

Prologue

The New Griffin of War*

Shane R. Reeves and Robert E. Barnsby

Famed seventeenth-century jurist Hugo Grotius warned that in warfare belligerents must “not believe that either nothing is allowable, or that everything is.” The latter belief holds that any and all tactics are allowed in warfare, while the former, a largely Christian theological view, holds that warfare is immoral and any resultant actions are therefore prohibited. Grotius understood that unilateral adherence to either of these notions would lead directly to an unworkable paradigm. Rejecting each belief’s most extreme position while simultaneously adopting their reconcilable characteristics, Grotius began to develop a feasible legal framework for conducting warfare. Ultimately, as Oxford University’s Karma Nabulsi describes in her outstanding work *Traditions of Justice and War*, by seeking the “middle ground” between these two seemingly incompatible views Grotius successfully shaped a conciliatory, realistic model for regulating warfare. The resultant middle ground, which recognized the necessity and legality of “just” wars while proscribing certain aspects of military conduct, solidified Grotius’s legacy and, more importantly, set the stage for the profound legal developments—particularly in the 20th century—that would circumscribe subsequent conflicts, including those in which the United States finds itself today.

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The Future of Warfare

Reminiscent of the unworkable opposites Grotius encountered, contemporary prognostications concerning the near-term future of armed conflict too often settle into a misleading “either/or” construct. One group of theorists vehemently argues that the future remains one of “asymmetric warfare,” which is generally understood as conflict between two unequal adversaries where the weaker opponent uses unconventional or indirect methods to exploit the superior opponent’s vulnerabilities. Typically set between a state actor (such as the United States) and either an ideologically motivated non-state armed group (such as Al-Qaeda) or an insurgent group (such as the Taliban in Afghanistan) these conflicts are often labeled as “non-international armed conflicts,” “terrorism,” or “guerilla warfare,” and currently dominate resources and intellectual capital. However, a growing cohort of theorists rejects this asymmetric warfare prediction. This group—warily watching the increasing militarization of Asia, recognizing the sectarian breakdown of the Middle East, and observing the nation-state fragmentation of Africa—contends instead that “conventional warfare” between national armed forces, commonly referred to as “international armed conflict,” is the future of warfare.

This ferocious theoretical debate has created a false dichotomy between these competing scholarly predictions. Limiting predictions in this way ignores the reality that contemporary conflicts are both difficult to define and are often an amalgamation of characteristics from traditionally unrelated forms of warfare. For example, state actors regularly use the indirect tactics of asymmetric warfare by blurring the line between combatant and civilian, conducting cyberattacks, and lethally targeting individual actors in order to gain a strategic advantage over their non-state adversaries. Similarly, non-state armed groups and insurgencies do not hesitate to use devices of conventional armed warfare, including traditional weaponry, in conflicts with state actors.

Further confusing attempts to categorize warfare is the often overlapping nature of modern conflicts. For instance, it is not uncommon for battles to simultaneously rage between state adversaries, insurgent groups, and transnational terrorist organizations in the same geographic location. Therefore, in actuality, “asymmetric warfare” and “conventional warfare” are the extreme boundaries on a vast spectrum of warfare possibilities.

Neither purely asymmetric nor purely conventional, modern conflicts are, rather, hybrids that display traits from both forms of warfare. Like the mythological half-eagle, half-lion griffin, which possesses strength far greater than either of its two component animals, the combination of asymmetric and conventional methods of warfare results in particularly potent modern conflicts.

Failure to recognize this new strand of warfare has potentially devastating implications for those nations likely to be involved in future armed conflicts. A nation unable, or perhaps unwilling, to perceive the growing hybrid warfare threat will remain comfortable with outdated and stale military ideas developed from their experiences in previous conventional or asymmetric conflicts. At ease with the status quo, and devoted to obsolete warfare strategies, these nations make misguided budget decisions, generate irrelevant military doctrine, and limit technological innovation. This misallocation of national resources produces a complacent armed force blind to evolutions in contemporary warfare. Therefore, while ready to “fight the last war,” these nations, and in particular their armed forces, are woefully unprepared for the novel challenges of a hybrid conflict.

Some nations, such as the United States, have begun to recognize this risk. A document describing the future capabilities required of the United State Army, titled “The Army Capstone Concept Operational Adaptability—Operating Under Conditions of Uncertainty and Complexity in an Era of Persistent Conflict,” states that “Army forces must be prepared to defeat what some have described as hybrid enemies: both hostile states and non-state enemies that combine a broad range of weapons capabilities and regular, irregular, and terrorist tactics; and continuously adapt to avoid US strengths and attack what they perceive as weaknesses.” While it is encouraging that nations are moving toward addressing the hybridization of warfare in their military doctrine, of greater concern for the global community, and the most dangerous potential development, is the failure of international law—particularly the Law of Armed Conflict—to evolve with the hybridization of war.

Challenges for International Law

The Law of Armed Conflict, synonymous with International Humanitarian Law and the Law of War, is the specific portion of international law that regulates and controls the actions of those parties participating in a

conflict. Comprised of both conventional and customary law, this body of law is binding upon all conflict participants in either an international or non-international armed conflict. Intertwining both a humanitarian and functional purpose, the Law of Armed Conflict ensures that those adversely affected by warfare, whether civilians, prisoners of war, or wounded and sick, are protected while simultaneously elucidating the permissible and prohibited activities for conflict participants. This specialized area of international law, which assigns both national and individual obligations, limits the effects of warfare by providing positive and clear rules which, if violated, may result in international sanctions or war crime prosecutions.

However, the continued effectiveness and enforceability of the Law of Armed Conflict is highly dependent on whether the expressed rules remain definitive, understood, and accepted in today's complicated conflicts. Debates concerning indefinite detention at Guantanamo Bay, the use of drone aircraft, the required protections afforded civilian participants in warfare, and various other contentious topics highlight a troubling lack of unanimity in the international community concerning the Law of Armed Conflict. Increasingly, the treaties and customary laws of the past century that comprise the Law of Armed Conflict, while recognized as extremely meaningful, have proven incapable of satisfactorily resolving the myriad of legal issues arising from modern warfare.

The hybridization of warfare only exacerbates these already complicated problems and may ultimately render the Law of Armed Conflict irrelevant. If the trend toward viewing the Law of Armed Conflict as confusing, subjective, and ineffectual continues, conflict participants, as well as much of the international community, may begin to see this area of international law as more of an anachronistic nuisance than a legal imperative. As the law's authority diminishes, traditional legal prohibitions will be violated with impunity and only popular morality will remain to limit actions in war. State and non-state adversaries alike will deem abiding by these long-standing legal norms too significant a disadvantage to continue. Instead, parties in conflict will ignore the obligations embedded in the Law of Armed Conflict under the guise of self-defense or engage in manipulation of the law for strategic reasons by conducting "lawfare."

The term "lawfare," connoting the strategic use of laws as a means of waging war, has rapidly and meaningfully entered the international legal lexicon in recent years. Scholars and practitioners alike are aware of vari-

ous groups' ability to significantly undermine more powerful nations' traditional methods of waging warfare through the aggressive use of laws—whether treaty-based or customary in nature—arising decades ago in response to very different threats in very different historic contexts. Arguments about detention, targeting, cyber warfare, intelligence law, and related topics characterize lawfare, defined by Harvard Law School's Jack Goldsmith, Texas Law School's Robert Chesney, and the Brookings Institution's Benjamin Wittes in their blog of that name, as the “use of law as a weapon of conflict and, perhaps more importantly, [recognition of] the depressing reality that America remains at war with itself over the law governing its warfare with others.”

Whether conflict participants misuse the law as a means of warfare or simply dismiss the law as inconsequential, the international ramifications are potentially catastrophic. As the law diminishes in importance, parties in conflict will most likely emphasize the idea of military necessity—the justification for doing those things in war which are required for securing the complete submission of the enemy—with little concern for their countervailing obligations to prevent unnecessary suffering and protect civilian populations. With the idea of military necessity becoming paramount, a concomitant deterioration of legal incentives to act humanely is inevitable, given the delicate balance between necessity and humanity at which the law has presently arrived. Current legal incentives—the most important of which provides combatant immunity for lawful acts committed by lawful combatants, and includes comprehensive protections for those adversely affected by conflict—create the conditions that enable the equilibrium between necessity and humanity to exist. However, with increasing emphasis placed upon military necessity and the descent of legal incentives to act humanely, even minimal baseline humanitarian behavior by warring groups risks becoming relative. The resultant downward spiral into brutality and savagery would dramatically increase the proliferation of disastrous humanitarian calamities accompanying contemporary conflicts, thereby undercutting any historical efforts to “humanize” warfare.

To preempt the possibility of undermining efforts to humanize warfare, the international community must recognize that questions concerning the effectiveness and practicality of the Law of Armed Conflict are increasing as the hybridization of warfare becomes the new norm. Ignoring this trend, and believing that current legal conditions are sufficient,

simply expedites the increasingly ineffectual regulation of contemporary armed conflicts and continues to undermine confidence in the Law of Armed Conflict. Instead, international efforts must be made to push the Law of Armed Conflict into the hybrid warfare age. Whether through treaties or legally obligated customs, the international community must update the Law of Armed Conflict to address the various questions created by hybrid warfare while simultaneously reemphasizing that the comprehensive humanitarian protections afforded under the laws of war remain sacrosanct. Additionally, those participating in the often pernicious act of “lawfare” must be penalized in order to stop their misuse of the law. By taking these positive actions, the international community can begin to reassert the primacy of the law even in the challenging and complex environment of hybrid warfare.

Learning from Grotius

Arguing over whether future conflicts will resemble today’s asymmetric fights or the conventional wars of the past assumes that the global community is in warfare stasis. This belief is as dangerous as it is surprising, for history has repeatedly demonstrated that warfare is constantly evolving and adopting less-than-apparent characteristics and traits. Contemporary war theorists must follow Grotius’ example, rejecting extreme adherence to either the asymmetric or conventional warfare theories and endeavoring to find a workable “middle ground” paradigm in order to provide truly informed predictions about the future of armed conflict. The importance and urgency of adopting a Grotian approach to this problem cannot be overstated, as the continued relevance of the Law of Armed Conflict is highly dependent upon our willingness to recognize the hybridization of modern warfare.