

The Changing Rules of War

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In his historic May 2016 speech in Hiroshima, President Barack Obama highlighted the need to strengthen the institutions that govern, however imperfectly, the initiation, conduct, and aftermath of war. The speech marked the first time a sitting American president had visited Hiroshima, a city the United States destroyed in August 1945 with a single atomic bomb, killing well over one hundred thousand men, women, and children. Obama ended his speech with a call for new institutions to address the destructive power of nuclear weapons:

The wars of the modern age teach us this truth. Hiroshima teaches this truth. Technological progress without an equivalent progress in human institutions can doom us. The scientific revolution that led to the splitting of an atom requires a moral revolution as well.¹

The Fall 2016 issue of *Dædalus* on “Ethics, Technology & War” focused on how different technological developments have influenced ethics and the conduct of war in the past and how they might change the conduct of war in the future. This Winter 2017 issue of *Dædalus* on “The Changing Rules of War” presents a collection of essays about the evolution of just war doctrine, the laws of armed conflict, the rules of engagement, war crimes tribunals, and other domestic and international organizational procedures that together constitute the “human institutions” that Barack Obama highlighted at Hiroshima. The American Academy of Arts and Sciences has convened an interdisciplinary group of scholars and practitioners both to look back at the history of these institutions and to identify reforms that might strengthen them in the future.

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doi:10.1162/DAED_a_00418

The issue begins with two essays that discuss the evolution of the rules of war in the United States and highlight what combat was like before such laws and norms began to influence the conduct of war. Laura Ford Savarese and John Fabian Witt first analyze how U.S. political and military leaders have over time promoted adherence to specific laws of armed conflict for strategic reasons, and how such laws have later constrained U.S. military conduct in ways that were not anticipated when the laws were originally formulated. The laws of armed conflict, they argue, may have been created to serve particular strategic interests, but the power of such law is clearest when it legitimizes certain actions (and delegitimizes others) and influences behavior apart from the narrow self-interest of its creators. I contribute the second essay, describing “The Face of Battle without the Rules of War.” This essay analyzes a stunning set of drawings by Red Horse, a Lakota warrior, portraying his experiences during the 1876 Battle of the Little Bighorn against George Armstrong Custer and the U.S. Seventh Cavalry. Seeing the brutality of combat in the nineteenth-century Great Sioux War in graphic detail helps us understand both what has changed today, because of adherence to the laws of armed combat, and what is the same, because these rules are not always followed in the crucible of war.

The following three essays discuss the rules of war in modern asymmetric conflicts, especially wars between states and nonstate actors. Joseph H. Felter and Jacob N. Shapiro analyze the effects of the U.S. military adoption of the doctrine of “courageous restraint” during the wars in Afghanistan and Iraq. They present evidence demonstrating that U.S. efforts to reduce the deaths of noncombatants during these counterinsurgency campaigns had positive tactical and strategic effects, for example, by increasing the information pro-

vided to U.S. and allied forces by the local population about insurgents placing improvised explosive devices (IEDs). (As an illustration, the photograph on the inside back cover shows three U.S. Marine Corps soldiers investigating a possible IED while on a patrol in Helmand province, Afghanistan, in February 2010.) Allen S. Weiner’s essay focuses on the rights and responsibilities of the fighters in nonstate groups commonly involved in modern wars. Weiner argues that such individuals, often called “unprivileged belligerents” today, should be granted war rights, but that such fighters must not violate the laws of war, for example, by intentionally targeting civilians or using human shields. In the next essay, Tanisha M. Fazal focuses on when and why some rebel groups, one type of nonstate actor, choose to follow international humanitarian law regarding appropriate behavior during combat operations. She presents evidence demonstrating that leaders of secessionist rebel groups, who seek to establish an independent state, are more likely than leaders of other kinds of rebel groups to comply with the rules of war. She argues that to such rebel leaders, signaling compliance with international law is a means to win international recognition and legitimacy. Fazal’s essay on contemporary rebels thus resonates with historical themes raised in the Savarese and Witt essay; after all, the American founding fathers were leaders of a violent rebellion against the British Empire seeking international recognition and legitimacy for their cause.

The next two essays discuss one of the major challenges of *jus post bellum*: namely, the problems associated with transitional justice and the prosecution of war criminals. Playing off Justice Robert H. Jackson’s famous assertion at Nuremberg that the World War II victors had “stayed the hand of vengeance,” Mark S. Martins and Jacob Bronsther address the critics of contemporary war crimes trials in their es-

say, “Stay the Hand of Justice? Evaluating Claims that War Crimes Trials Do More Harm than Good.”² Martins and Brons-ther argue that, when carried out within established rules and procedures, “war crimes prosecutions are a legitimate, and sometimes necessary, response to egregious and widespread violations of the laws of war.” (The photograph on the inside front cover shows a bulletin board with a posting of the Geneva Convention rights and rules for detainees in an exercise yard at the Camp 5 high-security detention center at the Guantanamo Bay U.S. Naval Base in Cuba.)

Leslie Vinjamuri then analyzes the contemporary history of efforts by the International Criminal Court and other legal institutions to balance demands for justice after wars with the need for peace and reconciliation. She notes that when international tribunals prosecute groups or individuals who have committed atrocities, powerful spoilers can emerge, leading to organized violence and even renewed war. When international tribunals fail to prosecute such groups or individuals, however, they are often accused of hypocrisy. Vinjamuri proposes a set of criteria for acceptable “transitional justice compromises” that might be more effective than what exists today.

The final three essays present major critiques of contemporary just war doctrine, which is the intellectual apparatus upon which many of the institutions and rules that influence war today have been built. Over the past two decades, analytic philosophers have developed a detailed critique of traditional principles of noncombatant immunity, proportionality, and the moral equivalence of soldiers, leading to a body of thought known as “revisionist just war theory.” Seth Lazar’s essay clearly explains the main features of the revisionist school of just war theorists, provides a spirited critique of revisionism for presenting “a disturbing vision of the morality of war,” out-

lines an original defense of the principle of noncombatant immunity, and discusses the continuing challenge of justifying the killing of soldiers, or what he calls the problem of “combatant nonimmunity.” Antonia Chayes and Janne E. Nolan follow with an explanation of a pattern of failures by the United States to take seriously the difficult task of ending wars and transitioning to peaceful, indigenous governance when planning to initiate conflicts. Their essay focuses primarily on the recent U.S. and allied war in Afghanistan and the 2003 invasion of Iraq and its aftermath, but they identify this failure as permeating American history. Paul H. Wise concludes the issue with an innovative and important study of the “indirect costs of war,” focusing especially on the rise in neonatal deaths in societies that have suffered from civil or interstate wars. Wise argues, from the perspective of a pediatrician, that we have improved both our ability to measure the indirect costs of war and our ability to prevent or mitigate this human toll of conflict. But political leaders and just war theorists alike have not taken such long-term human costs into account when discussing the concept of “proportionality” or making decisions about initiating a conflict or continuing a war once it has started.

This American Academy of Arts and Sciences initiative has brought together a remarkable and diverse group of scholars and practitioners to address emerging dilemmas of technology, ethics, and war. I am grateful to have had the opportunity to direct the project and interact over the course of two years with leading just war thinkers of all kinds: political scientists and philosophers, lawyers and historians, medical doctors, politicians and soldiers, a pilot and a poet. As a group, we have encouraged each other to sharpen our ideas and present rigorous logic and accurate empirical analysis of contemporary chal-

lenges. We have not, as a group, tried to develop a consensus position about specific military technologies appearing on the horizon nor about whether recent or current conflicts have been just or unjust wars (and just or unjust for whom).

In lieu of conclusions, however, I do want to make four personal observations about the current state of thinking about just and unjust wars, thoughts that have been inspired by reading and editing the contributions of the authors in these two *Dædalus* issues. First, I have become much more aware of how the laws of armed conflict, even if they were created in part for strategic reasons by the most powerful actors in the international system, nonetheless come to constrain the actions of those powerful actors over time. Yet, as emphasized in the Felter and Shapiro essay on “Limiting Civilian Casualties as a Part of a Winning Strategy,” in counter-insurgency and counterterrorism operations today, it is often only the soldiers of powerful states that seek to follow ethical principles and the laws of armed conflict. They do so both because they think it is the morally right thing to do and because they think it will help them win (or at least borrow) the hearts and minds of the people. Thucydides, the great Athenian political theorist and general, presented his severe “realist” vision about the absence of morality in war in the Melian Dialogue when he wrote that “right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must.”³ But if it is only the strong today who seek to follow ethical rules and the laws of armed conflict, and the weak who engage in the deliberate killing of civilians, Thucydides’s dictum has been turned on its head. The weak do what they can; the strong suffer what they must.

Second, I think it is important to consider that this “suffering” by strong actors who

seek to follow just war doctrine principles in combat is a good thing even in conditions in which it does not contribute to tactical success or a war-winning strategy. It is always easier for soldiers to “suffer what they must” by following the rules of war when that suffering contributes to tactical or strategic victory. It is harder, but no less important, for soldiers to follow just war doctrine principles to reduce risks to civilians even when such acts are not expected to make a positive contribution to victory. Under all conditions, we should want our soldiers to take some risks and to have what Michael Walzer has called “a positive commitment to save civilian lives”:

Not merely to apply the proportionality rule and kill no more civilians than is militarily necessary – that rule applies to soldiers as well; no one can be killed for trivial purposes. Civilians have a right to something more. And if saving civilian lives means risking soldiers’ lives, the risk must be accepted.⁴

The requirements of “constant care” and “feasible precautions” are enshrined in the Geneva Conventions, Protocol I, Article 57, though there is no explicit reference to accepting risks that this might entail: “In the conduct of military operations, *constant care* shall be taken to spare the civilian population, civilians, and civilian objects. . . . Those who plan or decide upon an attack shall . . . *take all feasible precautions* in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects [emphasis added].”⁵

Third, I have come to believe that we should not, in civilian society, ask our soldiers to hold all the burden of risk that comes with efforts to protect enemy or neutral or friendly civilians. If just soldiers should accept at least some risk of their own lives to protect the lives of innocent civilians in combat zones, then our society

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should also accept at least some risk of not winning the war, or of having to fight longer, to protect the lives of those innocent civilians. In the long process of strengthening the human institutions that govern the conduct of war, there will be times when soldiers and statesmen following the rules will suffer tactical setbacks at the hands of the less scrupulous. We should accept that possibility. But this does not mean that adherence to just war doctrine and the laws of armed conflict should be abandoned, for if we look at the face of battle without the rules of war, we see a descent into moral brutality.

Finally, the kind of “progress in human institutions” that Obama called for to match the modern revolution in military technology will never come about unless

soldiers, statesmen, scholars, and citizens alike are all engaged in the debate. “War is too important to be left to the generals,” George Clemenceau famously noted during World War I. In the complex and dangerous world we live in, just war doctrine is too important to be left to the philosophers and political theorists. I hope the informative and provocative essays in these two special issues of *Daedalus* inspire much more innovative research and writing about ethics, technology, and war in many different academic disciplines, across professions, and among the informed public. Welcome to the debate. I encourage readers to be more than witnesses to the “moral revolution” that President Obama called for in Hiroshima. Join it.

ENDNOTES

- ¹ “Text of President Obama’s Speech in Hiroshima, Japan,” *The New York Times*, May 27, 2016, http://www.nytimes.com/2016/05/28/world/asia/text-of-president-obamas-speech-in-hiroshima-japan.html?_r=0.
- ² International Military Tribunal, “Second Day, Wednesday, 21 November 1945, Morning Session,” in *Trial of the Major War Criminals before the International Military Tribunal, Volume II: Proceedings 14 November 1945 – 30 November 1945* [Official text in the English language] (Nuremberg: International Military Tribunal, 1947), 99, https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-II.pdf.
- ³ Thucydides, “Chapter XVII: Sixteenth Year of the War, The Melian Conference, Fate of Melos,” *History of the Peloponnesian War*, <https://www.mtholyoke.edu/acad/intrel/melian.htm>.
- ⁴ Michael Walzer, *Just and Unjust War: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977), 156.
- ⁵ Adam Roberts and Richard Guelff, eds., *Documents on the Laws of War*, 3rd ed. (Oxford, United Kingdom: Oxford University Press, 2010), 452 – 453.