The Laws of War and Humanitarian Law:
A Turbulent Vista

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REVIEW ESSAY

The Laws of War and Humanitarian Law: A Turbulent Vista

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Adam Roberts and Richard Guelff, eds., *Documents on the Laws of War,* 3d ed. (Oxford: Oxford University Press, 2000), 765 pp.

Ingrid Detter, *The Law of War,* 2d ed. (Cambridge: Cambridge University Press, 2000), 516 pp.

Françoise Bouchet-Saulnier, *The Practical Guide to Humanitarian Law,* 1st English language ed. (Lanham, Md.: Rowman & Littlefield Publishers, 2002), 489 pp.

Roy Gutman, David Rieff, and Kenneth Anderson, eds., *Crimes of War: What the Public Should Know* (New York: W.W. Norton, 1999), 399 pp.

> The laws of war are strange not only in their subject matter, which to many people seems a contradiction in terms, but also in their methodology. There is little tradition of disciplined and reasoned assessment of how the laws of war have operated in practice. Lawyers, academics, and diplomats have often been better at interpreting the precise legal meaning of existing accords, or at devising new law, than they have been at assessing the performance of existing accords or at generalizing about the circumstances in which they can or cannot work. In short, the study of law needs to be integrated with the study of history: if not, it is inadequate.
>
> —Adam Roberts[1]

As the United States sent its military forces to engage in operations in Afghanistan, commentators struggled to understand, explain, and criticize the political, security, and legal arguments marshaled to justify the violence. For many scholars, the normal response involves the review of literature addressing history, politics, and the laws of war. Unfortunately, the literature in those fields seems to move independently, with each discipline offering little reference to the learning offered by the others. More important, these disciplines offer very little guidance in the new and unexpected situation occasioned by a "war against terrorism."

History offers no precedent analogous to the assault by two small bands of individuals that caused the collapse of two huge buildings, killing nearly 3,000 innocent victims. Political science offers no wisdom that can facilitate the peaceful resolution of a conflict in which one side can only be satisfied with the total destruction of the other. The laws of war offer no doctrines capable of reliably constraining conflicts between states and amorphous groups bent on suicidal annihilation of noncombatants. From a number of perspectives, the path of historical change in warfare has diverged dramatically from the applicable body of law; new forms of conflict now pose dramatic challenges to the legal tradition.

In this article, I explore four works that indirectly reflect the difficulties confronting any effort to make sense of current conflicts using traditional concepts. The works discussed reveal the challenging environment that circumscribes the evolution of the traditional laws of war into norms for the modern era.

Adam Roberts and Richard Guelff catalogue those international legal agreements that constitute the formal starting point of the contemporary laws of war. Ingrid Detter analyzes the rules and principles derived from those documents, and the state practices based on them, intending to place these rules in a contemporary historical and technological context.

Françoise Bouchet-Saulnier provides a valuable handbook for humanitarian practitioners seeking to assist victims of large-scale violence. Based on her experience as legal director of Médecins Sans Frontières (MSF) and legal counsel and research director for the MSF Foundation in Paris, her handbook could inform and prepare aid workers on the ground seeking to protect those most in need of assistance. Roy Gutman and David Rieff are working journalists who have provided a volume for their colleagues and the public that dissects the humanitarian law, describes specific contemporary instances of egregious breaches of humanitarian law, and explains the major terms used in international discussions of international war crimes. The authors of these last two works follow the contemporary trend to incorporate modern international human rights principles into the traditional laws of war.

Before launching the critical review, I examine the background and historical evolution of the laws of war to place the works in their proper context. The laws of war have elements that have evolved over at least 2,500 years; in each case, the principles that constrained the conduct of warfare arose and changed as historical circumstances forced adjustment to new realities. Ultimately, scholars may be required to develop entirely new modes for restraining collective violent conflict in the

twenty-first century. This article may encourage the start of the thousand-mile journey that, as Lao Tzu reminds us, begins beneath our feet.[2]

The Evolutionary Heritage of the Modern Laws of War

Most academics and lawyers find the term *laws of war* to be oxymoronic. Michael Howard noted that "restraints on war grew out of the cultures of the war-making societies, rather than being imposed on them by some transcendent moral order."[3] In ancient times, these constraints were culturally based, and those engaged in combat complied with conventions about acceptable and unacceptable practices with motivations removed from our contemporary notions of legal obligation. Some practices were adopted or avoided because of the desire for a comparable behavior from opponents; others resulted from fear of retribution for noncompliant behavior. Still others arose from traditional cultural norms and religious practices. Whatever the origins, reciprocity continued; when reciprocity failed, disappointed expectations led to unconstrained warfare.

Beginning in the time of ancient Rome, commentators began to codify the customs and rules of warfare.[4] Some of the most enduring concepts of ancient Roman warfare evolved into a Catholic "just war" tradition and into the rules of chivalry adopted in the Middle Ages.[5] For purposes of this discussion, two principal dimensions of this doctrine began on these foundations. First, the resort to warfare required justification; that idea became the doctrine of *jus ad bellum*. The primary early justifications involved defense of borders or pacification of "barbarians" across borders. Second, "within these limits, the conduct of war was essentially unrestrained."[6] Thus, the early doctrine limited war by constraining its initiation, but war could be conducted in any manner thought appropriate by military commanders. Subsequently, religious qualms led Catholic scholars to propose limits on the manner in which war was conducted when opponents were co-religionists. A corollary was the general acceptability of unconstrained warfare against those who could be characterized as nonbelievers or uncivilized peoples.

Within the context of this evolving doctrine, the older pragmatic limitations of reciprocity continued to function as parameters limiting the choices of those engaged in combat. In late Roman times, with greatly increasing specificity during the Age of Chivalry, explicit and identifiable rules came to be expected of some combatants on the battlefield. These rules, applicable between opposing warriors of equal nobility, provided fewer limitations on the manner in which those of

lesser rank could be brutally crushed in combat. These pragmatic rules of practice set the foundations for *jus in bello* doctrine, and articulated the appropriate limits for the manner in which combat could be conducted. The discriminatory character of these rules allowed medieval knights to behave with charity toward one another and toward other persons of acceptable status and class. Concurrently, these medieval knights could behave with utter ruthlessness toward non-Christians during the Crusades.

The stratified rules of war reflected in the parallel doctrines of jus in bello and jus ad bellum faced insurmountable difficulties during the Reformation. European opponents of otherwise equal rank faced each other across abyssal depths of religious difference; brutal treatment that would be intolerable if imposed on a fellow knight could be justly meted out to a heretical religious enemy. As the relative simplicity of one common religious perspective collapsed into the spiritual complexity of the Reformation, leaders faced increasing difficulties in distinguishing between justifications for resorting to military force; kings who decided not to fight heretical princes could be accused of failing their faith. After decades of religious war, doctrines of moral judgment became ambiguous guides; at the same time, exhaustion made practical rules limiting combat more acceptable. As a consequence, jus ad bellum principles became less reliable as guides for rulers, while concerns involving pragmatism and reciprocity gave greater value to the war-making limitations facilitated by jus in bello.

The rise of powerful states provided additional impetus for the waning of notions of jus ad bellum. Observers commonly cite the Peace of Westphalia in 1648 as the beginning of the era of the modern state; one author sees the same historical point as demonstrating the "deconfessionalization" of Europe.[7] The judgmental evaluation of the choices of rulers to resort to force became less viable as states came to be seen as equally valid agents; at the same time, all agreed that only legitimate governments had the authority to wage war.[8] The rulers of these governments resorted to professional military forces, who adopted their own rules and regulations for the conduct of war. These regulations arose out of past practices and traditions of war; many practices addressed the treatment of civilians and prisoners of war. During the era after the Peace of Westphalia, the pragmatic customs and practices of jus in bello came to constitute the core of the laws of war. As one scholar described, "a large part of the modern law of war was developed simply as a codification and universalization of the customs and conventions of the vocational/professional soldiery."[9]

Before states formally codified these customs through international agreements, the writings of "publicists," or respected legal scholars, provided the best catalogs of those customs.[10] These writings established a fundamental principle that the means of conducting warfare fell subject to limitations. Two core rules stated the substance of those limitations. Proportionality required that the damage created by military action bear some reasonable relation to the circumstance cited as the cause of that action, and that the means used to accomplish a military objective not cause excessive harm in relation to that objective. Discrimination required that the application of military force be directed toward impacts on active combatants, and that the means adopted be capable of minimizing unnecessary harm to noncombatants. Through the writings of publicists and the texts of rules and regulations established by state military establishments, these principles formed the foundations of the laws of war, until the mid-nineteenth century when these rules were codified into international agreements.

The works discussed in this article reflect the evolution of the laws of war into the modern era. Those reflections cause us to raise questions about the efficacy of traditional rules under modern circumstances. Examination of the modern history of violent conflict exposes significant problems for anyone attempting to apply the older principles to the actors in modern violent conflicts and to the range of destructive technologies that are at the disposal of those actors. Any critical observer recognizes that a huge effort is required to fashion the intellectual and legal tools necessary to restrain the modern purveyors of violent armed conflict. Any attentive reader of current events must understand that countless lives depend on the discovery and application of those tools.

Formalizing the Rules

By the beginning of the nineteenth century, the traditional customary rules of warfare had come under significant stress as the Napoleonic wars witnessed the shift of European militaries from small professional armies to very large forces drawn from the general populace. While officers, trained in the common cosmopolitan traditions and customs of their profession, led most national armies, the rank and file had not internalized those same rules. As a result, these officers faced far greater difficulties in controlling massive formations of volunteers and conscripts who lacked familiarity with any restraining customs and traditions of warfare. Also at this time, broader popular participation in

national armies and greater exposure in the popular press combined to increase public awareness of the horrible death and destruction of war. This growing awareness served to influence general sentiment toward improving the efficacy of any possible constraints on warfare. Diplomats initiated negotiations to minimize the tendency of states to resort to war to resolve disputes.[11]

By mid-century, Henri Dunant, a Swiss citizen, began a movement to provide aid and assistance to the victims of war. He was motivated to form the International Committee of the Red Cross (ICRC) as the result of his exposure to thousands of helpless casualties resulting from the Battle of Solferino in 1859.[12] By establishing this institution, the states of Europe negotiated the first of many formal international agreements that have come to constitute the modern substance of international humanitarian law (or IHL, the term used by many to describe the laws of war).

Roberts and Guelff have compiled an invaluable inventory of the formal products of 150 years of diplomatic codification of the laws of war. In publishing the third edition of *Documents on the Laws of War,* they have collected virtually all of the international legal texts essential to comprehending the contemporary status of the law, including six additional recent international agreements and seven nontreaty documents. The editors have provided the original texts of these documents, with subsequent materials to indicate which states executed, ratified, or acceded to the particular agreements. An explanation of the initial context and origin of the document prefaces each document; these explanatory notes also describe the subsequent history of the document.

Roberts and Guelff recognized the need to address readers who are not completely immersed in the structure and method of international law, and they have presented a work that has particular value in this regard. They have provided an expanded introductory article that offers both a short but valuable explanation of the principles and processes of international law generally and a brief glimpse of the rich history behind the current rules and agreements. In this manner, they have created a book that can be useful to scholars outside of law.

Roberts and Guelff selected documents consistent with their focus "on the laws of war as codified in treaties" (p. 34). In addition, they include a number of relevant nontreaty documents because of their potential for illuminating the development of the modern laws of war. For example, they include extracts from the 1946 Judgment of the Military Tribunal at Nuremberg. They include excerpts from the Statute of the International Criminal Tribunal for the Former Yugoslavia. They incorporate the advisory opinion of the International Court of Justice on

the Legality of the Threat or Use of Nuclear Weapons. Further, they provide excerpts from the Rome Statute of the International Criminal Court (ICC). Most interestingly, they incorporated a pocket card on the rules of engagement issued to U.S. personnel engaged in Operation Desert Storm. These documents provide insight into the degree to which the rules of the laws of war provide meaningful parameters for decisions made at all levels, even down to that of the individual soldier in combat.

On the other hand, Roberts and Guelff omit a number of documents that some readers would expect to find in a collection of this sort. Certain excluded agreements have been superceded by later agreements or have been made irrelevant by later technologies (e.g., an agreement prohibiting discharge of explosives from balloons). Other omitted agreements concern arms control and disarmament, matters not directly related to the actual conduct of warfare but critical to the strategic considerations that prompt states to prepare their war-making capabilities. Their logical and appropriate omission of agreements on the legitimacy of war provides an illuminating perspective on the entire collection. Among these are the Covenant of the League of Nations, the Kellogg-Briand Pact, and the Charter of the United Nations. These agreements concern jus ad bellum considerations and address the legality of the initial resort to armed force. In considering the contemporary problem of determining the proper responses to global terrorism, questions of the legality of the initial use of military force become entangled with considerations related to the manner in which that military force is to be applied. This entanglement is complicated by the conflation of the objective of conducting a war against terrorism with the objective of bringing terrorists to justice. Those attempting to justify resorting to military force may find themselves either facilitated or hampered by the justifications adopted for the action; that may be the ultimate lesson of the separation of the jus ad bellum analysis.

Another revealing omission is the exclusion of international human rights documents. This omission demonstrates an interesting contrast with the other works considered in this article. In fact, that editorial choice reflects an interesting shift in the central focus in the evolution of contemporary IHL. Roberts and Guelff recognize that "the human rights stream of law merges at many points with the laws of war, and is often relevant to situations of armed conflict and military occupation" (p. 38). While many inferences may be drawn about the reasons for this editorial decision, an earlier passage may clarify their rationale. In discussing the term *international humanitarian law* as an alternative appellation for the laws of war, the editors observe: "Indeed, the term 'international humanitarian

law' could be seen as implying that the laws of war have an exclusively humanitarian purpose, when their evolution has in fact reflected various practical concerns of states and their armed forces on grounds other than those which may be considered humanitarian" (p. 2). In fact, the authors of other works in this review essay have emphasized humanitarian and human rights concerns in a manner that reflects a strong assumption that those concerns should provide the predominant focus.

Any reviewer of the documents included in the collection edited by Roberts and Guelff must recognize that a number of significant shifts have occurred in the modern era. First, the changes in military practices and technologies during the twentieth century have made many agreements seem like quaint anachronistic relics. "Draft Rules of Aerial Warfare" (document 12) attempted to establish limitations on targets that could not survive the strategic bombing campaigns of World War II. A 1930 agreement, "Rules of Submarine Warfare" (document 14), required that merchant vessels could not be sunk until after the safe exit of the crew. No student of modern submarine warfare could escape the irony of such an agreement having been signed by Germany, Japan, the United States, and the United Kingdom less than a decade before the Battle of the Atlantic and the interdiction of Japanese shipping.

Second, the variation in the character of violent conflicts that occurred at the end of the last century called into question many assumptions about the feasibility of distinguishing between combatants and noncombatants. Many irregular unconventional forces have resisted invading armies throughout history. As many violent conflicts came to be dominated by combat between irregular or guerrilla groups and regular military forces within a single country, it became progressively more difficult to distinguish between civilian guerrilla fighters and civilian noncombatants because many civilians supported and protected guerrillas.[13] Although Geneva Convention IV (document 20) was established for the express purpose of avoiding wartime maltreatment of civilians, that agreement assumed that the combatants would be members of regular military organizations accountable to traditional chains of command. At the time of the signing of the convention, the French were engaged in a guerrilla war in Indochina, to be followed within five years by a vicious war in Algeria. Shortly afterwards, the United States became involved in combat in Vietnam. In these wars of national liberation, massive military organizations of uniformed personnel confronted opposing forces consisting of part-time civilian fighters, full-time irregular units, and uniformed regular forces—all coexisting mainly within the borders of a single state. The carefully crafted edifice of protections for civilians came under great pressure, requiring the modifications and

adjustments adopted in the 1977 Protocols Additional I and II (documents 24 and 25), relating to international and noninternational armed conflict. Even so, Adams and Guelff remind us that "application of Protocol II in conflicts has been problematical" (p. 482). Twenty-first century warfare may defy twentieth-century assumptions.

Under contemporary circumstances, a third shift may prove most disturbing—the shift from war to terrorism. The editors reasonably choose to omit international agreements on terrorism because "their application is mainly in peacetime, however defined, rather than in armed conflicts." Even so, "counter-terrorist military operations may be subject to certain provisions of the laws of war" (p. 39). Obviously, Roberts and Guelff did not contemplate the scale of death and destruction caused by contemporary terrorist actions directed solely against noncombatant civilians. From one perspective, treatment of terrorism as primarily criminal in character begins appropriately to excoriate such action. On the other hand, criminal characterization suggests focusing on apprehending and punishing past acts rather than emphasizing defensive or preemptive action that adopts a prospective agenda. Striking the right balance between punitive and preventive action may be the most difficult task at hand, and the traditional laws of war may not offer much assistance generally; however, it may offer some guidelines for appropriate military responses to terrorism.[14]

This article merely provides a few additional perspectives on the incredible wealth offered in the Roberts and Guelff collection; there are no significant grounds for criticism to tarnish this treasure. Any observer of the laws of war must acknowledge deep inadequacies, inconsistencies, and self-serving superficialities in the contemporary construct that makes up the laws of war. Those defects result from the political motivations of states combined with the overwhelming and evolving destructiveness of modern warfare. In this edition, Roberts and Guelff have improved an already excellent resource for examining or teaching about the formal textual foundations of the contemporary laws of war.

Interpreting the Documents

The researcher who first attempts to understand the texts of international agreements faces an arduous and difficult task. Diplomats select the language for such agreements in order to serve many purposes; clarity of expression and simplicity are seldom given priority. The opacity of these legal texts leads legal scholars to publish explanations of the texts, and the edifices of doctrine generated from them, in

treatises. When a treatise is done well—for example, Ian Brownlie's classic—its author can become a widely recognized and acknowledged expert.[15] That author's work may be cited by governments and judicial tribunals as evidence of the current state of international law.[16]

Detter has offered a revised edition of her 1987 treatise on the laws of war. She attempts to provide a modern treatise to explain "the law of war" since "there is now a homogeneous body of rules applicable to the modern state of war." Detter recognizes that her book covers "an immense area of problems and must necessarily balance the importance of different subjects" (p. xvii). She certainly endeavors to address a dauntingly vast number of subjects. That endeavor begins with "General Principles," the first of which is "the concept of war" that starts with a short discourse on "the nature of war" (pp. 3–5). That brief passage is followed by a much longer discussion of "the definition of war" (pp. 5–26). One might infer that the "definition" of war played a more important role in the concept of war than did the "nature" of war. However, Detter goes further to examine other dimensions of the concept of war. Both the changes in international society and the variety of the types of war are explored as necessary precursors to subsequent discussion of the prohibition or prevention of war or the limitation of the means of conducting combat.

Most remarkably, Detter undertakes this massive introduction with comparatively little support from disciplines outside of law. While there are citations to nonlegal works, legal writings provide the principal sources of the author's evidence about the definition of war and its typologies. Unfortunately, discussions of the laws of war sometimes lose touch with the political and historical dimensions of war. Legal scholars exert much effort in defining and categorizing varieties of human action in order to understand appropriate remedial responses to the consequences of those actions. However, the identification of appropriate remedial or punitive legal measures addresses only a few of the dimensions of the kaleidoscope of consequences that result from war. Discussion of the violations of the laws of war by Allied strategic bombing practices misses the immediate and long-term consequences of that activity for the defeat of Nazi Germany. This is not to suggest that the validity of the ends ought to justify any means. However, scholars who engage in subsequent abstract logical analysis of human behavior that occurred in politically and historically supercharged circumstances can capture only one part of the reality. That part of the image may be sufficient for the subsequent assignment of culpability for harms that have already occurred; however, a broader image may be needed to facilitate the prevention and constraint of future violent conflict. Precision-guided

weapons may be more effective at accomplishing military objectives while directly causing immediate harm to far fewer noncombatants.[17] One thorough study of Iraqi wartime and immediate postwar deaths concluded: "In modern warfare, postwar deaths from adverse health effects account for a large fraction of total deaths from war. In the Gulf war, far more persons died from postwar health effects than from direct war effects."[18] This may be the most important product of the systematic study of all of the dimensions of war.

After her initial theoretical inquiry, Detter illuminates the opaque language of the international agreements and judicial decisions that make up the bulk of the laws of war. Some of the assertions offered are controversial. For example, Detter contends that "in Korea . . . the UN, without much authorization, acted as an umbrella organization for collective state action" since "troops operating under the aegis of the United Nations may not have been forces of the United Nations" (p. 133). Few other international legal scholars would reach that conclusion. However, the author does explain much of the complex treaty language included in a number of important agreements.

Detter points out that the modern laws of war have addressed a number of issues concerning the lawfulness of particular weapons systems. Giving some attention to weapons of mass destruction, the author highlights some of the contemporary efforts to adjust traditional rules to new technology, but much work remains. It is unfortunate that Detter did not provide us with a few more steps forward in our journey.

Some readers may feel that Detter treats war as an example of unruly behavior by those who are unhappy with the current body of legal norms. As stated earlier, she avoids the phrase "laws of war" because she asserts that there is a homogenous body of rules; the "Law of War . . . provides the framework inside which problems and rules can be systematically ordered" (p. xviii). Detter asserts that clarification of the rules will prevent "formless and lawless behavior, including excesses and atrocities." If clarification succeeds, "states and groups may consider other options than armed force to voice their differences" (pp. xx–xxi). Unfortunately, war is not merely an unruly and illogical abstraction. To paraphrase Shakespeare, war by any other name, or analyzed through any other framework, is still war. The deaths and destruction of war occur independently of salutary or befuddling bodies of rules. At the margins, the laws of war may save some lives and protect some property; this result alone provides enormous value. However, lawyers should not have the hubris to believe that the problem of war can be solved through better codification. Incremental progress is sufficient.

Enhancing the Humanitarian Impact of the Rules

Whether characterized as "international humanitarian law" or "the laws of war," the norms applicable to violent conflict are intended for immediate practical application as well as subsequent adjudication. Those concerned with the critical protection of victims of war seek to utilize the rules to protect the defenseless from death and destruction; those concerned with regulating the conduct of the military seek operational guidance for finding a proper balance between military necessity and disproportionate destruction. Legal treatise writers dedicated to demarcating the bounds of legality for judicial decisionmakers cannot provide adequate guidance for military officials, journalists, and humanitarian relief workers in contemporary wars. Under these circumstances, authors who provide accessible works offering comprehensible explanations of these rules to individuals lacking formal legal training can perform a valuable function, enabling humanitarian assistance personnel to save lives successfully or journalists to record seminal events accurately.

Bouchet-Saulnier has written a very useful handbook for individuals and organizations engaged in providing humanitarian aid and assistance to the victims of large-scale violent conflict. She has had pivotal roles in Somalia, Rwanda, and Kosovo and significant experience in many other crises. The work is intended to be "a practical guide to the different ways in which international law can be used for relief actions" (p. 2). By making available the knowledge offered in the handbook, she hopes to provide relief personnel with additional tools for helping victims in emergencies (p. 9).

Gutman and Rieff, assisted by Ken Anderson on legal materials, have edited a collection adapted for journalists and members of the public who seek information about international humanitarian law in general and war crimes in particular. Both Gutman and Rieff are journalists, and they came to recognize the need for informed journalists to assist in the gathering of evidence against war criminals. Lawrence Wechsler, one of their contributors, commented in "International Humanitarian Law: An Overview": "By virtue of their profession, war correspondents may well find themselves among the first outside witnesses on the scene at war crimes. As such, they're going to need to be informed witnesses, and the rest of us are going to have to become a far better informed and engaged public" (p. 22). These editors have oriented their work to serve a different audience than that Bouchet-Saulnier addresses; consequently, they have produced a quite different volume, valuable in a different way.

Both Bouchet-Saulnier's book and Gutman and Rieff's edited work have similar structures. Each book assumes that readers need to find a tool for coping with the avalanche of new terms and concepts confronting any new entrant into this arena where seemingly mundane or banal terms can describe startlingly horrendous events. As a result, each book establishes alphabetical compilations of short articles, allowing each work to provide a single-volume encyclopedia on humanitarian law. However, the diverse approaches that these authors take in exploring the subject matter allow the two works to complement each other in constructive and stimulating ways, amply rewarding anyone who decides to explore both.

The "practical guide" created by Bouchet-Saulnier is clearly intended to provide tools to enable humanitarian assistance personnel to take on the immediate protection of victims at risk. In each alphabetical entry, she has endeavored to use clear and direct language, devoid of the labyrinthine conditionality characteristic of academic legal prose. At many points, boxed text summarizes key points or adds additional important details. After examining each main entry, the reader finds subsequent additional resources, including cross-references within the book, additional outside readings, and addresses of relevant organizations or agencies.

Because of the practical focus, Bouchet-Saulnier has paid particular attention to the documents, practices, and mandates essential to the daily operations of intergovernmental and nongovernmental organizations (NGOs). Since the adoption of the Geneva Conventions of 1949, the International Committee of the Red Cross has played a unique and important formal role in implementing those agreements. Consequently, the author has devoted significant effort to the explanation of the Geneva Conventions, to the Protocols Additional, and to the structure and operation of the ICRC. Bouchet-Saulnier also devotes significant attention to the UN and its associated and subsidiary organs, since humanitarian assistance workers around the world frequently act in conjunction with the world organization. Assistance workers who explore Bouchet-Saulnier's work will find valuable information to support them in coping with the chaotic, hellish maelstrom of human suffering they encounter during and after large-scale violent conflicts. It will also assist them in helping the victims of the complex humanitarian emergencies that result.

In comparison to Bouchet-Saulnier's book, Gutman and Rieff offer a broader perspective on the structures and functions served by international humanitarian law. Because their work is intended for a much

wider audience and is designed for readers who may never directly witness the horrors of war, they endeavor to educate readers intellectually and emotionally about the consequences of mass violence. While the editors have included a number of well-drafted legal essays by renowned scholars of human rights and IHL, they have also employed other methods to communicate their message.

Gutman and Rieff capture the abhorrence of the crimes of war through shocking but arresting photographs, spanning the period from the end of World War II to the present. These images capture the victims, the perpetrators of crimes, and the graphic scenes of death and destruction. The photos have not been included for gratuitous sensationalism; they were carefully selected to accompany articles as illustrations of the violations and crimes considered. The illustrations remove any hint of abstraction.

Gutman and Rieff also include narrative elements in their textual descriptions. Although they adopt a similar alphabetical ordering of their entries, they have adopted several different types of essays. They provide specific descriptions of the major breaches of international humanitarian law, concentrating on grave breaches of the four Geneva Conventions of 1949. In each case, they provided an explicit account of the breach, based on the narratives of reporters who had been at the scene. They include short essays by legal scholars on the applicable legal rules and brief articles by journalists and scholars describing key terms and concepts. Finally, the editors include more extensive discussions of ten case studies concerning flagrant violations. By providing these complementary perspectives on the grave violations that stand at the core of modern war crimes, Gutman and Rieff have provided a valuable guide for helping the public understand the purposes and functions of international humanitarian law.

While the two works use similar structures and address similar subject matters, they differ in a number of ways. Bouchet-Saulnier addresses operational personnel who need specific legal tools to enable them to engage in a particular activity—providing humanitarian relief. She provides precise information oriented toward specialists involved in providing assistance to victims. These operational specialists do not need graphic portrayals of the situations; their experience supplies examples of the harms for which they must provide remedies. In contrast, Gutman and Rieff intend to provide information that enables the broader public to understand the frightful situations that humanitarian assistance workers encounter. Hence, narrative and graphic materials serve a valuable function.

On another level, these two works differ from the others discussed earlier, which note that two strains of principles undergird the laws of war. One strain of normative principles implies a judgment of the normative justification and authorization for the conduct of warfare and the pursuit of its objectives. Another strain of these norms was founded on practical considerations that arose during the conduct of combat operations. The laws of war grew from both sources; however, the import of those sources differed at various historical moments. Both of the works I have discussed in this section assume that the primary function of IHL involves the protection of the helpless victims of warfare. This political perspective has much in its favor, but it fails to recognize that some of the significant practical functions historically served by the laws of war retain contemporary importance.

The laws of war reflect a continuing struggle to balance military considerations against risks to noncombatants; giving predominance to humanitarian concerns would predetermine the result of that struggle. Unfortunately, if military decisionmakers are required to make combat decisions that comply with a predetermined strict liability test, such an assessment automatically promotes every humanitarian concern ahead of any possible military consideration. If they conclude that violations will always be attributed to them, regardless of the military necessity for action, they may make either of two choices. They may choose to forgo coercive military action that serves humanitarian ends, even though their withholding may permit even more dangerous and harmful violence to go forward unrestrained. Or they may undertake coercive military action, focusing primarily on the military objectives with decreased emphasis on humanitarian operational constraints that might diminish prospects for success, trusting that success will ultimately justify the chosen course of action. So long as individuals and groups engage in acts that cause large-scale violence, coercive and aggressive responses may be required to constrain the perpetrators. Actors who resort to military action must have effective rules to guide their choices. Consequently, the laws of war must retain the practical function of providing guidance to military decisionmakers as they weigh operational options. The equilibrium between the protection of civilian victims and the pursuit of necessary military objectives will shift, but the need to determine the proper balance will continue in this new millennium.

Both of these works make important and invaluable contributions, and the authors must be commended. They add to our awareness and understanding of the humanitarian costs of war. However, it is essential for readers to understand the assumptions behind the authors' perspectives.

Conclusion: A Whole New Ballgame

Military and political leaders may confront even greater imponderables as they consider the proper responses to contemporary forms of terrorism, force, and violence. Some contemporary commentators suggest that the nature of war has fundamentally changed; others scoff at that assertion. In many respects, the conflict in Afghanistan raises serious difficulties with the uncritical reliance on the applicability of the accepted principles of the laws of war as pertinent to armed conflicts.[19] However, future decisionmakers may find that similar difficulties have become commonplace as the new forms of violent conflict proliferate. Contemporary security analysts can provide a glimpse of some potential changes in the manner in which apparently weaker state or nonstate parties may choose to impose violence on ostensibly stronger states. In the resulting conflicts, the traditional laws of war may prove desperately inadequate.

John Arquila and David Ronfeld have written on the possible modalities of warfare, crime, and political conflict in the twenty-first century. Their very different perspective explores the startlingly new and different dimensions of large-scale violent conflict, terror, crime, and political confrontation.[20] They expose the radically changed context in which rules of violent conflict will function, suggesting that entirely new approaches will be required to resist and constrain new varieties of state and nonstate participants in global conflict. They argue that the traditional large, hierarchically organized forces of states will not face like-minded and similarly organized opponents in future conflicts. The contemporary effort to fight terror must address the daunting task of evaluating the choice between the tactics of war fighting and crime fighting. These authors illuminate the reasons behind the difficulty of that choice. Their work supports the inference that the difficulty will become endemic and unavoidable.

Many commentators on strategy and military history see the increased likelihood of "asymmetric warfare" over the next century.[21] Weaker states or groups have frequently adopted forms of warfare that compensate for the overwhelming material superiority marshaled by a powerful state.[22] Arquila and Ronfeld explore these ideas, focusing on these trends through their concept of "netwar":

> The term netwar refers to an emerging mode of conflict (and crime) at societal levels, short of traditional military warfare, in which the protagonists use network forms of organization and related doctrines, strategies, and technologies attuned to the information age. These protagonists are likely to consist of dispersed organizations, small

> groups, and individuals who communicate, coordinate, and conduct their campaigns in an internetted manner, often without a precise central command. Thus, netwar differs from modes of conflict and crime in which the protagonists prefer to develop formal, stand-alone, hierarchical organizations, doctrines, and strategies as in past efforts, for example, to build centralized movements along Leninist lines.[23]

When successful, the dispersed groups engaged in netwar share common elements that allow them to conduct devastating operations despite constant interference with their ability to maintain mutual communication and logistical support. First, they share a common narrative that describes their role and purpose in the world, as they perceive it. Second, they share a common doctrine of methods for pursuing their common struggle. Third, they share strong social ties, often ethnic or religious, that permit mutual confidence during interactions among separate bands of relative strangers.[24] Groups like Al-Qaida that operate in this fashion can survive the destruction of individuals touted as leaders because dispersed groups can generate new organizational or doctrinal leaders, so long as the group narrative and core doctrine remain constant among the members of these socially bonded, but geographically scattered, tactical groups. They can undertake actions on their own initiative, using modern technologies to accomplish destructive effects of awesome proportions. Those attempting to defend themselves against such groups face enormous difficulty in penetrating small and insular bands for intelligence gathering. Even when intelligence collection efforts succeed, defensive operations based on that intelligence may fail. The defenders may find it impossible to prevent massive damage when many different small groups pursue various independent initiatives, acting toward the same general objectives without the constraining bonds of continuous communication and coordination characteristic of bureaucratic governmental and military hierarchies.

Adam Roberts gives us the basic structure of the laws of war:

> Although some of the law is immensely detailed, its basic principles are simple: the wounded and sick, [prisoners of war] and civilians are to be protected; military targets must be attacked in such a manner as to keep civilian casualties and damage to a minimum; humanitarian and peacekeeping personnel must be respected; neutral or non-belligerent states have certain rights and duties; and the use of certain weapons (including chemical weapons) is prohibited, as also are other means and methods of warfare that cause unnecessary suffering.[25]

Professional military organizations have become accustomed to these traditional Geneva Convention norms as standard operating practice,

particularly those that emphasize discrimination between combatants and civilians (Detter, p. 135). As stated in one U.S. Department of Defense directive, "The Armed Forces of the United States shall comply with the laws of war in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized."[26] The military chain of command holds accountable those individuals who breach those standards; under U.S. law, they are subject to criminal trial with imprisonment or capital punishment as possible sanctions.[27] However, certain modern cold-blooded protagonists, who function as individuals or groups outside of constraining military hierarchies, ignore the limits of the laws of war. They do not hold themselves accountable to any hierarchy of command. They attack nonmilitary civilian targets directly and indiscriminately with the express purpose of causing civilian casualties. They have attacked humanitarian assistance workers; they have used prohibited weapons; and they have conducted their actions without any concern for the amount of suffering caused. While military and police forces hold themselves accountable for compliance with the principles and norms of the laws of war (as well they should), those forces now face certain modern opponents who brook no humanitarian restraints. Violation of the laws of war by traditional militaries do occur, through negligence or even recklessness; but those occasional violations differ drastically from meticulously premeditated acts undertaken with the primary specific intent of causing grievous harm to large numbers of civilian noncombatants.

This imbalance poses a grave danger for the viability of any limiting norms in the conduct of the current "war on terrorism." Anyone who argues for the preservation of the traditional norms of the laws of war must face the dilemma that they would require constrained opposition to an unconstrained and merciless antagonist. While the maintenance of restraint is a common demand when made on police officers who seek to enforce traditional criminal law, one wonders whether such restraint can continue to be expected when each criminal act can cause thousands of civilian deaths. Police and military forces may determine that the necessity of avoiding those civilian deaths may overwhelm any pleas for constraint. "Taking off the gloves" may become hard to resist.

The works discussed here provide a foundation from which an important search may begin. As we seek new rules for the constraint of state violence, we may learn from historical and practical materials. However, anyone who seeks new rules and norms to constrain states that resort to force in the future must understand that new groups of

actors using new means of violence and destruction will pose tremendous challenges. Those challenges will thwart easy reliance on familiar traditional principles. 🌐

Notes

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1. Adam Roberts, "Land Warfare: From Hague to Nuremburg," in Michael Howard, George J. Andreopoulous, and Mark R. Schulman, eds., *The Laws of War: Constraints on Warfare in the Western World* (New Haven: Yale University Press, 1994), p. 117.

2. Lao Tzu, *The Tao Te Ching,* translated by Stephen Mitchell (New York: Harper Collins, 1999), chap. 64, v. 2.

3. Michael Howard, "Constraints on Warfare," in Howard, Andreopoulous, and Schulman, *The Laws of War,* p. 2.

4. Robert C. Stacey, "The Age of Chivalry," in Howard, Andreopoulous, and Schulman, *The Laws of War*, p. 27.

5. Ibid., p. 28.

6. Ibid., p. 27.

7. Geoffrey Parker, "Early Modern Europe," in ibid., p. 54.

8. Ibid., p. 42.

9. Geoffrey Best, *Humanity in Warfare* (New York: Columbia University Press, 1980), p. 60.

10. See works of Francisco de Victoria, Balthazar Ayala, Alberico Gentili, Hugo Grotius, and others cited in Adam Roberts and Richard Guelff, *Documents on the Laws of War,* 3d ed. (Oxford: Oxford University Press, 2000), p. 3, note 7.

11. The Concert of Europe provides the classic example of this effort. See Henry Kissinger, *Diplomacy* (New York: Simon & Schuster, 1994), p. 78ff.

12. ICRC history, online at http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList2/About_the_ICRC:History.

13. See Brian Loveman, "Guerrilla Warfare," in Joel Krieger, ed., *The Oxford Companion to Politics of the World* (New York: Oxford University Press 1993), p. 373.

14. While the United Nations Charter limits self-defense to situations of armed attack, some have argued that traditional ideas of self-defense may offer some support for preemptive action. See Yoram Dinstein, *War, Aggression, and Self-Defence* (Cambridge, England: Grotius, 1994).

15. Ian Brownlie, *Principles of Public International Law,* 5th ed. (Oxford: Oxford University Press, 1998).

16. See Statute of the International Court of Justice, Article 38, para. 1(d), citing "the teachings of the most highly qualified publicists" as a subsidiary means that the Court may use to determine the rules of law.

17. Tami Davis Biddle, "Air Power," in Howard, Andreopoulous, and Schulman, *The Laws of War,* p. 158.

18. Beth Osborne Daponte, "A Case Study in Estimating Casualties from War and Its Aftermath: The 1991 Persian Gulf War," *PSR Quarterly* 3, no. 2, available online at http://www.ippnw.org/MGS/PSRQV3N2Daponte.html.

19. See, for example, Adam Roberts, "Counter-terrorism, Armed Force and the Laws of War," *Survival* 44, no. 1 (spring 2002): 7–32.

20. John Arquila and David Ronfeld, *Networks and Netwars: The Future of Terror, Crime and Militancy* (Santa Monica, Calif.: RAND, 2001)

21. See, for example, Anthony Cordesman, *Terrorism, Asymmetric Warfare, and Weapons of Mass Destruction: Defending the U.S. Homeland* (Westport, Conn.: Praeger, 2002).

22. See Vincent J. Goulding, Jr., "Back to the Future with Asymmetric Warfare," *Parameters* 30, no. 4 (winter 2000/01): 21–30.

23. Arquila and Ronfeld, *Networks and Netwars,* p. 6.

24. See David Ronfeld and John Arquila, "What Next for Networks and Netwars?" in ibid., p. 311ff.

25. Adam Roberts, "Counter-terrorism, Armed Force and the Laws of War," in Social Science Research Council, *After 9/11: Perspectives from the Social Sciences,* available online at http://www.ssrc.org/sept11/essays/roberts.htm.

26. DOD Directive 5100.77, 10 July 1979, quoted in The Judge Advocate General's School, *The Operational Law Handbook,* JA 422, July 1997, available online at http://www.cdmha.org/toolkit/cdmha-rltk/PUBLICATIONS/oplaw-ja97.pdf.

27. See 18 United States Code §2441 ("War crimes"). That statute applies expressly to members of the U.S. military who have committed violations of specifically identified international conventions.