

How Atrocity Becomes Law: The Neoliberalisation of Security Governance and the Customary Laws of Armed Conflict

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This article discusses the impact of neoliberal ideologies of security governance on the customary laws of armed conflict, and describes how neoliberal practices of privatisation, outsourcing, and risk management within the security sector have facilitated the legalisation of atrocities. Neoliberal mentalities of governance have significantly impacted military administration in combat operations by decentralising control, by promoting discretion and freedom of action down the chain-of-command, and by institutionalising intent-based orders and standing Rules of Engagement. In so doing, the military has shifted the criteria for attack from one based upon an individual's status as a combatant to one of defining and containing risky populations. Whether used to justify counter-insurgent strikes in Iraq or Afghanistan, military intervention in Libya, or protest policing of the Arab Spring, neoliberalised security governance is designed to be waged not against States and regular combatants, but against 'failed States' and 'non-State actors' participating in activities, often political, that authorities perceive as threatening. This article provides a theoretical and historical discussion of what is at stake in such a logic, and illustrates its operation through reference to the intentional killing of civilians in Iraq depicted in the 12 July 2007 video made public by WikiLeaks. It argues that the ideologies and practices of neoliberalism in the security sector are not only facilitating such killings, but are in fact facilitating their justification as lawful, thereby normalising civilian atrocities within the laws of armed conflict in ways that can be described as distinctly imperial.

Introduction

Certain practices of contemporary warfare, such as pre-emptive attacks on civilians, house clearings, air strikes in residential neighbourhoods, targeted killings, and attacks on medical personnel and providers of humanitarian assistance, have become increasingly common in the War on Terror, in protest policing, and in counter-insurgent and urban warfare. This article will discuss the ways in which the ideologies and practices of neoliberal governance in the security sector are not only facilitating such practices, but are in fact facilitating their justification as *lawful* within the customary laws of armed conflict. Moreover, these are practices that until recently were denounced as atrocities and even prosecuted as war crimes. To a certain extent, it would seem reasonable to assume that modern States have ordinarily sought to normalise the atrocities that their security forces commit against civilians, preferring to use the language and logic of the law whenever possible to justify such actions. However, there is a distinct pattern to the tactics that are being normalised today, and this is due in part to the widespread adoption of neoliberal ideologies of governance and administration within the security sector. This is enabling the U.S. and its allies to institute what Agamben (2005) has discussed as a permanent state of exception within the ordinary law, and the normalisation of atrocity is a key component of this.

The post-war period has seen an increase in attention to war crimes and the codification of the laws of war, and this has given us such instruments as the *Rome Statute of the International Criminal Court*, and the United Nations *Responsibility to Protect Protocol* (UN Res., 2009), as well as the International Committee of the Red Cross which continues to address pressing issues in humanitarian law (Melzer, 2008). At the same time, though, the neoliberalisation of security governance is significantly weakening protections for civilians by permitting and justifying attacks against them as being customary under the laws of armed conflict. There is very little that international law would have to offer such civilians if the harms they suffer are rendered *lawful* as customary practices of war. Yet, this is indeed what is happening, and one can canvass the above strategies and perceive that their impact on their target populations consists not only of intentional deaths, but also injuries, mayhem, and widespread social dislocations that serve to further fracture and marginalise such populations. Whether they are used to justify counter-insurgent strikes in Iraq or Afghanistan, military intervention in Libya, or protest policing in regimes experiencing the Arab Spring, the strategies of what Abrahamsen and Williams (2011) have termed “globalised security governance” are designed to be waged not against states and lawful combatants, but against ‘failed States’ and ‘non-State actors’ – categories that are essentially euphemisms for civilians. The present article focuses on the neoliberal ideologies embedded within globalised security

governance, arguing that these are having serious negative impacts on the development of civil institutions and political mobilisation within a societies already fractured by conflict. Moreover, this development further reinforces the political power of the military hegemons that wield these strategies – whether these are the U.S. in Afghanistan and Iraq, NATO in Libya, or United Nations peacekeepers on the borders of Kosovo and Serbia.

The article will first review the orthodox thinking concerning the customary laws of armed conflict, particularly the traditional 'two element' theory that posits that customary norms can be determined by examining the elements of actual state practice and the state's *opinio juris* that the norm is a legally binding one. It will then present critical alternatives to this view, which posit that customary law is a kind of discursive practice, where customary laws emerge from the overarching normative and ideological framework within which customary norms are articulated and by reference to which they are justified. The second section then describes how neoliberal ideologies of governance have shifted the normative framework within which we understand and justify the customary laws of war, and focuses in particular on how neoliberal ideologies of management have radically decentralised and disaggregated the traditional military chain-of-command. It is argued that neoliberal ideologies of individualisation, privatisation, and strategies of risk management are used to promote the use of force against civilians as seemingly legitimate acts of 'self-defence' against unknown and unknowable risks – risks that emerge from a conflict zone which the actions of the security forces themselves have rendered endemically dangerous. The third section will then illustrate this logic at work through reference to a specific case of atrocities committed against civilians, using the example of *Collateral Murder*; which is a piece video footage that was recorded by the U.S. First Air Cavalry Brigade in Iraq on 12 July 2007. This footage, which was released in April 2010 by WikiLeaks, depicts the killing of civilians, including civilians who were collecting bodies and aiding the wounded. This case study will then be supplemented by a range other examples which illustrate how justifications for civilian atrocities are becoming increasingly widespread throughout the security sector. The argument that I wish to make is not that such acts are illegal under the normative framework of the customary laws of war, but instead that this normative framework itself is being shifted by neoliberal strategies of security governance in such a way as to normalise atrocities within the customary laws of armed conflict.

In order to make this argument, I will pull together diverse strands of thinking in the nature of customary law, the organising principles of the laws of war, and the history of the doctrine of the chain-of-command, and discuss how these have all been disaggregated and reconfigured by the neoliberalisation of governance in the security sector. The argument that is developed through the grasping together of these strands will then be illustrated through reference to the events depicted in *Collateral Murder*, and linked to broader set of examples from elsewhere in the security sector, so as to

demonstrate the increasing extent to which these norms are shared. In so doing, I will be examining the problem of intentional – and seemingly justifiable – civilian atrocities from a number of different points of view. More specifically, though, the starting point will be a focus on the customary law principle of distinction, which requires that security forces distinguish between civilian and military targets. Civilians are liable to attack only for such time as they have taken up arms and are actively posing a threat, or if they are part of an organized armed group such that they perform a “continuous combat function” (Melzer, 2008). This article argues that the neoliberalisation of the security sector has shifted the criteria for attack from one based upon an individual’s status as a combatant to one of defining and containing risk. Security forces in global war zones are thus shifting the criteria for attack to one in which they use armed force to define and then manage ‘risky populations’ in a way that subverts the ability of the humanitarian law to regulate attacks against civilians. Typically, violations of the principle of distinction and the killing of civilians have been all-too-commonplace, calling into question the ability of the humanitarian law to play such a regulatory role. However, with the transformations in the customary laws of war called into being by the neoliberalisation of security governance, what is at stake is not merely the failure of humanitarian law to protect civilians in conflict zones, but its increasing use as an instrument of their violent repression.

Critical Perspectives on the Customary Laws of Armed Conflict

Neoliberal ideologies of security governance are transforming the customary laws of war and normalising civilian atrocities, not only in the sense that particular strategies are being practiced, but in the deeper sense that they are being normalised by security forces as being lawful and legitimate practices. Yet *changes* in the international customary law are not possible under orthodox methods of characterising customary law, which require not only an objective practice, but also a subjective belief that the practice is a lawful one, to both be in existence. This is what Kammerhofer (2004, p. 531) has called the “widely held but erroneous belief which plagues state practice and the nature of customary international law in general” – i.e. that in traditional customary international law, change is not possible. This section will present and critique the orthodox views of customary international law, and will then proceed to summarise the literature concerning the discursive practice view of customary law. It will argue that customary law is an emergent phenomenon, and that the discursive view is therefore the most fruitful method for examining how contemporary customary norms of war are in flux.

In contrast to more orthodox views, the discursive view takes the customary law to be dynamic; that is to say, it is an unwritten and malleable law that captures the morality, politics, and indeed even the prejudices, of the community whose laws and customs these are. In this case, the relevant community is the U.S. military, and from here

one can see their customs at work in the activities of their partners and allies, such as the Coalition forces in Iraq, or the International Security Assistance Forces in Afghanistan, and increasingly, multi-national peacekeeping forces such as NATO and the United Nations (UN).

The traditional sources of international law are outlined by Article 38 of the UN *Statute of the International Court of Justice*, which in turn is derived from the *Statute of the Permanent Court of Justice of the League of Nations*, and includes treaties, general principles of law found in municipal legal systems, and customary law. Customary laws are founded upon consent and established by actual State practice (*usus*), as well as a State's recognition that the norm is a legally binding one (*opinio juris*). Within this, customary norms can have varying degrees of binding force, ranging from the very low – in the form of 'soft law' – to very high, such as in the peremptory norms of *jus cogens* that cannot be derogated from, and in those norms that are binding *erga omnes* (Besson, 2010, p. 172). These latter norms would include grave breaches of the *Geneva Conventions*, and can be established by formal sources and processes, such as legislative enactment and treaty making (*ibid.*). Customary norms, on the other hand, are established by informal means, and include "all the moral or social processes by which the content of international law is developed" (*ibid.*).

Customary international law has received much recent attention from academics and legal philosophers, and the nature and constitutive elements of customary law – indeed, even its very existence – remain contentious (Roberts, 2001, p. 757). Neoliberal conceptions of customary law, often embodied in economic or game-theoretical analyses of international law (see Goldsmith & Posner, 2005; Trachtman, 2008), and liberal internationalist perspectives (Rawls, 1993; Walzer, 2000; see also Atack, 2005) both argue for the exclusion of politics and values from an analysis of the customary international law in favour of self-interest and consent, respectively. Realist views of customary international law posit that States in the international arena each pursue their own interests, and reject the proposition that there can be an overarching normative regime that binds States (Goldsmith & Posner, 2005). Such views of customary international law, as embodied in contemporary doctrines of Political Realism and Law and Economics, begin with the claim that States are rational actors and seek only to protect and pursue their own self interest (*ibid.*; see also Trachtman, 2008). Prescriptive views further posit that states are not only exempt from moral scrutiny, but that they *ought* to be (Orend, 2000, p. 66). Hence, the customary law, to the extent that it does exist, is seen by such approaches to rest primarily on political self-interest.

Orthodox legal theories of customary international law focus on consent, to be found in the rules of recognition for customary legal norms, positing that legally binding rules arise when the subjective element of *opinio juris*, a State's belief in the rule's legally binding character, is added to the objective element of *usus*, or actual State practice. This

additive, or 'two element' theory is the orthodox view of customary international law; it is the view most often asserted by liberal internationalist jurists and scholars, and has generally been affirmed by the International Court of Justice. The main difficulty with the orthodox view is that it cannot account for changes in customary norms, let alone for the creation of new ones. Certain schools of thought have sought to resolve this difficulty not by abandoning the orthodox view, but by instead minimising the 'practice requirement' in favour of States' *opinio juris*. This constitutes an attempt to resolve the conceptual difficulties inherent to the additive view, including the 'paradox' that for State practices to become legal customary norms, a State must begin by acting on the erroneous belief that its practices are *already* legally binding (Leopard, 2010).

However, critical scholars of international law have found deeper flaws within the orthodox views of customary international law. Koskenniemi traces this to the loss of the Grotian, natural law, view of international justice. He states that "[f]rom the simple denial of the existence of principles of natural justice – or at least our capacity to know them – follow the three liberal principles of social organisation: freedom, equality, and the Rule of Law" (Koskenniemi, 1990a, p. 5). To be *legal* is to be neutral and objective, but this obscures the political nature, and the political consequences, of such practices and purported justifications (*ibid.*). In Koskenniemi's view, then, we should abandon the orthodox view, not only because there is actually very little in the case law to support such a theory (1990b, p. 1948), but more so because at the heart of our construction of the customary law is always a worldview, an ideology, and/or an idea about the good life:

We remain just as unable to derive norms from the facts of state behaviour as Hume was. And we are just as compelled to admit that everything we know about norms which are embedded in such behaviour is conditioned by an anterior – though at least in some respects shared – criterion of what is right and good for human life. (Koskenniemi, 1990b, p. 1953)

On this reading, we can understand neoliberal security governance as part of an overarching and anterior ideology, which is having a powerful effect on the laws and customs of war, and that privileges the interests of some human beings over those of others in ways that purport to be neutral and objective, but which are in fact nothing of the sort. This has the effect of privileging hegemonic interests whose conceptions of the law are then backed up through force by means of the strategies of globalised security governance. In this way, customary law-making can end up as little more than legislating at the end of a truncheon in its purest form, in the sense that the acts of law-making, interpretation, and enforcement are collapsed into a single undertaking.

While customary law formation is a political activity, it is also a normative one. States – and the U.S. in particular – are certainly eager to avail themselves of the Rule of

Law; yet States themselves have legitimated the body of law known as 'the customary laws of armed conflict', imbuing it with the Rule of Law status even as they seek to shape it for their own purposes. Accordingly, this article seeks to understand customary law and its consequences not in orthodox terms, but as a discursive practice in which the normative force of customs are embodied in and inseparable from the ways in which they are practiced and justified. Such a move places the community's values back at the heart of a recognisably and deeply political construction of the law. Customary law is not expressly made, as with statutes, treaties and case law, but is instead "created and changed not by what people say is to be done but by what they do" (Gardiner, 2007, p. 61). In Bederman's (2010, p. 113) words, there is really no need to determine which comes first, 'the practice "chicken", or the recognition "egg"', because customary norms *emerge* from the social environment in which they operate (see also Postema, 2007, p. 284). Koskenniemi too argues that finding a customary norm is a contextual assessment, and therefore entails a process of "making contested, political calculations. It is not a rule-determined activity, but one which gives meaning to rules ... and which therefore remains external to them' (Koskenniemi, 1990b, p. 1953-4).

The discursive view of customary law therefore recognises the self-reflexive nature of customary law formation, and suggests a need to analyse customary norm generation in a more holistic manner. Agents are not only determining what they think and feel ought to be done, but are also determining what other members of the community think and feel ought to be done, with reference to an interconnected framework of shared norms and values. Participants in customary law formation are thus "mutually sanctioning and reinforcing" (Postema, 2007, p. 289). It is this that gives customary law its binding force, whether or not any given individual explicitly subscribes to the law (*ibid.*, p. 296), and it is this that makes it a public as opposed to a purely private endeavour. Individuals, in other words, must reference a framework of interrelated norms and meanings in order to guide their deliberations concerning whether a given practice ought or ought not to be done. As Postema states, customary rules are not discrete practices, but "stable nodes in a dynamic discursive network. Their existence and normative force depend on their place in this network, and their ability to guide members of their community depends on mastery of the deliberative discipline of the practice" (*ibid.*, p. 292). Yet those who have mastered the customary laws of armed conflict are those who have mastered the discipline of war, and State leaders and diplomats may be less influential than the professional military officers and ordinary soldiers whose discipline and practices these are.

The creation and transformation of customary laws of armed conflict are thus best understood through reference to the overarching normative framework within which their practices are elucidated and justified. This includes the institutions of the military and security sectors within which parties operate, and their norms governing

conduct and discipline; it also includes foundational principles, such as paradigms of State sovereignty and State prerogatives, and it includes core institutional values, such as comity and reciprocity among belligerents, honour and courage, and how agents' understandings of these values shape what practices are considered consistent with them. In other words, the creation and transformation of customary laws must be understood through all of the practices and mentalities of security governance. Understanding customary law is therefore not an exercise in defining and applying discrete rules, but instead one of elucidating the fundamental values, principles and institutional practices that constitute the framework – or the *habitus* – within which discursive practices arise and by reference to which they are justified (Bourdieu, 1977). This includes in particular the moral values of the community, which Postema (2007, p. 296) describes as “values so fundamental that the community might regard them as defining minimal conditions of membership in the community”. Koskeniemi (1990b, p. 1953) echoes this view when he suggests that conclusions regarding customary norms simply “appear reasonable and coincide with our moral imagination”. Yet for the purposes of the present paper, it is important to note that it is precisely this moral imagination, this anterior worldview of what is good for human beings, that is being articulated by neoliberal ideology and practice, which is busy creating a new story of the 'good life' and reconfiguring the global security apparatus. Moreover, as Rajagopal (2006, p. 149) has pointed out, such a development effectively raises the “spectre of [a] return to ... an ‘imperial’ international law which legitimates the exercise of raw power by the US”.

The Normative Framework of Neoliberal Security Governance

On the basis of the above reading, the normative framework of neoliberal security governance is at the heart of understanding how and why new customary laws are arising within – and being justified by reference to – its overarching structure and normative values. This section will first address the privatisation of what was formerly conceived as the application of *public* force, which it argues has fundamentally altered the legal justifications of the use of force at the core of the customary laws of war. This privatisation has been effected through the disaggregation and decentralisation of the chain-of-command, which has placed the responsibility for making decisions to apply force within the hands of front-line security providers, such as soldiers, peacekeepers, and private contractors, who are all now encouraged to subjectively assess the risks they face in the conflict zone, and to defend themselves accordingly. This shift towards risk management is a direct result of the assumption of neoliberal ideologies of administration that have taken hold of the security sector, which began in the 1980s, but which gained their most significant traction after the institution of counter-insurgent wars in Iraq and Afghanistan, and the revolutions in military doctrine that govern them. Moreover, it is this

development that enables a proper understanding of why and how the soldiers of the U.S. Air Cavalry Brigade committed the killings in New Baghdad on 12 July 2007. Specifically, such a backdrop draws attention not only to how these soldiers were trained to do this, but also to the manner in which the military investigators constructed their justifications of the killings, and to how these acts were considered lawful under the customary laws of armed conflict and the U.S. military's own Rules of Engagement. Here I focus on the U.S. as the dominant military hegemon and leader in the neoliberalisation of security governance, and then go to argue that from here these strategies are gaining ground in a variety of other contexts.

Security governance – which may be defined as the institutions, technologies and practices that are used to govern security forces and to promote secure environments (Johnson & Shearing, 2003, pp. 7-8) – emanates from the centres of power and embodies many of the values, mentalities of governance, and forms of social ordering of the society within which it arises. This in turn gives rise to the institutional and normative framework within which the customary laws of armed conflict are generated and understood. Distinctions between public and private forces, foreign and local forces, as well as between military, police, and other State intelligence and national security services have all been disaggregated and reassembled into the new global security assemblages that are used to enforce security within and against civilian populations (Abrahamsen & Williams, 2011). As Saskia Sassen states, the “epochal transformation we call globalization is taking place inside the national to a far larger extent than is usually recognized. It is here that the most complex meanings of the global are being constituted, and the national is also often one of the key enablers and enactors of the emergent global scale” (Sassen, 2006, p. 1). The globalisation of security governance is therefore not merely about the changing nature of the threats posed by weak and failed states and non-state actors, nor is it simply about the growth of private actors and security companies; instead, it concerns the fundamental restructuring of power, mentalities of governance, and forms of social ordering that are taking shape in the late modern age.

U.S. military doctrine states that building a legitimate political process and local capacities for security governance are the core objectives of its counter-insurgency strategy, a realisation that has been embodied in its 2006 *Counterinsurgency Field Manual* (Department of the Army, 2006). This has come as a result of military authorities reflecting upon their failures to contain insurgent movements in the post-war era despite their military superiority, including particularly the failures of the U.S. military in Vietnam, and subsequently in Lebanon, Somalia and occupied Iraq, as well as the failures of the French in Indochina and Algeria (see Klein, 2005; Peterson, 2003). Military authorities attribute these failures largely to the ineffectiveness of the tactics of conventional warfare, and to the inability of the military to modernise itself to wage unconventional war against non-State actors.

Yet as in times past, the restructuring of the security sector heralds a shift in the broader political and economic structures of society; it is influenced by those shifts at the same time that it serves to reinforce them through the strategic use of coercive force. The increasing institutionalisation of the strategies of neoliberal security governance, when taken as a whole, indicate the emergence of new and transnational technologies of political and economic power, which are being employed to shape the broader economic, social and normative orders that are emerging alongside of them. This is justified by authorities as an attempt to modernise security governance in order to reduce the threats posed by terrorists and armed insurgents, yet its overall effects are to justify and increase the use of force and coercion against civilian populations. This exposes a fundamental inconsistency at the core of globalised security governance and its claims to efficacy: its strategies are designed to justify the use of force against non-State actors, i.e. civilians, in order to build legitimate governance, yet the prospects of building stable and legitimate governance among the civilian population are decreased to the extent that force and coercion are deployed against them.

Here I focus on the decentralisation of the chain-of-command and on strategies of risk management, which I argue are the two facets of neoliberal security governance most relevant to the intentional killing of civilians in war zones, and which are exemplified by the actions of the Air Cavalry Brigade in *Collateral Murder*. These serve to justify and increase the subjective and pre-emptive use of force in 'self-defense' as a short-term measure, but in so doing they feed back into a cycle of violence that will necessarily supersede the long-term projects of reconstruction, democratisation, and securing the well being of the affected community.

The Public Authority Requirement for Making War

In order to understand the role that the decentralisation and disaggregation of the chain-of-command plays in the justification of atrocities against civilians, it is first necessary to understand the public authority requirement in international law. The public authority requirement is a direct expression of the state's assumption of the monopoly over the legitimate use of force. As such it justifies both the state's exercise of force, as well as the laws of war that purport to organise and regulate that use of force, and yet it has been significantly reconfigured by the neoliberalisation of security governance. This has been accomplished by neoliberal ideologies of management that have sought to push decisions to employ force against civilians down the chain-of-command, and onto front-line security personnel. This has led to the growth of what are known as 'intent-based' orders, orders that only express the goal the security provider is to achieve while leaving him or her with the ultimate decision as to how to use initiative to accomplish that goal. This, in turn, has led to the increasing institutionalisation of Rules of Engagement, an

'intent-based' standing order. These neoliberal innovations in the governance of the use of deadly force in conflict zones had their genesis in the post-World War II era. They were introduced by the U.S. military in a limited fashion to govern mobile tank warfare, and then the air bombing campaigns in the wars first in Korea, and then in Vietnam. Yet they began to gain ascendance only in the late 1980s, after neoliberal ideologies of public management had become widespread throughout the public service as a whole (see Armor, 1988). They have now become the primary method of governing the use of force across the security sector, and – since the revolution in counter-insurgent warfare engendered by the U.S-led wars in Iraq and Afghanistan – have become the prime method of governing the use of force. Together, the decentralisation of the chain-of-command combined with strategies of risk management have served to legitimate the intentional killing of civilians, and they arise directly out of the neoliberal normative framework.

International law has long required that only a legitimate public authority can initiate and wage war. Once initiated, the *in bello* use of force is governed by a tightly-bounded and hierarchical chain-of-command that ensures that the use of force is kept within the bounds of this public authority. The public authority requirement is rooted in social contract theory, an idea most influentially articulated in the writings of Thomas Hobbes. The establishment of security requires a centralised and coercive authority to enforce norms and establish order, and citizens agree to be bound by this authority in order to free themselves from the violent anarchy of the state of nature (Hobbes, 1962). In this liberal view, public force is morally justified because the state is itself a just institution – that is to say, one that meets the liberal goals of providing liberty and security, and which legitimately represents the collective will.

The use of armed force is a “core governance function” (Harel, 2009, p. 2), as it involves the exertion of violence in the name of the public (*ibid.*, p. 5). Core governance functions must be self-executing, such that state agents do not interpose their own private or personal judgment in ways that would strip the act of its public character (*ibid.*). State agents, such as soldiers in the military, must not scrutinise the decisions made by public authorities, and for this reason soldiers are trained to be “reflexively obedient” (Osiel, 1999, p. 3). For a soldier, like an executioner, “[i]t is this blind conformity that makes an executioner a public official in the first place and which also justifies labeling of the executioner's acts as acts of state” (Harel, 2009, p. 5). If soldiers discard their blind obedience to public authority, their acts cease to be acts of state – or acts committed in the name of the public – and they are rendered bereft of any moral or legal justification. It is this ideal view that has been used to justify and to organise the public authority requirement, and the laws of war have hitherto incorporated this principle at their core. They are embodied at the national level in the hierarchical and tightly bounded military chain-of-command.

The Decentralisation of the Chain-of-command

The neoliberalisation of the public authority requirement – both as an ideal mechanism of organising the use of force, and in terms of the practices which emanate therefrom – has significantly impacted the military chain-of-command. The use of military force has traditionally been governed by the doctrine of the chain-of-command, which ensured that the public authority requirement was embodied in the armed forces of nation States, and which eliminated the personal judgment and discretion of soldiers at the front lines. The chain-of-command is composed of a series of offices such that each holder is directly responsible to, and takes orders from, the office above. The traditional doctrine of the chain-of-command requires that it be hierarchical, clear, and unequivocal at all times. There must be unity of command in a single, clearly identified commander for each operation, and there must be continuity of command, with a clear succession of command at all levels (Chief of Defense Staff, 2009, para. 0507).

However, significant changes in traditional military administration governing the chain-of-command have been shaped and justified by neoliberal and entrepreneurial mentalities of governance that have gained influence since the 1980s (Osborne & Gaebler, 1992), and have come to be embodied in a succession of management philosophies known typically as the New Public Management, but also more recently as the New or Networked Governance Management (see e.g. Salmon, 2002; and Hartley, 2005). Such ideologies of management are themselves facilitators of neoliberal globalisation, and are intended to embody the thinking of a “postindustrial, knowledge-based, global economy” (Osborne & Gaebler, 1992, p. xvi). They have led to a wave of government reforms that import techniques of business management into public administration, accompanied by the privatisation of many government functions to promote efficiency and competition. Neoliberal governance is driven by goals and outcomes – or ‘missions’ (ibid., p. 19 [emphasis in original]) – and not by enforcing strict rules and regulations, as it seeks to empower subordinates by decentralising control out of the hands of leaders and government officials (ibid.; see also Osiel, 1999). Entrepreneurial mentalities of governance ask that agents be proactive and directed toward identifying and preventing problems before they emerge (ibid., p. 20). Successful ‘entrepreneurs’ in the service of the public are defined by ‘the extent to which they define risks and contain them’ (ibid., p. xx). These neoliberal mentalities of governance have significantly impacted military administration in combat operations by decentralising control, by promoting discretion and freedom of action down the chain-of-command, and by institutionalising intent-based orders and standing Rules of Engagement. Control has in this way been disaggregated and spread among various actors, including not only ordinary soldiers but also private contractors, and officials within various non-military

government departments and agencies.

The disaggregation and decentralisation of control has transformed the military's own command control structure by pushing decisions to employ force as far down the chain-of-command as possible, thus individualising and privatising decisions to employ force. Throughout the course of the late twentieth century, the military doctrine has grown up that maximum freedom of action must be given to subordinates, and this decentralisation of command control has been assisted by the development of 'intent-based' orders – also called “mission-type” orders – which U.S. doctrine states are now the standard form of providing field orders in combat (Department of the Army, *Counter-insurgency Field Manual*, 2006, para. 1-145). These orders are often delivered orally, and primarily communicate the commander's intentions, explaining the result the commander wishes subordinates to achieve, rather than what soldiers ought to do or how they should accomplish this (*ibid.*). Intent-based orders were first put into limited use during World War II. At that time, field orders generally took the form laid down by the nineteenth-century Prussian military, and were characterised by their detailed and exact information and minute and precise instructions (Armor, 1988). These generally took the forms of the 'five-paragraph field order', which received widespread use in the militaries of many nation States (*ibid.*) Exacting instructions were viewed by central command authorities as being essential – particularly in the course of waging World War I – in which intensive planning and management was required to execute commanders' strategies under the conditions of trench warfare, as well as to overcome the limitations of inexperienced citizen soldiers (*ibid.*, p. 14). However, the complex and rapidly changing tactical situation that characterised the mobile warfare of World War II required that somewhat greater freedom and responsibility be placed on small-unit commanders, and this was then later strengthened by the American counter-insurgency experience in Vietnam (*ibid.*).

By 1988, the old rationalised system of using clear and detailed five-paragraph field orders was becoming obsolete. The timing here is significant. Intent-based orders had been in use in some limited form since the mobile warfare of World War II, yet they did not begin to become institutionalised within military doctrine until the late 1980s. At that time, the U.S. had not been involved in any major counter-insurgent operations for over a decade, and so this shift cannot be simply attributed to the military restructuring required to wage war against non-State actors. It does, however, coincide with the ascendance of neoliberal ideologies of governance throughout the public service as a whole that occurred during this period. This transition can be seen in a mobile infantry field manual from 1988, which provides one of the earliest formulations of intent-based orders within official military doctrine. This early intent-based order states that “Orders reflect the commander's intention and will. Indecisive, vague, and ambiguous language leads to uncertainty. Subordinates are told in direct and unmistakable terms exactly what

the commander wants them to do; they are not normally told how to accomplish it" (Department of the Army, 1988, Appendix B, para. B-2(e)). Typical of neoliberal philosophies of management, the military has come here to emphasise small-unit commanders' information, initiative and responsibility, based upon their experience in the combat zone (Armor, 1988, p. 15, 22). As we shall see, this has progressed to a far greater extent than what was embodied in this early version of an intent-based order, allowing for a significant degree of 'vague and ambiguous language' and 'uncertainty' surrounding the circumstances under which civilians can be killed in order to meet mission goals.

In addition to intent-based orders, the military has made increasing use of standing Rules of Engagement to govern the use of force in specific theatres of operation. As with intent-based orders, standing Rules of Engagement are drafted broadly so as to leave the actual decision of whether or not to employ force with the individual soldier. Virtually unknown during World War II, limited use was first made of standing Rules of Engagement during the Korean War, and this was undertaken so as to be seen to comply with the UN mandate to restrict the conflict and to utilise restrained air power (Perry, 1999, p. 17). Significant use of Rules of Engagement began to be made during the US air bombing campaign in the Vietnam War, due largely to its political fallout (*ibid.*). They have since become the primary means of regulating the use of force in such counter-insurgency operations as Iraq and Afghanistan, as well in inter- and multinational peacekeeping operations (*ibid.*). Standing Rules of Engagement are a natural outgrowth of the intent-based system of regulating force – they are essentially intent-based orders that 'stand' during the course of the operation, and do not need to be modified by a commander – and they were originally designed with the goal of making air bombing campaigns appear to conform to the laws of armed conflict then in existence.

Neoliberal ideologies of management have in this way been incorporated into U.S. military doctrine, where their effect has been to institutionalise the decentralisation of decision-making by soldiers and commanders in the field. The ideologies of New Public Management and New Governance Management have been particularly influential in the production of the U.S. Marine *Counterinsurgency Field Manual* of 2006 (Department of the Army, 2006), which provides a substantive re-conceptualisation of its doctrine for waging complex irregular warfare, and constitutes what is perhaps one of the most significant shifts in military doctrine since the nineteenth century. Similar revisions were subsequently adopted in other countries, including the United Kingdom (Ministry of Defence, 2009), Canada (Department of National Defence, 2008), and Australia (Grey, 2009).

Intent-based orders and standing Rules of Engagement empower subordinates in the field to make decisions to employ force during counter-insurgency (COIN) operations:

Effective COIN operations are decentralized, and higher commanders owe it to their subordinates to push as many capabilities as possible down to their level. Mission command encourages the initiative of subordinates and facilitates the learning that must occur at every level. It is a major characteristic of a COIN force that can adapt and react at least as quickly as the insurgents. (Department of the Army, *Counterinsurgency Field Manual*, para. 1-146).

Perry (1999, p. 13) states of standing Rules of Engagement that they are “intended to be used throughout the spectrum of conflict in the absence of any superseding guidance from the National Command Authority”. Soldiers are thus being asked to make decisions to use lethal force in the absence of supervening command control. The decentralisation of governance and the empowering of subordinates to make decisions is a cornerstone of neoliberal mentalities of governance, upon which the U.S. military has drawn heavily in its recent updates of military doctrine. It is for this reason that the subjective discretion embodied in intent-based orders and standing Rules of Engagement are now institutionalised as the primary means of governing the use of force across *all* divisions of the U.S. military (Department of the Army, *Counterinsurgency Field Manual*, para. 1-146).

The U.S. *Counterinsurgency Field Manual* states that the primary objective of any counter-insurgency operation is to foster the development of effective governance by a legitimate host government (*ibid.*, para. 1-113). The excessive use of force by counter-insurgents can weaken the legitimacy of a host government that supports the counter-insurgency (*ibid.*, para. 1-132). On the other hand, the use of force in counter-insurgency operations is governed by intent-based orders and standing Rules of Engagement, leaving the details of execution to ordinary soldiers, who are expected to use initiative and judgment to accomplish the mission’s goals (*ibid.*, para. 1-145). This loose control over the application of deadly force, as well as its emphasis on using force pre-emptively to forestall possible risks of harm to soldiers, can have the effect of increasing soldiers’ use of violence, and produce consequent violent reprisals against the counter-insurgent forces. Condra et al. (2010), for example, found in their study of Afghanistan that attacks against International Security Assistance Forces [ISAF] were positively correlated with a recent ISAF attack against Afghan civilians. This dynamic can be expected to fuel the cycle of violent reprisals on both sides, further placing civilians in harm’s way, entrenching the insurgency, and weakening the development of democratic and stable institutions.

Self Defense, Risk Management, and the Disaggregation of the Principle of Distinction

The above discussion concerning the disaggregation and decentralisation of the chain-of-command in present-day security forces is important for understanding the transformations currently taking place in the customary law principle of distinction. The principle of distinction that asks military forces to distinguish between civilian and military targets is one of the core principles of the customary laws of armed conflict. Traditionally, combatants have been distinguished from civilians by the fact that combatants fight within the military corps of a nation State and are subsumed under its chain-of-command, as demonstrated by such characteristics as wearing distinctive uniforms and insignia that are visible at a distance, carrying arms openly, being subsumed under a military chain-of-command, and conducting themselves in accordance with the laws and customs of war (*Third Geneva Convention*, 1949, Art. 4). These requirements lie at the heart of the principle of distinction, as the use of armed force is a “core governance function” (Harel, 2010, p. 2) that involves the exertion of violence in the name of the public (*ibid.*, p. 5), and hence cannot legitimately be exercised by private individuals and organisations.

Distinguishing those civilians who are taking a direct part in hostilities – and are therefore liable to attack – has become a significant issue in international humanitarian law, due to the increasing confusion concerning distinguishing civilians in the course of counter-terrorist and counter-insurgent operations. The International Committee of the Red Cross’ *Interpretive Guidance* (Melzer, 2008) on this matter is in general agreement with what is stated in the U.S. *Counterinsurgency Field Manual* and in standard Rules of Engagement. The *Interpretive Guidance* notes that soldiers “run an increased risk of being attacked by persons they cannot distinguish from the civilian population” (Melzer, 2008, p. 994). Here, the distinction is drawn between civilians who are engaged in sporadic violence, and who are therefore liable to attack only for the time they are engaged in a specific hostile act (*ibid.*, p. 995), and organised non-State armed groups. Such groups are taken to “constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (‘continuous combat function’)” (*ibid.*). As with soldiers, then, those individuals performing a continuous combat function may be lawful targets of attack at all times (*ibid.*). The definition of ‘continuous combat function’ deliberately excludes private contractors, who must be engaged in a specific act that directly contributes to the hostilities in order to be liable to attack (*ibid.*). The fact that private contractors are defined as a non-risky class of person demonstrates the extent to which private military contractors have been re-interpreted as having greater protections under the international humanitarian law than ordinary combatants, who may be attacked at all

times. While the *Interpretive Guidance* states that all doubt must be resolved in favour of protecting the civilian (ibid., p. 1009), the loose definition of ‘continuous combat function’ has nevertheless allowed the traditional criteria of attack to shift from one based upon identifying specific hostile acts, to a criteria based upon identifying a risky class of persons. Almost all civilians in a territory subject to counter-insurgent operations have thus come to be viewed as a risky class of persons, and particularly military-aged males. Moreover, the construction of what constitutes a specific hostile act has been widened to encompass even very low levels of risk.

The *Interpretive Guidance* has not solved the problem of distinguishing those civilians who are taking a direct part in hostilities from those who are not. The U.S. *Counterinsurgency Field Manual* recognises that, “in COIN environments, distinguishing an insurgent from a civilian is difficult and often impossible” (Department of the Army, *Counterinsurgency Field Manual*, 2006, para. 7-40), and provides no guidance on how this distinction should be made. Soldiers are no longer tasked with identifying specific hostile acts, but are instead now charged with assessing the possible “hostile intent” of civilians, defined as being manifest when a soldier is “reasonably perceived to be in danger” (Shupe, 2003). Soldiers are therefore now to identify and neutralise possible risks of future harm to themselves and their unit (800th Military Police Brigade, 2003). The *Counterinsurgency Field Manual* further states that “combatants are not required to take so much risk that they fail in their mission or forfeit their lives” (Department of the Army, *Counterinsurgency Field Manual*, 2006, para. 7-23). ‘Self-defense’ as a euphemism for risk management has become the primary criteria for assessing the lawfulness of military attacks on civilians, and it is individual soldiers who are tasked with assessing the hostile intentions of the surrounding civilians in the conflict zone. The institutional objective here is to shift risk away from security forces and onto the civilian population.

Standing Rules of Engagement strongly emphasise the soldier’s inherent right of self-defense (Perry, 1999, p. 13). For example, a declassified Rule of Engagement for the 800th Military Police Brigade in Iraq states in bold letters at the top of the page – which is the standard format of expressing the intent of an order – that “Nothing in these rules limits your inherent authority and obligation to take all necessary and appropriate action to defend yourself, your unit, and other US forces”. The order goes on to state, “Do not target, except in self-defense, civilians, protected sites (i.e. hospitals, places of worship, schools, cultural institutions), or civilian infrastructure” (800th Military Police Brigade, 2003). Yet the ‘reasonableness’ standard appears nowhere in this order, and in the danger and confusion of a conflict zone the U.S. military has shown itself willing to tolerate very permissive criteria and very subjective feelings on the part of their soldiers as to whether they perceive a hostile intent before using lethal force. This is, indeed, what happened when U.S. soldiers decided to use lethal force against a group of civilians on 12 July 2007

in New Baghdad.

Collateral Murder: The US Civilian Killings in New Baghdad

On 5 April 2010, WikiLeaks released the video footage that it entitled *Collateral Murder*. The footage was widely reported and discussed in the media, and has resulted in the U.S. military detaining and charging PFC Bradley Manning with its unauthorised release. The events depicted in the video, and the discourse surrounding them, demonstrate the extent to which the neoliberal ideologies of security governance have justified the killings as being lawful under the customary principle of distinction. The footage depicts events that occurred on 12 July 2007 in the suburb of New Baghdad in which U.S. forces killed perhaps twelve Iraqis. The exact figure is disputed, but it ranges from eleven to sixteen persons, including two Reuters news agency employees, and the serious wounding of two children.

The day began for the U.S. soldiers with a ‘cordon and search’ operation, which is a standard counter-insurgent tactic in which soldiers cordon off an urban area and search all houses door-to-door looking for weapons, explosives, and other contraband. As they prepared to leave, the soldiers were hit by sniper fire from a nearby rooftop. Two Apache attack helicopters were called in to “clear” the area of insurgents (McCord, 2011). The soldiers in the Apache identify a group of military-aged males on a street, two of whom were reportedly armed, and they call in the air strike over their radio to their commander (First Air Cavalry Brigade, *Collateral Murder*, 2007, 0:30 *et seq.*). It was later revealed that this group included the two Reuters employees, whose camera equipment was possibly mistaken for a weapon. An AK-47 and an RPG launcher were reportedly later found at the scene (First Air Cavalry Brigade, *Memorandum*, 2007). The video itself depicts an individual with what may be an AK-47 slung around his arm, hanging down, walking in a calm manner and talking with another member of the group. Another individual is seen with what appears to be a weapon, possibly an RPG, crouching down and looking around the corner in a defensive manner and then returning to the group. The footage does not reveal weapons or hostile actions being directed towards the U.S. forces, nor that the individuals were aware of the presence of the U.S. Apache helicopters flying overhead. The footage itself does not provide evidence that these individuals were involved in the earlier small arms fire incident, nor that the soldiers were aware of any such evidence in making their decision to engage. Simply appearing to carry weapons in an area near which U.S. soldiers had recently come under fire was thus seen by the Air Cavalry Brigade as exhibiting a ‘hostile intent’ sufficient to warrant the application of deadly force.

A few minutes after this group was strafed with gunfire, a civilian van stops at the curb to assist one of the wounded men, which was later discovered to be one of the

Reuters employees. A man in white exits the vehicle, and a voice, speaking English and most likely of an American, can be heard over the radio saying, 'We need a doctor' (First Air Cavalry Brigade, *Collateral Murder*, 2007, 7:47 *et seq.*). A soldier in the Apache, codename 'Crazyhorse 18', explains over the radio to his commander, 'Bushmaster Seven', that someone has come to pick up the wounded and the bodies, and requests permission to engage (*ibid.*, 7:55 *et seq.*). The following is the exchange between the soldier and his commander:

BUSHMASTER: Picking up the wounded?
CRAZYHORSE: Yeah, we're trying to get permission to engage.
UNKNOWN: Come on let us shoot.
CRAZYHORSE: We have a black SUV, uh Bongo truck picking up the bodies. Request permission to engage.
BUSHMASTER: This is BUSHMASTER SEVEN. Roger. Engage.

The two children who would be wounded were sitting in the front seat of the SUV. A short while later in the footage, a U.S. tank drives over the body of one of the Iraqis and the soldiers treat the incident quite lightly. It is quite clear from the video that the U.S. soldiers perceived the individuals assisting the wounded to be manifesting a hostile intent simply on that basis. This would seem to be a strikingly permissive interpretation of a 'hostile intent'.

Interpreting the act of coming to the assistance of wounded on the battlefield as manifesting a 'hostile intent' appears at first to be a departure from the customary law as set down in the *Geneva Conventions*, particularly that which protects persons providing humanitarian assistance to the dead and wounded on the battlefield. Even those who are clearly combatants but who are engaged in humanitarian activities are, for that time, considered *hors de combat*, and are not lawful targets of attack (*Third Geneva Convention*, 1949, Common Art. 3(2)). Humanitarian law stipulates that the "wounded and sick shall be collected and cared for" (*ibid.*). The *First Geneva Convention* states, "The military authorities shall permit the inhabitants and relief societies, even in invaded or occupied areas, spontaneously to collect and care for wounded or sick of whatever nationality... No one may ever be molested or convicted for having nursed the wounded or sick" (*First Geneva Convention*, 1949, Art. 18). Article 15 further states that, "At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled" (*ibid.*, Art. 15). The suffering of the wounded at the Battle of Solferino of 24 June 1859, was the genesis for the founding of the International Committee of the Red Cross and the origins of humanitarian law, as embodied in the

First Geneva Convention for the Amelioration of the Wounded Armies in the Field of 1864. Violations of these prohibitions are considered grave breaches of the *Geneva Conventions* (International Committee of the Red Cross, 2005). It would appear, then, that justifications based upon risk management are coming to trump more traditional interpretations of the laws of war. Moreover, the footage shows that the decision as to whether a hostile intent was manifest was left to the individual soldiers, who – in an inversion of the traditional chain-of-command – are here collecting the relevant information and initiating the engagement. Their decision is merely ratified by those higher up in the chain-of-command, which is in line with neoliberal ‘New Public Management’ reforms to the military chain-of-command that are now increasingly typical.

The First Air Cavalry Brigade conducted an investigation of the incident and published their findings exonerating the soldiers involved a mere seven days later (First Air Cavalry Brigade, *Memorandum*, 2007). The *Memorandum* finds the soldiers’ conduct to be lawful under the customary laws of war and the Air Cavalry Brigade’s own standing Rules of Engagement. The *Memorandum* states that “a black van arrived to retrieve one of the wounded insurgents. Crazyhorse 18 requested immediate clearance to engage the van, received it, and completely disabled the vehicle within seconds” (ibid., p. 2). The *Memorandum* goes on to state that the soldiers involved “exercised sound judgment and discrimination during attempts to acquire insurgents, or moreover, to identify personnel engaged in hostile or threatening activities against our Brothers on the ground” (ibid.). The customary principle of distinction is here re-conceived in terms of the inherent right to self-defense, as determined by the personal judgment of the attack team: “Fundamental to all engagements is the principle of military necessity. This was clearly established and supported by the friendly forces (sic) inherent right to self defense and the ground commander’s obligation to ensure all necessary means were employed to defend or protect his Soldiers from hostile acts” (ibid.). Being a military aged male in a ‘cordon and search’ zone and possibly carrying a weapon was seen as sufficient evidence of a hostile intent, warranting the application of lethal force against civilians. Lt. Col. Scott Bleichwehl, spokesperson for the multinational forces in Baghdad, was widely reported in the media as saying, “There is no question that coalition forces were clearly engaged in combat operations against a hostile force” (See *eg.* Bumiller, 2010). The pattern of killings seen in *Collateral Murder* is strikingly similar to the manner in which U.S. soldiers killed sixteen civilians in Haditha, Iraq, during a house-clearing operation in the aftermath of a roadside bomb that killed a U.S. soldier. The attacks would therefore appear to be in line with broader neoliberal strategies of governance and the decentralisation of the chain-of-command, and the U.S. military clearly justified the soldiers’ actions along these lines. Indeed, both the risks of the occupation as a whole and those of the ‘cordon and search’ operation carried out that day were staged and managed by the U.S. forces

themselves.

However, such justifications for the intentional killing of civilians based on risk management are not particular to this incident, and are coming to stand alongside 'collateral damage' as one of the most proffered justifications for killing civilians. Moreover, these modes of justification are not limited to U.S. counter-insurgent actions in Iraq and Afghanistan. For example, the same basic move has been used by the government of Syrian President Bashar al-Assad to justify the killing of protestors in Syria. The political and media adviser to President Assad, Dr. Bouthaina Shaaban, explained the killing of several civilians to the Syrian Arab News Agency by stating that smugglers and gunmen had seized arms from a police station and opened fire on a military checkpoint. Soldiers killed them in "self-defense", she said (Quoted in Dalje.com, 2011). Self-defense was also used as a justification by Muammar Qaddafi, whose son, Seif al-Islam summed up the logic at work quite well when he stated in the early days of the uprising that *no one ordered troops to fire* on protestors; rather, "The guards were surprised by the attacking people and they (started) ... firing. They don't need an order to defend themselves" (Quoted in Sawyer, 2011). It was simultaneously used by NATO forces supporting the National Transitional Council, when a Pentagon spokesperson stated in April 2011 that the NATO airstrikes against Libyans were "defensive in nature", and so were not considered even to be "strikes" by the military (Quoted in Irish Times, 2011).

'Self-defense' as a euphemism for risk management and pre-emptive killing has also been used by a variety of security forces the world over in justifying violence committed against political protestors. In the early days of the Tunisian uprising, for example, a spokesperson for the Interior Ministry explained the deaths of fourteen protestors, stating, "The police fired in the air but the crowds continued, and the police acted out of legitimate self-defence" (BBC News, 2011). The European Court of Human Rights has recently found that Italy has not violated its international obligations in holding an Italian police officer not liable for the killing of a demonstrator at the 2001 G8 Summit in Genoa, on the grounds that the use of lethal force can be justified when it is "absolutely necessary in defence of any person from unlawful violence" (European Court of Human Rights, *Guiliani & Gaggio vs. Italy*, 2011, para. 307). In this case, the demonstrator was attempting to throw a fire extinguisher at the police vehicle (ibid.). Neoliberal strategies of risk management have thus gained ground in the European Court of Human Rights, as well. However, the concept of 'unlawful violence' used by the Court does not include an assessment of the legality of the force used by security personnel, nor whether civilians would have an inherent right of self-defence against such unlawful violence (see McMahan, 2009, p. 14).

International peacekeeping forces have also recently used similar justifications. This is a marked departure from the Balkan conflict when peacekeeping forces notoriously stood aside while war crimes were committed against civilians at the

Dutchbat Compound at Potočari prior to the massacre at Srebrenica; intervention then would have violated their then peacekeeping Rules of Engagement (UN Secretary General, *The Fall of Srebrenica*, 1999). Much has changed since that time, though, as exemplified by the NATO-led KFOR peacekeeping force in Kosovo and its actions during the 27 September 2011 border clashes at Jarinje, during which KFOR forces engaged Serbian protestors with rubber bullets. KFOR spokesperson Kai Gudenoge stated to *Agence France-Presse* in Pristina, that “(Serbs) threw stones on German soldiers. One soldier was hit and the troops were forced to fire non-lethal rounds in self-defence” (Quoted in EUbusiness, 2011). Rather than being unchanging and unchangeable, then, the international customary laws of war have in fact been noticeably transformed since the time of Srebrenica, and even since the UN Secretary General's Report on that incident of 1999. This is particularly striking when one remembers that the Serbian military itself used the very same justifications of pre-emption, self-defence, and military necessity that we saw in the U.S. *Memorandum* that justified the killings in New Baghdad. The international community's negative response to the Srebrenica incident most likely helped these justifications to achieve the acceptance that they have among international leaders and diplomats. The changes to the military command and control structure that began in a piecemeal fashion after World War II, and which gained traction with the rise of neoliberal forms of management in the 1980s and 1990s, have – since the counter-insurgent operations in Iraq and Afghanistan – taken over an ever-larger swath of the security apparatus and have transformed the customs of war to the point where atrocity has become law.

Conclusion

The principle of distinction under the customary laws of armed conflict requires that security forces distinguish between civilian and military targets, but this is now being reconfigured as a principle that permits security personnel to use force pre-emptively whenever they perceive there to be a risk of harm to themselves or to their colleagues. With the ‘inherent right of self-defence’ taking over the principle of distinction, there has been a significant weakening of protections for civilians versus combatants in their liability to be attacked in the conflict zone. The Statist view of the laws of armed conflict has long justified the use of armed force as part of the sovereign prerogative, so long as it emanates from a legitimate public authority, yet there is very little that can be characterised as ‘public’ in this sense about the individualised and privatised methods of self-interest and self-defence with which security personnel are now making decisions to employ lethal force. This collapse of the public/private distinction that has long been the central organising logic of the laws of armed conflict is not only leaving us with a legal vacuum *vis-à-vis* the protection of civilians, but has also effectively created a vacuum in

the fundamental legal justifications for the use of armed force *ab origine*. Moreover, neoliberal ideologies of governance – and the practices used to enforce these ideologies on the ground – have not only generated this vacuum, but have also made use of it to produce plausible legal justifications for the commission of atrocities.

Hitherto, the international humanitarian law has enjoyed a certain degree of moral force, and this has given it at least some power in the discourse surrounding the killing of civilians in war. However, neoliberal ideologies of security governance have the potential to dissolve the international humanitarian law from the inside out, and it will progressively lose its moral force the more it is used to justify atrocities against civilians. Furthermore, if the state has given away its monopoly on the legitimate use of force – what has long formed the basis of the laws of armed conflict – then there appears little left to justify either that force or the laws that purport to regulate it. All of this leaves us at somewhat of a crossroads as far as the customary laws of armed conflict are concerned. There is the potential either for us to wind up squarely in the realm of imperial power politics, backed up by an ever-growing and increasingly empowered security apparatus, or for us to open up new avenues to wholly de-legitimize the use of force as a tool of international relations in the global age.

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