this question. Partly for show, perhaps, to be able to argue that domestic institutions were both willing and able to deal with such allegations themselves, dedicated mechanisms and procedures nonetheless have a life of their own. And the threat of foreign adjudication has been used by

65. See *The States Parties to the Rome Statute*, INT’L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx [<https://perma.cc/YL7G-WPFB>] (last visited Mar. 18, 2019) [hereinafter *Parties to Rome Statute*]; U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Rome Statute of the International Criminal Court*, art. 12, U.N. Doc. A/CONF.183/9 (July 17, 1998).

66. Luis Moreno Ocampo, Prosecutor, Int’l Crim. Ct., Statement at the Assembly of States Parties to the Rome Statute of the International Criminal Court (Apr. 22, 2003).

both Israeli judges and government lawyers to justify their own deeper review of wartime conduct by the Israeli military.

The evolution of IHL has also contributed to the incorporation of lawyers into the defense establishments of liberal democracies who are specifically entrusted with assessing compliance with IHL. Even if one remains skeptical about the degree to which law can constrain force, it is indisputable that law plays an increasing role in military planning and operations. Just as professional soldiering requires specialized knowledge, experience, and expertise, military lawyering necessitates mastering the burgeoning body of IHL and the capacity to consider its consequences for tactical military operations.

That IHL should require lawyers to oversee its application is not surprising. Indeed, the role of lawyers in the armed forces was both envisioned and welcomed by IHL treaties themselves.⁶⁷ Even prior to these treaties, military lawyers were part of the armed forces. The first Judge Advocate General (JAG) in the United States was appointed by George Washington in 1775, and the laws of war undoubtedly played some part in all of the U.S. wars (most famously, through the Lieber Code during the Civil War). Still, the pervasiveness of lawyers in the armed forces today would be completely unfamiliar to earlier JAGs. Lawyers today are deeply involved and have an effective veto over almost any military operation, ranging from covert action, surveillance, lethal operations, taking of property, occupation, and detention. In all, the Department of Defense (DoD) had at one time over 10,000 attorneys, not including reservists.⁶⁸

And this is far from a uniquely American phenomenon. Across western militaries, the number of lawyers and the scope of their involvement have increased significantly in recent years, albeit on a smaller scale than in the United States.⁶⁹ Military lawyers are also building informal transnational professional networks. They meet in conferences, exchange views, and influence each other's positions on various matters. Just as battlefields have become more global and interconnected, so has the legal advice that

67. See, e.g., AP I, *supra* note 5, art. 82 (“The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.”).

68. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 91 (2009).

69. Charles J. Dunlap, Jr., *It Ain't No TV Show: JAGs and Modern Military Operations*, 4 CHI. J. INT'L L. 479, 486–87 (2003).

monitors them.

Alongside the growth of IHL lawyers, there has also been a growth in the tactical intelligence effort that informs their legal analysis, including through advanced technologies of surveillance, collection, and analysis.⁷⁰ If in the past, tactical intelligence was focused primarily on enemy forces (numbers, capabilities, locations), today's intelligence officers are also entrusted with collecting data on civilians and civilian property that might be affected by a military operation. The Collateral Damage Estimate (CDE) is a methodology employed by the United States military⁷¹ and other advanced militaries⁷² to gauge the impact of any military strike on its environment. It is based on algorithmic calculations that utilize data from munitions characteristics, experiments, tactical battlefield intelligence, and computer modeling. The estimates of impact generated by the CDE are then considered by the commanding level through the lens of the Non-combatant Casualty Cut-Off Value (NCV), which demands escalating the levels of authorization for any planned operation that is expected to cause harm to civilian, civilian objects, and the natural environment. As the estimated harm to civilians rises, the planned operation must be pre-approved by higher ranking officers. If the expected harm is substantial, targets must be referred to the U.S. Secretary of Defense or the President, subject to the Sensitive Target Approval and Review Process.⁷³

The CDE and the NCV exemplify, in many ways, the new rules of the modern battlefield and the ongoing debates around them. Though some human rights and humanitarian advocates were part of the process of designing these tools originally, welcoming the military's effort to translate its substantive obligations into effective procedures that would promote compliance, others have derided them as "callous," "cold calculating," "tolera[nt] [of] killing," and "unlawful." The critique

70. Vincent Stewart et al., *New Analytic Techniques for Tactical Military Intelligence*, in *ANALYZING INTELLIGENCE: NATIONAL SECURITY PRACTITIONERS' PERSPECTIVES* 249–264 (James B. Bruce & Roger Z. George eds., 2d ed. 2014) (articulating new analytic techniques in tactical military intelligence).

71. See CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTRUCTION CJCSI 3160.01, NO-STRIKE AND THE COLLATERAL DAMAGE ESTIMATION METHODOLOGY (2009), https://www.aclu.org/sites/default/files/field_document/drone_dod_3160_01.pdf [https://perma.cc/8QZQ-B9Z4].

72. See Scott Graham, *The Non-Combatant Casualty Cut-off Value: Assessment of a Novel Targeting Technique in Operation Inherent Resolve*, 18 INT'L. CRIM. L. REV. 655, 678–79, 684–85 (2018) (describing application of the CDE by coalition forces, including Canada, in Operation Inherent Resolve).

73. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-60, JOINT TARGETING, at I-8 (2013), https://www.justsecurity.org/wp-content/uploads/2015/06/Joint_Chiefs-Joint_Targeting_20130131.pdf [https://perma.cc/8W3E-P88Y].

is not always clear on whether the methodology employed by the CDE and NCV itself is unlawful under international law or whether it is employed in a way that ultimately reframes the reality of the growing loss of innocent lives from tragic to mundane.

The uneasy truth about the laws of war is that they do in fact accept the reality of civilian casualties in military operations. Nonetheless, the CDE and NCV are historically unprecedented tools designed to promote compliance with the law. Of course, having a methodology in place does not guarantee compliance: we cannot be sure that the data that is fed into the algorithms is accurate or that the people making decisions on the basis of its output are weighing civilian losses appropriately. Some observers, for instance, have argued that the civilian casualty rates in current U.S. wars are far higher than what is generally understood or accounted for.⁷⁴ If this is the case, the proportionality methodologies are not an example of how law shapes military conduct but of how military conduct works around the law's demands.

But whether exercising a real normative pull or operating as an exogenous constraint—like bad weather conditions—law is now undoubtedly shaping the way the militaries of liberal democracies are conducting themselves more than ever before.

III. WEAPONS AND THE TECHNOLOGY OF WAR

Technology has had a great effect on the conduct of war throughout history and on how wars are fought today. When the available means of warfare demanded hand-to-hand combat, soldiers engaged each other on a contained battlefield, and those with superior numbers, discipline, tactics, physical capacity—or perhaps just better luck—prevailed. The advanced militaries of today still emphasize the importance of soldiers' physical abilities, and combat soldiers undergo intensive training to prepare them for anything from hand-to-hand combat to carrying heavy loads over great distances. Yet, individual soldiers' capacities to fight are not what militaries invest in most.⁷⁵ Rather, standing militaries today are in pursuit of and in competition over advanced

74. See Azmat Khan & Anand Gopal, *The Uncounted*, N.Y. TIMES MAG. (Nov. 16, 2017), <https://www.nytimes.com/interactive/2017/11/16/magazine/uncounted-civilian-casualties-iraq-airstrikes.html> [<https://perma.cc/28KK-UJXM>].

75. See OFFICE OF THE UNDER SEC'Y OF DEF. (COMPTROLLER), REF. NO. A-65677F4, DEFENSE BUDGET OVERVIEW: UNITED STATES DEPARTMENT OF DEFENSE FISCAL YEAR 2019 BUDGET REQUEST 8-1 (2018), https://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2019/FY2019_Budget_Request_Overview_Book.pdf [<https://perma.cc/ZDW5-2VWD>].

weapons technologies. These technologies, they believe, are much more likely to determine the outcome of large military confrontations than the size, discipline, or dexterity of the troops they command. A closer look at the technology of the modern battlefield reveals, once again, how power is shaped by law and norms and how, in turn, technology shapes the interpretation and application of law and norms.

Weapons technology has primarily evolved along two dimensions: destructiveness and distance. Weapons with greater power of destruction can bring an enemy to its knees (or at least the bargaining table) more quickly. Weapons that operate across greater distances, with a higher effective range, allow the attacker to target more enemy forces and objects, at a lower risk of counterattack. If one maintains a qualitative edge on both these dimensions over one's enemy, one stands a greater chance of prevailing.

Pretty much every leap forward in warfare technology has been met with vocal criticism of its ethics and consequences. Homer criticized the use of plague arrows falling on invading armies as “weapons that did not display skill, marksmanship or bravery.”⁷⁶ The Fourth Lateran Council banned the longbow, not so much for religious objections but for the fact that it could be used by commoners and was powerful enough to penetrate the body armor of noble knights. Other weapons were thought to be immoral for the great destruction they can bring about. The introduction of dynamite onto the battlefield was met with criticism in Sweden, even as Alfred Nobel, the inventor of dynamite, was hopeful it would be an effective peacemaker through deterrence. Submarines were derided as unchivalrous and cowardly, allowing attackers to sneak up on their unsuspecting targets. Concerns about the indiscriminate nature of weapons and the potential harm they could inflict on civilians were especially strong around the advent of aerial warfare. Those who opposed nuclear weapons imagined not just harm and destruction to civilians or superfluous injury to combatants, but the possible annihilation of the human race.

Throughout the centuries, customary and conventional prohibitions on certain types of weapons were recognized. And international treaties have banned, as a general principle of humanity, weapons that cause “superfluous injury or unnecessary suffering,” requiring militaries to engage in a legal review process to vet any new technology for potential violation of this principle.⁷⁷

76. ALEXANDER GILLESPIE, 3 A HISTORY OF THE LAWS OF WAR 87 (2011).

77. AP I, *supra* note 5, art. 35.

Yet, for all the heroic efforts at arms control, the reality is that most weapons are neither subject to specific negotiated prohibitions nor stopped by the humanity principle. Few of the ethical concerns that surrounded emerging military technologies throughout history have found expression in legal proscriptions. As a matter of international law, parties in armed conflicts are at present almost unlimited in their choice of means of war, even if they are limited in the ways they may employ them and in the targets they may aim at.

And, of course, much destruction can be wrought without relying on weapons that are either powerful or distant. This is evident not only from past wars and destruction, but from much of contemporary violence: from the genocide in Rwanda where hundreds of thousands were slaughtered by machetes, to the televised beheadings, burnings, or drownings of captured opponents by members of ISIS. Still, weapons that can kill vast numbers or bring down substantial structures with minimal effort and reduced risk to the forces that use them is a goal that humanity has been pursuing for millennia.

More recently, however, the attributes of destruction and distance have been complemented by a third attribute—discrimination. Present-day liberal democracies consider the accuracy of munitions a value not only in terms of utility of force—directing maximum firepower at the desired target—but also for humanitarian purposes—eliminating or minimizing collateral harm. The wellbeing of those who are not directly responsible for or not directly participating in the conflict is now a factor in the development and choice of weapons, as much as the expected formation of enemy forces or the terrain on which they operate.

The GBU-43/B Massive Ordnance Air Blast—also known as “the Mother of All Bombs” (MOAB)—is a 21,600 lbs. (approximately 9,800 kg), GPS-guided bomb and the most powerful conventional ordnance in the U.S. military’s arsenal.⁷⁸ It was first dropped in combat by the United States in Nangarhar Province, Afghanistan, in April of 2017, with the goal of destroying underground tunnels used by ISIS-Khorasan fighters. Afghan officials later reported that ninety-four enemy militants were

78. Helene Cooper & Mujib Mashal, *U.S. Drops ‘Mother of All Bombs’ on ISIS Caves in Afghanistan*, N.Y. TIMES (Apr. 13, 2017), <https://www.nytimes.com/2017/04/13/world/asia/moab-mother-of-all-bombs-afghanistan.html> [<https://perma.cc/S42Z-RLUD>]; see also Barbara Starr & Ryan Browne, *First on CNN: US Drops Largest Non-Nuclear Bomb in Afghanistan*, CNN (Apr. 14, 2017, 7:10 AM), <https://www.cnn.com/2017/04/13/politics/afghanistan-isis-moab-bomb/index.html>.

killed in the strike.⁷⁹

The MOAB attack was widely covered in the news, the military released its own videos and reports, and correspondents were invited to tour the struck area to appreciate the ferocity of the weapon. Both military and nonmilitary coverage emphasized the awesome power of the bomb. All of that went hand in hand with the goals of great destructive power with minimal risk to the attacking forces.

Yet, no less than admiring the might of the MOAB, reports also emphasized that no civilians were harmed. It was the fact that civilians were entirely spared that made it a perfect strike: destructive to enemy forces, with no casualties or harm to our own forces, and with no casualties or harm to Afghan civilians. Given that the weapon itself was so powerful, the sparing of civilians stood as a testament to the U.S. military's resolve to follow the principles of distinction and proportionality to the fullest extent.

It is this kind of a "perfect strike" that human rights and humanitarian advocates have come to expect and demand. Consider, for instance, ongoing debates over the reliance on drones in targeted killing operations. The objections to targeted killings, of course, go well beyond the use of drones. Targeted killings implicate a host of fundamental questions about the geographical and conceptual scope of war, the lines between law enforcement and wartime operations, the process through which targeting decisions should be made, the allocation of power between the military and intelligence agencies, and civil-military relationship more broadly. Like all military operations carried out in civilian-inhabited areas, targeted killings also implicate questions of distinction and proportionality, of weighing lives and risks.

All of these concerns would have been valid even if targeted killings were conducted by F-16 airplanes, tomahawk guided missiles, or sniper fire. And still, the drone has become a metonymy for all that is problematic about targeted killings: an unmanned platform that effectively eliminates risk from those who employ it and shifts it entirely onto its target.

But it is not only the intended target that is at risk. Of particular concern to critics is the infliction of civilian harm by drone strikes. And, with no risk to our own forces, and with surveillance technology that provides real-time tactical intelligence, what then is the justification for maiming innocent civilians who are not the intended target?

79. Ehsan Popalzai & Laura Smith-Spark, *'Mother of All Bombs' Killed 94 ISIS Fighters, Afghan Officials Say*, CNN (Apr. 15, 2017, 5:23 AM), <https://www.cnn.com/2017/04/15/asia/afghanistan-isis-moab-strike/index.html> [<https://perma.cc/24XM-ECYK>].

Critics are undoubtedly correct that a great number of civilians have been killed and injured in the course of targeted killing operations; their numbers are hotly contested, but even the low estimates are in the many hundreds.⁸⁰ This fact may well suggest that targeted killings are being used too frequently, against too many people in too many places, and in a manner that calls into question the policy of targeted killings. Indeed, it is completely plausible that the lower costs of drone operations (in comparison, for instance, with manned aircraft attacks), coupled with the reduced risk to national forces, foments their excessive use.

But neither of these concerns touches upon the discriminatory nature of the drone itself: all weapons can be used indiscriminately; not all weapons can be used discriminately, and drones are in fact one of the most potentially discriminating weapons in modern arsenals. Collateral harm in targeted killings, in other words, is not the result of the weapon itself but in the decision-making of those who deploy it. In February 2010, a drone crew killed twenty-three innocent men, women, and children on the mistaken belief that a high-value individual was being transported in the group's vans. The team commanding the drone failed to account for the children in the vehicles, as well as the lack of weapons. The error was human: as a Special Forces sergeant reviewing the tragic strike commented, "Whoever was viewing the video real-time, maybe they needed a little more tactical experience."⁸¹

In response to criticism for indiscriminate use of drones, in 2013, President Obama issued Presidential Policy Guidelines (PPG) on the use of drones for targeted killings outside areas of active hostilities.⁸² Obama's PPG was intended, in part, to assuage growing concerns about the increased reliance on drone strikes under his own presidency and, in particular, after the strike on a U.S. citizen—Anwar al-Awlaki—in Yemen. The PPG included two commitments that went far beyond what IHL required:

80. Spencer Ackerman, *41 Men Targeted but 1,147 People Killed: US Drone Strikes*, GUARDIAN (Nov. 24, 2014, 11:55 PM), <https://www.theguardian.com/us-news/2014/nov/24/sp-us-drone-strikes-kill-1147> [<https://perma.cc/QD33-UVEP>].

81. ANDREW COCKBURN, *KILL CHAIN: THE RISE OF THE HIGH-TECH ASSASSINS* 16 (2015).

82. U.S. DEP'T OF JUSTICE, *PROCEDURES FOR APPROVING DIRECT ACTION AGAINST TERRORIST TARGETS LOCATED OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES* (2013), <https://fas.org/irp/offdocs/ppd/ppg-procedures.pdf> [<https://perma.cc/X99Y-6RLD>]. A redacted version of this PPG was obtained by the ACLU and made public in 2016. See Jameel Jaffer, *A Less-Secret Drone Campaign*, AM. CIV. LIBERTIES UNION (June 29, 2016, 10:20 AM), <https://www.aclu.org/blog/national-security/targeted-killing/less-secret-drone-campaign> [<https://perma.cc/EU7F-CMXW>].

Absent extraordinary circumstances, direct action against an identified high-value terrorist (HVT) will be taken only when there is near certainty that the individual being targeted is in fact the lawful target and located at the place where the action will occur. Also absent extraordinary circumstances, direct action will be taken only if there is near certainty that the action can be taken without injuring or killing non-combatants.

The laws of war, as they stand, demand that in case of doubt whether an individual is a combatant or civilian, he must be presumed to be a civilian. Though “doubt” is nowhere officially defined, “near certainty” undoubtedly goes beyond what is required to establish that the individual is a combatant and a lawful target. Proportionality, to recall, tolerates the infliction of civilian harm as long as that harm is not excessive in relation to the military advantage that is sought. “Near certainty” of zero civilian casualties is not required by law.

In July 2016, as criticisms of civilian casualties and demands for greater transparency of the targeted killing program grew, the White House issued a “Fact Sheet” entitled “Executive Order on the U.S. Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in the U.S. Operations”⁸³ The Fact Sheet also included the release of data on civilian casualties in strikes in areas outside the zone of active hostilities,⁸⁴ followed by another release of data a year later.

The practices and the casualties’ numbers are hotly debated by NGOs and advocates critical of the targeted killing policy and practices. My point here is not to adjudicate the debate but only show that military policy, de facto, has been informed by both technology and norms, by what they enable, and by what they demand. And in the process, this ratcheted up baseline expectations and obligations to the extent the laws of war had set the baseline. The principle of discrimination and the ability to comply with the rules on distinction and proportionality will undoubtedly inform the development and deployment of future technologies of war by liberal democracies. The next generation of military technology will likely be AI-infused, with a push for greater distancing and greater autonomy of machines, and with less direct forms of human involvement in the military operation.⁸⁵ Already, the debate over AI-based weapons, perhaps most

83. Executive Order 13,732, 81 Fed. Reg. 44,483, 44,485 (July 7, 2016).

84. *Id.*

85. See John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1290 (2018) (defining artificial intelligence).

prominently couched in the calls to ban “killer robots” or “fully autonomous weapons,” centers around several questions, including the delegation of life-and-death decisions to machines and the possibility of holding persons accountable for violations of IHL perpetrated in the first instance by autonomous weapons systems.⁸⁶ For its part, in 2012, the U.S. Department of Defense issued a directive on the incorporation of autonomous weapons systems into the military, ordering that

It is DoD policy that:

. . .

[p]ersons who authorize the use of, direct the use of, or operate autonomous and semiautonomous weapon systems must do so with appropriate care and in accordance with the law of war, applicable treaties, weapon system safety rules, and applicable rules of engagement (ROE).⁸⁷

The ability of these systems to enable commanders to comply with the principles of distinction and proportionality will be the ultimate test of the legitimacy and wisdom of the reliance on such systems in the future.

Cyber warfare, another technological frontier of war, raises a host of novel questions, ranging from what counts as military “force” or “armed attack,” through attribution of attacks and responsibility, to compliance with the laws of war.⁸⁸ Cyber weapons, now in the hands of myriad governments, nonstate actors, and even individuals, epitomize the traditional benefits of traditional weapons for those who deploy them. Their potential for destruction is immense, and they are unlimited by distance. But cyber weapons are thus far indiscriminate in the harm that they cause, which makes their utilization less attractive for liberal democracies. The United States, for instance, has more cyberattack capabilities than any other nation in the world.⁸⁹ But it has also been hesitant to use them.⁹⁰ There are many reasons

86. PAUL SCHARRE, *ARMY OF NONE: AUTONOMOUS WEAPONS AND THE FUTURE OF WAR* 271–96 (2018) (discussing the morality of autonomous weapons). See generally Michael C. Horowitz, *The Ethics & Morality of Robotic Warfare: Assessing the Debate over Autonomous Weapons*, 145 *DAEDALUS* 25 (2016).

87. U.S. DEP’T OF DEF., DIRECTIVE NO. 3000.09, AUTONOMY IN WEAPON SYSTEMS § 4(b) (Nov. 21, 2012) (incorporating changes from May 8, 2017).

88. NATO COOP. CYBER DEF. CTR. OF EXCELLENCE, *TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE* 4, 7 (Michael N. Schmitt ed., 2013).

89. Jack Goldsmith & Stuart Russell, *Strengths Become Vulnerabilities: How a Digital World Disadvantages the United States in Its International Relations* 2–3 (Hoover Inst., Aegis Series Paper No. 1806, 2018), <https://www.hoover.org/sites/default/files/research/docs/381100534-strengths-become-vulnerabilities.pdf> [<https://perma.cc/2PJL-DSLRL>].

90. *Id.* at 8. I distinguish here cyber offensive operations from myriad other cyber-

for this reluctance, including consideration of other states' sovereignty, domestic legal constraints, and more.⁹¹ But at least one reason, as Jack Goldsmith and Stuart Russell have recently pointed out, is precisely the concern that these weapons will not be discriminating enough and will inflict undue collateral harm.⁹² Though potentially more omnipotent than any other nation in theory, the United States is nonetheless highly constrained in using cyberattacks offensively as a matter of practice.

Both AI-based platforms and cyber weapons are thus examples of the paradox of power and of the interplay between law, norms, and technology. Western liberal democracies have the resources to lead the development of these weapons and make them ever more destructive from greater distances. Yet, in practice, these countries are highly constrained in what and how much they can do in practice, given legal, ethical and political commitments. In this sense, law and ethics may be playing a greater role in the shaping of military technology than in any previous time in human history.

IV. SOCIAL AND CULTURAL NORMS

In 1939, sociologist Norbert Elias coined the term “the civilizing process” to denote, among other things, Europeans' changing perceptions of violence. On Elias's account, the modern state, the growth of trade and urbanization, and the greater integration of individuals through social and commercial webs, have contributed to a decline in violence through both domestic pacification and greater self-restraint.⁹³ More recently, philosopher Charles Taylor famously claimed that the modern world is far more preoccupied with minimizing pain and suffering than the ancient world ever was.⁹⁴ Our “universal benevolence,” to use his term, is an ethical commitment to the welfare of others, beyond only ourselves, our families, and our neighbors, which is a marked difference from the ethical parochialism that has historically tended to be predominant.⁹⁵ And psychologist Steven

based operations, including spying or data manipulation, which the United States engages in frequently.

91. *Id.* at 14–15.

92. *Id.*

93. *See generally* NORBERT ELIAS, *THE CIVILIZING PROCESS* (1939). *See also* Talal Asad, *Reflections on Violence, Law, and Humanitarianism*, 41 *CRITICAL INQUIRY* 390–92 (2016).

94. *See* CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 11 (1989).

95. *See id.* at 64–65; *see also* Asad, *supra* note 93, at 390.

Pinker claims that contrary to conventional beliefs, ours is the least violent age in human history. Pinker attributes the decline in violence to various factors, including the rise of the nation state and its consolidation of the monopoly over legitimate use of force, developments in technology and science that have promoted knowledge and reason, and globalization that has encouraged connectedness and care. All of these, he argues, have generated greater empathy for others and less tolerance for pain and suffering in general.⁹⁶

Whatever trends have washed over the world at large, liberalism, in particular, has pledged an ideological aversion to pain and cruelty and a commitment to individual flourishing. In Judith Shklar's words,

liberalism's deepest grounding is in place from the first, in the conviction of the earliest defenders of toleration, born in horror, that cruelty is an absolute evil, an offense against God or humanity. It is out of that tradition that the political liberalism of fear arose and continues amid the terror of our time to have relevance.⁹⁷

And Charles Taylor argues: "One thing the Enlightenment has bequeathed to us is a moral imperative to reduce suffering. This is not just a sensitivity to suffering, a greater squeamishness about inflicting it or witnessing it . . . [W]e feel called on to relieve suffering, to put an end to it."⁹⁸

Liberalism, of course, did not lead to pacifism, and many wars have been fought since the beginning of the Enlightenment, entailing much destruction and suffering, sometimes, as in cases of Western-led humanitarian interventions, in the name of liberalism itself. Yet, liberalism, as a political commitment, promises individuals and groups protection from harm and realization of rights and liberties. It is not a coincidence that the great social revolutions empowering racial minorities, women, LGBTQ persons, and other previously-disenfranchised groups took hold (with some exceptions) in liberal democracies before spreading elsewhere.

Against the fundamental liberal commitment to reduce cruelty and suffering, the death and destruction brought about by war today call for an explanation and justification. War may still be a necessary evil, but evil it is nonetheless. If it is to be tolerated,

96. See generally STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* (2011). See also Asad, *supra* note 93, at 391–92.

97. Judith N. Shklar, *The Liberalism of Fear*, in *LIBERALISM AND THE MODERN LIFE* 21, 23 (Nancy Rosenblum ed., 1989).

98. TAYLOR, *supra* note 94, at 394.

it has to be not only a last resort but also as minimal in its destructiveness as is absolutely necessary. To be morally defensible, the death and destruction delivered by a liberal democracy through war must be distinguishable in both means and ends from the barbaric and savage violence of illiberal enemies.⁹⁹ Not coincidentally, where there is any doubt about the legitimacy of the war to begin with—if the *jus ad bellum* is questioned—there is bound to be much greater attention to and criticism over each particular act *in bello*.

All of this means that military force deployed by liberal democratic militaries must be directed only against those who can plausibly be characterized as having done something to render them eligible to be targeted with it. In turn, such force must distinguish with the utmost precision between the innocent and those who are liable to be “neutralized,” “frustrated,” or even “killed.” The ordinary civilian, even if on enemy territory, is—in principle, even if not in sentiment—human and therefore enjoys an initial entitlement to be spared injury or displacement: one that remains good until forfeited by participation in conduct of a sort that renders her eligible to be a military target.

The liberal commitment has both external and internal faces. Externally, as liberal democracies engage in a form of ideological “marketing,” often trying to sway local populations away from supporting an enemy that professes different political and ideological commitments, they are compelled to demonstrate the benefits of siding with the liberal ideology. To do so, they must prove their commitment to protecting civilians, even at great costs. The 2006 Counterinsurgency Manual (COIN), which set the United States strategy in its wars in Afghanistan and Iraq, ordered military combatants to prioritize civilian protection over force protection, with the rationale that civilian collateral damage strengthens local support for militants and harms the achievement of the military mission.¹⁰⁰ Though this instruction was neither a legal imperative nor a moral commitment, the self-interested strategy was called for only because the United States predicated its involvement in the region on a promise to local population of a better future with greater freedoms and liberties than under the authoritarian rulers that the United States had deposed.

Relatedly, several studies published in recent years suggest

99. See Asad, *supra* note 93, at 411–12 (analyzing the possibilities and pitfalls of such a distinction).

100. U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 1-23, 1-25 (Dec. 2006) [hereinafter COIN MANUAL].

that domestic constituencies in liberal democracies are wary of civilian casualties, even where they do not object to the military operation as a whole. One such study conducted in the United States and Britain found that “[a]cross two Western public and across multiple experiments with different scenarios, we invariably found support for military action to be lower where the civilian death toll—projected or actual—was higher.”¹⁰¹

Modern media has played a significant role in reinforcing the liberal commitments to life, liberty, and basic human protections. The ability to deliver (and consume) real-life or near-real life images of pain and suffering, with no censorship or filters, is now in more hands than ever before. The rise and spread of media have universalized the experience and realization of pain, however indirectly, empowering people not only to consume news but also to produce it and—as the Arab Spring demonstrated—effect true political change.

Of course, we have all lost our innocence with regard to the objectivity or reliability of these images. That everyone is a producer, reporter, and disseminator is both a blessing and a curse. The written word, image, or sound could be either authentic or manipulated. Even if authentic, it could be employed by different actors for different purposes. The gruesome videos of ISIS fighters beheading their captives are flouted by ISIS to instill fear in their viewers and by the anti-ISIS coalition to instill them with resolve and conviction.

Moreover, even if authentic, the effectiveness of media in arousing empathy is partial at best. World attention is not evenly spread: media attention to wartime suffering is still marginal when the war affects strangers in a strange land.¹⁰² Some types of suffering garner more attention and action than others, and not all deaths make it to the front page of the *New York Times*, even when thousands perish.¹⁰³

Even when there is media coverage, its effects on viewers are uncertain. It turns out that it is still possible to remain largely indifferent to human pain and suffering even when presented with graphic evidence. Images of the genocide in Rwanda were available early on but prompted no meaningful international

101. Robert Johns & Graeme A. M. Davies, *Civilian Casualties and Public Support for Military Action: Experimental Evidence*, 63 J. CONFLICT RESOL. 251, 270 (2019).

102. Julian Petley, *War Without Death: Responses to Distant Suffering*, 1 J. CRIME, CONFLICT & MEDIA 72, 74–85 (2003), https://www.researchgate.net/publication/26403579_A_War_Without_Death_Responses_to_Distant_Suffering [<https://perma.cc/RV2F-ZWTY>] (describing British media as sanitizing images and reports of war).

103. See, e.g., Howard Ramos et al., *Shaping the Northern Media's Human Rights Coverage, 1986–2000*, 44 J. PEACE RES. 385, 401 (2007).

reaction. Regardless of any legal symmetry that IHL might wish to draw among all civilians, it is unrealistic to expect that symmetry as a matter of human psychology, and national publics care less about civilians in enemy territory than they do about their own fellow citizens. The recent U.S. Senate vote to stop the American support for the Saudi-led war in Yemen was not motivated by the scathing New York Times profile of the war in Yemen and its catastrophic humanitarian impact but by the reports that the killing of a U.S.-based journalist was ordered by the Saudi Crown Prince.

And still, whether or not digital proximity has propagated a more demanding ethic of care, what the news outlets and social media platforms undoubtedly have done is make most battlefield actions and consequences known—and known more quickly—in turn allowing dissenters to voice their concerns on accelerated timelines. Even if ultimately these concerns do not carry the day, military planners now have to consider not only the “CNN effect” but also the corresponding Facebook, Twitter, and Instagram effects.

How far have we come? On August 5, 1965, Morley Safer of CBS news aired footage of U.S. Marines torching huts in the hamlet of Cam Ne with flamethrowers, Zippo lighters, and matches and villagers—all women, children, and older men—covered in smoke fleeing their homes in panic and horror.¹⁰⁴ Safer described it as: “The Marines went on a search-and-destroy mission, but it really was a destroy mission.”¹⁰⁵ The Marines captured on film were well aware of Safer’s presence there and remained undeterred by it. After the story aired, the Department of Defense and the White House were reportedly furious at CBS and Morley, labeling the latter “a Communist.”¹⁰⁶

The present-day military is in general more restrictive regarding how and where it allows journalists to cover its operations. Yet, with the ability to capture images now in the hands of anyone with a phone, the ability to keep secrets is also diminished. And it is hard to imagine a Marine team torching a village in Afghanistan or Iraq in front of TV cameras, or even civilians with smartphones, without thinking twice about it. Also, note the difference in the reaction of today’s DoD and White House

104. *Safer’s Watershed Report from Cam Ne*, CBS NEWS (May 15, 2016), <https://www.cbsnews.com/news/controversial-report-changed-war-coverage-in-america> [<https://perma.cc/D2GM-3NH9>].

105. *Id.*

106. *Id.*

to allegations of war crimes: President George W. Bush described the Abu Ghraib scandal as the “lowest point in America’s War on Terror,” and President Barack Obama, in conjunction with a long and detailed investigative report on the attack, apologized for an American air force strike on a Medicines-Sans-Frontiers hospital in Kunduz.¹⁰⁷ The Obama apology stood for a broader principle: whether or not an attack is a war crime, or even a violation of the laws of war, is less important (the United States clearly believed that the attack was a mistake not rising to a war crime). What matters is that a medical facility and civilians were harmed by the U.S. military. That harm required not only an apology from the U.S. President but also an announcement by the DoD that it would pay compensation to victims’ families—an offer not required by existing international laws but one that the United States makes as a matter of practice when civilians are harmed in the course of its operations.¹⁰⁸

Similar apologies have been issued by other liberal democracies’ leaders. In August 2018, a French airstrike targeted a senior jihadist leader of the Islamic State in the Greater Sahara Group at an isolated camp in the Menaka Region, northeastern Mali. The senior leader was killed, alongside an aide and two civilians—a mother and daughter. A statement by the French army spokesperson expressed regret at the civilian deaths and said an investigation was under way to determine how the civilians got caught up in the attack.¹⁰⁹

In many ways, norms are thus doing even more work than hard law in explaining the paradox of power and in setting the boundaries of legitimate military operations. So far this has contributed to a progressive move towards greater constraints, at least as a matter of commitment. But as I argue below, if norms are doing the work, the progressive trend is fragile.

107. Roberta Rampton & Stephanie Nebehay, *Obama Apologizes for Kunduz Attack, MSF Demands Independent Probe*, REUTERS (Oct. 7, 2015, 3:56 AM), <https://www.reuters.com/article/us-afghanistan-attack-msf/obama-apologizes-for-kunduz-attack-msf-demands-independent-probe-idUSKCN0S10SX20151007> [<https://perma.cc/BGV9-23XE>].

108. See Terry M. Cronk, *Mistaken Kunduz Airstrike Results in Greater Focus, Official Says*, U.S. DEP’T DEF. NEWS (Dec. 2, 2016), <https://dod.defense.gov/News/Article/Article/1019127/mistaken-kunduz-airstrike-results-in-greater-focus-official-says> [<https://perma.cc/75XD-6BY5>]; *Kunduz Bombing: ‘It Didn’t Have to Happen,’* CTR. FOR CIVILIANS CONFLICT (Apr. 29, 2016), <https://civiliansinconflict.org/press-releases/kunduz-bombing-didnt-have-to-happen> [<https://perma.cc/62YX-FN84>].

109. AFP, *Jihadist Leader Killed in Mali French Airstrike*, NEW STRAITS TIMES (Aug. 28, 2018, 7:57 AM), <https://www.nst.com.my/world/2018/08/405523/jihadist-leader-killed-mali-french-airstrike> [<https://perma.cc/QV4V-3TCU>].

V. WHERE DO WE GO FROM HERE?

The picture painted so far of the growing constraints on warfare through the combination of law, norms, and technology is painfully incomplete. One might even mistake it for a depiction of a world in which liberal democracies avoid wide-scale violence and are strongly committed to the wellbeing of individuals, wherever they are and wherever they may be. This is clearly not the world we live in. Wars waged by liberal democracies still kill many thousands of people, including civilians, and inflict devastating and long-term damage on communities and infrastructure. War crimes, including the intentional killing of civilians and torture of combatants, continue to occur, and few trials, if any, offer true accountability. Given that many of the current zones of conflict are less developed than those of the early twentieth century, the direct and indirect harms inflicted through contemporary wars may linger a lot longer.

But liberal democracies today are also more restrained, and more constrained, in how they operate on the battlefield, when compared with past eras. And they are more concerned, in both rhetoric and practice, with the wellbeing of the civilians they affect. Rather than a Marshall-Plan-like post-conflict reconstruction, with a hard break between war and post-war, the concern for civilians is now expressed *during war*, while active hostilities continue.

How sustainable is this trend going forward? At least two developments could push us backwards: First, a more traditional strategic account of the paradox of power might suggest that the key to the changing character of warfare for liberal democracies lies not so much in the laws, norms, and technology of warfare but in the diminished magnitude and type of threats with which they are dealing. When the enemy is not the Axis of Evil, but nonstate militant groups around the globe, perhaps nation states can afford to be more restrained in the application of force without losing too much by way of security interests.

A confrontation with another nation-state, especially a major power, would in all probability look very different than have the battlefields of Iraq, Afghanistan, Gaza, or Mali. The test for what or who counts as a legitimate military target might be applied more liberally, and proportionality tools like the CDE or the NCV might be deployed more permissibly. But even then, barring a true and palpable existential threat, certain practices of past wars—such as indiscriminate carpet bombing of the kind engaged by the United States in Japan, and even Vietnam—seems highly unlikely even in the face of substantial threats.

A potentially more troubling development is not external to the world of law, norms, and technology but internal to it. To the extent norms and sensibilities play a role in public attitudes towards war and warfare, the populist turn taken by many liberal democracies over the past few years threatens to loosen the constraints on contemporary fighting.¹¹⁰ With rising nationalist sentiments,¹¹¹ growing suspicion towards international institutions, and willingness to minimize protections for foreigners in the name of national self-interest, the norms of modern warfare may also come under increased pressure. Changes may come in various forms. Though I doubt they will express themselves in renegotiated treaties or other forms of “hard law,” they could nonetheless affect public expectations for or reaction to military conduct in a way that would ultimately affect the conduct itself. Recall, for example, the studies mentioned earlier suggesting that public opinion is generally averse to civilian casualties in enemy territory. If the public becomes desensitized or indifferent to such casualties, the military might eventually invest less in avoiding them. A study published by the ICRC in 2016, for instance, found that among the populations of Switzerland and the five permanent members of the Security Council, there has been a growing acceptance of civilian casualties as an inevitable part of war, in comparison with a similar study conducted in 1999.¹¹² President Trump, upon assuming office, has reportedly retracted some of the obligations set by his predecessor’s PPG on targeted killings outside areas of active hostilities, including the requirement that the intended target posed a continuous immediate threat to U.S. persons. Importantly, the new guidelines did not eliminate the

110. Writing about liberal internationalism and the populist turn, Eric Posner has observed, “An upswing in populist sentiment around the world poses the greatest threat to liberal international legal institutions since the Cold War.” Eric Posner, *Liberal Internationalism and the Populist Backlash* 1 (Univ. of Chi. Pub. Law & Legal Theory Paper Series, No. 606, 2017).

111. I do not mean to conflate populism with nationalism; the two ideologies are quite distinct and can present themselves in different ways, and independently from one another. In the United States, the United Kingdom, and Israel, at least, both have taken purchase in recent years.

112. INT’L COMM. OF THE RED CROSS, PEOPLE ON WAR: PERSPECTIVES FROM 16 COUNTRIES 4, 7 (2016), <https://www.icrc.org/en/document/people-on-war> [<https://perma.cc/8S8B-CSW2>]. The study asked the following question: “What about attacking enemy combatants in populated villages or town in order to weaken the enemy, knowing that many civilians would be killed—is that wrong or just part of war?” *Id.* at 7. The study found that “[t]here is a stark contrast between the views of those in conflict-affected countries, where nearly 8 out of 10 of people believe this is wrong, and those in the P5 countries and Switzerland, where only half of respondents share this view.” *Id.* The study did not provide additional data that would allow us to distinguish among the views of citizens in liberal democracies and those in other countries.

near-certainty of the no-civilian-casualties requirement.¹¹³ Yet, the combination of campaign-trail comments by Trump on the need to kill terrorists' family members and more recent reports on his blasé attitude towards civilian casualties¹¹⁴ is a cause for genuine concern. Indeed, according to some reports, the number of civilian casualties resulting from U.S. strikes has increased dramatically under President Trump, in comparison with previous years.¹¹⁵ These numbers, of course, do not provide the full picture of the current Administration's commitment (or lack thereof) to either the rules of war or the minimization of harm through war;¹¹⁶ yet, it does lend support to the proposition that the populist turn may well turn out to be a more impactful factor in how we will fight in the future than who we fight.

If the current trend does continue, what are the implications of the paradox of power for contemporary wars and for visions of victory?

The most optimistic scenario would be that, notwithstanding the array of justifications that are now said to allow for the initiation of hostilities, the limited ability to rely on military power will nonetheless deter liberal democracies from pursuing the military option to begin with. Indeed, in this sense, the *jus in bello* might end up being a more effective *jus ad bellum* than the *jus ad bellum* itself.¹¹⁷

113. Luke Hartig, *Trump's New Drone Strike Policy: What's Any Different? Why It Matters*, JUST SECURITY (Sept. 22, 2017), <https://www.justsecurity.org/45227/trumps-drone-strike-policy-different-matters/> [<https://perma.cc/CZA4-HCYV>].

114. A Washington Post story reported the following in a course of a meeting between Trump and the heads of the CIA:

[W]hen the agency's head of drone operations explained that the CIA had developed special munitions to limit civilian casualties, the president seemed unimpressed. Watching a previously recorded strike in which the agency held off on firing until the target had wandered away from a house with his family inside, Trump asked, "Why did you wait?" one participant in the meeting recalled.

Greg Jaffe, *For Trump and His Generals, 'Victory' Has Different Meanings*, WASH. POST (Apr. 5, 2018), https://www.washingtonpost.com/world/national-security/for-trump-and-his-generals-victory-has-different-meanings/2018/04/05/8d74eab0-381d-11e8-9c0a-85d477d9a226_story.html?utm_term=.e73dac3721b3 [<https://perma.cc/KNB7-GRFX>].

115. Margaret Sullivan, *Middle East Civilian Deaths Have Soared Under Trump. And the Media Mostly Shrug*, WASH. POST (Mar. 18, 2018), https://www.washingtonpost.com/lifestyle/middle-east-civilian-deaths-have-soared-under-trump-and-the-media-mostly-shrug/2018/03/16/fc344968-2932-11e8-874b-d517e912f125_story.html?utm_term=.10b10d1650d5 [<https://perma.cc/JSA2-PHPK>].

116. One would have to know much more, for instance, about the magnitude of current and recent military operations, the theaters in which they are fought, the type and numbers of forces involved, etc.

117. See Ryan Goodman, *Controlling the Recourse to War by Modifying Jus in Bello*, 12 Y.B. INT'L HUMANITARIAN L. 53, 84 (2009); Frédéric Mégret, *International Criminal Justice as a Peace Project*, 29 EUR. J. INT'L L. 835, 843 (2018). See also Hartig, *supra* note

In this context, it is important to recall that the COIN constraints on coalition warfare in both Afghanistan and Iraq were the result of a self-interested strategy, based on lessons learned from Vietnam and other counterinsurgency campaigns.¹¹⁸ They were reflective and derivative of the legal and normative environment in which the United States operates. There was no panoply of options, in other words, for military strategies that would have ignored those laws and norms, among which the constrained strategy was chosen. With any option of military conduct outside of humanitarian constraints effectively eliminated, only the restrained option survived. And if that option could not yield the desired outcomes in Afghanistan and Iraq, perhaps the only other remaining option would be one of abstention.

Yet the opposite is also possible and, given the events of the last fifteen years, is more likely in my mind: as war is becoming, at least in perception, “cleaner”—that is, seen as destructive only as to those who are appropriately subject to force and protective of those who are not—the aversion to engaging in war in the first place might be mitigated. The War on Terrorism may be precisely such a phenomenon. With greater oversight and scrutiny of detention and lethal operations, with fewer civilian casualties and greater promise of certain forms of due process, the public is likely to be less concerned about the continuation—or even expansion—of the war.¹¹⁹ The recent trends of fighting wars with “no boots on the ground” and engaging in “low impact operations” are, though motivated by a host of considerations, version of this impact—not avoiding war but conducting it with lighter footprint that would, presumably, be less demanding in terms of compliance with humanitarian law and norms.

A second implication is the replacement of some military power by “softer” strategies—political, economic, and social. These strategies might be adopted as a benevolent strategy of affirmative assistance and rebuilding of conflict-affected zones, an ongoing Marshall Plan that aims to win hearts and minds. But it could also present itself in forms of coercion, ranging from economic sanctions (like those imposed on Iran, Syria, or North Korea) to expanded reliance on domestic powers of regulation and enforcement (like the various counterterrorism regimes which the

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118. COIN MANUAL, *supra* note 100, at vii.

119. Samuel Moyn, *A War Without Civilian Deaths?: What Arguments for a More Human Approach to War Conceal*, NEW REPUBLIC (Oct. 23, 2018), <https://newrepublic.com/article/151560/damage-control-book-review-nick-mcdonell-bodies-person> [https://perma.cc/2XLY-8RQV].

United States engages in extraterritorially and compels other countries to follow). The appeal of these strategies is that they seem to operate within the ordinary world of law and diplomacy and not in the world of “war” and thus raise fewer questions, doubts, or ethical dilemmas. Yet, whether these strategies end up being any less harsh for the civilian populations that they affect in comparison with military strikes is an open question. Economic sanctions, in particular, can block access to food, medicine, energy, and essential services in a way that jeopardizes the well-being of large populations.

A third resulting phenomenon, which I predict will grow, is the reliance on third parties—who are neither liberal nor democratic—to employ military power on behalf of more constrained liberal democracies. Think of the United States military aid to Saudi Arabia in Yemen or the reliance on less savory regimes in counterterrorism efforts, including regimes who are known for torturing detainees. While not a new strategy, and perhaps subject to more scrutiny than in the past, as the constraints placed on liberal democracies in their own use of force grow, both the motivations and the propensity to “delegate” the prosecution of military actions to nations that face fewer constraints on their use of force will grow. Ironically, though NATO armies generally require in joint operations compliance by the United States with more stringent rules than those the United States sees itself bound by, they occasionally also benefit from the American freedom to act in ways that would be unlawful for them to do.

Finally, we come back to the definition of victory and its interplay with the paradox of power. As I noted at the beginning of this Article, liberal democracies find today that the *jus ad bellum* allows them to justify military action by reference to an ever-expanding and malleable set of goals—military, political, economic, and social. Yet, they are also more constrained, under the *jus in bello* regime (writ large), in their reliance on raw military power to achieve those goals. No one likes to lose or be seen as not having achieved one’s goals. And the more constrained liberal democracies are in obtaining their goals, the more they will be deterred from stating any goals explicitly at the beginning of their campaigns, for fear they will be judged not to have achieved them.

In the end, the engagement of liberal democracies in war—both in terms of the commencement and the conduct of hostilities—is *affected* by law, by technology, and by norms but will be *determined* by we, the people. It is our job as citizens to demand not only adherence to the laws of warfare but an account of why

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wars are being fought in the first place and how likely they are to achieve the goals that are invoked by our leaders to justify them.
