

# The Erosion of Noncombatant Immunity in Asymmetric War

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The protection of noncombatants from direct, intended harm during armed conflicts is recognized as of major importance in both the law of armed conflict and moral thinking about war. Indeed, it has been a particularly distinctive feature of both the law and moral discourse on war since World War II, occupying a place of major importance in both. Asymmetric warfare, though, poses significant challenges to the effort to protect noncombatants in the way of war. In such warfare, recognizing noncombatants is not always clear, and each party to the conflict may have a different conception, up to and including denial that the enemy has any noncombatants. Moreover, the very definition of asymmetric warfare indicates that the means available and employed by each party in the conflict are different in character, so different standards may apply to the weapons used by each and to their targets. Another issue is accountability. Violations of noncombatant immunity may be punished as a war crime, but the irregular nature of the forces on one side in asymmetric warfare makes investigation and prosecution of suspected crimes extremely difficult. Consequently, soldiers in the regular force may be held to a higher standard than those in the force opposing them. This article explores issues posed by asymmetric war and irregular warfare more generally to the protection of noncombatant immunity, arguing that both the law and moral discourse need to adapt to meet these problems.

## Historical Background

War is inherently destructive of lives, property, and the fabric of ordinary life. For some people, this fact is ample reason to abolish war. A considerable body of literature

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making this argument reaches from Erasmus's *Dulce bellum inexpertis* (War is sweet to them that know it not) through literary and historical works reacting to the loss of life in World War I to antinuclear books like Jonathan Schell's *The Fate of the Earth*.<sup>1</sup> For other people, however, like the various kinds of advocates for total war throughout history, this inherent destructiveness is a virtue to be amplified in the entire subjugation or even elimination of the enemy. In contrast to both of these positions, all the major cultures of the world have produced moral and legal traditions as well as other institutional structures that undertake to restrain the destructiveness of war.

In the just war tradition as it developed in the medieval West, canon law between the late tenth and thirteenth centuries identified certain classes of people who should not have war made against them (i.e., not subject to direct, intentional attack): the clergy, members of religious orders, pilgrims on the road, women, children, the aged, the physically and mentally infirm, peasants on the land, townspeople, and innocent travelers, as well as their property. The reasoning here was straightforward. These classes of people do not normally take part in war and so should not have war made against them. If any individuals from any of these classes should engage in the war or give direct support to it in any way, then they forfeit their immunity.<sup>2</sup> In the period of the Hundred Years' War (midfourteenth through midfifteenth centuries), the chivalric code was absorbed into the developing tradition on just war, naming the same categories of people as noncombatants but adding provisions specifically concerning combatants. Knights taken prisoner in combat should not be killed but might be held as prisoners for ransom or released on parole (if they promised not to engage in the fighting for the duration of the war). Any nonknights serving in the enemy army, though, might be killed. This latter provision was actually an effort aimed at mitigation of war by limiting it to men of the knightly class, those properly socialized in how to fight and in whom they should properly fight.

In the modern period, the restraints on war defined in just war tradition provided the basis for the development of codes of military discipline and for a conception of customary rules for warfare—"the laws and customs of war." These in turn laid the foundation on which positive international law on war began to develop in the latter part of the nineteenth and early twentieth centuries.<sup>3</sup> Although the law of armed conflict in contemporary international law is defined by the agreement of states to be bound by the rules it specifies, this background in Western moral tradition remains visible in how the law is structured and what it contains.

The "regular"—that is, rule-defined—warfare established in this way fundamentally depends on the agreement of states. In the early development of positive international law regulating the conduct of war, the states signatory to the formal agreements were bound by the law. Those states, in turn, agreed to regulate their armies accordingly. The context assumed was a formally declared war involving parties to the agreement described as "belligerents" (i.e., states engaged in war).<sup>4</sup>

Other kinds of armed conflict were not addressed in the law at this early stage for major reasons. First, the deep historical precedent was to regard all such armed conflicts as unjust. The underlying just war tradition in Western culture had originated in an effort

to limit the right to use armed force in a violence-prone society by restricting that right to a temporal ruler with no temporal superior. Others who resorted to force were understood as acting unjustly and harming the peace of the society in question, whether they were persons internal to that society or external to it, projecting armed force across its borders.<sup>5</sup> As this moral tradition developed, it continued to regard any form of “private” use of armed force as inherently unjust, whatever the reason for it. One finds a particularly striking historical example in Luther’s explosive reaction to the German peasants’ rebellion of 1624, when he exhorted the German nobility to “stab, smite, slay” the peasants in arms without mercy—though earlier he had shown sympathy with the peasants’ grievances.<sup>6</sup> A decisive turning point in the historical tradition came in the American Civil War, when the Union decided—but only after spirited debate—to treat the Confederates as legitimate belligerents, not as rebels whose rights were not guaranteed by the “laws and customs of war” as understood at the time.<sup>7</sup> But the older way of thinking remained in the use of armed force against indigenous rebellions in the colonial wars of the later nineteenth century. This mind-set produced an unhappy legacy: the sowing of the seed of unlimited war in the collective memories of the peoples of former colonies, a seed that has borne repeated fruit and is exemplified today in the ongoing wars of Central and West Africa and in the attacks on civilians justified in the ideology of al-Qaeda and the behavior of those it has inspired.

### Protection of Noncombatants in Recent Law and Moral Discourse

As noted earlier, in its early development, positive international law on war held states responsible for any violations. A decisive shift in the law as to who is accountable, from states to individuals, begins with the war crimes tribunals after World War II. The first unequivocal language marking this shift appears in Article IV of the 1948 Genocide Convention: “Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.” Articles V and VI continue by spelling out the procedures for punishment of such persons.<sup>8</sup> The 1949 Geneva Conventions similarly identify individual persons to be held finally accountable for violations of any of the conventions though they make the contracting states responsible for their punishment.<sup>9</sup> The 1949 Conventions also took two other important steps away from previous assumptions about the international law regulating armed conflict, extending its requirements to parties in conflict even when they are not signatories of the conventions and to certain noninternational armed conflicts.<sup>10</sup> Finally, the 1949 Conventions offered the most fully developed legal regulations up to that time for treatment of the whole spectrum of persons who might be victims of war: not only combatants rendered hors de combat by sickness, wounds, shipwreck (at sea), or being taken prisoner but also civilians as a class (to which the whole of 1949 Convention IV is devoted).

The 1977 Protocols to the 1949 Conventions continue along the same trajectory, aiming to “reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application,” addressing both international armed conflicts (Protocol I) and certain forms of noninternational armed conflicts (Protocol II).<sup>11</sup> The protection of civilians in the way of war is particularly fully developed, with parties to an armed conflict required to “distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”<sup>12</sup> As this language suggests and the later definition of civilians clarifies, the term *civilians* here refers to those classes of people who in the moral literature are normally referred to as “noncombatants.”<sup>13</sup> Thus with the 1949 Conventions and the 1977 Protocols, the positive law of armed conflict has importantly converged with the concerns of the deeper moral tradition to mark off such classes of people and avoid direct, intended harm to them. This convergence is also signaled in another way. The requirement that civilians be distinguished from combatants has given rise to the idea of a “principle of distinction” between these two types of people, corresponding directly to the “principle of discrimination” generally used in recent moral discourse.

Although the first responsibility for enforcing the requirements specified here and punishing violations is placed on the parties to the conflict, the establishment of war crimes tribunals for specific conflicts and, ultimately, creation of the International Criminal Court have provided a legal framework beyond the level of the states for punishing persons who have violated the rules thus established. The Rome Statute of the International Criminal Court gives it jurisdiction over four categories of offenses: genocide, crimes against humanity, war crimes, and aggression.<sup>14</sup> Since, in practice, not all states can be relied on to enforce the rules against these kinds of actions, in a fundamental sense this is a logical next step following on the definition of such behavior in armed conflict as criminal and assigning responsibility for such behavior to the individual persons who have committed it. Creation of such tribunals also puts pressure on states to punish the sorts of violations listed.

Recent moral discourse relating to protection of noncombatants has by no means been so broadly gauged or so finely grained. That portion of moral discourse which is pacifist includes all that is done in war within its overall critique and condemnation of war as such as inherently evil. If we think of the three pillars of the recovery of the just war idea—Paul Ramsey’s two books from the 1960s, Michael Walzer’s *Just and Unjust Wars* a decade later, and the United States Catholic bishops’ pastoral letter *The Challenge of Peace*—both Ramsey and the Catholic bishops essentially left the matter of noncombatant immunity at the level of nuclear strategy.<sup>15</sup> For both, the focus was United States military policy and actions. They simply did not address how to transfer this reasoning in some way to limitation of the behavior of others in irregular warfare of the recent sort. Walzer’s development of his analysis by use of historical examples from various wars led him into more fine-grained considerations of whether someone is a noncombatant or not and exactly what protections are owed to noncombatants in various kinds of circum-

stances. In this vein, he extended requirements of the rule of double effect beyond where Ramsey had left the matter, introducing a third stipulation that the military act in question positively seek to avoid or minimize harm to noncombatants. However, this element was only one in a large study undertaking a more general exploration of the requirements of just war for modern war as a whole, illustrated by the historical examples provided. These illustrations were valuable for anchoring Walzer's reflections, but they look back in time. Further, in his discussion of noncombatant immunity, Walzer did not anticipate the ways irregular warfare has come to be fought.

If we think of more recent moral discussions of contemporary warfare, we find similar trajectories. Consider, for example, talks about the moral implications for non-combatants of dual-use targeting or drone strikes. Frequently such moral discourse has concentrated on showing the immorality of such practices, with the result that they effectively become an attack on how the United States makes war. So far as similar practices are adopted by other highly developed countries, they too become a target for the same criticism. Every war, though, has two sides (at least), and the protection of noncombatants is a matter of the policies and practices of all parties to a conflict. This includes the terrain of contemporary irregular warfare, which recent moral discourse has largely failed to engage. Although it is right to raise moral concerns about drone strikes that mistakenly or disproportionately kill civilians, the direct and intended targeting of civilians has become a common feature of irregular warfare of all sorts, and moral discourse has neither engaged this directly nor considered how to weigh it in calculations of proportionality when criticizing actions used against forces employing such means. The moralists here might well look to the example of the lawyers regarding the full range of discourse needed. Moreover, they might well do more to take into account the moral difference between directly and intentionally attacking civilians and harming them collaterally or by mistake when the direct and intended purpose of an action is an attack against a combatant target.

A significant influence on both moral reflection (particularly that growing out of the work of Walzer) and law in recent decades has been the growth in attention to human rights since World War II.<sup>16</sup> As statements of an ideal, the body of material defining various kinds of human rights is impressive, and protection of the rights identified transfers easily to parameters for the protection of noncombatants in the law of armed conflict and moral discourse on war. Yet, the ideal is not the same as the reality. There remain differences, some substantial, among the various international statements as to the nature of the rights defined; their sources; the protections given them; and the sanctions, if any, to be imposed on violators. Some of the disparities are grounded in cultural differences, including religious belief and practice as well as long-standing cultural mores. Some trace to particular political aims of individual states and blocs of states; others reflect the influence of nongovernmental organizations and private voluntary organizations on the shaping of given agreements. Not all the rights identified in the various international instruments have the same priority, and, indeed, it is difficult to know exactly how to chart the relative priority of all the kinds of rights identified. When one compares the protections explicitly given or implied in international human rights law to those in the international

law on armed conflict, the latter are clearly more specific and focused as operational guides. Increasingly, however, human rights law has come to be used as providing a broader frame and rationale for the protections and restraints set out in the law of armed conflict. For example, the offenses listed as “crimes against humanity” in Article 7 of the Rome Statute of the International Criminal Court include protections based in the various human rights agreements. In Article 8, though, “war crimes” are defined first in terms of specific violations of the law of armed conflict but then additionally defined by reference to the same offenses named in Article 7.<sup>17</sup> Yet, the fact remains that the differences referred to above make this much less a precise listing of rights-based offenses than it is intended to be.

The law of armed conflict has proceeded by establishing rules for the conduct of warfare, including the protection of noncombatants: the goal is “regular” or rule-governed warfare. At least thus far it has not entirely succeeded in this objective, but the framework it has defined is an impressive one. Fundamentally, even though for more than half a century the law has sought to hold individuals accountable for violations of the established rules, the law depends ultimately on the cooperation of states. The content of the law is itself understood to be the product of agreements among states, including the assent to be bound by the rules agreed to. In reality, of course, some elements of this framework of rules enjoy less general support than others, and states often disagree on the meaning of matters to which they have formally acceded. Further, states are not equal in their ability to enforce the established laws during circumstances of armed conflict. The rule-governed warfare the law seeks to create thus remains a goal rather than a completed achievement.

### Particular Challenges to Noncombatant Protection in Irregular and Asymmetric Warfare

The discrepancy between goal and reality is aggravated when one or more of the parties to an armed conflict ignores, denies, or overrides the rules—that is, in irregular warfare in all its forms, including asymmetric conflicts. The nature of irregular warfare presents serious challenges to the effort to limit the destructiveness of warfare by regularizing it. Four particular kinds of issues are especially problematic.

#### *Cultural Differences*

First, recent irregular warfare has frequently been defined in terms of significant cultural differences, particularly ethnic or religious dissimilarities or both, between the warring parties. When a conflict is framed in this way, from the perspective of each side all members of the enemy group—not just those persons who function as combatants—are perceived as equally enemies and may be deemed liable to be killed, driven out, or subjected to other damage. Examples abound, including the wars of the breakup of Yugoslavia; the Rwandan genocide of 1994; the Tamil-Sinhala conflict in Sri Lanka; the frequent, recent,

and ongoing wars in Central Africa; the simmering Pakistani-Indian conflict; and the terrorist activity of such groups as the Irish Republican Army and al-Qaeda. As a particular example, realist analysts have often tended to dismiss the religious element in al-Qaeda's actions, but doing so ignores the plain language of statements from its leaders, which describes an ongoing struggle on behalf of Islam itself against Western aggression.<sup>18</sup> The cause for war is depicted as religious, and all Americans and their allies are equally subject to being killed, with no distinction between combatant or noncombatant. The appeal to norms that transcend anything in common between the parties to the conflict effectively makes everyone identified with the enemy worthy of being attacked and killed: *all* Americans are guilty of attacking "Allah, his messenger, and Muslims." Al-Qaeda rejects efforts to provide for noncombatant protection defined not only in just war tradition and in international law but also in Islamic tradition.

What can be said against this? In the West, the horrors of religiously motivated warfare experienced in the Thirty Years' War led to the denial of religion as a justifying cause of war, beginning with the Peace of Westphalia. That denial carries over into international law, in which the only legitimating cause for a state to go to war is defense against "armed attack" or assisting another state in its own defense against such attack. So what is at stake in the claim that religion justifies attacks against civilians and military alike is both a denial of the combatant-noncombatant distinction and a denial of the effort to exclude religious difference from among the justifying causes for war. The same can be said for the claim that ethnic difference justifies war—indeed, justifies indiscriminate war—as exemplified, for example, by the Hutu massacre of Rwandans of Tutsi and mixed ethnicity in 1994. Quincy Wright observed several decades ago in his pioneering book *A Study of War* that war across major cultural boundaries is especially hard to moderate, and here we see this manifest in the denial that internationally recognized norms in fact matter in such warfare.<sup>19</sup> Reaffirming and enforcing these norms present a problem to the entire international community.

Exactly how best to do so, though, remains largely unaddressed and uncertain, as enforcement in particular would likely require more aggressive use of military measures against violators. But who is to do this? At this writing, French troops are in the Central African Republic assisting the government against insurgents who have routinely attacked civilians. Recently, French troops also intervened in Mali to repel advances by fighters from al-Qaeda in the Islamic Maghreb who, as they took over population centers, routinely attacked ordinary civilians. At the same time, though, the United States and Britain have withdrawn all troops from Iraq, and the Iraqi government has proven unable to offer secure protection to its population from al-Qaeda-affiliated insurgents; further, NATO nations have withdrawn their forces from Afghanistan, and United States forces are scheduled to withdraw in 2014. Except for France's willingness to intervene militarily as needed in former French colonies, no Western country today shows much interest in such military action, even in cases of serious humanitarian need. Nor do they have much room to do so in terms of international law. The iteration of the Responsibility to Protect doctrine that came out of the 2005 World Summit has restricted authority to intervene

for such purposes (except in cases of intervention by invitation, as exemplified by the French in the Central African Republic and Mali) to the Security Council. The council has authorized such action only once—in the case of the Libyan revolution—and has a much more general record of not acting. Nor does the institutional structure of United Nations peacekeeping operations provide much hope for the kind of robust military action that would be needed in cases of serious danger to a civilian population caught in the midst of irregular war, as memorably exemplified by the failure of peacekeeping forces in Rwanda at the time of the 1994 massacre to stop it or protect the victims.

### ***Distinction between Noncombatants and Combatants***

Even if all members of the enemy group are not regarded as equally subject to targeting, the question of exactly who is a noncombatant and who a combatant in irregular warfare may be unclear and, in practice, difficult or impossible to discern. In such warfare, combatants are typically attired in the clothes they would normally wear in their civilian lives; they may continue to live at home with their families or be sheltered and fed in friendly neighborhoods; they may move into and out of combatant functions frequently and seamlessly. Paul Ramsey once acidly commented that no just war thinker ever assumed noncombatants would be separated from combatants by roping them off “like ladies at a medieval tournament.”<sup>20</sup> In fact, though, medieval just war thinking proceeded by identifying classes of persons—including women as a class, not just “ladies at a . . . tournament”—normally to be treated as noncombatants. Ramsey’s observation may have been useful in the context in which he offered it (an argument for counterforce nuclear targeting and against counterpopulation targeting). Irregular warfare, though, is conducted by individuals and small groups of fighters in contexts where noncombatants are typically among and around the combatants on one or both sides. Thus, it is of the utmost importance to recognize the noncombatants—not only to permit the targeting of combatants but also, and very importantly, to let the fighters on both sides know who among the enemy poses a threat.

In this respect, one particular element in the development of international law on armed conflict has in fact contributed to creating ambiguity regarding who is a combatant and who a noncombatant. Francis Lieber’s rules concerning members of irregular groups involved in warfare, originally set out in the context of the American Civil War but subsequently adopted into international law at the 1907 Hague Conference and carried forward intact in the 1949 Geneva Conventions, required that the following conditions be satisfied:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.<sup>21</sup>

Consider, by contrast, this language from the 1977 Geneva Protocol I, Article 44, paragraph 3, which modifies conditions (b) and (c) above:



Recognizing . . . that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

- (a) during each military engagement, and
- (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.<sup>22</sup>

What does this mean in practice? An example will help to answer this question. During the invasion of Iraq by American forces in 2003, according to news stories at the time, members of the Fedayeen Saddam (a paramilitary group) approached an advancing American unit dressed as ordinary Iraqi Bedouin.<sup>23</sup> When they got close enough to attack, they opened their robes, took out weapons, and opened fire. Since Iraq had not ratified the 1977 protocols, one may argue that the Fedayeen were governed by the rules of 1949 Geneva Convention III, by which this was clearly a violation of the law of armed conflict. (The same holds from the perspective of the United States, which has signed but never ratified the 1977 protocols.) Nonetheless, from the perspective of the 1977 protocols, the matter is more ambiguous. More to my present point is that such behavior (other similar incidents occurred) led the American troops to mistrust all civilians, treating them as combatants until proven otherwise. This mind-set led to a number of events in which civilians were fired on as they approached checkpoints in vehicles while attempting to flee combat areas. In other words, the behavior of the Fedayeen, which might be read as permitted by the modified Lieber rules found in 1977 Protocol I, undermined the protection of noncombatants by creating ambiguity as to who is a noncombatant and endangered genuine noncombatants who were behaving in a way that seemed to pose a threat.

The 1977 Protocol I, of course, pertains to international armed conflicts, and so it applies to the 2003 Iraq war (though neither the United States nor Iraq have ratified the protocols). But the sort of behavior found in the above example, as well as the same sort of effect, is endemic to noninternational conflicts in which the combatants very often dress the same way as civilian noncombatants and use this fact to gain military advantage. That the Lieber rules as modified by 1977 Protocol I may have a tendency to import this erosion of noncombatant protection into noninternational conflicts suggests that some new attention to this version of the Lieber rules may be in order. At the very least, moralists might take critical note of the effect of the change in these rules on eroding the combatant-noncombatant distinction as it has to be made in the heat of combat.

### ***Decisions Regarding Weapons and Targets***

Insofar as the armed conflict in question is asymmetric, widely different means are available by each party to the conflict, and each has equally dissimilar structures for command and control. This fact returns us to an issue already broached in the above discussion of the first challenge posed by irregular warfare to noncombatant protection. As a result of the asymmetry between the parties to the conflict, different standards may apply to the

types of weapons used by each party and the decisions made concerning their targets. Although almost any weapon can be used discriminately or indiscriminately, a fundamental difference exists between the direct, intended targeting of noncombatants or intentional disregarding of noncombatants present in a targeted area and the effort to target only combatants while accepting the possibility of harm to noncombatants and seeking to minimize it. That is, the issue is not centrally the weapons themselves (e.g., missile strikes from remotely piloted aircraft [drones] versus the explosion of a car bomb by a suicide bomber) but the nature of the decision behind a given strike and its intention. The actual nature of a particular strike and the trail of decision leading to it are relatively straightforward to investigate for a sophisticated, well-organized military force. By contrast, irregular forces have every incentive to promote ambiguity in the results of their actions and to keep hidden their decision trail, the motives for the particular decision, and the person or persons responsible for it. These persons are also typically kept hidden, so bringing them to accountability is difficult and may be impossible, at least in the limited time frame in which it would easily be tied to the harm to civilians in question. The moral critics of contemporary asymmetric war have tended to go after the low-hanging fruit represented by the actions of the more highly organized and technically able party to the conflict, and the law is more easily applied to the military actions of well-organized and well-armed forces. Reaching inside the command and decision structure of irregular groups, however, is often impossible, and the perpetrators of specific actions deemed wrong are often beyond the reach of sanctions or even (in the case of suicide bombers) dead.

One way to think about this matter is that perhaps it would be good to return to the older standard whereby irregular warfare itself was regarded as wrong so that persons engaged in it could be proceeded against as persons without combatant rights. The difficulty with this approach is that it may slide into extreme measures involving the disregarding of all rights for persons identified with such warfare. To approach the matter this way is hard in any case for democracies (as the controversy over the “enemy combatants” detained at Guantanamo exemplifies) though relatively easier for autocratic or despotic governments. At the same time, though, moral warrant for it can be found in both the Western and Islamic traditions—to name only two of the major cultural and moral traditions involved in asymmetric conflicts today.

### ***Accountability***

There remains the problem of adjudicating accountability. Violations of noncombatant immunity may justify punishment as a war crime, but in irregular warfare the nature of the forces and their actions makes the gathering of evidence, the identification of responsible individuals, and the capture of those to be tried difficult or even impossible, undercutting the legal process. When the conflict in question is also asymmetric, with regular forces on one side and irregular ones on the other, the potential for enforcement of the rules for right conduct is also asymmetric. For regular forces the functioning of command

and control, including the keeping of records for each operation, provides a chain of evidence that is, in principle, straightforward to access. Consequently, one can identify the persons involved in the violation in question and, at least in principle, determine responsibility for the violation. As a result, soldiers in the regular force can be held to a higher disciplinary and judicial standard for their conduct than those in the irregular force opposing them. Their relative vulnerability on this count also opens the door for political motivations in singling out cases to investigate and/or prosecute. This prospect puts the fairness of the law in question and thus further undermines its protections as to be trusted. Thus, not only is noncombatant protection undermined, but also military personnel on the side that is held to the rules are disadvantaged relative to those on the other side, who may fight unrestrainedly with no substantial fear of being judicially held to account for their actions.

## Conclusion

This article has been a pessimistic review of the matter of noncombatant protection in contemporary asymmetric warfare. Although the protection of noncombatants has developed as a major theme in both moral reflection on warfare and the international law of armed conflict, efforts to offer such protection remain fragile. This protection is especially endangered in irregular warfare, in which irregular forces may not share the underlying moral values and purposes defining such protection but may offer different justifications that define everyone as an enemy worthy of death and other harm. These same forces, typically nonstate actors, ignore or deny the restraints laid out in international law and in any case cannot easily be reached by sanctions the law provides. We need to pay more attention to the negative implications of this situation by all who are or may be in a position to affect future policy and action.

## Notes

1. Desiderius Erasmus, *Bellum Erasmi* (London: Thomas Berthelet, 1533); and Jonathan Schell, *The Fate of the Earth* (New York: Knopf, 1982).

2. James Turner Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts, 1200–1740* (Princeton, NJ: Princeton University Press, [1975]), 43–46.

3. See, for example, 1907 Hague Convention IV, preamble, in Adam Roberts and Richard Guelff, *Documents on the Laws of War*, 3rd ed. (Oxford, UK: Oxford University Press, 2000), 69–70.

4. *Ibid.*, Arts. 1 and 2.

5. James Turner Johnson, *Sovereignty: Moral and Historical Perspectives* (Washington, DC: Georgetown University Press, 2014), 28–32. Cf. Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton, NJ: Princeton University Press, 1981), 127, 162–65.

6. Clyde L. Manschreck, *A History of Christianity*, vol. 2 (Englewood Cliffs, NJ: Prentice-Hall, 1964), 36–38.

7. Johnson, *Just War Tradition*, 306–22.

8. Roberts and Guelff, *Documents*, 181–82.

9. See, for example, 1949 Geneva Convention I, Art. 49, in Roberts and Guelff, *Documents*, 198.

10. *Ibid.*, Art. 2; and 1949 Geneva Conventions, Common Art. 3, in Roberts and Guelff, *Documents*, 198–99.
11. 1977 Protocol I, preamble; cf. Protocol II, preamble, in Roberts and Guelff, *Documents*, 422–23, 483–84.
12. 1977 Protocol I, Art. 48, in Roberts and Guelff, *Documents*, 447.
13. *Ibid.*, Art. 50, 448–49.
14. See Art. 5, par. 1, in “Rome Statute of the International Court,” accessed 11 December 2014, [http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf).
15. Paul Ramsey, *War and the Christian Conscience: How Shall Modern War Be Conducted Justly?* (Durham, NC: Duke University Press, 1961), and *The Just War: Force and Political Responsibility* (New York: Charles Scribner’s Sons, 1968); Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977); and National Conference of Catholic Bishops, *The Challenge of Peace: God’s Promise and Our Response* (Washington, DC: United States Catholic Conference, 3 May 1983), <http://www.usccb.org/upload/challenge-peace-gods-promise-our-response-1983.pdf>.
16. See, for example, David Rodin, *War and Self-Defense* (Oxford, UK: Oxford University Press, 2003). For international statements on human rights, see “Human Rights,” United Nations, accessed 13 December 2013, <http://www.un.org/en/rights/index.shtml>.
17. See “Rome Statute.”
18. See, for example, the declaration of “Jihad against Jews and Crusaders: World Islamic Front Statement,” Federation of American Scientists, 23 February 1998, <http://www.fas.org/irp/world/para/docs/980223-fatwa.htm>.
19. Quincy Wright, *A Study of War*, 2nd. ed. (Chicago: University of Chicago Press, [1965]), 1344–54.
20. Ramsey, *Just War*, 145.
21. 1907 Hague Convention IV, Annex, Art. 1, in Roberts and Guelff, *Documents*, 73. The language here is that found in 1949 Geneva Convention III, Art. 4 (2), in *ibid.*, 246. The provisions are the same as in the earlier contexts.
22. Roberts and Guelff, *Documents*, 444–45.
23. *New York Times*, 24 March 2003, B6; and “Iraqis Fake Surrender and Put Prisoners on TV,” *Star-Ledger* [Newark, NJ], 24 March 2003, 1.