

Law and War: A Doctrine of Deterrence, 35 UN Chronicle 52-53 (1998) (Code A982)

Law and War: A Doctrine of Deterrence
Anthony D'Amato

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.-Universal Declaration of Human Rights, Article 10

The United Nations Security Council, it can be argued, can enforce the "laws of war" when there is a geographically limited war not involving superpowers. No one who works at the International Criminal Tribunal for the former Yugoslavia, in The Hague, would entertain the thought that there is no such thing as war crimes. However, defendants may have some doubts. My client, Milan Kovacevic, who passed away a few months ago, when his trial was in its second week was indicted for complicity in genocide, war crimes and crimes against humanity-a relatively new category, including the crimes of persecution and forcible deportation of persons.

He told me that these alleged "crimes" were trumped up by a kangaroo court.

I replied that regardless of what he thought about the validity or invalidity of the charges against him, this Tribunal has the power to convict him, sentence him to life imprisonment, and enforce that sentence. So I asked him to suspend his disbelief for the time being. We'll make more progress in his case, I said, if we proceed under the assumption that all the charges against him are legally valid. "Why should we?" he asked. Because the law, I replied, is the only thing standing between him and a life sentence. His only chance for acquittal is to work within the "language" of international law. Not only do the judges understand this language, not only are they sympathetic to arguments couched in its terms, but they will likely take offence if you use any other language (such as "revolutionary" language defying the court and challenging its right to decide your case).

At the trial of the major war criminals in Nuremberg, 19 out of 22 defendants were convicted of crimes against peace, war crimes and crimes against humanity. The three who were acquitted-Schacht, von Papen and Fritzsche-won their cases because they were able to use the language of international law to show that the laws of war did not apply to their specific conduct during the Second World War.

When the Allied Powers were setting up the Nuremberg Tribunal, the Soviet representative argued against such proceedings. In his view, all the Nazi leaders should be shot by a firing squad.

The three acquitted defendants owed their freedom to the rejection of the Soviet representative's view.

Nevertheless some observers will contend that in "total war" there can be no laws regulating military conduct; after all, if it's "kill or be killed", there is no room for law or morality. But international lawyers will point out that there is no such legal concept as "total war".

The laws of war apply without exception to all wars. Furthermore, consider the perspective of the active combatant. To him or her, it seems like total war. If your life is on the line, it may seem unreasonable or superfluous to worry about rules. Yet your military training is all about rules. If you have been taught not to kill an enemy soldier who has laid down his arms and surrendered to you, then you don't do it, no matter how desperate your military position may appear to be.

The prohibition against killing prisoners of war is one of the oldest war crimes, dating back at least to the American Civil War. Other prohibitions, such as sparing civilians, came into international law in part because of the global revulsion following General Sherman's march through Georgia during that Civil War. Gen. Sherman avoided the Confederate Armies and instead killed civilians in the streets and burned their homes. The existence of war crimes can have a deterrent effect even in wars that seem total to the combatants. For example, in the recent civil war that raged through Bosnia and Herzegovina, civilians were, for the most part, spared. The huge number of displaced persons in Bosnia today attests to the fact that there was no Gen. Sherman targeting them. To be sure, the forced deportation of civilians is one of the newer war crimes-technically, a "crime against humanity"-but it is of course a far less serious crime than murder or genocide.

It is often argued that part of the durability of the rules of law during a war can be attributed to the concept of reciprocity. Soldiers respect the rights of prisoners of war, for example, because later in the war they may wind up as prisoners of the enemy, and then they will want their own rights to be respected. There is no doubt that reciprocity plays a role in strengthening the laws of war. But reciprocal "retaliation" can sometimes erode a rule. If the enemy bombs your civilian population centres, you may retaliate by bombing his. The bombardment of undefended civilian cities and towns was an established war crime well before the Second World War, yet, during that war the increasing escalation of retaliatory action chipped away at the rule.

At the time of the Nuremberg trials, there were no prosecutions specifically directed against pilots or their commanders for aerial bombardment of undefended civilian population centres.

My own view is that the laws of war are significant because of the oldest theory of criminal jurisprudence: deterrence.

Consider the following typical example: N., a soldier in a war has an opportunity to kill (or rape or torture) some defenseless civilians. Assume further that some other soldiers in his platoon are engaged in killing (or raping or torturing) civilians. We'll even assume that the war is particularly brutal and "total" from the soldiers' point of view. Clearly, N can proceed without any personal risk or immediate fear of punishment. He might hesitate for reasons of conscience, but we'll make the example stronger by assuming that N has no sense of moral obligation. The only thing that might deter him is the degree of his aversion to taking personal risk. If he believes that there is some chance, even if it is extremely small, of his being imprisoned in the future for the acts that he is considering now, he might hold back. He analyzes the situation from a risk vs. reward perspective. There is no reward for him personally if he engages in killing civilians. Given a reward of zero, and a risk of a very small positive number, the risk/reward ratio is unfavourable. N may be deterred.

Obviously I am not claiming that everyone will be deterred; people have different degrees of risk aversion. Indeed, I assumed that other soldiers in N's platoon were committing war crimes. But that is not a flaw in deterrence theory (murders in peacetime are not totally deterred by legal prohibitions). What is important is to establish a positive degree of personal risk for all soldiers who might be tempted to commit war crimes. Some and maybe a majority of soldiers may then be deterred.

This positive degree of personal risk is established in three ways. First, if N's side loses the war, he may be prosecuted for war crimes by the enemy after the war. Second, if N's side wins the war, his own country may court-martial him. Third, whether the war is won or lost, an international tribunal may prosecute him. This is the strongest possible way to deter criminal behaviour during war. We are now seeing a watershed development in human history: the establishment of war-crimes tribunals for

Yugoslavia and for Rwanda, and the attainment a few months ago of a statute for a permanent International Criminal Court.

Prof. Anthony D'Amato is one of Northwestern University School of Law's (USA) most prolific scholars and an active litigator in international human rights. He is defence counsel for the first genocide case against a Bosnian Serb at the International Criminal Tribunal for the Former Yugoslavia, in The Hague, and represented indicted war criminal Milan Kovacevic. He wrote this article for the UN Chronicle.