

*The Power of Precedent:
Will American Practice Change the Norms of
International Humanitarian Law?*

With the end of the Cold War, a number of observers began to argue that something called “global civil society” was emerging to exert influence on the norms that govern international politics, including war. In this article I would like to present some examples of the influence of nongovernmental organizations on the development of international human-rights law and the laws of war (international humanitarian law) in the years following the attacks of 11 September 2001. Then I propose to consider how US policy during the so-called war against terrorism has threatened to weaken the norms established by the efforts of nongovernmental groups.

The first example is the campaign against torture conducted for years by Amnesty International and other human-rights groups. They succeeded in stigmatizing the practice of torture, especially in dictatorial regimes in Latin America such as Chile and Argentina. During the 1980s and 1990s these

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countries saw a return to democracy and respect for human rights.

There are many examples of the efforts to limit the justifications for the use of force (*jus ad bellum*) and the conduct of war (*jus in bello*). With the partial exception of military intervention for humanitarian reasons, as in Kosovo for example, we have seen the justifications for war gradually reduced to a single one: self-defense.

In the realm of *jus in bello*, the most striking example of the influence of nongovernmental organizations was the campaign to ban landmines. In just five years, grassroots and transnational activists convinced a number of states to sponsor a process that resulted in the 1997 Ottawa Mine Ban Treaty to outlaw the production, sale, and deployment of antipersonnel mines (Hubert 2000; Price 1998). Skeptics of a realist bent would point out that the treaty's signatories did not include the world's major producers of landmines, which happened also to be some of the world's leading military powers: the United States, China, Russia. Absent from the list were also countries in particularly war-prone regions: Syria, Egypt, Israel, Iran, Iraq, Saudi Arabia, India, Pakistan (International Campaign to Ban Landmines, 2004). There are, in turn, two counterarguments to that skeptical view: First, what realist would expect a treaty to come into force in the military sphere despite the opposition of the major states that engage in military operations? But in the period 1999 to 2004, 152 countries had signed the treaty, sixty-two million stockpiled antipersonnel mines were destroyed, more than 1,100 square kilometers of land was cleared of more than four million antipersonnel mines and nearly one million antivehicle mines (*Landmine Monitor Report 2004*). Second, despite their

opposition, the major powers, with the notable exception of Russia, had by and large abided by the treaty's provisions, at least until recently. The U.S. has not used such mines since the 1991 Gulf War, has not exported them since 1992, and has not produced them since 1997.

A second area where one might argue that nongovernmental organizations have played a role in restraining the use of military power is aerial bombardment. Human Rights Watch, to take one of the most prominent groups active in this sphere, issues regular reports on the military practices of major countries that rely heavily on bombing. The organization has monitored the US wars in Iraq in 1991, Kosovo in 1999, and Afghanistan and Iraq more recently, as well as the decade of Russian military involvement in Chechnya (Human Rights Watch 1991, 2000, 2002, 2003; Bouckaert 2000). It regularly reminds the relevant states of their obligations under international humanitarian law and even points out which practices tend to cause the most violations - such as indiscriminate use of ground-launched cluster bombs in heavily populated areas (Human Rights Watch 2002, 2003). There is some evidence that a few countries have limited their use of cluster bombs in response to such criticism, but the overall impact of nongovernmental organizations on state military practice is still unclear (Petrova, *forthcoming*).

In cases such as the campaigns to ban landmines or limit the use of cluster bombs, human-rights groups are seeking to expand the normative and legal constraints on the use of military power beyond what existing law provides. Sometimes they do so in order to counteract the effect of what Nina Tannenwald has called "permissive" norms (Tannenwald 1999). Her main

example is fuel-air explosives (FAE). These bombs instantly consume all the oxygen present in the air (for that reason they are called “vacuum bombs” in Russia), creating a strong shock wave as nuclear bombs do. But because they are not based on nuclear technology the FAE have not acquired the status of “taboo” that nuclear weapons have, even though they have similar effects. These weapons are horrible but not illegal.

Another example of a permissive norm would be the following: as a number of observers have noted, international humanitarian law, provides constraints on disproportionate damage to civilian life and property during actual combat. But it is largely silent on the long-term impact of destruction of so-called dual-use facilities, such as electric grids, transportation networks, sewage and water stations, and the like. Bombing of this sort can cause a modest number of deaths in the immediate aftermath of the attack, but in the longer term many die of infections and sicknesses because they lack access to clear water, electricity, or modern health care. The classic case is Iraq after the 1991 war, but the 1999 bombing of Serbia had similar effects. My Cornell colleagues David Wippman and Henry Shue, among others, have argued that this lacuna in the law needs to be filled with meaningful prohibitions (Wippman, Shue, 2002; Smith, 2002).

The agenda of the nongovernmental groups is ambitious, but one for which the end of the Cold War and the elimination of major security threats to the world’s most heavily armed states seemed to provide a window of opportunity. Has September 11th shut that window?

THE REASSERTION OF STATE PRACTICE

Let us give the benefit of the doubt to those who would argue that the activity of human-rights organizations has served to constrain states to adhere to norms and laws of warfare, and perhaps even to broaden the scope of those norms to extend further protections to civilian non-combatants. The question is whether the U.S. declaration and conduct of a “war on terrorism” will continue or reverse that trend.

Why does this question arise in the first place? For one thing, a number of observers, close to and within the Bush administration, have argued that things have gone too far. International humanitarian law and the actions of human-rights groups have come to threaten U.S. sovereignty by inhibiting the United States from taken actions essential for its own security. The extreme version of this view holds that the U.S. Constitution permits of no legal restrictions, domestic or international, on the President’s ability to wage war, including the “war on terrorism.” This matter arose in connection with the detention of prisoners from al Qaeda and the Taliban and the concern that the President might be liable for prosecution if the prisoners were tortured during interrogation. We can then expect that states, in particular the great powers, will reaffirm their role in the formulation of international law to serve their own interests, leading to a reduction in the influence of non-state actors.

IMPLICATIONS OF CURRENT PRACTICE

The official US position today is a formal renunciation of torture as a method of interrogation and a commitment to prosecute those guilty of the practice. At

the same time, the Bush government is trying to exclude officials of the CIA from legal restrictions on the use of torture. In December 2005, Secretary of State Condoleezza Rice claimed that information gathered from US intelligence on “a very small number of extremely dangerous detainees” had contributed to preventing terrorist attacks and had saved human lives “in Europe, as in the United States and other countries” – an apparent justification for interrogation methods that are known to have included the “waterboard” (familiar from the film, *Battle of Algiers*, by Gillo Pontecorvo). This method was used on Khalid Sheikh Mohammed, an al Qaeda leader captured in March 2003.

In any case, the US government and armed forces have set a worrying precedent in dealing with charges of abuse and torture of detainees around the world: prosecuting the small fry and letting off the hook the senior military and political leaders who formulated the policies that contributed to the crimes. If its government and military establishment do not abide by the rule of law, the United States will find it very difficult to make the case that other countries should do so.

One can already observe the impact of the U.S. precedents in other areas of international law. Consider, for example, how the US government has embraced a preventive-war doctrine both in its official pronouncements and in practice in Iraq (Evangelista, Fanis, Strauss, Kirshner 2003). Russian President Vladimir Putin, for example, has declared that his country has the right to attack neighboring states such as Georgia or Ukraine, if it finds that they are harboring terrorists who might pose a threat to the Russian Federation. The

chief of the Russian General Staff went even further, indicating that Russia could launch preemptive strikes on terrorist bases anywhere. "Speaking of preemptive strikes," he said, "Russia will take all necessary steps for destroying terrorist bases in any part of the world. However," he added reassuringly, "it does not mean that we are going to use nuclear weapons during counterterrorist operations¹. The Bush administration, by contrast, has advocated creating a new type of nuclear weapon, the so-called Robust Nuclear Earth Penetrator, precisely in order to destroy deep underground facilities that might harbor terrorists or weapons of mass destruction². This is another area where the relaxing of norms – in this case the taboo against using nuclear weapons for purposes other than deterrence of a nuclear attack – sets a bad precedent and increases the risk of nuclear proliferation (Tannenwald 2006).

Another example concerns the use of white phosphorous by the US armed forces in Iraq. When it is used as an obscuring agent to create a cloud of fog or to illuminate objects, white phosphorous is not considered a chemical weapon and is therefore not illegal according to the Paris Convention on chemical arms. In this case, however, there is evidence that the US army used white phosphorous directly against Iraqi rebels in Falluja, risking a violation of the Convention. It would not be surprising if other countries followed the American example, taking advantage of a gray area in the Convention itself

¹General Iurii Baluevskii, quoted in *Russia to Use Israel's Methods to Fight against Terrorism*, pravda.ru, 27 August 2005, from Johnson's Russia List, an e-mail newsletter.

²For background, see <http://www.globalsecurity.org/wmd/systems/rnep.htm>

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Let me conclude with two comments linked to the themes with which I began: mines and torture. I will make an observation on mines and a prediction about torture.

Regarding mines, how are the norms constituting the Ottawa Treaty doing? The good news is that only four governments have conducted new mine-laying operations since early 2003: Russia, Myanmar, Nepal and Georgia. The bad news is that the United States is poised to join them. As the result of a policy review in February 2004, the United States is likely to violate the ban, by producing new weapons, continuing to stockpile old ones, and by deploying

³ ICBL Statement during the High Level Segment, delivered by Steve Goose, Director of Human Rights Watch Arms Division and Head of ICBL Delegation at Nairobi Summit on a Mine-Free World: First Five-Year Review Conference for the Mine Ban Treaty, 3 December 2004, <http://hrw.org/english/docs/2004/12/03/global10236.htm>; Human Rights Watch, "U. S.: New Landmines for Iraq Raise Fears of Civilian Risk," February 2005, <http://hrw.org/english/docs/2005/02/28/usint10214.htm>.

landmines in Iraq³. In September 2005, the New York Daily News reported that the Pentagon was ready to take the decision to build new mines. Although clearly a setback for the treaty, this decision nevertheless reflects the influence of the anti-mine norms that produced the Ottawa accord. How so? As the newspaper put it, “underscoring the unpopularity of the devices, defense officials working on the program, called Spider, decline to call the weapon a land mine, opting instead for generic descriptions such as ‘networked munitions’” (New York Daily News 2005). So officials in the Pentagon recognize a normative stigma against landmines at least enough not to want to say out loud that they are producing a new one – and this, even though it would be completely legal for the United States to produce land mines, because the United States never signed the Mine Ban Treaty. Perhaps we can call this a minor rhetorical victory in the midst of a potential major setback – the resumption of production of landmines by the United States. It could set a precedent by which other states would deploy mines, merely using other names such as networked munitions. Certainly it is possible that other countries and armed groups might not follow the US example. Recently we have seen an exception to the generalization: The Polisario Front, the independence movement fighting against Morocco for control of the Western Sahara, has declared its intention not to use mines anymore and has begun the destruction of its arsenal – an apparent effort to gain international sympathy for its cause.

In this article I have expressed a concern that certain US practices might create precedents that would redound to the disadvantage of everyone. This is

a view that Henry Shue has articulated in respect to torture, so I would like to conclude with his argument. He writes: "We have no guarantee that a precedent of refraining from torture will be followed by others, but we can be sure that a precedent of engaging in torture will be followed." He imagines the response of leaders of small countries and armed groups: "If the world's superpower, with all its high technology weapons, cannot defend itself without using torture, how can incomparably weaker and poorer groups like us manage without torturing captured fighters who might provide valuable life-saving information?" He continues: "Torture seems to be the ultimate in efficiency, the shortcut to end all shortcuts. It is difficult enough to resist when you would be the exception if you gave in. When you would simply be following the leader, the precedent is irresistible" (Shue 2003). If the current American behavior, rather than the efforts of nongovernmental organizations, shapes the norms and laws that govern the conduct of war, the implications for the international system and for our ethical standards could be very serious.

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