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Introduction

Civility, Barbarism, and the Evolution of International Humanitarian Law

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For as long as wars have been fought, there have been rules that attempted to limit their occurrence and moderate their conduct. Beginning in the mid-nineteenth century, these rules have since developed into an almost universal system of customary and treaty laws determining under what circumstances states can go to war (*jus ad bellum*) and what constitutes acceptable conduct during war (*jus in bello*).

Modern *jus in bello* has two principal components: so-called Geneva law, which is mainly concerned with the protection of victims of armed conflict, and rests primarily on the four 1949 *Geneva Conventions* and the two 1977 *Additional Protocols*; and so-called Hague law, named in reference to the 1899 and 1907 *Hague Conventions*, which is concerned with controlling types of weapons and means and method of warfare. Historically, international humanitarian law (IHL) was used in reference primarily to 'Geneva' law; however, it has become the norm for IHL to incorporate both the 'Geneva' and 'Hague' dimensions of *jus in bello* law, and this is how the term is used and understood in this volume (McCoubrey, 1998, p. 2).

Attempts to moderate behaviour in war, as observed by John Keegan (2001, p. 26), are as old as war itself: while 'war may have got worse with the passage of time, . . . the ethic of restraint has barely been absent from its practise . . . Even in the age of total warfare . . . there remained taboos, enshrined in law and thankfully widely observed'. Up until the middle of the nineteenth century, attempts to restrain the use of force during conflict existed mainly as customary rules, often agreed to among warring (European) parties and, most importantly, generally existing without consistent punishments for violations of said rules and customs.

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The pre-World War I enthusiasm for laws designed to limit warfare was understandably quashed by the events of the Great War. The mood following the end of World War II, however, was discernibly different. Policy makers, scarred by two world wars and the Great Depression, set about the construction of a new, liberal world order, underpinned by the idea of 'never again', to be realised through the establishment of multilateral institutions. Of greatest significance with respect to IHL are the four 1949 *Geneva Conventions* (and the subsequent 1977 *Additional Protocols*). Indeed, the *Geneva Conventions* signal the beginning of a shift away from laws focused on belligerents towards 'humanitarian law', primarily concerned with the well-being and protection of individual war victims (Neff, 2005).[1] In the post-war era, so-called Geneva law has been complemented by humanitarian-focused progress in so-called Hague laws, with international conventions banning chemical and biological weapons, land mines, cluster munitions, and, most recently, a treaty that bans nuclear weapons (see United Nations General Assembly, 2017).

While *jus ad bellum* is not the focus of this book, the *jus in bello* 'cannot be properly understood without some examination of the separate body of rules which determines when resort to force is permissible' (Greenwood, 2008, p. 1). For much of the modern period, the *jus ad bellum* was recognised as the sovereign right of the state to go to war (Kreβ and Barriga, 2017, p. 1). Indeed, up until the end of World War I, attempts to bound warfare in a legal framework had focused primarily on the *jus in bello*. The horrors of the Great War, however, served to focus policy makers' attentions on efforts to place legal restrictions on future resorts to war; 'to replace the anarchic Hobbesian world with a more regulated order' (Neff, 2005, p. 285). In the interwar years, these efforts were realised first through the League of Nations Covenant, which focused on the provision of mechanisms to prevent war, and second through the 1928 *Pact of Paris* (also known as the Kellogg–Briand Pact), which explicitly condemned 'recourse to war' for the solution of international disputes, combined with a renunciation of war 'as an instrument of foreign policy' (cited in Neff, 2005, p. 294; see also Hathaway and Shapiro, 2017). In the contemporary era, the use of force is prohibited under Article 2 (4) of the United Nations (UN) Charter. Overcoming the

[1] For Robert Kolb (2013, p. 45), the importance of the Geneva Conventions was far-reaching: 'The Law was now clearly influenced by the idea of a thorough international codification of mandatory norms of behaviour imposed on belligerents.'

limitations of both the Covenant and Kellogg–Briand Pact (see Neff, 2005, pp. 285–313), the Charter bans all resorts to armed force, except in the case of individual or collective self-defence (Article 51 of the UN Charter) or when authorised by the UN Security Council (arts. 43–48 of the UN Charter).

International legal positivists tend to stress that the two bodies of law are distinct from each other and that irrespective of the merits of resort to force consistently with, or in violation of the *jus ad bellum*, all parties to an armed conflict are bound equally by the *jus in bello* in the conduct of military operations. This distinction may be fine in theory, but it constitutes a superficial analysis of some contemporary realities that reveal significant overlap between the *jus ad bellum* and *jus in bello*. Frédéric Mégret's 'original sin' concept not only exposes such an over-simplification but also serves as an informant for the ideas and themes explored in this volume; in the rush to embrace the humanitarian imperative underlying the late nineteenth-century emergence of the *jus in bello*, contemporary scholars often conveniently overlook that the colonial powers that developed multilateral legal constraints on the waging of war in the name of humanity and civilisation only did so on the basis that it applied to war between civilised peoples, and certainly not to war involving 'uncivilised savages' (Mégret, 2006, pp. 265, 268). Indeed, the historical exclusion of 'uncivilised savages' from the protection of the newly emergent multilateral humanitarian constraints on the waging of war again rears its unprincipled head in the justification of the endless global war on terror. Western liberal democracies, and the United States in particular, justify their resort to lethal military force on the basis of the *jus ad bellum* ('the terrorists dared to attack us') but then justify the non-extension of the protections of the *jus in bello* on the basis of the 'lawlessness' of terrorists, who disregard all notions of human dignity (these are 'unlawful combatants' who have forfeited their rights of protection under the law). This rationale, used for the denial of prisoner of war status and to justify torture of detainees, is the twenty-first-century manifestation of the nineteenth-century 'uncivilised savages' concept. And, just as the supposedly 'civilised and humane' descended into savagery in their wars against indigenous peoples, so too the self-declared defenders of the dignity of humanity have descended into their own terrorising savagery in dealing with the 'terrorists'.

There are a couple of points worth making with regard to this short chronology of attempts to moderate and restrain war via international legal frameworks. The first concerns the extraordinary speed of change:

when one considers the historically central (and generally accepted) role that war played in maintaining international order, and the degree to which war was a legitimate way of righting wrongs, the relative alacrity with which war was delegitimised as a tool of statecraft through a period of no more than fifty years is extraordinary. Similarly, where once only the state exercised jurisdiction over the definition and prosecution of war crimes committed by its citizens or on its territory, the establishment of new judicial mechanisms, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), and more recently the International Criminal Court (ICC), provides evidence of a progressive 'movement away from a legal system in which states are the sole legal subjects' (Reus-Smit, 2004, p. 7).

The second point is also historical. In the period between the late nineteenth century and the end of World War II, there was general parity in the development of humanitarian efforts to progress the *jus in bello* and *jus ad bellum*. Since 1945, however, there has been uneven progress of the law. Nowhere is this more evident than in the case of punishing violations of these laws. High-profile *jus in bello* prosecutions at the ICTR, ICTY, ICC, and various special tribunals are contrasted with an absence of prosecutions for violations of *jus ad bellum* law.[2] Given the profound significance of the Nuremberg and Tokyo War Crimes Trials on the subsequent development of international criminal law, and the overwhelming focus of both trials on the crime of aggression as the pre-eminent crime on trial, the more recent atrophying of a multilateral commitment to accountability for the crime of aggression in the face of spectacular advances in the prosecution of war crimes is staggering. The current proposal for an ad hoc international tribunal to try Russian leaders for the crime of aggression undoubtedly represents an opportunity to reinforce the normative prohibition on violations of the *jus ad bellum*. But that same proposal is also fraught with the unsettling reality that Western nations would relish the prosecution of Russian leaders but perhaps not at the risk of subjecting themselves to similar processes in the future wars that they initiate unlawfully. While the state has acquiesced (to a degree) to being held to account for the worst violations of IHL at a level beyond the state, it continues to resist efforts to be held responsible by supra-state legal mechanisms for going to war.

[2] There is the potential for this situation to change now that the defined crime of aggression falls within the jurisdiction of the International Criminal Court (see Kreβ and Barriga, 2017).

There is also a degree to which the historical epoch in which the modern laws of war were created compounds the tension identified above. As war fighting in continental Europe became increasingly monopolised by the emerging nation-state, so too was the consent of nation-states a key principle in the establishment of mechanisms that sought to place legal boundaries around organised violence (Killingsworth, 2016, p. 101). Thus, for much of the modern period, states regarded the right to conduct war as a legitimate tool of statecraft; commenting in 1880, German Field-Marshall-General Count von Moltke wrote that 'war is an element in the order of the world ordained by God' (cited in Phillipson, 2015, p. 139).

The nature and character of war means that there have always been limitations to the efficacy of laws of war in limiting and moderating conflict. Current events, though, reveal these limitations more starkly than even before. The illegal invasion and subsequent annexation in 2014 of Crimea by Russia and more recently the illegal invasion of Ukraine and the purported Russian annexation of the Donbas provinces in Eastern Ukraine; the horrific and repeated violations of IHL in Syria, Ukraine, and Afghanistan, including the targeting of civilians and medical facilities, the use of torture, the recruitment of child soldiers, widespread rape – particularly of women – and the use of barrel bombs and chemical weapons; all serve to create scepticism, even despair, about the existence of any effective constraints on the waging of war.

Similarly, when one considers the nature and character of war, it is understandable that the evolution of attempts to moderate and constrain warfare through recourse to international law is replete with contradictions and tensions: discord between the growing language of humanity juxtaposed with ongoing atrocity, discord between multilateral mechanisms of accountability and ongoing impunity for violations of the law, and military operations conducted in compliance with the law which nevertheless result in extensive loss of civilian life.

In appreciating the institutional perpetuity of war, while simultaneously acknowledging the historically informed, inherent limitations of attempts to bound its conduct by international law, this book aims to provide answers to the following three, interrelated questions: first, is there an historical continuity with legal protections in war being informed by notions of 'civility' and 'barbarity'?; second, what is the relationship between the ideals and operational realities in IHL?; and third, what are the limitations of international laws designed to restrain excess in war?

The first question that the volume addresses is underpinned by two interrelated concepts that emerge in nineteenth-century Europe: humanitarianism and civilisation.

There is a tendency for over-simplification on the origins of the laws and customs of war – often by claiming that the starting point for the international legal regulation of the *jus in bello* is the 1864 *Geneva Convention*, the first multilateral treaty regulating the conduct of war. Occasionally, there is a concession to the existence of antecedent cultural values favouring constraints on the conduct of war in all human cultural, legal, and religious traditions – a convenient way of demonstrating the universality of humanitarianism in the conduct of war and, therefore, of substantiating the inevitability of the advent of the *jus in bello* in the late nineteenth century. One significant benefit of the cross-disciplinary nature of the current volume is a more wholistic and nuanced approach to the historical origins of the *jus in bello*. When the terms of the 1868 *St Petersburg Declaration* were negotiated, for example, repeated references to the 'laws of humanity' as a counterbalance to the necessities of war was not simply some amorphous humanitarian aspiration. In this volume's second chapter, Daly's exploration of the history of the law of siege warfare – particularly in eighteenth-century Europe – provides an excellent example of what the drafters of the *St Petersburg Declaration* meant by 'the laws of humanity': a town under siege that surrendered would be spared but a failure to capitulate, and the mounting of an 'obstinate defence', invited a violent three-day sack.

Of course, to use Rain Liivoja's inciteful phrase, there are 'challenges inherent in funnelling broad ideas of military necessity and sentiments of humanity into technical legal language'. Liivoja refers specifically to the rule prohibiting superfluous injury or unnecessary suffering as a 'vivid' example of what he is referring to, but his observation also has general application. It is challenging to formulate rules to strike a balance between military necessity and humanity, but that technical legal drafting challenge is symptomatic of the much broader paradox that attempts to moderate and constrain war through international legal means represents. This paradox is primarily due to the inherent tension between war and law: 'law implies order and restraint, war epitomises the absence of both' (af Jochnick and Normand, 1994, p. 54). Vec, in the volume's third chapter, claims that 'the progress narrative often attached to [international humanitarian law] is misleading, primarily due to the failure to acknowledge the inherent complexity of this narrative. The juridification was said to humanise warfare but . . . it also served to legitimate aggression, violence and warfare'.

The turn to humanitarianism that purportedly underpins the development of contemporary, codified international laws of war is also underpinned by a liberal-informed notion of universalism; all parties to an armed conflict – both states and non-state armed groups – are responsible for complying with the requirements of IHL. But, as Devetak identifies in Chapter 4, humanitarianism, as part of a broader 'civilising process', underpinned by a 'growing moral sentiment to alleviate human suffering on the battlefield', has limitations; moral sentiments are inherently ambiguous in their transference to the political domain and in their contribution to 'civilising processes', the result being a somewhat empty Western claim to civilisation.

The second informant, civilisation, came to be associated in its nineteenth-century usage with the idea of progress 'and the theory that nations advance through different stages of development' (Obregon, 2012, p. 917). Europeans increasingly came to use the term as a comparative 'other', believing they were 'endowed with an advanced level of social complexity, in opposition to "barbarous" nations, who could possible acquire civilisation if they conformed to certain values, or "savages", who were condemned to never access it' (Obregon, 2012, p. 917). Writing in 1758, and articulating the principles of non-combatant immunity, eminent Swiss jurist Emer de Vattel (2008, pp. 549, 562) argued that the existence of the rules of war 'is so plain a maxim of justice and humanity, that at present every nation, in the least degree civilised, acquiesces in it', and violators of them should be regarded as 'the enemy of the human race'. Intriguingly, Vattel is explicit in his qualifier that only citizens of civilised states are extended the protections of the law. This is further reinforced when Vattel writes that 'when we are at war with a savage nation, who observe no rules, and never give any quarter, we may punish them in the persons of any of their people whom we take' (de Vattel, 2008, p. 544).

Writing seventy years later, the Prussian military theorist, Carl von Clausewitz (1976, p. 14), argued that it was not the laws of war that moderated behaviour but rather the social 'status' of the belligerents:

> If wars between civilised nations are far less cruel and destructive than wars between savages, the reason lies in the social conditions of the states themselves and in their relationship to one another. These are the forces that give rise to war, the same forces circumscribe and moderate it. They themselves, however, are not part of war; they already exist before fighting starts.

For Vattel, being civilised was the criteria upon which protections under the laws of war were extended. Similarly, Clausewitz assumed that civilised nations are more likely to display restraint in their warfighting conduct. But this assumption is neither entirely modern nor in any sense accurate. As Mégret (2006, p. 294) observes regarding colonial wars against indigenous peoples:

> Ironically, what came to haunt European nations was not the warfare of the 'savages', as had been feared. Rather, it was the West's own savageness, revealed to itself in the process of repressing the colonial 'other'. Wars of colonization kept alive the savagery within that the laws of war were supposed to have expunged. . . . In the end, it was less the 'savages' who were 'civilized', than the 'civilized' who 'savaged' themselves, through no responsibility other than their own.

Again, we are reminded of Mégret's concept of an 'original sin': that the colonial powers that developed multilateral legal constraints on the waging of war in the name of humanity and civilisation only did so on the basis that it applied to war between civilised peoples and certainly not to war involving 'uncivilised savages' (Mégret, 2006, pp. 265, 268). In Chapter 5, McCormack, Galea, and Westbury discuss this major limitation on the scope of 'humanity' as a constraint on the waging of war in this volume and identify some of the profoundly devastating consequences for indigenous opponents in nineteenth-century wars.

Engaging further with the artificial distinction between 'civilised' and 'barbarian' in Chapter 6, Killingsworth explores the 'standard of civilisation' concept and argues that its application reveals a degree of continuity with regard to protections afforded to belligerents and non-belligerents determined by subjective notions of 'civilised' and 'barbarian'.

The second and third questions that the volume seeks to answer are informed by a number of different critiques of the laws of war. The first, and perhaps most hackneyed, is that the laws of war do not work. Such criticisms are part of broader dismissals of the efficacy of international law, underpinned by John Austin's assumption that law is – and can only be – an expression of state power (Austin, 1832, p. 47, 207). Even when reluctantly admitting that international law might have some efficacy, its critics argue that it is only as a reflection of pre-existing interests of, and power between, states (see Goldsmith and Posner, 2005). Yet the laws of war clearly do work. As Best notes, 'almost all international wars, and some major civil wars, since the eighteenth century have been softened by the operation of the law of war' (Best, 1980, p. 12; see also Solis, 2010,

pp. 9–10). Nonetheless, as Sutton identifies in Chapter 7, engaging with questions as they relate to universality and efficacy, there remain tensions as to the degree to which IHL is interpreted as 'Western' law.

The second critique concerns what could be regarded as an update of Immanuel Kant's 'sorry comforters' criticism of Vattel, Hugo Grotius, and Samuel Puffendorf; the laws of war legitimate activities that should otherwise be prohibited (Kant, 1971, p. 171). As identified above, the modern laws of war are informed by the nineteenth-century turn to humanitarianism; thus, it remains difficult to reconcile that conflicts conducted in accordance with the laws of war can still bear witness to civilian loss of life. Borrowing from Best (1980, p. 15), the contributors to this volume accept war as a regrettable occurrence that should ideally be reduced in time to non-existence, and in the meantime, acknowledge that 'restricting the extent of its horrors by observing the laws and rules of war 'will continue to do more good than harm'.

Another element, identified by Christine Chinkin and Mary Kaldor (2017, p. 3), is that the laws of war, constructed in the nineteenth and twentieth centuries, rest on an outmoded conception of war drawn from the experience of European wars: 'interstate clashes involving battles between regular armed forces'. Chinkin and Kaldor offer ahistorical assessments of the laws of war. For as long as the laws have existed, they have been violated. Furthermore, as Shaw identifies in Chapter 8, criticisms of the laws of war that rest on the changed nature of belligerents are a proverbial strawman; using private military companies and contractors as an example, she argues that 'firms within the industry do not operate beyond the bounds of legal recourse'. Rather than rendering them useless, the laws of war continue to provide a framework by which unacceptable behaviour and illegal acts can be determined.

The critique informing the third question concerns the degree to which changes in the way that wars are fought render modern laws of war unfit for purpose. This assessment has a number of elements to it, some of which are addressed in this volume. One element concerns new technologies in warfare. As Rain Liivoja, Kobi Lens, and Tim McCormack point out: 'advances in science and technology have had a major impact on the conduct of war throughout history . . . the question arises as to whether it should be accompanied by a "revolution in military legal affairs"' (Liivoja, Lens and McCormack, 2016, p. 603). In Chapter 9, Liivoja, engaging with the concept of superfluous injury or unnecessary suffering, considers the origins of the rule in question, and how key aspects of the rule are interpreted. The chapter then examines one of

the more contentious issues about the rule, namely whether it is only concerned with the inherent properties of particular weapons or whether it also deals with the use of weapons generally.

A final element as it relates to the third question addressed in this volume concerns prosecuting violations of IHL. As noted above, the evolution of supranational legal mechanisms to prosecute so-called atrocity crimes (including gross violation of the laws of war) when states were either unwilling or unable to prosecute was a critical moment in the longer evolution of the laws of war. But as the final two chapters identify, prosecutions of gross violations of IHL become problematic when reality conflicts with the neat boundaries prescribed by the Geneva Conventions. In Chapter 10, Grey poses the question of what legal protections young women and girls who, over the course of a single conflict, may occupy the roles of a child, a civilian, a combatant, a killer, a victim of sexual violence, and/or a mother, enjoy in theory, what these protections offer in practice, and what this means when prosecuting gross violations of the laws of war? Focusing on the activities of the ICC, Kersten, in Chapter 11, identifies a number of limitations, and subsequent solutions, for the Court to bring the 'civility' of international criminal justice to the 'barbarity' of modern violent political conflicts.

The contributions to this volume are united in acknowledging the indispensability of laws of war, while also being acutely aware of their imperfections. Appreciating the contested and pejorative nature of the terms 'civility' and 'barbarism', we have not sought to define either of these terms. Rather, through historical, political, and legal lenses, each of the contributions draws a range of conclusions about the degree to which 'civility' and 'barbarism' are valuable concepts when seeking to understand the distinction between who should be, and who actually is, afforded protections under IHL.

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