

Current Challenges to Normative Restrictions on Warfare*

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Abstract: The dominating order of warfare, with international humanitarian and arms control law at its core, is constantly subject to change with new experiences and differing political constellations. Changing practices of warfare by major military powers as well as intellectual challenges to the justification of rightful behavior in warfare question foundations of this order. While going into different, and partly contradicting directions, three common critical elements of practice and discourse are highlighted: the territorial and temporal debordering, repolitization of warfare, and damage limitation. While not likely to lead to a new order of warfare, the identification of these elements helps to understand both current and future warfare by major military powers.

Key words: Warfare, humanitarian law, arms control, norms

Stichworte: Kriegführung, Humanitäres Völkerrecht, Rüstungskontrolle, Normen

1. Introduction

Not everything is allowed in warfare. At least, rules and restrictions on warfare are the foundation of global orders¹ of warfare and an imperative for those armed actors who find themselves bound by them because they need to justify their conduct in warfare within rules both to their peers and their constituencies. Particular systems of norms on appropriate behavior with respect to war have constituted various different orders of warfare in history. Dominant orders were constantly reinterpreted and challenged, in theory and practice, and finally replaced. The order of warfare dominant since the end of World War II, with important restrictions codified in international law and additional ones rooted in the practice of all, or at least a large number, of states², has been challenged from its beginnings – by flagrant or hidden violations. A number of authors have contended that, largely corresponding to the end of the Cold War, a new set of practices in warfare, in the form of “new wars” for instance in Bosnia and various parts of Africa, has further eroded the post-World War II order of warfare.

The current order has not only been challenged by state and non-state actors involved in “new wars”, but also governments in the “Global North”. The last two decades or so have been marked by a number of changes and innovations in the way major military powers of the Global North justify and conduct wars. In parallel to changing practices, and their justifications, there are also a number of fundamental critiques of the post-World War II order of warfare coming from thinkers from the Global North.

* This is a shortened and revised version of „Aktuelle Herausforderungen der normativen Ordnung der Kriegführung durch große Militärmächte“ in: *Krieg im 21. Jahrhundert*, hrsg. von Hans-Georg Ehrhart, 253-281. Baden-Baden: Nomos Verlag.

- 1 I use the term “order” to signal a set of norms of behavior generally agreed, accepted and implemented by relevant actors. In addition to formal legal norms they are marked by shared informal understandings of proper and improper behavior, though the exact ways of interpretation and implementation of these norms and understandings may be contested). It extends the concept of social order beyond national societies to international relations.
- 2 I am here taking an institutionalist approach to warfare, focusing on existing and suggested rules for the regulation of war and their consequences for the frequency and intensity of warfare. My normative orientation is to minimize both. See Lazar 2016 for other approaches to the analytical study of warfare.

2. The dominant normative order of warfare

The argument that warfare should not be limitless can already be found in ancient texts and has been repeatedly reconfirmed (Kinsella and Carr 2007; van Crefeld 1991). Efforts to put morally justified arguments into political and legal practice can, for instance, be seen in the limitations on the use of modern weaponry by the Japanese Samurai or the just war criteria espoused by the Catholic Church.

Beginning in the 19th century, efforts to create an order built on considerations of liberal principles of humanitarians, legality and conflict arbitration began to be promoted by individuals and civil society organizations. They drew their momentum particularly from the ascent of middle classes, growing international commerce and the revulsion against reports of warfare, such as the Crimean War between Russia, the Ottoman Empire, Britain, France and Sardinia 1853 to 1856 or the Civil War in the United States of America 1861 to 1865 (and much less so in colonies) (Best 1980; Howard et al 1994; Neff 2005).

Early success of these movements can be seen in the banning of some types of weapons (St. Petersburg Declaration on explosive or incendiary ammunition for small arms and light weapons) as well on the treatment of wounded and captured combatants. A whole set of rules was laid down in the Hague Conventions of 1899 and 1907. Further legal norms came as a result of the carnage of World War I (where only few of the earlier restrictions had been observed). In addition to putting further limitations on warfare, for instance through the Geneva Protocol of 1925 forbidding the use of biological and chemical weapons, serious efforts got underway to ban war itself. The violence brought about in World War II also stimulated further legal action on limitations in warfare based on this foundation including in the Geneva Conventions of 1949 and Additional Protocols.

While the initial momentum for restrictions came from civil society movements, states soon dominated the development of the normative order of warfare. To some extent, that came natural, in the sense that even civil society groups saw the states as those actors that needed to negotiate, observe and

implement restrictions. It also coincided, particularly in the first half of the 20th century, with international orders based on the idea of equal and sovereign states. Both the charter of the League of Nations and the United Nations express this idea.

There are important legal distinctions between the rules for legitimate warfare between states (international armed conflict) and armed conflicts within states (non-international armed conflict). However, there is a body of principles and practices which constitute the central requirements of the legitimate conduct of warfare:

1. *Discrimination*. Civilians and civilian objects may not be targeted. Obviously, the definition of who are combatants and who are not as well as what are military and civilian objects and objectives is crucial (Downes 2008, Slim 2008).
2. *Proportionality*: Harming non-combatants and civilian objects is only permissible if it is not excessive in relation to the concrete and direct military advantage anticipated by a military attack. Recent efforts at humanitarian arms control, for instance in the field of land mines, have focused on the damage of warfare to civilians, including after the end of wars.
3. *Necessity*: When harming non-combatants and civilian objects, the least harmful way should be chosen.
4. *Unnecessary suffering*: While the gist of the limitations of humanitarian law concern non-combatants, there also is an element of protection of combatants from superfluous injury or unnecessary suffering. This was the focus of earlier arms control efforts, for instance with respect to the banning of explosive and incendiary ammunition.
5. *Treatment of combatants out of combat*. Combatants, who do not pose a threat, because they are wounded or captured, are protected. Legally, there are major differences between international and non-international armed conflict (ICRC 2011), however in practice differences are minor. Combatants taken prisoner may be detained, but their treatment has to be humane. Combatants in international armed conflicts cannot be punished for their behavior in warfare, according to the Geneva Conventions, as long as they have acted within the bounds of international humanitarian law. Combatants in non-international armed conflict do not have such legal protection.

Humanitarian law in summary attempts to reconcile the physical core of warfare, the elimination of legitimate targets, such as “dangerous” combatants and military structures with the protection of “innocents” (civilians, non-combatants, civilian objects). While the dangerous can be destroyed, the innocent need to be protected as much as possible.

3. Recent conduct of warfare by major military powers

Data on warfare in the past is a first indicator of changes during the last five decades or so. One striking change is the grown reluctance among states to go to war against each other. At the same time, war in the sense of armed conflict between states has become a rare event, while internal (civil) conflicts

have grown in number, and, particularly during the last two decades, increasingly with international military involvement (Melander 2016).

Another interesting trend observable in data on the intensity of warfare is the long-term decrease in the number of casualties. Data on casualties from the Uppsala Department for Conflict Research³ show a general decline over the whole period for which data is available, with peaks driven by very few conflicts, the latest being the civil war in Syria.

However, such data only gives crude indications of recent shifts. Even though warfare by major military powers since the early 1990s, ranging from major military campaigns, such as Iraq and Afghanistan, to involvement in minor armed conflicts, for instance in Sierra Leone (United Kingdom) and Central African Republic (France), has differed considerably from case to case, some general trends are observable⁴ (Shaw 2005, Duffield 2010; Wassermann 2015; Ehrhart 2016, 2017; Brzoska 2017):

- A major feature is the importance of the use of airpower. A number of involvements in warfare have been largely limited to air strikes, such as in Kosovo 1998, Libya 2011, Syria since 2014 and Yemen since 2011. Also in those cases where ground forces were used, such as in Iraq 2003 or in Georgia 2008, airpower played a major role. An exception is the conflict in the Ukraine since 2014. Airpower has increasingly been used to target infrastructure (Shue 2011).
- Related to the use of airpower is the cooperation of major military powers with local forces to attain and secure territory. In a number of cases, major military powers have acted as de facto airforces of local groups, such as in Syria since 2014; in other cases, the initiative lay with the major military powers with local forces largely acting as their proxies.
- Another element is the involvement of special forces, or agents of intelligence services performing military functions. Major advantages include the clandestine nature of their operations on the ground and the difficulties of oversight and control by political actors, including domestic parliaments, the media and civil society.
- The use of force has generally become more selective. This entails two trends. One is a growing effort to reduce “collateral damage”, e.g. through more exact targeting and the use of less kinetic force, the other the identification of priority targets. Examples include power plants in the 1998 Kosovo and civilian supporters in the “war against terror”.
- Military force is accompanied by other forms of force (that weaken enemies). Important aspects include propaganda and economic sanctions.

None of these trends is totally new. All of them have been part of warfare in the past to some degree. The claims here are, however, that recent warfare by major military powers has been marked by these trends, and that these can be found for all of them.

³ <http://www.pcr.uu.se/research/ucdp/datasets/>

⁴ Among major military powers which have been involved in warfare in the last 25 years, in addition to the major NATO members, are also Australia, Israel, and Russia.

4. Moral challenges to the dominant normative order of warfare

Parallel to the changes in warfare by major military powers, sometimes preceding, sometimes reacting to them, have been a number of intellectual challenges to the traditional order of warfare. I will focus on four of them in the following.

Humanitarian intervention and responsibility to protect (R2P)

Obviously, humanitarian intervention and the warfare-related element of R2P pose a humanitarian and moral dilemma: to kill to save lives. In humanitarian tradition, the core claim of R2P is the indivisibility of human rights worldwide (Holzgrefe and Keohane 2003, Paris 2014). But humanitarian intervention creates a hierarchy of the right to life: at the top are those threatened by grave human rights violations, followed by intervening soldiers, who may die in combat, followed by bystanders – who may rightly become unintentional victims – and combatants fighting against the interveners.

In order to narrow the gap between the concept of the indivisibility of human rights on the one hand, and the moral license of humanitarian law to kill on the other hand, promoters of human interventions have early on called for a focus on prevention as well as non-violent means by the international community. This expansion became the core of R2P. In case military means were deemed necessary, proponents of R2P argued for the minimization of the use of violence, primarily against civilians but also against combatants (ICISS 2001, 37; Barcelona report 2004, Pattison 2015, 115-117). In essence, this implies very strict interpretations of the principles of proportionality and necessity.

“Global War on Terror”

There are numerous important aspects to the declaration of a “Global War on Terror” by the US government and practices following it, only some of which can be discussed here (Schmitt 2002).

An important one is the rejection of the strict separation between situations of armed conflict and situations without armed conflict inherent in international warfare. Attacks against terrorists are seen as legitimate even outside of zones of combat among military-style forces, when police-style law enforcement and the application of penal law is not deemed feasible (Rona 2003). The licence to kill people outside of legal procedure is in principle extended to any time anywhere in the world (Gregory 2011; Prinz and Schetter 2014).

But the challenge to traditional order of warfare goes further. In addition to the rejection of the traditional view of the boundaries of warfare in geographical space and time, it also rejects the clear distinction between combatants and civilians. This distinction is central to the dominant order of warfare but not easy to implement in actual warfare. International humanitarian law has used the category of “unlawful combatant” for such case (Dörmann 2003). Such persons are to be treated as combatants when they fight, and as civilians when they do not, which includes that they can be punished for their deeds under domestic law (Melzer 2009).

The Bush administration in the US has, for instance, argued in the wake of the “Global War on Terror” that it has the right

to detain persons identified as members of al-Qaida and the Taliban as long as they continue to present a threat without treating them as combatants. However, it has also denied members of the group taken to prison in Guantanamo Bay the right to challenge its decision in courts, until the Supreme Court decided differently.

International humanitarian law, the core of the dominant order of warfare, limits the use of force, through the principles of proportionality and necessity. The defenders of the ideas of a “Global War on Terror” were not willing to accept these principled limits for individuals and armed groups which they classify as terrorists, even though using the rhetoric and means of warfare. Neither was national criminal law or human rights law deemed applicable. In essence, these violent actors are seen as too evil to be worthy of legal protection.

Revisionist just war theory

Going deep into moral questions, a number of philosophers have criticized some of the ethical foundations of the traditional order of warfare (Rodin and Shue 2007; McMahan 2009; Lazar 2016; Koch 2017). A major focus has been the combatant equality proposition in the dominant order of warfare. Even those who fight in an unjust war have an equal right to defend themselves and kill opponents as do those who fight a just war (Walzer 2006; Steinhoff 2012). Revisionist just war theorists question the separation between the rightfulness of the decision to go to war and the conduct of warfare. They find it counterintuitive, and morally wrong, to treat those fighting a “good war” the same way as those who are conducting a “bad” war.

This has major consequences for the order of warfare. One concerns the principles of proportionality and necessity. The current order of warfare is silent on which larger political objectives may justify a military attack (necessity), particularly when it also leads to the death of civilians (proportionality) as long as the war itself is legally justified. Revisionist just war theorists object to this. McMahan (1994), for instance, has argued that the rightfulness of warfare cannot be morally judged in practice without consideration of the political objective to be attained through military means. Another consequence concerns the distinction between civilians and combatants. In the dominant order of warfare it is based on the simple idea of who is “dangerous” in a war: Combatants who carry arms and are organized in military units are threatening, as are those planning or giving them orders to use violence. However, the actual combatants, while carrying arms, may only implement political objectives decided upon by persons who are not involved in military planning. While not combatants in the traditional technical sense, those political decision-makers are, in the last instance, in fact liable for military violence. Similarly, many civilians, beyond those employed in accepted military objectives such as arms and ammunition production facilities may be used to maintain warfare but are not essential for it. Some authors have suggested, as much as 25 per cent of the population is involved in relevant activity (Lazar 2016).

With its emphasis of liability through responsibility, revisionist just war theory can be used to argue for strict limitation of lethal violence including against combatants, clearly beyond what is foreseen in the current order of warfare. However, it

can also be drawn upon to justify an extension of violence against civilians and principally civilian objects, not seen as justified in the dominant order.

Revisionist just war theorists have been moved by moral concerns of the current order of warfare, which they argue is too obliviate towards the political objectives of those fighting wars, including the rightfulness of applying the principles of international humanitarian law in the same way to those fighting morally “right” wars as well those having powers of decision in fighting morally “wrong” wars. However, many are reluctant to draw conclusions for practice in warfare as done above. Furthermore, while the concept of liability through responsibility may make sense in the abstract, it is difficult to apply empirically both to those ordering military attacks and soldiers in combat situations. Many revisionist just war theorists concede that their questioning of the moral ground of the traditional order of warfare has not succeeded in providing a workable and unique alternative. However, many maintain that considerations of liability through responsibility could inform modifications of the current order of warfare, for instance by distinguishing more categories than just combatants and civilians (Strawser 2013).

Hybrid and non-conventional war

Any quick study of past warfare will reveal that justifications for attacking a wide range of civilian objects, which one can draw out of the arguments of revisionist just war theorists, are not new. A particularly striking example are the aerial bombing campaigns of all major powers in World War II which were justified by the argument that the general populations were supporting the war effort and were thus legitimate targets. In principle, in the post-World War II order of warfare such widespread targeting of civilians and civil objects has widely been judged as illegal.⁵

Another practice in many wars, namely to accompany or substitute warfare with a wide range of additional measures which aim at civilians, ranging from embargoes to sabotage of civilian objects and propaganda, had similarly become less acceptable. The same goes for the tactic of trying to engage civilians of the other side in a conflict situation to become belligerents for one’s own side, for instance by instigating armed unrest and civil wars in other countries. Such activity is counter to the state-based dominant order of warfare. This is clearly expressed in the UN Charter, which, in Article 2 (4) states: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” Thus, the prohibition is not about wars, or armed conflicts, but about any form of force. Important additional considerations are contained in other UN documents, such as the Friendly Relations Declaration of 1970 (A/RES/25/2625).

5 A problematic case, in this respect, relates to weapons of mass destruction, particularly nuclear weapons. Their use is generally seen as prohibited under international law (with the possible exception as a last resort when the survival of a nation is threatened), see International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, <http://www.icj-cij.org/files/case-related/95/7497.pdf>. However, all major nuclear powers retain plans to use them in other circumstances.

Recent war planning by major military powers from the Global North, as well as some of their practice, particularly in the case of the armed conflict in Ukraine, demonstrates the continuing importance of employing a wide range of instruments other than military force for obtaining political objectives (Hoffman 2008; Fleming 2011).

There are a number of factors responsible for the increased popularity of “unconventional”, “hybrid” warfare, or whatever the combination of military means with non-military ones as well as non-state partners in a foreign country are called. An important one is the perception of new dimensions of communication and interaction through new forms of media, including social media.

However, beyond the “pull” factor of new technical possibilities to achieve ones objectives in an armed conflict by adding other means than brute force into the mix, is the “push” factor of the current order of warfare. The UN Charter sets strict limits to justified armed conflicts. Hybrid warfare, particularly when it includes a local partner in the form of unconventional warfare offers a way to at least try to conceal the use of military means. Hybrid warfare allows to pursue a course of limiting military violence in the pursuit of political objectives, supporting the principles of necessity and proportionality. The price, however, is the erosion of the borders between war and peace, between civilians and combatants and between internal and external armed conflicts (Schmid 2017).

5. Common challenges

The changes in warfare by major military powers and the four intellectual challenges to the dominant order of warfare have different roots and address different aspects of war fighting. However, four common trends shall be highlighted:

1. Debordering of warfare

The dominant order of warfare is built on the ideas of the distinctions between armed conflicts and peace, in time and location, as well as between civilian and combatants, civilian and military objects. Particularly state practice and its justifications in the Global War on Terror and within the context of hybrid warfare fundamentally question not only the practical possibility of these distinctions, but also their appropriateness for the objective of obtaining political objectives which are deemed rightful. To some extent, revisionist just war theorists and those promoting humanitarian interventions supply moral justifications for deborderings. This certainly is the case for the challenge revisionist just war theorists pose to the distinction between civilians and combatants, but to a lesser extent also for their emphasis on liability through responsibility for wrongful wars, which can easily be extended to wrongful acts outside of wars, such as genocides or ethnic cleansing. Closely linking such major crimes with warfare is, in fact, the objective of those promoting humanitarian interventions.

2. Repolitization of the norms of warfare

In line with the dominant concept of equality and sovereignty of states pervading the UN Charter, a major goal of the post-World

War II order of warfare was the establishment of a system of rules that would apply equally to all states. In the absence of a strong independent authority to judge political objectives, norms were chosen that could be applied without such judgment. All four intellectual challenges to the dominant order of warfare depart from this framework. All of them introduce categories of “good” and “evil” into the justification of warfare. This is most pronounced in the “Global War on Terror”, which openly defies core limitations contained in the current order of warfare, but also is true for the revisionist just war theorists, among those arguing for humanitarian interventions and even in the justification for hybrid warfare. While in two lines of argumentation, linked to humanitarian intervention/R2P and revisionist just war theory, “badness” is primarily seen in individuals (another departure from the dominant order of warfare), in the other two it is with larger collectives, more in line with this order. However, the main difference with that order is the basic departure from refraining from judgments of “good” and “evil” objectives of warfare. As a consequence, power and politics are reintroduced in justifications of what is right and wrong in warfare. Deciding what is good and what is evil, however, is often far from self-evident, and not understood the same way by everybody. This leaves much room for perceptions and interests for those conducting warfare.

3. Damage limitation

Counter to the two trends justifying extension of warfare into additional spaces, all four lines of argumentation also emphasize restraint in the use of force, mostly within the realm of the dominant order of warfare but to some extent also beyond it. Particularly interesting in this respect are the discourses on humanitarian intervention and on the revisionist just war theory, with the questions about the targeting of enemy combatants, as well as the questioning of risk transfer to populations in combat zones. They aim to extend the protection of enemy combatants beyond the limit set by military necessity in the dominant order of warfare. It seems to need the further justification that they are “evil” in terms of the causes they are fighting for. While the protection of civilians remains the major concern, the status of civilian is reconsidered in a politicized perception of the rights and wrongs in warfare.

These trends in justifications of warfare are neither “good” nor “bad” in themselves. Through debordering and repolitization they clearly extend the possibilities for the justification of wars and warfare. That this is so for the Global War on Terror is obvious. But it can well be argued that humanitarian intervention and hybrid warfare also might license military adventurism (Kutz 2014).

At the same time, through damage limitation, restrictions on warfare are strengthened, and the repolitization can also be used to argue for more restraint both in getting involved in warfare and in warfighting. The quantitative data reported above seem to indicate both: a more numerous but less extensive involvement of major military powers in military interventions.

Overall, the trends can be interpreted as indicating a “cosmopolitan policing” direction of warfare (Mueller 2004). Major military powers are getting more involved, but with less destructive force. Individuals and their responsibilities are seen as

more important in justifications of warfare as well as in targeting in actual warfare. The trends discussed above push warfare into the direction of domestic penal law, albeit only in ontological terms as the means employed remain fundamentally different. We are far from the establishment of “policing wars”. Even if more limited and targeted, violence in armed conflict continues to be inflicted without due process and often leads to “collateral damage”. It is also not “cosmopolitan” when decisions about where to get involved in warfare are made in the capitals of the major military powers. It possibly would make the ideas behind the Global War on Terror, revisionist just war theory and humanitarian intervention more credible, if there were neutral decision-making institutions independent from those power who are involved in armed conflicts. However, as long as this is not the case, the ideas discussed above extend the range of options, as well as the responsibilities, of major military powers in warfare.

6. Conclusions

The current order of warfare resulted from historical experience and political compromises. It is therefore subject to constant change as new experiences are made and political constellations differ. This brief analysis indicates the interrelatedness between recent changes in the practice of warfare and an active intellectual search for justifications of such practices. Furthermore, both are influenced by broader changes, such as new technological options.

The dominant order of warfare still remains the official guiding frame for major military powers. Their interests of persisting in the pursuits of their military powers, however, have led to changes in their practices, which they largely continue to justify within that order. In addition, There are currently a number of challenges concerning the strict distinction between civilians and combatants, the dividing lines between war and peace, and the importance of the principle of necessity in the current theoretical discourse and practice. This indicates the outline of criteria for a potentially new order of warfare, with less emphasis on borderings and a repolitization of warfare. But it is more than open whether a new order will come about. Major military powers use debordering and repolitization for their own interests, but have not been willing to give up any of their authority to decide over which borders to ignore and which objectives to achieve through military means. It is also not clear whether it would be preferable from the point of view of limiting violence and unnecessary suffering. Like the principles of the current order, those who might constitute a new order are full of ambiguities and contradictions. In the end, warfare by major military powers may not look different under different sets of norms and rules about acceptable behaviour.

A few considerations about the future of warfare as practiced by major military powers result from this assessment. It can be expected that military engagements will grow in number but decrease in intensity. Furthermore, the trend is for even closer combinations of civilian and military means of power projection. This is likely to be combined with the attempt to reduce the number of victims as much as possible, as far as the political aims of the specific conflict allow. Cases of warfare

without clear territorial or temporal borders could well increase, including against small transnational armed groups. All this is likely to increase the attraction of the use of special forces and intelligence operations, as well as new technological means for employing military force with growing precision and over large distances.

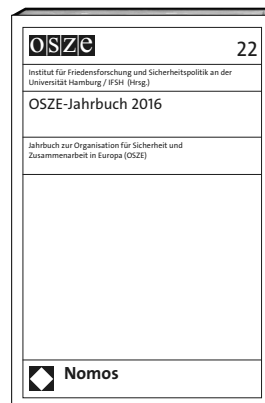


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