

Redrafting Perpetual Peace: Essay VI

Article VI. — “No State at war with another shall adopt such modes of hostility as would necessarily render mutual confidence impossible in a future Peace; such as, the employment of Assassins (percussores) or Poisoners (venefici), the violation of a Capitulation, the instigation of Treason and such like” (Immanuel Kant, Perpetual Peace: A Philosophical Sketch).

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According to Kant, “some confidence in the character of the enemy must remain even in the midst of war, as otherwise no peace could be concluded and the hostilities would degenerate into a war of extermination.” In other words, accepting the inevitability of war, following a code of conduct during armed conflict distinguishes legitimate from illegitimate warfare. Remarkably, Kant envisioned the heart of the modern laws of war, or *jus en bello*, now codified in the Geneva Conventions and their Protocols and further reflected in customary law. At the same time, neither Kant nor the authors of the Geneva Conventions envisioned how contemporary means and actors in armed conflicts have threatened the central efficacy of the normative framework for lawful combat. This brief essay suggests how the ideas embedded in Kant’s Preliminary Article 6 might be embellished to accommodate some verities of our contemporary world.

First, Kant and the *jus en bello* did not anticipate the emergence as a significant contemporary phenomenon asymmetric warfare perpetrated by non-state entities, including terrorist groups. Second, the laws of war do not for the most part reach the now-widespread use by sovereigns of non-uniformed personnel as surrogate fighters. Finally, the recent growth of jihadist violence shows that the Western *jus en bello* was rejected and the equally humane Islamic law of war hijacked by dissident insurgents bent on bastardizing Islam to justify their violence against civilians. While Kant could not foresee the late twentieth century divergence of Islam and western laws of war, the responsible States – western and Muslim-majority – are culpable in not assuring that harmonious principles of humanity in wartime were shared, understood, and practiced across cultures.

Does Law Matter in Wartime?

Cicero is credited with saying “*silent enim leges inter arma*”—in times of war the laws fall silent.[i] Cicero was correct, literally, but even in biblical times, when war was a quotidian occurrence, informal guidelines limited armed combat. Early Roman military codes recognized criminal offenses. Egypt agreed with neighboring states on standards for treating prisoners, and the Hindu Code from around 200 B.C. forbade some kinds of weapons.[ii] By the feudal period, knights and nobles practiced rules of chivalry, based on a duty to act honorably even in time of war. Throughout human history, however, the law has been reactive, catching up episodically to provide legal guidelines based on lessons learned from the last

war. Yet Kant had the wisdom and judgment to see that law can and should embody our noblest objectives and serve to inspire the people to further its normative aims—in this instance serving humanitarian goals of protecting civilians from the ravages of war.

There remains great skepticism that law matters in regulating warfare. Even after codes for the battlefield began to emerge in Europe in the sixteenth and seventeenth centuries, leading to the required return of prisoners in the 1648 Treaty of Westphalia, Clausewitz opined that the laws of war are “almost imperceptible and hardly worth mentioning.”^[iii] Yet the laws remain the most hopeful instrument we have for retaining a civilization in the face of the so-called necessities of war.

States and their armies developed battlefield codes over time, and a customary law of war based on state practice emerged alongside the codes. After Kant’s death, by the mid-nineteenth century, the British Articles of War were codified, and the first significant American code was written by Francis Lieber for the eventually victorious Union forces. Lieber’s *Instructions for the Government of Armies of the United States in the Field* (1863) essentially codified what was then the customary law of war for soldiers fighting on the battlefield.^[iv] The success of the Lieber Code is demonstrated by its adoption in similar forms in several countries in Europe, Russia, and Argentina. Meanwhile, the 1868 St. Petersburg Declaration Renouncing the Use in War of Certain Explosive Projectiles became the first multilateral treaty banning a particular weapon.

Following a signing ceremony in the Netherlands on 18 October 1907, the Hague Conventions Respecting the Laws and Customs of War on Land required state parties to “issue instructions to their armed land forces in conformity with the present convention.”^[v] Another article in the same document made clear that the rules of the Convention apply only to wars between state parties, and yet another stipulation limited the Hague rules to state militaries, a subset of states’ nationals defined as “lawful combatants”—a category evolved in customary law from the pre-Middle Ages practice of treating as enemies all inhabitants of another state.^[vi] Thus, over time the *jus en bello* developed from Clausewitz’s Eurocentric conception of war based on symmetric conflicts between state armies of roughly equal military strength and of comparable organizational structures.^[vii]

As the rules evolved, the *jus in bello* prescribe rules for the conduct of military operations during armed conflict, including standards for the protection of civilians, civilian objects, and other protected entities. The rules humanize war by setting criteria and limits on such issues as who and what may be targeted, how targeting may be executed, the weapons that may be used, how prisoners of war and other detainees must be treated, and the rights and obligations of occupying forces. World Wars and myriad other military conflicts large and small occurred throughout the twentieth century. However, the legal regimes for limiting the use of force on the battlefields—the Hague and Geneva Conventions and their Protocols, some specific multilateral treaties, and emerging customary law—continued to lag behind changes in armed conflict.

Postmodern War: Asymmetric Warfare Waged by Non-State Actors

It has been evident at least since the biblical story of David and Goliath that military conflicts may be unequal or asymmetric. Yet the laws of war do little to accommodate the asymmetric form. Sixty years ago, following extensive revision to the Geneva Conventions, the decision makers and military leaders of the nations of the world agreed that the Common Articles codified in the revised 1949 Geneva Convention constituted the exclusive threshold criteria for triggering the laws of war. Under Geneva, there are two kinds of wars: interstate (or international) armed conflicts and intra-state (or internal) armed conflicts. The former invoke the full panoply of the laws of war, which in turn regulate the conduct of war (through the principles of distinction, proportionality, and military necessity); the latter do not trigger all the regulations for the conduct of war but provide limited humanitarian protections for civilians and those captured or detained.

The Geneva provisions fail to account for non-state fighters, first, by providing a regulatory scheme designed for wars between states, except for minimal protections for those involved in non-international armed conflicts that may include non-state belligerents. Second, the Geneva criteria for earning the status of a lawful combatant are defined on the model of the state soldier. Requirements include a responsible command structure, wearing a fixed insignia recognizable at a distance, carrying arms openly, and conducting operations in accord with international humanitarian law. One byproduct is that only persons meeting these criteria gain full prisoner of war (POW) protections under the Conventions. It is virtually impossible for non-state actors to meet these criteria and, thus, to become lawful combatants under the *jus en bello*. Because the laws of war include a “combatant privilege,” a form of legal immunity for acts that would be criminal if performed during peacetime, non-state actors may neither engage in lawful combat nor be its deliberate target.

The challenges posed to the laws of war emerged as weaker, non-state combatants use forbidden tactics to offset their military disadvantage, and as irregular warfare becomes a common means for weaker parties to achieve political goals that they could not accomplish through established channels. Because the Geneva Conventions and Protocols do not account for non-state groups waging transnational attacks or prolonged campaigns of terrorism, modern battlefields may lack enforceable codes of conduct. When defending states and victims on both sides of the conflict find themselves without rules for dealing with insurgent groups operating within civilian populations and using tactics that blur the lines between soldiers and civilians for their strategic or tactical ends, the negative consequences are felt by the most vulnerable.

Asymmetric warfare is a central feature of twenty-first century global affairs. By the turn of this century, some observers began to recognize, as did General Sir Rupert Smith, that instead of a “linear process” where “peace is understood to be an absence of war . . . we are in a world of constant confrontation.” In today’s wars, Smith opined, civilians “are part of the terrain of your battlefield . . . [and] war is directed against non-combatants.”^[viii] Indeed, we live in an era of postmodern warfare. If modern war was interstate and typically large scale between professional state armies, postmodern warfare discounts the value of overwhelming force, traditional battlefield tactics, and even technological advances, and

substitutes equally lethal, smaller scale, urban-based war among the civilian populations. Postmodern war can be just as significant strategically as modern war, and its effects on a political order just as profound. Insurgents, after all, reject the existing political order.[ix]

Existing legal frameworks are not sufficiently nuanced or nimble enough to accommodate postmodern conflict forms. For example, Protocol I of the Geneva Conventions forbids indiscriminate attacks, defined as “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”[x] Focusing on “military advantage” may be an insufficient marker in postmodern warfare. In insurgencies those in non-combat roles may be as integral to the success of the insurgents’ cause as the fighters. Those who provide shelter, cook food, deliver messages, and the like create for the counterinsurgency force a dilemma, where the need to separate insurgents from the population requires dealing with civilians using military force. Is a civilian internet service provider (ISP) or radio station that spreads the insurgents’ propaganda directly participating in hostilities under the laws of war? Probably not. Are its personnel subject to targeting? To arrest and detention? To what extent should the chance that targeting or arresting the ISP or radio station owner will inflame the insurgency factor into making the operational decisions?

The trend in postmodern warfare has been for these adaptations to traditional *jus en bello* to take the form of operational law, or policy add-ons to the laws of war. Indeed, operational law has outpaced treaty-based legal developments and case law. It is not surprising that commanders in the field and their legal advisers would be the first to come to grips with the need for a reshaped legal paradigm in combating postmodern warfare. Nor has it been unhealthy for the reshaping to take the form of operational law standards. Going forward, however, nation states should assume full accountability for reshaping the framework for conducting postmodern warfare and adopt a new set of principles and guidelines, through states’ political processes and at their highest levels.

In asymmetric conflicts between states and non-state entities, is there a middle ground between law enforcement and armed conflict regimes to guide states and to determine when a state is justified in using force? For states, we offer combatants POW status, which is difficult to apply to non-state groups due to definitional conundrums in the laws of war. Likewise, the war crimes regime serves as a negative incentive, though it is not strong enough to deter fanatics. In creating incentives for non-state entities to buy into the laws of war system, are there innovative ways to structure legal relationships in asymmetric war? Are there other incentives—to punish non-compliance, and to reward compliance?

Regulating the New Warriors: Insurgents, Terrorists, and Contractors

The laws of war and accompanying policies should be clarified to take into account basic definitional dilemmas that arise in asymmetric conflicts. The most complex issue involves defining the terms ‘combatant’ and ‘civilian.’ These status issues, in turn, lead to critical examination of what is meant by such related designations as ‘lawful combatant,’ ‘unlawful combatant,’ and ‘taking an active part in hostilities.’ Should the law classify terrorists as combatants, civilians, or neither? What about insurgents?

If the law classifies these actors as combatants or some third category, is mere membership in a terrorist organization or insurgent group enough to identify an individual with an organization that acts in violent or destructive ways? Should we give terrorists POW privileges? These status designation issues call for exercise of the fundamental conceptual tools needed to adapt the law to the current conflict environment. How may we improve upon some of the open-ended, subjective, or historically outdated standards that underlie humanitarian law? For example, it is very likely that more concrete guidance can and should be provided on how to carry on a conflict in and around protected sites. Likewise, proportionality in asymmetric warfare could also be more clearly spelled out by establishing a set of criteria or pre-conditions for a proportionate military response. More controversially, should the threshold distinction between “international” and “non-international” armed conflict be delinked from the question of state status?

What should be the roles and legal status of new nontraditional actors—private security companies, child soldiers, NGOs, among others—that increasingly play a prominent role on the battlefield in asymmetric conflicts and in post-conflict settings. How the law takes into account the role of private security contractors in the asymmetric setting has become a high-profile and controversial issue since the 2007 Baghdad incident at Nisour Square where contractor security personnel shot unarmed civilians. Military contractors in Iraq and Afghanistan have played much more than support roles and have been present in battle zones, especially as downsized militaries task them with broader responsibilities. Likewise, military contractors have played a significant role in interrogation in ways that may skirt law of war provisions. What legal obligations and responsibilities do private contractors have, what protections do they deserve under humanitarian law, and what are the obligations of states that hire them regarding their conduct? Since being inside or outside the strictures and protections of the laws of war depends largely on these threshold determinations of armed conflict type and combatant status, working toward modifying or replacing traditional categories with ones that can reach some non-state actors may also very well include contemplating the range of new actors on the battlefield.

Jihadists Hijacking Islam

People have always killed other people in the name of God, although closer examination of the religious wars reveals that the *causae belli* were in fact secular. Kant undoubtedly recognized that the interplay of religion and culture plays an important role in establishing norms for regulating warfare and limiting its effects on victims. Yet Kant did not anticipate the contemporary hijacking of an extremist interpretation of Islam and the rejection of western laws of war in furtherance of the extremists’ political objectives.

Since Kant’s time, religion and culture have continued as major factors in national and international security. As religious and cultural practices transcend borders, their interplay creates dynamic contexts that shape how questions of conflict and peace are understood, practiced, and valued. Humanitarian attempts to regulate conduct in war has strong ties to the ethical philosophies that comprise post-Enlightenment humanism—the intrinsic value of human life, the role of equality and freedom in rights and dignity, and the importance of reason and conscience. Indeed, the *jus en bello* is a form of applied humanities, where cross-cultural understanding is necessary for effective policy creation and implementation.

Islam and Islamic leaders had a significant though mostly unacknowledged role in the early development of the *jus en bello* and the aggregate legal corpus of customary rules and treaties that regulate and limit the conduct of warfare between states. From the entry of the Ottoman Empire into the European legal system in 1856 through the first Hague Peace Conference in 1899, Islam heavily influenced the growing internationalization and humanization of the European laws and customs of war. Historians find this influence in Hugo Grotius's works on the law of combat, as well as Baron de Taube's 1926 course at The Hague that noted Islamic doctrine in the chivalric codes of the Crusades which were then passed on to the Christian church and into the modern laws of war. The role of Turkey and Persia in ratifying the 1864 Geneva Convention, Turkey's presence at the 1868 St. Petersburg Conference, and the crisis in the Balkans led to the recognition that the laws of war had to abandon their previously Christian doctrine. As Muslims and Islamic culture presented a classic "other" to be measured against European Christian states during this early period, the entry of Islamic states into the European system, forced a re-definition of the laws of war into secular terms. The Hague and Geneva Conventions and even the 1977 Protocol Additional to the Geneva Conventions continued to be influenced by Islamic participants and concepts.

By the 1970s, however, the Arab-Israeli conflict and various armed conflicts in colonial states brought signs of shifting attitudes among some Islamic states and Muslim groups toward western laws of war. Skepticism about the *jus en bello* grew, and some began to consider Islamic law as an alternative. Following the Islamic Revolution in Iran, the Iran-Iraq war of 1980-1988, and the gender controversy in negotiating the Rome Statute of the International Criminal Court, some Muslim-majority states and new non-state groups openly rejected the western laws of war in favor of a radical form of Islam in shaping their approaches to war. Instead of weakening the military forces of the enemy, the objective in war became to manifest one's faith through the spilling of one's own, or an infidel's, blood. As the growth of radical jihadist terrorism directed at states and their citizens came to dominate discourse in the 1990s and especially since September 11, discussion about Islam as a source of law of war principles virtually disappeared.

Based on their disparate heritage, western laws of war and Islamic law differ fundamentally in their methods and sources of legitimacy and authority. Do fighters and those who make policy decisions leading to armed conflict owe their fealty to laws enacted by secular institutions, or to Allah? Are soldiers involved in a religious and identity-defining process? To what extent are the *jus en bello* and Islamic law harmonious on such core principles as combatant status, protection of civilians, treatment of detainees and prisoners, proportionality, reciprocity, perfidy, and protection of property? While it is true that diverse Islamic traditions and methods of reasoning from authoritative sources in relation to armed conflict are now well known, our understandings of the relationship between Islam and western laws of war is limited. How might the shared history and conceptual landscape between the *jus en bello* and Islam provide the basis for a cooperative enterprise between the traditions that could address present gaps in the law, such as the lack of standards for dealing with irregular armies and the inability of the law to accommodate asymmetric forms of conflict by non-state entities against states. To be sure, making progress in exploring commonalities in western and Islamic laws of war will rely on what the eighth century jurist al-Awzai emphasized: approaching the law as a "living tradition," the uninterrupted and

intergenerational practice of adapting approved legal precepts to contemporary circumstances. Fortunately, western *jus en bello* depends heavily on the very same organic legal tradition. It will thus be essential for twenty-first century reformers to abandon the tendency to reduce Western and Islamic legal traditions to static or monolithic constructs by recognizing each as complex, dynamic, and plural. Western and Muslim-majority states shoulder the pressing burden of publicly endorsing and then working to implement shared humanitarian codes of conduct during wartime that reflects the best of our shared traditions.

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- [i] M. Tullius Cicero, The Speech of M. T. Cicero in Defence of Titus Annius Milo, *The Orations of Marcus Tullius Cicero*, literally translated by C. D. Yonge (1891), (London: George Bell & Sons). For the original Latin, see M. Tullius Cicero. M. Tulli, *Ciceronis Orationes: Recognovit brevique adnotatione critica instruxit Albertus Curtis Clark Collegii Reginae Socius*. (Albert Curtis Clark. Oxford. e Typographeo Clarendoniano, 1918). Scriptorum Classicorum Bibliotheca Oxoniensis.
- [ii] See generally John Keegan (1993), *A History of Warfare* (New York: Knopf).
- [iii] Carl von Clausewitz (1982), *On War* (A. Rapoport ed., London: Penguin), 101.
- [iv] U.S. War Department (1899), *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*, Series III, V3, 148-164 (Washington, D.C., Government Printing Office).
- [v] Article 1, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, <http://www.icrc.org/ihl.nsf/FULL/195>
- [vi] Article 2, Convention (IV) respecting the Laws and Customs of War on Land and Article 1, Annex to the Convention: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Article 1, <http://www.icrc.org/ihl.nsf/FULL/195>
- [vii] Von Clausewitz, *On War*, 101.
- [viii] Toni Pfanner (2006), "Interview with General Sir Rupert Smith," *International Review of the RedCross*, 864 (December), 720.
- [ix] See generally, Philip Bobbitt (2008), *Terror and Consent: The Wars for the Twenty-first Century* (New York: Knopf).
- [x] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.