Law and War: An Introduction

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On September 30, 2011, some two weeks after the tenth anniversary of the 9.11 attacks, a Hellfire missile fired from an American predator drone in a remote region of Yemen killed Anwar al-Awlaki. The killing immediately unleashed a storm of criticism, at least in legal circles. A number of legal experts and political actors decried the killing as a stark violation of constitutional rights, American domestic law, and the international law of armed conflict. Speaking for many, Mary Ellen O'Connell, a professor of law at Notre Dame, decried the attack as dangerous, immoral, and criminal.[1] What law authorized the CIA to "take out" al-Awlaki?

Many commentators noted that because al-Awlaki was an American citizen, he should have been protected by the Fifth Amendment's guarantee of due process. Even those experts who conceded that terror suspects may be treated differently than suspects in "ordinary" crimes insisted that al-Awlaki's killing raised thorny constitutional questions. The killing appeared difficult to square with the Supreme Court's ruling in *Hamdi v. Rumsfeld*.[2] In that critical decision, the Court held that the designation and indefinite detention of an American citizen as an "unlawful combatant" (or as an "unprivileged enemy belligerent," to use the substitute nomenclature passed by Congress) in the absence of any mechanism of review constituted a violation of due process. If the executive could not constitutionally detain citizens without supplying some modicum of process, how could it engage in the far more radical act of killing? As presidential candidate Ron Paul observed, a targeted killing of Timothy McVeigh, the Oklahoma City bomber, would have been an unthinkable violation of the Constitution.[3]

Other critics saw the killing as a violation of international law. Jameel

Jaffee of the ACLU observed that al-Awlaki was killed in northern Yemen, far from any battlefield.[4] While the law of war permits the killing of soldiers and officers in a battlefield or war zone, it does not authorize the killing of one's own citizens in an area far removed from any armed conflict based on secret evidence. Such an act resembles less the killing of a belligerent during wartime and more an extrajudicial killing of a terror suspect. And an extrajudicial killing is ultimately nothing other than a state-authorized assassination, forbidden by both domestic and international law. Ron Paul was perhaps the only political figure to push this argument to its conclusion, insisting that the president's authorization of al-Awlaki's killing was an impeachable offense.[5]

Equally vociferous, however, were the defenders of the drone strike. Benjamin Wittes, a prominent legal expert, agreed that al-Awlaki was due a measure of process but insisted the Fifth Amendment does not require prospective judicial review of a targeting decision when the suspect is "believed to play an active, operational role" in an enemy force.[6] In passing the Authorization for Use of Military Force (AUMF), Congress gave the president the legal authority to "use all necessary and appropriate force against those nations, organizations, or persons" that "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."[7] Because apprehending al-Awlaki and placing him on trial was not feasible, and because the suspect failed to surrender despite knowledge that he was being targeted, Wittes insisted that the administration was authorized by the law of war to treat al-Awlaki as an enemy soldier or leader in a time of war.

A full year and a half before the drone strike, Harold Koh, the State Department's chief legal advisor, offered what now reads as a detailed, prospective defense of al-Awlaki's killing.[8] As the dean of Yale Law School and as an expert on national security law, Koh had been a sharp critic of the Bush administration's conduct in the war against terror. Now against those who believed the "use of lethal force against specific individuals fails to provide adequate process and thus constitutes *unlawful extrajudicial killing*" (emphasis in original), Koh strongly insisted that the "state may use lethal force" when "engaged in an armed conflict or in legitimate self-defense."[9] Appealing to the example of American aviators who "tracked and shot down the airplane carrying the architect of the Japanese attack on Pearl Harbor, . . . also the leader of enemy forces in the Battle of Midway," Koh argued that such targeting

was "lawful . . . under international law."[10] Assuring his audience that "our procedures and practices for identifying lawful targets are extremely robust," Koh concluded that "lethal operations" such as the al-Awlaki killing do "not constitute 'assassination.'"[11] Far from unconstitutional, illegal, or criminal, such acts are "conducted in accordance with all applicable law."

In the days following the strike, the *New York Times* reported on a memo prepared within the Obama administration in the run-up to the killing.[12] Although the contents of the memo remain secret and the full evidence against al-Awlaki is yet to be revealed, the *Times* reported that the memo was an elaborate legal document that cited Supreme Court cases such as *Scott v. Harris* (whether the police's high-speed car chase violated the Fourth Amendment) and *Tennessee v. Garner* (whether the police can use lethal force in pursuit of a fleeing suspect when such force poses a significant threat to bystanders). While critics of the administration's actions seized upon the secrecy of the memo, defenders noted its elaborately legal character as evidence of the profound and sober legal analysis that lay at the heart of the executive's action.

In reviewing the colloquy over al-Awlaki's killing, we do not intend to take sides in an ongoing debate. For us what is more remarkable than the specific arguments themselves is the thoroughly juridified nature of the argument. Largely absent from the debate is any discussion of the wisdom or efficacy of the killing. Instead, we find an argument about law: constitutional, domestic, and international. Perhaps most remarkably, we find *both sides* of the argument making appeals to law.

The Cold War created a memorable schism between two schools of international relations. On the one side were the realists, who believed that on the world stage, the interests of order and security trump the interests of justice; on the other were the idealists, who insisted that, like domestic politics, international relations should submit to the logic and regimen of the rule of law.[13] Here we find no such schism. Both sides in the debate about the al-Awlaki killing appeal to the law; they differ not about the relevance or bindingness of legal norms, but only about matters of interpretation: what the law requires and permits in the specific case.

The debate, then, reveals a great deal about the way that America, and many other nations, presently think about waging war. Law has become a crucial element in that thinking. One cannot engage in war without seeking

authorization from the former. Whether the law ultimately functions as a tool of restraint or of empowerment, it has become inescapable. The waging of war and the doing of law are inextricably bound.

The intimate connections between war and law would have been unintelligible to earlier generations of statesmen and legal theorists. The very term "the law of war" would have smacked of the oxymoronic, as law and war were long considered oppositional terms, the one excluding the other. This was perhaps nowhere more clearly the case than in Hobbes's *Leviathan,* arguably the most influential work in Western political theory.

In a stunning heuristic that anticipated modern game theory, Hobbes argued that a state of nature would necessarily devolve into a state of war—not because men are naturally aggressive and appetitive, but because men are naturally self-protective and fearful of the behavior of others likewise engaged in self-protection. In a state of nature, locally rational behavior—acts designed to promote one's survival—lead men inevitably to other actions, such as preemptive strikes, that turn the world into a horrifically irrational state of chaos. This is the world that Hobbes simply calls "war." It is not, in Hobbes's formulation, a state of constant killing. Rather, "as the nature of Foule weather, lyeth not in a showre or two of rain; but in the inclination thereto of many dayes together: So the nature of War, consisteth not in actual fighting; but the known dispostion thereto."[14] Given the ever-present possibility of renewed violence, the state of war is one of relentless misery, deprivation, and want. And it is a state completely without law.

While Hobbes speaks of a law of nature existing in a state of nature, his conception of natural law is remarkably thin and places no restraints on human bloodletting in a state of war. To the contrary, anything and everything are permissible in Hobbes's state of war, as the man who acts with unilateral restraint becomes nothing more than the architect of his own destruction. For Hobbes, the law of nature acts, then, less as a curb on conduct than as a maxim of prudence, urging men to escape the state of war, if possible. For all intents and purposes, then, the state of war is a legal vacuum. The state of war is utterly lawless.

Indeed, for Hobbes, law is the necessary and sufficient condition to extinguishing warfare. And yet the making of law is not simply one of the functions of the state; the state is the precondition of law. Without the state,

there can be no law in the Hobbesian scheme: "Where there is no Common Power, there is no law."[15] It is the sovereign that enjoys the monopoly of force requisite to make law and covenants binding on its subjects. The strong relationship between sovereign power and law thus carves Hobbes's world into strict and separate categories. Where there is war, there is no law; and where there is law, there is no war. To put it even more sharply: where there is war, there are no limits to the violence a person may do; where there is law, there are no limits to what the state can proscribe. The two define mutually exclusive zones.

Although Hobbes appears to treat the state of nature as a heuristic, the international arena remained for him a powerful example of the continuing reality of the state of nature. Sovereigns confront each other on the international stage precisely as persons confront each other in the absence of a sovereign. Indeed, for Hobbes, it was the relations between the former that illuminate the plight of the latter, not the other way around.[16] Thus it becomes meaningless to speak of any external legal limits on a sovereign's war-making powers. Such limits could be enforced only by some supergovernment, in which case that power would itself be *sovereign*. Nations can, of course, enter into treaties, but these lack a truly legal character in the absence of a power capable of enforcing their terms. They are like promissory agreements entered into in the state of nature: followed when mutually advantageous, broken when not. Perhaps it comes as no surprise to find an exemplary expression of this view in the words of Adolf Hitler, who in a speech to his generals on November 23, 1939, reminded them of Germany's nonaggression pact with the Soviet Union, but declared: "Agreements are to be kept only as long as they serve a certain purpose."[17] In the absence of an overarching global sovereign, each state finds itself in a state of nature vis-à-vis all others. From this perspective, international law is a contradiction in terms.

It is difficult to exaggerate the influence of this Hobbesian picture on the further development of legal theory. For one thing, it established a tradition, not entirely benign, of sharply distinguishing the internal police powers of a state from its external war-making powers, a point made visible in the work of two of the most important legal theorists of the twentieth century, both profoundly influenced by Hobbes. In *The Pure Theory of Law*, Hans Kelsen, a refugee from Nazi-occupied Vienna, described the development of increasingly

centralized nation-states in terms of the extension and penetration of law into every aspect of civic life. As law proliferates and becomes ubiquitous, it works to prohibit the use of all force between persons in civil society. In Kelsen's words, "[T]he use of force is prohibited by making it the condition of a sanction, . . . itself a use of force."[18] The fundamental basis of the legal system, then, is the creation and enforcement of the distinction between the delict (prohibited private force) and the sanction (authorized legal force). This process reaches perfection in the centralized nation in which, to quote Kelsen's breathtakingly simple formulation, "The use of force of man against man is either a delict or a sanction."[19]

Kelsen's highly positivistic account casts fresh light on the purposes of criminal law. Legal prohibitions against murder can be seen as something other than the deontological condemnation of the quintessential *malum in se*. Rather, as an act that invites "self-help"—namely, retaliatory acts of revenge—murder challenges the state's monopoly on force. The state must punish the murderer to eliminate the prospect of retaliatory violence and blood vengeance, and so defend its monopoly on force.

For Kelsen, then, the centralized state is defined by a totalizing project of law. Like Hobbes, Kelsen sees law ultimately as an instrument that aims at the "pacification of the legal community."[20] While Kelsen acknowledges that the inevitable persistence of violence in civil society means that "one cannot very well assert that the state of law is necessarily a state of peace," he insists that "the development of the law runs in this direction."[21] His positivism thus establishes a strong conceptual relationship between the proliferation and centralization of legal power and the establishment and enforcement of conditions of peace.

Contrast Kelsen's Hobbesian understanding of state power with Carl Schmitt's. Schmitt, the preeminent legal apologist for Nazi Germany, embraced Hobbes's understanding of sovereign power as absolute and illimitable. Like Hobbes, and Bodin before him, Schmitt insisted that the sovereign could not be bound by the laws he makes. And, like Hobbes, he understood sovereignty not in institutional terms (the structures of governance), but in functional terms (the powers of governance). This is made clear in his famous definition of the sovereign as "he who decides on the exception."[22] For Schmitt, the exception—the *Notstand*, or state of emergency—is "that which cannot be subsumed."[23] It "defies general codification" under any normal legal configuration, as no legal

rule can specify the condition of its nonapplication.[24] Kelsen's vision of a social reality controlled by a totalizing project of law thus made no sense, Schmitt insisted, as the most essential exercise of sovereign power *by definition* resisted juridification. It is because the state of emergency resists juridification and articulation through rules that its invocation signifies the purest instance of the exercise of sovereign power. Indeed, for Schmitt, we can locate where sovereign power resides by identifying who enjoys the power to decide when to suspend the normal application of law (and when to reintroduce it).

Again, our point here is not to settle the debate between Kelsen and Schmitt. Rather, it is to suggest that together the two theorists offer a complex but ultimately complementary picture of the Hobbesian tradition as it came to conceptualize the relationship between law and war. For Schmitt, the paradigmatic instance of emergency is war. It is war that imperils the sovereign; it is war that threatens the very existence of the state. And yet because war represents an existential threat, it presents the sovereign with the opportunity for the pure exercise of power, the chance to command any and all acts necessary for its survival. This contrasts with Kelsen's view from within: in the ordered confines of the centralized state, law reigns supreme, and all acts of private force are treated as delicts. And so we are left with a picture of a nether external condition of war, in which law is absent and all acts of violence are permitted; and an internal world of law, in which all violence is codified, regulated, and policed. In war, the exceptional state, there is no law; in times of peace, there is only law. In both cases, the sovereign's powers are plenary.

The Hobbesian notion that war submits to no law has, of course, been sternly rebutted by generations of legal thinkers. The idea that morals, if not laws, control the waging of war dates back thousands of years. Herodotus describes rules of war recognized by both the ancient Greeks and Persians.[25] One finds similar norms expressed in the Hindu code of Manu ("let him not strike with weapons . . . barbed, poisoned, or the points of which are blazing with fire").[26] In 1474, Peter von Hagenbach was tried and executed in Austria for wartime atrocities committed during the Siege of Breisach.[27] But the Hobbesian view found its sternest conceptual challenge in the writings of his contemporary, Hugo Grotius.

It is perhaps an exaggeration to call Grotius, the great Dutch jurist, the father of international law. Grotius's thinking was part of a tradition built

on the earlier work of Bodin and which found richer exposition in the later work of Vattel. But Grotius's magnum opus, *De Jure Belli ac Pacis* (*On the Law of War and Peace*), published in 1625, some twenty-six years before Hobbes's *Leviathan,* remains a watershed work. In it, Grotius challenged the position "which some people imagine" that "in war all laws are in abeyance."[28] Against this view, Grotius insisted on the existence of a "law of nations" that existed separate from and independent of "the law of nature and the law of particular countries."[29] Anticipating the Hobbesian critique, that a system of law based on mutual consent and lacking the force of sanction was no law at all, Grotius insisted, "[L]aw, even though without sanction, is not entirely void of effect":

> For justice brings peace of conscience, while injustice causes torments and anguish, such as Plato describes in the breast of tyrants. . . . But, most of all, in God injustice finds any enemy, justice a protector. He reserves His judgements for the life after this, yet in such a way that He often causes their effects to become manifest even in this life, as history teaches by numerous examples.[30]

As a legal theorist, Grotius lacks Hobbes's clarity of thought. As the quotation above reveals, Grotius, despite his own claims to the contrary, often conflates law with morality, international law with natural law. When he observes that "even the most powerful peoples and sovereigns seek alliances" either "for purposes of trade" or "even to ward off the forces of many foreign nations united against it,"[31] he appears to overlook the distinction between a politically expedient agreement and a legally binding norm. Still, Grotius's argument that "there is a common law among nations, which is alike for war and in war"[32] created a necessary counterweight to the Hobbesian position, and in so doing, exercised a tremendous influence on the development of legal thinking on war in two regards.

Firstly, Grotius insisted, "[W]ar ought not to be undertaken except for the enforcement of rights."[33] Lamenting that "I observed that men rush to arms for the slightest of causes, or no cause all," Grotius argued that for wars to be justified, they must be undertaken with the "scrupulousness" of "judicial processes."[34]

As a second matter, Grotius argued that the conduct of war had to follow law. Moved by the devastations of the Thirty Years' War, which had run less than half its course at the time of his writing, Grotius observed: "Throughout the Christian world I observed a lack of restraint in relation to war, such as

even barbarous races should be ashamed of . . . . [It] is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes."[35]

Insisting on a law "valid alike for war and in war," Grotius thus introduced the distinction between *jus ad bellum* and *jus in bello*. The former, which became known as just war theory, came to concern itself with specifying the conditions under which the recourse to war was permissible; the latter, which became known as the law of war, sought to articulate the means by which law may be permissibly waged. Grotius insisted that both matters fell within the ambit of international law.

Since the days of Grotius, the development of a meaningful law of war has obviously achieved far greater success in the domain of *jus in bello* than *jus ad bellum*. By the time of the promulgation of the "Lieber Code," a manual enumerating "serious breaches of the law of war" that was distributed to field commanders of the Union Army during the American Civil War,[36] it was believed that such norms expressed the content of customary international law. Such customary law found codification in the Hague conventions of 1899 and 1907, which established the "general rules of conduct for belligerents in their relations with each other and with populations."[37] While the Hague conventions sought to establish the legal parameters controlling acts between and against belligerents, the Geneva Conventions of 1949 and 1970 articulated the legal protections of noncombatants, POWs, and other persons *hors de combat*.

By contrast, the attempts to articulate a coherent *jus ad bellum* foundered. Just war theorists attempted to identify the lawful reasons for going to war—self defense, the redress of injuries, and punishment of an offense—but their attempt to locate such norms in customary international law or to frame them through a convention met with little success. The Kellogg-Briand Pact of 1928 sought to prohibit war as "an instrument of national policy" but notably failed to define aggressive war and the sanctions for its waging.[38] Recognizing these failures, J. L. Brierly wrote in his canonical work of 1928, *The Law of Nations*, "[I]nternational law came frankly to admit that all wars are equally lawful."[39]

All this changed with Nuremberg. The trial of the major Nazi war criminals before the International Military Tribunal (IMT), 1945–46, marked a sea-change in the relationship between law and war. As the first international

criminal tribunal in human history, Nuremberg represented an emphatic rejection of the Hobbesian-Schmittian theory of the absolute and illimitable powers of sovereignty in the matter of war-making. Nuremberg first punctured sovereign prerogatives by revolutionizing the international community's treatment of the question of responsibility. Despite its somber adumbration of offenses, the Hague conventions had remained silent on the matter of sanctions. Nuremberg, by contrast, assigned "individual responsibility" for the violations of international law under its purview.

The principle of individual responsibility was effectuated by two key provisions of the IMT's Charter: Article 7 held that "the official position of defendants . . . shall not be considered as freeing them from responsibility"; this provision effectively punctured the immunity that previously had shielded heads of state and ministers from answering for their conduct in foreign or international courts.[40] Article 8, in turn, held that "the fact that the defendant acted pursuant to [an] order of . . . a superior shall not free him from responsibility . . ."[41] Taken together, these two provisions essentially created a jurisprudence of war crimes, enabling the imposition of penal sanctions on individuals found guilty of violating international law.

Nuremberg also sought to establish what Brierly, just a few years earlier, had dismissed as a Grotiusian pipe dream: the creation of a workable international jurisprudence of *jus ad bellum*. Often overlooked in more recent treatments of the IMT, the case of the Allied prosecution did not in the first instance focus on war crimes, violations of *jus in bello*; rather, the gravamen of the case was the "crime against peace"—the launching of an aggressive war, a violation of *jus ad bellum*. As we noted above, it was Kelsen who observed that drawing a distinction between the lawful and unlawful use of force is the most basic internal function of a state's legal system. At Nuremberg, the prosecution insisted that an operation fundamental to domestic law should not be ruinously complicated for international law. As Robert Jackson, who led the Allied prosecution during his leave of absence from the U.S. Supreme Court, rhetorically put it, "[It] was, under the law of all civilized peoples, a crime for one man with his bare knuckles to assault another. How did it come that multiplying this crime by a million, and adding firearms to bare knuckles, made it a legally innocent act?"[42] Building on just war theory, Nuremberg insisted that an unjust war was more than a moral wrong—it was an illegal, or

rather, a criminal act:

> Any resort to war of any kind is a resort to means that are inherently criminal. War inevitably is a course of killings assaults, deprivations of liberty, and destruction of property. An honestly defensive war is, of course, legal and saves those lawfully conducting it from criminality. But inherently criminal acts cannot be defended by showing that those who committed them were engaged in a war, when war itself is illegal.[43]

Taken as a whole, Nuremberg marked an astonishing repudiation of the idea that law and war are separate and autonomous spheres of activity. To the contrary, Nuremberg insisted that every aspect of the waging of war—from the decision to launch hostilities, to conduct on the battlefield and the treatment of civilians—would be subject to legal scrutiny from the empyrean reaches of an international institution that stood above the domestic legal system of any specific nation-state. Clearly the most vulnerable legacy of the Nuremberg experiment was the effort to create a workable jurisprudence of *jus ad bellum*, as crimes against the peace disappeared from the jurisdictional mandate of the two ad hoc international tribunals established in the 1990s to deal with international crimes perpetrated in the Balkans and Rwanda.[44] Nonetheless, the establishment of the International Criminal Court (ICC) in 2002, a permanent institution meant to supplant the use of ad hoc courts such as Nuremberg and, more recently, the International Criminal Tribunals for Yugoslavia and Rwanda, has renewed the efforts of international jurists inspired by the dream of Grotius to shape a coherent definition of the crime of aggression. Indeed, these labors appeared to bear fruit in the summer of 2010 when a review conference of the ICC drafted and adopted a definition of the crime of aggression, which could pave the way for the court's exercise of jurisdiction over this incrimination.[45]

Nuremberg remains the most visible symbol of the juridification of war, but it hardly stands alone. Taking the American experience as an example, we can point to the incorporation into federal law of international incriminations against war crimes and torture; the articulation of elaborate codes of military conduct and justice, such as the Uniform Code of Military Justice (UCMJ); the promulgation of elaborate procedures to permit the trial of alien terror suspects before military commissions; and the articulation of elaborate rules of engagement in theaters of battle.[46] All of these developments can be seen as

placing war and its waging under the aegis of legal oversight. If at one point in Western history, war represented the ultimate evacuation of law, it has now become thoroughly saturated with law, so much so that the decision to kill a single apparent belligerent in a remote region in the Middle East unleashed a debate that directly involves the president of the United States. And as we have noted, at the heart of this debate was not an argument over what is strategically wise but over what is legally permissible.

The remarkable juridification of war raises, of course, a profound question: what has it achieved? For Grotius, the application of law to war was envisioned as a means of limitation, restraint, and humanization. *Jus ad bellum* was understood to reduce to a minimum the instances in which nations would make recourse to war, while *jus in bello* was meant to reduce the brutality of conflict itself, shielding both belligerents and noncombatants from the worst excesses of war. Law, then, was understood as a necessary and perhaps sufficient tool toward the aim of humanizing war.

At the most general level, the essays collected in this volume explore whether this aim has been achieved or is achievable. Has the advent of "lawfare"[47] tamed warfare or has it simply shifted the form and manner of its waging? The question, not surprisingly, resists a simple answer, and our five contributors all push toward somewhat different answers, some operating on a historical register, others on a more normative level. What they share is an interest in interrogating the assumption implicit in the Grotiusian project: that the insertion of law into war is a necessarily salutary development. While none of our contributors defend the Hobbesian/Schmittian position that rejects as incoherent the effort to juridify acts of war-making, they all question the belief, most explicitly expounded by Jackson at Nuremberg, that sees law as the cornerstone of any bulwark against aggression.

This ambivalence is perhaps most explicitly thematized in our first chapter, "Limits of Law: Promoting Humanity in Armed Conflict," by Sarah Sewall. At first glance, Sewall's chapter appears to tell a familiar story about the tension between "law on the books" and "law in practice." Law's efficacy, Sewall insists, will always be measured by its capacity to restrain actual practice. If too wide a gap opens between norm and practice, the very integrity of law will be eroded, as regulations turn farcical. This, Sewall fears, will be the consequence of the growth and proliferation of new laws of armed conflict. Instead of

offering meaningful restraint, these laws will simply create occasions for weak enforcement and noncompliance.

On closer inspection, however, Sewall's argument reveals itself to be narrowly tailored to the specific problems raised by the fraught effort to submit war to legal regulation. Sewall notes—as do Gabriella Blum and Samuel Moyn in their contributions—that the law of armed conflict is built on a paradoxical relationship to violence. At its most basic level, the law of armed conflict (LOAC) authorizes persons to commit the very act, which, *pace* Kelsen, describes the paradigmatic delict from the perspective of domestic law: the purposeful, premeditated killing of another person. In this regard, the law of armed conflict serves not only as a restraint but also as an authorization, or, to borrow David Kennedy's language, as "war generative."[48] If for Hobbes, acts of brutal warfare always stood outside of legal restraint, LOAC stands for an equally remarkable proposition: that acts of astonishing violence and horrific destruction can be deemed lawful and legally authorized.

As Sewall (and Blum) remind us, three key norms underlie the line LOAC draws between lawful and unlawful acts of killing: necessity, distinction, and proportionality. "Necessity" stands for the idea that even an extensive destruction of persons and property will not be considered a crime under *jus in bello* so long as such destruction is justified by military necessity; "distinction" requires that belligerents target only combatants and not civilians; and "proportionality" insists that "harm to noncombatants is not excessive in relation to its military benefits."[49]

These interrelated principles obviously raise thorny, if not intractable, problems of interpretation. Sewall notes that in Operation Desert Storm, the U.S. Air Force assessed proportionality in terms of the "overall campaign, not target by target."[50] Is that the proper calculus? The principle of necessity raises similar problems, as it appears to justify potentially calamitous "collateral damage" in attacks that confer great military advantage.[51] Indeed, arguments of necessity have been invoked to justify the dropping of nuclear weapons on Hiroshima and Nagasaki, inasmuch as the bombings arguably accelerated Japan's surrender.[52] If infinitely plastic, then the norms of LOAC offer little meaningful restraint, or rather, provide a legal cover to the most extreme depredations of war.

At the same time, Sewall reminds us that the reality that gave birth to LOAC

has been rapidly changing in a manner that raises concerns about its continued relevance. As we noted above, the dream of jurists going back to Grotius was that law could restrain and humanize the allegedly illimitable power of the sovereign in waging war. The Nuremberg paradigm, which helped realize this dream, likewise used international criminal law as a means of punishing atrocities committed by sovereigns. As such, LOAC has been predicated upon a number of foundational distinctions—between war and peace, combatant and civilian, international combat and domestic policing. The changing nature of warfare in the twenty-first century, particularly in the struggle against terrorist organizations and local insurgencies, has volatized these distinctions.[53] These instabilities are nowhere more visible than in the debates over al-Awlaki's killing—whether the targeting should be legally understood as a military operation or as a police chase, and whether the target himself was to be viewed as a combatant or as a civilian, as a soldier or as a criminal. This shifting complex reality, Sewall insists, cannot be juridically subdued by simply expanding the available categories and protections of LOAC, as the categories themselves no longer accommodate the rapidly changing field of practice. Here the gap between norm and practice has opened not because actors choose to ignore the norm, but because the norm no longer corresponds to any *possible* practice.

Similar concerns inform Gabriella Blum's chapter, "The Individualization of War"; indeed, Blum provides a broad conceptual account of the phenomenon described by Sewall. Blum asks us to understand the expansion of the law of war in terms of a shift from "collectivism" to "cosmopolitanism." In this account, from the end of the nineteenth century and through much of the twentieth, the legal regulation of war operated on the level of the "collective"—that is, through a "state-oriented set of obligations—which viewed war as an intercollective effort."[54] More recently, however, the law of war has moved toward embracing the commitments of "cosmopolitan individualism,"[55] a theory that understands rights as vested in individuals "regardless of national affiliation or territorial boundaries."

Like Sewall, Blum argues that this shift has worked to unsettle and destabilize the foundational distinctions upon which the law of war was predicated. As an example, Blum describes changing understandings in the meaning of proportionality, the "just allocation of risk between combatants

and civilians."[56] Under the classic collectivist approach, soldiers are allowed "not only to prefer compatriot civilians to enemy civilians" but also their own well-being over that of enemy civilians. From this perspective, "the nationality of the civilian is . . . a determinative factor in risk allocation."[57] Contrast this with the commitments of cosmopolitan individualism. From this perspective, soldiers "bear an equal duty to risk their lives for the sake of enemy civilians as they do for compatriot civilians"; or, to put it somewhat differently, "[It] is the duty of soldiers to risk their lives for civilians, while pursuing military tasks, just as it is the role of police officers to risk their lives for the sake of civilians when they pursue criminals."[58]

This shift—from the collectivist to the cosmopolitan—does not signal simply a sharpening of the calculus of proportionality; rather, it signals a fundamental change in the law of war, as it effectively erases the distinction between combat and policing. Indeed, war begins to look all the more like a police action, controlled by similar norms. This is not a change that Blum finds entirely salutary. For one thing, Blum fears that the "higher bar of compliance" may deter liberal democracies from deploying force "even when such force is justified."[59] More to the point, she fears that treating war like policing creates the risk of treating policing as war: "[O]nce certain practices become legitimated under a paradigm of 'international policing,' they risk spilling over and being legitimated under a paradigm of domestic policing as well."[60] This, of course, is precisely what we've seen in the controversies over detention practices, the use of military commissions to try terror suspects, and the targeted killing of terrorists/fugitives such as al-Awlaki.

Similar concerns animate Laura Donohue's chapter, "Pandemic Disease, Biological Weapons, and War." Broadly historical in its perspective, Donohue's chapter also tells a story of the blurring of categories. From the founding of the Republic through the end of the twentieth century, the legal authority to respond to the threat of pandemic disease dramatically shifted from the police powers of the states to those of the federal government. The events of 9.11, however, triggered a fresh shift in thinking, as the threat posed by disease has more recently come to be seen through a "national security framework" and "through a lens of war."[61] Or, to use the language we encounter in Sewell and Blum, the line between police powers and military action has been rendered fluid and unstable.