

A Hobbesian Approach to Cruelty and the Rules of War

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Hobbes is normally thought to be one of the most notorious defenders of the view that during war there are no rules. During war the strongest should prevail, and in this sense might makes right. If we follow this interpretation, then Hobbes would not recognize general moral rules governing the conduct of war, especially rules concerning cruelty in the use of violent force during war. Yet, this is by no means obvious in a careful reading of Hobbes. Indeed, I will claim that Hobbes, like Grotius before him, recognizes rules of war and gives us a good start at a plausible view of universally applicable *jus in bello* rules. As will become clear, a Hobbesian approach to the rules of war sees these rules as grounded in the idea that unnecessary or superfluous harm should not be inflicted. Such an understanding of the basis of the rules of war does not recognize exceptions even for those who fight on the side of a war that is clearly only defending itself and where the other side of a war is engaging in aggression.

Contrary to the way Hobbes has been interpreted for centuries, I will argue that Hobbes laid the groundwork for contemporary international law and for a distinctly moral approach to the relations among States. Hobbes is not the great supporter of realism that has denied the relevance of morality to international affairs. In this paper I will try to mine Hobbes's texts, both Leviathan and the Dialogue Between a Philosopher and a Student of the Common Laws of England, for a plausible basis for understanding the *jus in bello* rules of war, especially a universal prohibition on cruelty.

The paper has the following structure. First, I will explain the role that the laws of nature play in Hobbes's understanding of the state of war. Second, I will explain Hobbes's views of self-preservation and inflicting cruelty. Third, I reconstruct Hobbes's important insight that rationality governs all human affairs, even those concerning war. Fourth, I explicate the idea of cruelty moving from what Hobbes says to a plausible Hobbesian position. Fifth, I address recent philosophical writing on how best to understand the rules of war. Sixth, I then turn to legal discussions of cruelty's place in debates about the laws of war. Seventh, I respond to several objections.

I. The Laws of Nature

I begin with Hobbes's discussion of the laws of nature. In Chapter 13 of Leviathan, where Hobbes describes the conditions of the state of nature, he says:

Hereby it is manifest, that during the time men live without a common Power to keep them all in awe, they are in that condition called Warre; and such a warre, as is of every man, against every man... Whatsoever therefore is consequent to a time of Warre, where every man is Enemy to every man; the same is consequent to the time, wherein men live without other security, than what their own strength, and their own invention shall furnish them withall.¹

This state of war exists as people's natural state, before they form commonwealths, and also in the state that exists among sovereigns.²

But then at the beginning of Chapter 14 of Leviathan, Hobbes begins to set out the "laws of nature" where among other things "men are commanded to endeavour Peace."³

¹ *Leviathan*, Ch. 13, pp. 88-89.

² *Ibid.*, p. 90.

³ *Leviathan*, Ch. 14, p. 93.

The laws of nature are dictates of reason that tell people how to preserve their lives, where preservation is not mere sustaining of life but also contentment. Hobbes is often portrayed as linking the laws of nature to an egoistic ethics. Yet, Hobbes says at the beginning of Chapter 14 that the laws of nature aim at peace. Of course, peace and egoism are not incompatible, but the point is that the laws of nature do not tell people how to gain advantage over others. The laws of nature are aimed at securing a situation of lasting peace for all.

In Chapter 15 of *Leviathan*, Hobbes sets out the important eleventh law of nature, which is equity:

if a man be trusted to judge between man and man, it is a precept of the Law of Nature, that he deale Equally between them. For without that, the Controversies of men cannot be determined but by Warre.⁴

Here Hobbes says that war determines how controversies are to be solved in situations where there is no person who is trusted to judge.

Hobbes then follows his discussion of equity with a discussion of the twelfth law of nature:

And from this followeth another law, That such things as cannot be divided, be enjoyed in Common, if it can be, and if the quantity of the thing permit, without stint, otherwise Proportionably to the number of them that have Right.⁵

Here is where proportionality first arises for Hobbes, although at this point in the text, it is not elaborated on. But it seems that proportionality is reserved for situations where controversies can be adjudicated and not to situations where there is war – seemingly

⁴ Thomas Hobbes, *Leviathan*, (1651), edited by Richard Tuck, Cambridge: Cambridge University Press, 1996, Ch. 15, p. 108.

⁵ *Ibid.*

leaving out many if not all questions of rules of war. Yet, in other respects this is too easy a move since the situation of war is one concerning the state of nature. As we will see, for Hobbes, the laws of nature apply to this state, the natural state of war, most clearly of all.

The state of nature is a state coextensive with a state of war for Hobbes, unlike for Locke. But what Hobbes means by this is not that actual war exists in the state of nature but that people will be disposed toward fighting, not constantly involved in fighting in this state. The state of nature has a set of laws, the laws of reason that regulate it. Since the state of nature is coextensive with the state of war, and since the state of nature has laws or rules, then it seems to be a fair inference that the state of war for Hobbes is not lawless but regulated by the laws of nature. In general, the laws of nature for Hobbes are just the sort of rules regulating conduct during war that the *jus in bello* has concerned throughout the history of the Just War tradition, and in international law scholarship as well, or so I shall argue in what follows.

There has been a debate among scholars about how to understand the laws of nature in Hobbes's work. In Hobbes's view, the laws of nature oblige only "*in foro interno*, that is to say they bind to a desire they should take place, but *in foro externo*; that is to say, to the putting them in act, not always."⁶ Nonetheless, Hobbes says at the end of Chapter 15 of Leviathan that "the true Doctrine of the Lawes of Nature, is the true Morall Philosophie."⁷ Hobbes says that these laws are not laws properly so-called. But as dictates of reason, Hobbes clearly means for them strongly to guide conduct. Similar claims are often made today about the *jus in bello*.

⁶ Ibid., p. 110.

⁷ Ibid., p. 111.

In Chapter 28 of *Leviathan*, on punishments and rewards, Hobbes expands on the idea that the law of nature prohibits the punishment of the innocent. This prohibition is linked to considerations of equity: “the law that commandeth equity; that is to say, and equal distribution of Justice; which in Punishing the Innocent is not observed.”⁸ Punishment is only deserved when a person has broken the law. But Hobbes seems also in this discussion to deny that the innocent have rights outside of the commonwealth. Indeed, Hobbes says that victors do not make distinctions between the innocent and not innocent when dealing with enemies, because “it is lawful by the original Right of Nature to make Warre.”⁹

In Chapter 20 of *Leviathan*, Hobbes seemingly equates the state of war with the “state of mere nature.”¹⁰ In this chapter, Hobbes grants to those who are in a state of war unlimited use of whatever means they need to preserve themselves. It can never be unlawful to do what is necessary to preserve one’s life. This is the clear message of the beginning of Chapter 14. The prominence of pursuing peace is mixed with near license in terms of what one can do to preserve one’s own peaceful condition in the state of war understood as a mere state of nature.

Here is one of the central problems in interpreting Hobbes: he seems to allow that victors can do whatever leads to the preservation of their societies; but Hobbes also holds that in a state of war, or a state of nature, there are rules nonetheless, and these are pretty clearly seen as binding moral rules. So, Hobbes is no pacifist, although he certainly

⁸ *Leviathan*, Ch. 28, p. 219.

⁹ *Ibid.*

¹⁰ *Leviathan*, Ch. 20, pp. 139-140.

argues in favor of what might be called pacifist attitudes.¹¹ But while allowing that war can be justified, Hobbes nonetheless also argues that reason dictates restraint in war, just as it does in all other human affairs. And these restraints are universal in application, as we will see. In international law, the *jus in bello* rules are also universal in scope. In my view, Hobbes presents one of the best cases for minimal and universal rules governing conduct during war, and hence Hobbes's work is worthy of study for those interested in the laws of war today.

II. Hobbes on Self-Preservation and Cruelty

In reading through Hobbes's corpus, it becomes clear that there are limits to what can be done even in war. Throughout the long historical development of the *jus in bello* branch of the just war tradition, unnecessary suffering has been condemned. And Hobbes does not disagree. In Chapter 15 of Leviathan, Hobbes says: "It is necessary for all men that seek peace, to lay down certaine Rights of Nature, that is to say, not to have libertie to do all they list."¹² And then in several significant places, Hobbes discusses these limits.

A bit earlier in Chapter 15, Hobbes says "Whereby we are forbidden to inflict punishment with any other designe than for the correction of the offender, or the direction of others."¹³ Hobbes is quite clear that there is a limit in punishment or in other attempts to cause harm to another. Most significantly, in Chapter 6 of Leviathan, Hobbes says:

¹¹ See my paper, "Hobbes on the Attitudes of Pacifism," Thomas Hobbes: De La Metaphysique A La Politique, Martin Bertman and Michel Malherbe, editors, Paris: Libraire Philosophique J. Vrin, 1989, pp. 129-140.

¹² Leviathan, Ch. 15, p. 107.

¹³ Ibid., p. 106.

Contempt, or little sense of the calamity of others, is that which men call Cruelty; proceeding from Security of their own Misfortune. For that any man should take pleasure in other mens great harmes, without other end of his own, I do not conceive it possible.¹⁴

Considering this and like passages, Richard Tuck rightly says “certain things (including pointless cruelty) were always seen by Hobbes as unlikely ever to be justifiable in terms of an agent’s own preservation.”¹⁵

Notice here that Hobbes not only links cruelty to inflicting harm beyond that which advances self-preservation, but also to contempt for the misfortunes of others. Cruelty on Hobbes’s account then has two important components: 1) harm that is unnecessary for self-preservation; and 2) contempt for the needs of others. One acts cruelly when one harms another in a way that is not justified by one’s own needs and in a way that is openly contemptuous of the needs of others. And Hobbes finds cruel behavior to be beyond the pale of how it is reasonable for people to act toward one another.

Thus, even though the state of nature is a state of war for Hobbes, there are limits to what individuals can do in that state. These limits are determined by first establishing what it is necessary to do in order to preserve one’s own life. But not everything can be easily justified by reference to that end state. Especially if we think of harms that can be done to others, there are clear harms that could not be explained or justified by reference to self-preservation even broadly construed. Harm that is cruel in that it could achieve no good for the harmer is of this sort. And in the situation of war it will turn out that these

¹⁴ Leviathan, Ch. 6, pp. 43-44.

¹⁵ Leviathan, Tuck’s Introduction, p. xxix.

limits to what is justifiable will apply as well, especially concerning such things as cruelty.

So, there is a sense in which Hobbes might be thought to overstate his case when he says that in the state of nature “every man has a Right to everything; even to one anothers body.”¹⁶ But then we must realize that for Hobbes, rights in the state of nature are mere liberties, and liberties are only limited by “external impediments.”¹⁷ The laws of nature are not linked to such impediments, yet they are linked to reason nonetheless. So, according to Hobbes’s technical use of the terms right and liberty, there is a right to everything in the state of war, yet reason counsels that we not exercise that liberty in cases where there is no good for us to be had by so doing.

It is interesting to speculate about these rules or dictates of nature, the so-called laws of nature, in respect to the limits on what one can do in the state of war. Why would there be such limits at all. Perhaps, such a thing as wanton cruelty, even during war, is actually not consistent with our own long term self-preservation. No one wants to be the recipient of harm that is not even aimed at the good of the harmer, and is even contemptuous of the one who is harmed. And so acts of wanton cruelty will call forth retaliation or revenge that may last long after war has ended and long after there is hope for the maintenance of a lasting peace.

In Chapter 15 of Leviathan, Hobbes indicates that people will need to rely on one another in order to achieve a lasting peace:

in a condition of warre, wherein every man to every man, for want of a common Power to keep them all in awe, is an Enemy, there is no man can hope by his own

¹⁶ *Leviathan*, Chapter 14, p. 91.

¹⁷ *Ibid.*

strength, or wit, to defend himself from destruction, without help of Confederates.¹⁸

This quotation is part of Hobbes's well-known response to the Foole, but in my view it is also part of Hobbes's less well-known defense of the limits of what it is reasonable to do in situations of war.

In a long discussion of the fourth law of nature, the law of gratitude, Hobbes gives more evidence for the view that in order to gain the sort of reconciliation that is necessary for lasting peace a person needs to act in such a way so as to provide good grounds for another person's trust:

For no man giveth, but with the intention of Good to himselfe; because Gift is Voluntary; and of all Voluntary Acts, the Object is to every man his own Good; of which if men see they shall be frustrated, there will be no beginning of benevolence, or trust; nor consequently of mutual help, nor reconciliation of one man to another; and therefore they are to remain still in the condition of War; which is contrary to the first and Fundamental Law of Nature, which commandeth men to Seek Peace.¹⁹

Perhaps surprisingly, Hobbes seems to be concerned here with reconciliation in order to get out of the situation of war. And one of the key things to do is to give signs of trust. In the state of nature that exists (hypothetically) before civil society arises, such trust is not sufficient for peace. But in the situation of war between sovereigns, the idea seems to be more palatable to Hobbes.

¹⁸ Leviathan, Ch. 15, p. 102.

¹⁹ Ibid., p. 105

Indeed, some of the laws of nature are addressed directly to the conditions of pursuing peace among States. For example, Hobbes declares that the fifteenth law of nature is: “That all men that mediate Peace, be allowed safe Conduct.”²⁰ Today, one can easily see such a remark aimed at peace-keeping forces as well, perhaps, as those humanitarian workers who minister to those who are injured during battle, one of the linchpins of the Geneva Conventions of 1948. In Hobbes’s time, the idea of rules during war was also certainly not uncommon. Grotius, whom Hobbes read and apparently admired, spoke at length of the laws of war, as did the scholastic writers, with whom Hobbes had less sympathy but certainly was acquainted.

For Hobbes, the rules or laws in the state of nature bind morally, even as they do not bind legally, at least in a proper legal sense. But that is surely also what the rules of war are today, at least for philosophers who write about them, if not also for many international lawyers. In international law, the *jus in bello* has been similarly controversial as setting out laws properly so-called. But as with Hobbesian laws of nature, the *jus in bello* rules are also supposed to be strong guiding norms for conduct during war. In general, Hobbes’s project of describing and defending laws of nature is not dissimilar from the project in international law of describing and defending the *jus in bello*.

III. Rationality in War

The idea that there is a limit to what soldiers can do during war is related to the idea of cruelty that we discussed in the previous section. In Hobbes’s Dialogue, the Lawyer says:

²⁰ Ibid., p. 108.

sensual Pleasure... Masters the strongest Reason, and is the root of Disobedience, Slaughter, Fraud, Hypocrisie, and all manner of evil habits... the root remaining, new fruit will come forth till you be weary of punishing, and at last destroy all Power that shall oppose it.²¹

The Philosopher responds: “What hope is there of a constant peace?” And the Lawyer rejoins “You are not to expect such a Peace between two Nations.”²² Here it appears that sensual pleasures that lead to slaughter during war are contrary to reason because they interfere with what is most rational, namely pursuit of a lasting peace. The idea that we should curb our natural desires and instead follow the path of what is rational and reasonable sets the stage well for thinking that unnecessary violence should not be employed even during war. And this idea then leads easily to the idea that again, even in war, response should not be disproportionate.

In *Leviathan*, Hobbes seemed to argue for the opposite conclusion. Early in Chapter 14, he says:

it is a precept and generall rule of reason, That every man ought to endeavour Peace, as far as he has hope of obtaining it; and when he cannot obtain it, that he may seek and use, all helps, and advantages of Warre.²³

Hobbes goes on to say that the right of nature gives us liberty “By all means we can to defend ourselves.” Many have interpreted these passages to say that Hobbes believes that there are no limits to what can be done during war. But another plausible reading is that

²¹ Thomas Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England*, (1681) edited by Joseph Cropsey, Chicago; University of Chicago Press, 1971, p. 57.

²² *Ibid.*

²³ *Leviathan*, Ch. 14, pp. 91-92.

pursuit of peace should trump such considerations. And in any event, going beyond what is necessary to defend oneself has not here been countenanced.

Hobbes seems to conflate the rational and the reasonable in *Leviathan*. For an act to be reasonable it must have some rational end, and the end must be related in the appropriate way to what is a clear good, such as self-preservation. Peace is another clear good for Hobbes. What is reasonable is that actions would aim at one or another clear good. And reason is employed to find these ends as well as to make sure that the means we have chosen do advance those ends. So, on this understanding of rationality for Hobbes it serves both to identify means and also ends.

One obvious reason for disallowing license during war is seen in the *Dialogue's* admonition to think about things rationally so as to secure peace, as well as in *Leviathan* Chapter 15's admonition to think about reconciliation perhaps as a way to get to war's end. In Hobbes's view, there is a complex set of rational dictates concerning behavior of those in the state of nature. The normal interpretation is that Hobbes speaks conclusively about the right for people to defend themselves. Yet, as it turns out, the first branch of the first law of nature is "to seek Peace, and follow it."²⁴ In my view, this colors all of the rest of the discussion of the laws of nature. These laws are about how to secure peace, and self-defense is only the second not the first of these considerations of what it is reasonable to do in the state of nature.

Some of the laws of nature counsel in such a way that it seems hard to regard them as aimed at the (hypothetical) pre-civil state of nature. Consider, for instance, the law concerning mediation of Peace. As I explained above, this seems clearly directed at peace among sovereign States. Another kind of law, only discussed in the *Review* and

²⁴ *Ibid.*, p. 92.

Conclusion, also seems hard to see in any other way than as directed at the state of war among States. Here it is:

That every man is bound by nature, as much as in him lieth, to protect in Warre, the Authority, by which he is himself protected in time of Peace.²⁵

This reference to war cannot really be to the (hypothetical) state of war in the pre-civil state of nature. Like the law of nature about mediation, we have here a law of nature that is addressed to war among sovereign states. And for Hobbes there are other laws of nature that are best understood as concerning both the (hypothetical) pre-civil state of nature and the state of nature among sovereign States, even those like gratitude that one wouldn't expect to be about both states of nature.

In these various laws of nature that govern behavior in the state of war among sovereign States, the rule of reason prevails. The move that I wish to make in a Hobbesian vein, but not clearly embraced by Hobbes, is that in a state of nature involving sovereign States, the laws of nature also bind individual human persons especially those who fight in behalf of their States. Hobbes has a variety of things to say about the nature of reason. He speaks of reason in the early chapters of *Leviathan* as follows:

Reason, in this sense, is nothing but Reckoning (that is Adding and Subtracting) of the Consequences of generall names agreed upon for the marking and signifiying of our thoughts.²⁶

When Hobbes then says that a law of nature “is a Precept, or generall Rule, found out by Reason,” he can be understood most plausibly to be saying that the consequences

²⁵ *Leviathan*, A Review and Conclusion, p. 484.

²⁶ *Leviathan*, Ch. 5, p. 32

reckoned in the formulation of the laws of nature are those which best lead to a person's self-preservation and peace.

In his Dialogue, Hobbes also considers the type of reason that is associated with the laws of nature. At the beginning of the book, Hobbes indicates that "Equity is a certain perfect Reason."²⁷ He distinguishes natural or universal reason from what Edward Coke had called "artificial reason," that is the reason that is based on long study and expert knowledge. Instead, Hobbes has his Philosopher say that "all study is Rational, or nothing worth."²⁸ Again, what Hobbes means by reason is what is useful, or prudential, in various situations. But there is also the sense that what is rational also has a universal appeal, which is in keeping with the doctrine of Leviathan that sees the precepts of reason as dictating what the law of nature is, and hence binding for all time. Here it is instructive to consider one last quotation from Hobbes's Dialogue:

seeing every Man knoweth by his own Reason what Actions are against the Laws of reason, and knoweth what Punishments are by his authority for every evil action ordained; it is manifest Reason, that for breaking the known Laws, he should suffer known Punishments.²⁹

To think of war as having known rules of reason is in keeping with what Hobbes sets out in Leviathan and A Dialogue.

IV. A Hobbesian View of Cruelty

On the analysis I have provided so far, Hobbesian rules of war are rational precepts concerning what practices are most likely to lead to self-preservation and peace.

²⁷ A Dialogue, p. 54.

²⁸ Ibid., p. 53.

²⁹ Ibid., p. 141.

In this sense, these rules of war are founded in what could easily be seen as prudence. But as already indicated, Hobbes sees the laws of nature also as moral rules as well. Indeed, it is most plausible, I believe, to see Hobbes's dictates of reason as some mixture of prudence and morality. In this sense, Hobbes provides a useful way to regard the dictates of reason concerning the state of war. The Hobbesian rules of war are dictates that sit in the realm of overlap of prudence and morality. Rather than seeing Hobbesian rules of war, as is traditional in Hobbes scholarship, as sanctioning license, we have seen that the Hobbesian rules of war set distinct limits on what it is wise to do in times of war among States.

One of the most significant prohibitions of the rules of war is the condemnation of cruelty. By cruelty I mean roughly what Hobbes meant when he spoke of acting with disregard for the calamity of others and where harms inflicted against the other are "without other end of his own."³⁰ During war, cruelty is the gratuitous infliction of harm. Gratuitous infliction of harm involves infliction of harm that is not necessary for achieving a military objective. If harming another, especially in a situation of war, has the end of self-defense, then this act will not normally count as cruelty.

The exception is the case where the response to a threat to self-defense is disproportionate to the threat. If harm is inflicted in excess of what is needed for self-defense then the harm may be cruel despite having as its end self-defense. This will not be true in all cases. Cruelty is an extreme response to a given situation. There must be disregard of the needs of the person to whom the harm is directed. Acts of self-defense that are only slightly disproportionate will not count as cruel since the need of the one inflicting the harm also has to be taken into account. But the one who is the threat to the

³⁰ Leviathan, Ch. 6, p. 44.

self-preservation of another does not somehow forfeit all rights, especially in the case of innocent or non-culpable threats.

Cruelty involves the infliction of excessive or unnecessary suffering. In some cases, the line between militarily necessary and unnecessary suffering may be hard to draw. But in many cases, clear guidelines can be determined. Cruelty is also gratuitous because it is not only undertaken in disregard for the needs and interests of others, but with contempt for the other's needs. When harm inflicted on another is clearly disproportionate to what could be seen as necessary for self-preservation understood broadly, this is tantamount to showing contempt for the needs of the other, since this so clearly is contrary to the need for self-preservation of the other.

The use of cluster bombs and "exploding" bullets are acts of cruelty in this view. Cluster bombs risk inflicting unnecessary suffering since these weapons cannot, by definition, be targeted to specific soldiers or away from civilians. Exploding bullets are, by design, likely to cause far more internal injury in those whom they hit than is necessary to take the soldier out of commission on the battlefield. Perhaps there is some deterrent value in the terror that the anticipated use of such weapons causes in enemy soldiers. But as I have argued the possible deterrent advantages are almost always outweighed by the costs in terms of anger and retaliation such tactics also cause.

The rationale for condemning cruelty in war is partly moral and partly prudential, in keeping with Hobbes's explicit blending of these two normative categories in his laws of nature. From a moral standpoint, the infliction of suffering or harm is *prima facie* wrong if it is excessive or unnecessary since such harm fails to treat a fellow person with even a minimum of respect as a fellow person who is naturally equal. From a prudential

perspective, acts that antagonize one's enemies will make the pursuit of peace much harder, and it is the pursuit of this goal that is the most important prudential goal. In addition, as Hobbes said, when we deal unequally with some people we give them little recourse but for continuing war.

Soldiers are trained to inflict injury, especially lethal injury, upon enemy soldiers. Soldiers are also trained to do all they can to protect their fellow soldiers and doggedly to fight for what ever military objective they are commanded to achieve by their superiors. It is this training that is responsible for soldiers being tempted to engage in excessive suffering against the enemy they have been told to destroy. Yet, if the objective of war is to achieve long term peace, as seems to be Hobbes's position at the beginning of Chapter 14 of *Leviathan*, it is paramount that limits be placed on the amount of suffering that soldiers are allowed to inflict.

Today, the standard rationale for such limitations on excessive suffering has to do with reciprocity. On this account, showing restraint toward the enemy will provide an incentive for the enemy likewise to show restraint toward one's fellow soldiers.³¹ But Hobbes, and a Hobbesian, would be skeptical of this rationale, since in the state of war there is no basis for reciprocal trust. As Hobbes says:

he that performeth first, has no assurance the other will performe after... And therefore he that performeth first, does but betray himselfe to his enemy.³²

The hope for reciprocity, in the state of nature or of war, is not only inadvisable it is dangerous in Hobbes's view.

³¹ For an excellent critique of this idea, see Mark Osiel, *The End of Reciprocity*, NY: Cambridge University Press, 2010.

³² *Leviathan*, Ch. 14, p. 96.

Instead, from a Hobbesian perspective, such restraints as those on cruelty are likely to lead to the achievement of peace since enemy soldiers will not be antagonized by being forced to experience suffering that is not warranted by self-preservation. Indeed, such restraint will advance the goal of reconciliation which is itself crucial for achieving a lasting peace at the end of war. Soldiers presumably will experience resentment when ever an enemy inflicts suffering. But if it is clear that the suffering was unnecessary for achieving a military objective, or for defending the soldier who inflicts such suffering, and is contemptuous of the enemy's needs, the resentment will increase to such an extent that peaceful reconciliation will be made nearly impossible.

The prudential argument for restraint during war is not alone sufficient, for like the reciprocity argument, there is no guarantee that reconciliation will in fact occur by the acts of restraint. In addition, from a Hobbesian perspective there is also the moral idea that it is wrong to harm another unless there is some clear moral good to oneself that will come from it, and where proportionality is satisfied. Hobbes generally does not argue for more than minimalist restraint on this basis, but the rules of war I seek to provide support for are also minimalist restraints. For Hobbes there is a close link between what is reasonable to do and what it is morally appropriate to do. The prohibition on cruelty fits this idea of being a reasonable, and thus, moral restraint on conduct during war.

The rules of war are minimalist in the sense that they must leave a large space for possible uses of violence that are necessary for self-defense and self-preservation more generally. Battlefield situations are highly variable, especially as the "battlefield" shifts into cities where it is hard to tell who is a combatant and who is a civilian. In such situations, it may be very difficult to accomplish legitimate military goals, or even for

soldiers to defend themselves, without risking civilian casualties. Still, such tactics as the intentional targeting of civilians are not justifiable and will hence be reasonable to prohibit on a Hobbesian understanding of the rules of war.

Cruelty during war seems to be potentially justifiable until one realizes that built into the definition of cruelty is the idea that it serves no obvious purpose that would be related to the defense or preservation of a soldier's life. What is reasonable would include the pursuit of nearly all sufficiently important military objectives, since these objectives are related to overall well-being of the soldier and the society in which the soldier lives. But there will be cases of tactics or weapons that should be nonetheless outlawed by a prohibition on the infliction of cruel or unnecessary suffering.

V. Minimalist Rules of War

Hobbesian minimalism is the view that moral and other normative restrictions should only include what is least objectionable. The laws of nature are supposed to represent such a minimalist set of restraints. The underlying idea is that morality should not make demands that are considered to be overbearing or unnecessarily intrusive. Such more intrusive moral demands are not ruled out altogether, but when there are a large number of somewhat conflicting perspectives in a society it is thought to be prudent to try to find some moral and prudential norms that could be agreed to, rather than to have none at all due to the plurality of perspectives. Hobbesian minimalism recognizes a plurality of values and value orientations, and seeks to provide the kind of view that can be adopted by many disparate perspectives which otherwise seem at odds.

Today, some have argued that the rules of war should be different for those who fight with just cause than for those who fight a war of aggression. And while there may

or may not be a plausible moral basis for such a view, from a Hobbesian view, where prudence and morality are deeply entangled, it appears that certain restraints during war are rational regardless of on which side one fights. The Hobbesian view of the rules of war that I will seek to defend here is that all people have a right to use all means that are necessary for self-defense and self-preservation, but that all people do not have a right to employ tactics not necessary for self-defense and self-preservation during war, and this most especially includes a prohibition on cruelty.

The contemporary debates about the rules of war have recently focused on the question: should there be different rules for those who are engaging in a just war as opposed to those who are fighting an aggressive war. The idea under attack is the “moral equality of soldiers.” This idea, popularized in contemporary debates by Michael Walzer, was also commonly held in the historical debates. The view holds that the rules of war apply equally to all combatants, regardless of which side they are from.³³ I have defended a version of this view by reference to the need to socialize soldiers to have a sense of honor in what they do so they do not view themselves as merely hired killers. In order to foster this sense of honor, soldiers need to see themselves as members of a professional class who act for the benefit of their countries.³⁴

It is common to distinguish between the law of war concerning tactics, strategies, and weapons, on the one hand, and prohibitions on who can be targeted during war, on the other hand. The first concerns the infliction of suffering on combatants and the second concerns suffering inflicted on those who are not, or who are no longer, engaged in hostile actions. Both types of the rules of war are ultimately supported by the

³³ Michael Walzer, Just and Unjust Wars, NY: Basic Books, 1977.

³⁴ See Larry May, War Crimes and Just War, NY: Cambridge University Press, 2007,

proposition that war and its terrible devastation should be minimized as much as possible. In the philosophical literature, most of those who reject the moral equality of soldiers do so by claiming that only some soldiers are liable to be killed, namely those who fight on the unjust side of a war. Philosophers have not explicitly argued that the prohibition on the infliction of unnecessary suffering should only be extended to those soldiers who fight on the just side of a war.³⁵ But such matters are certainly in the air, with various philosophers questioning the prohibition on the targeting of civilians, and even of Red Cross medics.³⁶ I shall focus on the question of weapons and tactics used against soldiers, but my arguments also raise questions about the rejection of other traditional *jus in bello* doctrines as well.

From a Hobbesian perspective, regardless of how one comes down on this debate, the rules of war should be conceptualized as reasonable and minimalist restraints that apply to all soldiers. One could deny the moral equality of soldiers thesis and still support minimalist restraints on all soldiers, where the minimum had to be met by all, but a more maximalist set of restraints only applied to those who were fighting on the aggressive, as opposed to a defensive, side of a war. David Rodin has recently supported a version of the rules of war that I think would be consonant with my proposal, even though he, unlike me, generally rejects the moral equality thesis.³⁷

Socializing soldiers not to use cruel tactics that cause unnecessary suffering, and socializing soldiers not intentionally to target innocent civilians, even though understood

³⁵ See Jeff McMahan, *Killing in War*, Oxford: Oxford University Press, 2009; C.A.J. Coady, *Morality and Political Violence*, Cambridge: Cambridge University Press, 2008; and Lionel McPherson, "Innocence and Responsibility in War," *Canadian Journal of Philosophy*, vol. 34 (2004), pp. 485-506.

³⁶ See Cecile Fabre, "Guns, Food, and Liability to Attack in War," *Ethics* 120 (2009): 36-63; and Helen Frowe, "Killing the Red Cross," paper present at annual meeting of the Society for Applied Philosophy, Manchester, July 2011.

³⁷ David Rodin, "The Moral Equality of Soldiers: Why *In Bello* Assymetry is Half Right," in *Just and Unjust Warriors*, edited by David Rodin and Henry Shue, Oxford: Oxford University Press, 2007.

as minimalist restraints, will be important in instilling a sense of honor among all soldiers. And prohibiting cruelty even on the battlefield will also instill in soldiers the idea that they are only to use the immense power that they have either for their own self-defense or for advancing a legitimate military objective that promotes their self-preservation. A common minimum of restraint for all soldiers is in my view the key to a Hobbesian concept of the laws of nature.

In my previous writings about the rules of war, I have stressed the importance of understanding such rules as grounded in the principle of humane treatment. In the history of these debates it is normally Grotius who is thought to have best represented this idea in the 17th Century. I have been arguing that Hobbes can also be placed in this camp. But for Hobbes this would only be true if we understand humane treatment in the minimalist way I have been exploring above. A minimalist approach to the rules of war allows for such distinctions in how we understand cruelty and sets the stage for a position on respect for the rules of war that is consistent with several different theoretical approaches.

Taking a Hobbesian minimalist approach to the rules of war helps us also in resolving some of the issues raised in contemporary theoretical debates as well. Even if one thinks that there might be different rules of war for those fighting on the just as opposed to the aggressive side of war, we might still reach agreement about a core of the rules of war that apply equally to all soldiers, even if there may be other rules that apply differentially. The minimalist approach also allows for the core rules to be supported with a strong moral principle that is also acceptable from a wide variety of ethical perspectives.

I have been proceeding in a minimalist vein in order to make it more likely that the rules of war so conceived will indeed seem obvious across humanity. The Hobbesian project is just of this sort: the laws of nature are supposed to be what anyone would recognize as reasonable principles. As Hobbes says in the Introduction to *Leviathan*, he can only set out principles and ask his reader if he “find not the same in himself.” Hobbes rightly says that there is no other demonstration possible in these fields of value inquiry. This seems to me to be a highly plausible strategy for thinking about what in international legal theory is often described as the laws of humanity. In the remainder of this paper I wish to indicate how such a minimalist understanding of the rules of war would fit with contemporary legal understandings of the rules of war.

VI. The Laws of War

The contemporary legal debates about the laws of war are often framed by reference to the so-called Lieber Code, the “Instructions for Government of Armies of the U.S. in the Field” drawn up by Francis Lieber in 1863. In the code, Lieber indicated that the guiding idea was that “military necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or revenge.”³⁸ Similarly, the Hague Convention (IV) of 1907, Article 23 states: “it is especially prohibited... (e) to employ arms, projectiles, or material calculated to cause unnecessary suffering.” The French term “maux superflus,” here translated as ‘unnecessary suffering,’ has also been translated as ‘superfluous suffering.’³⁹

³⁸ Quoted in Leslie C. Green, *International Regulation of Armed Conflicts*, in *International Criminal Law: Vol. 1, Crimes*, edited by M. Cherif Bassiouni, 2nd ed., Ardsley, NY: Transactional Publishers, 1999, p. 363.

³⁹ See my discussion of this debate in *War Crimes and Just War*, NY: Cambridge University Press, 2007, pp. 75-79.

Clearly related to the points from Hobbes by which I began, is the idea that the laws of war are to minimize the calamities of war, the calamities of others that Hobbes addressed directly in *Leviathan*. The first modern treaty on the rules of war, The St. Petersburg Declaration, begins by stating “that the progress of civilizations should have the effect of alleviating as much as possible the calamities of war.”⁴⁰ The example provided is telling: “the employment of arms which uselessly aggravate the suffering of disabled men.” In the same document, the rules of war were said to be meant to prohibit violations of “the laws of humanity.” Hobbes’s discussion of the laws of nature is clearly in the same camp as laws of humanity, and Hobbes also worried about war’s calamities.

Another context where a Hobbesian minimalist understanding of the rules of war, especially concerning cruelty, arises concerns those who are confined and under our control. It is especially cruel to mistreat people who are disabled prisoners of war or otherwise dependent on us for meeting their basic needs. It would produce unnecessary suffering to subject these prisoners to conditions that are harmful to them, and would show contempt for these needs. As under our control, these prisoners do not pose a threat and mistreating them can normally not be justified by reference to our own interests or any reasonable military objective. This is consistent with the way the Geneva Conventions are often understood, at least concerning Common Article III, where cruel treatment is also singled out for prohibition.

But if prisoners of war escape, thereby posing a threat, or causing the expending of resources otherwise needed for legitimate military means, then what would otherwise be cruel treatment may be allowed. Although even here there are surely limits as well,

⁴⁰ Quoted in Green, *op. cit.*, p. 364.

where certain forms of treatment are excessive even for the military objectives just mentioned, then the use of such tactics or procedures are not warranted.

Indeed, the Geneva Conventions articulate the idea of “outrages to human dignity,” in addition to the more general idea of inhumane treatment. And the theoretical work of late has similarly focused on dignity and humane treatment. What is needed, and what a Hobbesian minimalist approach can provide, is a general grounding for the ideas of the Geneva Conventions and other important statements of the laws of war. I hope that I have supplied the beginnings of an articulation of what that grounding could be based in, namely, what is thought to be reasonable from some kind of state of nature account that is drawn in broadly Hobbesian terms.

In some respects the laws of war are an odd doctrine since the best way to avoid unnecessary suffering is not to go to war in the first place. What is peculiar is that the laws of war seen as laws of humanity do not make war illegal. One could plausibly ask why the intentional large-scale taking of life is not also obviously wrong. It seems that the answer conforms to the old Augustinian Just War view that some wars need to be fought for the progress of civilizations. The war against Nazism is normally cited today as the obvious Just War. The laws of humanity, in the form of the laws of war, while not outlawing all war, do the next best thing: these rules try to make war less horrible than it would be otherwise. While I have challenged this position about the justifiability of war, I do support the laws of war nonetheless.⁴¹

The doctrine that is central to the Geneva Conventions is based on the assumption that there will be wars, even if it is not necessarily assumed that those wars will all be

⁴¹ See Larry May, “Contingent Pacifism and the Moral Risks of Participating in War,” Public Affairs Quarterly, volume 25, number 2, April 2011, pp. 95-111.

necessary. And once it is assumed that there will be wars, then the doctrine underlying the Geneva Conventions, and most of the other documents on the laws of war, is to minimize suffering during war. Even though war is all about inflicting suffering, suffering should be kept to a minimum. This is clearly in keeping with the Hobbesian doctrine I set out above.

As I mentioned, the Declaration of St. Petersburg in 1868 declared that the rules of war are supported by the proposition “that the progress of civilization should have the effect of alleviating as much as possible the calamities of war.” To this end, it was declared:

That the only legitimate target which States should endeavor to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the suffering of disabled men, or renders their death inevitable;

That the employment of such arms would be contrary to the laws of humanity⁴²

The idea is supposed to be that certain rules or principles are so obvious that they can be used to proscribe behavior as a kind of law across all of humanity.

One of the most obvious universal principles of the laws of humanity is that the production of unnecessary suffering be prohibited. Again, now put in slightly different terms than those above, the idea is that rationality is supposed to be the basis for evaluating behavior. And the challenge then is to find behavior that could not be construed as rational, even during war. The answer provided is that even during war, it is irrational to produce suffering that is useless or to no obvious end, as well as to produce

⁴² The Declaration of St. Petersburg, 1868.

suffering that shows contempt for the needs of others. Given that rationality relates means to ends, if a given means has no reasonable end understood in terms of the legitimate aims of war, then that behavior is irrational and to be proscribed.

VII. Objections

Let us next consider a few objections to the views I have set out in order to see more of the supporting reasons. First, it could be objected that calling cruel behavior irrational does not capture the full force of what is so obviously wrong with cruelty. Perhaps it might be said, it is the assault on dignity that makes cruelty so obviously wrong. Cruelty is an assault on the person and in this sense is inhumane, not merely irrational or unreasonable. My Hobbesian minimalism has not allowed for the full force of cruelty to be appreciated.

I would not disagree that this is a highly plausible way to explain the wrongness of cruelty. But there is in some respects an even more obvious basis for the wrongness of cruelty – that it is a subspecies of irrational behavior in the sense that it is pointless, or at least pointless in terms of any legitimate objective that could be articulated as counting during the course of war or armed conflict. And we should also remember that Hobbes also added that cruelty shows contempt for the needs of others, perhaps indicating that even Hobbes was grappling with the idea of dignity, even if he did not fully articulate this important moral idea.

If rationality is going to be any guide at all to what are the normative constraints on behavior, it will surely be in cases where there is no point to the behavior. Of course in the case of the rules of war, especially concerning cruelty, there may seem to be a point to cruel behavior. It may be thought that deterrence is made more effective the

more extreme is the response to harm. During war, one would seemingly gain an advantage by being known for cruelly treating those who are captured, for instance. But on any rational construal of what proper behavior during battle should be there is no point to cruelty. Cruelty does not, at least in the long run, advance any of the acceptable goals of war.

A second objection can be seen in a counter-example, the use of cruelty as a means to deter prisoners of war from attempting to escape. In the movie, “Bridge Over the River Kwai,” the Japanese are portrayed as employing extremely cruel treatment of Allied prisoners of war as the means to prevent them to escape or to mutiny given that there were more prisoners of war than there were Japanese soldiers to guard them. Here it might be said, it was not irrational for the Japanese to employ cruelty as a strategy of war, given the point of keeping prisoners of war out of battle and using the least number of soldiers possible to keep the prisoners from escaping back to that battlefield.

And yet, there are factors even here that tell against this use of cruelty being seen as rational. One of the most common objections to the use of cruelty in such situations is that it upsets the reciprocity upon which some have defended the rules of war. If the Japanese are known for mistreating prisoners of war then Japanese prisoners of war should expect similar behavior from the Allies. As I said earlier, I do not necessarily support this reasoning since the cruelty could be covert, or as seems to be true today, reciprocity itself may not be something that either side can expect.⁴³

Another consideration is that the use of cruel tactics may be rational in the short run but not in the long run. Here I would point to various problems that emerge in *jus*

⁴³ See Mark Osiel, The End of Reciprocity, NY: Cambridge University Press, 2010.

post bellum thinking.⁴⁴ The most serious problem with cruelty, even if it has a short term military point, is that it makes reconciliation very difficult after war ends. As Michael Walzer has said, we must avoid:

the danger of provoking reprisals and of causing bitterness that will long outlast the fighting. The bitterness ... might, of course, be the consequence of an outcome thought to be unjust... but it may also result from military conduct thought to be unnecessary, brutal, or unfair or simply ‘against the rules.’ So long as defeat follows from what are widely regarded as legitimate acts of war, it is at least possible that it will leave behind no festering resentment...⁴⁵

The climate that leads to reprisals and bitterness, after war ends, is made much more likely if unnecessary harms are inflicted on a State’s soldiers.

A third objection is that I have been mainly focused on the part of the Hobbesian concept of cruelty that concerns unnecessary suffering. But there is another part that concerns showing contempt for the needs of others. One objection might be that I have failed to note that in war respect for the needs of enemy soldiers is simply not possible when the whole point of war is to kill as many enemy soldiers as one can. If it is not cruel to kill soldiers contrary to their needs, it would similarly seem not to be cruel merely to harm enemy soldiers contrary to their needs. Indeed, it might be claimed that it is a duty of soldiers to do all they can to kill or incapacitate enemy soldiers and that my proposal sends soldiers at best mixed messages that could undercut this important duty.

The laws of war have indeed allowed that States can go to war to protect what they perceive to be their interests, but that nonetheless there must be limits on what can

⁴⁴ On this general topic see my book, *After War Ends: A Philosophical Perspective*, Cambridge: Cambridge University Press, forthcoming in 2012.

⁴⁵ Walzer, *Just and Unjust Wars*, NY: Basic Books, 1977, p. 132.

occur on the battlefield. Pacifists of course have found such a position incoherent. But killing during war is simply what war is about, whereas inflicting harm is not. Again, as I said above, the idea is that soldiers are trained to kill but not to be inhumane in the way the killing occurs. To this end, the laws of war have been articulated to do what we can to make war not so horrible. A soldier will not necessarily act in a way that is inhumane if cruelty can be avoided.

It is not necessarily cruel to kill soldiers on the battlefield, just as it is not necessarily cruel to kill a convicted murderer by lethal injection. In both cases there are ways to do the killing that show more or less regard for the needs of sentient humans who can be subjected to unusually awful forms of treatment, and where merely being killed is not necessarily one of those painful forms of treatment. And while inflicting pain is not the only measure of showing contempt for the needs of others, it can be a rough approximation of whether sentient beings are being treated with contempt for their needs. Indeed, this is one of the reasons why death is considered not as bad as torture.⁴⁶

A fourth objection is that I have failed to see that if a soldier is a threat to the self-preservation of another soldier, there is no limit on what can be done to him if he fights on the unjust side of a war. Soldiers who are unjust threats have forfeited their rights, and these rights include the right not to be treated cruelly. In defending ourselves, we do not have to be careful not to be cruel. Such care is not owed to those who threaten our life, regardless of whether the threat is innocent or non-culpable. Self-defense trumps other considerations such as cruelty, since life is the most precious of all goods.

My response here is to point out that there is indeed a conflict that will be hard to resolve here. I hold the view that there are other goods or values that are as significant as

⁴⁶ See Henry Shue, "Torture," Philosophy & Public Affairs, vol. 7, no. 2 (1978), pp. 124-143..

self-defense, such as humaneness. I have defended this position at length in other works.⁴⁷ Suffice it here to say that when life is not at such risk that only one kind of action is reasonable, then even if life is given highest value other moral considerations such as humaneness can be reasonably appealed to. The prohibition on cruelty, even during battle, is one of the considerations of humaneness that is not ruled out simply because one person has a right of self-defense and another person is acting in support of an unjust war.

The laws of war are traditionally seen to be universally applicable. I have argued that the cornerstone of these laws, the prohibition against cruelty and the infliction of unnecessary suffering have a strong claim to be regarded as universal principles. These principles are essential for war to be waged in a humane manner and for combatants to see themselves as professional soldiers rather than merely as killers. Contemporary theorists who think that all of the laws or rules of war should be seen as specific to which side of the war one is on need to think harder about what would constitute minimal conditions for humane wars. There may be reasons to see some of the rules of war as varying depending on the side on which one fights, but there are some rules of war that need to be adhered to by all soldiers.

In this paper I have looked to a seemingly unlikely source, the philosophical writings of Thomas Hobbes to provide the beginning of an argument supporting the laws or rules of war, especially the prohibition on cruelty and other forms of unnecessary suffering. From the Hobbesian understanding of the laws of nature as grounded in rationality I attempted to provide a grounding for certain minimalist constraints during war, such as can be found in the Declaration of St. Petersburg and the Geneva

⁴⁷ See my book, War Crimes and Just War, Cambridge University Press, 2007.

Conventions. A Hobbesian account of the rules of war is one that would stress minimalist constraints, but constraints nonetheless, despite the way that Hobbes has often been interpreted. And I have argued that such *jus in bello* minimalist prohibitions are universally applicable during wars.