

WAR AND THE VANISHING BATTLEFIELD

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These days, the battlefield hardly seems to be a term of art in international humanitarian law discourse. The laws of war are about conflicts, international or non-international, and hostilities or zones of combat. It is customary to contrast the conventional war of yesterday that occurred in relatively neatly delineated spaces with today's complex,¹ asymmetrical,² or even post-modern³ wars that do not depend on the classical battlefield. Certainly, the idea of disciplined armies meeting in a rural setting at dawn to fight each other off belongs to distant memories.

This article will suggest that the application of the laws of war nonetheless remains more haunted by the idea of the battlefield than is commonly acknowledged, and that the concept provides a crucial variable to understand the law's evolution. Indeed, it will contend that the "battlefield" continues to serve a strong role in assessing why, when and how international humanitarian law applies (or does not). In turn, the destructuring of the concept of the battlefield has had a strong impact on the very possibility of the laws of war, and of war itself. These issues have not escaped the attention of some international lawyers

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¹ See generally Kirk Mensch & Tim Rahschulte, *Military Leader Development and Autonomous Learning: Responding to the Growing Complexity of Warfare*, 19 HUM. RESOURCE DEV. Q. 263 (2008).

² See generally David L. Grange, *Asymmetric Warfare: Old Method, New Concern*, in NATIONAL STRATEGY FORUM REVIEW 1-5 (2000); Andreas Paulus & Mindia Vashakmadze, *Asymmetrical War and the Notion of Armed Conflict—a Tentative Conceptualization*, 91 INT'L REV. OF THE RED CROSS 95 (2009); Andrew Mack, *Why Big Nations Lose Small Wars: The Politics of Asymmetric Conflict*, WORLD POLITICS: A Q. J. OF INT'L REL. 175 (1975); Michael Mazarr, *The Folly of "Asymmetric War"*, 31 WASH. Q. 33 (2008).

³ See John Kiszely, *POST-MODERN CHALLENGES FOR MODERN WARRIORS*, DEFENSE ACAD. OF THE U.K.: THE SHRIVENHAM PAPERS – No. 5 (Dec. 2007), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA510767>; Dr. Steven Metz, *ARMED CONFLICT IN THE 21ST CENTURY: THE INFORMATION REVOLUTION AND POST-MODERN WARFARE*, U.S. ARMY WAR COLLEGE (Mar. 2000), available at http://www.au.af.mil/au/awc/awcgate/ssi/metz_info_rev.pdf.

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but they have tended to be seen mostly through the prism of the most recent developments, notably the “War on Terror.”⁴ This article will suggest that the definition of the battlefield has always been central to the genesis and evolution of the laws of war, and that the idea of the battlefield captures more of what constitutes war as an activity than many other indicators.

Defining the battlefield in war is not only a question of militarily deciding where actual battle will occur, nor is it merely a theoretical or doctrinal exercise. Behind these efforts lies a more fundamental struggle to define what constitutes a *legitimate* battlefield and, with it, legitimate forms of war. During the era of colonization, for example, it became crucial to defining colonial wars that, because they occurred outside any conventional battlefield, colonizers could not be expected to abide by ordinary laws of war.⁵ Movements of national liberation managed to obtain the recognition of armed attacks that often occurred far from the classical battlefield, even as some countries sought to deny them a status because of their shunning of conventional military operations. Contentiously, the Bush administration decided after September 11, 2001 (9/11) that the “War on terror’s” battlefield was the entire world, a move that has been resisted as too simplistic and dangerous.⁶ The International Committee of the Red Cross (ICRC) and other interested humanitarian parties have a complex role in both seeking to uphold a certain idea of the battlefield as a normative space, and seeking to adapt to changes that are being decided by actors on the ground.

In order to show how the fortunes of the idea of the battlefield affect the evolution of war, this article will highlight the origins of the idea and its connection to a view of warfare as a specific form of armed violence. Part I analyzes the role that the idea of the battlefield serves in the laws of war and, symmetrically, the role that the laws of war have in maintaining a certain fiction of the battlefield. In Part II, the article attempts to show some of the ways in which the regulatory role of the battlefield has been increasingly challenged. The Article concludes that the death of the battlefield significantly complicates the waging of war and may well herald the end of the laws of war as a way to regulate violence.

I. The Social Construction of the Battlefield

The concept of the battlefield has long structured the understanding of war. A battlefield is typically an area, limited in space and time, upon which a battle occurs. The battlefield may be created by the chance encounter of enemy troops, but it may also be agreed upon by opposite armies. The battlefield is not a clearly defined space, not even in the most traditional of battles. It is “an imagi-

⁴ See Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 GA. J. INT’L & COMP. L. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677965.

⁵ Frédéric Mégret, *From ‘Savages’ to ‘Unlawful Combatants’: A Postcolonial Look at International Humanitarian Law’s ‘Other,’* in INTERNATIONAL LAW AND ITS OTHERS 265-317 (2006).

⁶ See generally HELEN DUFFY, *THE “WAR ON TERROR” AND THE FRAMEWORK OF INTERNATIONAL LAW* (2005); Frédéric Mégret, “War”? *Legal Semantics and the Move to Violence*, 13 EUR. J. OF INT’L L. 361 (2002).

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nary arena in which the bounds are seen to be the edges of the territory occupied by the two armies during the course of the fight.”⁷ But it is space nonetheless, one that has a core and a periphery and whose existence is premised on the ability to distinguish between what occurs within it and what is beyond it. For that space to have any meaning, however, it must be inscribed in a series of understandings about its purpose and its rules. The battlefield is, in other words, as much an *idea* as it is a space, and only when one understands the assumptions underlying the *idea* of the battlefield can one understand how the battlefield today has come under threat.

A. Origin and Purpose of the Battlefield

The battlefield has, of course, the utmost *military* significance. Battles are won not only by performance on the battlefield but also by the ability to define the battlefield and draw one’s enemy to it. The battlefield, then, is also a goal for military domination. There is a rich military literature on how to control it. As one author puts it, “the soldiers themselves regard the battlefield as limited, a tangible area for which they can fight and of which they can take possession. Soldiers will treat some geographical feature as the limit which, when reached, marks the end of the battle.”⁸ The battlefield also has a rich symbolic allure, and is a central focus of war narratives. In the time that two armies encounter each other in the battlefield, that space “will assume the character of a sacred spot.”⁹ Former battlefields are often revered and take on an almost mystical value.

Aside from its sheer strategic and tactical value for the military, one could say that the battlefield more fundamentally structures what it means to do battle. The battlefield as such does not exist, in that it is like any other field except for a particular form of social activity that occurs or has occurred upon it. It is part of a sophisticated construction of reality that allows us to understand certain armed encounters as battles, themselves part of a larger thing called war. Calling an area a battlefield implies that one understands what occurred on it as part of that intellectual heritage, an intellectual heritage that, throughout the Middle Ages and beyond, saw the modern concept of war emerge. According to that concept, war is the use of violence for *public* purposes, typically involving more or less organized armies under responsible command. War is, therefore, typically not a chaotic or random violence of all against all but a contest of sovereign might. In that respect, war is imagined as both potentially extremely violent (the clash of armies in the field) yet strangely circumscribed to the battlefield.

The battlefield thus stands as a deeply social marker of war’s limitation. There is more than a passing analogy between the battlefield and the fields on which sports are played. The sports field is a confined area within which a highly specialized activity occurs that will, in some cases, involve violent physical contact that would be prohibited if it occurred outside the field. In a paradox-

⁷ JAMES MCRANDLE, *THE ANTIQUE DRUMS OF WAR* 39 (1994).

⁸ *Id.* at 140.

⁹ *Id.*

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ical way, the battlefield is created by the “agreement” of both parties to engage something like a battle (if that fundamental implicit agreement is lacking then arguably, as we will see, the idea of a battlefield crumbles).¹⁰ The battle occurs at the point where there is a mutual, even grudging, willingness to fight (otherwise flight or surrender prevent the battle from taking place at all). Although there may be considerable enmity between forces facing each other in battle, what characterizes battle historically is a shared understanding that there is such a thing as a battlefield, and that fighting should be conducted on, not beyond it. The battlefield circumscribes a space of exceptionality within which a highly unusual activity can take place and be recognizable as such to its participants. As Khan notes, “The concept of the battlefield provides logistical and psychological constraints on the scope of war.”¹¹

Arguably, though the constraints are not only logistical and psychological, they are also specifically *normative*. The battlefield is also, more deeply, a normative space, one that shapes the activities that are conducted within it and stands for a certain set of values. “Increasingly,” as David Kennedy puts it, “defining the battlefield is not only a matter of deployed force - but it is also a rhetorical and legal claim”¹² - one would be tempted to say that it has always been that. From a normative point of view, the battlefield is the site of exceptional norms. It is the place where killing other human beings – normally a tremendous taboo – becomes legal under both domestic and international law. The battlefield, then, is constructed by a certain understanding of what rules apply within it. This understanding is crucial to the distinction of war from other forms of violence. One of the challenges in the Middle Ages was that “civil life and battle strife had to function simultaneously.”¹³ As a result, “*jus in bello* instituted parameters and facilitated this simultaneity by confining fighting to the battlefield.”¹⁴ Thanks to the idea of the battlefield, “the distinction between the battlefield and civilian neighborhoods is at least theoretically maintainable” and “symmetric warfare with its identifiable battlefields in terms of space and duration did allow, at least in theory, a relatively clear separation of military and political necessities and objectives in the actual conduct of warfare.”¹⁵

Thus, the battlefield also underscores the normative exceptionality of war, and even its limited desirability. David Kennedy, for example, emphasizes that “for the military, defining the battlefield may still define the privilege to kill.”¹⁶ Con-

¹⁰ If that fundamental implicit agreement is lacking then arguably, as we will see, the idea of a battlefield crumbles.

¹¹ LIAQUAT ALI KHAN, A THEORY OF INTERNATIONAL TERRORISM: UNDERSTANDING ISLAMIC MILITANCY 274 (2006).

¹² David Kennedy, *Modern War and Modern Law*, 12 INT’L LEGAL THEORY 55, 74 (2006).

¹³ Patricia Viseur Sellers, *The Context of Sexual Violence: Sexual Violence as Violation of International Humanitarian Law*, in SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS 263, 266 (Kluwer Law Int’l, vol 1., 2000).

¹⁴ *Id.*

¹⁵ Robin Geiß, *Asymmetric Conflict Structures*, 88 INT’L REV. OF THE RED CROSS 757, 770 (2006).

¹⁶ DAVID KENNEDY, OF WAR AND LAW 121 (2006).

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versely, “humanitarians . . . want to define the not-battlefield to open a space for humanitarian law.”¹⁷ War should be *confined* to the battlefield, as allowing it to spill beyond that zone is to make societies run a considerable risk. As Lawrence Keeley notes:

[L]et us put war in its place. . . there can be no dispute that peaceful activities, arts, and ideas are by far more crucial and more common even in the most bellicose societies. Even when the most violent scenes are unfolding on some battlefield or raided village, all around the arena of combat, often at no great distance, children are being conceived and born, crops and herds attended, fish caught, animals hunted, meals prepared, tools made or mended, and thousands of other prosaic, peaceful activities pursued that are necessary to sustain life or serve other human needs. No society can sustain itself purely on the proceeds of war.¹⁸

The battlefield thus stands for this peculiar ideal that, whilst war may and will rage, what distinguishes it from random violence is the fact that it unfolds in discreet spaces insulated from the rest of society, confining military violence to a confrontation between specialized forces whose operation should minimally disrupt surrounding life.

B. The Role of the Laws of War

Within this construction of war through the battlefield, the laws of war have always played a preeminent role. Indeed, contrary to a vision of war as pure violence, the laws of war, through a concept such as the battlefield, suggest a vision of highly regulated and social violence. In their contemporary variant, which emerges in the late 19th Century, they inherit a certain concept of what war is that is deeply structured by notions of what armies do. Indeed, it is no wonder that the origin of the contemporary laws of war is generally dated to Henry Dunan’s stumbling onto the very classic battlefield of Solferino.¹⁹ This original incident has a very central role in the dramaturgy of international humanitarian law. Even today, “conventional warfare” is referred to routinely by experts in relation to the sort of conflict that unfolds on a battlefield.²⁰

In that respect, the laws of war do not merely seek to regulate the battlefield. They are also part of its symbolic maintenance and even construction as a particular space defined by the norms that apply to it. In other words, the battlefield does not predate norms on warfare; rather it has always been subtly coterminous with them. The laws of war are, therefore, a crucial foundation for understanding

¹⁷ *Id.*

¹⁸ LAWRENCE KEELEY, *WAR BEFORE CIVILIZATION* 178 (1997).

¹⁹ *See generally* HENRY DUNANT, *UN SOUVENIR DE SOLFERINO* (1980).

²⁰ Prosecutor v. Boskoski & Tarculovski, Case No. IT-04-82, Portions of the Transcript of Expert Witness Testimony (Oct. 19, 2007) (Case before the Int’l Crim. Trib. for the Former Yugoslavia), *available at* http://www.icty.org/x/cases/boskoski_tarculovski/trans/en/071019IT.htm. For example, in expert testimony given to the ICTY, Mr. Bezruchenko highlights conventional warfare as “the type of warfare which is common for two opposed armies clashed in the field. The classical example of such warfare would be the First World War or Second World War.” *Id.*

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the evolution of the battlefield and, conversely, the evolution of the battlefield is a key way in which the evolution of the laws of war can be understood. In fact, such is the association between the laws of war and the battlefield that *jus in bello* is sometimes referred to as “battlefield law.”²¹ It is important to note, in that respect, that the laws of war are quite plastic and adaptable. The battlefield in question may not be a classical battlefield (i.e. literally a field) and indeed often will not be. It may break into all kinds of smaller battlefields, only loosely connected to each other. However, it is a *paradigmatic* field in the sense of a space within which fighting can operate legitimately and beyond which it will be hard to meet conditions for respect of the laws of war.

This translates into a number of explicit references in relevant laws of war instruments. For example, article 14 of the Hague Convention IV speaks of the function of the inquiry office as “to receive and collect all objects of personal use, valuables, letters, etc., found on the field of battle.”²² The First Geneva Convention anticipates the arrangement of armistices or suspension of fire “to permit the removal, exchange and transport of the wounded left on the battlefield”²³ or “from a besieged or encircled area.”²⁴ The First Protocol to the Geneva Conventions (Protocol I) speaks of the need for parties to the conflict to “endeavour to agree on arrangements for teams to search for, identify and recover the dead from battlefield areas.”²⁵ Implicit in such references is that the battlefield is the typical locus for organized armed violence to have occurred.

Apart from such explicit references to the battlefield, one also finds implicit references to some sort of contact point or front between opposite armies that is quite reminiscent of the idea of the battlefield and shows, if nothing else, the power of the metaphor for the genesis of the laws of war. For example, the Third Geneva Convention speaks of “the combat zone” drawing dangerously close to a camp and possibly requiring prisoners’ transfer.²⁶ Article 29 of the Hague Convention anticipates that “[a] person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the *zone of operations* of a belligerent, with the intention of communicating it to the hostile party.”²⁷ According to the Draft Agreement Relating to Hospital Zones and Localities, hospitals “shall not be situated in areas which, according to every probability, may become important for the conduct of the

²¹ See generally A.P.V. ROGERS, LAW ON THE BATTLEFIELD (2d ed. 2004).

²² Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land art. 14, October 18, 1907, 187 C.T.S. 227 [hereinafter Hague IV].

²³ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 15, para. 2, Oct. 21, 1950, 75 U.N.T.S. 31 [hereinafter GC1].

²⁴ *Id.* art. 15, para 3.

²⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 33.4, June 8, 1978, 1125 U.N.T.S. 3 [hereinafter Protocol I].

²⁶ Convention (III) relative to the Treatment of Prisoners of War art. 47(2), Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter GC3].

²⁷ Hague IV, *supra* note 22, art. 29.

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war.”²⁸ Protocol I art 26.1 also speaks of “the contact zone” for the purposes of regulating the protection of medical aircrafts.²⁹ In other words, the laws of war have a keen sense of the geography of war and of combat occurring in certain areas because of the movement of armies. The commentators to Protocol I also characteristically argue in defense of the Red Cross emblem as “allow[ing] its bearers to venture onto the battlefield to carry out their humanitarian task.”³⁰

Perhaps even more importantly than these lateral references to the idea of the battlefield, is the fact that the laws of war would seem to be more generally premised on the existence of war, if only because their application would be greatly facilitated if wars were indeed, as was the case traditionally, fought on battlefields. In turn, the laws of war help maintain the centrality of the idea of the battlefield to what waging war entails. One might go as far as to describe the laws of war as the normative project whose goal it is to make sure that the battlefield, or something as close as possible to it, remains a central notion to the pursuit of warfare. Within the battlefield, the law has a much higher tolerance for certain forms of violence. For example, the official commentary to Protocol I notes a “widely shared assumption that battlefield damage incidental to conventional warfare would not normally be proscribed” by article 35 of the Protocol.³¹ Conversely, damage caused entirely beyond the battlefield will be much less tolerated and the object of humanitarian condemnations.

There is no obligation to fight war on a battlefield in the Geneva Conventions or the Hague Regulations as such, in the sense that there is no provision stipulating that “all fighting should occur on a battlefield.” At the same time, it is also very clear that there is a strong preference for combat occurring on something like a battlefield. That preference is expressed, first, in an old chivalrous preference for open and frontal warfare that is characteristic of the battlefield ethos. Open and frontal warfare does not mean that armies should simply march in straight lines shooting at each other, and the exigencies of modern warfare have long allowed for both fluidity of maneuvers and camouflage. What it does mean, however, is that the laws of war frown upon various forms of treachery that involve deceiving the enemy about one’s quality as a combatant (for example by dressing up as a civilian) or as an enemy (for example by dressing up with the uniform of enemy forces). Although not per se illegal under international law, there has long been an understanding that spies or *franc tireurs* who fail to appropriately identify themselves may be unprivileged and be the object of relatively strong forms of punishment (including the death penalty), no doubt because of the dangers they raise both against the particular party against which their action is directed and the structuring idea of the battlefield.³²

²⁸ Convention (IV) relative to the Protection of Civilian Persons in Time of War, annex 1, art. 4(d), August 12, 1949, 75 U.N.T.S. 287 [hereinafter CG4].

²⁹ See Protocol I, *supra* note 25, art. 26.1.

³⁰ YVES SANDOZ ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 450 (1987).

³¹ *Id.* at 417.

³² See generally Richard R. Baxter, *So-Called Unprivileged Belligerency: Spies, Guerrillas, and Saboteurs*, 28 BRITISH Y.B. OF INT’L L. 323 (1951).

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The importance of the notion of the battlefield to the operation of the laws of war can also be seen in the reliance on and natural affinity with a cardinal concept in the laws of war – the principle of distinction.³³ The essence of the principle of distinction is that parties to an armed conflict should distinguish between combatants and non-combatants. For the principle of distinction to be operational, an obvious way to facilitate distinction is by distinguishing areas where combat occurs from areas where combat shall not occur, ensuring that combatants fight in the former and that non-combatants are in the safety of the latter. This illustrates the importance of the battlefield as a humanitarian construct, namely as a place where fighting occurs to the exclusion, ideally, of any non-combatant presence.³⁴

In that respect, the laws of war devote much attention to creating conditions for the separation of the battlefield from the non-battlefield, recreating a battlefield less by direct designation than by the negative. In effect, what humanitarians seek to do is constantly highlight areas that are off limits from battle, even if these areas change often and fluidly. Military objectives, for example, should not be located “within or near densely populated areas”³⁵ or “in the vicinity of the works or installations containing dangerous forces.”³⁶ Medical establishments and units should be “as far as possible, situated in such a manner that attacks against military objectives cannot imperil their safety.”³⁷ Furthermore, when fighting breaks out, “[t]he Parties to the conflict shall, to the maximum extent feasible . . . endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives.”³⁸ They may also “remove children temporarily from the area in which hostilities

³³ See generally Frits Kalshoven, *Civilian Immunity and the Principle of Distinction*, 31 AM. U. L. REV. 855 (1982); Stefan Oeter, *Comment: Is the Principle of Distinction Outdated?*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES 53-57 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007); ESBJORN ROSENBLAD, INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT: SOME ASPECTS OF THE PRINCIPLE OF DISTINCTION AND RELATED PROBLEMS 53-63 (1979); Jann K. Kleffner, *From “Belligerents” to “Fighters” and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Conflicts One Hundred Years After the Second Hague Conference*, 54 NETH. INT’L L. REV. 315 (2007); Mark Maxwell & Richard Meyer, *The Principle of Distinction: Probing the Limits of its Customariness*, ARMY L. 1 (March 2007), available at http://www.loc.gov/rf/frd/Military_Law/pdf/03-2007.pdf; Gabriel Swiney, *Saving Lives: The Principle of Distinction and the Realities of Modern War*, 39 INT’L LAW. 733 (2005); Eric Talbot Jensen, *The ICJ’s “Uganda Wall”: A Barrier to the Principle of Distinction and an Entry Point for Lawfare*, 35 DENV. J. INT’L L. & POL’Y 241 (2007); Michael Schmitt, *The Impact of High and Low-Tech Warfare on the Principle of Distinction* (Nov. 2003) (working paper for the International Humanitarian Research Initiative), available at http://ihl.ihlresearch.org/_data/n_0002/resources/live/briefing3296.pdf; Asa Kasher, *The Principle of Distinction*, 6 J. OF MILITARY ETHICS 152 (2007); Horace Robertson, Jr., *The Principle of the Military Objective in the Law of Armed Conflict*, 8 A.F. ACAD. J. LEGAL STUD. 35 (1997); Michael Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L. J. 143 (1999).

³⁴ Rosa E Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 706 (2004) (arguing that “the Hague and Geneva Conventions presuppose a clear distinction between front lines and battlefields, on the one hand, and civilian areas, on the other; and a correspondingly clear distinction between combatants and noncombatant.”).

³⁵ Protocol I, *supra* note 25, art. 58.

³⁶ *Id.* art. 56.5.

³⁷ CG1, *supra* note 23, art. 19; see also Protocol I, *supra* note 25, art. 12.4 .

³⁸ Protocol I, *supra* note 25, art. 58.

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are taking place to a safer area within the country.”³⁹ Prisoners of war must be evacuated “to camps situated in an area far enough from the combat zone for them to be out of danger.”⁴⁰ Article 19 of the Third Geneva Convention also speaks of a “danger zone” in which Prisoners of War (POW) who would be at greater risk of being evacuated can be “temporarily kept back.”⁴¹ Similarly, “[t]he Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand,”⁴² and “[t]he Detaining Power shall not set up places of internment in areas particularly exposed to the dangers of war.”⁴³

In addition, upon the outbreak and during the course of hostilities, the parties concerned may agree on mutual recognition of hospital zones⁴⁴ and “safety zones and localities so organized as to protect from the effects of war”.⁴⁵ The affectation of such zones shall not be changed by activities contrary to their status.⁴⁶ The Fourth Geneva Convention also anticipates the creation of “neutralized zones” which are “intended to shelter (protected persons) from the effects of war” in “the regions where fighting is taking place.”⁴⁷ Protocol I also anticipates the possibility of non-defended localities, which should be visibly marked by signs “agreed upon with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways.”⁴⁸ There is, in addition, the possibility of placing “a limited number of refuges” under special protection to “shelter movable cultural property in the event of armed conflict, of centers containing monuments and other immovable cultural property of very great importance,” if they “(a) are situated at an adequate distance from any large industrial center or from any important military objective constituting a vulnerable point, [and] (b) are not used for military purposes.”⁴⁹

Moreover, there are certain territories whose affectations can *a priori* not change because they are the place of residence of civilians, except for some compelling reason. For example, according to Protocol II “[c]ivilians shall not be compelled to leave their own territory for reasons connected with the conflict”⁵⁰

³⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. art. 4, ¶ 3(e) [hereinafter Protocol II].

⁴⁰ GC3, *supra* note 26, art. 19.

⁴¹ *Id.*

⁴² GC4, *supra* note 28, art. 49, ¶ 5.

⁴³ *Id.* art. 83.

⁴⁴ *Id.* art. 14.

⁴⁵ *Id.*

⁴⁶ GC1, *supra* note 23, annex 1, art. 2 (stating, “No persons residing, in whatever capacity, in a hospital zone shall perform any work, either within or without the zone, directly connected with military operations or the production of war material.”).

⁴⁷ GC4, *supra* note 28, art. 15.

⁴⁸ Protocol I, *supra* note 25, art. 59, ¶ 6 ; *see also id.* art. 60, ¶ 5 (Demilitarized zones).

⁴⁹ Convention for the Protection of Cultural Property in the Event of Armed Conflict art 8.1, May 14, 1954, 249 U.N.T.S. 216.

⁵⁰ Protocol II, *supra* note 39, art. 17.2.

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unless for their own security.⁵¹ In occupied territories, the Fourth Geneva Convention provides that “the Occupying Power may undertake total or partial evacuation of a given area,” but only “if the security of the population or imperative military reasons so demand.”⁵² Finally, certain operational requirements, particularly those relating to identification, are closely related to one being in a battlefield type zone. For example, the Fourth Geneva Convention anticipates that “in zones of military operations, [Persons regularly and solely engaged in the operation and administration of civilian hospitals] shall be recognizable by means of an identity card certifying their status.”⁵³ Similarly, Protocol I article 18.3 anticipates that protected personnel should be made recognizable “in areas where fighting is taking place or is likely to take place.”⁵⁴ These areas are defined as “area[s] where the armed forces of the adverse Parties actually engaged in combat, and those directly supporting them, are located.”⁵⁵

In other words, the general intent of key humanitarian instruments is to constantly evacuate non-combatants from a hypnotized battlefield that has the potential to put them in harm’s way. In addition to greatly facilitating and being the best expression of the principle of distinction, the idea of the battlefield probably also has a role in the operation of the cardinal principle of proportionality. According to Protocol I, targeting civilians is illegal, however the protocol recognizes that attacks in some areas may kill civilians collaterally. In such cases, the only sort of attack that is illegal is one “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”⁵⁶ Such attacks are even considered war crimes and fall within the International Criminal Court’s jurisdiction.⁵⁷ However, the standard of excessiveness is notoriously difficult to evaluate. The notion of a “concrete and direct military advantage”⁵⁸ points to something that is most likely evaluated on the battlefield.

The battlefield is far from having disappeared from the laws of war. Rather, it lives on as an idea and a normative ideal, even as its reality may otherwise be challenged. Some of the psychological, military, and legal determinants of a battlefield, therefore, include: a certain commitment to the laws of war on both sides of a conflict; a willingness to and a preference for conducting fighting on something like a battlefield (at least understood paradigmatically); a degree of communication between parties as to what might be legitimately considered a

⁵¹ *Id.* art. 17.1.

⁵² GC4, *supra* note 28, art. 49.

⁵³ *Id.* art. 20.

⁵⁴ Protocol I, *supra* note 25, art. 18.3.

⁵⁵ This was the definition given by a mixed group at the diplomatic conference that led to the adoption of Protocol I quoted in SANDOZ ET. AL., *supra* note , at 620.

⁵⁶ Protocol I, *supra* note 25, art. 51.

⁵⁷ Rome Statute of the International Criminal Court, art. 5,8, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

⁵⁸ Protocol I, *supra* note 25, art. 51.

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battlefield (for example, through communication via an intermediary about protected areas, etc); and a fundamental commitment that for the idea of a battlefield to mean anything at all, then the entire theatre of war cannot be equated with it (if everything is a battlefield, then nothing is).

II. The Deconstruction of the Battlefield

Despite the laws of war's best efforts to maintain a certain idea of the battlefield as a constant, those whose aim it is to fundamentally alter the conditions of warfare have repeatedly assailed the notion. The deconstruction of the battlefield is, in fact, well under way, and already in the late 1980s the commentators to Protocol I noted that "[i]n modern armed conflicts hostilities are more continuous, flaring up in varying degrees and moving from place to place; it would often be difficult to determine where exactly the battlefield is in place and in time."⁵⁹ In fact, as will be seen, the challenge to the idea of the battlefield has gone much farther than simply a challenge to the *geography* of battle, and is instead very much to the idea of the battlefield as a normative and regulatory concept.

Central to the challenge of the battlefield as a more or less level playing field is the decline of a key idea in the regulation of war, that of reciprocity. The idea of the battlefield depends on shared understandings over and above enmity that the other party will wage war according to the loose, but nonetheless guiding, model of war. That reciprocity can be contradicted on the short term, but it can never disappear entirely or war descends into random violence or crime. In other words, it will be very hard for a party to a war to cling to a notion of battlefield if the other does not. This is because of the perception that the party that does away with some of the constraints of the battlefield obtains an undue advantage, but also quite simply because if one party decides to ignore the battlefield and the other continues to treat it as operative, they will not be engaging in a common, mutually compatible activity. Hence, throughout the subsections that follow it is important to note that every deconstruction of the battlefield by one party is accompanied by a similar move to further deconstruct the battlefield by the other party, as the common vocabulary provided by the idea broke down.

A. Technological Developments

First and foremost, technologies of war have drastically changed the nature and scope of the battlefield. Even as a relatively fixed physical space, the battlefield has gradually extended because of the range of weapons. Whether bows or archbows were used, for example, could make a considerable difference on the breadth of the battlefield. But it was the invention of firepower that, from the 1800s onward, "help[ed] transform the very concept of the battlefield."⁶⁰ By 1863, Antoine Chassepot had designed a musket with a reach of 600 meters, although limitations on the human eye seem to have acted as a greater limit on

⁵⁹ SANDOZ ET AL., *supra* note , at 1414.

⁶⁰ DAVID GATES, *WARFARE IN THE NINETEENTH CENTURY 2* (2001).

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the scope of the effective reach of volleys.⁶¹ With the increasing reach of weapons, fewer and fewer men were necessary to hold a mile-long battlefield – an estimated 20,000 between 1700 and 1850 at a time of smoothbore guns, to 12,000 by 1870, to as little as 1,500 by 1917 with the introduction of the magazine fed-rifle.⁶² Moreover, logistical improvements made it possible to transport ever-growing numbers of troops to the battlefield at greater speeds and for greater durations. As David Gates puts it, “once apt, this term [battlefield] became something of a misnomer as improvements in the reach of weaponry and increases in the size of fighting units led to engagements being fought over ever larger tracts of territory.”⁶³ For example, at the battle of Leipzig, 2,070 guns and 520,000 soldiers were present along a front that extended for up to 42 kilometers.⁶⁴

The nineteenth century probably witnessed the last true battles. The First World War (WWI) retained unity of space but trench warfare prolonged combat in a zone far beyond what would normally have been considered a battlefield. Effectively, battlefield and theater of war merged so that, for example, although World War I remains famous for particular battles – the *Somme*, *Ypres* or *Verdun* – these battles really combined seamlessly over a front that extended over hundreds of miles. The outset of maneuver warfare, a strategy based on disruption and movement, has made battlefields even more dislocated, even though it can still be argued that war occurs in a series of localized battlefields.

The industrial revolution was crucial to some of the most spectacular changes in the history of warfare. In fact, according to Martin Shaw, the very idea of battlefield betrays its indebtedness to agrarian societies:

[A]s long as there has been a war, any physical arena of human activity could become a place of battle. But only in modern and late-modern war has the idea of the battlefield been transformed into one of *complex, multiple, overlapping spaces of violence*. The modern revolution in slaughter took the new technologies of production, transport, and communications and turned them into means of killing. By the same token, it took the ever-ramifying social and physical spaces of industrial societies and made battlefields of them.⁶⁵

The advent of the airplane provided an even greater blow to the limiting virtues of the battlefield as a concept. Although initially concentrated around the battlefield, air forces, particularly sophisticated bombers, increasingly made forays beyond enemy lines and extended the battlefield well behind enemy lines. Suddenly, huge areas of the opposing state’s territory became accessible to a

⁶¹ *Id.* at 77.

⁶² PATRICK O’SULLIVAN, *TERRAIN AND TACTICS* 114 (1991).

⁶³ GATES, *supra* note 60 at 2.

⁶⁴ *Id.* at 33.

⁶⁵ MARTIN SHAW, *WAR AND GENOCIDE: ORGANIZED KILLING IN MODERN SOCIETY* 130 (2003) (emphasis in original).

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state's air force. As Hans-Peter Gasser, former Senior Legal Adviser at the ICRC, put it:

The concept of the battlefield contains the idea of geographic limitation. Civilians in the area were often able to move away or flee (or even watch the fighting from the surrounding hills. . .). The advent of the airplane fundamentally altered the nature of warfare and brought in its wake a vast potential for destruction to the civilian population.⁶⁶

The battlefield is thus a space in constant expansion as a result of the combination of all of these developments,⁶⁷ though arguably not to the point of breaking apart.

B. Total and Nuclear war

Few developments in the history of war have affected the notion of the battlefield more than the rise of total war, understood as an armed conflict that mobilizes all of its participants' resources, including their population.⁶⁸ Whether because of technological limitations or a lingering attachment to the idea of respecting certain bonds, wars up to the middle of the 20th Century had resisted the idea that the battlefield could extend to the entire territory of an enemy. It was not technological developments (such as long range bombers) alone that made total war possible, but the general erosion of the idea that the battlefield should be the exclusive locus of war and a determination that an entire country's infrastructure and even population became valid targets in war. From the London blitz to the battle of Stalingrad and the bombing of Dresden, both Axis and Allied powers of the Second World War (WWII) made sure that the war was brought to major urban centres. As a result, the battlefield extended far beyond traditional areas devoted to the practice of war to cover entire swaths of enemy territory. Moreover, these territories were often only loosely connected to battle as such, and were targeted because of the presence of supporting industries or of populations whose morale was vulnerable to bombing.

In addition to tactics of total war, war also became global in a different sense in that it gradually and remarkably quickly extended to the entire planet through the interconnectedness of Empires and their colonial dependencies, airspaces and oceans. It is thus no surprise that the White House broadcast following Pearl

⁶⁶ Thomas M. McDonnell, *Cluster Bombs over Kosovo: A Violation of International Law?*, 44 ARIZ. L. REV. 31, 65 (2002) (quoting HANS-PETER GASSER, INTERNATIONAL HUMANITARIAN LAW 61 (1993)).

⁶⁷ O'SULLIVAN, *supra* note 62, at 117 (pointing out that "The dispersal and velocity of mechanized warfare with radio communications and airborne firepower has greatly expanded the battlefield in time and space. Set piece battles fought between sunup and sundown are a thing of the past. The prospect now is of a sprawling zone of continuing, sporadic firefights, which erupt day or night over a period of a week or more. The maneuvering of formations in broad sweeps to outflank the enemy has become a matter of strategy rather than tactics. The battle zone is too big for one person to keep an eye on what is going on and to direct the action from a lofty viewpoint.").

⁶⁸ See generally DAVID A BELL, THE FIRST TOTAL WAR: NAPOLEON'S EUROPE AND THE BIRTH OF WARFARE AS WE KNOW IT (2007); RAYMOND ARON, THE CENTURY OF TOTAL WAR (1985); PETER CALVOCORESSI & GUY WINT, TOTAL WAR: THE STORY OF WORLD WAR II (1972); YASUSHI YAMANOUCHI, J. VICTOR KOSCHMANN & RYUICHI NARITA, TOTAL WAR AND 'MODERNIZATION' (1998).

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Harbor specifically alluded to transformation of the notion of the battlefield, pointing out:

[t]he course that Japan has followed for the past 10 years in Asia has paralleled the course of Hitler and Mussolini in Europe and Africa. Today, it has become far more than a parallel. It is collaboration so well calculated that all the continents of the world, and all the oceans, are now considered by the Axis strategists as one gigantic battlefield.⁶⁹

Of course, the Allies answered in kind, contributing to the further entrenchment of WWII's worldwide character.

However, even more than the idea of total war, the development of nuclear weapons has, to a considerable degree, helped blur the notion of the battlefield. Nuclear weapons represent both a momentous technical development and a pragmatic conceptual change in the nature of war. This shift was evident at Hiroshima and Nagasaki, where the attacks concretely and metaphorically annihilated the battlefield by sending the message that no place was safe from war, and that the new weapons could, in one great big flash, abolish any distinction between combatants and non-combatants. Nuclear weapons are in that respect not just quantitatively but qualitatively different from all other weapons because their use is, by definition, premised on the total breakdown of the battlefield. The trend has if anything been reinforced since WWII with Cold War nuclear scenarios that anticipated deterrence based on a threat of assured destruction if attacked. Nuclear war has generally turned "existing social spaces into fields of death" so that, for example, "[n]early every sizeable urban area in the northern hemisphere was a planned target of nuclear missile attack. . . . The battlefield was everywhere; everywhere was the battlefield."⁷⁰ Although the International Court of Justice, in its Advisory Opinion of July 8, 1996, was not insensitive to the idea that nuclear weapons might still conceivably be used in a tactical way as "battlefield" weapons, the Court left little doubt that the use of nuclear weapons would be inherently incapable of distinction and proportionality when asked for an advisory opinion on the legality of their use.⁷¹

Interestingly, one of the less discussed ramifications of all-out nuclear warfare is the impact it would have on third party states through the propagation of nuclear residue, thus effectively considerably expanding the effective range of the battlefield (or at least some of its consequences) to third party states. The majority in the advisory opinion acknowledged that "[t]he radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area,"⁷² which obviously extends beyond the battlefield. Nauru, in its submission to the Court, noted that "[n]uclear weapons for

⁶⁹ Franklin D. Roosevelt, President of the United States, War with Japan, Radio Address by the President of the United States Broadcast from the White House on Tuesday, Dec. 9, 1941, in S. Doc. No. 148, at 23 (1941).

⁷⁰ SHAW, *supra* note , at 134.

⁷¹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 92 (July 8).

⁷² *Id.* at ¶ 35.

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which the status of legality is claimed should not damage or pollute neutral territory.”⁷³ Judge Shahabuddeen made much of this dimension in his dissenting opinion noting that collateral damage to a neutral country through the use of nuclear weapons “would have had the consequence of physically violating the territory of the neutral State.”⁷⁴ In other words, states were faulted in advance because the use of nuclear weapons that would in a sense make it impossible for belligerents to, as it were, keep the battlefield to themselves.

C. Guerilla, People’s War, and Counter-Insurgency

One of the consequences of accepting battle on a battlefield was that traditionally, apart from the exigencies of camouflage, belligerents were keen to distinguish themselves from enemy troops. At least, the fact that belligerents did distinguish themselves made the notion of a battlefield much easier to conceptualize – the battlefield was that area where men in uniform fought each other as part of organized armies.

For reasons that are too long to describe here in any detail, weaker parties in war, notably in the context of anti-colonial struggles, have long felt that the openness of engagement characteristic of the battlefield did not play in their favor. Instead, they developed tactics that would draw the enemy away from the conventional battlefield, where the enemy’s advantage was overwhelming, and engage the enemy in unorthodox areas. Guerilla warfare can thus be described as a type of warfare that is based on a refusal of the conventional battlefield, and the propensity of combatants to retreat and hide amongst civilians in between phases of combat. It is typically a warfare of the weak causing “the world’s great powers [to discover] one-by-one how limited their military supremacy [is] in the face of [a] particular form of warfare, *which has neither a front nor a battlefield.*”⁷⁵ The result is that the battlefield concept either becomes inoperative or so wide as to encompass virtually any area including areas where the guerillas mingle with civilians.

Guerilla warfare’s corrosive effect on the notion of the battlefield is often replicated by troops involved in anti-guerilla or anti-insurgency warfare, precipitating a further deterioration of the idea’s ability to regulate war. Anti-insurgency troops tend to redefine the battlefield in the broadest way to include the entire territory within which a guerilla conceivably operates, thus making the notion of the battlefield, as a distinctive concept, useless. Yet, there is perhaps nothing worse for the validity of the laws of war than the reality that there is never any respite and that any area could become a locus of engagement within seconds. Guerilla and counter-insurgency warfare also have implications for the status of

⁷³ Letter from Jerome B. Elkind, Counsel Appointed by Nauru, to the I.C.J (June 15, 1995), *available at* <http://www.icj-cij.org/docket/index.php?p1=3&p2=4> (responding to the legality of the use by a state of nuclear weapons in armed conflict).

⁷⁴ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, Dissenting opinion of Judge Shahabuddeen, 1996 I.C.J. 375 at 389, *available at* <http://www.icj-cij.org/docket/files/95/7519.pdf>.

⁷⁵ Pierre Pahlavi, *Political Warfare is a Double-Edged Sword: The Rise and Fall of the French Counter-Insurgency in Algeria*, *CAN. MIL. J.*, at 53 (Winter 2007-2008) (emphasis added).

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civilian populations. Battles not only occur within zones populated by civilians; civilians, in fact, often become the battlefield and the object of conquest from both parties. Hence, in insurgency warfare, “the war effort targets the entire population, whose conquest constitutes a higher aim than taking possession of a territory or dominating a battlefield.”⁷⁶

In turn, civilians may be tempted to join the war effort on either side, further reinforcing the complete deconstruction of the battlefield. One of the factors that made it traditionally possible to distinguish between the battlefields and beyond was that civilians would not be present. In other words, non-combatants were relatively content to leave the battlefield to combatants, thus reinforcing a sense of its purity and exclusivity. As a result, and even though the civilian population might be sympathetic to combatant forces and help them beyond the battlefield, both parties were inclined to respect the fact that civilian areas did not thus become part of the battlefield. As the ICRC put it:

Throughout history, the civilian population has always contributed to the general war effort of parties to armed conflicts, for example through the production and supply of weapons, equipment, food, and shelter, or through economic, administrative, and political support. However, such [civilian] activities typically remained distant from the battlefield and, traditionally, only a small minority of civilians became involved in the conduct of military operations.⁷⁷

Conditions fundamentally change, however, from the moment that civilians are seen as in effect supporting one side in battle, even though combatants are the ones who brought combat to the civilians. In lieu of civilians kept safely at bay, “[a] continuous shift of the conduct of hostilities into civilian population centres has led to an increased intermingling of civilians with armed actors and has facilitated their involvement in activities more closely related to military operations.”⁷⁸

III. Crimes Against Humanity and the Breakdown of War

Another way of looking at the breakdown of the battlefield is through attempts by certain belligerents to break entirely from the mold of battle by systematically targeting and exterminating civilian populations. As is well known, this has long been a characteristic of modern warfare, perhaps most notoriously with the operation of the *Einsatzgruppen* in the eastern front during WWII – troops that followed the advance of the *Wermacht*, but whose own “battlefield” really consisted

⁷⁶ *Id.* at 54; see also Interview by Toni Pfanner with General Sir Rupert Smith, in 88 INT’L REV. RED CROSS 719, 720 (Dec. 2006) (explaining that “in wars amongst the people, the people are part of the terrain of your battlefield.”).

⁷⁷ *Id.* at 720.

⁷⁸ Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 90 INT’L REV. RED CROSS 991, 993 (2008).

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in the summary execution and massacre of countless civilians.⁷⁹ Various groups since, from Bosno-Serb militias to the Rwandan Interahamwe, have shown their propensity to spend much more time in civilian areas than on military frontlines. In effect, so-called combatants desert the battlefield and, instead, deliberately bring war where it was meant to have been excluded. As opposed to what might be described as “bringing civilians to the battlefield,” this might be known as the phenomenon of “bringing the battlefield to civilians.”

For war to occur and even for war crimes to be committed, there must be an activity recognizable as war. The markers of hostilities and combat are relatively numerous, but few suffice in isolation. For example, the fact that individuals engaging in violence wear what appear to be military uniforms is not sufficient in itself to characterize the existence of hostilities for the purposes of the laws of war. They could just as well be criminals, or members of a gang who enjoy military paraphernalia. Similarly, hierarchy and discipline do not by themselves characterize fighting forces because discipline is not only present in legitimate military operations. Thus, while their existence in rigid form may be a strong suggestion of a military-type organization, it is not conclusive of one (for the sake of illustration, Al-Qaeda is probably a disciplined and hierarchic organization yet not one that can easily be described as being involved in warfare). The battlefield, understood broadly, is quite characteristic of the activity known as war because it tends to be the place where many of the markers of war coincide, and its existence manifests willingness for direct combat between troops.

The situation is quite different where the object of a campaign is not to dominate the battlefield but to destroy a civilian population. In that respect, it would occur to no one to describe *Srebrenica* as a “battle” or Auschwitz as a “battlefield.” The “camp” is fundamentally different from the “battlefield” in that the camp does not contain opposing military parties engaged in an open contest for domination of a space. The camp guards may wear military uniforms but they are only pseudo-military engaged in an activity, the destruction of a civilian population, that bears no relationship to war, even though it may profit from it. The “camp” therefore stands as the ultimate negation of the “battlefield” because it fundamentally abdicates the ideal of fighting in areas removed from civilians, and is instead busy rounding up civilians far beyond the battlefield (if there is a battlefield at all) for the purpose of exterminating them.

IV. Terrorism, Anti-terrorism and the War on Terror

It has become almost a cliché of post-9/11 analysis to say that 9/11 has fundamentally transformed the practice of war, and deeply challenged the laws of war. Perhaps slightly less noticed is the extent to which these changes are a result of deep challenges to the very idea of a battlefield. Early on, however, commentators had noted Al-Qaeda’s “commitment to [a cause that] redefines the concept of

⁷⁹ See generally Norman M. Naimark, *War and Genocide on the Eastern Front, 1941-1945*, 16 *COMP. EUR. HIST.* 259 (2007).

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the battlefield, at once globalising and deterritorialising it.”⁸⁰ Commentators, especially in the immediate wake of 9/11, were prompt to point out how aware they were of the new character of the war then unfolding, particularly as it related to territory. For example, Ari Fleisher stated, “that’s, again, why I indicated when the President talks about the new type of threat, 21st century war on terrorism, all planning accounts for that, all planning knows that this is not just an old-fashioned battle on a battlefield with tanks and sand.”⁸¹ Or as another commentator put it:

[T]he concept of the battlefield, so central to the way in which Clausewitz understood warfare, has dissolved. The 9/11 attacks, for instance, demonstrated that today’s battlegrounds might be Western cities while the US-led ‘War on Terror’ . . . conceives of the battlefield as literally spanning the entire globe.⁸²

Yet, post-9/11 developments have been more complex than this simple before/after opposition suggests. The War on Terror, in fact, has been a complex and sometimes bizarre mixture of real battlefields (some of the traditional battles that occurred in Afghanistan and Iraq), unorthodox battlefields (e.g. fights waged by special forces in the territory of foreign countries outside an all-out invasion), and not-battlefield-at-all type violence (drone attacks on suspected terrorists). Matters are complicated by the fact that the invocation of the battlefield has been used somewhat opportunistically as a familiar trope reinforcing the sense that an actual war is going on, thus legitimizing the use of force in certain contexts (if a battle is occurring on some sort of battlefield, then the privilege of belligerency applies and violence is licensed). Yet, the existence of a battlefield has been denied when the strictures of the laws of war threatened to curtail states’ freedom of action. This was most spectacularly illustrated in Guantanamo, a camp that held “unlawful combatants” caught on the various “battlefields” of the War on Terror, who were sufficiently like combatants to be held without trial, but not sufficiently so to be granted POW status.

Nonetheless, there is no doubt that a deliberate attempt to manipulate what constitutes the battlefield and to transcend it in ways that liberate rather than constrain violence has been at the heart of the response to the terror attacks of 9/11. Some of the developments highlighted in the previous subsections can now help us better contextualize just how radical the War on Terror’s impact on the structuring concepts of the laws of war is. The War on Terror essentially combines all the deconstructing effects that have taken their toll on the idea of the battlefield in the 20th Century, to the point of making it barely recognizable.

The starting point here is terrorism itself as a species of asymmetrical violence. For the guerilla, the issue was to transform the battlefield into a series of

⁸⁰ Jason Ralph, *War as an Institution of International Hierarchy: Carl Schmitt’s Theory of the Partisan and Contemporary US Practice*, 39 MILLENNIUM J. INT’L STUD. 279, 281 (2010).

⁸¹ Press briefing by Ari Fleischer, September 11, 2001: Attack on America (Sept. 15, 2001, 12:35 PM), available at http://avalon.law.yale.edu/sept11/press_sec_004.asp.

⁸² SECURITY STUDIES: AN INTRODUCTION 154 (Paul D. Williams, ed., 2008).

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skirmishes and ambushes rather than line battles in order to conquer the hearts and minds of the population. In such a situation, the notion of a battlefield retained a residual role as an indicator that some sort of struggle against an enemy was involved. Terrorism takes the destruction of the battlefield one step further. More than ambushes and skirmishes, it targets civilians; more than trying to conquer hearts and minds, it is bent on terrorizing them.⁸³ Although terrorism can be used to achieve territorial aims (for example, the liberation of a country) its territorial ambitions are secondary. Terrorists most of the time do not aim to control territory in the way an army would; if anything terrorist's territorial ambitions aim to increase the costs for the other party of holding on to territory. In some cases, terrorism loses any territorial connection so that it becomes as much a fight against a certain vision of society, making the idea of the battlefield even less relevant. Terrorism is perhaps the ultimate refusal of the battlefield, a commitment to bring violence when and where one pleases, unbound by any requirement that it unfold in a particular space and be constrained by particular norms.

Perhaps the most evident legacy of the 9/11 attacks and their aftermath is the truly global character of events, which was made possible by the downgrading of the importance of the idea of a battlefield and the rise of concepts of uncertain legal pedigree such as the "zone of combat." Global terrorism typically transports violence across borders and brings it where it is least expected, far beyond the confines of any conceivable battlefield. However, it is not only "transnational terrorists" who fundamentally change the nature of the battlefield, but also the states that chose to follow them on that terrain, effectively fighting "a war" as if it unfolded on a "global battlefield." From the outset, the perception was that the limits of the battlefield had been fundamentally redrawn. As Congressman Toricelli put it, "I regret that the front lines of this new struggle have formed through the communities I represent in northern New Jersey and our neighbors in New York City. . . . [T]he battlefield of this new war was Manhattan and Jersey City and Fort Lee and Queens. We are all soldiers."⁸⁴ This sort of statement showed a remarkable and perhaps discomfiting ability to internalize terrorists' ambition to bring the battlefield home - to the heart of civilian life. But, if the battlefield could be Manhattan, then it could also be Baghdad or Waziristan; and if the battlefield was everywhere, then it really was nowhere in particular. As Ali Khan stated:

The War on Terror has no traditional battlefields, and therefore, even theoretical civil/military distinctions make little sense. Since terrorists are not traditional soldiers but civilians fighting a professional army, they operate from civilian neighborhoods. This forces a professional army to consider an entire country as a seamless battlefield. In fact, since Muslim

⁸³ News briefing, Donald Rumsfeld Secretary of Defense (Sept. 27, 2001), available at http://avalon.law.yale.edu/sept11/dod_brief15.asp (stating that "[t]hese assaults have brought the battlefield home to us.").

⁸⁴ *September 11, 2001: Attack on America: Hearings on S.J. Res. 22 Before Senate and House of Representatives*, 107th Cong. (Sept. 12, 2001), available at http://avalon.law.yale.edu/sept11/senate_proc_091201.asp (emphasis added).

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militants live in almost all countries of the world, the US War on Terror has turned the entire earth into one large global battlefield.⁸⁵

The notion of a global battlefield (the “war everywhere” model)⁸⁶ is a manifestation of the terminal decadence of the term. If the concept describes the whole world, then it quickly loses much of its ability to limit violence to a particular space by outlining where combat can and cannot occur. Ironically, the notion of a “global battlefield” is an implicit disavowal of the very notion on which it purports to rely.

The absence of a battlefield also confirms the breakdown of the frontier between war and crime previously highlighted in the context of the commission of crimes against humanity and the replacement of the battlefield by the camp. This is, of course, very true of terrorism itself, which is better understood as a particular mode of criminality rather than a new mode of fighting wars, even though it may occasionally loosely borrow from the register of war and adopt some sort of military posturing (for example, the brandished AK47, targeting the CIA). It is perhaps terrorism that has most clearly refused to acknowledge the concept of a battlefield by refusing to recognize that there is a fundamental difference for the purposes of struggle between military and civilian targets, and engaging in illegal and criminal behavior.

This is also true of the response to terrorism, which has implicitly accepted the model terrorists set, and not always been free of the commission of crimes. The response has fundamentally hesitated between a traditional war-waging model, a police enforcement model, and one that is a curious mix of both models with strong elements of secrecy, stealth and crime. The invasion and occupation of Iraq and Afghanistan are examples of almost traditional warfare, yet in retrospect their link to fighting terrorism was either artificial (Iraq) or very partial (Afghanistan). Some of what has gone on in the name of the War on Terror is characteristic of police work (the arrest, detention, transfer, and trial of a very suspected terrorists). Yet, much of what has occurred has fallen somewhere in the middle of war waging and police enforcement, and in some cases outside either. The refusal to grant full combatant status to suspected terrorists, even if they were apprehended in what for all intents and purposes resembled a traditional battlefield (they are often referred to as “battlefield detainees”), reflects the fact that adherence to terrorist tactics was seen as trumping terrorists’ occasional participation in straightforward combat operations.

But it is perhaps the commission of crimes by those engaged in the War on Terror that has been most characteristic of the dangers of fighting a war without a notion of battlefield. The detention of individuals suspected of being security threats without trial and (for a long time at least) outside the safeguards of the judiciary, or the use of torture in military detention centres such as Abu Ghraib, in violation of both the standards of police work and the waging of war, show how the utter disappearance of the battlefield leaves us with very few criteria to

⁸⁵ LIAQUAT ALI KHAN, *supra* note 11.

⁸⁶ See generally Brooks, *supra* note ; Derek Gregory, *The everywhere war*, 177 THE GEOGRAPHICAL J. 238 (2011).

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determine what sort of activity is going on and, accordingly, what its proper limitations should be. The fact that these occurrences were at times more central to what the military was involved in than actual combat operations further suggests that, with the loosening of the strictures of the battlefield, it is the entire meaning of what it means to wage war that is being lost.

Finally, terrorism and the War on Terror are not without their own technological developments that further corrode the idea of the battlefield. In a way, one could describe terrorists' 9/11 attacks as the refinement of a particular terrorist technology – that of the suicide bomber mixed with the plane hijacker. Both are technologies that are designed to bring the war to the heart of civilian areas and, therefore, violently in contradiction with the idea of a battlefield. In the anti-terrorism camp, the emergence of technologies of targeted killings, including the use of unmanned drones, has had the effect of potentially bringing the battlefield to any location in the world in novel and radical ways that defy the traditional idea of the battlefield. Most targets of drone attacks will never know that they were targets and will be hit in a variety of locations (roads, homes, offices), which bear little relation to a battlefield, if only because there is less a battle than an instant flash annihilating the enemy, leaving no chance of flight or surrender.

This makes it possible that force will be used in situations far removed from what the laws of war anticipated. As a result, an effort to reassert the relevance of the concept of battlefield is starting to be heard. For example, the Human Rights Watch position on targeted killings is that “its use can be legally justified so long as it is limited to situations involving a combatant on a genuine battlefield or its equivalent beyond the reach of law enforcement, or in a law enforcement situation when the threat to life is imminent and there is no alternative.”⁸⁷ But as Tom Malinowski, the Washington HRW Director goes on to point out:

“the administration. . .has not laid out a clear legal rationale for drone strikes in Yemen or anywhere else. It has not explained what if any limits exist on the president’s ability to order targeted killings. Who can be targeted? *Can strikes be launched anywhere on a global battlefield*, or only in ungoverned areas where arrest is impossible?”⁸⁸

Similarly, an American Civil Liberties Union (ACLU) letter to president Obama on the targeted killing issue becomes an opportunity to deplore the dangerous disappearance of the battlefield:

The program that you have reportedly authorized appears to envision the use of lethal force not just on the battlefield in Iraq, Afghanistan, or even the Pakistani border regions, but anywhere in the world, including against individuals who may not constitute lawful targets. The entire world is not a war zone, and wartime tactics that may be permitted on the battlefields in Afghanistan and Iraq cannot be deployed anywhere in the world where a terrorism suspect happens to be located. Your administration has es-

⁸⁷ Benjamin Wittes, *Human Rights Watch Responds*, LAWFARE, <http://www.lawfareblog.com/2010/10/human-rights-watch-responds> (Oct. 26, 2010, 8:51 PM).

⁸⁸ *Id.* (emphasis added).

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chewed the rhetoric of the “Global War on Terror.” You should now disavow the sweeping legal theory that underlies that slogan.⁸⁹

Both global terrorism and the War on Terror have tended to push the boundaries of what constitutes the battlefield further than any previous developments, in a way that may make the battlefield virtually unrecognizable, and essentially licenses large amounts of violence unrestrained by even a loose sense of geographic and temporal limitation. This new “unrestricted warfare”⁹⁰ bears little relation to the sort of violence that the laws of war contemplated from the late nineteenth to the late twentieth century.

V. Conclusion: The End of War?

In essence, all of the major developments in warfare that have been outlined in this article have gone towards the elimination of the battlefield as a recognizable and thus legally regulated space. These developments do not only coexist, they tend to snowball, so that an idea such as those underlying the War on Terror would have been impossible without a series of developments in the 20th century that have loosened the bonds of the battlefield and therefore what is permissible in war.

The ICRC has seen the potential for the disintegration of the laws of war that lies in the deconstruction of the battlefield for a long time, although the events of the last decade have put the risk in ever-starker focus. The challenge is a complex one because of some of the ambiguity of humanitarian goals in changing times. On the one hand, humanitarians have been tempted to extend the scope of the battlefield to make sure that as much violence as possible falls under its constraints. For example, the broad territorial applicability of the laws of war is emphasized so that “[e]ven if substantial clashes were not occurring in the [specific region] at the time and place the crimes were allegedly committed. . . international humanitarian law applies.”⁹¹ As the International Criminal Tribunal for the Former-Yugoslavia (ICTY) put it:

There is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring states or, in the

⁸⁹ Press Release, ACLU, ACLU Letter Urges President Obama to Reject Targeted Killings Outside Conflict Zones (April 28, 2010), *available at* <http://www.aclu.org/human-rights-national-security/aclu-letter-urges-president-obama-reject-targeted-killings-outside-co>; *see also* Letter from Kenneth Roth, Exec. Director of Human RightsWatch, to President Obama on targeted killings and drones (July 12, 2010), *available at* [http://www.hrw.org/sites/default/files/related_material/Letter%20to%20President%20Obama%20-%20Targeted%20Killings%20\(1\).pdf](http://www.hrw.org/sites/default/files/related_material/Letter%20to%20President%20Obama%20-%20Targeted%20Killings%20(1).pdf) (stating, “While the United States is a party to armed conflicts in Afghanistan and Iraq and could become a party to armed conflicts elsewhere, the notion that the entire world is automatically by extension a battleground in which the laws of war are applicable is contrary to international law.”).

⁹⁰ *See generally* QIAO LIANG & WANG XIANGSUI, UNRESTRICTED WARFARE (People’s Liberation Army Literature and Arts Publishing House 1999)(original in Chinese).

⁹¹ Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-T, Order on the Prosecution Motion for Leave to Participate in the Present Appeal, ¶ 32 (Feb. 26, 2001) (case before the Int’l Crim. Trib. for the Former Yugoslavia) *available at* http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf.

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case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there, and continue to apply until a general conclusion of peace or, in the case of internal armed conflicts, until a peaceful settlement is achieved. A violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place. [T]he requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting.⁹²

International criminal tribunals have also resisted narrowing the scope of individual criminal responsibility to occurrences on the battlefield.⁹³ According to the ICTY, crimes need not “all be committed in the precise geographical region where an armed conflict is taking place at a given moment.”⁹⁴ Rather than presence on a hypothetical battlefield, the laws of war have developed a more sophisticated and fluid concept of “participation in hostilities.”⁹⁵ The fact that this notion has become so controversial and yet central to the application of the laws of war reflects the continued uncertainty left open by the waning of the battlefield. In effect, the growing prominence of the notion of “participation in hostilities” replaces the predominantly spacio-temporal framework of analysis of the laws of war (who is where) by a functional-personal one (who is doing what).

On the other hand, some advocates of the laws of war have sought to restrict the scope of who is a combatant by appealing to the notion of the battlefield.⁹⁶ It

⁹² Prosecutor v. Kunaric, Kovac, & Vokovic, Case No. IT-96-23 & 23/1-A, Judgment, ¶ 57 (June 12, 2002) (case before the Int’l Crim. Trib. for the Former Yugoslavia), *available at* <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>; *see also* Prosecutor v. Vasiljevic, Case No. IT-98-32-T, Judgment, ¶ 25 (Nov. 29, 2002) (case before the Int’l Crim. Trib. for the Former Yugoslavia), *available at* <http://www.icty.org/x/cases/vasiljevic/tjug/en/vas021129.pdf> (“The requirement that the acts of the accused be closely related to the armed conflict does not require that the offence be committed whilst fighting is actually taking place, or at the scene of combat.” In that case, even though the appellant argued that there was no armed conflict in the municipality where he found himself, his acts were nonetheless “closely related to the armed conflict” since the Accused was “closely associated with Serb paramilitaries, his acts were all committed in furtherance of the armed conflict, and he acted under the guise of the armed conflict.”).

⁹³ Prosecutor v. Brdjanin, Case No. IT-99-36, Judgment, ¶ 123 (Sept. 1, 2004) (case before the Int’l Crim. Trib. for the Former Yugoslavia), *available at* <http://www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf> (“In linking the offences to the armed conflict, it is not necessary to establish that actual combat activities occurred in the area where the crimes are alleged to have occurred.”); *see also* Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995) (case before the Int’l Crim. Trib. for the Former Yugoslavia), *available at* <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>; Prosecutor v. Simic, Tadic, & Zaric, Case No. IT-95-9-T, Judgment, ¶ 105 (Oct. 17, 2003) (case before the Int’l Crim. Trib. for the Former Yugoslavia), *available at* <http://www.icty.org/x/cases/simic/tjug/en/sim-tj031017e.pdf>.

⁹⁴ Prosecutor v. Blaskic, Case No. IT-95-14, Judgement, inc. Declaration of Judge Shahabuddeen, ¶ 69 (March 3, 2000) (case before the Int’l Crim. Trib. for the Former Yugoslavia), *available at* <http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf>.

⁹⁵ Melzer, *supra* note .

⁹⁶ Mary Ellen O’Connell is probably the author who has most consistently expressed skepticism about the possibility of targeting individuals far from the battlefield via drone attacks. *See generally* Mary Ellen O’Connell, *The Choice of Law Against Terrorism*, 4 J. OF NAT’L SEC. L. & POL’Y 343 (2010).

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may be that the concept of participation in hostilities multiplies and diversifies the battlefields, tracking actual armed clashes as closely as possible, but this does not and should not mean that the battlefield becomes literally all encompassing. Even though actual presence on the battlefield is not required, for example, a core requirement of “war crimes” (which are more generally a good indicator of what counts as war-related activity) is that they have some “nexus” to an armed conflict.⁹⁷ In fact, according to the ICTY, it must be “that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.”⁹⁸ In practice, this will cover crimes committed outside actual battle zones but that nonetheless display a strong element of connection to them. From a purely evidentiary point of view, presence on or proximity to the battlefield is a significant indicator that a commander knew what was happening on it; conversely suggesting that one was a long distance from the site of combat will undermine the view that one was participating in hostilities.⁹⁹ In addition, there is great reluctance to extend participation in hostilities to “civilians” who are no longer engaging in combat, or even military forces that are not on active duty. The fear here is that these individuals will attract military responses when returning to their civilian quarters that will make it very difficult to maintain the distinction principle.

Crucially, the ICRC defines direct participation in hostilities as the carrying out acts “which aim to support one party to the conflict by directly causing harm to another party, either directly inflicting death, injury or destruction, or by directly harming the enemy’s military operations or capacity.”¹⁰⁰ Implicit in such a vision is an activity that is likely to involve engagement at the level of some sort

⁹⁷ Brdjanin, *supra* note 93; Melzer, *supra* note , ¶ 123; Kordic & Cerkez, *supra* note 91, at ¶¶ 32, 69; Prosecutor v. Limaj, Bala, & Misliu, Case No. IT-03-66-T, Judgment ¶ 91 (Nov. 30, 2005) (case before the Int’l Crim. Trib. for the Former Yugoslavia), available at <http://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf>; Prosecutor v. Halilovic, Case No. IT-01-48, Judgment, ¶ 28 (Nov. 16, 2005) (case before the Int’l Crim. Trib. for the Former Yugoslavia), available at <http://www.icty.org/x/cases/halilovic/tjug/en/tcj051116e.pdf>.

⁹⁸ Brdjanin, *supra* note 93, at ¶¶ 123, 128; Prosecutor v. Blagojevic & Jokic, Case No. IT-02-60-T, Judgment, ¶ 536 (Jan. 17, 2005) (case before the Int’l Crim. Trib. for the Former Yugoslavia), available at http://www.icty.org/x/cases/blagojevic_jokic/tjug/en/bla-050117e.pdf; Prosecutor v. Halilovic, Case No. IT-01-48, Judgment, ¶ 29 (Nov. 16, 2005) (case before the Int’l Crim. Trib. for the Former Yugoslavia).

⁹⁹ Prosecutor v. Galic, Case No. IT-98-29, Judgment, ¶¶ 613, 659-663 (Dec. 5, 2003) (case before the Int’l Crim. Trib. for the Former Yugoslavia), available at <http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf> (“General Galic was present on the battlefield of Sarajevo throughout the Indictment Period [from around 10 September 1992 to 10 August 1994], in close proximity to the confrontation lines, which remained relatively static, and he actively monitored the situation in Sarajevo. General Galic was perfectly cognisant of the situation in the battlefield of Sarajevo.”).

¹⁰⁰ *Direct participation in hostilities: questions & answers*, ICRC RESOURCE CTR. (Feb. 6, 2009), <http://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm>. An attempt to reassert the geography of the laws of war is also implicit in one of the examples given by the ICRC of what distinguishes direct and indirect participation in hostilities: “the delivery by a civilian truck driver of ammunition to a shooting position at the front line would almost certainly have to be regarded as an integral part of ongoing combat operations and would therefore constitute direct participation in hostilities. However, transporting ammunition from a factory to a port far from a conflict zone is too incidental to the use of that ammunition in specific military operations to be considered as ‘directly’ causing harm.” *Id.*

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of contact zone, if not quite the battlefield.¹⁰¹ In other words, even as the ICRC seeks to adapt to a very changing battlefield, it is drawn back to basic geographic markers to assess what constitutes the activity of participating in hostilities.

None of these hesitations should appear surprising. They merely reflect the difficulty of the law to adapt to rapidly changing circumstances. For those seeking to uphold a concept of humanitarianism in the midst of war such as the ICRC, the dilemma is a complex one. If one accompanies the changes too fast and too willingly by, for example, agreeing to the most expansive concept of the battlefield, there is a very real risk of destroying one of the conceptual linchpins of the laws of war. If radical change is assumed too willingly and the battlefield pronounced dead as a concept, the laws of war risk sacrificing their regulatory and constraining potential and have very little to offer in exchange. They will be seen to give in and, in the process, fundamentally contribute to the deterritorialization of international law and the end of war as we know it for the benefit of something that may well be even more horrendous. On the other hand, if humanitarians accompany the changes too slowly by clinging to a rigid, territorially demarcated concept of the battlefield, chances are that much violence will occur beyond the realm of the laws of war altogether. The laws of war will also be condemned to irrelevance, having failed to adapt to the times. At best, they will be in the strange situation of regulating something that no longer really exists, and having only a weak claim to regulate what has replaced it.

It is in this context that more and more calls are being heard to either dispense with or substantially reform the laws of war, either allowing unlimited violence in the name of worthy causes (e.g., the need to protect oneself from apocalyptic terrorism), or upgrading the protections provided by the laws of war by resorting to, for example, international human rights. If the battlefield does disappear entirely, then one may indeed wonder what the relevance is of a law that was largely created with its presence in mind, and is now confronted with endlessly varied forms of violence that do not conform to any pre-ordained model. With the idea of the battlefield gone, even in its most rarefied, paradigmatic form, it is much of the heritage of the laws of war and the idea of war that is in the process of vanishing, and with it the possibility of both as regulatory ideas.

¹⁰¹ Melzer, *supra* note 78, at 1023 and 1024.