INTERNATIONAL LAW STUDIES

Published Since 1895

Does International Humanitarian Law Confer Undue Legitimacy on Violence in War?

Kieran R.J. Tinkler

100 INT'L L. STUD. 605 (2023)

Volume 100

2023

Published by the Stockton Center for International Law

ISSN 2375-2831

Does International Humanitarian Law Confer Undue Legitimacy on Violence in War?

*Kieran R.J. Tinkler**

CONTENTS

* Wing Commander Kieran R.J. Tinkler is a Legal Officer with the United Kingdom Royal Air Force. He currently acts as legal advisor to NATO's Allied Air Command. His previous roles include advising on deliberate and dynamic targeting as part of Operation Inherent Resolve, and as Military Professor at the Stockton Center for International Law, U.S. Naval War College. This work is based on an essay recently completed as part of the Advanced Command and Staff Course at the UK Defence Academy.

The thoughts and opinions expressed are those of the author and not necessarily those of the U.S. or UK governments, the U.S. Department of the Navy, UK Ministry of Defence, Royal Air Force, or the U.S. Naval War College.

I. INTRODUCTION

Cicero famously observed that "*inter arma enim silent leges*" (amidst the clash of arms the laws are silent).[1] This is commonly understood to mean that war is the antithesis and thus the negation of law.[2] International humanitarian law (IHL) has been heralded as invalidating this maxim by particularizing binding rules on the conduct of hostilities.[3] Nonetheless, there are two reasons why such a characterization of IHL is misrepresentative.[4] First, Cicero's observation was against the backdrop of a prosecution for murder following riots between the *optimates* and *populares*.[5] The genesis of this maxim is therefore divorced from the context of war. Second, properly understood, Cicero was not suggesting that laws become silent once a "clash of arms" begins. His more modest proposition was that Rome had an unwritten *law* of self-defense that superseded the written law of murder.[6]

The foregoing acts as a metaphor for this article. IHL is broadly conceived as a civilizing force that pronounces whether actions in war are just or unjust.[7] It is generally considered axiomatic that IHL seeks to limit the effects of war for *humanitarian* reasons.[8] Yet this characterization of IHL is problematic. IHL undoubtedly prescribes rules that humanize warfare.[9] It is therefore understandable why States seek to champion IHL in benevolent

1. Christopher Greenwood, *International Humanitarian Law in Context*, *in* A NEW INTERNATIONAL LEGAL ORDER 312, 313 n.7 (Chia-Jui Cheng ed., 2016).

2. *See, e.g.*, William K. Lietzau & Joseph A. Rutigliano, *History and Development of the International Law of Military Operations*, *in* THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 14 (Terry D. Gill & Dieter Fleck eds., 2015).

3. NILS MELZER, INTERNATIONAL HUMANITARIAN LAW: A COMPREHENSIVE INTRODUCTION 165 (2022).

4. Despite the present author preferring the term "law of armed conflict," for reasons that will become apparent, this article will use the term "international humanitarian law" throughout to facilitate its critical evaluation.

5. Philip C. Bobbitt, *Inter Arma Enim Silent Leges*, 45 SUFFOLK UNIVERSITY LAW REVIEW 253 (2012).

6. Video: Brenda Hale, *Romanes Lecture—Law in a Time of Crisis*, UNIVERSITY OF OXFORD (Nov. 25. (2020), https://www.ox.ac.uk/news-and-events/The-University-Year/romanes-lecture/law-time-crisis.

7. DAVID KENNEDY, OF WAR AND LAW 6 (2006).

8. *See, e.g.*, ANNE QUINTIN, THE NATURE OF INTERNATIONAL HUMANITARIAN LAW: A PERMISSIVE OR RESTRICTIVE REGIME? xix (2020).

9. Sean Watts, *Humanitarian Logic and the Law of Siege: A Study of the Oxford Guidance on Relief Actions*, 95 INTERNATIONAL LAW STUDIES 1, 6 (2019).

tones.[10] Nevertheless, an alternative account of IHL is that it has facilitated rather than restrained military operations by conferring undue legitimacy on violence in war.[11] This article will focus on the nature of the relationship between legitimacy and IHL in order to ascertain whether this is indeed the case.

Part II will lay the intellectual groundwork for the rest of the article by appraising discrete conceptions of legitimacy, before concluding that the sine qua non of legitimacy for battlefield conduct is compliance with ethical and legal norms. Part III will then utilize the *jus in bello* standard of proportionality to demonstrate how, at times, moral legitimacy and legal legitimacy are irreconcilable. Consequently, this article will contend that IHL cannot independently confer "normative legitimacy" on violence in war. Part IV will begin by exhibiting why IHL is frequently determinative of "empirical legitimacy," that is, social perceptions of permissible conduct. It is in this sense that IHL is *capable* of bestowing unwarranted legitimacy on violence in war. The core argument presented here will be that there is no definitive view on whether IHL confers undue legitimacy since this requires us to evaluate the content and consequences of IHL against an alternative point of reference. That reference point is not fixed but should, as explained below, be tied to the "moral reality of war."[12]

This article will draw from history, political philosophy, legal theory, sociology, moral philosophy, applied ethics, and strategic studies—as well as international law—to scrutinize the disposition of legitimacy vis-à-vis IHL. There is a fundamental distinction between abstract moral judgments and intersubjective ethical norms.[13] Nevertheless, for ease of exposition, "morality" and "ethics" will be used interchangeably to denote what is morally acceptable in warfare.

---

10. *See, e.g.*, GOV'T OF THE UNITED KINGDOM, GLOBAL BRITAIN IN A COMPETITIVE AGE: THE INTEGRATED REVIEW OF SECURITY, DEFENCE, DEVELOPMENT AND FOREIGN POLICY 47, 79 (Mar. 16, 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/975077/Global_Britain_in_a_Competitive_Age-_the_Integrated_Review_of_Security__Defence__Development_and_Foreign_Policy.pdf.

11. Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARVARD INTERNATIONAL LAW JOURNAL 49 (1994).

12. *See* Michael Walzer, *Response to McMahan's Paper*, 34 PHILOSOPHIA 43, 45 (2006).

13. ALEX J. BELLAMY, MASSACRE & MORALITY: MASS ATROCITIES IN AN AGE OF CIVILIAN IMMUNITY 24 (2012).

II. THE SUBSTANCE OF LEGITIMACY

There is a disorientating array of meanings conferred on the term "legitimacy."[14] Not surprisingly, therefore, the relevant literature is marked by dissension.[15] This level of discord has the potential to reduce the epistemic status of "legitimacy" to little more than a Rorschach blot.[16] Consequently, this Part will provide an intellectual framework for further analysis by examining divergent conceptions of legitimacy.

A prospective source for the meaning of legitimacy is how militaries understand that term in their doctrine. Military doctrine is highly significant since it institutes the philosophy and principles that underlie military activity.[17] One such philosophical tenet is that the "effective employment" of military force is "dependent on its legitimacy."[18] Under UK doctrine, for example, legitimacy encompasses "the legal, moral, political, diplomatic and ethical propriety of the conduct of military forces at both an organisation and individual level."[19] This polycentric approach to legitimacy appears to render the effective employment of military force more difficult since it requires us to judge legitimacy through more than just a legal and/or ethical lens. Yet, conversely, it also serves to clarify that a central philosophical precept for military force is the need to abide by legal and ethical norms.

This precept is integral to the armed services of the United States.[20] Indeed, according to U.S. doctrine, legitimacy is one of the twelve principles

14. Richard Falk, *Introduction: Legality and Legitimacy: Necessities and Problematics of Exceptionalism*, *in* LEGALITY AND LEGITIMACY IN GLOBAL AFFAIRS 3, 5 (Richard Falk et al. eds., 2012).

15. Robin Stryker, *Rules, Resources, and Legitimacy Processes: Some Implications for Social Conflict, Order, and Change*, 99 AMERICAN JOURNAL OF SOCIOLOGY 847, 848 (1994).

16. *See* Ivan Ermakoff, *Shadow Plays: Theory's Perennial Challenges*, 35 SOCIOLOGICAL THEORY 128, 130 (2017).

17. *See* AARON P. JACKSON, THE ROOTS OF MILITARY DOCTRINE: CHANGE AND CONTINUITY IN UNDERSTANDING THE PRACTICE OF WARFARE 1 (2013) (defining doctrine as "the expression of a military's institutional belief system"). *See also* BARRY R. POSEN, THE SOURCES OF MILITARY DOCTRINE: FRANCE, BRITAIN, AND GERMANY BETWEEN THE WORLD WARS 33 (1984) ("Military doctrines are important because they affect the quality of life in the international and political system and the security of the states that hold them").

18. UK Ministry of Defence, Joint Doctrine Publication 0-01, UK Defence Doctrine, § 2.49 (6th ed. Nov. 2022).

19. *Id.* § 2.51.

20. *See* OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL § 1.6.4 (updated ed. July 2023).

of joint operations and "is based on the actual and perceived legality, morality, and rightness of the actions from the various perspectives of interested audiences."[21] In the same way, Dutch military doctrine sees legitimacy as rooted in legal and ethical considerations.[22] A corresponding emphasis and appreciation of the importance of legitimacy can be found in the Israeli military.[23] It is therefore clear that military doctrine regards legitimacy as focused primarily on questions of law and ethics.

At this stage of analysis, it is useful to carefully extricate the *word* legitimacy from both the *concept* of legitimacy and specific *conceptions* of legitimacy.[24] Dealing with each of these in turn, the modern meaning of legitimacy is "[c]onformity to the law, to rules, or to some recognized principle."[25] The distinct etymology of legitimacy highlights that it encompasses legality but also rightfulness in the sense of accordance with the natural order.[26] Therefore, even if the word has been used to represent a range of ideas, contemporary and historical meanings associate legitimacy with matters of law and morality.

The contrast between legitimacy as a *concept* and specific *conceptions* of legitimacy is best demonstrated through analogy; where Johnny considers a tiger as a striped animal, but Emmy does not, both share the concept of a tiger but diverge over conceptions of tigerhood.[27] Most of the literature addressing legitimacy is focused on *conceptions* of legitimacy, with specific conceptions typically addressing substantive and/or procedural conditions that must be met to obtain the benefits of legitimacy.[28] To illustrate, for Thomas Franck, legitimacy is the capacity of a rule to pull States towards compliance

---

21. CHAIRMAN, JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-0, JOINT OPERATIONS, at A-4 (Oct. 22, 2018).

22. *See* Paul A.L. Ducheine & Peter B.M.J. Pijpers, *The Notion of Cyber Operations*, *in* RESEARCH HANDBOOK ON INTERNATIONAL LAW AND CYBERSPACE 272, 291 n.119 (Nicholas Tsagourias & Russell Buchan eds., 2d ed. 2021).

23. Thomas E. Ayres & Jeffrey S. Thurnher, *Legitimacy: The Lynchpin of Military Success in Complex Battlespaces*, *in* COMPLEX BATTLESPACES: THE LAW OF ARMED CONFLICT AND THE DYNAMICS OF MODERN WARFARE 223, 228–29 (Winston S. Williams & Christopher M. Ford eds., 2018).

24. *See* Arthur Isak Applbaum, *Legitimacy in a Bastard Kingdom*, (Gov't Center for Public Leadership, Working Paper, 2004), https://dspace.mit.edu/handle/1721.1/55927.

25. *Legitimacy*, OXFORD ENGLISH DICTIONARY ONLINE (rev. 2016), https://www.oed.com/view/Entry/107111?redirectedFrom=LEGITIMACY.

26. Willibald M. Plochl, *The Philosophy of Legitimacy*, 3 JURIST 64 (1943).

27. Maite Ezcurdia, *The Concept-Conception Distinction*, 9 PHILOSOPHICAL ISSUES 187, 188 (1998).

28. Applbaum, *supra* note 24, at 83.

on the basis that the rule has come into being through "principles of *right process*" (i.e., "determinacy," "symbolic validation," "coherence," and "adherence").[29]

A distinct approach to conceptualizing legitimacy is to segregate legitimacy for attorneys (legal validity), philosophers (moral justifiability), and social scientists (belief in legitimacy).[30] This underlines the contrast between empirical legitimacy (i.e., de facto social acceptance) and normative legitimacy (i.e., compliance with formulated standards or values).[31] Empirical legitimacy is subjective by nature yet, paradoxically, can often be parasitic on normative legitimacy since one's views are typically shaped by judgments pertaining to normative standards.[32] This insight calls into question the assumption that normative legitimacy is generally fixed to a broadly static philosophical or legal argument, whereas empirical legitimacy will vary across societies and over time.[33] The wider point, however, is that debates over legitimacy are archetypally normative in nature rather than disagreements over what people actually believe.[34]

The just war tradition is a normative system that can be characterized as a longstanding dialogue about the legitimacy of war and conduct therein.[35] Indeed, according to Alex Bellamy, judgments about legitimacy are framed by a dynamic interaction between this tradition's "legal sub-tradition (positive law), moral sub-tradition (natural law), and political sub-tradition (realism)."[36] This specific comprehension of the just war tradition, and thus legitimacy, is undoubtedly polemical.[37] This is because the just war tradition is

29. THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24 (1990) (emphasis added).

30. DAVID BEETHAM, THE LEGITIMATION OF POWER 4–7 (1991).

31. Heike Krieger & Jonas Püschmann, *Law-Making and Legitimacy in International Humanitarian Law*, *in* LAW-MAKING AND LEGITIMACY IN INTERNATIONAL HUMANITARIAN LAW 2, 8 (Heike Krieger & Jonas Püschmann eds., 2021).

32. Applbaum, *supra* note 24, at 79.

33. For an example of this assumption, *see* Jonas Tallberg et al., *Introduction: Legitimacy in Global Governance*, *in* LEGITIMACY IN GLOBAL GOVERNANCE: SOURCES, PROCESSES, AND CONSEQUENCES 3, 9 (Jonas Tallberg et al. eds., 2018).

34. Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INTERNATIONAL AFFAIRS 405, 405 (2006).

35. ALEX J. BELLAMY, JUST WARS: FROM CICERO TO IRAQ 7 (2006).

36. *Id.*

37. *Cf.* VALERIE MORKEVIČIUS, REALIST ETHICS: JUST WAR TRADITIONS AS POWER POLITICS 43 (2018) (suggesting the just war tradition includes "embedded realism").

conventionally framed as a principled *alternative* to realism.[38] Political realism typically dictates that decisions are exclusively made in the national interest.[39] The national interest is, in turn, generally taken to mean the maximization of relative power among States.[40] In this sense, any case for realism is, ipso facto, a case against morality.[41]

This article takes the position that just war theory is concerned with moral philosophy.[42] Consequently, if normative legitimacy is to take account of international law, it must encompass elements beyond the just war tradition. Most conceptions of legitimacy do characterize it as more expansive than the "idealized world" of moral debate.[43] For example, Ian Clark posits that legitimacy is based not just on legal or moral principles but a sense of what is politically appropriate vis-à-vis social expectations.[44]

It is beneficial to recognize that, while legitimacy is addressed in myriad academic debates, it is generally treated differently in particular fields of study.[45] The term legitimacy is undefined in international law but overused in legal discourse.[46] It is nevertheless common for jurists to aver that "normative legitimacy" is a composite of both ethical and legal norms.[47] Consequently, legitimacy is not an independent standard against which violence in war can be measured.[48]

---

38. *See, e.g.*, MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 3–20 (5th ed. 2015). *Cf.* Jeff McMahan, *Realism, Morality, and War*, *in* THE ETHICS OF WAR AND PEACE: RELIGIOUS AND SECULAR PERSPECTIVES 78 (Terry Nardin ed., 1996) (where more moderate forms of realism are said to be compatible with revisionist views on just war).

39. JAMES TURNER JOHNSON, ETHICS AND THE USE OF FORCE: JUST WAR IN HISTORICAL PERSPECTIVE 103 (2011).

40. JOHN J. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS (2001).

41. Jonathan Leader Maynard & Alex Worsnip, *Is There a Distinctively Political Normativity?*, 128 ETHICS 756, 758 (2018).

42. Walzer, *supra* note 38, at 335.

43. Andrew Hurrell, *Legitimacy and the Use of Force: Can the Circle Be Squared?*, 31 REVIEW OF INTERNATIONAL STUDIES 15, 16 (2005).

44. IAN CLARK, LEGITIMACY IN INTERNATIONAL SOCIETY 19 (2007).

45. Eric W. Schoon, *Operationalizing Legitimacy*, 87 AMERICAN SOCIOLOGICAL REVIEW 478, 499 (2022).

46. Anthea Roberts, *Legality vs Legitimacy: Can Uses of Force Be Illegal But Justified?*, *in* HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE 179, 205 (Philip Alston & Euan Macdonald eds., 2008).

47. *See, e.g.*, Christopher A. Thomas, *The Uses and Abuses of Legitimacy in International Law*, 34 OXFORD JOURNAL OF LEGAL STUDIES 729, 731–32 (2014); Richard H. Fallon Jr., *Legitimacy and the Constitution*, 118 HARVARD LAW REVIEW 1787, 1794–1801 (2005).

48. CLARK, *supra* note 44, at 207.

The very idea that legal considerations offer an independent basis for assessing legitimacy is open to challenge on two principal grounds. First, according to political realists such as Hans Morgenthau, "[i]nternational law owes its existence to identical or complementary interests of states."[49] As conceived in this manner, international law is no more than an epiphenomenon of power.[50] This view is shared by influential legal scholars, sometimes labeled "new realists," who see international law more as a particular form of diplomacy and thus lacking true normative substance.[51]

Power is unequivocally a prominent feature in the formation of international law and its application to individual cases.[52] However, to say that powerful States shape the law to suit their interests falls short of recognizing that international law is epiphenomenal.[53] There are numerous metatheories that provide differing insights on the autonomy and limits of international law, but none appear able to fully explain the world as it truly is.[54] The position taken here is that State behavior manifests a more intricate relationship between international law and power than political realism allows for. "Law controls power, but power violates law. Power produces law, and law grounds power."[55]

The challenge that realism presents is not confined to international law. Thucydides describes how the Athenian generals on Melos reasoned that "the strong do what they can and the weak suffer what they must."[56] The predominant realist position is that war is amoral.[57] Yet strategic history

---

49. Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AMERICAN JOURNAL OF INTERNATIONAL LAW 260, 275 (1940).

50. *See* William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARVARD INTERNATIONAL LAW JOURNAL 1, 3 (2015).

51. *See* JENS DAVID OHLIN, THE ASSAULT ON INTERNATIONAL LAW 13 (2015).

52. Oscar Schachter, *The Role of Power in International Law*, 93 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 200, 204 (1999).

53. Oona Hathaway & Scott J. Shapiro, *What Realists Don't Understand About Law*, FOREIGN POLICY (Oct. 9, 2017), https://foreignpolicy.com/2017/10/09/what-realists-dont-understand-about-law/.

54. Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AMERICAN JOURNAL OF INTERNATIONAL LAW 64, 85–86 (2006).

55. Yasuaki Onuma, *International Law and Power in the Multipolar and Multicivilizational World of the Twenty-First Century*, *in* LEGALITY AND LEGITIMACY IN GLOBAL AFFAIRS 149, 153 (Richard Falk et al. eds. 2012).

56. *See* Francis J. Gavin, *Does Might Make Right? Individuals, Ethics, and Exceptionalism*, 2 TEXAS NATIONAL SECURITY REVIEW 4, 5 (2020).

57. David Whetham, *The Just War Tradition: A Pragmatic Compromise*, *in* ETHICS, LAW AND MILITARY OPERATIONS 65, 67 (David Whetham ed., 2011).

demonstrates that humans are predisposed to think in moral terms.[58] In fact, military personnel generally hold themselves to moral codes in a manner incompatible with realist accounts of conduct in war.[59]

The second main ground for challenging legal considerations as an independent basis for assessing legitimacy is natural law theory. Expressed by Thomas Aquinas, where international law deviates from the law of nature, "it is no longer a law but a perversion of law."[60] In this sense, positive law is simply a facsimile of natural law and thus subservient to morality.[61] However, a different understanding of natural law is that it embraces the basic thesis of modern legal positivists, namely, that laws do not depend on morality for their existence and validity but on social facts.[62] Given the multitude of views on natural law theory, legal positivism, and their relationship, this article will proceed on the basis that a given rule of international law is legally valid—as opposed to morally defensible—by virtue of its sources and not its merits.[63]

The preceding analysis has demonstrated that, while there is no definitive conception of legitimacy per se, the legitimacy of violence in war is best understood as an accommodation between independent normative systems.[64] There are several prospective normative systems that can be understood as constituents of legitimacy.[65] Nevertheless, the weight of evidence presented above validates the position taken here that the sine qua non of normative legitimacy should be viewed as adherence to legal and ethical standards. These two normative systems will form the focus of Part III.

---

58. COLIN S. GRAY, PERSPECTIVES ON STRATEGY 40 (2013).

59. HELEN FROWE, THE ETHICS OF WAR AND PEACE: AN INTRODUCTION 101 (2d ed. 2015).

60. RICHARD A.S. HALL, THE JUSTICE OF WAR: ITS FOUNDATIONS IN ETHICS AND NATURAL LAW 72 (2019).

61. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 28 (2d ed. 2011).

62. John Finnis, *Natural Law Theories*, § 1.5, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (rev. June 3, 2020), https://plato.stanford.edu/archives/sum2020/entries/natural-law-theories/.

63. *See* John Gardner, *Legal Positivism: 5½ Myths*, 46 AMERICAN JOURNAL OF JURISPRUDENCE 199 (2001).

64. CLARK, *supra* note 44, at 207.

65. *See, e.g.*, Joint Doctrine Publication 0-01, *supra* note 18.

III. COMPETING CONCEPTIONS OF PROPORTIONALITY

The just war tradition is a manifestation of over two millennia of appraising war through an ethical framework.[66] The nethermost roots of this tradition reach back to biblical Israel and classical Greek and Roman thought.[67] In its classic form, just war theory was a unified body of thought. However, by the early seventeenth century, this singular tradition had fractured into separate disciplines.[68] In particular, Hugo Grotius and other architects of modern international law transformed the inherited tradition of just war theory (grounded in morality) into a newly emergent normative system (focused on legality).[69] This historical fissure is the genesis of potential tensions between what morality and law might demand during warfare. It also elucidates why moral principles are still evident in contemporary rules of IHL (albeit to varying degrees).[70]

Contemporary just war theory is about morality and not law.[71] It is the predominant structure in international society for dealing with moral questions that emanate from the conduct of hostilities.[72] Moreover, political leaders who strive to afford legitimacy to acts of war habitually appeal to concepts derived from this tradition.[73] Consequently, when analyzing the ethical propriety of conduct in war, this article will privilege the just war tradition over alternative approaches to morality and war—such as pacifism or realism—which derive from distinct metaethical foundations.[74]

---

66. David Whetham, *Ethics, Law and Conflict*, *in* ETHICS, LAW AND MILITARY OPERATIONS 10, 11 (David Whetham ed., 2011).

67. James Turner Johnson, *The Just War Idea: The State of the Question*, 23 SOCIAL PHILOSOPHY AND POLICY 167, 168 (2006).

68. *Id.* at 169.

69. Yoram Dinstein, *The Interaction of International Law and Justice*, 16 ISRAEL YEARBOOK ON HUMAN RIGHTS 9, 23 (1986).

70. Michael N. Schmitt, *The Confluence of Law and Morality—Thoughts on Just War*, 31 MILITARY LAW AND LAW OF WAR REVIEW 296, 301 (1992).

71. Jeff McMahan, *Morality, Law, and the Relation Between Jus ad Bellum and Jus in Bello*, *in* 100 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 112, 112 (2006). *See also* WALZER, *supra* note 38, at 335.

72. *See, e.g.*, Cian O'Driscoll, *No Substitute for Victory? Why Just War Theorists Can't Win*, 26 EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS 187 (2020).

73. RICHARD NORMAN, ETHICS, KILLING AND WAR 117 (1995).

74. William E. Murnion, *A Postmodern View of Just War*, *in* INTERVENTION, TERRORISM, AND TORTURE: CONTEMPORARY CHALLENGES TO JUST WAR THEORY 23 (Steven P. Lee ed., 2010).

Having established the import of the just war tradition, this Part will trace what can be described as the dominant view of just war theory. It will then move on to examine how revisionists have challenged this orthodoxy. These competing accounts of how morality operates in war will then be contrasted with international law to demonstrate the extent to which moral legitimacy and legal legitimacy can, at times, diverge. The focus here will be on the requirement of proportionality in warfare since it provides fertile ground for comparison between morality and law.

A. The "War Convention"

Michael Walzer's *Just and Unjust Wars* is commonly heralded as the seminal modern explication of morality in war.[75] Walzer characterizes the just war tradition as a protracted normative discourse about armed conflict that has crystallized into a "war convention."[76] The war convention's constituent norms are organized around two foci, the *jus ad bellum* and *jus in bello*. The former concerns recourse to war, while the latter addresses conduct in war.[77] The foremost military power on the planet maintains that these ethical foci remain relevant to decisions concerning the employment of American forces.[78] Further, just war theory has, in recent times, played a prominent role in UK decisions apropos its military instrument.[79] The just war tradition has thus retained, at least ostensibly, "a remarkable vitality and power."[80]

The just war tradition prescribes that the minimum requirements of legitimate conduct in war are discrimination and proportionality.[81] The doc-

75. *See, e.g.*, Gabriella Blum & J.H.H. Weiler, *Preface: Just and Unjust Warriors: Marking the 35th Anniversary of Walzer's Just and Unjust Wars*, 24 EUROPEAN JOURNAL OF INTERNATIONAL LAW 13 (2013).

76. WALZER, *supra* note 38, at 44.

77. A.J. COATES, THE ETHICS OF WAR 98 (1997).

78. U.S. LAW OF WAR MANUAL, *supra* note 20, § 1.6.4.

79. Beatrice Heuser, *The Rise, Fall and Resurgence of "Just War" Thinking From Cicero to Chicago*, *in* THE ART OF CREATING POWER: FREEDMAN ON STRATEGY 97 (Benedict Wilkinson & James Gow eds., 2017).

80. Nicholas Rengger, *On the Just War Tradition in the Twenty-First Century*, 78 INTERNATIONAL AFFAIRS 353, 353 (2002).

81. *See, e.g.*, COATES, *supra* note 77, at 209. Walzer contends that the war convention incorporates three *jus in bello* standards, namely, discrimination, proportionality, and a prohibition on acts that are otherwise intrinsically heinous. *See* Brian Orend, *Just and Lawful Conduct in War: Reflections on Michael Walzer*, 20 LAW AND PHILOSOPHY 1, 2–3 (2001). Thomas

trine of double effect is the bedrock upon which the *jus in bello* norm of proportionality sits.[82] There are different understandings of the doctrine within moral philosophy.[83] Nonetheless, in whatever guise, the doctrine of double effect tackles the following moral conundrum. It is an ineluctable fact of war that attacks on morally legitimate targets will, sooner or later, result in incidental civilian deaths. Yet if civilians do nothing to lose their right to life, such as through waiver or forfeiture, surely the act of generating unintentional but foreseeable collateral damage is unjust?[84] The doctrine of double effect provides an ethical pathway to conciliate the absolute prohibition against attacking civilians with genuine military activity.[85]

Walzer counsels that the doctrine of double effect contains four conditions.[86] The condition of immediate interest here is that of proportionality. Proportionality, it is said, dictates that a combatant must not perpetrate "any mischief of which the conduciveness to the end is slight in comparison with the amount of the mischief."[87] Before comparing this ethical norm of proportionality with the corresponding rule of IHL, however, it is necessary to address certain revisionist challenges to such orthodox just war thinking. This is because these revisionist approaches, if valid, wholly transform what should be considered morally legitimate conduct in war (including *in bello* proportionality).

B. Reductive Individualism

The notion of reductive individualism is central to revisionist just war theory.[88] What is meant by "individualism" is that persons, rather than collectives such as States, are the apposite object of moral concern.[89] Under this

---

Hurka also suggests there are three *in bello* conditions but asserts that these comprise discrimination, necessity, and proportionality. *See* Thomas Hurka, *Proportionality in the Morality of War*, 3 PHILOSOPHY & PUBLIC AFFAIRS 34, 36 (2005). Of import here, the concept of proportionality is ubiquitous across diverging just war constructs.

82. Whetham, *supra* note 57, at 82.

83. Michael Skerker, *The Rights of Those Targeted in Military Cyber Operations*, *in* CYBER WARFARE ETHICS 44, 51 (Michael Skerker & David Whetham eds., 2021).

84. Orend, *supra* note 81, at 11.

85. Walzer, *supra* note 38, at 153.

86. *Id.*

87. HENRY SIDGWICK, ELEMENTS OF POLITICS 254 (1891). *See also* Walzer, *supra* note 38, at 153.

88. Seth Lazar, *Method in the Morality of War*, *in* THE OXFORD HANDBOOK OF ETHICS OF WAR 19, 25 (Seth Lazar & Helen Frowe eds., 2018).

89. FROWE, *supra* note 59, at 346.

approach, wars are best understood as relations between individuals rather than States.[90] The essence of reductivism is that war makes no difference to the moral principles that govern killing in less extreme contexts other than to make their application more difficult.[91] In other words, for reductivists, the moral principles that justify death and destruction in war are entirely reducible to the moral principles that govern such behavior in ordinary life (e.g., the notion of self-defense).[92]

Reductivism is of practical relevance to *jus in bello* proportionality because of its attendant impact on the moral equality of combatants. The moral equality of combatants is predicated on analytic independence between *ad bellum* and *in bello* considerations.[93] It underpins the idea that combatants on both sides of *any* conflict are prima facie moral equals no matter how egregious a violation of the *jus ad bellum* that may have occurred to initiate the armed conflict. Accordingly, provided opposing combatants follow *jus in bello* requirements, both "just combatants" and "unjust combatants" may legitimately kill and be killed.[94] The underlying rationale reflects the reality that soldiers and sailors comprise the military instrument of the State and have no agency in the decision to go to war.

Reductivists reason that people using force in ordinary cases of self-defense, outside war, are not in a morally symmetrical relationship with their attacker.[95] Moreover, since killing in war must be justified on the same grounds as outside war, combatants cannot be moral equals. *Ex hypothesi*, the ethical propriety of violence in war must oscillate according to the legitimacy of the cause a combatant is fighting for. What this means for the condition of proportionality is that it is virtually impossible for a combatant taking part in an unjust war to comply with *in bello* proportionality since it requires comparing harms against good effects.[96] Where a combatant is fighting an unjust

90. Saba Bazargan & Samuel C. Rickless, *Introduction*, *in* THE ETHICS OF WAR: ESSAYS xi, xi–xii (Saba Bazargan & Samuel C. Rickless eds., 2017).

91. JEFF MCMAHAN, KILLING IN WAR 156 (2009).

92. Helen Frowe, *Reductive Individualism and the Just War Framework*, LEGAL PHILOSOPHY BETWEEN STATE AND TRANSNATIONALISM SEMINAR SERIES No. 46 (2015), http://digitalcommons.osgoode.yorku.ca/transnationalism_series/46.

93. Bradley Jay Strawser, *Revisionist Just War Theory and the Real World: A Cautiously Optimistic Proposal*, *in* ROUTLEDGE HANDBOOK OF ETHICS AND WAR: JUST WAR THEORY IN THE 21ST CENTURY 76, 77 (Fritz Allhoff et al. eds., 2013).

94. *Id.*

95. MCMAHAN, *supra* note 91, at 156.

96. Jeff McMahan, *Proportionality and Necessity in Jus in Bello*, *in* THE OXFORD HANDBOOK OF ETHICS OF WAR 418, 423 (Seth Lazar & Helen Frowe eds., 2018).

war, there are no "good effects" that can serve to legitimize foreseeable collateral damage.[97]

The most influential proponent of revisionist just war theory, specifically reductive individualism, has been Jeff McMahan.[98] McMahan sees ethical evaluations of just conduct in war as deduced from moral theory and employs analytic philosophy to produce his "theory-down" revisionist construct.[99] Put simply, his work starts with the theoretical grounds upon which it is permissible to take a human life and extrapolates from there to ascertain what this tells us about legitimate conduct in war. While sophisticated and influential, his approach and those like it have elicited criticism on discrete bases. Beyond theoretical or technical intricacies are what can be described as real-world objections. Walzer provides one such critique vis-à-vis the Persian Gulf War.[100] According to McMahan, the Republican Guard bore a "higher degree" of responsibility than conscripts in the Iraqi Army. Consequently, coalition forces were morally obliged to accept greater risks to their mission and person to reduce the harm being exacted on these conscripts.[101] Walzer offers the following hypothetical to underline practical difficulties in this approach.

> Imagine a battle in which American forces are about to turn the flank of a Republican Guard division, and some regular [Iraqi] army units are rushed into place to protect the flank . . . how would McMahan explain to the American soldiers that they have to use minimal force and accept greater risks over there, even while they are fighting as harshly as is "necessary" over here? I would like to listen to his talk to the soldiers.[102]

The weight Walzer places on soldiers' experiences in war and his attendant "ground-up" approach to morality nevertheless attracts criticism.[103]

---

97. Jeff McMahan, What Makes an Act of War Disproportionate?, at 13, 2008 William C. Stutt Ethics Lecture at the U.S. Naval Academy (Mar. 25, 2008), https://www.philosophy.ox.ac.uk/files/whatmakesanactofwardisproportionatepdf.

98. Seth Lazar, *Evaluating the Revisionist Critique of Just War Theory*, 146 DAEDALUS 113, 116 (2017).

99. Helen Frowe, *Collectivism and Reductivism in the Ethics of War*, *in* A COMPANION TO APPLIED PHILOSOPHY 342, 342 (Kasper Lippert-Rasmussen et al., 2017).

100. Walzer, *supra* note 12, at 43.

101. Jeff McMahan, *The Ethics of Killing in War*, 34 PHILOSOPHIA 23, 35 (2006), https://www.philosophy.ox.ac.uk/files/4-mcmahan-ekw1pdf.

102. Walzer, *supra* note 12, at 44.

103. *See* James Pattison, *The Case for the Nonideal Morality of War: Beyond Revisionism Versus Traditionalism in Just War Theory*, 46 POLITICAL THEORY 242, 243 (2018).

Ronald Dworkin, for example, sees Walzer's methodology as lowering moral philosophy since it merely reflects conventional social arrangements.[104] This criticism is rooted in the basic idea that, if ethical norms are in part the product of an exchange of opinions over battlefield conduct, Walzer's approach is absent true moral foundations.[105]

Such criticisms of Walzer's "war convention" address the fundamental question of what just war theory is or, at least, should be. It is beyond the scope of this article to seek to resolve the ongoing debate on what morality demands in war. Instead, the foregoing explication of the dialectic between orthodox and revisionist views on just war will help inform the task of appraising the extent to which moral legitimacy and legal legitimacy diverge. This article will now turn to that critical task by focusing specifically on *in bello* proportionality.

C. Proportionality: Morality and Law in Conflict

International law is a systematized corpus of binding rules that primarily governs the interaction of States.[106] IHL is the specific branch of international law that prescribes how armed conflicts should be conducted and, accordingly, has venerable roots by reason of age.[107] The textual formulation of the IHL rule of proportionality is located in Additional Protocol I to the Geneva Conventions (AP/I). That rule proscribes any attack "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[108]

---

104. Ronald Dworkin, *To Each His Own*, THE NEW YORK REVIEW (Apr. 14, 1983), https://www.nybooks.com/articles/1983/04/14/to-each-his-own/. Note, however, that Dworkin is not specifically referring to Walzer's approach to just war theory (though that is the indirect consequence). *See also* Richard Wasserstrom, Book Review, 92 HARVARD LAW REVIEW 536 (1978) (reviewing MICHAEL WALZER, JUST AND UNJUST WARS (1977)).

105. *See* Hedley Bull, *Recapturing the Just War for Political Theory*, 31 WORLD POLITICS 588 (1979).

106. OPPENHEIM'S INTERNATIONAL LAW, VOLUME 1: PEACE, at 4 (Robert Jennings & Arthur Watts eds., 9th ed. 1996).

107. MARCO SASSÒLI, INTERNATIONAL HUMANITARIAN LAW: RULES, CONTROVERSIES, AND SOLUTIONS TO PROBLEMS ARISING IN WARFARE 1 (2019).

108. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP/I].

Most States have agreed to be bound by AP/I, but the United States, Israel, Pakistan, India, and Turkey are noteworthy exceptions. Nevertheless, the Protocol's textual rendering of proportionality is the material source of a customary norm that is universally acknowledged to apply to all parties engaged in international or non-international armed conflicts.[109] Henceforth, this binding legal requirement will be referred to as the *rule* of proportionality, with the corresponding just war constraint expressed as the *condition* of proportionality.

There is no shortage of points for comparison between the condition of proportionality and the rule of proportionality. The first point of comparison will therefore concentrate on the term "excessive" given its status as the lynchpin of the rule of proportionality.[110] It is frequently said that the rule of proportionality forbids an attack where civilian harm will "outweigh" the military advantage.[111] Yet the rule of proportionality hinges on the notion of excess rather than proportion.[112] Scholars differ on why the architects of AP/I utilized the term "excessive" rather than "disproportionate."[113] The negotiating history to AP/I is equivocal but it seems the need for compromise resulted in the purposely vague term "excessive."[114] This term has been interpreted by States and the majority of scholars to mean that, rather than

109. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 46 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

110. Michael N. Schmitt, *Targeting the International Humanitarian Law in Afghanistan*, 39 ISRAEL YEARBOOK ON HUMAN RIGHTS 99, 108 (2009).

111. *See, e.g.*, MICHAEL NEWTON & LARRY MAY, PROPORTIONALITY IN INTERNATIONAL LAW 3 (2014).

112. Gregor Noll, *Analogy at War: Proportionality, Equality and the Law of Targeting*, 43 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 205, 208 (2012). *Cf.* William J. Fenrick, *Applying IHL Targeting Rules to Practical Situations: Proportionality and Military Objectives*, 27 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 271, 277 (2009) (suggesting the expression "excessive" is "synonymous" with disproportion).

113. *Compare* AMICHAI COHEN & DAVID ZLOTOGORSKI, PROPORTIONALITY IN INTERNATIONAL HUMANITARIAN LAW: CONSEQUENCES, PRECAUTIONS, AND PROCEDURES 93 (2021) (arguing that the architects of AP/I used the term "excessive" over "disproportionate" due to concern the latter would go too far in curtailing the ability of militaries to conduct hostilities), *with* Adil Ahmad Haque, *Indeterminacy in the Law of Armed Conflict*, 95 INTERNATIONAL LAW STUDIES 118, 131–35 (2019) (arguing that the term "excessive" was preferred by the States negotiating Additional Protocol I because it was seen as just as protective as "disproportionate" but without implying that civilian harm not explicitly prohibited is authorized).

114. A.P.V. ROGERS, LAW ON THE BATTLEFIELD 24 (3d ed. 2012).

a fine balancing of scales, the rule of proportionality concerns manifest disproportionality between advantage and harm.[115]

Are ethical requirements more demanding of States in this context? Walzer appears to suggest not when he avows that the condition of proportionality only prohibits "excessive harm."[116] This conclusion is unsurprising if one accepts that the contemporary debate on ethical conduct in war began with Walzer seeking to vindicate legal norms.[117] An alternate ethical approach is that the condition of proportionality demands that the advantage sought from an attack must outweigh the harm anticipated.[118] This stance is theoretically more demanding than a restrictive interpretation of IHL because it shifts the burden so that the anticipated military advantage must tip the scales before an act can be deemed just (as opposed to civilian harm outweighing military advantage).

This first point of comparison provides two central insights. First, dissensus is prevalent in both normative systems on exactly how proportionality governs incidental harm to civilians. Second, there appears to be agreement between more traditional just war theories and the predominant understanding of "excessiveness" within IHL. The following point of comparison, however, highlights how legal and ethical conceptions of proportionality can prove irreconcilable.

Thomas Nagel explains that there is "a morally relevant distinction between bringing about the death of an innocent person deliberately, either as an *end in itself* or *as a means*, and bringing it about as a side effect of something else one does deliberately."[119] This notion of "good intention" is a key facet of the doctrine of double effect and, as such, is a cardinal requirement for ethical conduct in war.[120] While technically the condition of good intention

115. *See, e.g.*, U.S. LAW OF WAR MANUAL, *supra* note 20, § 5.12.3; Gov't of Israel, Ministry of Foreign Affairs, The 2014 Gaza Conflict: Factual and Legal Aspects, ¶ 330 (May 2015), https://www.gov.il/en/Departments/General/2014-gaza-conflict-factual-and-legal-aspects.

116. Walzer, *supra* note 38, at 129. *See also* Orend, *supra* note 81, at 16.

117. *See* Lazar, *supra* note 98, at 115.

118. Jeff McMahan, *Necessity and Proportionality in Morality and Law*, *in* NECESSITY AND PROPORTIONALITY IN INTERNATIONAL PEACE AND SECURITY LAW 21 (Claus Kreß & Robert Lawless eds., 2021) ("An act of war that is expected to cause an amount of harm to civilians at a particular point on the scale that measures harm would then be proportionate only if it is also expected to yield a degree of military advantage at a point that is some distance higher up the scale that measures advantage").

119. Thomas Nagel, *War and Massacre*, 1 PHILOSOPHY & PUBLIC AFFAIRS 123, 130 (1972) (emphasis added).

120. Walzer, *supra* note 38, at 153.

stands apart from the condition of proportionality, their intrinsic relationship makes it impossible to deal with one and not the other.

In contrast to the doctrine of double effect, IHL does not require good intention as part of, or in support of, the rule of proportionality.[121] All feasible precautions must be taken to minimize harm to civilians.[122] Once such precautions in attack are met, a strike on a military objective is lawful even if the primary intent is to incidentally kill civilians (provided that harm is not excessive vis-à-vis the advantage anticipated).[123] IHL simply demands that the inclination to realize such a goal cannot transform something into a lawful target that would not otherwise be, or distort the calculation of military advantage present in the rule of proportionality itself.[124]

This second point of comparison illustrates how conduct perfectly permissible under IHL can be fundamentally at odds with ethical norms shared across antithetical theories of just war. It calls into question the prevalent viewpoint that ethical and legal standards in war are nearly identical in substance.[125] Yet it also demonstrates that, for acts of war to be *truly* legitimate, they must comply with the more restrictive standard provided by either ethics or law.

Jeff McMahan has argued that IHL, for pragmatic reasons, "*must* be substantially divergent from the morality of war."[126] There is, of course, an irony in McMahan relying on a deontological approach to justify "deep morality" but consequentialist reasoning to require combatants to comply with IHL above all else.[127] Where there is a gap between law and ethics this can potentially be bridged by interpreting IHL rules in their "morally best light."[128] However, that is manifestly not how States operate in practice. Further, when evaluating how law can best embody moral commitments, "there are

121. Christopher Greenwood, *The Applicability of International Humanitarian Law and the Law of Neutrality to the Kosovo Campaign*, 78 INTERNATIONAL LAW STUDIES 35, 48–49 (2003).

122. AP/I, *supra* note 108, art. 57(2)(a)(ii).

123. *Cf.* Yves Sandoz, *Commentary*, 78 INTERNATIONAL LAW STUDIES 273, 275 (2003).

124. Greenwood, *supra* note 121, at 48–49.

125. *See* David Rubin, *The Institutionalised Morality of War: Beyond Just-War Theory's Law-Morality Dualism*, 2 KING'S STUDENT LAW REVIEW AND STRIFE JOURNAL 29, 31 (2019).

126. Jeff McMahan, *The Morality of War and the Law of War*, *in* JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS 19, 19 (David Rodin & Henry Shue eds., 2008).

127. *See* David Rodin, *Morality and Law in War*, *in* THE CHANGING CHARACTER OF WAR 446, 453 (Hew Strachan & Sibylle Scheipers eds., 2011).

128. ADIL AHMAD HAQUE, LAW AND MORALITY AT WAR 4 (2017).

confusingly many apparent options."[129] Where does this all leave us for understanding legitimate conduct in war?

If the sine qua non of legitimacy in combat is indeed legal and ethical probity—and these two standards can differ in content regardless of what theory of just war is employed—then IHL cannot bestow legitimacy on military operations per se. Consequently, *a fortiori*, IHL cannot confer undue legitimacy on violence in war. There is nevertheless a growing sense that IHL can and does independently legitimize conduct.[130] The final Part of this article will examine whether this perception matches reality by revisiting the notion of "empirical legitimacy."

IV. UNDUE LEGITIMACY THROUGH INTERNATIONAL HUMANITARIAN LAW

States acknowledge the role that IHL has in affording legitimacy to violence in war and even the parties to a conflict. For instance, the U.S. Department of Defense suggests that States have historically been disinclined to acknowledge the existence of an armed conflict with non-State actors due to fears such recognition would serve to legitimize their actions.[131] David Kennedy considers it astonishing how far the legitimacy of war (*ad bellum*) and conduct therein (*in bello*) has come to be discussed in legal terms.[132] From his standpoint, international law now offers an "institutional vernacular" for legitimating and decrying battlefield conduct.[133]

There is, of course, an important distinction between IHL dominating perceptions of legitimacy and having the capacity to bestow legitimacy on violence in war unaided. This highlights the contrast made earlier between empirical legitimacy (i.e., de facto social acceptance) and normative legitimacy (i.e., compliance with objective standards). Since the irreducible core of normative legitimacy for violence in war is the observance of ethical and legal standards, IHL cannot independently bestow de jure legitimacy on military operations. The matter of de facto legitimacy, however, is a different

---

129. Henry Shue, *Do We Need a "Morality of War"?*, *in* JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS 87, 94 (David Rodin & Henry Shue eds., 2008).

130. CRAIG JONES, THE WAR LAWYERS: THE UNITED STATES, ISRAEL, AND JURIDICAL WARFARE 283 (2020).

131. U.S. LAW OF WAR MANUAL, *supra* note 20, § 3.4.2.1.

132. KENNEDY, *supra* note 7, at 7.

133. *Id.* at 116. *See also* Christopher P.M. Waters, *War Law and Its Intersections*, *in* ETHICS, LAW AND MILITARY OPERATIONS 90 (David Whetham ed., 2010).

question, and in many respects, it is the perception of international law that matters.[134] To illustrate, where collateral damage occurs as the result of a strike on a valid military target, the perception of illegality is all too often fueled by media speculation at the expense of careful legal analysis.[135]

While there is a symbiotic relationship between normative legitimacy and empirical legitimacy, acknowledging the import of de facto legitimacy opens the door to the prospect of IHL independently conferring legitimacy on violence in war, even if it theoretically should not. Part IV will therefore begin by assessing the extent to which IHL confers legitimacy on military operations in an empirical sense. Having concluded that IHL frames social perceptions of proper behavior in war, the discussion will then shift to whether IHL bestows undue legitimacy on battlefield conduct.

A. The Potency of IHL as a Legitimating Force

For IHL to have the capacity to afford legitimacy independently, logically, it must possess its own adequate stock of legitimacy and be able to utilize that stock to mask what would otherwise be objectionable (e.g., immoral acts).[136] The legitimacy of IHL is naturally contingent on the legitimacy of international law in toto. Here we encounter a different context and, thus, a discrete meaning of legitimacy. Whether international law itself has normative legitimacy is primarily a question of justification of authority.[137] One such justification is provided by "consent theory," that is, the thought that international law is legitimate because its rules are rooted in the actual or implicit consent of its users (i.e., States).[138] An entirely different but highly influential justificatory approach is Joseph Raz's "service conception of authority."[139] It is

134. *See* Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AMERICAN JOURNAL OF INTERNATIONAL LAW 88, 91 (2006).

135. *See* Laurie R. Blank, *Military Operations and Media Coverage: The Interplay of Law and Legitimacy*, *in* ROUTLEDGE HANDBOOK OF MILITARY ETHICS 348, 354–55 (George Lucas ed., 2015).

136. *See* David Delaney, *What Is Law (Good) For: Tactical Maneuvers of the Legal War at Home*, 5 LAW, CULTURE AND THE HUMANITIES 337, 341 (2009).

137. David Lefkowitz, *The Legitimacy of International Law*, *in* GLOBAL POLITICAL THEORY 98, 101–5 (David Held & Pietro Maffettone eds., 2016).

138. Matthew Lister, *The Legitimating Role of Consent in International Law*, 11 CHICAGO JOURNAL OF INTERNATIONAL LAW 663 (2011).

139. Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 MINNESOTA LAW REVIEW 1003 (2006).

beyond the scope of this article to address the strengths and weaknesses of these arguments. It will therefore be assumed that international law has sufficient normative standing for IHL to be *capable* of independently legitimizing battlefield conduct in an empirical sense.[140]

This assumption underlies the position taken by Chris Jochnick and Roger Normand that IHL legitimates conduct in war on two levels.[141] First, because the public typically see compliance with international law as an independent good, "acts are validated by simply being legal."[142] Second, legitimation is a function of international law's role in maintaining the prevailing world order. IHL is thus internalized as a belief and, in turn, that belief generates compliance.

The conviction that a rule of IHL ought to be obeyed can derive from the substance of that rule, its source, or the procedure through which the rule was founded.[143] Both levels of legitimacy espoused by Jochnick and Normand appear tied to society's belief in the validity of international law as a source of obligation for conduct in war rather than, for example, a rule's deontic value. This should not be surprising since there is a longstanding view that legal rules are obeyed not because the law is just per se but because we consider it just to obey the law.[144] Regardless of that view's validity, the "stamp of legality" undoubtedly sees IHL provide battlefield conduct shelter from criticism.[145] The pivotal question, however, is the *extent to which* IHL independently confers legitimacy on military operations.

While normative legitimacy is broadly binary in nature, empirical legitimacy can theoretically be judged on a sliding scale.[146] Yet, no systematic empirical data is available to provide scientific insight on how compliance with IHL shapes views on the legitimacy of violence in war. What is clear, how-

140. International law is not, as "deconstructionists" suggest, a hollow social structure beset by insuperable contradictions. On deconstructionism in legal theory, *see, e.g.*, CARLO FOCARELLI, INTERNATIONAL LAW AS SOCIAL CONSTRUCT: THE STRUGGLE FOR GLOBAL JUSTICE 112–13 (2012).

141. Jochnick & Normand, *supra* note 11, at 57.

142. *Id.*

143. Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INTERNATIONAL ORGANIZATION 379, 381 (1999).

144. *See* G.G. Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 MODERN LAW REVIEW 1, 13 (1956).

145. Ariel Zemach, *Indeterminacy in the Law of War: The Need for an International Advisory Regime*, 43 BROOKLYN JOURNAL OF INTERNATIONAL LAW 1, 24 (2017).

146. *See* BELLAMY, *supra* note 13, at 27–31 (discussing "degrees of legitimacy").

ever, is that States implicitly acknowledge the potency of IHL as a legitimating force by seeking to explain their actions almost exclusively by reference to law.[147] For instance, with respect to the Kosovo campaign, NATO stressed that no conflict in modern history had seen more care taken to comply with IHL.[148] Only four years later, the U.S. military acclaimed Operation Iraqi Freedom as the most legalistic war ever conducted.[149] The fact that militaries of all stripes habitually point to the laws of war to validate their actions—as well as the conspicuous absence of morality in those public discussions—succors the conclusion that IHL is decisive in generating de facto legitimacy.[150]

International law can be characterized as "an institutional locale in which established norms and privileged modes of reasoning condition social dialogue."[151] Why, we might ask, does the just war tradition rest in a comparatively impoverished position? The fact that core tenets of the just war tradition are often criticized as too vague and, thus, ill-equipped to steer behavior adequately on the battlefield is a significant factor.[152] As Lord Illingworth puts it in Oscar Wilde's play, *A Woman of No Importance*, "intellectual generalities are always interesting, but generalities in morals mean absolutely nothing."[153]

The legitimacy of international law is connected to its ability to better subsume cognate narratives from divergent cultures.[154] Nevertheless, the

147. Jochnick & Normand, *supra* note 11, at 57.

148. Nicholas J. Wheeler, *The Kosovo Bombing Campaign*, *in* THE POLITICS OF INTERNATIONAL LAW 189, 198 (Christian Reus-Smit ed., 2004) (citing a NATO press spokesman).

149. JANINA DILL, LEGITIMATE TARGETS? SOCIAL CONSTRUCTION, INTERNATIONAL LAW AND US BOMBING 1 (2015).

150. *See* Laurie Blank, *Syria Strikes: Legitimacy and Lawfulness*, LAWFARE (Apr. 16, 2018), https://www.lawfaremedia.org/article/syria-strikes-legitimacy-and-lawfulness ("Legitimacy has always been an essential component of military operations, particularly with regard to public support for both the launch and continuation of such operations. Although the lawful *resort* to force was once the primary key to legitimacy, in recent years, compliance with the law of armed conflict—namely the principles of distinction, proportionality and precautions—in the *conduct* of military operations has become the central pillar of legitimacy.").

151. Christian Reus-Smit, *Society, Power, and Ethics*, *in* THE POLITICS OF INTERNATIONAL LAW 272, 285 (Christian Reus-Smit ed., 2004).

152. *See, e.g.*, Laurie Calhoun, *The Metaethical Paradox of Just War Theory*, 4 ETHICAL THEORY AND MORAL PRACTICE 41, 46 (2001).

153. OSCAR WILDE, A WOMAN OF NO IMPORTANCE (1893), *reprinted in* THE WORKS OF OSCAR WILDE 395, 437 (Timothy Gaynor ed., 1997).

154. B. S. Chimni, *Legitimating the International Rule of Law*, *in* THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 290, 307 (James Crawford & Martti Koskenniemi eds, 2012).

general perception of international law is as a universal construct imbued with global validity.[155] The just war tradition's central ideas have found expression in all cultures because of the universal need to restrain war.[156] Yet the regnant presumption is that no ethical code has universal or enduring authority.[157] Moral relativism, or its perception at least, is another material factor in international law dominating perceptions of war. There are several other prospective factors, but the overriding point is that, at present, the empirical legitimacy of violence in war is framed by IHL.[158] Consequently, the focus will now turn to whether IHL confers *undue* legitimacy on violence in war.

B. IHL and Undue Legitimacy

The prevailing narrative is that IHL is a body of law conceived on the battlefield to alleviate human suffering.[159] In fact, it is commonly thought axiomatic that IHL seeks to limit war's effects for *humanitarian* reasons.[160] Nevertheless, a rising chorus of voices regards this narrative as ahistorical.[161] The most influential critique, however, remains that of Jochnick and Normand. Their appraisal is that IHL does not restrain battlefield conduct but rather facilitates inhumane warfare. Accordingly, it has bestowed "unwarranted legitimacy" on military practices.[162]

Underpinning Jochnick and Normand's critique is the postulate that IHL imposes *no substantive restraints* on established military practices.[163] This is not a suggestion that can be dismissed out of hand.[164] Michael Howard maintains

155. Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW 265, 267 (2009).

156. David Whetham, *"Are We Fighting Yet?" Can Traditional Just War Concepts Cope with Contemporary Conflict and the Changing Character of War?*, 99 THE MONIST 55, 56 (2016).

157. GRAY, *supra* note 58, at 45.

158. BELLAMY, *supra* note 35, at 121. For the view that international criminal law is increasingly overshadowing IHL, *see* Gabriella Blum, *The Shadow of Success: How International Criminal Law Has Come to Shape the Battlefield*, 100 INTERNATIONAL LAW STUDIES 133 (2023).

159. MELZER, *supra* note 3, at 12.

160. *See, e.g.*, QUINTIN, *supra* note 8, at xix.

161. *See, e.g.*, Boyd van Dijk, *What is IHL History Now?*, 104 INTERNATIONAL REVIEW OF THE RED CROSS 1621 (2022).

162. Jochnick & Normand, *supra* note 11, at 50–56.

163. *Id.* at 56.

164. *See, e.g.*, Richard Price, *Moral Limit and Possibility in World Politics*, 62 INTERNATIONAL ORGANIZATION 191, 208 (2008) ("Claims about the violence-legitimizing effects of the laws of war are not altogether misguided insofar as they are grounded on a brutal

that, while war is impossible without controls and limitations, the difficulty resides in instituting and maintaining limits not extrapolated from sound strategy or military discipline.[165] Howard sees additional limitations present in warfare through, inter alia, the nature of humans as moral beings.[166] Yet, despite his experiences as a soldier in World War Two and as an expert in the history of war, he is evidently unsure of the impact IHL has on restraining violence.[167]

Historically, IHL was divided into two main elements. "Geneva law" focused on the protection of victims of war, such as wounded combatants, while "Hague law" dealt with the conduct of hostilities.[168] These elements have essentially merged over time, but the distinction remains significant. When Antonio Cassese professes that IHL is one of humankind's greatest achievements, he is almost certainly referring to Geneva law.[169] This is because, in the same breath, Cassese opines that the portion of IHL governing combat is "loose," "flawed by lacunae," and "fails to restrain the violence of war."[170] There is, of course, a conceptual distinction between arguing that IHL "fails to restrain warfare"—which could be the result of inadequate enforcement mechanisms—and the notion that IHL establishes no substantive restraints. Yet it is apparent from the broader context that Cassese is close to the absolutism of Jochnick and Normand.

The absolutist position is that, despite humanitarian rhetoric to the contrary, States have been unwilling to accept *any* legal restrictions on their ability to use the military instrument to achieve victory that extend beyond good military practice.[171] To illustrate, the legal proscription on attacking civilians is deemed no more than the product of good military practice since military

correlation: the twentieth century witnessed the flourishing of elaborate laws and codes of war, and yet it was the bloodiest century of warfare in history").

165. Michael Howard, *Temperamenta Belli: Can War be Controlled?*, *in* RESTRAINTS ON WAR: STUDIES IN THE LIMITATION OF ARMED CONFLICT 1, 4 (Michael Howard ed., 1979).

166. *Id.* at 14.

167. *Id.* at 7.

168. *See* Leslie C. Green, *The Law of War in Historical Perspective*, 72 INTERNATIONAL LAW STUDIES 39 (1998).

169. Antonio Cassese, *Current Challenges to International Humanitarian Law*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 3, 3 (Andrew Clapham & Paola Gaeta eds., 2014).

170. *Id.*

171. Jochnick & Normand, *supra* note 11, at 56.

efficiency will rarely, if ever, be diminished by avoiding acts of violence directed at civilians.[172]

This article considers it misguided to say that IHL is absent rules providing meaningful constraints on military practice beyond what operational art dictates in any event. Two examples concerning AP/I demonstrate why this is the case.

AP/I both reaffirmed and extensively developed rules of customary and conventional international law previously applicable to warfare.[173] To illustrate, the detailed definition of indiscriminate attacks in Article 51(4) of AP/I went far beyond traditional practice at the time that treaty was negotiated.[174] This textual formulation of indiscriminate attacks has since developed into binding customary international law applicable in both international and non-international armed conflict.[175] Beyond such detailed examples is a recognition that, while IHL rules are invariably shaped by power, those same rules assume lives of their own.[176] Jurisprudence generated by the International Criminal Tribunal for the former Yugoslavia (ICTY) is demonstrative. The ICTY significantly contributed to the development of IHL by acting as the catalyst for AP/I rules on targeting being accepted as customary international law in the discrete context of non-international armed conflicts.[177] These two examples display why the absolutist position is neither theoretically nor empirically tenable.

A more nuanced critique is to accept that IHL does provide genuine restrictions on States but to emphasize that many, or most, of those restrictions are derivative in nature.[178] For instance, "the military case against

---

172. *See* GEOFFREY BEST, WAR AND LAW SINCE 1945, at 26 (1994).

173. MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 311 (2d ed. 2013).

174. Dieter Fleck, *Methods of Combat*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 202 (Dieter Fleck ed., 4th ed. 2021).

175. *See, e.g.*, Michael N. Schmitt & Kieran Tinkler, *War in Space: How International Humanitarian Law Might Apply*, JUST SECURITY (Mar. 9, 2020), https://www.justsecurity.org/68906/war-in-space-how-international-humanitarian-law-might-apply/.

176. *See* Hathaway & Shapiro, *supra* note 53.

177. *See also* Robert Heinsch, *Judicial "Law-Making" in the Jurisprudence of the ICTY and ICTR in Relation to Protecting Civilians from Mass Violence: How Can Judge-Made Law Be Brought into Coherence with the Doctrine of the Formal Sources of International Law?*, *in* THE PROTECTION OF NON-COMBATANTS DURING ARMED CONFLICT AND SAFEGUARDING THE RIGHTS OF VICTIMS IN POST-CONFLICT SOCIETY 297 (Philipp Ambach et al., 2015).

178. Jan Klabbers, *Off Limits? International Law and the Excessive Use of Force*, 7 THEORETICAL INQUIRIES IN LAW 59, 65 (2006).

area bombing would be, not that it was inhumane, but that it was . . . psychologically 'counter-productive' and materially wasteful."[179] There is a longstanding strand of scholarship that understands the foremost determinant of IHL rules as good military practice.[180] This understanding of IHL, in turn, implicates the role of political power vis-à-vis the laws of war.

When assessing the role of power in shaping IHL, it is important to keep in mind that this branch of international law is a product of rough history and tough politics.[181] This fact is perhaps best illustrated by a clear-eyed assessment of the Martens clause of the Hague Conventions of 1899 and 1907. This clause is celebrated as the epitome of the humanizing quality of IHL.[182] However, the Martens clause is not the progeny of a human impulse to reduce suffering. It was, instead, an adroit diplomatic expedient to end a dispute between great powers and smaller nations.[183] Analysis of the Geneva Conventions of 1949 is similarly illuminating since all four treaties fall within the rubric of Geneva Law. It is States who dictated the terms of those treaties, and their motivation for doing so was an amalgam of self-interest, concern for legitimacy, and morality.[184]

It is evident that the term "international humanitarian law" is defective. For some, this is due to the fallacious implication that humanitarianism rather than professional standards is the cornerstone of IHL.[185] For others, the modern preference for IHL is ideational and driven by a desire for a more pacific corpus of rules on the battlefield.[186] Neither of these criticisms is without merit, however this article takes the position that there is a deeper

179. Howard, *supra* note 165, at 4.

180. *See, e.g.*, BEST, *supra* note 172, at 264 ("The modern humanitarian eye delights to notice how religious, philosophical, and humanist concerns combined to clarify the concept of the non-combatant and to get it included in statements of war's laws and customs. The main determinants of the law's development however were the practices observed by professional combatants towards each other, and the readiness of political elites to back them.").

181. *Id.* at 262.

182. *See* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 239, 245 (2000).

183. Cassese, *supra* note 169, at 6.

184. Giovanni Mantilla, *The Origins and Evolution of the 1949 Geneva Conventions and the 1977 Additional Protocols*, *in* DO THE GENEVA CONVENTIONS MATTER? 35, 39–40 (Matthew Evangelista & Nina Tannenwald eds., 2017).

185. Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 11, 14 (1995).

186. GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 22–24 (2010).

flaw in the use of the term IHL. Specifically, if humanity is singled out as IHL's lodestar, we lose sight of the persistent presence of State interests in the formation and interpretation of the rules governing the conduct of hostilities.[187]

The *Harvard Manual* explains that the use of different terms to describe the law of armed conflict—such as "*jus in bello*," "laws of war," and "international humanitarian law"—is a semantic issue and not substantive in nature.[188] This is correct in the technical sense but is also prone to mislead. Contemporary commentators typically depict IHL as the product of a progressive balancing between humanitarian and military imperatives.[189] Yet, inquiry into the historical development of IHL demonstrates it has been formulated deliberately to privilege military necessity.[190] Consequently, the term "international humanitarian law" is disingenuous to the extent it gives the impression humanitarian considerations dominate the legal rules governing warfare.[191] Indeed, according to Yoram Dinstein, overemphasizing the adjective "humanitarian" in IHL both fails to adequately account for the substantial impact of military imperatives in the law and, occasionally, results in IHL being confused with international human rights law (IHRL).[192]

The relationship between IHL and IHRL provides a useful case study in explaining why an affected focus on humanitarianism, at the expense of all other considerations, is problematic vis-à-vis battlefield conduct. How these

187. In support, *see* PABLO KALMANOVITZ, THE LAWS OF WAR IN INTERNATIONAL THOUGHT 151 (2020).

188. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIVERSITY, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 30 (2013).

189. W.J. Fenrick, *International Humanitarian Law and Criminal Trials*, 7 TRANSNATIONAL LAW & CONTEMPORARY PROBLEMS 23, 30 (1997).

190. *See, e.g.*, Jochnick & Normand, *supra* note 11, at 50; Judith Gardam, *Women and the Law of Armed Conflict: Why the Silence?*, 46 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 55, 61–64 (1997); NETA CRAWFORD, ACCOUNTABILITY FOR KILLING: MORAL RESPONSIBILITY FOR COLLATERAL DAMAGE IN AMERICA'S POST-9/11 WARS 183 (2013); Gregory H. Fox, *Transformative Occupation and the Unilateralist Impulse*, 94 INTERNATIONAL REVIEW OF THE RED CROSS 237, 258 (2012). *See also* Eyal Benvenisti & Doreen Lustig, *Monopolizing War: Codifying the Laws of War to Reassert Governmental Authority, 1856–1874*, 31 EUROPEAN JOURNAL OF INTERNATIONAL LAW 127 (2020).

191. *Cf.* KENNETH WATKIN, FIGHTING AT THE LEGAL BOUNDARIES: CONTROLLING THE USE OF FORCE IN CONTEMPORARY CONFLICT 123 (2016).

192. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 23–24 (4th ed. 2022).

two bodies of international law interrelate is hotly contested in legal discourse.[193] Nevertheless, three broad schools of thought dominate: conflict, convergence, and complementarity.[194] Those arguing in favor of convergence or complementarity often do so on the grounds that IHL and IHRL are manifestations of the same legal impulse.[195] It is, of course, true that IHL aims to maintain a sense of humanity in times of war.[196] Further, both bodies of law apply during times of armed conflict and have much in common.[197] However, as the foregoing analysis lays bare, the laws of war do not privilege humanitarian considerations above all others. It is therefore hard to escape the conclusion that the ongoing project of assimilation between these two bodies of law is, to some extent, intended to reconceptualize and rewrite the rules of IHL by interpretation.[198]

193. *See* Marko Milanovic, *The Lost Origins of Lex Specialis: Rethinking the Relationship Between Human Rights and International Humanitarian Law*, *in* THEORETICAL BOUNDARIES OF ARMED CONFLICT AND HUMAN RIGHTS 78, 79 (Jens David Ohlin ed., 2016) ("[Human rights] enthusiasts accuse the skeptics of being morally inconsistent apologists for state power who only wish to facilitate the exercise of that power by making wholly arbitrary distinctions with regard to who is protected by human rights and who is not. The skeptics, on the other hand, accuse the enthusiasts of being a utopian, dovish bunch of fluffy, mushy-wushy do-gooders, who know nothing about the realities on the ground in wartime and who risk compromising both human rights and IHL with their relentless and illegitimate activism.").

194. Andrew Clapham, *Human Rights in Armed Conflict: Metaphors, Maxims, and the Move to Interoperability*, 12 JOURNAL OF HUMAN RIGHTS AND INTERNATIONAL LEGAL DISCOURSE 9, 9 (2018).

195. *See, e.g.*, Theodor Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AMERICAN JOURNAL OF INTERNATIONAL LAW 589 (1983) (reasoning that both IHL and IHRL are normative systems for the protection of human rights). This logic has been extended to international criminal law. *See* M. Cherif Bassiouni, *The Proscribing Function of International Criminal Law in the Processes of International Protection of Human Rights*, 9 YALE JOURNAL OF WORLD PUBLIC ORDER 193 (1982).

196. Jean-Marie Henckaerts, *History and Sources*, *in* THE OXFORD GUIDE TO INTERNATIONAL HUMANITARIAN LAW 1, 1 (Ben Saul & Dapo Akande eds., 2020).

197. Christopher Greenwood, *Human Rights and Humanitarian Law—Conflict or Convergence*, 43 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 491, 495 (2010).

198. *See* Rob McLaughlin, *The Law of Armed Conflict and International Human Rights Law: Some Paradigmatic Differences and Operational Implications*, 13 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 213, 214 (2010).

Whether a recasting of IHL norms is positive or negative can be reduced, ultimately, to a value judgment.[199] While in certain aspects, the law of occupation may benefit from assimilation, a broader recasting of IHL rules is troublesome. IHL does not represent, as is often said, a balance between opposing claims of humanity and military necessity.[200] There is frequently a confluence of interests in how to conduct an operation since, for example, indiscriminate bombing is highly inefficient and likely to erode domestic support for the overall campaign. IHL is, however, formed by weighing military interests and humane concerns.[201] Since these two factors often point in different directions, overemphasizing either concern is to distort the hard-fought equipoise ingrained in specific rules of IHL and is detached from the practice of international law by States.[202] This matters because, above all else, the strongest argument used to convince militaries to respect IHL is that they can achieve victory while respecting its strictures.[203] The present author judges that reconceptualizing or reinterpreting rules of IHL at the altar of humanitarianism will bifurcate law from practical realities and, therefore, undermine compliance at a moment in history where support for the vitality of international law is sorely needed.[204]

Overstating the role of humanitarianism in the laws of war is not just ahistorical—and potentially damaging in the longer term—but also presents a paradox. Specifically, despite the best of intentions, insistence on the preeminence of humanitarian concerns in IHL aids the social acceptance of bat-

199. *See* Heike Krieger, *A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study*, 11 JOURNAL OF CONFLICT & SECURITY LAW 265, 292 (2006).

200. *See, e.g.*, Jean Pictet, *The Formation of International Humanitarian Law*, 34 INTERNATIONAL REVIEW OF THE RED CROSS 526, 528 (1994).

201. *See* Shimoda v. Japan, Case No. 2,914, Tokyo District Court, Dec. 7, 1963, *reprinted in* 8 JAPANESE ANNUAL OF INTERNATIONAL LAW 212, 240 (1964).

202. *See also* Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VIRGINIA JOURNAL OF INTERNATIONAL LAW 795 (2010).

203. MARCO SASSOLI ET AL., HOW DOES LAW PROTECT IN WAR? 439 (3d ed. 2011).

204. This very personal view has undoubtedly been shaped by the author's professional experiences in the military but is based on a strategic view of what is the best course to ensure the continuing force of IHL and is not, as some may lazily assume, an apology for State interests. *See also* Pictet, *supra* note 200, at 528 ("Nothing is more dangerous than 'unbridled humanitarianism' acting from the best intentions but remote from reality, the very picture of 'wishful thinking'. It may well produce some fine writing, and perhaps a few gilded castles in the air, as evanescent as they are impressive.").

tlefield conduct that "humanitarians" typically deem deficient. This is because the "stamp of legality" that IHL provides serves to fuel empirical legitimacy for violence in war. This stamp is especially puissant due to the descriptor "international *humanitarian* law."

It has recently been suggested that IHL is, all too frequently, "the apologizing companion of war's brutality and violence."[205] The fact that purposeful acts in war may produce horrifying effects goes without question, given war's nature.[206] There is no shortage of commentators who admonish the application of fundamental IHL standards, such as the rule of proportionality, for failing to place meaningful limitations on these horrors.[207] Nevertheless, whether IHL confers *undue* legitimacy on violence in war ultimately demands we judge IHL against some external standard. While there are several prospective standards for informing our perception of what is undue, inexorably, it is our understanding of the morality of war that informs this judgment.

Part III of this article explained how there is a fundamental difference of opinion on the nature of morality in war. At the heart of this debate is the extent to which combatants should behave in a manner analogous to conduct acceptable in peacetime. David Rodin discounts orthodox just war theory on the grounds it is "question-begging" to assess the morality of war through some "special moral code" that already assumes unique rights for engaging in hostilities.[208] Still, while logically sound, such revisionist accounts of just war ultimately present a picture of what responsibility in war would be if war was not violent.[209] The position taken in this article is that ethical behavior in war should be tied to the "moral reality of war," that is, the belief that morality in armed conflict is *sui generis*. Consequently, it is suggested that the rules of IHL will be most susceptible to accusations of undue legitimacy where they fail to take account of routine moral considerations *as far as reasonably practicable*.[210]

---

205. Rotem Giladi, *Rites of Affirmation: The Past, Present, and Future of International Humanitarian Law*, 24 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 33, 62 (2021).

206. Howard, *supra* note 165, at 3.

207. *See, e.g.*, Noam Lubell & Amichai Cohen, *Strategic Proportionality: Limitations on the Use of Force in Modern Armed Conflicts*, 96 INTERNATIONAL LAW STUDIES 159 (2020).

208. Rodin, *supra* note 127, at 459.

209. Walzer, *supra* note 12, at 43.

210. *See* Shue, *supra* note 129, at 89–90.

V. CONCLUSION

The focus of this article has been the nature of legitimacy and its relationship with IHL. In some respects, the meaning of legitimacy can be seen as an *ignis fatuus* that disappears further into the distance as one approaches it.[211] Nevertheless, while Part II confirmed the absence of an authoritative conception of legitimacy, it also established the sine qua non of legitimacy as adherence to legal and ethical norms.

Part III began by contrasting orthodox and revisionist accounts of just war theory. The *jus in bello* standard of proportionality was then utilized to juxtapose international law and morality in war to demonstrate how, at times, moral legitimacy and legal legitimacy are irreconcilable. This conclusion served to illustrate why IHL cannot independently confer legitimacy on military operations, given de jure legitimacy demands compliance with both normative systems.

Max Weber has averred that, in contemporary discourse, "the most common form of legitimacy is the *belief in* legality."[212] Part IV opened by acknowledging the import of de facto legitimacy and explained why this construct raises the prospect of IHL independently conferring legitimacy on violence in war. The prevalence of international law in States' justifications for wartime action was then employed to support the conclusion that IHL is generally determinative of de facto legitimacy. Having resolved that social perceptions of combat are framed by IHL, the discussion then turned to whether IHL confers undue legitimacy on violence in war.

The view that States have been unwilling to accept *any* legal restrictions on their ability to fight wars beyond good military practice was shown to not withstand scrutiny. Nevertheless, it was suggested that the majority of IHL rules owe their existence—in whole or in part—to good military practice. The axiom that IHL seeks to limit war's effects for humanitarian reasons, above all else, was thus shown to be misleading. Whether the law of armed conflict confers undue legitimacy on violence in war was assessed as requiring us to judge the content and consequences of IHL against an alternative point of reference. That reference point was determined as the "moral reality of war." Part IV concluded by diagnosing that morality in war is ineludibly

---

211. Jose E. Alvarez, *The Quest for Legitimacy: An Examination of the Power of Legitimacy Among Nations by Thomas M. Franck*, 24 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 199, 255 (1991) (book review).

212. MAX WEBER, ECONOMY AND SOCIETY 37 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., U.C. Press 1978) (1921).

distinct from ordinary morality. As such, IHL will be predisposed to accusations of *undue* legitimacy where it neglects everyday moral considerations to the extent the context of war can reasonably accommodate such concerns.

One problem with this conclusion is knowing how far a rule of IHL can practically incorporate routine moral considerations. Beyond such difficulties, however, is the reality that multilateral treaties are the result of compromise and thus typically revert to the lowest common denominator.[213] Further, while States' motivations for developing rules of IHL will vary, they are likely to comprise a balance of self-interest, concern for legitimacy, and morality. Since IHL norms are at best a compromise between competing considerations, their content will almost certainly fail to take full account of moral considerations.

Each rule of IHL must allow a reasonable military commander to act lawfully and still effectively pursue military victory.[214] The principal defense against IHL privileging military needs over innocent lives in this manner is that this is the only way to maintain the legitimacy of the laws of war in the eyes of its users.[215] IHL may well fulfill the function of providing legal authority for and thereby legitimating violence.[216] Nevertheless, in the long run, the capacity of IHL to ameliorate suffering in war appears best served by a pragmatic corpus of rules designed to pull States toward compliance. The capacity of IHL to achieve that aim is perhaps the foremost prism through which to assess the relationship between legitimacy and IHL.

---

213. Michael N. Schmitt, *Normative Architecture and Applied International Humanitarian Law*, 104 INTERNATIONAL REVIEW OF THE RED CROSS 2097, 2098 (2022).

214. Robert D. Sloane, *Puzzles of Proportion and the Reasonable Military Commander: Reflections on the Law, Ethics, and Geopolitics of Proportionality*, 6 HARVARD NATIONAL SECURITY JOURNAL 299, 319 (2015).

215. Naz K. Modirzadeh, *The Dark Sides of Convergence: A Pro-civilian Critique of the Extra-territorial Application of Human Rights Law in Armed Conflict*, 86 INTERNATIONAL LAW STUDIES 349, 356 (2018).

216. *See also* Eliav Lieblich, *The Facilitative Function of Jus in Bello*, 30 EUROPEAN JOURNAL OF INTERNATIONAL LAW 321 (2019).