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The Law of War and Its Pathologies

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The Law of War and Its Pathologies

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This paper reflects the opinion of its author only

The law of war is alive but not well. It suffers from deep pathologies. These pathologies are inherent in the system itself. They are not simply the consequence of misapplying the law to facts, as typically occurred in the Goldstone Report. By examining these pathologies we shall be understanding not only how they distorted analysis in the Goldstone Report but how they wreak further damages in the law of war.

In this paper I will discuss the following pathologies:

The **first** is the myth, generated by the Geneva Conventions, that war takes place solely between the competing military forces. This myth leads to the troublesome doctrine of distinction and false belief that it is wrong to cause the death of civilians in warfare.

The **second** is the radical uncertainty about whether individual soldiers exist autonomously of the collective units in which they fight. In other words, who goes to war, a unified army acting command or collection of autonomous soldiers capable of committing crimes? Our doctrines on armed conflict and war crimes cannot resolve this tension.

The third is the persistent confusion of jus ad bellum and jus in bello in making claims about disproportionate force.

The **fourth** is when force is disproportionate.

The **fifth** is the inherent confusion about the conception of intention in international criminal law.

The **sixth** is the insoluble tension between war and crime and determining the way to treat terrorist attacks that have the qualities of both.

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That there is any form of law in warfare surprises many people. They wonder how law could apply amid widespread killing. There is much in the law of war that is sound but not properly understood, and there is much that is very bad but taken for granted.

On the good side, we should note the radical distinction between jus ad bellum and jus in bello. Jus in bello details the justifications for going to war. Jus in bello, the rules of engagement and the crimes and misdeeds committed in the violation of these rules.

The consequence of this distinction is that the same rules apply to both sides in a conflict, regardless of who started the war. The Germans and the Poles had to fight according to the same rules, even though the Germans were unjust aggressors. They violated jus in bello in going to war. This principle is very difficult for non-lawyers to understand. Philosophers, in particular, have written widely about the morality of war and have failed to grasp this central principle underlying the law of war. A good example is the sophisticated writer Jeff McMahan who treats the soldiers of a state violating jus in bello as unjust aggressors. Presumably they are entitled to lesser protection than are soldier fighting on the side of law and morality. This deviates from the law of war, which imposes a radical distinction between the wrong of the state violating jus ad bellum and the conduct of the soldiers fighting the war. Regardless of which state is in the wrong, the soldiers on both sides are entitled to the same treatment.

It is not just philosophers who confuse this distinction. In the popular mind, occupations of foreign soil thought to be wrongful and illegal if engaged in by victorious powers who originally went to war illegally. For example, it is commonly thought the justification of Israel's occupation of the West Bank depends on which side was the aggressor (and thus in violation of jus ad bellum) in the Six Day War. This is false under international law. Occupation is an extension of the way of fighting the war,

justified until a peace treaty is reached.

It may seem odd that a war breaks out, we are supposed to ignore who started it in deciding what is right and wrong in fighting the war. But that rule is absolutely necessary in order to avoid both parties from justifying exceptions to the conventional rules of *jus in bello* in the good faith belief that the other side started the war. It is common for commanders and soldiers to believe that they are fighting on the side of the gods (after all that is what their political leaders always tell them), but that if that self-righteous belief were relevant, it would preclude the stabilizing force of *jus in bello* and increase the harm that occurs in the course of fighting.

I am glad I have one good thing to say about the law of war for the rest of this paper is devoted to criticism of the way the law has evolved since the Lieber Code of 1863 to the Rome Statute of 2002 as well as in the American and Israel law governing asymmetric warfare, that is, war between a state with a regular army against non-state groups typically called terrorists.

Terrorists are supposedly those who fall between the categories of criminals and combatants. Their harm goes beyond criminal harm but falls short of the protected form that combatants are entitled to inflict in warfare. Thus we go to the principle of distinction and the first pathology.

1. Distinction: A Quick History

The idea that war is governed by a law of arms dates back at least to the middle ages and the chivalrous customs surrounding jousting or knightly combat. Shakespeare details many of the assumptions then current in his play *Henry V*. For example, he has the king express outrage that the French had killed the boy pages and then, paradoxically, orders the killing of all prisoners in retaliation. He also assumed that it is a war crime, punishable by death, to steal something from a church.

When the American Constitution was adopted in 1789 certain crimes were known as violations of the common law of law. The Constitution enables Congress to define these crimes "against the law of nations." The only source we have for what these crimes were is Blackstone's *Commentaries* (1765-69). He identified three crimes: piracy, interfering with safe conducts, and harassing ambassadors in their missions. These later become the foundation for the Alien Tort Claim for torts committed in the violations of the law of nations. There is no reason to assume that other nations agree with Blackstone except perhaps for the claim that piracy was a violation of the law of nations – not a war crime, but a peacetime violation.

When the codification of the law of war began in the nineteenth century the focus was on war crimes. The grandfather of all the codification efforts was Francis Lieber, a professor of criminology and follower of Kantian philosophy. He relied on two key premises of Kant's thinking about war – first that wars can only be fought between equals. (This important idea has been forgotten) and second, that the war should be fought in order to bring about the conditions that will make peaceful coexistence after the war more likely.

Lieber derived several important conclusions from the premises of fighting the war quickly in order to restore peace. For one, he thought that it was desirable to impose states of siege in order to induce surrender. He went so far as to prescribe that "it is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy" (Art. 18) and that it may be desirable for commanders to expel non-combatants from a besieged place but "it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender" (Art. 19).

These provisions are totally contrary to the modern law of war as represented by the Rome Statute Art. 8b (xxv) making it a war crime "intentionally to starve civilians" regardless of the beneficial long run purpose.

The contrast between Lieber's law and the Rome Statute is striking. The root difference of style is that Lieber avoids laying down black and white rules about the treatment of combatants or civilians. His approach is to describe what is desirable and then to make it clear that sometimes the correct pursuit of the ends of war require undesirable means. The overriding principle is necessity – which "admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war" (Art. 15).

Lieber is aware of the distinction between combatants and non-combatants but there is no categorical distinction between them.

It is better to minimize harm to civilian non-combatants but if the proper ends require that they suffer, they must suffer. This does not sound very Kantian at all. The principle of military necessity is rooted in a utilitarian calculus – everything necessary to bring about a hasty end of the war and a return to peaceful cooperation is desirable.

Lieber does recognize some absolute taboos in warfare, namely the limitation that Necessity does not admit of

“cruelty – that is, the infliction of suffering for the sake of suffering or for revenge, [and] torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. . . .military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.”

The last phrase states the relevant test – what make the return to peace more difficult? Atrocities on a mass scale, cruelty for its own sake, wanton devastation – these are harms not easily forgotten. They make it more difficult to return to a state of peace.

The most important feature of Lieber’s philosophy, for our purposes, is the rejection of a categorical distinction between combatants, who can be killed at will, and non-combatants, who are supposed protected under the law of war.

Lawyers prefer litmus paper tests, black-or-white ways of thinking. An act of violence is either lawful or unlawful. Lieber rejects this way of thinking and introduce a critical matter of degree. Some things are more desirable than others, but the undesirable is not necessarily unlawful.

Lieber was in fact a Romantic of the early nineteenth century, not an Enlightened Kantian of the late eighteenth century. He had a conception of war based on the entire people’s going to war. As he says in his classic Article 20:

Public war is a state of armed hostility between sovereign nations
or governments. It is a law and requisite of civilized existence that men live
in political, continuous societies, forming organized units, called states or
nations, whose constituents bear, enjoy, and suffer, advance and retrograde
together, in peace and in war.

The notion of law in this provision is descriptive, not normative. It is the way we live. It is in the nature of things for human beings to advance as a collective entity and to suffer as a collective “in peace and war.” When the collective suffers, it is obvious that civilians suffer as well. They can be starved, have their property destroyed, and even be killed when the goal of reestablishing peace requires it.

The progress (or perhaps regression) from the Lieber Code to the Rome Statute centers of a major thinking about the question “Who goes to war?” For Lieber the answer to that question was clear: The collective goes to war. The nation goes to war. However, just seventeen years later, in 1880, the Oxford Manual on the Law of War outlines a conception of war that eventually prevails in the Hague and Geneva Conventions. In its first Article the Manual declares the essence of the modern view: “The state of war does not admit of acts of violence, save between the armed forces of belligerent States.” The implication is that only the armed forces go to war. There might be definitional work to be done about the contours but it is clear that civilians are neither objects not subjects of the violence that war permits.

The Hague and Geneva conventions entrenched this idea and thus implicitly denied the social reality that Lieber described, namely that the entire society must flourish and suffer together.

The Hague Convention of 1899 presents us with the first treaty-based definition of a belligerent or a combatant. The modern definition already found in the Oxford Manual, but it reaches its canonized state under Article One of the Annex to the Hague Convention:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

To be commanded by a person responsible for his subordinates;

To have a fixed distinctive emblem recognizable at a distance;

To carry arms openly; and

To conduct their operations in accordance with the laws and customs of war.

The idea that these belligerents had certain rights looks like an important innovation. The most important of these rights was to be treated, when captured, as a Prisoner of War, that is to be held in suitable confinement until the end of hostilities. POWs could not be tried for any actions that outside the context of warfare would constitute obvious crimes, the most serious being murder. As POWs, they could not be harmed, and they certainly could not be killed as they were in the play *Henry V*. The concept of the POW is the beginning of the idea that there are certain people who constitute "protected persons" under the law of war.

On the whole, the Hague definition of combatants has had a baleful influence on the development of the law. The major problem is: What happens when one of these four requirements is not fulfilled? Say, the fighters are not part of a chain of command or they do not wear "a distinctive emblem?" If they are not combatants, what are they? Civilians? This hardly makes sense, though the International Committee for the Red Cross has persistently maintained that there are two categories of people in contemporary warfare: combatants and civilians.

The United States embarked on a totally different course in the class case of *Ex Parte Quirin* decided by the Supreme Court in 1942. Eight German soldiers landed in the summer of 1942 off the coast of Long Island and Florida. They buried their uniforms on the beaches and proceeded inland on missions of sabotage and espionage. Before they got very far, one of them got cold feet and confessed to the FBI and the others were quickly apprehended. There are many fascinating aspects of the case. The one that is important for our purposes is defining the crime they committed by walking around in the US without wearing "a distinctive symbol" as required by the Hague Convention.

Perhaps the answer should be that they committed no crime at all. Their conduct did not go far enough to constitute attempted sabotage or espionage. The joke around Washington at the time is that perhaps they were guilty of visa violations. But this was no joke to Roosevelt. He saw the plan as a major violation of the U.S. defensive perimeter and he was determined to punish the eight as severely as he could. For the first time since the Civil War, he convened a military tribunal. In my view this was a mistake.

The eight would easily have been found guilty of conspiracy in federal court but Roosevelt thought it would be more efficient to prosecute them in a military tribunal. As a result the Supreme Court had to engage in some fancy footwork to find them guilty.

They invented the idea that engaging in hostile action as a representative of the enemy but without being made a combatant made them "unlawful combatants" and further – this was totally unheard of – being an unlawful combatant was a war crime punishable by death. In my view the argument had no warrant. The crime that they committed by walking around in civilian clothes was something like driving without a license. They were guilty of engaging in warfare without getting the license called "belligerent status." They did not hurt anybody, they did not even come close to hurting somebody, but the Supreme Court allowed their trial in a military commission to go forward on the theory that unlawful combatants were guilty per se of a war crime. Six of the eight were quickly sentenced to death and the sentences were carried out even before the Supreme Court published its opinion in the case.

The *Quirin* case changed at least American thinking about the law of war. It relied on textbooks of international law to establish the view that there was a middle category between combatants and non-combatants: the unlawful combatants. It was not clear what you could do to these persons in the middle. When captured they were not entitled to POW status (that followed from the literal wording of the Hague provision). Thus they could be liable for crimes committed while serving as soldiers in the German Army.

The idea that you could be both a soldier and a criminal represented a very significant breach of Lieber's idea that collective entities or nations went to war against nations. The emphasis on the collective's going to war implied that the individual soldier

was absorbed into the collective identity. This idea has roots not only in Rousseau as well as in later Romantic concepts of the nation. In the idea of a war crime, the individual breaks out his immersion into a collective identity.

The idea that soldiers could be criminals had its precursors. There is some mention of liability for war crimes in the Oxford Manual in 1880. And after WWI there was an aborted effort to prosecute the Kaiser for war crimes. The absorption of the individual into the collective was never complete. Even Lieber said “Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God. (Art 15).”

The turning point in the prosecution of war crimes came when the Supreme Court convicted a Japanese general named Yamashita in 1946. Yamashita was the Japanese commander in the Philippines at the end of the war. When MacArthur brought his troops back to the Philippines the war broke out on a mass scale. Local Japanese troops engaged in systematic atrocities of the civilian population.

This was a good example of what Lieber meant by gratuitous cruelty – on the part of the Japanese troops. There was no evidence, however, that Yamashita was complicit in the misbehavior of his troops. Again the court was predisposed to convict and therefore they made up a new crime called “command responsibility.” Yamashita was supposedly guilty for having negligently failed to supervise his troops. There no prior treaty or statute establishing this crime. The court derived it from the first requirement of the Hague definition of combatants – to qualify the soldier must be “commanded by a person responsible for his subordinates.” From this provision the Court derived a legal duty of commanders properly to supervise their troops. His failure to do so constituted a war crime.

The Geneva Conventions in 1949 made no reference to the developments of the U.S. Supreme Court during and after WW II. Yet the *Yamashita* precedent eventually had a dubious effect on the law of war, creating its own particular pathology. The ICTY – the tribunal for prosecuting war crimes committed in the war between Serbians and other Yugoslav people – began using command responsibility as one of its basic techniques for convicting commanders without proving a causal connection between the commander’s action and the atrocities committed by the troops on the ground. The other technique was called Joint Criminal Enterprise. This totally made-up doctrine enabled the ICTY to convicted commanders for crimes committed by other persons simply because they were the foreseeable consequences of a common plan. Fortunately the ICC has begun to correct the latter abuse the *Yamashita* doctrine of command responsibility as it is now anchored in Article 28 of the Rome Statute.

The jurisprudential innovations of the ICTY are bit a far field from our main concern in the evolution of the principle of distinction. When the Geneva Conventions were adopted in 1949, the distinction between the military and protected persons becomes the foundation of the a new law of war called IHL or International Humanitarian Law. The four conventions are organized around categories of protected persons. The first and second are designed to protected the wounded, the sick, and the shipwrecked. The third is directed toward prisoners of war, and the fourth, toward civilians. The point of all of these conventions is to exempt these protected persons from the scope of warfare. The only people left to kill or be killed are the able-bodied active members of the regular army. Undiscussed is the status not only of reserve units but of mercenaries and military contractors. The latter as we know have come to play a critical role in the U.S.’s war in Iraq.

The point of the Geneva Conventions was to codify the idea, already found in the Oxford Manual, that only the army goes to war. The protected persons are on the sidelines, as it were, watching the game. Thus some people believe that it is equally bad to kill the civilians of the enemy as it is to expose one’s own citizens or to the ravages of war. This proposition of equivalence is contrary to all of our political intuitions. The first duty of any political leader is to protect his own population. If a national leader showed equal respect for the citizens of the enemy as for his own people, it would quite properly lead to his or her removal from office. Yet the Geneva Convention tries precisely to establish this idea of civilian equivalence by creating the myth that only the army goes to war.

2. The First Pathology: The Myth of Armies Going to War Alone

Thus we have the first major pathology of the law of war. It is the idea that war takes place only between those who are part of the armed services. The pathology arise from rejecting Lieber's principle that it is nature of all societies to "advance and retrograde together in peace and war."

The label given to this pathology is the principle of distinction. It leads many people to think that killing enemy civilians in warfare is illegal per se. Of course it is not. Nor could it be. Civilians always suffer as the indirect consequence of armed conflict. In fact we can say that as the international community has become solemn about protecting civilians, more and more civilians have died in warfare. In the American Civil War, 620,000 were killed, the vast majority soldiers. With the advent of aerial bombing and other brutal measure of modern warfare, the civilian death count has increased progressively. The most outrageous is the civilian casualty count in Iraq. A few thousand American soldiers have been killed but the collateral damage to Iraqi civilians has exceeded American was in Iraq,

The critical factor in the principle of distinction is the soldier's intention. The only things prohibited are intentionally attacking civilians and knowing that the pursuit of military will cause excessive or disproportionate harm to enemy civilians. As we shall see, however, each of these prongs of distinction reveal a distinctive pathology. The first turns on shifting and confused notion of intention. And the second requires that we capture the forever elusive notion of "clearly excessive" force.

3. The Second Pathology: Collective and Individual Action at the Same Time

The first pathology conceals a second, namely a radical uncertainty about when and where individuals function in the law of war. If armies go out to fight against armies, that is, collectives against collectives, what is the role of individuals in the law of war? If the individual does not merge completely into the collective, when is he sufficiently autonomous to commit a war crime?

It is clear that the doctrines of armed conflict retain the idea of collective action. Imagine this situation. Two states side by side, say Norway and Sweden. The Norwegian army attacks Sweden in the North. In response, Two hundred miles away, in the South, the Swedish army responds with an invasion of Norway. Under the principles of jus ad bellum, incorporated in the U.N. Charter Article 51, the action by Sweden in the South constitutes self-defense against the totally independent attack by Norway in the North. This way of thinking would not be possible unless we conceptualized both Sweden and Norway as collective entities in which the action of a part is the action of the whole.

That individual identity was submerged in collective identity provided the rationale for the traditional view that belligerents or combatants could not be held criminally liable for actions, such as homicide and maiming that would otherwise constitute crimes. Yes as we have seen in the development of the law from *Quirin* to the Rome Statute, individuals have become the focus of the law of war.

This is at least the official story. But there is another story not often told. The structure of war crimes is based, more than we realize, on collective action. First, they must be committed, according to Article 8 of the Rome Statute, "as part of a plan or policy or as part of a large scale commission of such crimes." Perhaps an individual could pull off this "plan or policy" but it is unlikely. Further, many specific crimes presuppose a collective group of actors. Here is a sample list from the many war crimes defined in Article 8:

1. "Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power."
2. "Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial."
3. "Taking of hostages."
4. "The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this

territory.”

This sample list makes the point. There are many war crimes that require the coordinated conduct of large numbers of people. No one, acting alone, can compel a prison to serve in a hostile army, deprive someone of a fair trial, take hostages, or transfer their civilian population into an occupied territory. It is conceivable that a commander might be able to mobilize his subordinates to engage in these collective crimes. But the subordinates – or at least some of them – are then liable as well. The commander’s criminal purpose is validated and reinforced by subordinates willing to carry out his orders.

Of course, there are some such as will killing that can be committed by a single individual acting alone, but it is not clear that a single person acting alone – even with a nexus to an armed conflict – must meet the fundamental test of international criminality stipulated in Article 5: “The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.” This provision remains undertheorized but we have good reason to doubt whether a single perpetrator harming a single victim would be one “the most serious crimes of concern” to the international community. The kidnapping of Gilad Shalit causes immense concern to Israelis but it is not clear whether the international sees the kidnapping as anything but a local matter.

The kinds of the issue that cause concern to the international community are collective in nature. They represent segments of the armed conflict. They are not just crimes but they instantiate the collective horrors of war.

The collective nature of international criminality stands in sharp contrast to the law of crime, where the basic paradigm is a single person acting alone. All crimes, as we know them in domestic criminal law, are susceptible of being committed alone, in isolation from group conflicts. If there are other involved, they are co-perpetrators or accessories. But the commander is not an accessory to the crime committed by his subordinates. The commander is fully liable as a perpetrator. The traditional criteria of complicity do not readily adapt to these situations of collective criminality.

Thus war and war crimes are collective in nature, and yet crimes are committed by individuals, and the Rome Statute purports to punish only “nature persons” acting as individuals. Thus we are left with the second pathology: we cannot resolve the tension inherent in the law of war between collective and individual action.

4. The Third Pathology: Confusion About Disproportionate Force

The common charge made against Israel – and it seems just against Israel – is that its army deploys disproportionate force against its enemies. This charge was widely heard after the bombing of roads in the Northern Lebanon during the Second Lebanon War in 2006 and the pinpoint bombing of militant sites in the Gaza War (Cast Lead) in early 2009. If you search the web and the media you will find endless claims of this sort. The proponents rarely know what they are talking about.

The first problem is the persistent confusion of using force *ad bellum* and using force *in bello*. As far as the state’s using force to defend against unlawful attacks is concerned, it is not at all clear that a limit of disproportionate force applies at all. All we know from U.N. Charter is that the use of force is lawful when used in self-defense against aggressors. Frequently commentators say the use of force must be “necessary and proportionate” but they never address the latter requirement at all.

The notion of disproportionate force in the law of self-defense, as it is interpreted in domestic legal systems, requires that the victim of an attack suffer the attack because the response would be too costly to the aggressor. In other words the victim must “lump it” instead of defending himself. Imagine a large group of foot soldiers squatting in our territory. We have no way of removing them except by shooting them. This is unfortunate but no one would suggest that we should simply cede our territory to a foreign power because the cost of defending ourselves is too high. In domestic legal systems this finding is possible because in some situations we have to accept the remedy of compensation in lieu of eliminating the aggressive occupation. For example if my neighbor mistakenly builds on five square feet of my property I could not get him to tear down the building if the value of the building is highly disproportionate to the loss in the value of my land. I would have to take compensation instead. This principle does not apply in international relations. If Sweden mistakenly builds a building on five square feet of Norwegian property, the Norwegians are entitled to reclaim sovereignty in their land. The building must come down.

As this example shows, the taboo of disproportionate force expresses a certain conception of social arrangements. The requirement of “lumping it” presupposes a certain respect for the humanity of the aggressor. When the victim and the aggressor are part of the same society, one might properly expect victims to be concerned about the welfare of aggressors. But this is not the case in the international order. There is no requirement of yielding one’s own territorial sovereignty because the cost of defending it falls too heavily on the enemy.

This is not to say that the requirement of necessity is so easily satisfied. Perhaps the bombing of the Northern roads in the Second Lebanon War was not necessary for Israel to defend itself. The principle of military necessity underlines the entire law of war, and in particular, the use of force in self-defense. That the force is unnecessary means that there are reasonable cheaper options for achieving the military aim. When those options are available they must be taken. But if the use of force is necessary, I find hard to understand how it could be ruled unlawful on grounds of proportionality.

If there is no problem of proportionality at the level of *jus ad bellum*, there still might be a problem in *jus in bello*. In fact the current rules of engagement do prohibit “clearly excessive collateral damage.” Article 8(b)(iv) makes it a war crime

Intentionally [to launch] an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects. . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

The precedent for this principle is the First Protocol to the Geneva Conventions, Article 51(5), which prohibits “an attack which may be expected to cause incidental loss of civilian life. . .excessive in relation to the concrete and direct military advantage anticipated.” The differences are that in the criminal provision the commander must “know” that the damage will be “clearly excessive.” What is not clear, however, is whether the commander must know only the facts that the courts will characterize as “clearly excessive” or whether the commander must also think that the damage is clearly excessive. I think the latter is the better reading. Though the Element of Crime, an official source of law under the Rome Statute, are ambiguous on this point, a careful analysis suggests that the elements support this reading. That is the commander must know not only of the collateral damages that will occur but know it would be legal classified as “clearly excessive.”

Although the term “disproportionate” does not appear in the Rome Statute, the phrase “clearly excessive” can be taken to mean disproportionate. Thus when critics claims that Israel engages in disproportionate force they might be referring to this provision. They never bother to clarify whether the commander must also think the damage is disproportionate.

There was a story in the Israel press this week about an Israel general named Eisenkut who explicitly threatened “disproportionate harm” against Hezbollah in the case of renewed of hostilities in the North. This was not a clever thing to say. He could have threatened overwhelming force without risking liability. There was no reason for him to confess to the crime before he committed it.

The issue of excessive collateral force raises so many problems of its own that we break here to underscore the third pathology of the law of war: the persistent confusion of *jus ad bellum* and *jus in bello* in making claims about disproportionate force.

5. The Fourth Pathology: The Pretense that We Know what Disproportionate Force is

To know about disproportionate force under the Rome Statute is that we have to engage in some kind of balancing between the value of the military objective and the collateral damage. When the latter gets too great relative to the former, it is “clearly excessive.” Of course no one knows what the numerical disparity must be. Whatever it is, the first question is how to evaluate the military objective. How critical is it to the war effort? It is only when that value is quantified that we begin to speculate about the number of lives may be lost as collateral damage to pursuit of the objective.

What concerns me most, however, is that international lawyers are not aware of how complicated the analysis of proportionality is under domestic law. My impression is that they go immediately for a strict cost/benefit analysis as one might expect under the principle of necessity as a justification in criminal law. The strict comparison requires merely the cost outweigh the benefit for the cost to be considered disproportionate. But this is oversimplified.

In fact there are three additional ways of interpreting the concept of disproportionality. Let us suppose we represent the strict weighing of costs and benefits as the standard 49/51. If the costs are 51 and the benefits 49, the costs would be regarded as disproportionate. In the analysis of self-defense the standard is entirely different. German law traditionally did not accept any principle of proportionality at all on the use of necessary force in self-defense. In fact the 1975 Criminal Code Art. 32 says explicitly that the defender has the right to use whatever force is necessary to thwart the unlawful attack. This extreme position – comparable in fact to the right of self-defense in international law – was expressed by the principle: The Right need never yield to the Wrong. It was typified by a 1920 case which held that a home owner could shoot an escaping apple thief, when there was no other way to stop him. Eventually German law introduced a principle of “abuse of rights” to limit the scope of self-defense. No one knows when this limit kicks in but on our scale we could describe as something like 10/90. The detriment from using force would have to be enormous (like killing the escaping thief) as compared to the benefit (saving the apple).

German law recognizes two positions between the strict comparison of costs and benefits (49/51) and the rule of proportionality in self-defense cases (10/90). The first is called passive necessity (BGB sec. 228) and second aggressive necessity (BGB 904). Passive necessity is characterized by an object threatening harm to a passive person, say a rabies-stricken dog attacking a child. In this case, the defender may exceed the limits of strict comparison, but because the attacker is not a human engaged in wrongdoing, the limits are lower than self-defense. We could characterize this as a 30/70 case.

Aggressive necessity is typified by an entry into some else’s land in order to avoid an emergency. A classic case is present in *Vincent v. Lake Erie RR*. In order to save his ship the defendant keeps it moored to the plaintiff’s dock as a brutal storm comes up and leads to the ship’s crashing against the dock and considerable damage to the dock. In this case the balancing is skewed against the intervener. We could label it a 70/30 case, that is, the benefit of saving the ship must be much greater than the expected damage to the dock. Interestingly, there seems to be an intuition shared across legal systems that the defendant need not pay in cases of passive necessity but must pay for the damage in cases of aggressive necessity. The latter resembles a taking under the law of eminent domain.

We should not another use of the term proportionality, which sheds little light on the laws of war. The term *Verhaeltnismaessigket* is a standard term of analysis under German law to assess the relation of means to ends in legislation. The term functions something like the concept of reasonableness in American law. Proportionality in this judicial sense has become a favorite of former Justice Barak. He used the concept with great subtlety in cases like the *Beit Sourik Village Council Case*, where the standard of proportionality was the proper way to balance the security needs of Israelis against the burdens falling on Palestinians in charting the proper course for the defensive barrier. This judicial use of the concept has nothing to do with the concept of “clearly excessive” force in the law of war.

With these five possibilities of interpretation (necessity, self-defense, passive necessity, aggressive necessity, judicial balancing) we should use the concept of proportionality with extreme care. In the literature, however, there appears to be no attention paid at all to these subtle differences. Scholars and lawyers throw the concept around as though we all knew what it meant. The fourth pathology, then, is the inherently contested nature of disproportionate force.

6. The Fifth Pathology: The Slight of Hand Called Intention

The Goldstone Report uses the concept of “intentional” harming and killing some 20 times, mostly to generate accusations of unlawful conduct. In my view, we should not invest much confidence in these allegations of intentional wrongdoing. The confusion about intention in international criminal law is one more pathology of the system.

The impulse for my critique comes from the intolerable sloppiness evident in the Rome Statute’s definition of intention. Article 30 reads:

Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. For the purposes of this article, a person has intent where: In relation to conduct, that person means to engage in the conduct; In relation

to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

The distinction between intent and knowledge suggests that the drafters paid attention to the structure of the Model Penal Code [MPC] sec. 2.02(2). This is confirmed by the distinction between the mental state for conduct and for consequences, a sophisticated distinction not found, so far as I know, outside of American law. But if the drafters of the Rome Statute had heeded the lessons of the MPC, they would have defined the requirement of intent or knowledge in the alternative rather than cumulatively. Perhaps the drafters really wanted to follow the structure of the MPC and just slipped and wrote "if the material elements are committed with intent and knowledge."

There is no point to requiring both intent and knowledge. The second term is redundant. Intent generally presupposes knowledge. But redundancy itself causes no harm. A serious risk of confusion does arise, however, when the drafters go further and define "intention" as equivalent to "meaning." I cannot figure out where they got this idea. So far as I know, there is no precedent for this definition in the legal systems of the world. The drafters are on their own as they tread circular ground. We do not know what "meaning to do" means without already understanding the concept of intention. Thus intention → "meaning to do" and "meaning to do" → intention. This is all word play with no effect illuminating the required mental state.

And then comes the claim that knowledge requires a certain form of awareness. I should think that "meaning to do" implies "knowledge" as well, thus rendering it pointless to require both intent and knowledge. Nonetheless, in its first decision in the *Lubanga* case, the ICC entrenches this mistake in its jurisprudence.

And yet the Rome Statute also uses the concept in a seemingly narrow way, particularly in the series of war crimes beginning with the word "intentionally." This is the characteristic of Article 8b(iv), which we discuss above. There is no apparent reason why intention used as an adverb should differ from intention as a noun, but this difference may correlate with hidden purposes of the drafters.

And then there is the problem of mistake of law – linked to the concept of intention. Article 32 explicitly limits the relevance of mistake of fact to negations of the required mental state. This is the approach of the MPC: mistake is not an affirmative defense but relevant only as a denial of the charges against the defendant. Logically it follows that any mistake, reasonable or not, which negates the required intent constitutes a full defense. This is a very unfortunate outcome. It is the manner of thinking that led to the disaster in the *Morgan* case in the House of Lords. *Morgan* held that any mistake about consent, even an unreasonable mistake, would be a complete defense to rape. This led to the acquittal of rapists who believed, on the basis of victim's husband's advice, that the victim enjoyed being taken by force. This is obviously an unsustainable position. Parliament changed the law to require a reasonable mistake. It is not clear their attempted change of the law prevailed in the courts.

The most difficult question under Article 32 is whether the status of the victim as a protected person is a "material element" of the crime. If it is, then any mistake about this status will imply a denial of intentionality and require an acquittal of all war crime charges. The soldier need only allege, with some grounds, that he believed that the injured party was not a civilian but a member of an underground resistance army.

The Goldstone Report accuses the Israeli military of intentionally killing civilians in Gaza. What could this possibly mean? Does it include an allegation that the soldiers firing on Gazans believed that their targets were protected persons? If it should, as I believe it should, then the charge seems highly implausible. We can assume that in general the soldiers fired in order to further their military objectives. If they were mistaken about who was a protected person, they would not have had the required intention. It was so difficult under the circumstances to know who was protected and who was not that it is implausible to ascribe to them an intention to kill unprotected persons.

7. The Ultimate Pathology: The Intersection of War and Crime

In the wake of 9/11, I wrote an op-ed in the Washington Post arguing that we were conflicted about whether the attack was a

crime or an act of war. We wanted it both ways. As an act of war, it would justify a retaliatory strike in Afghanistan. The standard for responding to acts of war is not justice, but the efficacy of the response. Things have not changed much since then. We are still confused about whether terrorist attacks are acts of war or crimes.

If an attack is merely a crime, we have put our chips on arresting and prosecuting the perpetrators and their supporters. Since the perpetrators of the 9/11 attack were dead, we had to concentrate on the supporters and we did find one, Zacharias Moussaoui and put him on trial for conspiring to kill U.S. citizens. The trial was a success, even though Moussaoui was able to defend himself and thus use the courtroom as a political platform.

Both the Bush and Obama administrations have been confused about how to apply the concept of war to threats posed by the loosely knit conspiracy called Al Qaeda. They have managed to get away with detaining hundreds of people without trials in Guantanamo Bay by pretending that they were something like prisoners of war, not quite POWs but “enemy combatants.” They think that if they must put these men on trial, it is safer to use military tribunals. But every time they have done so, defense counsel have raised effective objections in the federal court. In the *Hamdan* case (2006), four Justices of the Supreme Court held that the jurisdiction was limited to the law of war and that conspiracy was not a crime under the law of war. Even if the substantive charges pass muster, the courts are very skeptical of the procedural short cuts that the government thinks it can institute in military commissions. Even before the Court extended the application of the Constitution to Guantanamo Bay in the *Boumediene* case, the Justices were very sympathetic to applying vague international legal principles – such as common Article three of the Geneva Conventions – as a way of blocking prosecutions in the tribunals. The government has in fact prospered little by trying to extend the law of war to terrorist attacks.

The law of war is alive but not well.