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Civilians, Terrorism, and Deadly Serious Conventions

Jeremy Waldron[1]

1. Terrorism and Murder

On the morning of September 11, 2001, members of the terrorist organization Al Qaeda commandeered four American airplanes with civilian passengers. They flew two of them into the twin towers of the World Trade Center in Lower Manhattan, murdering around 2,800 people—more than 200 passengers and crew aboard the airplanes, almost 2,200 men and women working in the World Trade Center, and more than 400 of the police and firefighters who responded to the emergency.

Why do we call these "murders"? Why not "casualties of war"? We regard ourselves as engaged in a war against terrorism and apparently the Al Qaeda organization publicly declared itself to be in a state of war with the United States long before September 11.[2] I can imagine someone arguing that if *war* is what we have going on here, then we should use other terms to describe these killings—terms that are more appropriate to killings in time of war.

The immediate answer to this challenge is that the infliction of these 2800 deaths took place in clear and deliberate violation of the laws and customs of armed conflict. The laws and customs of armed conflict distinguish killings that are in some sense privileged as acts of war from those that are not so privileged.[3] They require us to follow a principle of discrimination, to make distinctions. The principle enshrined in the law at the moment is what I shall call the *traditional* principle of discrimination: I shall also use the phrase "the rule about civilians." It privileges the killing of combatants on either side, but it prohibits direct attacks on non-combatants, i.e., on civilians. The basic legal principles are set out in Articles 48 and 51 of the First Protocol to the Geneva Conventions.[4] As treaties, the

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[1] University Professor, New York University (Law School). I am grateful to Philip Alston, Kevin Dawkins, Stephen Holmes, Jeff McMahan, Tamar Meisels, Philip Pettit, Carol Sanger, Sam Scheffler, Henry Shue, and Joseph Weiler, for helpful discussions of these issues.

[2] See http://www.pbs.org/newshour/terrorism/international/fatwa_1998.html

[3] The term "privileged" is used in its Hohfeldian sense.

[4] Article 48: "Basic rule: In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." Article 51: "1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances. 2. The civilian population as

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Geneva Conventions only bind the states that have signed and ratified them.[5] But the principle of civilian immunity is also a principle of customary international law. In addition Article 8 (2) (b) and (e) of the Rome Statute of the International Criminal Court makes it a crime for any organization or individual to intentionally direct attacks against the civilian population as such.[6]

Apart from the special provisions of war crimes legislation, killings that are not privileged as acts of war are to be assessed in the usual way as culpable homicides—mostly as murders, that is, unlawful intentional killings. The 9/11 killings were of that kind, the Al Qaeda actions being deliberately aimed at civilians in exactly the way that the laws and customs of armed conflict prohibit. That is why the September 11 attacks were wrong. (But "wrong" is too mild a word: they were murderous atrocities.) And that is why terrorism in general is wrong, in all cases and in all circumstances, because terrorism is an approach to armed conflict that involves little else besides attacks of this kind. The military doctrine of terrorism is to create fear and panic in a population by murdering large numbers of civilians in circumstances where they are going about their ordinary business with little thought that they will be made targets of armed attack because they believe they are protected both by the laws of war and by the ordinary laws concerning homicide.[7] The laws and customs of armed conflict prohibit this. But the military doctrine of terrorism holds the laws and customs of armed conflict in contempt, at least so far as the terrorists' own actions and strategies are concerned.

In what follows, I would like to explore the grounds and presuppositions of this judgment. In particular I want to discuss the moral significance of the positive laws, conventions and customs that make terrorist attacks illicit. Some theorists maintain that the laws and customs of armed conflict are conventional in character, rather than representing any deep moral insight. They could be otherwise; we can imagine them otherwise; they have been otherwise in other times and places. So, we have to ask: is the infringement of the laws and customs of armed conflict a matter of any greater significance than a breach of local convention? Is its wrongness not relative to the contingencies of time and place where these

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such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. 3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities."

[5] See also the observation of PHILIP ALSTON, REPORT OF THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS: MISSION TO ISRAEL AND LEBANON (2 October 2006), at p. 7 (§ 19): "Although Hezbollah, a non-State actor, cannot become a party to these human rights treaties, it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights." (on file with author)

[6] ICC statute, Article 8 (b) (i)-(ii) and (e) (i), available at http://untreaty.un.org/cod/icc/statute/romefra.htm

[7] For a discussion of the leading characteristics of terrorism, see Jeremy Waldron, *Terrorism and the Uses of Terror*, 8 JOURNAL OF ETHICS 5 (2004).

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conventions happen to flourish? If so, why do we judge these actions so vehemently, using terms of moral condemnation normally reserved for violations of the most serious moral absolutes?

I should say at once that I think there are convincing answers to these questions. I believe that the language of murder that I used in the opening paragraphs of this essay *is* appropriate. (I did not use it as a sneaky academic's *oratio obliqua,* intending eventually to discredit it or attribute it to someone else.) Though I want to subject the judgments with which I began to some scrutiny, my aim is to understand them, not deconstruct or criticize them.[8] Indeed one of my purposes in this paper is to defend the view that terrorism is murder against philosophers who argue that the blanket prohibition on attacking civilians is unjustified, irrational, or obsolete.

2. Jeff McMahan on Civilian Immunity

A recent paper by Jeff McMahan provides a useful point of departure for our discussion. In "The Ethics of Killing in War," published in *Ethics* in 2004,[9] McMahan argues that there is no moral justification for any blanket prohibition on intentionally attacking civilians. He thinks one could make a moral case for saying that certain civilians are properly liable to intentional attack—for example, civilians who share responsibility for an unjust war. This is because he believes that "it is moral responsibility for an unjust threat that is the principal basis of liability to [be the target] of defensive (or preservative) force."

> The requirement of discrimination should then hold that combatants must discriminate between those who are morally responsible for an unjust threat, or for a grievance that provides a just cause [for war], and those who are not. It should state that while it is permissible to attack the former, it is not permissible intentionally to attack the latter….[10]

It would follow, on McMahan's approach, that soldiers who are not themselves engaged in an unjust war—soldiers who are resisting unjust aggression, for example—are not legitimate targets; and civilians who *are* responsible for unjust

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[8] I do not think that terrorism is wrong *by definition*. If we say terrorism is wrong by definition, then we imply that we will never use "terrorism" to refer to anything we regard as right or justified or permissible (including anything which is just like terrorism in its character or consequences except that it seems right or justified or permissible to us). Such resolutions about how words will be used are of little or no theoretical interest. There is a reason why actions to which the term "terrorism" is properly applied are wrong. The definition or part of the definition of terrorism helps *explain* why it is wrong: it points us to the features that make it wrong. But its wrongness is not part of the meaning of the word. (Something analogous, by the way, is the case with the wrongness of torture. It's not wrong by definition, but its definition points us pretty quickly to the features that make it wrong.)

[9] Jeff McMahan, *The Ethics of Killing in War*, 114 ETHICS 693 (2004).

[10] Ibid., 722-3.

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aggression *may* be legitimate targets of deadly force. I know that McMahan does not think that any of the 9/11 casualties fall into the latter category. But on his view, the wrongness of killing them is not simply a function of their being civilians; we have to also figure out whether they had any responsibility for the unjust aggression that Al Qaeda claimed it was responding to.

In some contexts this might make an important difference. McMahan believes, for example, that the American capitalists who persuaded the Eisenhower administration to organize a coup in Guatemala in the 1950s so that they could get back some land that had been nationalized would have been legitimate targets for Guatemalan forces resisting American aggression.[11] Not that McMahan is arguing against the very idea of a principle of discrimination. He insists that his argument does not challenge the principle "in its most generic formulation, which is simply that combatants must discriminate between legitimate and illegitimate targets. Rather, it challenges the assumption that the distinction between legitimate and illegitimate targets coincides with that between combatants and noncombatants."[12] McMahan thinks that we need to complicate the categories we use by introducing categories of guilty and innocent civilians and justified and non-justified combatants, and adjusting our sense of the appropriate discriminations accordingly.[13]

I hope McMahan will forgive me if I add that many terrorists hold a similar view. For example, some Al Qaeda officials argue that the rule about civilians is wrong inasmuch as it protects the people who, in a democracy, vote for and pay for wars of aggression.[14] It is impossible to know whether this is said sincerely or in good faith; one rather thinks it is not. On the other hand, some intellectual apologists for terrorism have said something similar: they say that the real criminals, imperialist politicians in the West and those who support them, should not be given the benefit of outmoded laws of war designed mainly to protect their own interests.[15] I do not say this in order to discredit McMahan's critique by association. For reasons I will discuss in section 3, he opposes and condemns violations of the existing laws and customs of armed conflict. I mention the use of similar arguments by terrorists and their apologists only to show that this is a real-life dispute, not a made-up philosopher's dilemma.

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[11] Ibid., 725-6.

[12] Ibid., __.

[13] For an example of what a more complex taxonomy would look like, see TED HONDERICH, AFTER THE TERROR 159 (revised edition, 2003) , distinguishing non-combatants, unengaged combatants, half-innocents, clear innocents, etc.

[14] See STEPHEN HOLMES, THE MATADOR'S CAPE 52 (2006), citing interview with Osama bin Laden.

[15] Cite to HONDERICH, supra note 13 ?

3. Distinguishing the Legal and the "Deep Moral" Issue

It is not McMahan's intention to justify terrorist attacks. But he is anxious that we should think complex moral thoughts rather than simple-minded ones in our condemnation of them. He is surely right about that. What I want to do in this paper is to bring that complex thinking to bear also on our understanding of what it is for conduct in this area to be governed by positive law.

In particular I want to consider the suggestion that violations of the rule about civilians are not exactly wrong in the way that murder is wrong, but wrong more as a technical matter, rather like the violation of a convention. Another similar suggestion is that violations of the rule about civilians are wrong in the sense of *mala prohibita*, not wrong in the sense of *mala in se*—wrong because they are prohibited, not prohibited because they are wrong.[16] I shall argue that even if the killing of civilians is categorized as a breach of convention or as *malum prohibitum*, that does not diminish the seriousness of these violations. I shall argue also that a move from the moral simplicities of *mala in se* to the complexities of conventional rules does not necessarily correspond to a move from deontological prohibitions to consequentialist assessment. In certain circumstances, the violation of a convention or of a merely technical rule may be absolutely forbidden from a moral point of view.

In addition, there is the complexity associated with the distinction between idealized moral thinking and the sort of assessments that are appropriate for embodiment in law. That this distinction might be important is suggested by some remarks Professor McMahan makes at the end of his article. McMahan observes that although he takes himself to have mounted a successful moral attack on the rule about civilians, it is probably a good idea for the laws of war to continue to prohibit intentional attacks on civilians (any civilians).

> [T]he account I have developed of the deep morality of war is not an account of the laws of war. The formulation of the laws of war is a wholly different task, one that I have not attempted and that has to be carried out with a view to the consequences of the adoption and enforcement of the laws or conventions. It is, indeed, entirely clear that the laws of war must diverge significantly from the deep morality of war as I have presented it.[17]

For example, although McMahan organizes his deep moral account around the principle of responsibility, he believes that the laws of war are oriented to different values: "[T]he laws of war are conventions established to mitigate the savagery of

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[16] For this distinction, see 1 William Blackstone, Commentaries on the Laws of England __ (17__), Introduction, sect. 2.

[17] McMahan, supra note 9, 730.

war."[18] McMahan emphasizes that when we move from what he calls the deep morality of warfare to these conventions, we are still in the realm of the moral.

> It is in everyone's interests that such conventions be recognized and obeyed. …Given that general adherence to certain conventions is better for everyone, all have a moral reason to recognize and abide by these conventions. For it is rational for each side in a conflict to adhere to them only if the other side does. Thus if one side breaches the understanding that the conventions will be followed, it may cease to be rational or morally required for the other side to persist in its adherence to them. A valuable device for limiting the violence will thereby be lost, and that will be worse for all.[19]

This claim, that the rule about civilians is best understood as a valuable convention, is quite common in the literature.[20] One of its best-known proponents is George Mavrodes.[21] Non-combatant immunity, says Mavrodes, is best thought of in relation to "a convention which substitutes for warfare a certain form of limited combat."[22] We could substitute single combat for warfare, but it is unlikely that that convention will be viable. So we substitute limited fighting among designated participants—large numbers of participants, but not as large as the number that would be involved in total warfare between all the members of rival communities. Mavrodes observes that the convention we have may actually be inferior to some other viable and morally less disreputable convention. But he denies that this means that we have now have a duty to follow this improved convention. "[T]he results of acting in conformity with a preferable convention which is not widely observed may be much worse than the results of acting in conformity with a less desirable convention which is widely observed."[23]

Still, neither thinker believes that the importance of following existing and observed conventions renders moral critique redundant. If a case could in fact be made for single combat as an alternative, then Mavrodes reckons we would have a "moral obligation to promote its adoption."[24] And McMahan's view is that we should establish laws and conventions for war that are "best suited to get combatants on both sides to conform their action as closely as possible to the constraints imposed by the deep morality of war." He believes the moral

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[18] Ibid., __.

[19] Ibid., 730.

[20] See also the discussion in TAMAR MEISELS, THE TROUBLE WITH TERROR __ (2008).

[21] George Mavrodes, *Conventions and the Morality of War*, 4 PHILOSOPHY AND PUBLIC AFFAIRS 117 (1975).

[22] Ibid., 127

[23] Idem.

[24] Idem.

arguments he has given can provide a basis "for the reevaluation of the rules we have inherited."[25] He acknowledges, in some suggestive passages at the end of his article, that it might be "dangerous to tamper with rules that already command a high degree of allegiance." "The stakes," he says, "are too high to allow for much experimentation with alternatives."[26] He acknowledges too that the conventional rules, though defective from a strictly moral-philosophy point of view, "may be well suited to the regulation of the conduct of war in conditions in which there are few institutional constraints, so that the restraining effects have to come from the content of the rules rather than from institutions in which the rules might be embedded."[27] McMahan says:

> It is possible that the rules of *jus in bello* coincide rather closely with the laws that would be optimal for regulating conduct in battle. These rules have evolved over many centuries and have been refined, tested, and adapted to the experience of war as the nature of war has itself evolved.

This is all extremely interesting, and it attests to the seriousness with which McMahan regards the laws and customs of armed conflict even as he undertakes a deep moral critique of one of their leading principles. I shall not say very much more about that critique in this essay, but I will try to explore the reasons that should lead—and I think mostly do lead—McMahan and other moral philosophers to take the positive law of the matter very seriously.

4. Is the Moral Question Prior to the Legal?

Some philosophers think that the concentrating on the legal question—the laws and customs of armed conflict—is a red herring.[28] Of course, the actions of Al Qaeda and other terrorist groups are legally wrong they will say; but legal wrongness leaves open the question of moral wrongness and it is moral wrongness we should be interested in. I agree that the issue of the sheer illegality of terrorism is not what people want to talk about. It is too easy: no one doubts that the terror attacks were illegal.

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[25] McMahan, supra note 9, __.

[26] Ibid., __. He even wonders whether it might not be appropriate to suppress his and others' moral criticisms: "Suppose … that … if combatants are to be sufficiently motivated to obey certain rules in the conduct of war, they will have to believe that those rules really do constitute the deep morality of war. If it is imperative to get them to respect certain conventions, must we present the conventions as the deep morality of war and suppress the genuine deeper principles? Must the morality of war be self-effacing in this way? I confess that I do not know what to say about this…" (Ibid., 732).

[27] Ibid., 731.

[28] See e.g. HONDERICH, op. cit., 94 and 104.

The moral question is much more to the philosopher's taste: is terrorism ever morally permissible or morally justified?[29] But in answering it we should take into account all the circumstances of the actions under consideration and the relation of the actions to existing positive law is one of those circumstances. I can imagine someone responding that the law's view of terrorism can be one of the circumstances attending an act of terrorism only if the law has formed a view of terrorism, and to do so the law must already have addressed the question of the rightness or wrongness of terrorism. And necessarily—so this response may continue—it must have addressed *that* question apart from the legal issue. The moral issue seems to be prior and inescapable.

But I don't accept that this is necessarily the order of priority, for all sorts of reasons. First: law often colonizes an area of normative inquiry first, before serious moral inquiry as we know it begins. Often we learn how to moralize by learning how to ask and answer legalistic questions: I strongly believe that law is a school of moral philosophy. Historically, this has been particularly true of the laws and customs of armed conflict. In this area, people were asking what it was lawful to do long before they were asking—in any refined sense—what it was right and wrong to do. We know that the modern law of war commenced in the spirit of "natural law" inquiry and, although it is tempting to say that natural law inquiry was just high-level moralizing (in a vaguely Catholic mode), that is an impression that cannot survive acquaintance with the actual natural law reasoning of early pioneering figures such as Gentili and Grotius.[30]

Secondly, even the most moralistic of philosophers will acknowledge that there are some matters that need to be settled by law even though they cannot be settled by moralizing. There are, for example, coordination problems that need to be solved: the rule of the road, the nature of the currency, and so on. As I have mentioned several times, many theorists of the laws and customs of armed conflict believe that some of its leading principles—including the rule about civilians—are best understood in this light. They may be wrong—or, as I shall argue in section 7, they may be only half-right. But still the suggestion needs to be taken seriously. If we accept it, then we do need to consider what the morel significance is of these essentially legalistic solutions.

Thirdly, even with the best will in the world on all sides, we are unlikely to find moral reasoning on these matters converging on moral consensus (let alone a consensus that all can regard as objective moral truth). I don't mean to sound

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[29] Cite to Honderich discussion.

[30] Cite ALBERICO GENTILI, ON THE LAW OF WAR, Bk. I, Ch. 1, p. 8 (Carew translation, Hein Online) and HUGO GROTIUS, ON THE LAWS OF WAR AND PEACE __ (___). See also Jeremy Waldron, *Ius Gentium: A Defense of Gentili's Equation of the Law of Nations and the Law of Nature*, available at http://ssrn.com/abstract=1280897

skeptical; I mean simply to indicate that what John Rawls called "the burdens of judgment" has particular application in this area.[31] The area under study in this paper is the area of inter-communal conflict and violence. To the extent that things can go very badly without the settlement that law alone makes possible and to the extent that law can provide settlement even in the absence of consensus about what McMahan calls the "deep morality" of war—to that extent, a cavalier or dismissive attitude towards the moral significance of law is not acceptable.

These last two points suggest that the existence and operation of law in an area like this must itself be regarded as a morally important institution. Its importance as an institution may vary from context to context: it is a matter of what law can do in a given area of human conduct, of what it can contribute, of what goods it can promote, and what evils it can avert or mitigate (discounted of course by the improbability of its having the effect that it aims to have or that it is valued for). In the area of armed conflict, law—mainly international law and international humanitarian law—has both modest and ambitious aims. Since 1945 international law has sought, with only moderate success, to suppress armed conflict between nations altogether.[32] More modestly, international humanitarian law seeks to mitigate the horrors of warfare when armed conflict takes place. This is an extremely important aim. So long as it remains possible that law can succeed in this aim, we must always be prepared to give great weight to its moral importance.

How the moral importance of law figures in our calculations also depends on the extent to which our actions—or the actions of those we are assessing—have an impact on the viability of law in this area and the likelihood of its succeeding in its aims. In some areas of human life, law is so robust and funded so well with the resources and the means of coercion, that we need not consider the impact of our actions on it. (We can afford to be preoccupied with its impact on us.) This was not always so. When Socrates imagined the Laws asking him:

> Can you deny that by this act which you are contemplating you intend, so far as you have the power, to destroy us, the Laws, and the whole State as well? Do you imagine that a city can continue to exist and not be turned upside down, if the legal judgments which are pronounced in it have no force but are nullified and destroyed by private persons?[33]

—he was asking about the impact of defiance by citizens of sentences handed down in routine criminal cases. Lacking any extensive means of coercion, the

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[31] Cite Rawls on burdens of judgement in JOHN RAWLS, POLITICAL LIBERALISM __ (1986).

[32] Cite to UN Charter, Chapter VII.

[33] Plato, *The Crito* in PLATO, THE LAST DAYS OF SOCRATES __ (Penguin Books, 1954).

Athenian laws relied largely on self-application as the primary mode of their administration. That is no longer so much the case: we make coercive arrangements for citizens to serve their sentences rather than asking them to carry out those sentences themselves.

Unlike modern criminal law, however, the laws of war rely immensely on self-application. There are sporadic *post facto* prosecutions for war crimes, and these may become more common with the institution of the International Criminal Court.[34] But for the immediate application of the rules protecting civilians, we rely on the discipline and military doctrines of the world's armed forces. We know that in the recent past, these prohibitions were seriously violated, even amongst the most civilized and best organized armed-forces: the use of fire-bombing and weapons of mass destruction against civilian areas in Germany and Japan by the United Kingdom and the United States are appalling examples. Thankfully, the nations that perpetrated these atrocities do not seem to have repudiated the principle of discrimination altogether. Since 1945 they have reaffirmed it in their practice (to a certain extent), in their international commitments, and in their military doctrine. But the events of 1943-5 showed how fragile the law in this area is. Doubtless there will always be violations, even when doctrine is firm. But the growth of international terrorism represents the emergence of armed groups that repudiate the laws restricting the waging of armed conflict not just at the level of individual incidents but as a matter of doctrine. It remains to be seen what the broader impact of this will be. But it is not hard to see how we could adapt the Laws' characterization of the Socrates escape plan in the *Crito* to the actions and doctrines of these terrorist organizations:

> Can you deny that by these actions which you are contemplating you intend, so far as you have the power, to destroy the laws and customs of armed conflict? Do you imagine that a regime of international humanitarian law can continue to exist and not be turned upside down, if its leading principles are nullified and destroyed by armed groups such as yours?

Terrorists have organized a whole way of fighting around the repudiation of the laws and customs of armed conflict; they have adopted institutionally and doctrinally the principle of acting as though the viability of this body of law did not matter. Since the body of law in question is both fragile and important, this is a staggeringly irresponsible course to have embarked on.

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[34] See footnote 6 above.

5. Disagreement and Compromise

I turn now to consider the formal character of law in this area. How should we think about the existing laws and customs of armed conflict? McMahan and Mavrodes suggest that the rule about civilians is better understood as a convention than as a legal rule aiming directly to capture the force and content of some moral principle. They may be half right, as I will argue in section 7. But I worry that their path to this conclusion is suspect.

The path goes something like this.[35] Professor X begins reflecting on the very idea of a principle of discrimination in warfare. He asks what such a principle might possibly be based on. He comes up with the idea of *innocence*: many of those who are most vulnerable to attack are innocent of the crimes that the attackers take themselves to be resisting or punishing. So he considers that a good approach to discrimination in warfare might be organized around the idea of guilt or innocence—around what McMahan calls the principle of responsibility. But then Professor X examines the principle of discrimination that we actually have in international humanitarian law (the rule about civilians) and he sees that it doesn't correspond to the innocence approach. True, it protects some innocents like very young children. But it also protects some guilty people, like civilian politicians and influential citizens who voted and argued for unjust aggression. And in other cases it renders innocents liable to attack, like young conscripts under orders who are not in any moral sense "guilty" of their superiors' crimes against peace. Faced with this mismatch, Professor X considers whether to dismiss the rule about civilians altogether, pending its replacement by one organized more consistently around the idea of innocence. But he balks at this; the prospect of leaving armed conflict unregulated in the meantime does not appeal to him. So he concludes that the rule about civilians must be justified in the meantime on grounds other than its inherent merits. He concludes that the rule must have the moral status of a convention. It does not reflect any moral truth in itself. (If it did, Professor X reckons it would reflect his moral principles.) But it still may have the significance of a convention solving a coordination problem.

Now, of course X is not the only moral philosopher reflecting on these matters and following a path like this. Professor Y has also been reflecting on the idea of a principle of discrimination in warfare. Professor Y thinks it ought to be organized around the idea of self defense: a person is permitted to try to kill those, but only those, who are trying to kill him or who pose a deadly threat to himself and others. He recognizes that some of these may be innocent in the moral sense; he accepts the idea of innocent threats; but he reflects that one is entitled to kill even an innocent threat in self-defense. The trouble is that Professor Y's approach

[35] What follows is a bit of a caricature, intended to make a point.

does not match the existing legal rule about civilians either: that rule permits one to bombard members of the catering corps if they are in uniform, but not a college of civilians doing the science that will make deadlier weapons available for use against us. So Professor Y goes through ruminations analogous to those that Professor X went through. If the rule about civilians deserves our support, it does so not on the merits, but perhaps as a convention.

I hope it is clear why X's or Y's path to the convention conclusion may be unsafe. The rule that each of them describes as a convention may in fact represent a victory for moral factions in the law-making community who do not share Professor X's ideas (or Professor Y's ideas). X may describe as a convention what is in fact a victory for Y's moral ideas and *vice versa*.

An even more likely account is that the existing law represents not a decisive victory for any one side—for as we have seen neither Professor X nor Professor Y regards it as such—but a compromise between people like X and people like Y and perhaps others besides. The compromises may look ragged and unsatisfactory from a moral point of view. But like the outcome of a vote, they may still have fairness-based process-based claims on us. So *a compromise* or *a moral position that we oppose* are two alternatives to the convention hypothesis.

I believe there is a lot in the compromise characterization. The traditional principle of discrimination has elements in it that make moral sense. It certainly tries to protect a large category of individuals whose innocence is indisputable. It also gives those who are engaged in actual fighting the right to protect their lives against those who are trying to kill them. By trying to do these two things together, it ends up being both over- and under-inclusive in both regards, and that is a mark of legal compromise. Much positive law has this character. I stressed earlier the Hobbesian point that law has to do its work and secure its allegiance among people who disagree about moral priorities. Sometimes it does so in a morally coherent way, by opting exclusively for one set of priorities through a fair political process. More often however the strategy is to take on board as much as possible from each contesting moral position even if the result looks incoherent from a theoretical point of view. Some jurists deplore this.[36] I think they are wrong to do so. Be that as it may, the compromise hypothesis arguably provides a better explanation of what some regard as the moral arbitrariness of the rule about civilians than the convention hypothesis.

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[36] See, e.g., Dworkin on legislative integrity in RONALD DWORKIN, LAW'S EMPIRE __ (1986).

6. Technicality

In addition we also need to take account of considerations of legal technicality and implementation which may make a positive norm, any positive norm, look odd by the standards of moral philosophers. There are several points to consider here.

First, the relevant laws have to be administered among people who almost certainly disagree about justice and guilt in relation to the armed conflict in question. It may be difficult to administer norms using words like "just" and "guilty" in their traditional moral senses, or to impose tests about whose application there is likely to be irresolvable disagreement. McMahan acknowledges this.

> Perhaps most obviously, the fact that most combatants believe that their cause is just means that the laws of war must be neutral between just combatants and unjust combatants, as the traditional theory insists that the requirements of *jus in bello* are.[37]

The laws *in bello* have to use simple categories like the distinction between members of the organized military and civilians even though these categories are certainly over- and under-inclusive by moral standards. But the moral standards by which we judge them to be so could not possibly be administered effectively in these circumstances of dissensus. But this does not show that norms *in bello* that we do administer are just conventions. Instead they may be approximations to the moral truth—the closest we can feasibly get in the circumstances of disagreement.

Perhaps the laws *ad bellum* can afford to use criteria whose application is more controversial; perhaps they have to. But in their modern form even they strive to avoid the difficulty we are discussing by orienting themselves not to disputable questions of justice but either to authoritative political determinations (e.g. UN Security Council determinations) or to circumstances that are thought to be patent and indisputable (like the imminence of attack). The 1967 War in the Middle East and the American invasion of Iraq in 2003 show that we have not wholly succeeded in this: the import of an array of Security Council resolutions can be a matter of dispute and the imminence of attack, justifying a resort to self-defense without authorization, can be a contested matter of judgment. So we do get some irresolvable disagreement over *ius ad bellum*, which makes the administration of these norms quite difficult. Imagine the havoc that would result if the administration of the norms *in bello* were as contestable as this; that might well be the price of making the norms morally more refined.

A second feature of legal administrability has to do with the reasonableness of the burdens that the laws and customs of armed conflict lay upon combatants.

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[37] McMahan, supra note 9, 730.

The laws of war (especially *ius in bello*) are to be administered not only in circumstances of moral disagreement, but in circumstances of panic, anger, and great danger. The moral burdens they impose have to be shouldered by those whose lives may be imminently at risk as a result of compliance. With regard to some of the laws of war, we just accept this: for example, we say that prisoners are not to be executed, even if that is the only way for their captors to avoid defeat and death. But too much of this, and the laws of war become utopian and impossible to enforce—especially to the extent that they rely on self-administration by the forces concerned. What is true of danger is also true of anger. We impose certain absolute prohibitions that have to stand up to and curb the worst excesses of the anger and mutual hostility that combat involves: for example, in no circumstances may a military unit proceed on the basis that no quarter is to be offered to its opponents. So sometimes the laws of war defy anger, just as in some respects they defy fear. But again a delicate balance must be struck; for the most part the laws of war must work around the emotions like fear and danger that the circumstances of warfare impose, rather than assuming they do not (because they morally should not) exist.

Moreover, we should not assume that this is a balance that can be arrived at in the philosopher's armchair. The rules have to emerge from the experience of war itself. This is the basis of one of McMahan's concessions to the existing laws (whose deep morality he deprecates):

> It is possible that the rules of *jus in bello* coincide rather closely with the laws that would be optimal for regulating conduct in battle. These rules have evolved over many centuries and have been refined, tested, and adapted to the experience of war as the nature of war has itself evolved.

Thirdly, laws designed to govern conduct in the fog of war cannot take account of every detail that a deep moral theory will take account of. Most *ius in bello* are self-administered by individual soldiers and their unit commanders. A refined moral principle might require of our combatants a delicate inquiry of the guilt and moral status of every person or unit fired upon. But that would be utterly unworkable. Even if it is crude by moral standards, some criterion such as the wearing of uniforms has to be used instead. No doubt these criteria are conventional in character. They place what may seem to a philosopher undue emphasis on trivialities like uniforms, or insignia, and the open (visible) carrying of weapons, and they denounce, again with what must seem like un-called-for vehemence, the perfidious use of flags and signage of various sorts. But these conventional criteria are indispensable for the administration of any norm like the rule about civilians the circumstances where they have to prevail.

Fourthly, apart from reasonableness and administrability there are simply the technical aspects of positivization. Positive law is never just an application of natural law or of moral ideas; it involves specification, or as the natural lawyers called it *determinatio*.[38] Moral ideas do not initially present themselves in law-like form, if what we mean by law-like is something that can really work like a law. But real-life laws are complex bodies of articulate doctrine and ordered criteria, organized in ways that most moral philosophers can barely comprehend.[39] The layman sometimes complains that cases in law are won or lost on "technicalities." But law-making is largely a technical matter, with all sorts of devices that look counter-intuitive to the sensitive conscience but which are required to ensure administrability (e.g. in the particular and themselves highly regulated circumstances of a court), to take into account other moral needs that may be relevant to administration (procedural fairness, for example), and to allow a given norm to take its place in a coherent and complex *corpus juris*.

There is a sense in which these technical elements are conventional rather than directly moral. But that does not necessarily make the rules themselves into conventions. The technical aspects of positivization would have to apply even if the legal norm in question purported to be just an embodiment of a moral norm. So even in the case of rules which undoubtedly are not conventions—e.g. the rule against killing—John Finnis observes that "it is the business of the draftsman to specify, precisely, into which of these costumes and relationships an act of killing-under-such-and-such-a-circumstance fits. That is why '*No one may kill ...*' is legally so defective a formulation."[40] Details have to be settled; rules of evidence, presumptions and burdens of proof laid down; bright lines drawn; operationalized criteria established; and so on.

7. The idea of a "convention"

So far, my intention in this paper has not been to show that the "mere convention" hypothesis is completely wrong as an account of the rule against killing civilians. Instead I have tried to show how it may be layered with other elements that provide an alternative or additional explanation why the rule might seem unsatisfactory from a moral point of view. But now I want to confront the "convention" suggestion more directly.

The word "convention" can mean many things; it has a technical sense in philosophy—corresponding roughly to what are known as "Lewis-conventions,"

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[38] AQUINAS, SUMMA THEOLOGICA __.

[39] The best modern account of this is JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980), Ch. 10.

[40] Ibid., 283.

and it has a number of looser senses, some but not all of which are quite unrelated to the technical sense.

One meaning, which we can put aside at this point, is the sense used in the phrase "Geneva Convention," referring to a multi-lateral agreement, negotiated internationally and binding on a party by virtue of its consent expressed through signature and ratification. As we have already seen, the Geneva Conventions themselves are hugely important as sources of the modern principles of international law that protect civilians in wartime. But that is not the sense of convention I am about to discuss. The Geneva Conventions contain certain rules that are definitely not conventional in the sense I am about to discuss: the rule against torture, for example, in Common Article Three.

Another much looser sense of "convention" is that which contrasts the *conventional* with the *natural*. There is a version of this in David Hume's contrast between something virtues that are natural and virtues that arise out of human artifice or contrivance.[41] Hume argues that justice and respect for property are artificial virtues.[42] Based on our understanding of the advantages that accrue from certain arrangements—such as mutual respect for one' another's possessions—we respond to actions and situations in terms of an artificial and often quite complex classification; as such our response is quite different from the responses generated by our natural and unreconstructed passions. The contrivance here need not take the character of a deliberate agreement. Instead, the origin of an artificial virtue may be found in a convention which Hume understands as the upshot of what is often a tacit sense of common interest:

> I observe, that it will be for my interest to leave another in the possession of his goods, provided he will act in the same manner with regard to me. He is sensible of a like interest in the regulation of his conduct. When this common sense of interest is mutually express'd, and is known to both, it produces a suitable resolution and behaviour. And this may properly enough be call'd a convention or agreement betwixt us, tho' without the interposition of a promise; since the actions of each of us have a reference to those of the other, and are perform'd upon the supposition, that something is to be perform'd on the other part. … In like manner are languages gradually establish'd by human conventions without any promise.[43]

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[41] DAVID HUME, A TREATISE OF HUMAN NATURE 474 and 477 (Selby-Bigge ed., ___).

[42] Hume acknowledges that in a sense of course the products of human judgment and understanding are as "natural" as our immediately given sentiments: ibid., 474 and 484.

[43] Ibid., 490.

We must be careful, however, not to run together the two notions of artifice and coordination in Hume's account. Some of the virtues that Hume calls artificial do not have the coordinative character that we see in the examples he gives here (property and language). The virtues associated with government—such as loyalty or allegiance—fall into this category, as do the virtues regarding modesty and chastity.[44] This is an important point because some theorists who recognize the artificial character of our traditional principle of discrimination have sometimes felt obliged—wrongly, in my view—to represent it as something like a common-interest solution to a coordination problem.

The best-known philosophical explication of conventions is that of David Lewis.[45] Lewis is interested in conventions that solve coordination problems among two or more agents. In a simple two-person coordination problem, each of two persons faces two options and each person's choice between these options must be made independently of the other's. If two agents each face two choices there are four possible pairs of choices. There is no conflict of interest, but there are two pairs of choices either of which would be regarded by the players as advantageous and two pairs of choices either of which would be regarded by the players as disadvantageous. Two cars approach each other from opposite directions on a narrow road: each driver could move either to his own left or to his own right. If each of them moves to his own left, they can pass each other unobstructed and if each of them moves to his own right, they can pass each other unobstructed. But if one of them moves to his own left and the other moves to his own right, then there will be a collision or at best an impasse. When situations of this kind tend to recur, a convention can be helpful. A convention in Lewis's sense is a regularity of behavior which, if observed by both parties, tends to solve such coordination problems. In America we drive on the right. We could all drive on the left as they do in Britain. That would be an equally good rule if everyone was prepared to follow it. But we have our own settled convention in the United States; and no sensible person drives on the left around here. The convention means that, whenever these situations occur, each of us approaches them with the same expectations about the other's likely choice. This enables us to find our way through these situations with little or no difficulty.

Lewis offers a useful general definition of a convention, along the following lines.[46] (What follows is not exactly Lewis's formulation, but a simplified version of it.)

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[44] See Hume's passage on "Of the source of allegiance," ibid., 539 ff. and his passage on "Of chastity and modesty," ibid, 570 ff.

[45] See DAVID LEWIS, CONVENTION (1986).

[46] Ibid., 78.

> A regularity R in the behavior of members of a population P when they are agents in a recurrent situation S is a convention if and only if it is true that, and it is common knowledge in P that, in almost any instance of S among members of P, (1) almost everyone conforms to R; (2) almost everyone expects almost everyone else to conform to R; (3) almost everyone has approximately the same preference regarding all possible combinations of actions; (4) almost everyone prefers that any other person conform to R on condition that almost everyone conform to R; (5) almost everyone would prefer that any other person conform to a different regularity R' on condition that almost everyone conform to R' (where R and R' indicate alternative incompatible actions in S).

The rule of the road obviously satisfies this definition: S is the situation where two drivers approach one another from opposite directions; in America, R is "Bear to one's own right" and R' is "Bear to one's own left." Each of us prefers that the others follow the same regularity that we are following ourselves; it doesn't particularly matter whether we follow R' or R; but since R has become established among us, that is the convention we follow.

It is not hard to see how someone might think the rule about civilians might be an instance of R in this schema, where S is the recurrent situation of armed conflict. Recall that McMahan suggested that this convention exists to mitigate the horrors of war.[47] Each member of the international community prefers that the horrors of war be mitigated. R is one way of mitigating the horrors of war. It limits the class of those who are liable to be attacked or killed to those who are members of armed forces in uniform. But there are other ways of limiting the class of those who are liable to be attacked or killed: we could have a rule that no women and children are to be targeted, for example (call this R'). But if most of other nations are following R rather than R', then each nation has an interest in following R, the traditional principle. So it is a convention. The reason for following it is not anything about the merits of R that would differentiate it from R': the reason for following it is that most others are following it and most others expect others (including ourselves) to follow it.

If the rule about civilians is to be understood as a Lewis-convention, then some important consequences would follow. First, it seems to follow that if other armies are not abiding by the rule about civilians, it makes no sense for me to abide by that rule. That would be like me driving on the left in Britain after everyone has for some reason started driving on the right.[48] Secondly, it seems to make the rule

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[47] Supra, text accomponaying note 19.

[48] See Mavrodes, supra note 21, 86-7.

about civilians highly contingent on the interests of the warring parties. Even if each side has an interest in mitigating the horrors of war, it may not be the case that that interest always trumps other interests that a nation or army might have. Or it might be trumped by an interest in mitigating the horrors of war in some other way: in 1945 the United States reckoned that the deliberate killing of hundreds of thousands of civilians in Hiroshima and Nagasaki would be a better way of mitigating the horrors of the final stages of the Second World War than continued combat which observed the traditional principle of discrimination.[49]

In these ways, the Lewis account[50] seems to undermine the idea of the rule about civilians as a moral absolute. It shows that in certain circumstances, it makes sense to violate it, and it gives no other account of the rule that would stand against this. Of course, theorists differ in the tone in which they point this out. Some think it is an advantage of the Lewis account that it has these consequences. Others think that these points indicate that the Lewis account must be wrong. I am in the latter camp. I think the Lewis account is defective as an explication of the rule about civilians. If the rule about civilians is a convention, it must be a convention in a looser sense than this. Let me explain why.

Lewis-conventions have two notable features. The first concerns the coincidence of interests: it is better for all concerned if all or most of the others follow some rule; and if all or most of the others follow R, it is better for oneself to follow R. I call this the *convergence of interest* feature. The second notable feature of Lewis-conventions has to do with the relation between R and R'. They are arbitrary alternatives in the sense that any differences between them pale in comparison to the importance of following one of them or the other as opposed to no such regularity. I call this the *arbitrary alternative* feature. Lewis's conception requires the presence of both features.

I think it is at least arguable that the rule about civilians and its alternatives satisfy the arbitrary alternative feature; I shall talk more about that in a moment. But I don't think it satisfies the convergence of interest feature. When two groups are locked in armed conflict, it is easy to imagine that any one of them would most prefer that the other observe R while it does not. Following R, after all, is costly. What could be better from a selfish point of view than that the other side bear the costs of refraining from attacking one's own civilians, while one wages indiscriminate warfare oneself? In a classic game of coordination, it makes no sense to violate the regularity that one expects others to conform to. But in the situation of war it often does. I believe terrorist groups often operate with this in

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[49] I return to this point in the final section of this paper: infra text accompanying note 73.

[50] My phrase "the Lewis account" just means an explication of the rule about civilians as a Lewis-convention. I know of no evidence that the late David Lewis thought the rule about civilians was a Lewis-convention.

mind. They complain when *they* are not accorded the benefit of the rules of armed conflict; but they routinely violate these rules themselves. Their actions are wrong; but they are not unintelligible in the way that "defecting" in a coordination game would be unintelligible.[51]

More important: it can make sense for one side to continue to follow the rule about civilians even when the other side is not. This is because the rationale of the rule is partly (on both sides) altruistic rather than self-interested. One follows the rule out of concern for the civilians in question, civilians on the other side as well as civilians on one's own side.[52] The rationale usually given for the rule—mitigating the horrors of warfare—recognizes this. My refraining from targeting civilians obviously mitigates the horrors of warfare even if others do target them. I don't mean to suggest that Lewis-conventions cannot operate in a context of altruism. There may be cases of altruistic coordination, where it makes no sense for me to play my part in a given altruistic scheme unless others are also playing theirs.[53] But the rule about not targeting civilians is not like that.[54]

For these reasons, I don't think the rule about civilians can usefully be regarded as a Lewis-convention in the strict sense. It lacks the crucial element of interdependence of interests (even taking moral interests into account).

Is there perhaps a looser sense of interdependence that applies to the rule about civilians? I can imagine someone saying that observing the rule is something of a handicap to a warring army, and that it cannot be expected to labor under this handicap unless the opposing army does so too. The handicap need not be equal on both sides, but there may nevertheless be a sense of its being *unfair* for one party to wage unrestrained warfare while the other party observes the legal constraints. In this sense—a very loose sense of interdependence indeed—we may not expect a principle of discrimination to survive unless it tends to be followed by both sides in most conflicts.

What about the *arbitrary alternative* feature? There the Lewis account is more suggestive. Various alternatives to the rule about civilians are imaginable.

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[51] True, if X violates R, it might expect retaliation. Or X might expect that the other side will not long continue observing R once it becomes clear that X is not following it. And these features of reciprocity and retaliation may lead X back to conformity. But these are secondary matters and by themselves they don't establish the sort of essential coordinative background that Lewis conventions seem to presuppose.

[52] Maybe one has greater concern for the latter. But refraining from attacking the other side's civilians need not be merely a strategy for protecting one's own civilians.

[53] Derek Parfit said something about this in DEREK PARFIT, REASON AND PERSONS __ (1984). See also the fine account of coordination for the common good in FINNIS, supra note 39, Ch. [on authority].

[54] So I think McMahan is mistaken when he writes (supra note 9, at __) that it is rational for each side in a conflict to adhere to the rules of war only if the other side does: "[I]f one side breaches the understanding that the conventions will be followed, it may cease to be rational or morally required for the other side to persist in its adherence to them."

Jeff McMahan seems to be imagining one alternative. And others can be imagined. In the past, some Palestinian terrorist organizations have proclaimed their adherence to an alternative principle of discrimination which forbids the targeting of Israeli citizens living within Israel's pre-1967 borders, but permits the targeting of settlers within the Occupied Territories. Or in Northern Ireland during the troubles there, nationalist groups said they would target civilians involved in supplying goods and services to the police and the military but not civilians (even members of the opposing community) who were unconnected with the security forces.

We know that the rule about civilians has varied over time. It used to be the practice to put the civilian inhabitants of a besieged city as well as its military defenders to the sword when a siege was successful. We no longer allow this. But the element of historical relativity might seem to suggest we are dealing with something conventional.

Can we therefore proceed with a looser sense of convention which, though it lacks the *convergence of interest* feature, is characterized by the artificiality associated with the *arbitrary alternatives* idea? I am not sure whether it is possible entirely to separate the two features. Andrei Marmor has outlined an understanding of convention that seems to be dominated by the idea of *arbitrary alternatives*.[55]

> A rule, R, is conventional, if and only if all the following conditions obtain: 1. There is a group of people, a community, P, that normally follow R in circumstances C. 2. There is a main, or primary, reason (or a combination of reasons), call it A, for members of P to follow R in circumstances C. 3. There is at least one other potential rule, [R′], that if members of P had actually followed in circumstances C, then A would have been a sufficient reason for members of P to follow [R′] instead of R in circumstances C.[56]

Marmor's feature 2 replaces the interdependence of interest with the idea of a shared reason. But there is still an element of interdependence in Marmor's account of arbitrariness:

> Arbitrariness is an essential, defining feature, of conventional rules. This is actually a twofold condition. First, a rule is arbitrary if it has a conceivable alternative. If a rule does not have an alternative that could have been followed instead without a significant loss in its function or purpose, then it is not a convention. Basic moral norms, for instance, are not conventions; properly defined and qualified, they do not admit of alternatives (in the sense defined above). … Second, the reason for following a rule that is a

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[55] See Andrei Marmor, Deep Conventions, 74 PHILOSOPHY AND PHENOMENOLOGICAL RESEARCH 586 (2007).

[56] I have changed Marmor's algebra slightly so it coincides with Lewis's on p. 18 above.

> convention depends on the fact that others follow it too. … The reason for following a convention partly depends on the fact that it happens to be the rule that people in the relevant community actually follow. Had they followed an alternative rule, the same reason, A, would have applied to the alternative rule, namely, the one that people actually follow.[57]

In the absence of convergence of interest, what could explain this inter-dependence? One possibility is that if war is to be limited at all, it has to be limited by rules laid down and accepted by all or most members of the international community in advance of a given conflict. The rules must be a common juridical resource, on the shelf, waiting for conflicts as they arise. If the rules are not settled in advance, it will be too late once conflict breaks out. So perhaps we can explain Marmor's condition 3, viz.

> There is at least one other potential rule, [R′], that if members of P had actually followed in circumstances C, then A would have been a sufficient reason for members of P to follow [R′] instead of R in circumstances C

by saying that, had R′ instead of R been agreed and available on the shelf (as it were) in advance of this conflict (or any given conflict), then R′ would have been the rule the parties followed to promote reason A (if they were to follow any such rule at all).

But then the sense of arbitrariness becomes quite weak. R's being on the shelf rather than R′ may be evidence of moral progress. For example, maybe we think our approach to the killing of civilians is superior to the usages of siege warfare. Or to take another example: Grotius observes that the permissibility of killing prisoners used to be taken for granted at least in certain circumstances, but that now civilized countries no longer follow that rule. [58] We may still say that had the earlier rule still been on the shelf, *that* is the one we would have followed. But this does not show that the two rules are *arbitrary* alternatives. Rather the continued presence of the earlier rule as our only juridical resource for dealing with this sort of situation would indicate that there hadn't been the moral progress necessary to get to a better rule.

In section 5, I raised the issue of moral controversy. For example: there is a dispute between Jeff McMahan and some others about what is the best principle of discrimination. Traditionalists defend what I have called the rule about civilians; McMahan proposes a better rule (based on his "principle of responsibility").[59] But McMahan understands the danger of an unresolved controversy among combatants

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[57] Marmor, supra note 55, at 590-1.

[58] GROTIUS, supra note __, Bk. III, Ch.

[59] See above text accompanying note 10.

about which is the appropriate rule to follow: if *both* rules are (so to speak) on the shelf, there is a danger that no rule will be followed, because neither of them will seem to combatants in the heat of incipient battle to be *the* rule to follow. So McMahan acknowledges that, for the time being at least, it is better if all combatants follow the traditional rule. But this does not mean he regards them as arbitrary alternatives. His acknowledgment is like the position of a player in a "Battle of the Sexes" game.[60] (Husband and wife want to go out one evening; he prefers to go to the opera and she prefers to go to the ballet; but most of all they want to go out together rather than each to his or her favorite entertainment alone.)[61]

8. Deadly Serious Conventions

I implied at the beginning of the paper that I was less interested in refuting the thesis that the traditional principle of discrimination is a convention, than in showing that its conventional character (or whatever conventional character it has) should not be thought of as diminishing its moral importance. I imagined someone asking, "What is the big deal about killing civilians if the rule prohibiting it is just a convention or an artificial technical device?" As it stands the question is corrupt and irresponsible. But there is a serious issue to be faced: if we accept that the rule about civilians has important conventional elements as well as technical elements that are bound to distinguish it from familiar moral norms, how should we think about the seriousness of violating it?

The first thing that needs to be said is that even if the choice of a conventional rule is arbitrary, the point of having a convention may not be. Take the example of the rule of the road. Nothing seems more trivial than the choice of driving on the left or driving on the right. But if we do not coordinate on one or the together then the result is chaos and paralysis at best and very likely carnage. The underlying goal won't be served at all unless we choose—and stick with—a convention. And the key point is that the reason for having a convention generates a reason for observing it. In many instances a violation of the rule will result in death and mayhem. This is an arbitrary convention; but it is a *deadly serious* arbitrary convention.[62]

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[60] There is an excellent account in JEAN HAMPTON, HOBBES AND THE SOCIAL CONTRACT TRADITION __ (19__), Ch. 6.

[61] Marmor sees this when he observes (supra note 55, at __) that "arbitrariness … should not be confused with indifference. … [C]ondition [3] does not entail that people who follow the convention ought to be indifferent as to the choice between R and S. The rule is arbitrary, in the requisite sense, even if people do have a reason to prefer one over the other, but only as long as the reason to prefer one of the rules is not stronger than the reason to follow the rule that is actually followed by others."

[62] See also FINNIS, supra note 39, 232.

If the rule about civilians is a convention, it is a convention of this kind. It is a deadly serious convention: serious in its responsiveness to an important underlying reason, namely the mitigation of the savageries of war, and deadly serious in the consequences of this violation.

Of some conventions, it is true that individual violations may have little deleterious impact on the convention. My grammatical errors, for example, do not undermine the language. But it does not follow that violations are harmless. My driving on the right in Britain is still incredibly dangerous even though it is unlikely to rock the prevailing convention. For some cases, however, violations may also undermine the convention or the public good that the convention aims to secure. I think this is true of the rule about civilians. As well as the sheer diminution of carnage, the rule seeks to establish as a collective good some sort of atmosphere of moral restraint even amid the horrors of war. One of the things that is wrong with deliberate violations of civilian immunity—and certainly (to return to our original subject) one of the things that is wrong with terrorism—is that it makes the securing of this collective good much more vulnerable to collapse. Violations here are not like individual contributions to pollution: a drop in the ocean, so to speak, making little discernable difference. Quite the contrary, sustained violations as a matter of policy by powerful entities may bring us quickly and closely to the tipping-point where the convention simply collapses. We should remember that, despite the large numbers of people actually engaged in combat, the numbers of individual states and armed organizations with military doctrines is quite small (numbered in the hundreds, not the millions).[63] Also, the knock-on effects of perceived violations, especially if these seem like acts of policy, are likely to be extensive.[64] Because of what is at stake for any group in armed conflict, because of the problem of the costs of compliance, because of the temptations of positional advantage and the fear of being taken advantage of, any sense that others are securing an advantage in armed conflict by violating these norms is likely to lead to others' violating them as well.

Any convention can stand a certain amount of defection and still survive; but the amount that it can stand and still survive may be quite limited.[65] In the case of the laws of war, the environment in which they operate is such that they are inevitably close to this threshold most of the time. They are observed imperfectly at best and sometimes not at all. Sustained violations therefore or the development and implementation of doctrines that hold the laws of war in contempt stand a

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[63] I don't just mean the numbers with regard to any given war, but even the numbers in regard to wars in general.

[64] Terrorism amplifies and aims to amplify the knock-on effects of violations, so that particular incidents are accompanied by a more general diminution of confidence.

[65] Cf. the argument in RICHARD KRAUT, SOCRATES AND THE STATE __ (19__).

good chance of adding so much to the number of violations that the convention has to reckon with anyway, that they will contribute significantly to the failure of the entire enterprise. [66]

9. Murder

I have left the most important point till last, and it will help us finally think about conventions in a way that explains and justifies the opening paragraph of this paper. The artificial laws of war (to the extent that they are artifices) including the conventional principle of discrimination between soldiers and civilians (to the extent that it is a convention) do their work not just against a background of danger, destruction, and death, but against a background of *murder*.

The norm we are considering—the rule about civilians—may be artificial and conventional, but it does not prohibit things that apart from its operation would be perfectly permissible. It is not like a set of parking regulations, introducing prohibition into an area where there was no prohibition before.[67] On the contrary, the conventional rule that prohibits attacks on civilians prohibits something that—apart from the laws of war—would already be a grave moral offense. The default position, apart from any convention, is that intentionally killing or attacking any human being is prohibited as murder. The laws of armed conflict provide an exception to that; they establish what we call in the trade a Hohfeldian privilege in relation to what is otherwise forbidden. And the rule about civilians is to be understood as a limitation on the scope of that privilege.

Absent the laws and customs of armed conflict, *all* killing in war would be murder.[68] (The default position is emphatically *not* that you are allowed to kill anyone you like and that the rule about civilians has encroached upon *that*.) The situation is that the laws of war have drawn an artificial line withdrawing the prohibition on murder from a certain class of killings. The rule about civilians reflects the point that this withdrawal of the prohibition on murder from certain

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[66] Refer back to the discussion at the end of section 4.

[67] Cf. the account of the Bush Administration's approach tot the Geneva Conventions in Jeremy Waldron, Torture and Positive Law: Jurispsrudence ofor the White House, 105 Columbia Law Review 1681 , at 1691-5 (2005).

[68] IMPORTANT NOTE: **Much of what we call "collateral damage" would be murder too, for legally and morally the category of murder is not confined to intentional killings. (Absent the laws of war, blowing up a building to kill one person you intended to kill with the predictable effect that other persons you didn't intend to kill would die as a result would clearly constitute the murder of the latter group. It is a pernicious fallacy of philosophers to think that the Doctrine of Double Effect makes some killings like this permissible. Most legal systems punish as murder reckless killings of this kind.) The laws of war modify that situation by permitting the intended killing (if it is of an enemy combatant) and of sometimes permitting the unintended killing if it is necessary for and proportionate to the securing of a legitimate military objective. But if those conditions (necessity and proportionality) fail, the unintentional killing remains murderous or (at best) a serious form of culpable homicide such as manslaughter.**

killings is a partial, not a wholesale withdrawal. In this regard, the position about *malum prohibitum* that has been toyed with from time to time in this paper—sometimes attributed to others, sometimes entertained by me[69]—is misleading. The basic premise of any adequate account has to be that the killing of civilians is always *malum in se*. The element of artifice or convention does not affect that.

Perhaps this argument is little too quick. Most accounts of the background, i.e. of the basic moral rules which make killing wrong, provide various qualifications. The most notable one is for self-defense or defense of others, and perhaps even more generally for resisting and repelling unjust aggression. And we may want to see the conventional elements—like the rule against not killing civilians—as affecting *this part* of the background rather than as qualifying the rule against killing *per se*. On this account, if we take away the conventional element (or whatever the rule about civilian immunity is), we are left not with the bare rule against murder, but with a qualified rule against murder.

The point is well taken. But we must not exaggerate the qualification. On the one hand, self-defense is a very strictly limited justification for homicide, both legally and morally. It certainly does not entitle a person to kill anyone if that would contribute to their defense of themselves or others; only the most imminent deadly threats may be answered in this way. And on the other hand, the rule about civilians also has some such qualification built into it: a civilian aiming a rifle may be killed.[70] So even if we accept that the moral background—the default position—is complicated in this way, an account of the rule about civilians will reflect this complexity. And still the conclusion I have been arguing for in this section will follow: the deliberate killing of civilians, even when it seems to be a military necessity, is murder. It is murder, not on account of the operation of the rule about civilians, but on account of the limit that this rule represents so far as the artificial privilege of killing combatants is concerned.

Notice, too, that a plausible account of the complexity of the background will certainly not yield anything like an entitlement to kill those who are responsible for unjust aggression or other forms of injustice. Someone who wanted to pursue McMahan's suggestion might try to take this line and say that the rule about civilians artificially limits that, by prohibiting (perhaps for good reasons) what would otherwise be the justified killing of the guilty. But it won't work. There is no general moral permission to kill those who are guilty of injustice.

The immediate upshot of this is to vindicate the position taken at the beginning of this paper. The September 11 killings were murders, and they were

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[69] See supra text accompanying note 17.

[70] See Article 51 (3) of the First Protocol to the Geneva Conventions, cited in footnote 4 above.

murders in a quite straightforward sense. They were not justified as self-defense; and they could not have been justified on grounds that people working in the World Trade Center were complicit in the injustice of capitalism or American foreign policy. They were murders, pure and simple. This is not a special or artificial sense of "murder." The rule about civilians, conventional though it may be in certain respects, does not create a special or artificial sense of murder. Instead it reminds us of the severe limits placed upon the special artificial privileging of the killing of combatants in wartime.[71]

There are also some more consequences, some of them philosophically quite interesting. If some rule is a convention, it is tempting to think that it must be supported by consequentialist calculations--the good of setting up and having the convention--and that it may also be vulnerable to consequentialist considerations too, when the advantages of violating or abandoning it seem to outweigh the good consequences of having it. Or at best, it may seem that conventions are rather like rule-utilitarian or indirect-utilitarian norms.[72] They may perhaps be insulated to a certain extent from direct consequentialist calculations, but in the long run they cannot and should not survive if their purposes could be promoted by other rules more effectively.

But now we see that even if this is true of some conventional rules, it is really not true of the rule about civilians. Several times throughout the paper I endorsed the view that the point of the rule is to mitigate the horrors of warfare, and we have imagined various ways in which the rule might be undermined by that teleology: for example, maybe the horrors of war can be mitigated more decisively by the use of terror weapons on large cities, to bring the war to a speedy end.[73] But actually that's a misleading account of the normative force of the rule. The normative force of the rule is deontological: "Thou shalt not kill." The wrongness of killing civilians is established independently of the goal of mitigating the horrors of warfare: killing civilians is murder.[74]

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[71] This conclusion, by the way, applies not only to the deliberate killings of civilians by terrorists, but also to the deliberate killings of civilians by organized armed forces. The killings of civilians in Hiroshima and Nagasaki are murders in this straightforward sense. (I am not saying there is a moral equivalence between Hiroshima and the September 11 attacks; there plainly is not, though readers may disagree about the direction of the asymmetry; all I am saying is that they have this in common, that they both involved a large number of murders in the sense I have explained.) As for foreseen but unintended killings of civilians by armed forces, the points made above in footnote 70 apply. Unless these are specifically justified by norms of necessity and proportionality, they too are culpable homicides and often murders in a straightforward sense

[72] Cite to R.M. HARE, MORAL THINKING __ (19__) or whatever.

[73] Cf. the discussion supra at text accompanying note 49.

[74] Of course it is possible that someone may have a utilitarian account of the wrongness of murder, in which case their principles are vulnerable all the way down to consequentialist calculations.

The goal of mitigating the horrors of warfare comes into play in the following way. For whatever reason, the law of nations has recognized the special character of warfare and privileged certain killings that would otherwise be murders. That, we all know, has the potential to generate a morally horrific situation: legally unregulated killing fields. To lessen the horror of that, we have insisted that any privileging of killings in wartime is not to be comprehensive; it covers some killings but leaves others as murders. The choice as to which killings to privilege--the choice as to how large the residual area of murder should remain and how it should be delineated—all that is perhaps dominated by consequentialist considerations. It could hardly be organized deontologically (at least not without pretending that we have certain deontological principles that in fact we don't have—such as McMahan's principle of responsibility: it is right to kill those who are responsible for aggression and injustice).[75]

The difficulty, however, is that we really don't have a clear picture in moral or legal theory of what justifies the privileging of certain killings in wartime (at least not one which takes seriously what it is to privilege a killing that would otherwise be murder). We have worked too long with a model that assumes that the default position is that you can kill anyone you like in wartime and that people have to be argued out of *that* if civilians are to be given immunity. (And maybe that is the practical or political problem; but it is not the right perspective for moral theory.) We have worked so long with that model, that we have forgotten how to think clearly—and carefully and with appropriate moral severity—about the legitimate taking of human life in time of war. That should be the next issue for discussion; but unfortunately not in this paper.

[75] See above text accompanying notes 10-13.