The International Laws of War and the American Civil War

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This is a book about a war without precedent in American history and the rules that two American governments and their armies developed to regulate its conduct. For a very long time, rules governing the use of armed force among belligerent states have been called the "laws of war." For just as long, however, observers have remarked upon the paradox—or hopelessness—of international rules purporting to govern state-sponsored violence against another community of human beings in the absence of institutional enforcement for violations as reliable as those available for domestic violence.1 A standard rejoinder is that the rules are obeyed because of the threat of reciprocity: each side sticks to the rules because if it breaks them the other will break them too, and it is in the shared interest of both sides not to escalate the scale or scope of the conflict beyond set objectives for the use of force. On this pragmatic view, the rules will go unheeded, for instance, in an asymmetric war where one side lacks the capacity to reciprocate or consciously seeks to escalate the scale of conflict, or, less systematically, under circumstances where individual breaches might go undetected.

But even apart from these general concerns about enforcement, the armed conflict between the United States and the Confederate States from 1861 to 1865 could be seen as a civil war, and so a threshold question about the international laws of war was applicability. There were important domestic and international reasons why the United States should have been inclined to cast the conflict as a domestic police action to which the international laws of war would not apply. To recognize the Confederacy as a belligerent nation whose armies and peoples were entitled to protections under the international laws of war—and not exclusively governed by the domestic laws of the United States, such as those relating to treason—implied recognition of the southern States' rights to secession and subsequent re-confederation. From the Confederacy's vantage, the same calculus strongly favored its application of the international laws of war, but as we shall see, there were other significant countervailing concerns against their application in certain circumstances. For example, what was the status of captured Union soldiers who were freed black slaves? Were they unlawful combatants? Or property that could be confiscated by the enemy and lawfully used?

Nevertheless, both sides, more or less, proclaimed to act in compliance with the international laws of war and generally complied with its rules on the field. They acquiesced in the propriety of law talk of international, not domestic, cast. That is not to say that they adopted all of that body of law uncritically: some rules were accepted without change, others modified, and still others ultimately rejected. The body of rules that crystallized over the course of the Civil War, in turn, was the primary source of the modern laws of war governing international conflicts adopted by countries around the world, most famously set forth in the Hague and Geneva Conventions of the twentieth century.

Why did the United States choose to apply the international laws of war to a conflict that it insisted was a matter of purely national concern? Why did the Confederate States depart from the laws of war in some instances? And what were the specific rules? What sources were they drawn from? Which rules were rejected? How did the rules evolve in response to the changing complexion of the war? How were they implemented in the field? How were violations enforced? How did the international laws of war interact with domestic law, most notably federal constitutional law pertaining to war powers? These are the questions this book will try to answer.