Massacres and Morality: Mass Killing in an Age of Civilian Immunity

Alex J. Bellamy

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Alex J. Bellamy*

ABSTRACT

The norm of civilian immunity, which holds that civilians must not be intentionally targeted in war or subjected to mass killing, is widely supported and considered a *jus cogens* principle of international law. Yet not only does mass killing remain a recurrent feature of world politics, but perpetrators sometimes avoid criticism or punishment. This article argues that the paradox can be explained by understanding that civilian immunity confronts a protracted struggle with competing ideologies, some of which have proven resilient, and that decisions about how to interpret the norm in specific cases are subject to intervening contextual variables.

I. INTRODUCTION

There is an overlapping moral consensus that holds that the deliberate killing of civilians is wrong.¹ Since the late 1940s, this consensus has become

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* Alex J. Bellamy is Professor of International Security at the Griffith Asia Institute/Centre for Governance and Public Policy, Griffith University, Australia. Formerly, he was Executive Director of the Asia-Pacific Centre for the Responsibility to Protect. His recent books include, *The Responsibility to Protect and Global Politics* (Routledge, 20011), (with Paul D. Williams) *Understanding Peacekeeping* (2nd edition, Polity, 2010), and *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Polity, 2009). He has recently completed a monograph on the norm of civilian immunity and has begun work on a history of the UNPROFOR mission in former Yugoslavia.

embedded in international law, which prohibits the deliberate killing of non-combatants in armed conflict (including those of a “non-international character”), forbids genocide and demands that states take positive measures to prevent and punish it, asserts that no one may be arbitrarily deprived of their right to life, and bans a range of activities commonly associated with mass killing, such as forced displacement. Constructivists hold that such shared norms serve as “meaningful constraints” on behavior. They achieve this through internalization, where compliance becomes constitutive and habitual, or through the preference of social actors to be seen to be acting legitimately by other group members. Given that civilian immunity is widely considered a jus cogens norm, we should expect it to inhibit mass atrocities and prompt the punishment of violators with “ridicule,” “diplomatic and economic pressure” or coercion. Yet not only does mass killing remain a recurrent feature of world politics, sometimes perpetrators avoid punishment. This implies both that civilian immunity sometimes fails to inhibit behavior and that perpetrators are able to secure sufficient legitimacy.

This article attempts to explain this paradox. It argues that actors typically seek to legitimize their behavior and will be inhibited from acting in ways that cannot be plausibly justified. Civilian immunity limits the number of plausible justifications for mass atrocities. As such, since the Second World War justifications have tended either to draw on one or both of only


two “anti-civilian ideologies,” which provide normative grounds for killing civilians (described here as “military necessity” and “selective extermination”) or contest the facts of the case to portray behavior as consistent with civilian immunity. The struggle for civilian immunity is therefore partly a struggle between the norm itself and competing norms and partly a struggle over the interpretation of events. This is not the end of the matter though, because legitimation is an agential process and is therefore influenced by intervening variables. Understanding these variables and how their content and relative importance changes over time is as important as understanding the ideational battle between civilian immunity and its competitors to understanding the legitimation of mass atrocities.

This article proceeds in five parts. The first examines the factors that might influence the legitimation of mass killing in the face of a norm proscribing such killing, focusing on the politics of legitimacy, the ideational contest between civilian immunity and its competitors, and important intervening variables. The remaining sections examine how these factors shaped the legitimation of mass killing in four historical periods—the long nineteenth century, the period around the Second World War, the Cold War and the post-Cold War era—focusing especially on changes in patterns of justification and legitimation. From this, the article contends that civilian immunity has engaged in a protracted ideational struggle and has prevailed to some extent. At the same time, important changes in the operation of key intervening variables have made it more difficult for perpetrators to legitimize mass killing. Most notably, improved reporting makes contesting the facts of the case less viable and the end of the Cold War removed significant countervailing concerns which reduced the chances of perpetrators being seen as more legitimate actors than other relevant actors and removed other key policy priorities which had previously served to limit condemnation and punishment. Nevertheless, despite its apparent ascendancy the norm remains vulnerable to ideational challenges—made evident by the War on Terror, which has pitted an ideology of selective extermination against liberal governments tempted to revert to necessity arguments to justify skirting the edges of civilian immunity.

7. The label “anti-civilian ideology” is taken from Hugo Slim and refers to political doctrines or ideas that hold that certain groups of civilians do not enjoy the protection of civilian immunity and provide reasons or justifications. See Hugo Slim, Killing Civilians: Method, Madness, and Morality in War (2008).
II. ATROCITIES, CIVILIAN IMMUNITY AND THE STRUGGLE FOR LEGITIMACY

Contemporary mass killing is often explained without reference to civilian immunity. It has been portrayed as, variously, a rational tool employed to accomplish radical social transformations or eliminate perceived enemies, a useful strategy for defeating certain types of insurgencies, a recourse for governments unable to prevail over their enemies with conventional military means, and (in the case of non-state actors) a product of the conditions in which groups originate. Where the norm is found to encourage actors to wage war more discriminately, it does so in tandem with other developments such as technological progress which permits those actors to conduct themselves more effectively and discriminately. The general implication here is that civilian immunity is too weak to inhibit behavior.

But there are glimpses of civilian immunity at work in these studies. In particular, these accounts agree that perpetrators generally resort to mass killing only reluctantly and only when other strategies have proven ineffective or prohibitively expensive. More often than not, armed belligerents choose to not exterminate their enemies, even when they have the capacity to do so and stand to benefit. According to Alexander Downes and Benjamin Valentino, this is because potential perpetrators are concerned about the risk of retribution and third party intervention, which might be triggered by moral outrage against the atrocities. Fear of retribution is certainly evident in some cases—most notably Britain and Germany at the outset of the Second World War—but is not a realistic fear in most cases, where significant imbalances of power make it unlikely that victim groups could seriously harm their tormentors. In most cases, therefore, the reluctance to kill civilians as a first resort is explained by the fear that it will prove counter-productive owing to its illegitimacy. Potential perpetrators also sometimes worry that illegitimacy will undermine domestic support and elite cohesion.


9. THOMAS, supra note 3.


11. VALENTINO, supra note 8; DOWNES, supra note 8.


13. This was particularly evident in Britain and the US during the Second World War. Both governments refused to acknowledge their strategy of bombing city centers because they feared that such an admission would undermine support for the war. See MAX HASTINGS, BOMBER COMMAND 172–73 (1979); SAHR CONWAY-LANZ, COLLATERAL DAMAGE: AMERICANS, NON-COMBATANT IMMUNITY, AND ATROCITY AFTER WORLD WAR II 10–11 (2006).
To explain the factors that determine the capacity of civilian immunity to inhibit behavior, therefore, we need to understand the politics of legitimacy. Legitimacy refers to recognition of the rightfulness of an actor or behavior and is judged in relation to relevant norms.\(^\text{14}\) An action is legitimate to the extent that it is justified in terms of shared norms and those justifications are validated by others.\(^\text{15}\) As a rule of thumb, the greater the extent of the validation, the more legitimate an action can be and vice-versa. This social element means that acts are seldom either wholly legitimate or illegitimate. Thus, it is more accurate to speak of degrees of legitimacy. When actors proffer justifications for their behavior, different audiences weigh the claims and act based on their judgments of legitimacy.\(^\text{16}\) Societies generally have multiple—sometimes contradictory—norms, meaning that actors may employ one norm in order to justify behavior that violates another or argue about how to apply the norm or which norm ought to be prioritized.\(^\text{17}\) Moreover, because legitimation is a social process, it is open to competing interpretations of how relevant norms apply to particular cases and the facts of the case at hand.

Seeking legitimacy, actors communicate claims or arguments in order to explain and justify their actions. Claims and arguments typically assert either that a particular norm ought to be applied in a particular situation or that new normative beliefs ought to be developed and translated into norms.\(^\text{18}\) These claims and arguments are evaluated by relevant audiences on the basis of their shared expectations of appropriate behavior as well as political and prudential calculations. What is considered legitimate depends on claims, arguments and judgments that represent a balance of different norms and political calculations.\(^\text{19}\)

Norms are not simply guides to how we must act, but are constituted and governed by the community. As such, actors are not entirely free to select whatever argument they like because interpretations of a norm are monitored by the community as a whole.\(^\text{20}\) The purpose of making justificatory

\(^{14}\) Hurd, supra note 3, at 381. In a similar vein, Thomas Franck argues that legitimacy is the property of a rule that exerts a compliance pull, Thomas Franck, The Power of Legitimacy Among Nations 24 (1990).

\(^{15}\) From this perspective, legitimacy is a social fact built on consent that is meaningful only to the members of the community that accepts it. Ian Clark, Legitimacy in a Global Order, 29 Rev. Int’l Stud. 75, 80 (2003).

\(^{16}\) Thomas Franck, Recourse to Force: State Action against Threats and Armed Attacks 185 (2002).

\(^{17}\) As Finnemore points out, “determining which rules and norms apply in different situations involves sophisticated reasoning processes.” Martha Finnemore, National Interests and International Society 29 (1996).

\(^{18}\) See Neta C. Crawford, Argument and Change in World Politics: Ethics, Decolonization and Humanitarian Intervention 24 (2002).

\(^{19}\) Ian Clark, Legitimacy in International Society 207 (2005).

arguments in the first place is to persuade others about the legitimacy of a course of action and implausible arguments are unlikely to be persuasive.\textsuperscript{21} Therefore, as Quentin Skinner argued, actors “cannot hope to stretch the application of the existing principles indefinitely; correspondingly, [the actor] can only hope to legitimate a restricted range of actions.”\textsuperscript{22} If Skinner is correct, there is a limited range of arguments that an actor (even a powerful one) can use to legitimize the commission of mass atrocities. Thus, while there will be contestation about the appropriate interpretation of norms and events, actors cannot put forth wholly self-serving and idiosyncratic justifications in every case.\textsuperscript{23} If plausible arguments are not available, then a course of action will be inhibited because it cannot be legitimated. Of course, as I noted earlier, a powerful actor may pursue the course of action anyway, on the grounds that its material power makes it able to withstand the material and reputational costs of illegitimacy. But even powerful actors have limits on the costs that they can tolerate and history is littered with examples of illegitimacy imposing unbearably high costs on the powerful.

There are three basic ways of legitimizing action that may be thought to violate a particular ethical norm (such as civilian immunity). The first is to appeal to other norms. Norms are inconsistent, sometimes contradictory, and do not share ethical content.\textsuperscript{24} Nor is there a ready-made hierarchy of norms. Where hierarchies emerge, it is usually through processes of contestation and legitimation. Earlier, I argued that in modern times, two sets of norms, labeled “anti-civilian ideologies,” have been used to justify the intentional killing of civilians. The first is the principle of military necessity. This principle holds that in certain circumstances, actors may legitimately target civilians when it is necessary. For the norm to legitimize mass atrocities the actor in question must be considered a legitimate authority and its purpose must also be seen as legitimate. Audiences will also expect perpetrators to demonstrate necessity—in other words, that there is no other plausible way of achieving that legitimate goal. The military necessity argument was most commonly

\begin{itemize}
  \item \textsuperscript{21} Finnemore, supra note 17, at 141.
  \item \textsuperscript{22} Skinner, supra note 6, at 117.
  \item \textsuperscript{23} Edward Hallett Carr, The Twenty Years' Crisis 1919–1939: An Introduction to the Study of International Relations 92 (1946).
  \item \textsuperscript{24} As Martha Finnemore has argued:
    
    \begin{quote}
    To understand how norms work, we need to understand the complexity, contradictions and indeterminacy of the larger normative system in which political action takes place. Any policy decision of consequence is taken within a dense web of normative claims that often conflict with one another. . . . After all, if the prescriptions of norms and values were always clear or if they never conflicted with one another, we would not have to make any decisions; we would just follow the prescriptions.
    \end{quote}
    
\end{itemize}
used to justify the killing of civilians in counter-insurgency warfare in the
nineteenth and early twentieth centuries, but also the bombardment of cities
in high attrition wars and by non-state actors to justify terrorism. The second
anti-civilian ideology, I label selective extermination. This ideology holds that
certain classes of civilians do not enjoy the protection of civilian immunity
and can therefore be legitimately killed. Selective extermination had its ori-
gins in Western imperialism, which drew sharp racial distinctions between
civilians deserving protection (i.e. Europeans) and those not so deserving
(i.e. non-Europeans). The logic of this imperialist ideology underpinned the
totalitarian ideologies of the twentieth century that removed whole races
(Fascism) and socioeconomic classes (Communism) from the protection
of civilian immunity, and is evident today in extreme Islamism and many
localized nationalist ideologies. I call it “selective” extermination because
it identifies specific groups as outside the protection of civilian immunity
rather than rejecting civilian immunity as a whole. Selective extermination
ideologies never have universal appeal, as they divide human society into
either two (the “in group” and “out group”) or three (in group, “bystanders,”
out group) groups and do not make appeals to out groups and bystanders.
At most, these ideologies tend to be internalized and enjoy strong validation
within their host community but tend not to be considered a plausible justi-
fication for mass killing outside that community. Indeed they are structurally
opposed to universalism and thus make no universalist claims to legitimacy.

The second strategy is to contest the facts of the case in order to deny
that the norm is being violated. Actors may simply deny that they are
deliberately targeting civilians. Given conditions that make it difficult to
distinguish combatant from non-combatant (as in urban war or counter-
insurgency) or that make external scrutiny difficult, or a context where the
interests of powerful external actors are served by turning a blind eye and
there is sufficient scope to contest the accuracy of reported violations, ac-
tors may argue that they are not intentionally killing civilians or may deny
that civilians are being killed at all. These arguments provide counter-factual
validity to the principle of civilian immunity. The reluctance to be truthful
demonstrates a degree of deference to the norm and fear that open viola-
tion may prove costly. Actors making this argument may be required to go
to some lengths to cover-up evidence of atrocities and make it appear as
if they were complying with the principle. Often, actors employing denial
modify their behavior in order to reduce the appearance of norm violation.
This may include (but is not limited to) prosecuting a handful of low-ranking
perpetrators to sustain the argument that mass killing was perpetrated by

25. An approach identified in a different context by Michael Byers, Pre-Emptive Self-Defense:
“rogue elements” and not as a matter of policy, limiting the commission of atrocities to regions less likely to attract international media attention, and offering humanitarian assistance to the survivors.

A third potential strategy is to contest the substance of the norm itself and propose new norms. This option is usually open only to the most powerful and even then is only viable when the society exhibits dissatisfaction with the existing norm. Given the depth of the overlapping moral consensus about civilian immunity the third strategy is not an option that is likely to have been available to actors in the modern era.

Judgments about the legitimacy of a particular action are therefore influenced by the plausibility of their arguments relative to relevant shared norms. However, as I argued in the introduction, both the judgments and the consequences that flow from them are heavily mediated by intervening variables. Intervening variables mediate the way in which justifications are articulated, the manner in which they are judged, and the costs and payoffs associated with particular courses of action. They influence the extent to which justificatory arguments are validated or rejected and increase or reduce the likelihood that norm violation will be met with condemnation and punishment.

This article identifies three significant intervening variables which impact upon the legitimation of mass atrocities—but this is not a definitive list of variables nor is it necessarily transferable to other sectors or norms. First is the extent of agreement about the facts of the case and availability of reliable information. In evaluating the extent to which the perpetrator’s action corresponds with shared norms and the plausibility of its justificatory arguments, third parties have recourse only to the known facts at the time. Incomplete information grants perpetrators more latitude in the selection of plausible justificatory arguments, whereas more extensive reporting reduces the range of plausible justifications that are available, thereby reducing the likelihood of legitimation.

Second is the legitimacy of the actor that is perpetrating the mass killing relative to other relevant actors. Because identities are “inherently relational,” judgments about the legitimacy of an actor are never made in isolation of the social context. They are therefore relative. Actors and behaviors are judged to have more or less legitimacy and these judgments inform assessments about the legitimacy of the behavior or actor relative to other

26. See Finnemore & Sikkink, supra note 4, at 897.
27. Intervening variables, Valentino argues, “may act to increase or decrease leaders’ incentives or capabilities to launch mass killing and, consequently, the likelihood that mass killing will occur.” Valentino, supra note 8, at 69–71.
relevant behaviors and actors. Actors that are thought legitimate, or whose purposes are considered legitimate, are likely to succeed in legitimating norm violating behavior to a greater extent than actors whose legitimacy is already in doubt. Third parties that consider an actor and its purposes to be more legitimate than other relevant actors are predisposed towards accepting that actor’s justifications. They are more likely to validate justifications for norm violating behavior, and may do so even if those justifications are not particularly plausible.  

Third is the importance attached to the case at hand and the norm of civilian immunity, relative to other policy priorities. It is not only important to know whether or not an actor believes that a course of action violates a particular norm, we also need to know what significance is attached to that judgment. Actors may criticize violations of a norm but regard them as less important than other policy concerns, reducing the likelihood that the illegitimacy of an action will undermine the legitimacy of the perpetrator or that illegitimacy will produce punishments. Along with the relative legitimacy of the actor, this factor helps establish the sufficiency threshold. All else being equal, the higher the level of priority accorded by third parties to a case and to norm violating behavior, the higher the threshold of sufficiency for legitimacy. In addition to prior judgments about the actor’s legitimacy, the key determinants of policy priority include historical relations between the two entities, the geostrategic location of the event, the relationship between the perpetrator and great powers, and the degree of domestic agitation in favor or against the perpetrators.

The process of legitimation mediated by intervening variables has a cumulative effect, altering the strength of the norm and the importance of individual intervening variables. When actors alter their behavior as a result of this process—for example, by not resorting to mass killing as a first option because of concerns about potential costs or by adopting a particular justificatory strategy (for instance, disputing the facts of the case rather than appealing to an alternative norm)—it can be said that they are “learning.” There are many different types of, and ways to categorize, social learning but for our purposes it is useful to distinguish two: learning what works and learning what is appropriate. The first is instrumental learning: learning about the consequences of particular actions and the activities, postures and communicative actions likely to deliver desirable outcomes in given situations. Actors may learn instrumentally to make judgments about the expected costs

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associated with mass atrocities, taking account of the relevant intervening variables. If expected costs are thought excessive, they are likely to choose norm-compliance. The second form of learning is socialization (or social learning). This refers to learning appropriate behavior for an actor with a given identity. Socialization is typically understood as a process of inducting new members into the ways of behaving that are expected by a community.32 As more actors are socialized and internalize the principle of civilian immunity, the balance between the principle and the “anti-civilian ideologies” shifts, making it more difficult to employ the latter to justify breaches of the former and pushing perpetrators towards other justificatory strategies.

From this discussion, we can derive five basic propositions, which will guide the remainder of the article. They are:

1. Actors prefer to legitimize their behavior and will be inhibited from acting in ways that cannot be legitimized by shared norms. Shared norms constrain behavior either by making compliance habitual (embedded or internalized norms) or by influencing others to impose reputational or material costs on actors that fail to comply with shared standards of behavior, thereby altering the anticipated costs and benefits associated with mass killing.

2. To legitimize their behavior, perpetrators will typically invoke either an anti-civilian ideology to justify violating the principle of civilian immunity or will contest the facts of the case and deny they are violating the principle.

3. The process of legitimation is mediated by two sets of factors: (1) the relative weight given to civilian immunity and the anti-civilian ideologies; (2) intervening variables. These factors determine both the level of legitimation and the consequences that flow from this.

4. Judgments in individual cases have cumulative effects thanks to social learning. These cumulative effects alter the relative weight given to civilian immunity and the anti-civilian ideologies and influence the relevance of intervening variables. This is not a linear or teleological process and the weight of precedent can move either in support of, or against, the norm of civilian immunity.

5. To understand why mass killing persists in the face of the principle of civilian immunity we need to study this process of legitimation.

Using this framework, the remainder of the article examines the legitimation of mass killing in four historical periods: the long nineteenth century when civilian immunity made the jump from widely held moral principle to shared ethical norm; the period around the Second World War when fascists and communists employed industrial scale mass killing and liberal states responded in part with their own mass atrocities; the Cold War period dominated by the violent struggle between communism and capitalism; and the post-Cold War era when the focus temporarily shifted to the collective enforcement of civilian immunity, only to be replaced by its potential winding back thanks to the emergence of a new totalitarian ideology (radical Islamism) and the return of “military necessity” arguments in relation to the “War on Terror.”

III. THE LONG NINETEENTH CENTURY (1789–1939)

This section examines the legitimacy of mass atrocities from the French Revolution to the late 1930s. Although there was no formal international legal prohibition on the killing of civilians during this period, this was the period in which the moral principle of civilian immunity began to be translated into a shared ethical norm.33 While recognizing that non-state actors also employed mass atrocities, this section focuses on the legitimacy of atrocities committed by states.

During the long nineteenth century, state-based mass atrocities were justified by reference to the two anti-civilian ideologies described earlier. Typically, European powers justified the violent suppression of civilian protestors and counter-insurgency strategies that involved mass killing within Europe on necessity grounds and employed “selective extermination” arguments to justify mass atrocities in the non-European world.34 The legitimization of these justifications was shaped principally by a combination of their quality and two of the intervening variables described earlier. First, the legitimacy of the regime in question, measured in terms of its domestic and international standing and relative to other relevant actors. Second, judgments based on the known facts of the case about the extent to which mass atrocities were necessary for accomplishing the legitimate ends of that authority. The illegitimacy of killing civilians played only a secondary role, but one that grew with importance as the period unfolded and civilian immunity evolved.

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33. To borrow terminology used by Thomas, supra note 3, at 27–28.
34. As Edward Keene argues, “the world was clearly divided in two for the purposes of international and political legal order: an order promoting toleration within Europe” and one violently enforcing a concept of “civilization” outside. Edward Keene, Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics 7 (2002).
from an overlapping moral principle to a shared norm. The justification of
mass atrocities by states was supported at the beginning of the period by a
consensus that “uncivilized” non-European peoples (by dint of their race) and
irregular combatants and their civilian supporters (by dint of their decision to
wage or support an illegitimate form of warfare) did not enjoy the protections
afforded by civilian immunity.35 Thus, racist doctrines associated with the
colonists’ “civilizing mission” and conventions governing reprisals against
irregular combatants and their supporters created a permissive normative
environment that enabled and legitimized mass atrocities in these settings.

The French Revolution marked the opening of a profound transformation
of world politics away from an order founded on absolute monarchs and
empires towards a society of sovereign states constituted, nominally at least,
by the will of the their people. This transformation had a profound impact
on the legitimization of mass killing and opened the door for activists like
Henri Dunant to campaign that the moral principle of civilian immunity be
translated into a shared norm.36 The social bases of government legitimacy
began to change as authority claims based on the supposed “divine rights”
of monarchs were challenged by the increasingly popular idea that political
authority derived from the will of the people.37 This had a varied impact on
the legitimization of mass atrocities. On the one hand, the doctrine of popu-
lar sovereignty made it theoretically possible for non-state actors to justify
political violence against civilians by claiming authority derived from the will
of the people, thus expanding the number of actors who could legitimize
mass atrocities and increasing the overall threat to civilians.38 On the other
hand, in some cases where a government was unable to suppress rebellion
through the use of mass atrocities, doubt was cast on its right to rule that

35. On the denial of legal protection to uncivilized peoples see Elbridge Colby, How to
Fight Savage Tribes, 21 Am. J. Int’t. L. 279, 279–80 (1927). The idea that civilians could
be punished for the illegal acts undertaken by guerrillas was widely acknowledged. See

36. A transformation described in detail by Mladu Bukovansky, Legitimacy and Power Politics:
The American and French Revolutions in International Political Culture (2002); Christian Relis-
smi, The Moral Purpose of the State: Culture, Social Identity, and Institutional Rationality in
International Relations (1999). It is important to note that in this period “humanitarianism”
usually only extended to whites; it was certainly not universal in scope.

37. This claim was first stated in Europe by the French revolutionary government and was
resoundingly rejected by Europe’s other powers, though the United States expressed
sympathy for the French cause. This should not be surprising, as the French revolution
sits at the very beginning of the transformation. See, e.g., Bukovansky, supra note 36, at
1–10; Theda Skocpol, States and Social Revolutions: A Comparative Analysis of France, Russia,
and China (1979); Charles Tilly, Coercion, Capital, and European States, AD 990–1990 (1990);
Andreas Osiander, The States System of Europe, 1640–1990: Peacemaking and the Conditions

38. This created something of a dilemma for nineteenth century liberals who were concerned
that such violence might descend into mob rule. For a discussion see John Skorpinski,
particular territory. Sometimes, when external judgments about legitimacy and strategic interests aligned these doubts translated into punitive action against the state perpetrator, as is shown below.

Another product of emergent liberalism was the codification of the laws of war. The 1899 and 1907 Hague Conventions formalized the idea that military necessity could not be used as a justification for breaking the laws of war.\(^{39}\) In addition, through the so-called Martens principle, the Conventions insisted that non-combatants remained “under the protection” of the “laws of humanity, and the requirements of public conscience.”\(^{40}\) As a result, necessity came to be understood as both justification and constraint, a logic set out most clearly in Lincoln’s *General Orders No. 100*.\(^{41}\) While necessity could legitimize mass killing, therefore, it also imposed constraints—only killing that could be plausibly demonstrated to be necessary could be legitimized thus. This did not entirely preclude the use of necessity as a justification for mass atrocities by states because the Hague system permitted lawful reprisals (including against non-combatants) and applied only between mutually recognized belligerents.\(^{42}\) Nonetheless, these developments had three effects on the principle of necessity as a justification for mass atrocities by states. First, the threshold at which governments began to incur criticism for using mass atrocities was incrementally lowered. In other words, by the end of the period “necessity” arguments could be used to justify much less civilian destruction than they could at the beginning.\(^{43}\) Second, external criticism of mass atrocities increased, though intervening variables remained dominant in influencing decisions as to whether to punish perpetrators. Finally, by the end of the period, the relative legitimacy of the perpetrator and victim groups was an increasingly important consideration in framing judgments about the legitimacy of mass killing.

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39. It should be noted that the laws of war continued to permit reprisals against civilian populations in times of insurgency. This is discussed in greater detail below.


42. Weidenbaum, supra note 41, at 130.

In cases where the legitimacy of the government and the necessity of using mass atrocities were accepted, governments typically avoided international opprobrium. Thus, despite being at war with Napoleon, Britain recognized France’s right to kill Spanish civilians in reprisal for guerrilla attacks on the French army. Britain and other European powers welcomed the violent suppression of the 1848 insurrection in Paris by the Republican government, which involved the summary execution of 2,000 to 3,000 civilians, and Germany supported Britain’s use of concentration camps during the Boer War. General Sherman’s use of “total war” tactics directed against the South’s civilian population during the US Civil War also attracted little international criticism, and was actually applauded by Prussia. Sometimes, the perception that violence against civilians exceeded a level necessary for the actor to achieve its legitimate purpose resulted in criticism. This was notable in the case of the fall of the Paris Commune in 1871, where the summary execution of 20–25,000 civilians by the French government drew sharp criticism from both Britain and Germany, forcing the government to adopt a more conciliatory line, and in the case of European responses to the use of reprisals against French civilians by Prussian forces during the Franco-Prussian war which grew steadily more critical the longer they persisted. In these cases, it was not the killing of civilians per se that was faulted, but their excessive killing. This was taken to new heights by the Armenian genocide in 1915. The killing of between 800,000 and 1.2 million Armenians by the Turks in 1915 was resoundingly condemned from almost every quarter of international society between 1915 and 1920—the only notable exception was Turkey’s German ally, but not even Germany excused the killing. And although its right to govern Armenia was uncontested in 1915, the genocide helped build an international consensus against Turkish rule there.

Increasingly conditioned by the idea of popular sovereignty, judgments about a government’s entitlement to govern a particular territory also framed normative assessments about the degree of violence that could be justified

by reference to necessity. The clearest example of this comes from comparing French and Austrian experiences in 1848. Although the Habsburg crackdown on Hungarian nationalists in 1848 was somewhat less bloody and indiscriminate than the French crackdown in the same year, it attracted higher levels of international concern and criticism primarily because its right to govern its multinational empire was more in doubt than the French government’s right to govern its national state.\textsuperscript{49}

As I intimated earlier, this normative order applied only to the “European” world. The treatment of non-European colonized peoples was judged according to a different, and much more lenient, set of conditions governed by the doctrine of the civilizing mission and ideology of selective extermination. Between 1789 and the Second World War, Western states waged almost perpetual war outside Europe, much of it against civilians. Fifty-eight full-scale wars were waged outside Europe between 1807 and 1912 and force was used to suppress risings on many more occasions.\textsuperscript{50} Atrocities were used by the British to suppress opponents in southern Rhodesia, Uganda and India;\textsuperscript{51} by Leopold and the Belgians (1880–1907) to govern their factory-colony in the Congo, claiming up to 2 million lives; the Germans in Southwest Africa (1904), virtually exterminating the Herero; the Italians in Abyssinia (1935–1939) where some 250,000 Ethiopians were killed, many in summary mass killings and gas attacks;\textsuperscript{52} by the Dutch in Java;\textsuperscript{53} by the US in the Philippines (1899–1902) at the cost of some 200,000 lives;\textsuperscript{54} and in German East Africa (Tanzania).\textsuperscript{55} As noted earlier, this killing was justified on the basis of an ideology of selective extermination which held that

\textsuperscript{49} The US, for instance, dispatched a diplomatic mission to persuade the Austrians to end their oppression. See Arthur James May, \textit{Contemporary American Opinion of the Mid-Century Revolutions in Central Europe} 54 (1927).

\textsuperscript{50} Sandra Halperin, \textit{War and Social Change in Modern Europe: The Great Transformation Revisited} 6–7 (2003).


\textsuperscript{52} The Italian colonial minister imagined an “Ethiopia without Ethiopians.” Enzo Traverso, \textit{Origins of Nazi Violence} 67 (Janet Lloyd trans., 1996). Graziani, the Italian viceroy in Ethiopia, adopted a policy of mass executions and deliberately gassed non-combatants in order to terrorize the population into submission. See Angelo Del Boca, \textit{The Ethiopian War 1935–1941}, at 214 (P.D. Cummins trans., 1965).

\textsuperscript{53} The Dutch used mass executions, reprisals, forced starvation and ‘scorched earth’ to retain control in Java. See Michael Adas, \textit{Prophets of Rebellion: Millenarian Protest Movements Against the European Colonial Order} 174–80 (1979).

\textsuperscript{54} For the most detailed account see Stuart Creighton Miller, “Benevolent Assimilation”: \textit{The American Conquest of the Philippines}, 1899–1903 (1982).

\textsuperscript{55} During a tribal revolt in East Africa, German Captain Hassel gave orders for everyone suspected of disloyalty to be hanged from trees, Thomas Pakenham, \textit{The Scramble for Africa}, 1876–1912, at 620 (1997). In 1899, the German authorities near Kilimanjaro killed 2,000 Africans who refused to pay a “hut tax.” Hans Wagner, \textit{Falsche Propheten: Gouverneur von Liebert und seine Presse} (1900).
the norms of conduct between civilized peoples simply did not apply to relations with the “uncivilized.” Colonial atrocities were not often criticized by European governments, though they did attract the ire of some liberals and socialists. One notable exception was Leopold’s massive abuse of the Congolese in the late nineteenth century, which (eventually) drew sharp criticism and diplomatic pressure from Britain, and later from France and Germany, which forced Belgium to assume responsibility for the colony. The legitimacy of the regime played a key role as well, however, and it is important that in this one case where mass killing produced international punishment of a colonial ruler, the abuse was committed under the authority of a private individual (Leopold II) rather than a European state.

IV. THE AGE OF TOTALITARIANISM

The totalitarian governments that emerged in the early Twentieth Century built on this colonial legacy and typically justified mass killing by reference to ideologies of selective extermination, which removed entire nations, races or socioeconomic classes from the basic moral and legal protections afforded to humans during this period. The genocide and mass atrocities unleashed by Stalin’s Soviet Union and Hitler’s Germany attempted to remold societies by annihilating class and racial enemies. Japanese militarism justified mass killing by reference to the idea that non-Japanese people were inferior and could not therefore claim moral or legal protection. All three of these forms of totalitarianism justified the mass killing of civilians by reference to the rationale of selective extermination that underpinned the legitimation of mass killing in the non-European colonies that preceded them. Totalitarian states developed this rationale into comprehensive ideologies that permitted or required the extermination of entire social groups in order to mold new ways of life. These ideologies of selective extermination appealed only to the perpetrator’s own community and ideological sympathizers.

60. The clear links between colonial and Nazi ideology are set out in Enzo Traverso, supra note 52.
In other words, each had its own closed moral system that did not appeal to or require external validation. This also removed the limits imposed by the other anti-civilian ideology, necessity, meaning that neither necessity nor civilian immunity provided any constraint to totalitarian mass killing. However, although a perpetrator was able to legitimize mass killing within its own community, the closed nature of these ideologies limited the extent to which mass killing could be legitimized outside that community, with the result that each received widespread condemnation and opposition from those outside the perpetrators’ own community. Thus, although the colonial doctrine from which Nazism and Japanese nationalism especially drew from was widely held, very few actors outside the totalitarian’s own political or ideological community validated their justifications. Indeed, even some governments within the Axis orbit refused to cooperate with Hitler’s extermination of the Jews partly on moral grounds. For their part, liberal governments criticized and waged war at some point against all three of the major totalitarians, though in the 1930s and 1940s they set aside their qualms about Stalinism in order to unite against the fascists.

The normative picture is made more complex, however, by the fact that whilst condemning totalitarian mass killing as uncivilized and barbaric, the Western allies themselves adopted a strategy of intentional mass killing, in the form of the area bombing of German and Japanese cities in the Second World War. In his dissenting opinion at the Tokyo war crimes trial, Justice Pal argued that the clearest case of direct orders to commit “indiscriminate murder” might be found in “the decision coming from the allied powers to use the atom bomb.” A. C. Grayling recently put forth a similar view, describing Britain’s bombing of German cities a “moral crime” according to the standards enumerated by the allies to prosecute German and Japanese war criminals. There are still those, however, who believe that the bombing was “perfectly justified” or merely a consequence of the inevitable breakdown of the distinction between combatant and non-combatant in total war.

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62. Hitler was only able to transport Italian Jews to the death camps after Germany seized control of Italy, had to remove the Hungarian government by force in 1944 to achieve his ambitions.

63. As Richard Overy cogently put it, “the most striking moral paradox of the war years was the willingness of ostensibly liberal states to engage in the deliberate killing of hundreds of thousands of enemy civilians from the air.” Richard Overy, Why the Allies Won 296 (1995).


66. The strategy was “perfectly justified” according to Robin Neillands, Facts and Myths about Bomber Harris, 146 RUSI J. 69 (2001). The idea that the combatant/non-combatant distinction breaks down in total war is put forward by Melden E. Smith, Jr., The Strategic Bombing Debate: The Second World War and Vietnam, 12 J. Contemp. Hist. 175, 184 (1977).
Between 300,000 to 600,000 German non-combatants and over 200,000 Japanese non-combatants were killed by allied bombing during the Second World War.\(^{67}\) The strategies of the Royal Air Force (RAF) and US Army Air Corps (USAAF) in the European and Pacific theatres respectively followed a similar trajectory.\(^ {68}\) At the outset of the war, both committed themselves to precision raids against military targets. A combination of inaccuracy, poor weather, high casualty rates, and strategic preferences persuaded the RAF (over Germany) and USAAF (over Japan) to adopt strategies of area bombing aimed at “de-housing” workers by creating huge firestorms in residential areas.

For our purposes, there are two critically important aspects of the terror bombing experience. First, whilst politicians and publics worried about its legitimacy and some lobbied for international prohibition, among strategists a consensus emerged that held area bombing to be the most effective means of utilizing strategic air power and morally preferable to the protracted slaughter of trench warfare. This consensus persisted well into the Cold War and informed strategic arguments in favor of area bombing and nuclear deterrence.\(^ {69}\) Second, despite this, neither the British nor American government publicly justified the deliberate bombing of civilians, primarily because they believed that it could not be legitimized and that this failure would undermine support for the war. Instead, both governments disputed the facts of the case, arguing that civilian casualties were the *unintended* consequence of attacks on military and industrial targets.\(^ {70}\) Although they made use of widespread and systematic use of intentional attacks on civilians, allied governments believed that a combination of necessity and rightful authority alone were not enough to substantiate a case for legitimizing their actions. Political figures in Britain and the US believed that their domestic constituencies would not support arguments openly justifying the deliberate targeting of civilians.\(^ {71}\)

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\(^{68}\) It is important to note that in the European theatre, the USAAF remained committed to precision bombing though in practice the inaccuracy of targeting meant that the US Airforce also rained bombs down on German cities. The US participated in the infamous attack on Dresden, for instance. For the purposes of this discussion, however, I will limit my comments to considering the RAF in Europe and the USAAF in Japan.

\(^{69}\) This consensus persisted well after the Second World War. See Ward Thomas, *Victory by Duress: Civilian Infrastructure as a Target in Air Campaigns*, 15 Sec. Stud. 1 (2006).


people in allied countries were prepared to accept terror bombing, at least partly because they were misled about the real nature of the campaigns. Once the war was over, however, public support for the air campaigns dwindled as the intent behind them became clearer.\textsuperscript{72} Although largely nascent during the war itself, throughout these debates it is possible to discern an emerging belief, vocalized by critics of the bombing, that states were not entitled to use deliberately kill civilians even if they believed it necessary to accomplish their justifiable ends. Such arguments, however, were confronted by the gravity of the threat and the apparent utility of terror bombing. Nonetheless, liberal states could not condemn others for intentionally killing civilians while simultaneously committing the same types of acts without creating profound contradictions. To avoid this, allied governments carefully maintained the moral distinction between wanton genocide and (unintended) \textit{collateral} damage in their public discourse though not in their actual behavior.

This duplicity suggests that liberal governments recognized that the deliberate killing of civilians could not be legitimized by reference to anti-civilian ideologies because of the normative strength of civilian immunity within liberal societies. These considerations also point towards the emergence of a paradox in liberal thinking on the issue: on the one hand, a belief in the necessity of terror bombing for defeating great evil and, on the other, a commitment to human rights and civilian immunity.\textsuperscript{73} This paradox helped to shape debates about aerial bombing and other forms of mass killing in the second half of the twentieth century. In the wake of the Second World War, the putative success of allied bombing created a strategic rationale for disregarding the principle of civilian immunity in future defense planning. On the other hand, however, Axis war crimes (and the Holocaust especially) created a powerful impetus for strengthening the protections of civilians. As one historian notes, “the killing of innocent civilians would become the international epitome of evil and symbolize the cruelty of an enemy that the Allies had sacrificed so much to defeat.”\textsuperscript{74} Throughout the next forty years, ever-greater progress was made towards the institutionalization of civilian immunity, yet the West in particular would be recurrently confronted with the tactical potential of killing civilians.

\textsuperscript{72} Michael Walzer, \textit{Just and Unjust Wars: A Philosophical Argument with Historical Illustrations} 325 (1977); Lewis Mumford, \textit{Atom Bomb}, 2 \textit{Air Aff.} 326 (1948); Abraham John Muste, \textit{Not by Might: Christianity, the Way to Human Decency} 5–17 (1947).

\textsuperscript{73} Described as the “annihilation-restraint paradox” by Colin Krah. See Colin H. Krah, \textit{In the Crossfire or Crosshairs? Norms, Civilian Casualties and US Conduct in Iraq}, 32 \textit{Int’l Sec.} 7 (2007).

\textsuperscript{74} Conway-Lanz, \textit{supra} note 13, at 15.
V. THE COLD WAR

The immediate post-Second World War period saw the establishment of legal rules designed to protect civilians and reduce the likelihood of future genocides. While both major parties of the emerging Cold War divide committed themselves to these standards, there remained important countervailing concerns relating to strategic necessity that mitigated against compliance with the new rules. Within this context, the emerging normative consensus on civilian immunity sat uneasily with the prevailing belief in both blocs that governments must do whatever necessary to protect themselves from their ideological enemies. Although, with the fall of Stalin, the Soviet Union backed away from the use of atrocities to effect domestic social transformation, it continued to deliberately kill civilians when challenged overseas, as in Hungary in 1956 and Afghanistan after 1979. Moreover, Communist regimes in China and Cambodia especially (but also Vietnam and Ethiopia) adopted strategies similar in form—and effect—to Stalin’s selective extermination strategy of the 1930s, maintaining much as Stalin had done, that, whether by dint of their identity, social status or the political activities of some of its members, entire groups constituted a threat to the people and placed themselves outside the protections afforded to civilians.75

For the West and its allies, two sets of norms—the principles of civilian immunity and necessity—were in perpetual tension with one another. Very few actors in the West were prepared to reject humanitarian principles out of hand, but neither were they prepared to forgo the perceived utility associated with the deliberate killing of civilians in certain circumstances. As a result, atrocities were used or condoned in many different settings. The protagonists and their allies used deliberate attacks on the civilian population as a strategy of war. Most notably, in the Korean War (1950-1953) the US and its allies deliberately bombed North Korean cities and killed civilian refugees.76 Similar tactics were later adopted in Indochina, especially in Cambodia and Laos.77 Western governments also tolerated, and sometimes endorsed and aided, atrocities committed by governments against their own citizens, usually in counter-insurgency warfare. The US actively supported the governments in El Salvador and Guatemala as they used civilian devastation as a strategy for defeating communist insurgents,

75. See ValenTino, Final soluTions, supra note 8, at ch. 4.
at the cost of somewhere between 100,000 and 260,000 civilian lives. It also tolerated and cooperated with the rightist governments in Argentina and Chile as they suppressed communist movements by killing, torturing and kidnapping civilians, killing between 14,000–30,000 civilians. In addition, the West tolerated the killing of up to 600,000 civilians suspected of being communist by the Indonesian military and various military-backed groups in 1965–1966. Finally, the West failed to seriously criticize the killing of some two million civilians by the Communist Khmer Rouge in Cambodia because although the Khmer Rouge were communist, they were viewed as a useful bulwark against the regional hegemony of communist Vietnam. After the Khmer Rouge was ousted from power by Vietnam, the US and UK provided political and military support to them.

The fact that atrocities were so widely used and condoned by the West does not mean that the new humanitarian rules were an irrelevance. In none of the cases recounted above were the perpetrators able to secure a high degree of legitimacy for their actions, and in each case mass killing attracted criticism. Indeed, the Cold War protagonists often invoked the principle of civilian immunity in a self-serving fashion to denounce their opponents. In addition, continuing the pattern set by the allies during the Second World War, the non-communist perpetrators refrained from justifying the killing of civilians and instead focused on disputing the facts of the case in order to claim that their behavior was consistent with the norm. Perpetrators typically argued that civilians were killed unintentionally and that their deaths were the unfortunate by-products of necessary attacks on legitimate military targets. When facing communist insurgencies that made discriminating between soldiers and civilians difficult, they employed various techniques (issuing warnings, removing populations, declaring “free fire zones” or “red zones”) to collapse the distinction allowing them to maintain that everyone in a given area at a particular time could be classified as a combatant and therefore be legitimately killed in a fashion consistent with civilian immunity. Another common tactic was simply to deny that atrocities had occurred. The various strategies used to achieve these effects included collapsing the distinction between non-combatants and combatants by establishing “free fire/red zones” and issuing warnings, subcontracting the killing out to non-state actors, misleading the public and sometimes even legislators about the nature and even the location of armed attacks, creating convoluted rules of engagement and targeting procedures, blaming “rogue elements” for the killing and issuing token punishments, questioning the reliability of reports

by organizations such as the UN and OAS, rejecting reported massacres as communist propaganda, and blaming the communists for civilian deaths.\textsuperscript{80}

For example, during the Korean and Indochinese Wars, political and military leaders took a number of steps to accommodate the norm and create the \textit{appearance} of compliance with it, but were prepared to tolerate the killing of large numbers of civilians if necessary. In these cases, concern about civilian casualties played a limited role in the key decision-making moments. Where necessity seemed to dictate the killing of civilians, this was generally privileged over compliance with civilian immunity. In practice, therefore, there were often only limited efforts to avoid the killing of civilians, especially in Korea, Cambodia and Laos. Where restraints were introduced these were primarily intended to avoid domestic and international opprobrium and secure external legitimacy and was not habitual behavior consistent with an embedded norm. Thus, American decision-makers and strategists took greater care to avoid civilian casualties in Vietnam than in North Korea or Cambodia not because they were themselves convinced by the triumph of civilian immunity over military necessity but because domestic, international and world societies were starting to exhibit greater sensitivity to the protection of civilians—to the extent that judgments about the legitimacy of wars conducted by states were, for the first time, guided primarily by judgments about compliance with the norm of civilian immunity.\textsuperscript{81} This factor was more of an issue in Vietnam than in Korea or Cambodia because the international media attention shined a spotlight on civilian casualties there in sharp contrast to the very limited reporting of such casualties in the other two cases. The steady spread of global communications made denial less plausible as the Cold War progressed, increasing the legitimacy costs associated with the commission of atrocities.\textsuperscript{82} Thus the reporting of civilian deaths in Vietnam created serious legitimacy problems and forced US leaders to pay more attention to civilian immunity but because the norm was not internalized, they continued to employ justificatory strategies (such as collapsing the civilian-soldier distinction in free fire zones) that subverted the norm’s intention. The role of information dissemination can be seen by comparing contemporaneous aerial strategies over North Vietnam which was relatively well covered by the world’s media, making denial implausible


\textsuperscript{81.} American diplomats expended significant energy reassuring European governments about the direction of the air war. \textit{Kim McCord, The Anxious Years: America in the Vietnam-Watergate Era} 72 (1989). \textit{See also Levy, supra} note 77, at 400.

and forcing the US to discriminate between military and civilian targets, and aerial strategy over Laos and Cambodia, which were much less well covered by the media, more susceptible to plausible denial, and therefore open to largely indiscriminate bombardment.83

When perpetrators adopt a strategy of denial and argue that their behavior is consistent with the norm rather than invoking an anti-civilian ideology to override the norm, the intervening variables play a significant role in determining legitimation and the costs associated with illegitimacy. As such, the availability of accurate and timely information, the relative legitimacy of relevant actors, and the presence of countervailing policy concerns often coalesced to ensure that simple denial and obfuscation about the facts protected the perpetrator from perceived illegitimacy and punishment. Of these, the supply of information was particularly crucial. Where it was anticipated that attacks on civilians would be widely reported, potential perpetrators were inhibited from proceeding and encouraged to impose restraints on their behavior. But where it was expected that the flow of information could be controlled, civilian immunity imposed few constraints. In some cases, most notably Guatemala and El Salvador, the gradual accumulation of information brought pressure to bear over time on the perpetrators and their supporters.

In stark contrast to the Western experience during the Cold War, there is little evidence to suggest that the communist world confronted a tension between fidelity to civilian immunity and the belief that it might be sometimes necessary to deliberately kill civilians. Between 1945 and 1989, communist regimes massacred literally millions of civilians. A conservative estimate puts the total number of civilians deliberately killed by communists after the Second World War between 6.7 million and 15.5 million people, with the true figure probably much higher. Communist governments in China and Cambodia embarked on programs of radical social transformation and killed, tortured or allowed to starve whole groups that were thought hostile to change or simply unworthy of life. In the Soviet Union, Albania, North Korea, East Germany, Romania, Bulgaria, Ethiopia, Vietnam, Yugoslavia and China, communist governments used sometimes massive levels of indiscriminate violence against civilians to deter and defeat actual and imagined opponents and/or exact revenge for the Second World War. Where communist governments were violently challenged, they exhibited little concern for civilian immunity, as evidenced by the Soviet assaults on Hungary and Afghanistan and North Korea’s conduct in the Korean War. Finally, communism spawned violent non-state actors, such as the Red Brigades and Bader-Meinhoffer gang in Europe, Shining Path in Peru, and FARC in Colombia, all of which deliberately targeted non-combatants.

83. See Shawcross, supra note 77.
But it is not simply the number of victims that distinguishes communist from non-communist mass killing in the Cold War—though that in itself is important to acknowledge. The most important difference for our purposes lies in the fact that amongst the perpetrators and their supporters there was very little recognition that the deliberate extermination of large numbers of civilians might be morally problematic, let alone prohibited. Where there was criticism of this litany of mass murder, it almost always came from outside the communist world.\textsuperscript{84} The principal reason for the failure of civilian immunity to moderate the behavior of communist governments during the Cold War was the persistence and spread of communism’s ideology of selective extermination, and its general acceptance within the communist world as a legitimator of mass killing. As I argued earlier, this “anti-civilian ideology” identifies whole groups as being outside the protection of non-combatant immunity and therefore liable for legitimate extermination. The basic communist variant of this ideology was first developed and applied by Stalin and held that certain socioeconomic or national groups or political attitudes were anti-communist and that group members were “enemies of the people” who could be legitimately destroyed. Although each of the communist regimes that massacred large numbers of civilians during the Cold War developed their own distinctive account of selective extermination, they all shared the basic idea that their targets—identified as whole groups—had by their identity, actions, or thoughts, placed themselves outside legal or moral protection.\textsuperscript{85} Thus, in contrast to most Western or anti-communist perpetrators of mass atrocities during the Cold War, communist perpetrators tended to argue that their victims were “criminals” or “enemies of the people” and therefore beyond the protection of civilian immunity. These regimes devoted little energy to satisfying civilian immunity’s justificatory requirements. In some such cases, the justifications they offered were pure farce. Most notable, perhaps, was the Khmer Rouge submission to the UN Commission on Human Rights which claimed that most employees of the

\textsuperscript{84} One notable exception being Vietnamese criticism of the Khmer Rouge, but this was only stepped up immediately prior to and after Vietnam’s 1978 invasion of Cambodia. Despite good knowledge of Khmer Rouge atrocities, between 1975 to 1977, Vietnam tended to defend the Khmer Rouge regime. This is discussed in greater detail below.

pre-communist government “support the regime” and “are also pleased to have participated in the construction of the new society.”

By the time this document was submitted (June 1978), most employees of the former government were already dead.

As I argued earlier, selective extermination arguments cannot be legitimized outside the political community in which they operate and are therefore dependent on a combination of exogenous factors (such as the material power of their hosts, intervening variables etc.) for their survival. As a result, towards the end of the Cold War period—when the crumbling of communist power made regimes more vulnerable to, or reliant on, influences outside the communist world—some (though not all) communist regimes shifted from outwardly espousing selective extermination to strategies of denial similar to those utilized by the West. For example, to justify brutal reprisals against Afghan civilians, the Soviet Union collapsed the distinction between combatants and civilians in much the same way as the US had done in relation to Indochina. Likewise, in 1989 China simply denied that its forces had massacred students on Tiananmen Square as reported in the Western media. This was quite true—few, if any, students died on the square, but hundreds of protesters were killed in its environs, especially at Muxidi. Neither proved successful, largely because their implausibility was exposed by the dissemination of accurate information. The Soviet war in Afghanistan drew annual criticism from the UN General Assembly, its atrocities were exposed and criticized by the UN Human Rights Commission’s Special Rapporteur, and its mujahedeen opponents secured significant foreign aid from the US and the Muslim world. Chinese denials were rebutted by evidence provided by the global media and the communist regime was punished by US, European, and Japanese sanctions. Since the end of the Cold War the remaining communist regimes have been no more likely to commit mass atrocities than non-communists, suggesting that the demise


88. Richard Baum, Burying Mao: Chinese Politics in the Age of Deng Xiaoping 292 (1994). This line of argument was given succor by the publication of accounts that claimed that students were gunned down in the square. One account even goes as far as to argue that certain groups of students elected to say on the square and were summarily killed. There is no evidence at all to support this account, and the basing condemnation of China on the claim that students were massacred in the square only assists the Chinese government. For one such example, see James C. F. Wang, Contemporary Chinese Politics: An Introduction 30–31 (2002).

of the communist bloc took with it their ideology of selective extermination
and left their denial strategies just as exposed as the West’s by the prolifera-
tion of global media and reporting.

VI. AFTER THE COLD WAR

The end of European imperialism brought an end to the colonial doctrine
of selective extermination. The defeat of Germany and Japan in the Second
World War closed the book on fascist selective extermination. The end of the
Cold War helped persuade the world’s remaining communist governments
to shift away from the communist doctrine of selective extermination first
developed and practiced by Stalin. In the immediate post-Cold War period
one might have been forgiven for thinking that civilian immunity had finally
triumphed over the major doctrines of selective extermination. While new
episodes of mass killing continued to emerge, there was little question of
these cases avoiding international opprobrium as so many had done during
the Cold War. Debates now turned on the questions about the facts of the
case and what measures international society should adopt to halt the kill-
ing, protect the victims, and punish the perpetrators.90 Nor were strategies
of denial successful. Although Rwandan genocidaires, Bosnian Serbs, and
the government of Sudan were able to avoid international intervention to
some extent by presenting the killing as part of complex tribal or civil wars
in which all sides were culpable, this was a product more of international
uncertainty about the most prudent courses of action, the lack of will to
commit troops and resources, and disagreement about the relative weight
of human rights and sovereignty norms, and not of doubts about whether
the perpetrators were in fact deliberately killing civilians or the legitimacy of
this.91 Even governments that opposed intervention generally recognized and
criticized the intentional killing of civilians. After a number of false starts,
international efforts gradually improved, testified by the steady reduction of
both the number of new cases of mass killing and the average lethality of
those cases, and the concomitant increase in the number of international
missions dispatched to protect civilians.92 In short, continuing the trends
evident towards the end of the Cold War, the 1990s seemed to suggest that
civilian immunity had triumphed over the anti-civilian ideologies and that

90. It is especially the question of humanitarian intervention. See Wheeler, supra note 6.
91. See Michael Barnett, EYwITNESS TO A GenocIDe: THE UNIdTED NATIONs AND RWAndA (2003); James
Gow, Triumph of THE LACK OF WILL: InternatioNal DIPLOMacy AND THE Yugoslav WAr (1997); The
INterNatioNal poLities oF Mass AtroCiTies: THE CaSe oF Darfur (David R. Black & Paul D.
Williams eds., 2010).
92. Erik Merlander, Magnus Oberg & Jonathan Hall, Are “New Wars” More Atrocious?
Battle Severity, Civilians Killed and Forced Migration Before and After the End of the
Cold War, 15 EUR. J. IN’L RELATIONS 505 (2009).
at least two important intervening variables were now working in its favor: the dissemination of information made it easier to detect mass killing and the end of global strategic rivalry reduced the number and seriousness of countervailing policy concerns that had formerly reduced the degree to which civilian immunity was prioritized.

But it would have been premature to believe that no new doctrines of selective extermination would emerge to challenge civilian immunity. Indeed, one such doctrine—embedded in radical Islamism—was thriving in several parts of the world and was thrust to the fore of world politics on 11 September 2001.93 At its most basic, the doctrine holds that civilian immunity does not apply to non-believers or apostates (Muslims who do not follow the radicals’ interpretation of Islamic law) and that people in both groups may be legitimately killed either as collective punishment for perceived wrongs inflicted on the Muslim world or as a necessary part of war to establish the world Islamic state (caliphate). Like all such doctrines, the radical Islamist variant appeals only to members of a specific group, (mainly Sunni Muslims) and is therefore limited in the degree of global support it can plausibly hope to secure. The doctrine is hotly disputed within Islam itself. It is this relative lack of support, rather than any limitations on violence contained within the doctrine itself that explains why radical Islamism has thus far killed so many fewer people than colonialism, fascism and communism.

Developing the ideas presented by earlier radical Islamist writers (principally Mamduni, Faraj, al-Banna and Qutb), Al Qaeda declared a global jihad against the West, secular Muslim leaders, and others it considered to be apostate, whose ultimate aim is to establish the (ill-defined) Islamic state (caliphate).94 This jihad has principally targeted civilians. To justify this, Osama bin Laden, issued a fatwa making it a religious duty for Muslims to kill Americans and their allies, including civilians. This, in turn, was justified by a variety of arguments (e.g. the imposition of Islamic law by any means possible was God’s will, the intractable conflict between the dar al-Islam and dar al-Harb, the impossibility of coexistence, collective Western guilt for the oppression of Muslims and occupation of Muslim lands, the unlimited nature of jihad that together comprised a doctrine of selective extermination containing all the main ingredients exhibited by earlier fascist, communist and imperial doctrines.95

As with earlier doctrines of selective extermination, Al Qaeda’s arguments have little appeal for those outside the “in group.” It is not surprising therefore that they have been repeatedly and comprehensively denounced

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94. This chain of influence is noted by John Kelsay, Arguing the Just War in Islam 96 (2007).
and subjected to severe international punishment, including the use of force.96 Within the Muslim world, however, Al Qaeda has proven more divisive. Whilst governments and religious leaders have tended to either condemn the organization or fault its religious reasoning, Al Qaeda has enjoyed a degree of popular support, particularly among disaffected youths in the Middle East, Pakistan, Iraq, Afghanistan and the West.97 This has proven sufficient to enable periodic terrorist attacks in the West and much more frequent attacks in Pakistan, as well as the insurgency in Afghanistan (which, admittedly, owes more to local factors), but insufficient to propel Islamic insurrections against established governments in the Muslim world (Arab Spring revolts were not Islamist in nature). As such, to date, the case of Al Qaeda provides “counterfactual validity” to the norm of civilian immunity and the claim that with the ending of the Cold War and communist China’s retreat from selective extermination, the norm is no longer seriously challenged by such doctrines. Although new doctrines may emerge, they are less likely to secure sufficient legitimacy for episodes of massive killing.

But Al Qaeda and its doctrine of selective extermination is not the only challenge to civilian immunity to emerge from 9/11. Waging a war on Al Qaeda and its allies raises a set of particular dilemmas. Most notably, Al Qaeda operates in clandestine cells and its terrorists are indistinguishable from civilians most of the time. In Afghanistan, Pakistan, Iraq, and elsewhere Al Qaeda operatives, their allies and supporters concealed themselves

96. Beginning in 1999, the UN Security has unanimously passed several resolutions and presidential statements, condemning Al Qaeda, commending the use of force against it, and demanding that states cooperate in the fight against it. This consensus even survived the controversy over the US-led war in Iraq. As Boulden argued:

The level of Council activity is significant, and has expanded across the issue area. All of this has occurred with a remarkable degree of consensus within the Council even while the drama of the divisive debate about Iraq and its aftermath has been carried out. The sustained unanimity that the Council has demonstrated on this issue speaks to the shared sense of threat that extends to all members of the Council, not just the Permanent Five.


97. It is difficult to know the precise level of support that Al Qaeda’s arguments have elicited in the Muslim world. One 2006 study points to a “recent survey” showing that “as much as 60 per cent of the population in some Arab countries” declared support for Osama Bin Laden—though without indicating which countries, when the survey was taken, or what questions were asked. More concretely, in November 2003 more than half of Saudis polled indicated support for Bin Laden’s message. There is also circumstantial evidence for the view that Al Qaeda secured significant support in the Muslim world. The radical Islamist message evidently garnered support among young Muslims, especially in the Middle East, Pakistan, and Afghanistan and some disaffected Muslims living in the West. It is also reported that in Nigeria, 70 percent of boys born in the months after 9/11 were named “Osama”—though this finding is contradicted by other polls showing that over 70 percent of Nigerians support US counter-terrorism policies. See Abdel Bari Atwan, The Secret History of Al Qaeda 40, 59 (2006); Leonard Weinberg, Democracy and Terrorism, in The Roots of Terrorism 45, 52 (Louise Richardson ed., 2006).
within the civilian population in an attempt to manipulate the moral and legal restraints observed by their enemies to further their cause.\textsuperscript{98} In these circumstances the tension between humanitarianism and necessity, evident in Western debates about the conduct of armed conflict during the Cold War, returned to the fore. The reasoning went thus: military targets are not easily identified; threats can emerge rapidly from ostensibly civilian sources. There are a large number of “dual use” technologies, actors, and buildings: box cutters can be harmless civilian tools or a critical piece of technology in turning a civilian aircraft into a weapon. In this environment it is much harder to distinguish combatant from non-combatant and the potential costs of failing to destroy combatants are high. In these conditions there is a strong temptation to place the protection of military forces and potential victims of future terrorism ahead of concerns for enemy non-combatants and to interpret the rules liberally to gain tactical advantage.\textsuperscript{99}

The Bush administration adopted a series of strategies (aerial bombardment, torture of suspects, and some less than discriminate counter-insurgency actions such as the 2004 assaults on Fallujah) that prioritized perceived necessity over the protection of civilians. To justify this, it pointed to the gravity and uniqueness of the threat facing the US and its allies. It also laid the blame for civilian casualties squarely at the feet of Al Qaeda. According to US Secretary of Defense, Donald Rumsfeld, “we did not start this war. So understand, responsibility for every single casualty in this war, whether they’re innocent Afghans or innocent Americans, rests at the feet of Al-Qaeda and the Taliban.”\textsuperscript{100} I am certainly not arguing here that there is moral equivalence between these actions and Al Qaeda atrocities but even some War on Terror advocates concede that some of the strategies employed “skirt the edges” of law and restraint.\textsuperscript{101} Combined with the perceived illegitimacy of the 2003

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\textsuperscript{101.} A point made, and justified by reference to the unique pressures of combating terrorism, by Jean Bethke Elshtain, \textit{Terrorism, in The Price of Peace: Just War in the Twenty-First Century} 118, 135 (Charles Reed & David Ryall eds., 2007).
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invasion of Iraq, the illegitimacy of some aspects of the way in which the War on Terror has been prosecuted helped strengthen hostility to the US.102

By potentially weakening civilian immunity, these strategies helped Al Qaeda to legitimize its own doctrine by softening the grounds upon which it is condemned and contributing to anti-Americanism.103 The commission and validation of either Al Qaeda terrorism or US-led behaviors that are not wholly consistent with civilian immunity, makes it easier to commit and validate the other by weakening the principal normative inhibitor of both—the norm of civilian immunity. More troubling though, they demonstrate the frailty of non-combatant immunity as a restraint on human behavior and threaten to unravel decades of steady—if tortuous—progress towards a world society that unambiguously forbids mass atrocities.

VII. CONCLUSION

While there is a long-established overlapping moral consensus, which crystallized into a legal norm after the Second World War that prohibits the deliberate killing of civilians, not only has this practice persisted, but perpetrators have sometimes avoided punishment. The underlying reason for this is that legitimation is a social process. In the long-run, the norm of civilian immunity has been engaged in two major contests—one direct and the other less so. The first was a contest between this norm and two competing sets of norms, or “anti-civilian ideologies,” military necessity and selective extermination. During the long nineteenth century, the principle of necessity, which initially enabled the killing of civilians especially as reprisals during counter-insurgencies, came to be associated with restraint as much as license, leading states to base legitimacy judgments on the extent to which they believed that killing of civilians to be “necessary.” What could be justified by reference to necessity reduced over time to the point where the use of reprisals by Germany in 1914 Belgium was widely condemned and provided a key component of the case for US intervention in World War I. Although necessity continued to influence political and military decision-making well

102. According to the Pew Global Attitudes Project, the percentage of people with a favorable view of the US in mainly Muslim Turkey fell from 52 percent in 2000 to 30 percent in 2004. In Morocco it fell from 77 percent to 27 percent, in Pakistan from 23 percent to 21 percent, and in Jordan from 25 percent in 2002 to 5 percent. Although the Iraq invasion played a role in this, evidence suggests that it was US conduct as much as the invasion itself that triggered negative responses. For example, in July 2003, only 30 percent of Iraqis favored the near-term withdrawal of coalition forces. By January 2005, after the Abu Ghraib scandal, that figure had jumped to 82 percent of Iraqis.

103. See Michael S. Stohl, Counterterrorism and Repression, in THE ROOT CAUSES OF TERRORISM 57, 67 (Louise Richardson ed., 2006) (referring specifically to the propaganda value of the Abu Ghraib prisoner abuses for Al Qaeda).
into the Cold War, it ceased to be part of the justificatory armor after 1914. In short, after 1914, military necessity was no longer seen as a legitimate excuse for killing civilians. It is therefore notable that necessity was not used to justify Allied aerial bombardment in the Second World War. Selective extermination has a longer, and altogether bloodier, history. Its modern roots lay in the colonial idea that the rules governing conduct between civilized people did not apply to the non-European world. This basic idea—that the rules do not apply to certain groups—was used by fascists and communists, and is used today by some Islamists—to justify the killing of civilians and extermination of entire groups. The weakness of this ideology, though, rests in its particularism. By dividing the world into hierarchically organized groups, selective extermination cannot legitimize mass killing beyond the in-group (e.g., Europeans, Aryans, Japanese, workers/peasants, Sunni Muslims who follow Shari’a). The colonial version died with empire, the fascist version was defeated in the Second World War, and the communist versions fell with the end of the Cold War. But as the persistence of petty nationalist or tribalist mass killing and the rise of radical Islamism demonstrates, new accounts of selective extermination do emerge to challenge the universalism of civilian immunity. Though falling well short of justifying mass killing, the partial return of necessity-style arguments to defend practices that skirt the edges of the rules in the War on Terror, demonstrates that although civilian immunity might have triumphed over its ideational rivals this victory was relatively recent and remains fragile.

The second, indirect, struggle relates to the role of intervening contextual variables. Even where actors agree that a shared norm must not be violated, this does not necessarily translate into the automatic condemnation and punishment of violators. With the triumph of civilian immunity over its ideational rivals (first in the West, and then in the rest of the world at the end of the Cold War), perpetrators used a variety of strategies to claim that their norm-violating behavior was actually consistent with the norm. In these situations, the intervening variables played a major role in determining the extent of legitimation and it was changes in these variables rather than changes related to the norm or practices of mass suicide that produced the profound changes which began towards the end of the Cold War. All three intervening variables (information, relative legitimacy of the actors, policy priorities) were in evidence, influencing and shaping legitimation and the consequences that flowed from this. During the World War II, the absence of information about German civilian devastation assisted allied claims to not be targeting cities and civilians. During the Cold War, legitimation was more likely where information was scarcer and punishment was related to the relative legitimacy of the actors and relative policy priorities. As information improved and the recession of Cold War tensions removed countervailing policy priorities, it became more difficult to legitimize mass atrocities and
focus switched from legitimation to the nature of the punishment, and especially the question of armed intervention against perpetrators. Although intervening variables continued to influence the level of international punishment, they were much less able to prevent punishment *per se* or aid in the legitimation of mass killing.

What emerges from all this is that civilian immunity is both more recent and more fragile than might have been thought. Although it has asserted its predominance over anti-civilian ideologies, new ideologies emerge to challenge it. If in responding to that challenge, governments succumb to the temptation to privilege necessity over civilian immunity, the norm’s capacity to restrain behavior could recede very quickly.