


REVIEW ESSAY

The fight for humane war

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Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War*, Farrar, Straus and Giroux, 2021, 400pp, \$30.

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1. Introduction

Since the terrorist attacks of 11 September 2001, few international law issues have been as consequential as United States counterterrorism operations. The ways the US has decided when, where, and how to use force around the world has affected almost every country in the world. In *Humane*, Yale Law School Professor Samuel Moyn seeks to explain how and why the US has acted in this way.¹ These questions are not just important to those in the US; they affect anyone where the US might assert power and they affect the shape of international law.

In October 2002, as the Bush Administration was ramping up its inexorable push for war in Iraq, Senator Barack Obama gave a speech in Chicago opposing the war.² He called it a ‘dumb war’, a ‘rash war’, and an attempt by the ‘weekend warriors’ in the Bush Administration to ‘shove their own ideological agendas down our throats, irrespective of the costs in lives lost and in hardships borne’.³ Obama told the crowd that he was not opposed to all wars; the Civil War and the Second World War were his examples of good wars.⁴ But he saw war as a choice and never inevitable. He told the crowd that war came with costs that were sometimes just too high to pay.⁵ On that day in 2002, Obama made clear that just as going to war was a righteous choice in the face of some evils, the choice *not* to go war could be righteous in other cases.

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¹H. R. Luce Professor of Jurisprudence and Professor of History, Yale Law School; S. Moyn, *Humane: How the United States Abandoned Peace and Reinvented War* (2021).

²B. Obama, ‘Senator Barack Obama’s speech against Iraq war’, *NPR*, 20 January 2009, available at www.npr.org/templates/story/story.php?storyId=99591469.

³*Ibid.*

⁴*Ibid.*

⁵*Ibid.*

In 2009, Obama, now speaking as president, delivered an equally stirring but very different message in his Nobel Peace Prize acceptance speech.⁶ There Obama decried war in general, of course.⁷ But as president, he saw the war on terror as inevitable. He told those assembled they must acknowledge ‘the hard truth: We will not eradicate violent conflict in our lifetimes’.⁸ He acknowledged that there was, in many places, ‘a deep ambivalence about military action’,⁹ but this did not stop him from advocating for more war. He then spent much of the rest of his speech arguing in favour of benevolent uses of American military power. He lamented but accepted the inevitability of war and extolled the virtues of efforts to curb the violence in these conflicts.¹⁰ As president, Obama saw war as an inescapable reality to be managed, ideally by mitigating its violence through law and policy.

In *Humane*, Moyn argues that Obama’s transformation – from a war sceptic who was clear-eyed about its many costs, into a leader who was resigned to war’s inevitability and focused instead on regulating it – epitomizes the profound shift that the US has made over the past generation.¹¹ The United States has been at war in Afghanistan or elsewhere in the world continuously since at least 7 October 2001, when the US launched air strikes against the Taliban in the wake of the 11 September attacks.¹² US ground forces entered Afghanistan about a month later, and the US fought there for almost the next 20 years. At the same time, the US has used force in many other places all around the world. Some of these conflicts have received substantial attention, especially the US invasion of Iraq.¹³ But the US has engaged in conflicts of one sort or another, all in the name of fighting against terrorism, in many other places.¹⁴ The public has scarcely noticed, much less debated, US involvement in Djibouti, Eritrea, Ethiopia, Georgia, Kenya, Libya, Niger, or Somalia.¹⁵ But, Moyn argues, even with all of this US involvement in conflicts around the world,

⁶Pres. B. Obama, ‘Remarks by the President at the Acceptance of the Nobel Peace Prize’, *The White House, Office of the Press Secretary*, 10 December 2009, available at obamawhitehouse.archives.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize.

⁷*Ibid.*

⁸*Ibid.*

⁹*Ibid.*

¹⁰*Ibid.*

¹¹Of Obama, Moyn writes that he ‘perfected’ ‘an innovative new form of war’. See Moyn, *supra* note 1, at 8. In this new warfare, the US takes ‘unprecedented care when it comes to killing people’, but the conflicts themselves become ‘more expansive in scope and perpetual in time by virtue of these very facts’. *Ibid.*, at 8.

¹²President George W. Bush announced the beginning of the US war in Afghanistan on 7 October 2001. Pres. G. W. Bush, ‘Presidential Address to the Nation’, *The White House Archives, President George W. Bush*, 7 October 2001, available at georgewbush-whitehouse.archives.gov/news/releases/2001/10/20011007-8.html. On 31 August 2021, President Joe Biden announced the end of the war in Afghanistan. Pres. J. Biden, ‘Remarks by President Biden on the End of the War in Afghanistan’, *The White House Briefing Room*, 31 August 2021, available at www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/31/remarks-by-president-biden-on-the-end-of-the-war-in-afghanistan/. The US has had some form of military presence in Iraq since the 2003 invasion. See M. Berger, ‘Invaders, Allies, Occupiers, Guests: A Brief History of U.S. Military Involvement in Iraq’, *Washington Post*, 11 January 2020, available at www.washingtonpost.com/world/2020/01/11/invaders-allies-occupiers-guests-brief-history-us-military-involvement-iraq/. For a full cataloging of the official starting and ending dates of US conflicts see ‘U.S. Periods of War and Dates of Recent Conflicts’, Report RS21405, *Congressional Research Service*, 14 December 2018, at 6–10.

¹³See generally S. Walgrave and D. Rucht, *The World Says No to War: Demonstrations Against the U.S. War on Iraq* (2010) (describing and analysing worldwide protests involving millions of people against the US invasion of Iraq).

¹⁴Indeed, just in the years 2018, 2019, and 2020, the US carried out counterterrorism operations in 85 countries around the world. See S. Savell, ‘United States Counterterrorism Operations 2018–2020’, *Costs of War–Watson Institute*, February 2021, available at watson.brown.edu/costsofwar/files/cow/imce/papers/2021/US%20Counterterrorism%20Operations%202018-2020%2C%20Costs%20of%20War.pdf.

¹⁵See, e.g., M. Reed, ‘Presidential References to the 2001 Authorization for Use of Military Force in Publicly Available Executive Actions and Reports to Congress’, Memorandum, *Congressional Research Service*, 11 May 2016 (listing US military operations and other uses of force for which the executive branch claimed justification under the 2001 AUMF).

the regulation of armed conflict has become more formal, aimed at making armed conflict less brutal.¹⁶ This shift has come from changes in both law and practice, driven by an increase in the legal regulation of armed conflict and changes in the kinds of tactics and weapons employed by the armed forces. With the exceptions of Afghanistan and Iraq, none of these operations involved the heavy presence of US ground troops. Largely gone are the large-scale bombing raids that marked the Second World War and the Vietnam War.¹⁷ In their place are drones strikes – the use of missiles launched from unmanned aerial vehicles – and kill/capture raids conducted by teams of US special operations forces.¹⁸ Also gone is a clear sense of the geographic boundaries of the conflict or when it will end.¹⁹ As significant as these changes are, Moyn argues that what is most important is the absence of any robust debate about whether to go to war at all.²⁰

Moyn argues that these two trends – less brutality but more and longer conflicts – are directly and causally linked.²¹ He argues that as wars have become more humane, it has become less politically difficult for political leaders to resort to violence. Humanity in warfare makes it less costly to resort to war in the first place and much easier for leaders to prolong conflicts.²² With *Humane*, Moyn has changed the terms of the debate about the causes and consequences of the US war on terror. Alongside concerns about the effects of the conflict on those it impacts should be a robust debate about whether armed conflict is the right approach at all.

Humane can be read as a kind of response to scholarship that centres another legal issue, the rules governing the decision to go to war. For example, *The Internationalists*, published in 2017 and written by Moyn's Yale colleagues Oona A. Hathaway and Scott J. Shapiro,²³ highlights international agreements that attempted to outlaw going to war. Hathaway and Shapiro argue that the Paris Peace Pact of 1928, in which states agreed to 'condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy', had a real effect.²⁴ This treaty, coupled with the UN Charter²⁵ and subsequent agreements, effectively outlawed war. Moyn's view is different. He centres the unintended consequences of the development of the regulations on the way wars are carried out, not whether they occur at all.

Moyn's work is different from earlier work on the legality of war. Moyn's analysis of the movement to humanize the conduct of war includes consideration of a wide range of international efforts. But his later discussion – the effect produced by these earlier efforts – is almost entirely focused on US policy and actions. This is not necessarily a weakness of the book; the US's post-11 September actions are certainly worthy of deep engagement. But it does raise the question of how other states that have engaged in multiple conflicts, like Russia in Chechnya, Georgia, and Ukraine, reacted to the international efforts to humanize war.

Moyn argues that attempts to make war less brutal and more humane have amounted to a distraction from what should be the real goal of advocates, states, and international institutions.

¹⁶Moyn provides a helpful timeline of the major changes in the regulation of armed conflict beginning in the US Civil War through 2021. Moyn, *supra* note 1, at 327–32.

¹⁷For a history of the effects of bombing in the Second World War see H. Knell, *To Destroy a City: Strategic Bombing and its Human Consequences in World War II* (2003).

¹⁸See, e.g., L. Robinson, 'The Future of Special Operations: Beyond Kill and Capture', (2012) 91 *Foreign Affairs* 110, at 110–11 (describing pace and frequency of US kill/capture raids).

¹⁹See, e.g., B. Egan, 'Address at the Annual Meeting of the American Society for International Law', *U.S. Department of State Archives*, 1 April 2016, available at 2009-2017.state.gov/s/l/releases/remarks/255493.htm (describing US government position that there is no geographic boundary or temporal limit on the war on terror).

²⁰Moyn, *supra* note 1, at 262.

²¹*Ibid.*, at 12–13.

²²*Ibid.*, at 294–5.

²³O. A. Hathaway and S. J. Shapiro, *The Internationalists: How A Radical Plan to Outlaw War Remade the World* (2017). Hathaway is the Gerard C. and Bernice Latrobe Smith Professor of International Law at Yale Law School. Shapiro is the Charles F. Southmayd Professor of Law and Professor of Philosophy.

²⁴1928 General Treaty for the Renunciation of War as an Instrument of National Policy, 94 LNTS 57 (1929).

²⁵1945 Charter of the United Nations, 1 UNTS 16 (1945).

Moyn wants the reader to imagine a third choice, better than humane, perpetual war and better than short and brutal armed conflicts: a real and lasting peace. Moyn's point is that the energy and attention given to trying to make war more humane has distracted policy-makers and the public from this loftier goal.²⁶ To make his case, Moyn sets out to explore two interwoven issues. The first is to identify what has contributed to making war more humane in recent decades. This outcome was not inevitable, as Moyn shows, even if it was the product of humanitarian impulses. Related to this is a second set of issues. What are the consequences of this humanization of war and how has conflict become endless?

The answers Moyn provides to these compelling questions are important and, in places, convincing. But they are also incomplete. In this Review, I first lay out the case Moyn makes in support of his twin theses about humanized and endless war. In Section 3, I argue that his history is incomplete in important places. It omits relevant considerations, including political differences in different eras, general changes in the role of law in American life, and changes in technology. I then argue in Section 4 that Moyn's treatment of the decisions facing policy-makers and humane war advocates, who come in for much critique in *Humane*, does not fully account for the difficult constraints each faced. Finally, in Section 5 I draw on Moyn's work to identify some of the key issues that may arise in future wars.

2. Humanizing War

Moyn's history of the path to humane war is rich and complex, with vivid portraits of many of the key players in debates about whether to humanize war or prohibit it. He weaves together the history of the antiwar movement and its tensions with efforts to make war less brutal with vivid portraits of the personalities that brought each movement to life. He identifies three principal inflection points in recent history that have shaped current US policies. The first centres around the Second World War and the ways the victorious powers responded to the horrors of that conflict. The brutality of the Nazis and other Axis powers has been thoroughly documented by advocates and scholars and Moyn does not ignore this history.²⁷ But he also critically examines the way that the US's own actions affected later US policy. The US bombing campaign during the Second World War was one of the most brutal in history. The architects of these US tactics knew that their campaign would unleash 'firestorms on urban centers', killing civilians and destroying homes, schools, and businesses.²⁸ They knew that by firebombing cities night after night in Germany, their choice of weapons and tactics made it impossible for them to distinguish civilian targets from military targets or to mitigate the harms to civilians.²⁹ Moyn notes that US firebombing of Japanese cities, with many buildings built of wood, was especially brutal.³⁰ Indeed, more people were killed during a particularly harsh night of firebombing in Tokyo than were killed when the atomic bombs were dropped on Hiroshima and Nagasaki.³¹

After the war the voices in favour of humanizing armed conflict became louder, especially in the US and Europe. The 1945 charter that created the Nuremberg Tribunals explicitly mentioned the new offense of crimes against humanity to allow for the punishment of those who abused civilian populations.³² The Geneva Conventions of 1949 formalized legal rules governing the treatment of civilians, combatants, and the sick and wounded during armed conflict. Moyn describes these rules as 'toothless' when written,³³ but they were evidently influential over time as the

²⁶Moyn, *supra* note 1, at 8–9, 270.

²⁷*Ibid.*, at 131–2.

²⁸*Ibid.*, at 133.

²⁹*Ibid.*

³⁰*Ibid.*, at 135.

³¹*Ibid.*

³²Nuremberg Charter Art. VI., in L. Friedman (ed.), *The Law of War: A Documentary History*, Vol. 1, (1972), at 883.

³³Moyn, *supra* note 1, at 148.

principles in these foundational documents helped form the core of what has become the laws of more humane war. It is true that they did not provide for adequate enforcement and left out many possible crimes.³⁴ And the unparalleled destruction in the Korean War supports Moyn's argument. Indeed, he notes that a higher proportion of the population died during that conflict than in any modern war, with more than 4 million people dead at the end, about half civilians.³⁵ Nonetheless, the Geneva Conventions were a step away from un- or under-regulated brutality and toward humanity even if the reality of US military actions did not yet reflect their principles.

The next inflection point, and perhaps the most important in Moyn's argument, came during and after the Vietnam War. US bombing tactics in Vietnam were perhaps as brutal as those in the Second World War or Korea. The US deliberately used napalm, an incendiary chemical, to burn villages and the civilians living in them.³⁶ As images of these atrocities slowly began to reach the US public, sentiment turned against the war.³⁷ Moyn argues that the public turned in earnest against the Vietnam War after the world learned about US committed atrocities at My Lai and other places.³⁸ These stories did not all emerge at once, of course, which seems to have amplified their effect.³⁹ As more and more stories emerged, support for the war dried up and opposition increased. Activists had time to publicize each new outrage and rally more support against the war. Moyn argues that as stories and images revealing the brutality of the US operations became more widely known, these images galvanized the public and helped turn the nation against the war, thereby hastening its end.⁴⁰

Moyn draws a direct link between sentiment about how the war was being fought to public opposition to war itself. For Moyn, the end of the Vietnam War was largely produced by public opposition to it, which itself was produced by outrage over the atrocities committed by US forces against civilians. This, for Moyn, led to a lost opportunity. Lawyers and activists who attempted to generate a larger debate about the use of war as a tool of US policy failed to have a lasting impact.⁴¹ Their arguments might have helped to end one war, but they did not help prevent another. Worse, Moyn argues, because these arguments helped push the laws humanizing war closer and closer to the centre of US policy, they helped legitimate the emergence of humane but endless war.⁴²

Moyn contrasts public reaction to wartime atrocities during Vietnam to the ways that the US reacted after his third inflection point, the US response to the 11 September attacks.⁴³ He argues that policy-makers and the public responded to atrocities in Afghanistan and elsewhere in the war on terror by demanding less brutality but not by making any serious demands to end the biggest armed conflicts of the war on terror or reconsider the use of war as a response to terrorism.⁴⁴ It is important to Moyn that after the public saw images of US troops abusing prisoners at Abu Ghraib in Iraq, whatever protests that occurred were not sufficient to turn the US away from the broader war on terror.⁴⁵ Indeed, the US continued to fight in Afghanistan for

³⁴*Ibid.*, at 147–8.

³⁵*Ibid.*, at 155.

³⁶See generally R. Neer, *Napalm: An American Biography* (2013) (describing the development and deployment of napalm as a weapon of war in the Second World War and the Vietnam War).

³⁷See, e.g., 'The Fire This Time', *New York Times*, 11 June 1972, available at www.nytimes.com/1972/06/11/archives/the-fire-this-time.html (publishing photo of naked child who had been napalmed and describing reactions to the tragedy).

³⁸Moyn, *supra* note 1, at 162–3.

³⁹*Ibid.*, at 162.

⁴⁰*Ibid.*, at 182–5.

⁴¹*Ibid.*, at 190–2.

⁴²*Ibid.*, at 200–3.

⁴³*Ibid.*, at 163.

⁴⁴*Ibid.*, at 253–4.

⁴⁵*Ibid.*, at 254. It is important to note that there were large public protests against US drone policies, but many of these were outside the United States. See, e.g., 'Thousands Protest Against Drones at U.S. Air Force Base in Germany', *Reuters*, 11 June 2016, available at www.reuters.com/article/us-usa-drones-germany-idUSKCN0YX0FM (describing public protests against US drone strikes).

another 17 years.⁴⁶ And even as the devastating civilian toll of drone strikes became known to the public, calls to stop the war or prohibit drone strikes were not taken seriously by policy-makers.⁴⁷

Moyn closes the book with concerns about the future of warfare and the US role in the world if there is not a serious reckoning with the problems he has identified. He argues that the humanizing of war through changes in the law and practice still leaves ample space for brutal violence.⁴⁸ From the ‘charnel house of Yemen’ – where the US has supported and supplied weapons to some of the warring factions,⁴⁹ helping to contribute to a humanitarian disaster – to the continuing wars in Afghanistan and Syria, even the humane version of war is devastating to those who experience it. And, Moyn warns, by supporting legal changes that nominally constrain violence, the US has gained more legitimacy for its actions.⁵⁰ Even more ominously, Moyn warns that humanized war may portend an even worse future, in which war as it has been traditionally understood is replaced with ‘a global policing system burnished with . . . humane aspirations but under’ the ‘sole authority’ of the US, forcing onto other peoples ‘a humbling new form of permanent subjugation’.⁵¹

3. The causes of humane war

Moyn is telling a causal story. He makes the case that the trend toward endless war is a direct, if seldom-recognized and little-understood, cost of making war more humane and less brutal. It is on this point that Moyn’s case is the weakest, even if it is still compelling. Moyn’s causal story is not the best interpretation of the evidence he presents, and there are additional considerations that he does not fully address. He makes a convincing case that the laws of war place greater restrictions on those waging war, and that the current war on terrorism appears to have no end in sight. But it is not at all clear that the first caused the second. *Humane* is best read as part of a larger conversation about how war has been transformed in the past two or three decades. Although he does not say so explicitly, Moyn’s work suggests that his explanation for the rise of endless war is just one of the factors that has produced this change. Moyn argues that scholars and policy-makers have not given sufficient attention to the role of humane war in normalizing a perpetual state of war. But to fully understand the rise of perpetual war, it is useful to consider other factors that might also contribute to the phenomenon.

This is more than a mere quibble. If the principal cause of endless wars is not their humanization but some other amalgam of politics, technology, and law, then the choice Moyn posits is a false one. Put slightly differently, those advocating in favour of humanizing armed conflict are not necessarily complicit in the production of endless war. Endless war might have happened anyway, without the humanizing changes in law that have at least mitigated some of its brutality and devastation. And the best ways to address this new problem might not lie where Moyn suggests they do. He argues that those devoted to peace should invest their energy in opposing war, not in trying to

⁴⁶The US presence in Afghanistan, Iraq, and other locations has shifted over time, of course. The US has surged troops into each country, withdrawn most or all troops, and re-engaged in different ways. For a general history see C. Malkasian, *The U.S. War in Afghanistan: A History* (2021); J. K. Weston, *The Mirror Test: American at War in Iraq and Afghanistan* (2016).

⁴⁷See generally A. Edney-Browne, ‘The Psychosocial Effects of Drone Violence: Social Isolation, Self-Objectification, and Depoliticization’, (2019) 40 *Political Psychology* 1341 (describing consequences of drone strikes and threat of drone strikes on civilians living in high-risk areas); ‘The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions’, *Center for Civilians in Conflict and Columbia Law School Human Rights Clinic*, 2012, available at web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/The%20Civilian%20Impact%20of%20Drones.pdf (describing effects on civilians of drone strikes, including lost loved ones, disruptions to daily life, and increased anxiety among other effects).

⁴⁸Moyn, *supra* note 1, at 316–17.

⁴⁹See generally R. Malley and S. Pomper, ‘Accomplice to Carnage: How America Enables War in Yemen’, (2021) 100 *Foreign Affairs* 73 (describing US involvement in war in Yemen); ‘Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014’, A/HRC/45/6, *Report of the Group of Eminent International and Regional Experts on Yemen*, U.N. Human Rights Council, 9 September 2020, available at reliefweb.int/report/yemen/situation-human-rights-yemen-including-violations-and-abuses-september-2014 (describing human rights abuses in Yemen).

⁵⁰Moyn, *supra* note 1, at 317.

⁵¹*Ibid.*, at 322.

mitigate the effects of conflict. Based on his evidence and some additional considerations, those who wish to humanize war need not worry quite as much as Moyn does that their actions will cause more harm than good.

Before moving on, it is important to note that even if Moyn's causal assertions are not entirely convincing, his twin observations that war is becoming more humane and that there is now a risk of endless war appear to be accurate and their implications are critically important. Moyn argues that one of the principal consequences of the impulse to make war more humane has been to make it more palatable to policy-makers. He describes the process in transactional terms. Policy-makers got the freedom to kill terror suspects 'across an arc of the earth and for an indefinite period'.⁵² 'In compensation' they promised that 'such killing would take place humanely, targeting only combatants and avoiding civilian harm'.⁵³ Even if it is not a transaction, these two phenomena – more humane war, longer conflicts – both warrant much more attention than they have received, regardless of whether the causal link is not as strong as Moyn suggests.

3.1 All wars are different

The Russian novelist Leo Tolstoy, whose work figures prominently in *Humane*,⁵⁴ opened the novel *Anna Karenina* with the famous sentence: 'Happy families are all alike; every unhappy family is unhappy in its own way.'⁵⁵ Something similar could be said about the causes and consequences of wars. Each war arises because of its own amalgam of causes, inspires its own particular mixture of support and protest, and ends for its own reasons. Moyn compares the reactions of the public and policy-makers to the brutalities of the Second World War, Korea, Vietnam, and the current war on terror to support his case that what is happening now is different, and that the humanization of war has led to endless wars.⁵⁶

Moyn's treatment of the evidence regarding public protests surrounding Vietnam and the early years of the wars in Afghanistan and Iraq reads as equal parts advocacy and meticulously-researched history. He is using history to make the moral and political case that after the 11 September attacks, the public and policy-makers were less interested in whether the US should be at war than was the case during the waning days of the Vietnam War. There is a clear logic to this: there were publicized atrocities in the Vietnam War, followed by antiwar protests, followed by the end of the war. Publicized evidence of atrocities in the war on terror has not led to the end of US operations around the world and did not lead to the swift drawdown of the wars in Afghanistan and Iraq. But Moyn gives little weight to other evidence that would complicate his case. There were enormous protests against the Iraq war⁵⁷ and public outrage over the torture of prisoners at Abu Ghraib.⁵⁸ Moyn argues that there was a 'single-minded concern with American abuse of captives, and the specter of Guantanamo', which 'masked the deeper horror of an escalating shadow war'.⁵⁹ For Moyn, the focus on reducing brutality was a distraction from what should have been the real issue, ending the war. Policy-makers were able to displace public anger away from the real issue by promising to comply with rules that make war less brutal.

⁵²*Ibid.*, at 305.

⁵³*Ibid.*

⁵⁴Moyn surveys Tolstoy's life, his fiction, and his essays. See, e.g., Moyn, *ibid.*, at 17–19, 30–2, 42–3. Tolstoy ultimately rejected the idea of humane war, arguing that it was 'no more ethically plausible than agitation for humane slavery'. *Ibid.*, at 322.

⁵⁵L. Tolstoy, *Anna Karenina* (translated by C. Garnett (2012), 1877), at 1.

⁵⁶Moyn, *supra* note 1, at 133–8, 155–6, 180–92, 290–7.

⁵⁷See generally J. Verhulst and S. Walgrave, 'Politics, Public Opinion, and the Media: The Issues and Context Behind the Demonstrations', in Walgrave and Rucht, *supra* note 13, at 42 (analysing reasons giving rise to the mass protests against the Iraq war).

⁵⁸For a discussion of the widespread media coverage of the Abu Ghraib photos see D. Folkenflick, 'Photos Turned Abuse into a Scandal', *Baltimore Sun*, 8 May 2004.

⁵⁹Moyn, *supra* note 1, at 270.

Moyn is likely correct that the different responses by the US public to Vietnam and Afghanistan are telling, but it is not clear that they provide as much support for his distraction argument as he assumes.⁶⁰ It is not clear that the US public was distracted by efforts to make the war less brutal; more likely is that public opinion was simply different for understandable reasons. For example, the visible toll on the US was much larger in the Vietnam war than it has been in the wars fought since the 11 September attacks.⁶¹ More than 2,700,000 American military personnel served in the Vietnam War. In contrast, over the first 18 years of the war in Afghanistan, about 775,000 American military personnel served.⁶² Many of the US fighting forces in the Vietnam War were draftees.⁶³ The risk of being drafted existed for almost all young men in the US. Its salience was simply greater to people in the US.⁶⁴ Americans might ignore the Afghanistan war because they did not know anyone fighting there, but that was not possible in the Vietnam War because virtually everyone knew someone who might be required to go fight. Perhaps more important is that 58,000 Americans were killed in Vietnam.⁶⁵ Of course, that total pales in comparison to the millions of Vietnamese, Laotian, and Thai people killed.⁶⁶ But even the total of Americans killed in Vietnam far exceeds the approximately 7,000 Americans killed in the wars in Afghanistan and Iraq combined.⁶⁷ Indeed, more civilians were killed in the attacks of 11 September 2001 than US service members were killed in the 20 years of the Afghanistan conflict.⁶⁸ It should come as no surprise that the US public's reaction to each conflict was different.

Just as the public response to wars is different, so too are causes for wars different. The reasons for the wars in Vietnam and Afghanistan (including the war on terror writ large) were different.⁶⁹ The US entered the Vietnam War for many complex reasons, of course, but it did not do so

⁶⁰For a discussion of the importance of selecting the appropriate analogies from which to draw lessons see R. Neustadt and E. May, *Thinking in Time: The Uses of History for Decision-Makers* (1986), at 89–90. Neustadt and May argue that those drawing on history in this way should survey many possible analogies and identify similarities between them before reaching conclusions about their meaning.

⁶¹See J. Love and R. Nordland, 'Why Afghanistan Became an Invisible War', *New York Times*, 1 March 2020, available at www.nytimes.com/interactive/2020/03/01/world/asia/afghanistan-invisible-war.html (analysing numbers of troops and casualties in US wars including World War II, Korea, Vietnam, and the post-11 September wars and finding that the number of people serving and suffering casualties had declined significantly).

⁶²D. Lamothe, 'How 775,000 U.S. Troops Fought in One War: Afghanistan Military Deployments by the Numbers', *Washington Post*, 11 September 2019, available at www.washingtonpost.com/national-security/2019/09/11/how-us-troops-fought-one-war-afghanistan-military-deployments-by-numbers/.

⁶³Moyn, *supra* note 1, at 207. 'Contractual Report of Findings from the National Vietnam Veterans Readjustment Study', *National Vietnam Veterans Readjustment Study*, 7 November 1988, available at www.ptsd.va.gov/professional/articles/article-pdf/nvvrsv_vol1.pdf, at 107. One study commissioned by the Veterans Administration found that approximately 25% of those who served in the Vietnam War were drafted. *Ibid.*

⁶⁴For example, Juliette Love and Rod Nordland, in their comprehensive analysis for the *New York Times*, found that the number of news headlines in that paper about whichever war was ongoing was more than twice as high during the Second World War than it was during the wars in Iraq or Afghanistan. See J. Love and R. Nordland, 'Why Afghanistan Became an Invisible War', *New York Times*, 1 March 2020, available at www.nytimes.com/interactive/2020/03/01/world/asia/afghanistan-invisible-war.html.

⁶⁵See 'Vietnam War U.S. Military Fatal Casualty Statistics', *National Archives*, available at www.archives.gov/research/military/vietnam-war/casualty-statistics (reporting that 58,220 Americans were killed in the Vietnam War).

⁶⁶See, e.g., C. Hirschman, S. Preston and V. Loi, 'Vietnamese Casualties During the American War: A New Estimate', (1995) 21 *Population and Development Review* 783, at 807 (describing difficulties of arriving at a precise number of Vietnamese and other non-American casualties and noting estimates from 1 million to 3.1 million).

⁶⁷See 'U.S. & Allied Killed', *Costs of War—Watson Institute*, July 2021, available at watson.brown.edu/costsofwar/costs/human/military/killed (reporting that a combined 7,057 US service members were killed in the wars in Afghanistan and Iraq combined).

⁶⁸See A. Suliman, 'Near 20 Years of War, 10 Days to Fall: Afghanistan, by the Numbers', *Washington Post*, 20 August 2021, available at www.washingtonpost.com/world/2021/08/20/afghanistan-war-key-numbers/ (reporting that 2,352 American service members were killed in the Afghanistan war).

⁶⁹See N. Grossman, 'America's Forever War Must Go On', *The Atlantic*, 8 September 2021, available at theatlantic.com/ideas/archive/2021/09/america-afghanistan-terrorism-forever-war/619999/ (arguing that because the threat from terrorism remained urgent, US counterterrorism operations must also continue, albeit in modified form).

because it was attacked by groups that were based there.⁷⁰ It is likely that for most Americans, their views about the continued conflicts in Afghanistan and elsewhere, all part of the war on terror, were based on a several factors.⁷¹ These would include their memories of the attacks of 11 September, their perceptions of the risk of another attack, the cost to them or their families of continuing the war, their reactions to US atrocities, and a host of other issues. Thus the US public might have made sense of US actions after 11 September as the price to pay for the absence of further attacks on the US homeland. Thus, Moyn's argument that humane war was the result of displaced energy or a distraction from the real issues does not account for all of the evidence.

3.2 The infrastructure and technology of warfare

Another important consideration is something Moyn mentions, but does not fully consider. The US response to terrorism is largely done through military rather than law enforcement means. It is by now almost cliché to decry the military-industrial complex,⁷² but the terror-industrial complex warrants close attention.⁷³ The US has military bases all over the world⁷⁴ and continues to increase its drone capabilities.⁷⁵ Since the attacks of 11 September, the US has conducted counterterrorism missions in countries all over the world, creating a web of bases, relationships, and expectations that continue to grow.⁷⁶ The humanization of war may have helped to obscure this rise and may have made it more politically salable, but now that this enormous counterterrorism organism exists, it is almost self-sustaining. The ease with which policy-makers and political leaders boast of the humanization of war is matched by the fear they have of appearing to retreat from the fight against terrorism. War may be perpetual because the war-fighting machine is simply too large and complex to be easily curtailed.

In addition, the precision of modern weapons and the commitment of American policy-makers to reducing the risk to American forces have also combined to make war both more humane and longer-lasting. Militaries have long sought to make their weapons more precise for many reasons.⁷⁷ One, as Moyn rightly emphasizes, is the strict targeting requirements imposed by the modern laws of armed conflict.⁷⁸ But there are other reasons. Those involved in war fighting want to reduce the risk to their forces as much as possible while increasing their ability to destroy

⁷⁰See generally C. Appy, *American Reckoning: The Vietnam War and Our National Identity* (2015), at 3–117 (analysing complex reasons for US involvement in Vietnam).

⁷¹See, e.g., 'Post September 11 Attitudes', *Pew Research Center*, 6 December 2001, available at www.pewresearch.org/politics/2001/12/06/post-september-11-attitudes/ (reporting that 85% of Americans favoured military action in Afghanistan in response to terrorism); 'War Concerns Grow, but Support Remains Steadfast', *Pew Research Center*, 3 April 2003, available at www.pewresearch.org/politics/2003/04/03/war-concerns-grow-but-support-remains-steadfast/ (reporting that approximately 70% of Americans favoured the war in Iraq).

⁷²For a history of the term and the phenomenon it describes see J. Fallows, 'The Military-Industrial Complex', (2002) 133 *Foreign Policy* 46.

⁷³See generally W. Isaacson, 'GQ Icon: Colin Powell', *Gentlemen's Quarterly*, 6 September 2007, available at www.gq.com/story/colin-powell-walter-isacson-war-iraq-george-bush (interview of Colin Powell in which Powell warns against the politicization of counterterrorism); J. Risen, *Pay Any Price: Greed, Power, and Endless War* (2014) (describing growth in counterterrorism infrastructure and spending in the US and the risks that it could become self-perpetuating).

⁷⁴For a thorough discussion of the growth of the US military's influence around the world see generally D. Vine, *The United States of War* (2018). Vine has produced a publicly available database and map of all US bases around the world.

⁷⁵See, e.g., Savell, *supra* note 14, at 1 (mapping US counterterrorism operations, including drone strikes).

⁷⁶See generally W. Arkin, *The Generals Have No Clothes* (2021) (describing the creation of a permanent, self-sustaining national security and counterterrorism infrastructure in the US); Risen, *supra* note 73 (analysing the growth of counterterrorism infrastructure in particular).

⁷⁷See generally G. Raudzens, 'War-Winning Weapons: The Measurement of Technological Determinism in Military History', (1990) 54 *Journal of Military History* 403 (analysing expectation that better and more precise weapons would make militaries more effective).

⁷⁸Moyn, *supra* note 1, at 230–2.

the enemy's forces.⁷⁹ Technology is one way to do this. It also has the effect of humanizing war. Moyn describes the brutal, indiscriminate Allied bombing campaigns in Europe and Japan during the Second World War.⁸⁰ Hundreds of thousands of civilians were killed and injured as bombs and incendiary devices fell on neighbourhoods.⁸¹ Those campaigns would be unthinkable today, partly because of the influence of the humanized laws of war. But another part of the reason is that many militaries have learned that such indiscriminate bombing is inefficient.⁸² There are other, less risky ways to accomplish the military's goals.

Coupled with this strategic calculation has been the rise in precision technologies. The bombs dropped in the Second World War were guided, if at all, by rudimentary guidance systems, not GPS.⁸³ As technology has changed, it has become possible to put more and more distance between the attacker and the target. One of the factors that Moyn mentions but does not fully explore is whether the goal of force protection has played as much of a role in the reduction in the brutality of war as any other reason.⁸⁴ Political and military leaders use the tools they do in order to protect US forces from harm as much as possible.⁸⁵ Moyn's focus on the link between the humanization of war and endless war serves to obscure the ways that other trends have contributed to endless war. Precision technology and a commitment to shielding American forces from harm are drivers of both of the trends that Moyn identifies.

Moyn's causal argument raises another question that he does not give satisfying answers to. War is an interaction; it is a dialogue, not a monologue. The US has not simply gone about making war on other states without context or reason.⁸⁶ To be sure, many of these reasons may be weak or manufactured or misguided,⁸⁷ but as with all states that use violence in pursuit of their national interest, the US has done so with reasons. Parties to an armed conflict respond both to the rules governing the conflict and the actions of the other belligerents. They respond to the needs of the situation. Any critique of the consequences of various forms of regulation of armed conflict must grapple with a robust engagement with the real choices faced by the participants at the time. Whether to use violence or opt for some other means to resolve a dispute is the question that Moyn wants policy-makers to focus on. But often the answer to this question will turn on how, whether, and against whom other belligerents are using violence.

Consider an example: In 1994, the Rwandan Patriotic Front (RPF) was massed in Uganda while a genocide was raging in neighbouring Rwanda.⁸⁸ The RPF faced the decision of whether to use

⁷⁹See, e.g., O. Gross, 'The New Way of War: Is There a Duty to Use Drones?', (2016) 67 *Florida Law Review* 1, at 47–60 (analysing arguments that, as compared to the use of ground troops or other kinds of weapons, drones reduced risks to civilians and to US personnel).

⁸⁰Moyn, *supra* note 1, at 133–7.

⁸¹*Ibid.*, at 135.

⁸²See generally M. Lewis and E. Crawford, 'Drones and Distinction: How IHL Encouraged the Rise of Drones', (2013) 44 *Georgia Journal of International Law* 1127 (arguing that a combination of changes in the laws of armed conflict and the military's recognition of the increased efficiency of using smaller footprints in conflict contributed to the rise of drones).

⁸³See, e.g., J. Correll, 'The Emergence of Smart Bombs', *Air Force Magazine*, 1 March 2010, available at www.airforcemag.com/article/0310bombs/#:~:text=The%20results%20from%20the%20Linebacker,had%20CEP%20of%2025%20feet (describing history of military's attempts to develop technology to better guide bombs).

⁸⁴Moyn, *supra* note 1, at 250.

⁸⁵See, e.g., D. Byman, 'Why Drones Work: The Case for Washington's Weapon of Choice', (2013) 92 *Foreign Affairs* 32, at 33–4 (arguing that drone strikes are an effective and relatively low-cost means by which to advance US counterterrorism policy goals in part because they reduce the risk to US personnel).

⁸⁶See Grossman, *supra* note 69 (arguing that even if US counterterrorism strategies are not optimal, they should continue because the threat of terrorism continues); R. F. Perl, 'International Terrorism: Threat, Policy, and Response', *Congressional Research Service*, 3 January 2007, available at sgp.fas.org/crs/terror/RL33600.pdf (describing terrorist threats facing the US).

⁸⁷See, e.g., D. Cole and J. Lobel, 'Why We're Losing the War on Terror', *The Nation*, 6 September 2007, available at www.thenation.com/article/archive/why-were-losing-war-terror/ (critiquing the US rationale for its counterterrorism operations).

⁸⁸See W. Schmidt, 'Rwanda Puzzle: Is Uganda Taking Sides?', *New York Times*, 18 April 1994, available at www.nytimes.com/1994/04/18/world/rwanda-puzzle-is-uganda-taking-sides.html (describing situation in Central Africa in the days leading up to the genocide in Rwanda).

violence to stop the genocide or to wait and hope that a peaceful process would end the violence.⁸⁹ Part of that decision was surely influenced by the concerns that Moyn addresses: the morality of peace, the costs of using violence, and the like. But a bigger part of the decision was driven by what the enemy was doing.⁹⁰ Atrocities inspire action. So, the RPF swept across Rwanda and ended the genocide.⁹¹ (The RPF also committed its own violations of international law, and its record in governance is decidedly mixed.)⁹² Of course atrocities do not always inspire the right action at the right time. But it is undeniable that states and other actors feel some impulse to act in the face of atrocities.

3.3 More law everywhere

Moyn's case regarding the humanization of war relies, in large part, on what he sees as the proliferation of legal and 'legal-ish' rules governing the conduct of armed conflict.⁹³ But the increased commitment to rules and the explosion of legal regulation is a much broader phenomenon that includes both an increase in the number of areas of life subject to legal regulation and an increased commitment to the use of law as a tool to shape behaviour.⁹⁴ Legalism is the trend toward formalizing norms or standards into legal rules and viewing compliance with rules as moral in itself.⁹⁵ The emergence of the laws of war provides some general evidence for this observation, but the trend accelerated after the 11 September attacks, and became particularly important during the Obama Administration.⁹⁶ Historically there were norms governing when states could resort to violence and how they could deploy violence in conflict.⁹⁷ Since the end of the Second World War, these norms have increasingly become laws, and they are increasingly applied in contexts for which they were not developed.⁹⁸ Legal rules touch more areas of life and decision making than in earlier areas. What is more, the trend toward legalism also includes the tendency to use the language of law but not really accept its authority.⁹⁹ These are general trends, of course, and not unique to the national security arena.

Moyn identifies this problem, but does not situate it in the larger trend of legalism. Scholars and advocates from fields as diverse as bankruptcy law and human rights decry (or at least debate) the trend toward more regulation. This omission matters because Moyn's history is causal: he argues

⁸⁹See A. Des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (1999), at 10–11, 92–5 (describing ineffectual efforts of UN peacekeepers and other UN endeavours to address the genocide).

⁹⁰See *ibid.*, at 143–54 (describing atrocities in Rwandan genocide).

⁹¹See *ibid.*, at 10–11, 484 (describing RPF role in ending the genocide in Rwanda).

⁹²See, e.g., J. Gettleman, 'The Global Elite's Favorite Strongman', *New York Times*, 4 September 2013, available at www.nytimes.com/2013/09/08/magazine/paul-kagame-rwanda.html (describing the rise and rule of Paul Kagame, the chief military strategist of the RPF and president of Rwanda after the genocide).

⁹³Moyn, *supra* note 1, at 293 (including accompanying unnumbered footnote at 376). Moyn adopts this terminology from the work of Naz Modirzadeh, including a blog post: N. Modirzadeh, 'A Reply to Marty Lederman', *Lawfare*, 3 October 2014, available at www.lawfareblog.com/reply-marty-lederman; N. Modirzadeh, 'Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance', (2014) 5(1) *Harvard National Security Journal* 225, at 225.

⁹⁴See generally E. Glaeser and A. Shleifer, 'The Rise of the Regulatory State', (2003) 42 *Journal of Economic Literature* 402 (describing the increase in regulatory regimes in the US); J. Shklar, 'In Defense of Legalism', (1966) 19 *Journal of Legal Education* 51 (analysing an increase in the use of legal reasoning rules in new domains).

⁹⁵See generally R. West, 'Reconsidering Legalism', (2003) 88 *Minnesota Law Review* 119 (explicating and analysing legalism).

⁹⁶Moyn, *supra* note 1, at 292–4.

⁹⁷For a history of the regulation of conflict and the conduct of belligerents while engaged in combat see D. Bederman, *International Law in Antiquity* (2001), at 207–63.

⁹⁸Shklar, *supra* note 94 (analysing an increase in the use of legal reasoning rules in new domains).

⁹⁹See generally S. Ratner, 'Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War', (2011) 22 *European Journal of International Law* 459 (analysing the relationship between using legal language and internalizing the underlying legal concepts the language describes).

that policy-makers dress up their preferences as law in order to make it easier for them to get away with abhorrent acts. That might be the case, of course, but Moyn does not present evidence of this. If the growth of legalism in the laws of war is just a part of a larger trend, then it should be easier to address. It is not necessarily a harbinger of growing authoritarianism, as others have argued,¹⁰⁰ but the product of larger trends that can be reversed if recognized and addressed directly. For example, human rights scholars have argued that the way to address the problem of legalism in that domain is to understand the law as the product of public and political conversations.¹⁰¹ Regardless, not situating the trend toward legalism as it affects the law of armed conflict into the larger trend allows Moyn to make the causal claim central to his political argument, but it does not help identify ways to address the problems he describes.

3.4 *The relationship between law and politics*

Another weakness comes from failing to analyse the influence of law on behaviour. Moyn writes that before the Additional Protocols to the Geneva Conventions were enacted in the 1970s, 'one could say with only a bit of exaggeration that there were no laws of war, humane or not'.¹⁰² This is simply not true, as Moyn's own account demonstrates. What Moyn appears to mean with this bit of hyperbole is that existing laws were inadequate to the purpose.¹⁰³ Moyn is correct that laws meant to humanize war did not eliminate brutality and laws meant to limit the resort to war in the first instance did not prevent the outbreak of wars. I highlight this error not to draw attention to a small overstatement in what is an otherwise meticulously researched scholarly work. Moyn's assertion is important because it highlights two other problems that are more consequential to the larger issues that he addresses. The first is the debate about whether and how international law works its influence, if at all, in international affairs. Moyn's work vacillates between celebrating legal victories and criticizing failures to do more than seek changes in the law. For example, Moyn lauds the work of Quincy Wright and others as they attempted to make peace 'the purpose of international law'.¹⁰⁴ But he criticizes other legal changes as 'toothless'¹⁰⁵ because legal changes did not produce changes in behaviour. Moyn does not consider why changes in the law produce changes in behaviour in some cases but not others. Instead, he moves between celebrating legal changes as important ends in themselves and criticizing them as unhelpful.

The relationship between legal changes and behavioural changes is complex and one that has produced substantial scholarly debate. For example, Jack Goldsmith and Eric Posner argue that international law has no independent pull on the real behaviour of states.¹⁰⁶ They argue instead that states pursue their own self-interest and that states conform their behaviour to international only to the extent that the law serves their existing interests. Mary Ellen O'Connell makes a

¹⁰⁰See generally K. Scheppelle, 'Autocratic Legalism', (2018) 85 *Chicago Law Review* 545 (arguing that autocrats are increasingly insisting that adherence to rules is a moral good and political imperative, and increasingly creating legal rules to justify their conduct).

¹⁰¹See generally G. Dancy and C. Fariss, 'Rescuing Human Rights Law from International Legalism and Its Critics', (2017) 39 *Human Rights Quarterly* 1 (arguing that human rights norms can be influential and need not fall victim to the critiques of legalism).

¹⁰²Moyn, *supra* note 1, at 200.

¹⁰³*Ibid.*, at 220–1.

¹⁰⁴*Ibid.*, at 68.

¹⁰⁵*Ibid.*, at 148.

¹⁰⁶See generally J. Goldsmith and E. Posner, *The Limits of International Law* (2006) (arguing that international law does not independently influence state compliance with international rules; instead, states comply with rules when doing so is in their self interest).

contrary argument in a book written in part as a response to Goldsmith and Posner's work.¹⁰⁷ O'Connell addresses the questions around whether international law (and by extension, international criminal law) constitutes law or merely a set of norms and institutions through which states pursue their own interests.¹⁰⁸ She concludes for a variety of reasons that international law has an independent influence on the behaviour of states and other international actors.¹⁰⁹ In their work, Ryan Goodman and Derek Jinks put forth a positive theory about the pathways through which international law influences state behaviour using social, political, and other mechanisms.¹¹⁰ Regardless of which approach is correct, the role of law in influencing state behaviour is important and should be central to Moyn's story. He decries attempts to create formal policies as driven by 'a desire to be good and a desire to mask evil'.¹¹¹ If legal changes are toothless, what is the point of urging legal advocates like Michael Ratner, Kenneth Roth, and Harold Koh – all of whose decisions come in for critique – to pursue different legal strategies than those they pursued? At times Moyn puts law at the centre of his story and at times it is on the periphery. More sustained engagement with the ways that law has been influential would have strengthened the work.

4. Complex problems force complex choices

Moyn critiques the choices made by both policy-makers and advocates as they confronted the problem of armed conflict and terrorism. Politicians and antiwar activists faced a similar dilemma after the 11 September attacks and the initial US responses to them: how to respond to unprecedented and unexpected events. For policy-makers, their dilemma centred around how the US should respond to the attacks and the continuing threat of terrorism. For human rights and antiwar advocates, the dilemma was how to push back against US policies – including the decision to go to war, the treatment of prisoners captured in the fighting, and the use of targeted killings – without giving up any of their ideals. Moyn describes figures like Michael Ratner and Harold Koh as 'tragic'¹¹² for their contributions to endless war even though the two human rights lawyers fought very different legal battles after the 11 September attacks. He describes another human rights advocate, Kenneth Roth, as not understanding the 'unexpected implications' of humanitarian advocacy on the perpetuation and legitimization of war.¹¹³ But he reserves his most strident critique for President Obama for using his 'rhetorical genius' to convince the public that 'his policies of endless and humane war' were 'morally wholesome'.¹¹⁴ Missing from Moyn's analysis is any discussion of what their choices were. They faced a dilemma familiar to anyone attempting to solve a complex problem that causes terrible symptoms: whether to treat the underlying problem or alleviate the suffering of those who were suffering from the symptoms. For policy-makers like Obama, their leadership role also meant that doing nothing was not an option, a reality that Moyn does not grapple with. Further, Moyn gives too little weight to the work that advocates did that was designed to address both causes and symptoms at the same time.

¹⁰⁷M. O'Connell, *The Power and Purpose of International Law* (2008).

¹⁰⁸*Ibid.*, at 19–149 (analysing various theories as to why and how international law independently affects the behaviour of states).

¹⁰⁹O'Connell's argument centers on the role of sanctions available for violations of rules. *Ibid.*, at 369.

¹¹⁰See generally R. Goodman and D. Jinks, *Socializing States: Promoting Human Rights Through International Law* (2013) (arguing that states, through a variety of mechanisms, internalize human rights norms and conform their behaviour to them over time).

¹¹¹Moyn, *supra* note 1, at 294.

¹¹²*Ibid.*, at 246, 250.

¹¹³*Ibid.*, at 205.

¹¹⁴*Ibid.*, at 306.

4.1 The policy-maker's dilemma

Moyn argues that as the drive to institutionalize the rules of humane war reached their apex in the Obama Administration, those advocating these changes were motivated by 'a desire to be good and a desire to mask evil',¹¹⁵ as noted above. This framing may be accurate, but there are explanations other than the desire to cover up bad intentions. One of the figures who comes in for the most praise in Moyn's work is Quincy Wright, a leader of the global peace movement.¹¹⁶ Wright tirelessly worked for peace, not merely the humanization of war, from perches in government and academia.¹¹⁷ But it is Wright who asks the question that many of those who come in for sharper critiques also faced. When considering what the US should do if it were ever faced with aggressive hostile acts by another state – three years before the rise of Hitler – Wright asked 'What will the United States do about it?'.¹¹⁸ Wright was considering how the US would go about helping to enforce new legal norms that prohibited states from using force to resolve disputes.¹¹⁹

In Moyn's telling, Wright did not have a ready answer to the question, but it is one that policy-makers must confront. Much of Moyn's book is an argument against the decisions made by President Obama and Harold Koh, who as State Department Legal Advisor did as much to give the veneer of law to humane, endless war as anyone. Moyn gives the reader a sense of the arguments of each man but does not fully uncover what seems to be the real core of the issue. Obama and Koh saw themselves as having two choices, between large-scale, inhumane armed conflict and smaller-scale, longer-term humane armed conflict.

Obama and Koh's perspectives were based in part on their roles. Policy-makers must make policy and justify it in some way. They believed they were required to do *something* about terrorism, an imperative every American policy-maker has felt since the attacks of 11 September 2001.¹²⁰ Koh famously used the phrase 'lawful but awful', to describe legal but unsavoury choices that policy-makers must often confront.¹²¹ They had to choose and saw two choices, one promising greater political risk and greater harm and one promising less of each. They choose the lesser harm.

It is also important that Obama and Koh choose the humane path, even if, as Moyn suggests, they did so for cynical reasons. It does, in fact, involve fewer casualties than had been the case in earlier, larger-scale conflicts. This is true even though the pain and suffering has been dishonestly reported by the US government, the distribution of suffering has been wildly skewed toward vulnerable civilian populations far from the US, and the US definition of what counts as suffering has been distorted to exclude all but the most severe physical pain or death.¹²² More people are alive today than would have been the case if the wars were less humane. Large-scale war, inevitably

¹¹⁵*Ibid.*, at 294.

¹¹⁶*Ibid.*, at 70–7.

¹¹⁷*Ibid.*, at 138–9.

¹¹⁸*Ibid.*, at 76.

¹¹⁹*Ibid.*, at 75–6.

¹²⁰See, e.g., Pres. B. Obama, 'Remarks by the President at the National Defense University', *The White House, Office of the Press Secretary*, 23 May 2013, available at obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university (arguing that because 'doing nothing is not an option' in response to the threat of terrorism, drone strikes are justified even if they result in civilian casualties).

¹²¹See R. Brooks, 'Cross-Border Targeted Killings: "Lawful but Awful?"', (2014) 38 *Harvard Journal of Law and Public Policy* 233, at 234 (describing Koh's propensity to use the phrase 'lawful but awful').

¹²²For example, in a memorandum produced by the Department of Justice Office of Legal Counsel, the US took the position that for an act to constitute torture, it must produce pain akin to that produced by 'death, organ failure, or serious impairment of body functions', a standard that effectively prohibited nothing except actual killing. J. Yoo, 'Memorandum from the Office of the Assistant Attorney General to Alberto R. Gonzales', *U.S. Department of Justice, Office of Legal Counsel*, 1 August 2002, at 6, available at www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug1.pdf. For an analysis of the US approach to discounting civilian casualties and suffering see generally 'Counting Drone Strike Deaths', *Columbia Law School Human Rights Clinic*, October 2012, available at web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/COLUMBIACountingDronesFinal.pdf.

involving more American servicemembers dead and greater destruction in the war zone, is politically dangerous, expensive, and likely to draw unwelcome attention and protests. Koh and Obama framed their choice as a moral and legal one, of course, not a political calculation. They argued that reducing the physical toll of war is an unalloyed good in comparison with the greater harms from more brutal wars. Moyn acknowledges these truths, but still makes his causal distraction argument.¹²³ His history is compelling and moving, but his use of evidence is sometimes that of an advocate making a case.

This is closely related to a separate concern. Just as Moyn argues that those in favour of humanizing war must take into account the costs of doing so, his argument about the costs of humanization should include the benefits. Moyn's thesis is that the focus on humanizing war comes at the significant and unrecognized cost of making perpetual war more likely and more palatable, and that this will lead to something 'for more disquieting' than 'combatant killing and injury', namely 'the potentially nonviolent control of other peoples'.¹²⁴ What Moyn omits here, and throughout the book, is the fact that millions more people were able to live out their lives than would have been true if war had been even more inhumane. And that the laws enacted to make it more humane had some role in preserving these lives. It is possible that those in favour of humanizing war were motivated by a desire to make war more salable to the public; it is also possible that at least some of them made a simple moral calculation: if wars are inevitable, humanizing it is the least bad option.

As much as Moyn has contributed to the urgent debate about uses of US military power, he provides little guidance for those who must make real choices.¹²⁵ Once we recognize the costs associated with humanizing war, then what? He does not advocate abandoning the humanizing project, but he provides little idea about what to do instead. Moyn writes of opening a debate, of encouraging advocates to focus as much (or more) on preventing war or making it less likely as they do on humanizing it. But even by his account, antiwar advocates have not prevailed when they made their case. Antiwar advocates did not prevent the world wars or US involvement in Vietnam, Afghanistan, or Iraq. There was significant support for the war in Afghanistan, but there also were worldwide protests against the Iraq war which did not prevent the US from launching it. If anti-war protests are futile, as some of the most committed advocates in Moyn's story appear to have concluded, is advocating for humane uses of war the next best approach?

4.2 The advocate's dilemma

One of the people whose actions come in for critical analysis in *Humane* is Michael Ratner, whose work attempted to do much of what Moyn favours. Ratner, a human rights lawyer, had long been an anti-war advocate even as he litigated important civil rights cases.¹²⁶ Moyn describes Ratner as a 'lonely' and 'perhaps tragic' figure¹²⁷ who did not believe in war but did not do enough to stop it. Moyn writes that after 11 September, Ratner 'had given up as hopeless earlier campaigns to keep American wars from breaking out or continuing endlessly' and had shifted his focus to making 'them legal in their conduct'.¹²⁸ Moyn's critique of Ratner is not a full picture of the work that Ratner and others like him did around the wars in Afghanistan and Iraq.

¹²³Indeed, Moyn goes so far as to argue that 'those who had opposed' the war in Iraq and the militarization of the US response to the 11 September attacks 'were distracted into a misguided strategy' of fighting for humanized war by the legal argument made by some in the Bush Administration. Moyn, *supra* note 1, at 246.

¹²⁴Moyn, *supra* note 1, at 324.

¹²⁵In Section 4, *infra*, I draw on Moyn's analysis to better understand some contemporary issues in armed conflict.

¹²⁶See S. Roberts, 'Michael Ratner, Lawyer Who Won Rights for Guantánamo Prisoners, Dies at 72', *New York Times*, 11 May 2016, available at www.nytimes.com/2016/05/12/us/michael-ratner-lawyer-who-won-rights-for-guantanamo-prisoners-dies-at-72.htm (describing Ratner's life and career).

¹²⁷Moyn, *supra* note 1, at 246, 295.

¹²⁸*Ibid.*, at 236.

Moyn's critique of Ratner's work does not confront the issue that Ratner himself confronted: how should he spend his precious time, protesting (likely futilely) against a war, or representing some of the individuals whose treatment showed the worst of US practices? Moyn portrays Ratner and those like him as tragic figures, principled advocates who unintentionally contributed to greater suffering through their advocacy for individuals. The problem is that this critique is really an argument that all those who try to mitigate harms or alleviate suffering actually unwittingly contribute to making the cause of that harm worse. On this logic, people who work at homeless shelters make the problem of homelessness worse by mitigating its harms, thereby making it easier for the government to continue to ignore the urgency of the problem. Or that people who work with victims of sexual assault make the scourge of sexual violence worse because they reduce the political urgency necessary to address the causes of that problem. To be clear, Moyn does not address these issues or suggest that he is not sympathetic to those who work to help those without homes or survivors of assault. But he also does not say what Ratner and others like him should have done. If the course he chose was indeed tragic and contributed to greater harms, what should Ratner have done? He chose individual representation, not fighting what he saw as an inevitably losing battle against a war. He left that much of that fight for others, at least for a time.

Indeed, Ratner's own work emphasizes this point. Moyn notes that in 2013, after having spent years humanizing the war by litigating important cases on behalf of individuals who were gravely affected by US policies, Ratner went back to his antiwar roots by returning 'to the thankless task of seeking enforcement for the War Powers Resolution'.¹²⁹ This was the explicitly antiwar work that Moyn celebrates. The War Powers Resolution is a statute that seeks to require the president to seek congressional approval for military action under some circumstances.¹³⁰ Ratner himself surely knew from his own advocacy that legal cases attempting to stop a war, as opposed to those attempting to humanize its conduct, were virtually impossible to win. Moyn catalogues Ratner's losing efforts to fight war in the courts, principally through advocacy to enforce or change the War Powers Resolution, in the decades before the 11 September attacks.¹³¹ Cases involving the War Powers Resolution simply have not gained any traction in the US courts. In a comprehensive review, the Congressional Research Service found that in:

each and every case brought since the WPR's enactment to resolve the political branches' impasse over the law and/or the constitutional division of the war power in which a final judicial ruling has been issued, the reviewing court has concluded that the factors calling for abstention outweigh those in favor of involvement.¹³²

Put differently, the courts decided to stay out of all cases involving the War Powers Resolution, a victory for the executive branch and a defeat for antiwar advocates. Ratner's decision to try to make war more humane was not made in haste or out of an abandonment of his anti-war principles. Instead, it was made in resignation, a recognition that time and resources are limited.¹³³ What is more, Ratner won the most important individual case that he worked on, *Rasul v. Bush*.¹³⁴ That case established the right of individuals detained by the US at Guantanamo to bring *habeas corpus* cases in US courts, a key right that has enabled defendants to challenge US action in US courts.

¹²⁹*Ibid.*, at 264.

¹³⁰See generally, 'The War Powers Resolution: Concepts and Practice', Report R42699, *Congressional Research Service*, 8 March 2019, available at sgp.fas.org/crs/natsec/R42699.pdf (summarizing and analysing the War Powers Resolution).

¹³¹Moyn, *supra* note 1, at 247–9.

¹³²M. Garcia, 'War Powers Litigation Initiated by Members of Congress Since the Enactment of the War Powers Resolution', Report RL30352, *Congressional Research Service*, 17 February 2012, at 15, available at sgp.fas.org/crs/natsec/RL30352.pdf.

¹³³Indeed, tucked away in a footnote, Moyn notes that Ratner, even after deciding to devote his focus to the treatment of detainees and similar issues, said that he still believed the war was illegal. Moyn, *supra* note 1, at 370.

¹³⁴*Rasul v. Bush*, 542 U.S. 466 (2004).

Further, Ratner's advocacy for individuals was, in its way, an attack against the war in general. One of the most contentious issues in the very early days after the 11 September attacks was whether the US response should be based in a human rights and criminal law paradigm or a laws of war paradigm.¹³⁵ These debates, which were not the kind of mass public protests that Moyn would have advocated, were nonetheless influential in determining what the US actually did in response to the attacks.¹³⁶ They were a way of translating anti-war politics into actual policy, and took place on both a conceptual plane and a very practical, legal plane. Many, like Ratner and Kenneth Roth, who also comes in for criticism from Moyn for choosing to fight against US practices through litigation rather than through a direct attack against the war, argued at the time that much of the conflict with al Qaeda did not meet the legal definition of an armed conflict and should be addressed using ordinary criminal law tools.¹³⁷ This was a direct argument against the kinds of endless wars that Ratner warned against in 2001, when he protested the Congressional authorization to use force against al Qaeda, and that Moyn now decries as well.¹³⁸ Their argument was that using the tools of war was corrosive to the rule of law. Instead, they argued, the US and its allies should use well-established criminal law tools to investigate, arrest, prosecute, and punish suspected terrorists. Others argued that criminal law tools were inadequate because they were too slow to prevent attacks or would unduly limit the kinds of tactics available to the US as it fought al Qaeda.¹³⁹

The more technical aspects of this debate centred around the geographic dimensions of armed conflict and whether individuals affected by the conflict had recognizable rights in US courts. Even if this debate was not the full-throated broadside against war that Moyn would have advocated, it was indeed an argument about whether to use war as a response to the threat of terrorism. The US government had long argued that the conflict with al Qaeda and similar terrorist groups was part of a non-international armed conflict that permitted it to use the expansive permissions available under the laws of war instead of the limitations placed on it by requirements of human rights and criminal law.¹⁴⁰ But the US position rested on an unusual interpretation of international law.¹⁴¹ The US argued that the armed conflict existed everywhere, not merely in those areas in which there was ongoing, kinetic fighting. Thus, the US argued, it could apply the laws of war anywhere in the world it found a terrorism suspect.¹⁴² This meant that the US could capture and detain a suspect without a warrant or trial, kill a suspected terrorist without first convicting him or her, and

¹³⁵See, e.g., R. Wedgwood and K. Roth, 'Combatants or Criminals – How Washington Should Handle Terrorists', (2004) 83 *Foreign Affairs* 126 (presenting two sides of debate about whether to respond to terrorism using traditional criminal law tools or through armed conflict).

¹³⁶See generally L. Hajjar, 'The Counterterrorism War Paradigm versus International Humanitarian Law: The Legal Contradictions and Global Consequences of the US "War on Terror"', (2019) 44 *Law and Social Inquiry* 922 (analysing the growth of the war model instead of the law enforcement model for combating terrorism); L. Donohue, *The Costs of Counterterrorism* (2008) (describing the many disadvantages of using the war model for counterterrorism instead of traditional criminal law tools).

¹³⁷See Wedgwood and Roth, *supra* note 135 (arguing against the use of war-time rules in counterterrorism). Indeed, Ratner himself co-authored a short book outlining the legal and moral case against the war in Iraq. See generally M. Ratner, J. Green and B. Olshansky, *Against War in Iraq: An Anti-War Primer* (2003).

¹³⁸See M. Ratner, 'Making Us Less Free: War on Terror or War on Liberty?', in S. Aronowitz and H. Gautney (eds.), *Implicating Empire: Globalization and Resistance in the 21st Century World Order* (2003), 31, at 33–4 (warning against 'permanent war' abroad after the US invasion of Afghanistan and other counterterrorism measures).

¹³⁹See Wedgwood and Roth, *supra* note 135 (arguing in favour of using traditional criminal law tools to combat terrorism).

¹⁴⁰See, e.g., Egan, *supra* note 19 (describing US legal position regarding the scope and nature of the conflict with terrorist organizations); J. Daskal, 'The Geography of the Battlefield: A Framework for Detention and Targeting Outside the Hot Conflict Zone', (2013) 161 *University of Pennsylvania Law Review* 1165, at 1176–81 (describing US position regarding territorial limits of armed conflict with terrorist organizations).

¹⁴¹Daskal, *ibid.*, at 1174–6 (contrasting traditional territorial understanding of armed conflict with US position, including associated limitations on the types of actions permitted under each regime).

¹⁴²See, e.g., Egan, *supra* note 19 (describing US legal position on the geography of counterterrorism operations and legal limits on US actions).

interrogate suspects without first offering them a lawyer. But, the US decided, it would as a matter of policy, impose on itself many – but by no means all – of the same limitations that would have been in place had it not adopted such a distorted interpretation of international law. The leading lawyers in the Obama Administration’s foreign policy apparatus formalized this policy into the 2013 Presidential Policy Guidance.¹⁴³ In a speech in May 2013, President Obama described in general terms the principles by which his administration selected individuals for targeting and attempted to reduce civilian casualties from drone strikes.¹⁴⁴ The policy explicitly applied to operations outside of active areas of active hostilities (and outside the US).¹⁴⁵ Those areas were not specified in the policy itself, but news reports indicated that areas of active hostilities at that time were Afghanistan, Iraq, Syria, and parts of Libya.¹⁴⁶ Operations outside those areas – such as those undertaken in Pakistan, Somalia, and Yemen – would be governed by the policy. The policy described the legalistic process required to make targeting decisions, as well as the principles that would control US actions.¹⁴⁷ Moyn criticizes this policy and argues that it marks a key milestone in the humanizing road toward endless war.¹⁴⁸ Moyn’s argument is convincing, but it misses the point that the debate was about whether to use war or some other means to confront the threat of terrorism – the very thing that he criticizes human rights advocates like Ratner and Roth for abandoning. That the US government continued to choose the path of war does not mean the debate did not happen. It did, and those advocating for war won the debate.

Finally, Moyn does not engage with the ways the US has sometimes disengaged from Afghanistan, Iraq, and other areas in which it has launched combat operations. Between 2007 and 2020, US personnel levels in Afghanistan ranged from a low of approximately 18,000 to a high of almost 125,000 (these figures include US military personnel and contractors).¹⁴⁹ Similar levels in Iraq ranged from a low of less than 5,000 to more than 160,000.¹⁵⁰ The exact numbers of personnel involved in Afghanistan and Iraq is not directly connected to Moyn’s point that the increased regulation of how combat is conducted has made it easier for politicians to use the tools of war. But the variations in US involvement are germane to his arguments about the ineffectiveness of antiwar protests and the like. He does not explain why troop personnel levels have risen and fallen. Any level of involvement supports his point of an endless war. But the volatility of levels might be explained, at least in part, by the tactics of opponents of the US approach.

¹⁴³See C. Savage and P. Baker, ‘Obama, in a Shift, to Limit Targets of Drone Strikes’, *New York Times*, 22 May 2013, available at www.nytimes.com/2013/05/23/us/us-acknowledges-killing-4-americans-in-drone-strikes.html (describing Obama Administration policies restricting drone strike targeting).

¹⁴⁴Obama, *supra* note 120.

¹⁴⁵After President Obama’s speech at the National Defense University, the White House released a brief document that outlined US policy. See ‘Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities’, *The White House, Office of the Press Secretary*, 23 May 2013, available at obamawhitehouse.archives.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism. Eventually, in August 2016, in response to a Freedom of Information Act request from the ACLU, the Department of Justice released a redacted version of the 2013 PPG: C. Savage, ‘U.S. Releases Drone Strike “Playbook” for Targeting Terrorism Suspects’, *New York Times*, 6 August 2016, available at www.nytimes.com/2016/08/07/us/politics/us-releases-rules-for-airstrike-killings-of-terror-suspects.html. For the declassified document see ‘Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Hostile Activities’, *Presidential Policy Guidance*, 22 May 2013, available at www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download (hereinafter ‘Procedures’).

¹⁴⁶See C. Savage, E. Schmitt and M. Mazzetti, ‘Obama Expands War with Al Qaeda to Include Shabab in Somalia’, *New York Times*, 17 November 2016, available at www.nytimes.com/2016/11/27/us/politics/obama-expands-war-with-al-qaeda-to-include-shabab-in-somalia.html (describing Libya’s inclusion as an area of active hostilities).

¹⁴⁷See ‘Procedures’, *supra* note 145.

¹⁴⁸Moyn, *supra* note 1, at 292–5.

¹⁴⁹Department of Defense Contractor and Troop Levels in Afghanistan and Iraq: 2007–2020’, Report R44116, *Congressional Research Service*, 22 February 2021, at 7–11, available at sgp.fas.org/crs/natsec/R44116.pdf.

¹⁵⁰*Ibid.*, at 12–14.

5. The future of humane and endless wars

Even if Moyn's causal case is not entirely convincing, he has identified important phenomena that other scholars have not seen as clearly. His work raises a number of questions about the future of endless war. In the epilogue, Moyn looks to the future and what he sees alarms him. 'What if', he asks, 'the elemental aim of endless war is not the death of enemy soldiers but rather the potentially nonviolent control of other peoples?'.¹⁵¹ He sounds a similar alarm in the prologue, wondering if:

today's decentralized and endless war may mutate into an unprecedented new system: rule and surveillance by one or several powers across an astonishingly large arc of the world's surface, patrolled by armed drones or paid visits by the Special Forces acting as quasi-permanent police.¹⁵²

To be fair, Moyn worries about but does not go so far as to predict this dystopia. But even a less expansive reading of Moyn's evidence and arguments raises important questions, some theoretical and some very practical.

One issue is whether the way that policy-makers talk about war is sufficiently nuanced or precise.¹⁵³ There are many varieties of armed conflict, fought for different reasons with vastly different effects on the lives of the people they affect. Most of these conflicts are lumped into the term 'war', obscuring significant differences among them. In Moyn's telling, almost all of the contemporary legal and political arguments are about whether one practice or another is more or less humane, or whether specific uses of violence are consistent with the law. But this framing skips the antecedent question: what is the thing that the law is regulating? How do we define armed conflict and should the same rules apply to all conflicts? To be clear, Moyn discusses the brutality of previous armed conflicts and devotes attention to the history of racialized wars and counterinsurgency operations. Nonetheless, part of the reason for the misfit between the law and the phenomenon it is regulating is this definitional problem. In truth, there are wars, plural, requiring different justifications and different rules to govern them. If this is true, then Moyn's call for a third way suggests that there should be different rules governing whether and when it is appropriate to engage in these conflicts, not how to make them more humane or less brutal.

Consider, for example, the current debate about the appropriateness of so-called humanitarian intervention. To its proponents, humanitarian intervention is a way of using US power toward righteous ends. It is military intervention, ideally done under the auspices of the UN, but undertaken unilaterally if necessary, to prevent or mitigate significant human rights crises. Samantha Power, scholar and journalist turned government official in the Obama Administration, is one of the leading proponents of humanitarian intervention.¹⁵⁴ In her book, *A Problem From Hell: America in the Age of Genocide*, Power decries American reluctance to use its military might to stop genocides and other atrocities in places as diverse as Germany in the Second World War to the former Yugoslavia, to Rwanda. Published in 2002, after those conflicts but before the US response to the 11 September attacks had become clear, Power advocates the benevolent use of US power as a force of good. To like-minded advocates, humanitarian intervention is a phenomenon to be managed.¹⁵⁵ It demands its own regulations, just as any use of force should be regulated, but should be one of the tools available to policy-makers.

¹⁵¹Moyn, *supra* note 1, at 324.

¹⁵²*Ibid.*, at 9.

¹⁵³For a full exploration of the various state uses of violence that are considered armed conflict see A. Clapham, *War* (2021). Clapham argues that even as states have purported to outlaw war, they have continued to use violence in a wide range of cases and claimed the legal privileges that accompany lawful uses of force.

¹⁵⁴Moyn, *supra* note 1, at 283.

¹⁵⁵H. Koh, 'Humanitarian Intervention: Time for Better Law', (2017) 111 *American Journal of International Law Unbound* 287 (arguing in favour of permitting humanitarian intervention and regulating it).

To its critics, humanitarian intervention is just intervention: the use of force in service of a US policy goal, not much different than other uses of force, inflicting the same trauma on people and communities as other uses of force. Moyn does not fully engage with these issues, though he criticizes the debates over the humanitarian interventions of the recent past. Those debates, as with most debates about war, focused on how the intervention was conducted rather than on whether the use of force was legal in the first place.¹⁵⁶

Moyn's work provides some useful guidance on these questions. The first lesson readers should learn is to treat the use of the military as the exceptional and risky act that it is, not an ordinary response to foreign policy crises. Policy-makers should have to convince the public that the use of force is the best available alternative, with an honest accounting of the likely costs and consequences of the decision. With humanitarian intervention, this calculus might be difficult to discuss transparently, but Moyn's work should convince us that it is important. Beyond showing the importance of having the public discussion, Moyn also points toward some of the most significant issues to debate. One of these is whether and how long the intervention will last. Endless wars are costly in the usual terms – lives and money, chief among them – but they also have the effect of eroding the institutions and infrastructure in place to help mitigate problems and resolve disputes. As the use of force becomes regularized, even expected, the parties to a dispute might have little incentive to participate in peace-preserving processes in good faith. Moyn shows clearly that righteous intentions can still lead to bad decisions, and the consequences of those decisions might make it more difficult to avoid conflict the next time.

Moyn's work illuminates another important issue that is often left out of such debates: the centrality of politics to all of these decisions. Consider how recent history might be different if Moyn's approach had carried the day. For example, if American policy-makers had honestly and transparently debated the costs and consequences of intervening in the genocide in Rwanda, they might have concluded that the risk of long-term erosion of institutions was unlikely and worth the risk when balanced against the potential to save hundreds of thousands of lives. A similar honest discussion about the use of drone strikes, especially so-called signature strikes, might have produced a different result.¹⁵⁷ The long-term damage to international law of this practice has been significant. By insisting on humane wars, American leaders can often obscure the fact that the US is at war, is using violence in pursuit of its foreign policy goals, and that this is a choice. Moyn's work should convince us that even in the hard cases – and humanitarian intervention will always involve hard cases – these questions must be fully explored.

Consider another current issue. Attempts to regulate the growing problem of cyber attacks have garnered less attention than humanitarian intervention, but they are perhaps equally consequential. For more than a decade, scholars and policy-makers have worked to hammer out what will soon be three editions of the *Tallinn Manual on the International Law Applicable to Cyber Operations*.¹⁵⁸ This manual spells out the limits on cyber operations as techniques of warfare. The *Tallinn Manual* also addresses when it is permissible to engage in cyberwarfare in the first place. Even as rules prohibiting cyberwarfare are being written, policy-makers treat them like inevitabilities. The US and its allies and adversaries have all allegedly committed and been the victim of cyberattacks. Here the potential and limits of Moyn's call for a third way are apparent. Moyn would surely predict that policy-makers would accept cyberattacks as inevitable, just as they seem to accept (often with the rhetoric of reluctance) that conventional armed conflict is inevitable. Moyn's work suggests that much more of the policy

¹⁵⁶Moyn, *supra* note 1, at 227–31.

¹⁵⁷See generally K. J. Heller, "One Hell of a Killing Machine: Signature Strikes and International Law", (2013) 11 *Journal of International and Comparative Law* 89 (describing the legal controversies surrounding the US practice of signature strikes).

¹⁵⁸*Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, M. Schmitt (ed.) (2017).

and political energy should be focused first on whether cyberwarfare should be an acceptable policy tool. He might also argue that attempts to regulate such conflict, however well intended those attempts might be, risk regularizing cyberwarfare and leading to it becoming an accepted tool for states to use in conflict.

6. Conclusion

In the end, Moyn's book has done what serious, rigorous, and timely scholarship should do: shifted the debate about a vital issue of our time. The perpetuation of conflict and the growing use of American military power all over the world has happened under presidential administrations of both parties and without serious debate or sustained pushback from Congress or the courts. Moyn's book is a timely plea to pause and recognize how far the US has gone, how costly these changes have been, and what they might portend for the future.