

Rules of War, Civilian Status, and States' License to Kill

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Since the Treaty of Westphalia, where states were granted the supreme power in all the land, wars were most often fought between superpowers. The first and second world war saw global hegemony fighting within this Westphalian system where the interests and ideologies aligned against one and another. Westphalia was fundamental in terms of establishing the world order. After Westphalia, state sovereignty became a defining feature of state power, war was deemed a function of the state, and the anarchic world order was formalized. States exercised their power through expansionism and colonialism. Colonialism, in addition to international horrors like the holocaust led to the World Wars and utterly shocked the world. Western leaders were forced to respond with the 1949 Geneva Convention so that the liberal world order could survive.

The liberal world order was challenged again during the Cold War, but with the fall of communism came a new type of war that would undermine the Westphalian system and continue to challenge liberal promises of world peace. Eastern Europe grew unstable and war broke out in the Balkans. Bosnia and Herzegovina entered into a three-year war that would mark a turning in the conceptions of war within the Westphalian system. This required a new response from the western world in the Rome Statute of the International Criminal Court (ICC)<sup>1</sup>. The Rome Statute grew out of the Geneva Convention Protocols and was created in 1998, after the signing of the Dayton accords and the end of the war in Bosnia and Herzegovina. The document itself was created to outline the ICC's structure and area of jurisdiction. It was called to a vote by the United States of America and approved by 120 votes to seven with 21 abstentions.<sup>2</sup> The Rome Statute

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<sup>1</sup> *Rome Statute of the International Criminal Court*, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, U.N. Doc. A/CONF.183/9 (1998), 37 I.L.M. 999 (1998).

<sup>2</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002)

sought to establish humanitarian international law through a permanent international tribunal.

The Rome Statute effectively works with the Geneva Convention to put international conflict to bed by fortifying international law.

The international community heralded the document as a great achievement in writing the rules of war, giving the ICC a critical tool in implementing justice and bringing about the rule of law. In relation to post war Bosnia and Herzegovina, the ICC was able to create the International Criminal Tribunal of the Former Yugoslavia (ICTY) which acted as an ad hoc court to prosecute criminals from the wars in Bosnia, Croatia, and Serbia. The court delivered 161 high-profile indictments.<sup>3</sup> For this reason, the court played a major role in providing transitional justice in BiH and setting a precedent for further cases and trials before the court.<sup>4</sup>

The main purpose of the Rome Statute was to introduce the ICC and make clear the capacity with which it was meant to operate. The ICC is able to prosecute individuals that have committed genocide, war crimes, crimes against humanity, and crimes of aggression based on articles 6, 7, and 8. Moreover, in explaining the court's jurisdiction and general guidelines, the Rome Statute uses precise language in defining what falls under these four crimes in an attempt to create a clear framework for the court to abide by. To this end, articles 5-33 aim to make clear definitions of who is complicit in an international crime and who is not. While it is necessary to articulate a specific legal vernacular for the purpose of justice on the international stage, such cookie cutter practices rarely fit the reality that exists on the ground and can actually create more harm than good.

### Creating Sustainable Peace

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<sup>3</sup> Owen Bowcott, "Yugoslavia tribunal closes, leaving a powerful legacy of war crimes justice," *The Guardian*, December 20, 2017.

<sup>4</sup> Peter Verovsek, "The lessons of the ICTY for transitional justice," *Eurozine*, January 12, 2018.

It is often said that that the Geneva Convention Protocols and the Rome Statutes were a broad attempt at ending wars all together. While many recognize that an international document forged by the United Nations with the strong backing of western powers would not put an end to wars, it was nonetheless an important foundation through which the international community could set standards for war, provide a platform for accountability, and establish guidelines for the rules of engagement. In the case of BiH, the ICTY brought justice through convicting prominent figures such as Slobodan Milosevic, Radovan Karadjic, and Ratko Mladic for various war crimes. Without the Rome Statute, putting Milosevic and other Serbian leaders who committed countless atrocities before the international community would not have happened, and a critical piece of transitional justice would be missing. While this is a necessary aspect of post-conflict transitions, prosecuting criminals is only part in parcel to sustainable peace.

The ICTY left many problems in its wake. It was shut down in 2017, leaving many unresolved cases, it cost an incredible amount of money, and only targeted the heads of these criminal operations. However, it can be argued that the scope of the Rome Statute was limited from the outset and did not have the goal nor the capacity to properly facilitate sustainable peace. Rather, by providing the rules of a just war, the statute would set norms that would naturally curb atrocities while the ICC that would act as the teeth for the international community. It should also be noted that the Rome Statutes and the ICC were brought up in the mid to late 20<sup>th</sup> century when international law was being pieced together. At the time, the idea of delineating between combatants was revolutionary and relatively straightforward. Standard inter-state warfare had soldiers wearing uniforms, so it was easy to decipher between combatants and noncombatants.<sup>5</sup> It wasn't until insurgency and counterinsurgency campaigns in the midst of intra-state wars that

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<sup>5</sup> Asa Kasher, "The principle of distinction," *Journal of Military ethics* 6, no. 2 (2007): 152-167.

the lines between combatant and noncombatants were blurred. This made the principle of distinction and clear rules of engagement ever more important. The Rome Statutes aimed to protect civilians through establishing an international law that required military forces to target opposing militants and military property, known as the principle of distinction.<sup>6</sup>

While this argument is valid, it assumes that the given definitions and rule creation deters criminal action. It assumes that the rules of engagement and more precisely, the principle of distinction does not instigate legal violence and is not improperly exercised by those who hold power. Defining civilian status may seem simplistic at first but examining the underlying complexities and implications that come with these distinctions become apparent upon closer observation. An acute analysis reveals the ways in which the definition of a civilian can be made to fit a certain context. In other words, civilian is a malleable word, being bent to the will of those exercising power. The malleability of the term civilian has been the result of its productive purpose. Kinsella notes that definitions with a productive purpose essentially produce the very concept that they aim to define.<sup>7</sup> For Kinsella, it is clear that productive definitions originated after the Treaty of Westphalia and the Geneva Convention and were also used in the Rome Statutes. Since 1998, practitioners in international relations and international law relied heavily on productive definitions for deciphering between civilians and combatants. What was originally an attempt to protect civilians in the face of war became a severe drawback in the Rome Statute

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<sup>6</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002)

<sup>7</sup> Helen Kinsella, *The image before the weapon: A critical distinction between combatant and civilian*, (Ithaca, N.Y.: Cornell University Press), 2011.

as gender and age became proxy variables for “civilian status,” and the Statutes limitations were revealed.<sup>8</sup>

### The Principle of Distinction

The limitations of the Rome Statutes and the introduction of the ICC are most prominent within the principle of distinction. The problem with the principle of distinction and its negative definition of civilian is twofold: it is highly malleable, open to interpretation, and relies on the underlying assumption that combatants and civilians are opposites. Furthermore, the principle of distinction links civilians to gender, innocence, and state status, but also paves the way for state malpractice and manipulation of international law.

The civilian link to gender is congruent with the fact that traditionally, men fought in wars. Men fought in the world wars, men lead the free world, and ultimately men were drafting the Rome Statutes. Therefore, the context with which the Rome Statute was drafted reflects men’s biases and understandings of war. Gender is defined in article 7(3) with constructive ambiguity, implying that gender is a biological rather than a social construction.<sup>9</sup> Failing to construct a definition that considers the social constructions creates underlying assumptions like men are combatants and women are not. Linking men to combatants thus shapes our conception of civilian. Because civilians were defined as non-combatants, every woman and child was immediately labeled as a civilian even if they participated in guerilla groups or took up arms during war.<sup>10</sup> This definition helped women involved in insurgencies by dissociating them from

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<sup>8</sup> Carpenter, R. Charli. *'Innocent Women and Children': Gender, Norms and the Protection of Civilians*, (United Kingdom: Routledge), 2016.

<sup>9</sup> Valerie Oosterveld, "Constructive Ambiguity and the Meaning of “Gender” for the International Criminal Court." *International Feminist Journal of Politics* 16, no. 4 (2014): 563-580.

<sup>10</sup> Helen Kinsella, *The image before the weapon: A critical distinction between combatant and civilian*, (Ithaca, N.Y.: Cornell University Press, 2011), 163.

being enemies to the state, however, it also led to onslaughts of rape and other abuses because women were not seen as combatants.<sup>11</sup> Furthermore, the cultivation of gender as an indicator of civilian versus combatant status created a push factor for young men to join insurgency groups. While women were assumed civilians, men and soon to be men were seen as combatants in the making. In other words, men were automatically stripped of their civilian status, qualified as combatants, and had to choose whether or not they were going to be an enemy of the state which often meant taking up arms to survive.

Another important critical limitation of the Rome Statutes use of productive definitions is the construction of innocence as a tool to identify civilians. The underlying assumption within international law was that civilians as non-combatants were innocent actors caught in the crosshairs of war. The idea was that those who were not contributing to the fighting were neutral and should be protected. The problem, however, is how does one identify innocence or neutrality. Measuring innocence, as Kinsella<sup>12</sup> points out, depends on who has the power to decide. For example, El Salvadorian officials considered the children of insurgents ‘bad seeds’ and therefore these young children became enemies of the state. Innocence in this instance was a result of their parent’s actions and based on the decision made by the El Salvadorian government. Another example can be taken from the Cold War where ideology dictated innocence and that this frame for deciding innocence was formed and legitimized by the state.

Finally, the Rome Statute upholds traditional Westphalian conceptualizations of civilian status based on civilization. Civilization is closely related to state sovereignty, and state sovereignty deems the government presiding over a designated territory as the supreme power. In

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<sup>11</sup> Kinsella, *The image before the weapon*, (Ithaca, N.Y.: Cornell University Press), 2011.

<sup>12</sup> Kinsella, *The image before the weapon*, (Ithaca, N.Y.: Cornell University Press), 2011.

theory, the people give the state its authority and its legitimacy. Without a population, the state does not exist. Thus, the state must maintain its legitimacy among the people or the civilization. Within the principle of distinction, civilians make up the group of people within the territory that legitimize the state and make up the civilization within the state. The important thing to note about this process is that civilians are assumed to be within the civilization. The civilization becomes the in-group. Those that are outside of the “civilization” are ostracized and to one degree or other enemies of the state. This is what allows states to label guerilla or insurgency groups as barbaric, a sickness to the population, or a disease to civilization.<sup>13</sup> Anyone who opposes the government becomes a barbarian and a threat to the state.

This narrative made sense during the traditional wars where states wanted to protect their populations in international conflict. Further, the narrative around a collective civilization is important to molding a collective identity among citizens and a system of support and prosperity. After all, that is the point of the state, to provide security to its citizens and protection from harm. That said, the definition is vague and easy to manipulate. In Guatemala, for example, government and military officials used state legitimacy to create a binary between civilization and barbarism.<sup>14</sup> Barbarians became the radicals, guerillas, or anyone the state wanted to target. Using rhetoric like saving civilization or rescuing the people from uncivilized groups allowed the state to specifically target those that the government wanted to exterminate. Overall, the definition has been manipulated to serve the leaders of a repressive state that aims to maintain supreme power.

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<sup>13</sup> Helen Kinsella, *The image before the weapon*, (Ithaca, N.Y.: Cornell University Press, 2011), 166.

<sup>14</sup> Helen Kinsella, *The image before the weapon*, (Ithaca, N.Y.: Cornell University Press, 2011), 166.



In the end, the principle of distinction has played a tremendous role in outlining the rules of war. These rules of war have perpetuated a system that reproduces such limiting conceptions of civilians versus combatants that has adversely affected all actors involved. International aid and humanitarian organizations have inadequately “protected” civilians due to the underlying assumptions complicit in the international laws and norms.

States’ seemingly unlimited ability throughout history to mold the conception of a civilian and use it to identify and attack factions of the population based on their race, gender, or ideology brings to question why we define civilians at all? Everyone is protected under international humanitarian law and many people are legitimately saved because of it, but only because the state allows them to be protected. I do not attempt to make the argument that the state is the only important power on the global stage, that international law has no effect, or that we should do away with defining civilians at all. I believe that questioning the validity of definitions and understanding their productive capacity is essential to creating just laws and norms. However, more attention needs to be given to how categorizing things in a binary manner fails to address the grey area that exists on the ground. That is, definitions on documents are significantly diminished when they do not reflect the reality on the ground. Additionally, such definitions might be counterproductive to their actual intentions, as in this case when the principle of distinction gives states a license to kill.

In light of the changing environment with which conflicts are fought, it is necessary that the ICC reassess their definition of civilians by revising the Rome Statute or addressing the concern through another international treaty. This revision or treaty should look at civilians on a spectrum with the mutual understanding that each and every person is a civilian. A civilian is anyone and everyone in armed conflict. Combatant or not, organized within the military or

within an insurgency group, you remain a civilian. Thus, civilian status is determined by criteria that make certain individuals or groups more civilian than others. This allows for a highly adaptable and interpretive based international law and norm setting. This has its downsides in that it allows similar exploitation by states or other various actors but has an equal ability to adapt to exploitations. Similarly, an adaptable spectrum allows old conceptions of war to be molded with new to create a definition that is constantly checking itself to maintain legitimacy. In the end, it is imperative that actors in international law begin to see civilians and combatants not as opposites, but as individuals playing different roles in a conflict setting based on the specific exercising of power. Granted some actions are far worse than others, the **issue is how we organize and exercise power. We organize power through military means around a state controlled by a set of actors that dictate the rules. The United Nations and other organizations like the International Criminal Court are international bodies that do a great deal to check state power but don't have the authority to directly influence how states exercise their power. If we want to protect non-combatants, if we truly want to protect the innocent people, we must change the global world order to a highly centralized world government or decentralize the states and establish regional and transnational communities.**