2

Divisions over Distinctions in Wartime International Law

Ziv Bohrer*

In the movie *Stand by Me*, the following existential debate ensues: 'Mickey's a mouse, Donald's a duck, Pluto's a dog. What's Goofy?' 'Goofy's a dog. He's definitely a dog' 'He can't be a dog. He drives a car and wears a hat' 'Oh, God. That's weird. What the hell is Goofy?'[1]

In the legal classification of collective violence, cross-border fights between non-State and State forces (transnational conflicts) are Goofy, failing to neatly fit into any recognised category. It is important to classify them, however. Peacetime violence is regulated by 'general' international law, whereas armed conflict is regulated by radically different law: international humanitarian law (IHL). IHL is purportedly subdivided into two distinct corpora, setting apart the law governing international from that governing non-international armed conflicts.

Civil disturbances are peacetime violence; inter-State wars are international armed conflicts (IAC); civil wars are non-international armed conflicts (NIAC). What, then, are transnational conflicts? Unlike inter-State wars, but similar to civil wars and disturbances, organised non-State actors participate in them. Unlike civil wars and disturbances, but similar to inter-State wars, violence typically crosses borders. Unlike civil disturbances, but similar to inter-State and civil wars, violence is extensive, leading most to consider them 'armed conflicts'. What international law corpus, then, applies to

* Bar-Ilan University, Law Faculty. I wish to deeply thank the editors, Anne Peters and Christian Marxsen, my partners, Helen Duffy and Janina Dill, as well as Orna Ben-Naftali, Lena Bohrer, Adam H. J. Broza, Andrew Clapham, Emanuela-Chiara Gillard, Benji Grunbaum, Guy Keinan, Heike Krieger, David Landau, Gabriel Lanyi, Thilo Marauhn, Michael A. Newton, Jasmine Patihi-Goldofsky, Christian Tomuschat, Damion Young and the Max Planck Workshop participants.

[1] Bruce Evans and Raynold Gideon, *Stand by Me* (1985), Movie Script, available at: www.moviescriptsandscreenplays.com/johncusack/scripts/standbyme.txt.

transnational conflicts: peacetime general international law, IAC law, NIAC law or a new IHL altogether? Transnational conflicts' 'Goofiness' is commonly attributed to their novelty. But, nearly two decades have passed since 9/11 (which marked their rise) without reaching an accepted classification.

This classification dispute is not alone. Since the early 2000s, classification disagreements have intensified, notably with regard to: when and where does IHL apply (what constitutes 'war' and what constitutes 'peace')? When and where each of IHL's two sub-corpora apply and does IHL have a new (third) sub-corpus (what constitutes an IAC, what constitutes a NIAC and what legal corpus applies to transnational conflicts)? To whom do each of the two status-based sets of IHL rules apply (which individuals are 'combatants' and which are 'non-combatants')? Under what conditions, if any, does international human rights law (IHRL) apply alongside IHL? Such classification disputes are, presently, so strong that the legal materials that 'used to distinguish war and peace … have become surprisingly fluid'.[2] This chapter addresses that classification crisis.

Some classification debates emerged even before transnational conflicts' 'rise', but all have subsequently intensified. Accordingly, transnational conflicts are considered a primary cause for the present classification crisis: wars of a new kind that erode IHL's long-standing distinctions.[3]

In the current classification debates, formalist attempts to 'objectively' determine the 'correct' interpretation of the relevant law have proven futile, leading only 'into a Wonderland of duelling dicta'.[4] To avoid similar fate, instead of focusing on the debated issues, this chapter critically examines the only generally accepted assumption: that transnational conflicts' rise is a main cause of the current crisis.

Such critical analysis of consensual legal issues is inspired by social discourse accounts of 'law'. According to such accounts, a legal system's community members 'inhabit … a normative universe … The rules and … formal institutions … are … but a small part of the normative universe … No set of legal institutions or prescriptions exists apart from the narratives that … give it meaning.'[5] Unlike (hardline) formalist accounts, social

[2] David Kennedy, 'Lawfare and Warfare', in James Crawford and Martti Koskenniemi (eds.), *Cambridge Companion to International Law* (Cambridge University Press, 2012), 158–84 (165).

[3] E.g., Jed Odermatt, 'Between Law and Reality: "New Wars" and Internationalised Armed Conflict', *Amsterdam Law Forum* 5(3) (2013), 19–32 (19).

[4] David Luban, 'Human Rights Thinking and the Laws of War', in Jens David Ohlin (ed.), *Theoretical Boundaries of Armed Conflict and Human Rights* (Cambridge University Press, 2016), 45–77 (49).

[5] Robert Cover, 'Nomos and Narrative', *Harvard Law Review* 97 (1983/4), 4–68 (4–5). See also Hanoch Dagan, 'The Realist Conception of Law', *University of Toronto Law Journal* 57 (2007), 607–60; Hendrik Hartog, 'Pigs and Positivism', *Wisconsin Law Review* (1985), 899–935 (932);

discourse accounts recognise that law is not a wholly 'external, objective social fact'.[6] But, unlike (hardline) critical-legal studies (CLS) accounts, social discourse accounts acknowledge that law *does* tend to have a certain semi-objective social element that 'constrains the range of possible … juridical solutions';[7] a legal system's community members, including the powerful, often cannot simply claim that the law is whatever they wish it to be, even when the law has multiple interpretations.[8] Law's semi-objective element is the product of narratives that give the law meaning(s).[9] Narrative construction is a human tendency aimed at projecting order and causality onto a chaotic reality.[10] Due to reality's complexity, narratives cannot simply reflect reality; nevertheless, we often perceive narratives, especially widely accepted ones, not as opinions or stories, but rather 'as truth and reality'.[11] Because narratives are inevitably simplified accounts of reality, 'sharpen[ing] certain features and blur[ring] others',[12] critically examining widely accepted narratives enables us to see what was 'previously hidden'.[13]

This chapter begins by disproving the premise that the current crisis is due to novel wars. Section I reveals that transnational conflicts' attributes are not unprecedented. Section II uncovers that IHL regulation of conflicts with such attributes is not novel. Current uncertainty is, in part, chronic, stemming from the nature of 'law' and of 'war' which does not allow for a neat fit between war-related legal classifications and real wartime situations. This is not a crisis, but a fact of life. Moreover, the chapter gradually presents an IHL norm – *the adaptation approach* – that has long aided IHL in addressing such uncertainty. Section III reveals that the current classification crisis narrative is primarily the by-product of two competing attempts to take sole control over wartime international law: by hardline statists and by hardline IHRL advocates. These hardliners are also the main cause for the current *actual* legal crisis. In a legal system with a heterogeneous community, such as IHL, considerable

Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field', *Hasting Law Journal* 38 (1987), 814–53 (816).

6 Hartog, 'Pigs and Positivism' 1985 (n. 5), 932.

7 Bourdieu, 'Force of Law' 1987 (n. 5), 816.

8 *Ibid.*

9 Cover, 'Nomos and Narrative' 1983/4 (n. 5), 17.

10 Mark Currie, *Postmodern Narrative Theory* (New York: Palgrave Macmillan, 1998), 2.

11 Richard Sherwin, 'The Narrative Construction of Legal Reality', *Journal of Assistant Legal Writing Directors* 6 (2009), 88–120 (91).

12 Richard Ford, 'Law's Territory (A History of Jurisdiction)', *Michigan Law Review* 97 (1999), 843–930 (863).

13 Martti Koskenniemi, 'Histories of International Law: Dealing with Eurocentrism', *Rechtsgeschichte* 19 (2011), 152–76 (176).

disagreements and uncertainty would inevitably result from the community's diversity. This condition should be accepted, if not celebrated, as it is a mark of pluralism. Such uncertainties and disagreements amount to a crisis only when they are expounded by attempts to eradicate pluralism; a phenomenon herein called a *core jurisdictional struggle*. A core jurisdictional struggle begins when an influential faction within the legal system's community rejects pluralism: attempting to take sole control over the shaping of the system's norms and narratives and dismissing competing norms and narratives as non-obligatory and political. Once other community members (understandably) resist, the core jurisdictional struggle erupts: the different factions are no longer constrained by a shared normative corpus, and each perceives its opponents' actions as political and responds in kind. The system's law loses its independent (semi-objective) influence on human behaviour, which places the system at a risk of dissolution. As Section III shows, for two decades, a core jurisdictional struggle has been waging in IHL, driven by the competing attempts of hardline statists and hardline IHRL advocates to take sole control over its shaping. Current escalating uncertainty and disagreements primarily stem from these attempts and from the clash between them. The current classification crisis narrative, regarding distinctions-eroding novel wars, has been propagated by both opposing hardliners to justify and conceal their usurpation attempts. All this weakens IHL and might eventually lead to its demise. Section III, thus, responds by rebutting the fundamental premise of each hardline faction. It shows that hardline statists' drive to loosen wartime legal constraints gravely underrates existing IHL benefits and effectiveness. Likewise, the section shows that hardline IHRL advocates mis-assume that extensive IHRL wartime application and a rights-oriented reading of IHL increase civilian protection; counter-intuitively, doing so diminishes that protection, because of differences between obligations-oriented and rights-oriented systems that make (obligations-oriented) existing IHL better suited to protect civilians in wartime. This chapter as a whole is an attempt to quell the current core jurisdictional struggle by embracing the adaptation approach, inevitable indeterminacies and pluralism.

I. CLASSIFICATION CRISIS AND NOVEL WARS

Following 9/11, in a series of legal memos ('torture memos') the US administration reasoned that current IHL does not apply to transnational conflicts. Existing IHL is subdivided into two distinct bodies: IAC law, which was created to address inter-State wars; and NIAC law, which was created to address civil

https://doi.org/10.1017/9781108674416.003 Published online by Cambridge University Press

wars; transnational conflicts do 'not fit into either category'.[14] Transnational conflicts, therefore, represent a new phenomenon that existing IHL was not designed to regulate; they are regulated, instead, by new IHL, consisting merely of the norms authorising States to kill, capture and detain enemy combatants.[15]

The US characterisation of transnational conflicts as novel has become quite accepted. The US conclusion, regarding the applicable law, has not. (1) Some jurists agree that transnational conflicts are regulated by a new wartime international law, but, unlike the torture memos, they hold that it is more constraining than existing IHL.[16] (2) Others hold that transnational conflicts are not wars and are, therefore, regulated by the existing general peacetime international law.[17] (3) Yet others claim that existing IHL can be adapted to regulate these new wars, but such jurists diverge on three main issues: (i) when do several violent situations constitute a single transnational conflict?; (ii) must the demanded adaptations ease or harden existing IHL?; (iii) what is the relevant existing IHL: IAC law or NIAC law (note that the United States modified its position and currently considers NIAC law the relevant IHL (subject to adaptations))?[18]

The difficulty in classifying transnational conflicts as either IAC or NIAC seems to support their characterisation as novel. Additional core legal classifications also become goofy in the context of transnational conflicts, which seems to further support the novelty characterisation.[19]

The following is the accepted account for the unsuitability of core IHL classifications to transnational conflicts. Traditional IHL was primarily designed to deal with inter-State conflicts, therefore, IHL generally depends

[14] Deputy Assistant US Attorney General John Yoo and Special Counsel Robert Delahunty, Memorandum for D.O.D. General Counsel William J. Haynes II: Application of Treaties and Laws to al Qaeda and Taliban Detainees, 9 January 2002, 12.

[15] See Naz 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', *Harvard National Security Journal* 5 (2014), 225–304 (232–3) (summarising and citing the relevant memos).

[16] E.g., Daphne Visser, 'Conflicts, New Wars and Human Rights', Amnesty International Blog, 9 February 2017, available at: www.aisa.amnesty.nl/blog/142-9-february-2017-conflicts-new-wars-and-human-rights.

[17] E.g., Mary Ellen O'Connell, 'When is War Not a War? The Myth of the Global War on Terror', *ILSA Journal of International & Comparative Law* 12 (2005/6), 535–39 (535).

[18] ICRC, Report on the 31st International Conference of the Red Cross and Red Crescent, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, October 2011, 7–13, 48–53; Brian Egan, 'International Law, Legal Diplomacy, and the Counter-ISIL Campaign', 4 April 2016, available at: www.state.gov/s/l/releases/remarks/255493.htm.

[19] Eyal Benvenisti, 'Rethinking the Divide between *Jus ad Bellum* and *Jus in Bello* in Warfare against Nonstate Actors', *Yale Journal of International Law* 34 (2009), 541–8 (541).

on 'reciprocity . . . between . . . roughly equal militar[ies]'.[20] Because in such symmetric (inter-State) conflicts battlefields tend to be compartmentalised, IHL premises that it is generally possible to distinguish areas of actual combat from elsewhere, setting various IHL norms to address only combat.[21] Since battlefield compartmentalisation, together with other State attributes, aids in distinguishing combatants from non-combatants, IHL further premises that such a distinction is generally possible; thus, IHL establishes different rules for each of these two categories of individual.[22] Admittedly, even in inter-State wars, IHL *does*, generally, apply outside the battlefield, but international law prohibits waging wars on territories of uninvolved States and States commonly follow this restriction, which creates considerable clarity regarding IHL's spatial application boundaries.[23] IHL's temporal application boundaries are, likewise, clear, because States' war aims tend to be limited, which helps to determine that a war was started and whether it was won or lost.[24] Due to these clear temporal and spatial boundaries, 'Traditional international law made a conceptually rigid distinction between peace and war.'[25] IHL also regulates civil wars, where temporal, spatial and status-based distinctions are less clear. Nevertheless, civil wars are commonly confined to a single State, and often belligerents are willing to adhere to IHL because legitimacy aspirations influence belligerents' relationship with the international community.[26] In contrast, in contemporary transnational conflicts all traditional distinctions vanish. Presumably, this is due to technological advancements (in weapons, transportation and communication) and unique attributes of transnational non-State forces (uncompromising ideology, open battle avoidance, non-confinement to territorial boundaries and disregard of IHL (especially of the principle of distinction)). Thus, in transnational conflicts victory is unclear as the temporal, spatial and combatant–civilian distinctions are fuzzy, and attacks can simply happen anywhere across the globe and at any time.[27]

[20] Robert Sloane, 'Puzzles of Proportion and the "Reasonable Military Commander"', *Harvard National Security Journal* 6 (2015), 299–343 (334).

[21] *Ibid.*

[22] *Ibid.*

[23] W. Michael Reisman, 'Assessing Claims to Revise the Laws of War', *American Journal of International Law* 97 (2003), 82–90 (83).

[24] Sloane, 'Puzzles of Proportion' 2015 (n. 20), 339–40.

[25] Lung-chu Chen, *Introduction to Contemporary International Law*, 3rd edn. (Oxford University Press, 2014), 392.

[26] Toni Pfanner, 'Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action', *International Review of the Red Cross* 87 (2005), 149–74 (152).

[27] *Ibid.*, 153–69; Sloane, 'Puzzles of Proportion' 2015 (n. 20), 336–9; Visser, 'Conflicts, New Wars and Human Rights' 2017 (n. 16); Jonathan White, *Terrorism and Homeland Security* (Belmont, CA: Wadsworth, 2011), 23.

Transnational wars have also blurred the application boundaries of the law of occupation (an IAC law sub-corpus) by muddling the distinction between occupied and unoccupied territories.[28] Given their novelty and prevalence since 9/11, transnational conflicts are considered to be a primary cause for the current legal crisis, challenging IHL's fundamental distinctions.[29]

A. *Blurred Wartime–Peacetime Divide*

Try to guess when the following statements were written:

(1) '[S]o great a change has occurred in modern times ... [that] there would seem to be an impalpable progress from a state of peace towards a state of war.'[30]
(2) A 'wide borderland of hostilities ... exists between peace and war'.[31]
(3) '[T]he old classification into war and peace ... is far too rigid ... [T]he traditional law as applied to war situations has become somewhat out of date if not irrelevant.'[32]

The dates are 1843, 1883 and 1977. There are also similar historical statements about NIAC's indeterminate beginning and end.[33] The 'consensus about a *recent* elision of the difference between war and peace is rooted in a deep historical misconception ... [That] distinction ... has *always* been blurred.'[34] Throughout this chapter, I bring past sources showcasing the rich antecedents of 'unprecedented' contemporary phenomena.

Legal sources addressing *current* inter-State or civil wars also describe indeterminacy regarding their temporal boundaries.[35] This further diminishes the actual uniqueness of transnational conflicts.

The blurring of the wartime–peacetime divide in current *inter-State* conflicts is considered a *recent* phenomenon resulting from the increasing rarity of

[28] Pfanner, 'Asymmetrical Warfare' 2005 (n. 26), 169.
[29] Benvenisti, 'Rethinking the Divide' 2009 (n. 19), 541.
[30] John T. Graves, 'Lectures on International Law (Lecture I)', *Law Times* 1 (1843), 95–7 (96).
[31] John F. Maurice, *Hostilities without Declaration of War* (London: HMSO, 1883), 8.
[32] Leslie C. Green, 'The New Law of Armed Conflict', *Canadian Yearbook of International Law* 15 (1977), 3–41 (5).
[33] E.g., Edward Creasy, *First Platform of International Law* (London: Van-Voorst, 1876), 108; Jean S. Pictet, *Humanitarian Law and the Protection of War Victims* (Geneva: Sijthoff, 1975), 61.
[34] Mark Neocleous, 'War as Peace, Peace as Pacification', *Radical Philosophy* 159 (2010), 8–17 (9).
[35] Vincent Bernard, 'Editorial: Delineating the Boundaries of Violence', *International Review of the Red Cross* 96 (2014), 5–11 (9).

formal war declarations and peace treaties.[36] But Maurice's 1883 survey showed that between 1700 and 1870, of 107 Western conflicts a declaration of war was issued in 'less than ten'.[37] Undeclared wars remained common even after the 1907 Hague Convention demanded otherwise.[38]

Indeterminacy regarding the end of inter-State wars was also, historically, common. US Secretary of State, William H. Seward, observed in 1868:[39]

> [P]eace may be restored by the long suspension of hostilities without a treaty … History is full of such occurrences. What period of suspension of war is necessary to justify the presumption of the restoration of peace has never yet been settled …

The blurring of the peacetime–wartime divide in current inter-State wars is also considered a side effect of a mid-twentieth-century legal reform. Earlier IHL treaties relied on the term 'war' and States wishing to avoid applying IHL argued 'that a situation not expressly recognised as a war did not constitute a war in the legal sense'.[40] To abolish this legal tactic, the 1949 Geneva Conventions (and subsequent treaties) primarily rely on the term 'armed conflict', because (presumably, unlike 'war') the determination that 'armed conflict' exists relies on objective-factual benchmarks.[41] But a side effect of this substitution has been reduced clarity regarding the temporal application boundaries of IHL, because it led to gradual 'abandonment of the traditional rigid distinction … between … peace and … war'.[42] Oddly, the same terminological substitution is also depicted oppositely, as having enhanced clarity regarding IHL's temporal application boundaries by giving rise to a doctrine that applies IHL to inter-State conflicts starting from the first shot fired.[43]

[36] Marko Milanovic, 'The End of Application of International Humanitarian Law', *International Review of the Red Cross* 96 (2014), 163–88 (168).

[37] Maurice, *Hostilities without Declaration of War* 1883 (n. 31), 4.

[38] Article 1, Hague Convention (III) relative to the Opening of Hostilities (18 October 1907); Quincy Wright, 'When Does War Exist?', *American Journal of International Law* 26 (1932), 362–8 (363–5).

[39] 'Letter to Mr. Goni (22 July 1868)', in John B. Moore, *A Digest of International Law* (Washington, DC: US Government Printing Office, 1906), vol. VII, 336.

[40] Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, 4th edn. (Geneva: ICRC, 2011), 31.

[41] *Ibid.*

[42] Jann Kleffner, 'Scope of Application of International Humanitarian Law', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd edn. (Oxford University Press, 2013), 43–78 (43–4).

[43] Bernard, 'Editorial' 2014 (n. 35), 9.

In truth, this terminological substitution neither increased nor decreased clarity.[44] Even cases like the ones that the substitution specifically sought to abolish, in which States deny IHL application by denying that their situation is an armed conflict, reappeared as early as the 1950s.[45] Admittedly, the first-shot doctrine reduces indeterminacy regarding the start of IHL application in inter-State conflicts. But the history of such an approach, deeming IHL application mandatory even in small-scale, undeclared conflicts, goes back at least two centuries, to the 'imperfect wars' era.[46]

Another indeterminacy commonly attributed to transnational conflicts' rise concerns the difficulty of clearly determining whether a conflict is an IAC or a NIAC.[47] However, this indeterminacy is, actually, quite old; as George G. Wilson observed in 1900:[48]

> [O]pportunities for legitimate differences of opinion as to the nature of hostilities … are very great. From war in the full sense … between States … down to the unarmed struggle between individuals of the same State, there are many grades of conflict.

Even torture memo-like arguments are unoriginal. George Aldrich noted in 1973:[49]

> [T]he laws of war … are … in considerable part obsolete … [T]heir applicability to more recent types of warfare [such as] … mixed civil and international conflicts, and guerrilla warfare … raise[s] problems … Moreover, all too often nations refuse to apply the conventions in situations where they clearly should be applied. Attempts to justify such refusals are often based on differences between the conflicts presently encountered and those for which the conventions were supposedly adopted.

There is also nothing novel in asserting that 'the concept of "occupation" is juridically inoperative or disputed in practically all contemporary conflicts' (as this 1983 assertion demonstrates).[50] As early as 1876, it was observed that 'the definition of … "occupied district" is very hard to realize'.[51]

[44] Fred Green, 'United States: The Concept of "War" and the Concept of "Combatant"', *Military Law & Law of War Review* 10 (1971), 267–312 (283).
[45] Kalshoven and Zegveld, *Constraints on the Waging of War* 2011 (n. 40), 31.
[46] See John T. Graves, 'Lectures on International Law (Lecture III)', *Law Times* 1 (1843), 265–8 (267).
[47] Bernard, 'Editorial' 2014 (n. 35), 5.
[48] George G. Wilson, *Insurgency* (Washington, DC: US Government Printing Office, 1900), 3.
[49] George Aldrich, 'Human Rights in Armed Conflict', *Department of State Bulletin* 68 (1973), 876–82 (876). See also, I. P. Trainin, 'Questions of Guerrilla Warfare in the Law of War', *American Journal of International Law* 40 (1946), 534–62 (550–1).
[50] Michel Veuthey, *Guérilla et droit humanitaire* (Geneva: ICRC, 1983), 355.
[51] Creasy, *First Platform of International War* 1876 (n. 33), 483.

Why do the terminological dichotomies – occupied versus unoccupied territories, IAC versus NIAC, and war/armed conflict versus peace – persistently suffer from indeterminacy? Why are such chronic problems always perceived as new?

First, as already observed by Plato and Aristotle, the actual world 'in its very essence, [is] a world of things that . . . fall short of [their ideal model nature]'.[52] The jurisprudence that sprang from this Platonic and Aristotelian thinking would later prove to be significant in addressing the current classification crisis. For now, however, its aforesaid basic observation suffices. Platonic thinking considers this lack of sync between actual things and their ideal model form a result of the flawed nature of actual things. Alternatively, this lack of sync is because any attempt to define a category of things requires depicting a model form of those things that have only attributes generally shared among them; such generalising reasoning 'by its very nature involves simplification'.[53] That reasoning is dominant in law.[54] Law, in its ideal model form, provides certainty by setting clear rules, definitions and classifications. But in practice legal concepts are generalisations aimed at regulating numerous situations. Therefore, they unavoidably suffer from at least some measures of indeterminacy and over- and under-inclusiveness.[55] It is especially difficult to clearly define the application boundaries of a law that aims to regulate a category of exceptional cases, such as emergency situations, because each such case is unique and unpredictable.[56] War (armed conflict) and civil disturbances are categories of emergency situations; IAC and NIAC are sub-categories of war; and the distinction between occupied territories and unoccupied territories is between two wartime scenarios. Therefore, any attempt to enshrine in law *clear-cut* classifications (aimed at *accurately* defining the conditions under which each of these emergency scenarios exists), or *clear-cut* boundaries (aimed at *pinpointing* the *precise* transition point from one such scenario to another, or between any of them and peacetime scenarios) is bound to face 'the grey areas of . . . emergency',[57] and, therefore, unable to attain its aspired clarity.[58]

[52] Christine Korsgaard, 'Prologue', in Christine Korsgaard and Onora O'Neill (eds.), *The Sources of Normativity* (Cambridge University Press, 1996), 1–5.
[53] Robert Flood and Ewart Carson, *Dealing with Complexity* (New York: Springer, 1993), 155.
[54] Frederick Schauer, 'The Generality of Law', *West Virginia Law Review* 107 (2005), 217–34.
[55] *Ibid.*
[56] Fionnuala Ni Aolain and Oren Gross, 'Emergency, War and International Law: Another Perspective', *Nordic Journal of International Law* 70 (2001), 29–63 (30–1).
[57] *Ibid.*, 60.
[58] *Ibid.*, 54.

Secondly, although legal terms inevitably suffer from some measure of indeterminacy, incorporating a term into a law often leads people to assume that it has a clear, objectively ascertainable definition.[59] This tendency is especially strong when the legal terms portray opposing categories, because 'thinking in antonymous pairs is natural to the manner we construct the world'[60] (even though binary classifications often 'do not [truly] produce coherent knowledge, only terminological mess').[61] Thus, a dissonance arises between the exaggerated clarity attributed to emergency-related legal terms and the chronic haziness of the situations these terms address.[62] The intuitive attribution of clarity ceases whenever reality demands that individuals determine whether, or not, a certain emergency-related, classifying legal term applies to a concrete situation; once our attention is focused on applying such law to actual emergencies, our illusion of a neat fit between it and reality bursts. Recall the statements quoted earlier: in each a jurist from a different period asserted that during his time war had changed in a manner that diminished the (presumably) long-standing, clear-cut distinction between war and peace. Such statements (found in abundance, throughout modern times) demonstrate the aforesaid illusion-bursting phenomenon, because comparing them reveals that in each period the fault for diminishing the 'traditional' 'clear-cut' war–peace dichotomy was attributed to the kind of conflict that caught the greatest contemporary public attention: in the nineteenth century it was attributed to 'imperfect wars';[63] in the early twentieth century, to the phenomenon of world wars;[64] post-Second World War, to the Cold War phenomenon;[65] and, subsequently, to conflicts with mixed international and non-international attributes (in the light of anti-colonial and Communist rebellions).[66]

Although attribution of exaggerated clarity to core IHL distinctions ceases whenever these distinctions are applied to a concrete conflict, such clarity

[59] Jessie Allen, 'A Theory of Adjudication: Law as Magic', *Suffolk University Law Review* 41 (2007/8), 773–831 (799).

[60] Orna Ben-Naftali, 'The Epistemology of the Closet of International Law and the Spirit of the Law', *Law, Society & Culture* 4 (2011), 527–42 (533–4) (in Hebrew).

[61] *Ibid.*

[62] Giorgio Balladore Pallieri, 'General Report: the Concept of "War" and the Concept of "Combatant" in Modern Conflicts', *Military Law & Law of War Review* 10 (1971), 313–51 (339–40).

[63] E.g., Graves, 'Lecture I' 1843 (n. 30), 96.

[64] E.g., Georg Schwarzenberger, 'Some Reflections on the Scope of the Functional Approach to International Law', *Transactions of the Grotius Society* 27 (1941), 1–29 (2–5).

[65] E.g., Philip Jessup, 'Should International Law Recognize an Intermediate Status between Peace and War?' *American Journal of International Law* 48 (1954), 98–103 (100–3).

[66] E.g., Green, 'New Law' 1977 (n. 32), 5.

attribution often retrospectively re-emerges in the collective memory of the conflict. Stated differently, the sense of stability projected by core IHL distinctions frames our recollection of past wars, marginalising attributes of these wars that do not fit the IHL distinctions. For example, the First World War is intuitively recalled as an inter-State war, despite the participation of various non-State forces (exiled government forces, rebels, partisans, tribes, national liberation forces, etc.).[67] The First World War is also recalled with a clear end date, even though that date was, for a long period, factually unclear and legally disputed.[68]

The exaggerated clarity attributed to legal terms often leads jurists to believe that indeterminacy would be eliminated if they could only agree on the exact phrasing (e.g., if we only replaced the term 'war' with 'armed conflict'). But phrasing has only limited influence on legal indeterminacy levels, especially when the law addresses emergencies.[69]

Despite the chronic nature of IHL distinctions' indeterminacy, this indeterminacy was not always considered a crisis, but rather an unavoidable, yet manageable, condition. Such a non-crisis attitude acknowledges that the 'difficult[y] to formulate clear and precise [legal] rules … [to] define the character and the bearing of acts of war … [is] inherent *in the very nature of things*';[70] and that all newly adopted IHL 'definitions [tend to] become obsolescent [almost] upon formulation',[71] because '[t]he *very nature of war* is such that it is impossible to anticipate every new development'.[72] Nevertheless, it asserts that despite being 'blurred and … not always … readily determinable, the established [IHL] concepts cannot be merely abandoned',[73] nor can the attempt to reduce the indeterminacy by means of adopting new treaty IHL,[74] because dismissiveness towards IHL 'opens the door to every kind of excess and suffering'.[75] We must, instead, be realistic regarding IHL's

[67] *Wikipedia*, 'Allies of World War I', 30 December 2016, available at: en.wikipedia.org/wiki/Allies_of_World_War_I; *Wikipedia*, 'Central Powers', 30 December 2016, available at: https://en.wikipedia.org/wiki/Central_Powers.

[68] Manley Hudson, 'The Duration of the War between the United States and Germany', *Harvard Law Review* 39 (1926), 1020–45 (1020); Robert Gerwarth, *The Vanquished: Why the First World War Failed to End, 1917–1923* (London: Penguin, 2016), 1–16.

[69] Ziv Bohrer, 'Obedience to Orders and the Superior Orders Defense', PhD thesis, Tel-Aviv University, 2012, 73, 81–2, 413–15.

[70] Prince Gortchacow, 'Observations on the Dispatch from Lord Derby to Lord A. Loftus (20 January 1875)', in *Correspondence Respecting the Conference at Brussels on the Rules of Military Warfare* (London: UK Parliament, 1875), 5–6 (emphasis added).

[71] Green, 'United States' 1971 (n. 44), 284 (emphasis added).

[72] *Ibid.*

[73] *Ibid.*

[74] E.g., Gortchacow, 'Observations' 1875 (n. 70), 5–6.

[75] *Ibid.*, 6.

capabilities. Accordingly, *when making new treaty IHL* we should aim only to reduce '*as far as possible* … th[e] uncertainties'.[76] Likewise, *when applying existing IHL*, the appropriate way to address the inevitable indeterminacy is to '*analogize, insofar as possible* … [from the existing] law so as to preserve the intent thereof and thereby diminish the evils of war'.[77]

Past reliance on such a non-crisis 'adaptation' attitude indicates that the current crisis is not necessarily an unavoidable result of IHL distinctions becoming indeterminable due to changes in warfare. Those wishing to reform an existing law often propagate a crisis narrative that frames certain events as challenging that law; crisis narratives are used primarily by those who lack sufficient power, under the existing normative conditions, to shape the law.[78] Admittedly, not all factual circumstances can serve as a basis for a crisis narrative, and often those who support such a narrative honestly perceive a crisis. Nonetheless, most factual circumstances can be understood in various ways and different implications could be concluded from the same set of facts; our specific understanding of factual circumstances is shaped by the narratives we, consciously or unconsciously, construct.[79]

In international law, wars are often a basis for crisis narratives.[80] These crisis narratives have been mainly of two kinds: First, in various past conflicts States have claimed that changes in warfare and the indeterminacy of existing IHL have rendered that law obsolete and therefore inapplicable to their contemporary war.[81] Second, sometimes the crisis cry was subsequently also embraced by those wishing to increase the legal constraints on belligerents. They argued that the legal indeterminacy and warfare's changed, ghastlier nature prove that existing international law is inapt and contemporary conflicts necessitate new, more constraining laws.[82] Past successes of the second kind of crisis cries campaigns have shaped a prevailing narrative of IHL history, according to which

[76] *Ibid.* (emphasis added).
[77] Green, 'United States' 1971 (n. 44), 284 (emphasis added).
[78] Suzanne Katzenstein, 'In the Shadow of Crisis: the Creation of International Courts in the Twentieth Century', *Harvard International Law Journal* 55 (2014), 151–209 (153).
[79] Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame, IN: University of Notre Dame Press, 1988), 1–11.
[80] Katzenstein, 'In the Shadow of Crisis' 2014 (n. 78), 153.
[81] Aldrich, 'Human Rights in Armed Conflict' 1973 (n. 49), 886.
[82] Eleanor Davey, 'The Bombing of Kunduz and the Crisis of International Humanitarian Law', *Reluctant Internationalists Blog*, 21 January 2016, available at: www.bbk.ac.uk/reluctant internationalists/blog/the-bombing-of-kunduz-and-the-crisis-of-international-humanitarian-law; Katzenstein, 'In the Shadow of Crisis' 2014 (n. 78), 153.

advancing international law has, gradually, transformed quondam lawless wars into humane warfare.[83]

In truth, in some respects current IHL is more, and in others is less, constraining than past IHL. Both aforesaid kinds of crisis narratives, as well as non-crisis adaption attitudes, have influenced IHL development. The present prevalence of a crisis narrative merely attests to the increasing influence of factions that, in the existing normative setting, do not have sufficient power to shape IHL in accordance with their preferences.

B. *Blurred Principle of Distinction*

When do you think each of the following statements was made?

(1) Some view 'the new phenomena [of extensive civilian participation] . . . as a general decadence of the art [of war]; and h[o]ld . . . that in the evenly-balanced . . . war game [i.e., battle warfare] the perfection of the art is realized.'[84]

(2) Who should 'be considered combatants according to the laws of war? . . . [This] question . . . continues to be the theme of much consideration'.[85]

(3) '[The recent] war has emphasized . . . the archaic character of the [contemporary] Conventions. They speak the language . . . of [the] nineteenth-century . . . envis[ioning] war mainly as a trial of strength between opposing professional teams in which civilians would play the role of spectators. [Accordingly, these IHL conventions draw] . . . [s]harp distinctions . . . between the functions of the State and those of the individual . . . Under modern conditions these distinctions have everywhere become blurred and often obliterated.'[86]

(4) Within two decades, a 'new form of warfare [widespread terrorism] has been born . . . [It] differs fundamentally from the wars of the past in that victory is not expected from the [battlefield] clash of two armies'.[87] Unlike 'soldier[s] . . . terrorist[s] . . . [attack] without uniform . . . far from a field of battle . . . [and mainly] unarmed civilians'.[88]

[83] E.g., Daniel Thürer, *International Humanitarian Law* (The Hague: Martinus-Nijhoff, 2011), 44–6.

[84] Carl von Clausewitz, *On War*, trans. J. J. Graham (London: Trübner, 1873), 206 (*c.* 1816–30).

[85] Creasy, *First Platform of International War* 1876 (n. 33), 476.

[86] H. A. Smith, 'The Government of Occupied Territory', *British Yearbook of International Law* 21 (1944), 151–5 (151).

[87] Roger Trinquier, *Modern Warfare*, trans. Daniel Lee (Fort Leavenworth, KS: US Army 1985), 6 (*c.* 1961).

[88] *Ibid.*, 17–18.

https://doi.org/10.1017/9781108674416.003 Published online by Cambridge University Press

The first statement is from Carl von Clausewitz's book *On War*, written following the French Revolution and Napoleonic Wars. Like the torture memos, Clausewitz argued that 'to introduce into the philosophy of war itself a principle of moderation would be an absurdity',[89] and dismissed existing wartime international law as 'imperceptible'.[90] The second statement is from Edward Creasy's 1876 treatise, influenced by the failed 1874 Brussels Conference. The third statement is from a 1944 article, criticising the 1907 Hague Regulations in the light of the Second World War. The fourth source is a 1961 French analysis of *Modern Warfare*; inspired by Clausewitz, and like the torture memos, it dismisses IHL application to wars against terrorists.[91] These sources demonstrate that there is nothing novel in current claims that IHL is unable to deal with the supposedly recent blurring of the combatant–non-combatant distinction and the passing of battle warfare. This section addresses the former.

As Clausewitz's statement implies, irregular fighting has been on the rise since the late eighteenth century, beginning with a surge in civilian participation in wars and the transition to conscripted national armies.[92] Since then, civilian participation in wars has often been influenced by views dismissive of IHL in popular revolutionary movements; as Winston Churchill exaggeratedly noted, '[f]rom the moment Democracy . . . forced itself upon the battlefield, war ceased to be a gentleman's game'.[93] The nineteenth century was, therefore, not a period in which the principle of distinction was clear.

The inaccurate prevailing historical account is partly due to the previously discussed attributes of dichotomist emergency-related classifying legal terms. Because of these attributes, the blurring of the combatant–non-combatant distinction is somewhat unavoidable, as well as bound to be perpetually perceived as novel.

Due to this misguided perception, attention is primarily paid to the rather recent distinction-related reforms made in the 1949 Geneva Conventions and the 1977 Additional Protocols. Relative to earlier *treaties*, each of these reforms expanded: (a) POW status eligibility;[94] (b) the protections granted to 'unprivileged' (ineligible

[89] Clausewitz, *On War* 1816–30 (n. 84), 2.

[90] *Ibid.*, 1.

[91] Trinquier, *Modern Warfare* 1961 (n. 87), 22.

[92] Terry Gill, 'Chivalry: a Principle of the Law of Armed Conflict?', in Mariëlle Matthee, Brigit Toebes and Marcel M. T. A. Brus (eds.), *Armed Conflict and International Law* (The Hague: Springer, 2013), 33–51 (36–7); Carl Schmitt, 'The Theory of the Partisan (trans.) A. C. Goodson (c. 1962)', available at: www.obinfonet.ro/docs/tpnt/tpntres/cschmitt-theory-of-the-partisan.pdf.

[93] Winston Churchill, *A Roving Commission* (New York: Scribner, 1930), 64–5.

[94] Article 4 Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, 75 UNTS 135 (unrecognised States' forces and exiled governments' forces); Arts. 1(4), 43–4, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating

for POW status) enemy combatants (notably, until the 1949 adoption of Common Article 3, some still held that IHL authorised the extrajudicial execution of captured 'unprivileged' combatants).[95] But this focus on recent events neglects that the discourse dedicated to developing IHL since the 'nineteenth century, could not ignore questions relating to the [warfare] initiative of the people . . . in the form of hostile uprisings, guerrilla warfare, etc.'[96] Within this discourse two approaches often competed. One approach considered the blurring of the combatant–non-combatant distinction as a crisis likely to render IHL obsolete.[97] The second considered it an inevitable, manageable condition.[98]

The latter (non-crisis) approach is strongly expressed in a norm adopted long before 1949. At the 1874 Brussels Conference, a comprehensive proposal was advanced to resolve the combatant–non-combatant indeterminacy. But opposition was considerable, both because of political disagreements and because clarity is not in the nature of the thing. A compromise was therefore proposed, containing only two narrow distinction-related articles (other than those addressing regular State forces) setting the POW status eligibility conditions for: (a) certain irregular State forces (militia and volunteer corps), and (b) certain civilian fighters in unoccupied territories.[99] This compromise attempt failed, and only a non-binding declaration was adopted.[100] When States attempted again to codify IHL, in 1899, incorporating the above articles of the Brussels Declaration was suggested. Again, the proposal encountered strong opposition, which argued that (a) a clear-cut differentiation between those eligible and ineligible for POW status cannot be made because of the inherent blurriness of the principle of distinction, and (b) a clear determination of the existence of belligerent occupation is often impossible.[101] Eventually, a compromise was reached:[102] the articles were incorporated,

to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3 (national liberation forces).

95 Common Art. 3, 1949 Geneva Conventions; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II), 8 June 1977, 1125 UNTS 609; Aldrich, 'Human Rights in Armed Conflict' 1973 (n. 49), 879.

96 Trainin, 'Questions of Guerrilla Warfare' 1946 (n. 49), 536.

97 E.g., Schmitt, 'The Theory of the Partisan' 1962 (n. 92), 37.

98 E.g., Percy Bordwell, *The Law of War Between Belligerents* (Chicago: Callaghan, 1908), 2–6.

99 Articles 9–10, Project of an International Declaration concerning the Laws and Customs of War (Brussels, 27 August 1874).

100 Bordwell, *Law of War between Belligerents* 1908 (n. 98), 100–13.

101 Rotem Giladi, 'The Enactment of Irony: Reflections on the Origins of the Martens Clause', *European Journal of International Law* 25 (2014), 847–69.

102 *Ibid.*

becoming Articles 1 and 2 of The Hague Regulations, but as a counter-balance the following statement was included in the preamble:[103]

> [The treaty] desire[s] to diminish the evils of war so far as military necessities permit . . . It has not, however, been possible to agree . . . on provisions embracing all . . . circumstances . . . [Nevertheless] the cases not provided for [in the treaty are not] . . . left to the arbitrary judgement of the military Commanders . . . [I]n [such] cases . . . populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience . . . [I]t is in this sense especially that Articles 1 and 2 of the Regulations adopted must be understood;

I suspect that upon realising that the current discussion concerns the 'Martens Clause', you (the reader) uncontrollably rolled your eyes. The general feeling among jurists is that the Martens Clause means anything one claims it to mean and therefore means nothing.[104] This dismissive attitude is partly due to the clause's vague terms. But to an even greater degree, it stems from later developments. In the last half a century, some jurists, in attempt to advance expansive interpretations of the clause, constructed a mythological account of its creation. Such interpretations treat the clause like constitutional law, or IHRL, using its vagueness to evermore expand civilian protection.[105] In response, Statist-positivist jurists criticised both the clause's vagueness and its expansive interpretations, arguing that it places no effective obligations on States.[106] The clause's authoritativeness has further diminished due to recent CLS-oriented historical research that refuted the mythology regarding its 'birth', stressing the politics behind its adoption.[107]

However, the CLS account of 'law as politics' tends to be inaccurate, because political influences on law formation often do not bar legal and moral factors from also having an influence.[108] As for the IHRL-like and Statist-positivist approaches, neither tells the whole jurisprudential-normative story of the clause's creation. At the time (even more than today), IHL was influenced by an additional jurisprudential approach (henceforth

[103] Preamble, The Hague Convention (II) with Respect to the Laws and Customs of War on Land (29 July 1899).
[104] Giladi, 'The Enactment of Irony' 2014 (n. 101), 847–50.
[105] See *ibid.*
[106] See *ibid.*
[107] E.g., *ibid.*
[108] Annette Freyberg-Inan, *What Moves Man* (Albany, NY: State University of New York Press, 2012), 111–12.

'nature-of-things jurisprudence'). Reading the clause through that jurisprudential lens can better our understanding of the clause. But, before such a reading could be made, a (somewhat lengthy) presentation of the 'nature-of-things jurisprudence' is required.

Nature-of-things jurisprudence, although it does assume the existence of some universal rights and (even more so) obligations, considerably focuses on profession/status-specific rights and (especially) obligations.[109] This focus stems from its core jurisprudential premise that each kind of entity, including each profession and legal status, has a distinct ideal nature from which distinct rights and (especially) obligations derive.[110] State agents' obligations (e.g., those of rulers, judges and soldiers), like those of private professionals (e.g., doctors), are, accordingly, viewed as personal obligations deriving from the nature of their profession.[111] By contrast, both Statist-positivist and IHRL-like approaches regard State agents' obligations as derivatives of their State's obligations, based on a vision of the State as a corporate entity and on conceptualised clear distinctions between public and private, and between sovereigns and individuals.[112]

Nature-of-things jurisprudence also offers a unique perspective on the relations between positive and natural law, which, unlike Statist-positivism, does not conceptualise sharp distinctions between international and domestic law, law and policy, or morality and law. First, it expects positive law to reflect universal natural law, and permits the punishment of individuals for violations of core unwritten natural laws.[113] Secondly, it expects one's actions to be directed neither by fear of punishment, nor by deference to positive law, but by an aspiration to follow one's ideal nature; all the while, acknowledging that this aspiration could never be fully attained (as evident in Platonic and Aristotelian thinking).[114] Thirdly, this jurisprudence utilises both 'perfect' and 'imperfect' obligations.[115]

[109] Onora O'Neill, 'Rights, Obligations and World Hunger', in Thomas Pogge and Keith Horton (eds.), *Global Ethics: Seminal Essays* (Saint Paul, MN: Paragon House, 2008), 139–56 (150); Henry Sumner Maine, *Ancient Law* (London: Albemarle, 1908), 64–5; Christine Hayes, *What's Divine about Divine Law?* (Princeton University Press, 2015), 62–86.

[110] Maurice Keen, *The Laws of War in the Late Middle Ages* (London: Routledge, 1965), 15.

[111] *Ibid.*

[112] David Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', *Quinnipiac Law Review* 17 (1998), 99–138 (131); David Kennedy, 'War and International Law: Distinguishing the Military and Humanitarian Professions', *International Law Studies* 82 (2007), 3–33 (9).

[113] David Whetham, *Just Wars and Moral Victories* (Leiden: Brill, 2009), 74–5.

[114] Hayes, *What's Divine about Divine Law?* 2015 (n. 109), 62–86; Korsgaard, 'Prologue' 1996 (n. 52), 2–3.

[115] Hilly Moodrick-Even-Khen, 'Obligations at the Border Line: On the Obligations of an Occupying State towards the Occupied State', *Mishpat v'Mimshal* 8 (2005), 471–519 (508) (in Hebrew).

These two obligation concepts have various definitions. A 'perfect obligation' refers herein to a rather precise, non-discretionary normative duty that specifies its beneficiaries (a 'right' correlates to the duty).[116] An 'imperfect obligation' refers herein to a discretionary-aspirational normative duty, demanding its bearers be guided by a certain motivation, while according them extensive discretion: (a) regarding the (kind and amount of) resources they should invest into fulfilling the duty; and (b) towards whom to direct their efforts to fulfil that duty (no one has a correlating 'right').[117] This definition differs from imperfect obligations' popular definition as 'moral dut[ies] which cannot be enforced by law'.[118] Indeed, some prominent nature-of-things jurisprudential views (such as those that greatly influenced IHL) *do* hold that blatant grave violations of imperfect obligations could give rise to legal sanctions, despite these obligations' open-endedness.[119] The aforesaid popular definition of imperfect obligations, like the prevailing rejection of unwritten (customary and natural law) crimes, reflects the prevailing understanding of the principle of legality, which gained prominence from the nineteenth century onward under the influence of both positivism and rights jurisprudence.[120] However, IHL and international criminal law (ICL), along with some domestic (common law) systems, still rely considerably on a different understanding of that principle (which reflects nature-of-things jurisprudence).[121] That understanding perceives normative prohibitions as having a non-legal (social-moral) penumbra and a legal (even criminal) core; despite the acknowledged murky border between the core and penumbra, 'fair-warning' is assumed regarding perpetrators of blatant grave violations, based on the premise that a normative message to avoid that behaviour is already conveyed by the penumbra and that it amplifies as the breaching behaviour nears the prohibition's core.[122]

The aforesaid elements of the nature-of-things jurisprudence aid in addressing the limitations of law. Consider, for example, *in bello* proportionality law;

[116] Graves, 'Lecture I' 1843 (n. 30), 95–6.
[117] *Ibid*.; Moodrick-Even-Khen, 'Obligations at the Border Line' 2005 (n. 115), 508.
[118] John Goldsworth, *Lexicon of Trust* (Saffron Walden: Mulberry House Press, 2016), 171.
[119] E.g., *Britain v. Spain*, *Reports of International Arbitral Awards* 2 (1924), 645; Emer de-Vattel, *The Law of Nations* (London: Robinson, 1797), 369–70. See also Aaron X. Fellmeth, *Paradigms of International Human Rights Law* (Oxford University Press, 2016), 81.
[120] M. Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', *Virginia Journal of International Law* 42 (2001), 81–162 (99); Anne Peters, *Beyond Human Rights* (Cambridge University Press, 2016), 79–84.
[121] See Peters, *Beyond Human Rights* 2016 (n. 120), 82–92.
[122] See Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 1999), 75–80.

that IHL instructs commanders not to cause incidental civilian harm that is excessive in relation to the concrete and direct military advantage anticipated from their attack.[123] This norm is undeniably vague and encourages 'judicial deference to the military commander's situational judgement'.[124] Furthermore, it is widely acknowledged that that norm cannot become clearer, due to the 'fog of war' and because the required comparison is 'between unlike quantities and values'.[125] Yet, despite this chronic vagueness, criminal responsibility still exists 'in cases where the excessiveness of the incidental damage was obvious',[126] because in such cases a wide consensus is deemed to exist regarding the commission of a violation.[127] It exists only in such cases due to 'fair-warning' concerns.[128] But, as Mark Osiel observes, the norm's influence extends beyond the extreme penal cases, attempting to instruct soldiers to embrace the 'belief that "internal morality" of professional soldiering constrains their use of force in ways far more demanding than [the enforceable] international law'.[129] This further constraining demand of martial virtue and honour is conceptualised as, considerably, 'deriv[ing] ... from the fact that the weighty responsibilities demanded of [commanders] ... cannot find full reflection within the law governing [them]';[130] similar normative settings exist 'wherever we expect ... professionals ... to behave in morally exigent ways that we cannot quite bring the law to require of them.'[131] Furthermore, the extrajudicial 'forms and sources of inhibition on the measure of force employed in war have become integral to any acceptance of the proportionality rule'.[132] In short, *in bello* proportionality law is an imperfect obligation in the nature-of-things jurisprudence sense of that term.[133]

As evident in *ius in bello* proportionality's prominence, IHL has been strongly influenced by nature-of-things jurisprudence. That influence is further evident in the fact that 'humanity', 'necessity' and 'chivalry' – all

[123] ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the FRY*, PR/P.I.S./510-E, 13 June 2000, para. 48.
[124] Mark Osiel, 'Rights to Do Grave Wrongs', *Journal of Legal Analysis* 5 (2013), 107–219 (187).
[125] ICTY, *Final Report* (n. 123), para. 48.
[126] *Ibid.*, para. 21.
[127] *Ibid.*, paras. 48–51.
[128] Osiel, 'Rights to Do Grave Wrongs' 2013 (n. 124), 187.
[129] *Ibid.*, 191.
[130] *Ibid.*, 195.
[131] *Ibid.*
[132] *Ibid.*, 196.
[133] Above n. 117 and accompanying text.

https://doi.org/10.1017/9781108674416.003 Published online by Cambridge University Press

imperfect obligations – have long been core IHL principles.[134] Humanity, as an imperfect obligation, constitutes a universal duty to act mercifully.[135] Necessity is an imperfect obligation of moderation, imposed on anyone committing legally authorised acts of violence.[136] The Martens Clause explicitly mentions both humanity and necessity. Chivalry (military honour) has long been regarded as an imperfect obligation imposed on professional warriors as part of their 'very essence … [as guardians of the] fabric of international society',[137] holding that the 'soldier, be he friend or foe, is charged with the protection of the weak and unarmed … [based on] the noblest of human traits – sacrifice'.[138] Chivalry conceptualises adherence to IHL as 'a personal rather than a state [obligation]'.[139] Accordingly, the Martens Clause is addressed not to the collective State entity, but rather to military commanders; thus, it is said that in the Martens Clause, '"Chivalry" find[s] … [its modern] source'.[140]

The Martens Clause echoes the nature-of-things jurisprudence in additional ways. The non-positivist premise that wide discretion does not necessarily amount to the non-existence of obligatory norms is expressed in the assertion that cases unregulated by treaty are not 'left to the arbitrary judgement of the military commanders … [but] remain under the protection and empire of the principles of international law'.[141] The interrelated perception of law, policy and morality is expressed in the definition of 'the principles of international law … [as] result[ing] from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience'.[142]

Given this history, the Martens Clause should, arguably, be viewed as a legally binding imperfect obligation to guide military commanders (and those reviewing commanders' decisions). At minimum (considering its

[134] Mark Antaki, *A Pre-History of Crimes against Humanity* (draft manuscript on file with author), 215–17.

[135] *Ibid.*

[136] Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press, 2004), 32–8; Yishai Beer, 'Humanity Considerations Cannot Reduce War's Hazards Alone: Revitalizing the Concept of Military Necessity', *European Journal of International Law* 26 (2015), 801–28 (807–11).

[137] General Douglas MacArthur, 'Order Confirming the Death Sentence of General Tomoyuki Yamashita' (6 February 1946).

[138] *Ibid.*

[139] US Army, *International Law, vol. II: Laws of War* (PM-27-161-2, 1962), 15.

[140] Leslie C. Green, 'Enforcement of the Law in International and Non-International Conflicts: the Way Ahead', *Denver Journal of International Law and Policy* 24 (1995/6), 285–320 (300).

[141] Hague Convention 1899 (n. 103), preamble.

[142] *Ibid.*

explicit reference to Articles 1 and 2 of the Hague Regulations), the clause should be viewed as such when commanders need to address 'twilight' states between 'combatants' and 'non-combatants', or between 'occupation' and 'non-occupation'.[143]

Accordingly, for example, before the present classification frenzy, many held (and some still do) that:[144]

> [T]he rules which apply to occupied territory should also be observed as far as possible in areas through which troops are passing and even on the battlefield. All this is evidence of a more general tendency to think of the laws of war as a set of minimum rules to be observed in the widest possible range of situations, and not to worry excessively about the precise legal definition[s] ...

C. *The Demise of Battles*

It is widely held that existing (aka 'traditional' or 'modern') IHL was designed primarily based on a conceptualisation of war as 'symmetric conflicts taking place between [equal] state armies',[145] on 'compartmentalize[d] ... battlefield[s]'.[146] Therefore, many deem existing IHL to be unsuitable for transnational conflicts, as these wars do not fit that conceptualisation of war.[147]

But we have seen that for the past two centuries, similar forms of warfare – namely, irregular, civilian, indiscriminate, non-State and terrorist warfare – have been likewise described (in Carl von Clausewitz's words) as a 'new phenomenon [marking] ... a general decadence of ... the evenly-balanced ... war game [of inter-sovereign battle-warfare]'.[148] How can it be that over the course of this long period similar forms of warfare have each been perceived, at one time or another, as a novel phenomenon that recently abolished battle warfare?

Originally, a 'battle' was a legal concept, referring to a specific form of fighting to which unique laws applied.[149] In late medieval times, *ius ad bellum* defined two categories of enemies: (a) illegitimate, including rebels and non-

[143] Trainin, 'Questions of Guerrilla Warfare' 1946 (n. 49), 541–51.
[144] Adam Roberts, 'What Is a Military Occupation?', *British Yearbook of International Law* 55 (1985), 249–305 (256). See also *infra*, n. 327.
[145] Robin Geiss, 'Asymmetric Conflict Structures', *International Review of the Red Cross* 88 (2006), 757–77 (760).
[146] Benvenisti, 'Rethinking the Divide' 2009 (n. 19), 543.
[147] *Ibid.*
[148] Clausewitz, *On War* 1816–30 (n. 84), 206.
[149] Whetham, *Just Wars* 2009 (n. 113), 103–14.

https://doi.org/10.1017/9781108674416.003 Published online by Cambridge University Press

believers ('savages', 'infidels' and 'heretics'), against whom total war, without *ius in bello* restrictions, was prescribed; and (b) legitimate, against whom limited war must be fought, in which *ius in bello* applied.[150] Even in limited wars, non-combatant protections were slight: it was legal to execute most captured enemy combatants (only knights were eligible for POW status) and to harm most civilians (*ius in bello* prohibited harming only women, children, the elderly and select professionals).[151] Even limited wars were, usually, wars of attrition, conducted mainly through raids on the enemy's civilian population. Battles were a notable exception, conducted between opposing forces on a designated field, based on uniquely restrictive *ius in bello*.[152] Additionally, unlike victories attained otherwise, a battle victory was considered a binding legal ruling regarding the justness of the victor's cause; belligerents often avoided battles because of this decisive legal implication.[153]

In the sixteenth and seventeenth centuries, instances of total warfare increased because European conflicts were mainly rebellions and religious wars, and because knight-led forces were increasingly replaced by mercenaries.[154] But the ensuing trauma led to public pressure to humanise warfare, and mercenaries' indiscipline led to their replacement with professional, standing armies, whose officers, commonly, respected *ius in bello* because they saw themselves as the heirs of the knightly tradition.[155] Thus, 'chivalry' and 'humanity' inspired considerable legal reforms, including: (a) *all* regular soldiers, not only knights, wore uniforms and became eligible for POW status;[156] (b) contributions and requisitions, in return for protection, increasingly replaced raids against civilians;[157] (c) intentionally harming *any* non-combatant became illegal;[158] (d) 'use of [newer] more deadly weapon[s] . . . was [often perceived as] hostile to the law of war';[159] and (e) avoiding battles

[150] Frederick Russell, *Just War in the Middle Ages* (Cambridge University Press, 1979), 7–19.
[151] Keen, *Laws of War* 1965 (n. 110), 193; Geoffrey Parker, *Empire, War and Faith in Early Modern Europe* (London: Penguin, 2002), 146–60.
[152] James Whitman, *The Verdict of Battle* (Cambridge, MA: Harvard University Press, 2012), 35–55.
[153] *Ibid.*
[154] Gill, 'Chivalry' 2013 (n. 92), 36.
[155] *Ibid.*; Whitman, *The Verdict of Battle* 2012 (n. 152), 55–8.
[156] Toni Pfanner, 'Military Uniforms and the Law of War', *International Review of the Red Cross* 84 (2004), 93–124 (98).
[157] Whitman, *The Verdict of Battle* 2012 (n. 152), 55–8.
[158] *Ibid.*; W. E. Hall, *A Treatise on International Law* (Oxford University Press, 1904), 397.
[159] Francis Lieber, 'The Usages of War', *New York Times*, 19 January 1862, available at: www.nytimes.com/1862/01/19/news/usages-war-continuation-lectures-dr-lieber-columbia-college-admissibility.html.

became less acceptable.[160] This ushered in the era of limited or battle warfare. The decisive clash of opposing armies on a designated battlefield made it relatively easy to distinguish civilians from combatants and to identify IHL's spatial and temporal application boundaries. Because battles were perceived as collective jousts, and due to chivalry's strong influence, contemporary IHL was premised on a 'simple', tit-for-tat, fair-play conceptualisation of reciprocity.[161]

But that era should not be overly romanticised. Even at its eighteenth-century height, battles were still uncommon, merely more common than before.[162] Furthermore, the simplistic conceptualisation of reciprocity legitimised harsh reprisal measures in response to IHL violations; especially so against civilians, because civilian participation in the fighting was regarded as a severe violation of the laws of the war 'game'.[163]

The demise of battle warfare began in the late eighteenth century with the beginning of the surge in civilian participation in warfare.[164] Weapons innovations and progress-oriented cultural changes eliminated the aversion to using new weapons and contributed to battle warfare's 'demise'.[165] But that 'demise' was protracted and non-linear. Commitment to battle warfare precepts weakened at the turn of the nineteenth century. Yet it recuperated by the mid-nineteenth century, creating *unmet* expectations that the American Civil War (1851–6) and the Franco-German War (1870–1) would be conducted accordingly. Widespread civilian participation, new weapons and harsh reprisal measures caused extensive suffering in these wars, leading many to realise that battle warfare was waning.[166]

Both early and late nineteenth century sources depict battle-warfare's 'demise' as recent. The non-linear, protracted nature of that 'demise' explains that incoherence regarding the time of that 'demise'. But, it fails to explain the continued depiction of battle-warfare's 'demise' as a recent phenomenon throughout the last century, because the battle-warfare era fully ended by

[160] Whitman, *The Verdict of Battle* 2012 (n. 152), 55–9.
[161] E.g., Evan Wallach, 'Pray Fire First Gentlemen of France: Has 21st Century Chivalry Been Subsumed by Humanitarian Law?', *Harvard National Security Journal* 3 (2012), 431–69 (431).
[162] Whitman, *The Verdict of Battle* 2012 (n. 152), 59.
[163] E.g., Antoine Henri de Jomini, *Histoire Critique et Militaire des Guerres de la Révolution* (Brussels: Librarie Militaire Petit, 1840), vol. II, 367.
[164] Whitman, *The Verdict of Battle* 2012 (n. 152), 207–44.
[165] *Ibid.*
[166] *Ibid.*; Armand du Payrat, *Prisonnier de Guerre dans la Guerre Continentale* (Paris: Librairie Nouvelle de Droit et de Jurisprudence, 1910), 25–7; Allen Frantzen, *Bloody Good* (University of Chicago Press, 2004), 1–3.

WWI ('battle' ceased being a legal concept and compartmentalised battlefields became much rarer).[167]

Note further that the conditions of the American Civil War and of the Franco-German War played a pivotal role in bringing about both the realisation that battle warfare was waning and an effective determination to codify and reform IHL.[168] In the course of that late nineteenth- and early twentieth-century reform, legal constraints were increasingly placed on recourse to reprisals, which strongly contributed to IHL's gradual shift from the tit-for-tat (battle warfare era) reciprocity notion towards the current more abstract, long-term reciprocity notion that aspires to facilitate postwar peaceful relations.[169] Given the nature of these (and later) legal reforms, the premise that existing IHL was chiefly designed for battle-warfare, and so for 'simple' reciprocity conditions, is clearly wrong.

How could the depiction of a recent 'demise' of battle warfare continue throughout the last century? Why is current IHL misperceived as having been designed for battle warfare? The best place to start explaining these anomalies is modern IHL's proclaimed beginning. '[A]s every student of the subject knows, modern IHL began when the Swiss businessman Henri Dunant visited the battlefield of Solferino … [which led him to] found the Red Cross.'[170] As the story goes:[171]

> Dunant – a tourist as he described himself later – had walked across the [battle]field … Shocked by the suffering of the wounded soldiers who lay abandoned on the field, he tried to organize nearby villagers … to bring them relief. Shortly after, in 1862, Dunant gave the world his plan for protecting wounded and sick soldiers. Dunant's … belief in the ability of the law to limit and control violence … was in marked contrast to the attitude of the period … The world has since caught up with him …

Notice something odd with that historical account? It claims that the mid-nineteenth-century attitude, unlike that of today, did not believe in the legal regulation of warfare. But, if that is true, how come a similar, current battlefield visit feels much *more* (not less) dangerous than during Dunant's visit?

Dunant felt safer than we would, because Solferino was 'a classic single-day battle … [which] resolved its war, producing a momentous historic verdict:

[167] *Ibid*.; US Army, *International Law* 1962 (n. 139), 11–19.
[168] *Ibid*.
[169] Patryk Labuda, 'The Lieber Code, Retaliation and the Origins of International Criminal Law', in Morten Bergsmo, Cheah Wui Ling, Song Tianying *et al*. (eds.), *Historical Origins of International Criminal Law* (Brussels: Torkel-Opsahl, 2015), vol. III, 299–341 (302, 322).
[170] Luban, 'Human Rights Thinking' 2016 (n. 4), 50 (acknowledging that this is a myth).
[171] Daniel Thürer, *International Humanitarian Law* (The Hague: Martinus Nijhoff, 2011), 44–6.

the unification of Italy'.[172] Dunant's self-depiction as a tourist was not a metaphor. The decisiveness (and compartmentalised nature) of battles led to 'a characteristic mid-nineteenth-century phenomenon':[173]

> [B]attle tourists … appeared at every mid-nineteenth-century conflict … They often arrived in fine dress, in coaches, with servants and picnic baskets … Dunant … started out as just such a battle tourist. He came to Solferino … to witness history in the making.

These facts do not diminish Dunant's contribution. They do, however, reveal flaws in the humanitarian narrative that modern IHL was 'born' at Solferino. That narrative demonstrates a common tendency to examine the past not on its own merits, but, rather, in comparison with the present, which inevitably leads to exaggerated assumptions of similarity or difference between the past and the present.[174] The aforesaid narrative presumes exaggerated similarly between past and present by failing to realise that in the past the term 'battle' meant a legal (and not merely colloquial) concept that considerably constrained combat behaviour. The same is true for current sources that depict the demise of battle warfare as recent; the difference is that the aforesaid humanitarian narrative unreflectively attributes the disorderly qualities of recent battles to the compartmentalised ones of yore, while the forward-dating of battle warfare's 'demise' does the opposite. The aforesaid humanitarian narrative also presumes an exaggerated level of dissimilarly between past and present by assuming that in Dunant's time (unlike today) the prevailing attitude was dismissive of IHL. Dunant's actual experience reveals considerable adherence to IHL at Solferino. Contrary to that humanitarian narrative, a wide range of approaches influenced IHL's normative universe, then and now.

During the last two centuries, IHL has been shaped by three main types of approaches besides humanitarian ones: (a) 'warrior' approaches, usually held by military professionals; (b) Statist-positivist approaches that either deny IHL's effective existence or regard States as IHL's sole lawmakers; and (c) pacifist approaches, sceptical of IHL's combat influence. Each is responsible for a piece of the puzzle concerning the perpetual forward-dating of the 'demise' of battle warfare.[175]

[172] Whitman, *The Verdict of Battle* 2012 (n. 152), 4.

[173] *Ibid.*, 210.

[174] Randall Lesaffer, 'International Law and Its History: the Story of an Unrequited Love', in Matthew C. R. Craven (ed.), *Time, History and International Law* (The Hague: Martinus Nijhoff, 2007), 27–42 (34–8).

[175] Kennedy, 'Distinguishing the Military and Humanitarian Professions' 2007 (n. 112), 4–33.

(a) Many of the nineteenth-century military professionals who influenced IHL sought to adapt 'chivalry' to the changing warfare conditions. For them, symmetric battlefield clashes became desired ideals.[176] Nevertheless, warrior approaches tended to also acknowledge strong reasons against adopting 'the view that war is a sort of athletic contest, in which none but the authorized teams must play', because 'most wars are now contests of peoples rather than princes'.[177] Therefore, the influence of their aspirational battle-related ethos alone cannot explain the aforesaid persistent forward-dating.

(b) Statist-positivist approaches (fully crystalised in the late nineteenth century) hold that 'there was only one [form of] sovereignty … the territorial State',[178] and posit sharp 'distinctions between public and private, law and politics, international and municipal, sovereigns and individuals'.[179] Based on such approaches:[180]

> [An] attempt … [was] made to introduce another principle [to IHL] … confining wars to governments themselves. Under this principle the state would become in effect a corporation with limited liability … and war would become an athletic contest between two schools whose members … must not participate except as members of the duly authorized teams.

(c) For opposite reasons, pacifist approaches also embraced the premise that '[t]he battlefield, the territory of belligerency, was legally demarcated':[181]

> The[ir] point was to shrink the domain of war through moral suasion, agitation, shaming, and proselytizing … This conviction lent an ethical urgency to the emergence of a sharp legal distinction between war and peace … [c]ombatants and non-combatants …

Warfare did not reassume a compartmentalised battle form, and 'warriors' and 'humanitarians' have expressed much less faith than Statist-positivists and pacifists in sharp legal distinctions.[182] Nevertheless, this misleading narrative has caught on, and is likely the primary cause of the perpetual forward-dating of battle warfare's 'demise' and for the misconception of existing IHL as having been designed for battle warfare.

[176] Bordwell, *Law of War between Belligerents* 1908 (n. 98), 2–6.
[177] *Ibid.*, 3–4.
[178] Kennedy, 'History of an Illusion' 1998 (n. 112), 119.
[179] *Ibid.*, 131.
[180] Bordwell, *Law of War between Belligerents* 1908 (n. 98), 2.
[181] Kennedy, 'Distinguishing the Military and Humanitarian Professions' 2007 (n. 112), 9.
[182] *Ibid.*

The irony is that after their ideological forerunners created unrealistic expectations for sharp war-related legal distinctions, present-day peace-ordinated IHL sceptics (hardline IHRL advocates) and hardline Statists present IHL's failure to fulfil these unrealistic expectations as proof of its inability to regulate contemporary conflicts. Statists do so as part of their attempt to release States from existing IHL constraints. IHRL advocates do so to expend IHRL wartime application; after all, the 'once-sharp' distinction between peace (IHRL's original domain) and war has muddled.

D. *Unprecedented Wars*

When were the following statements made?

1. Because of technological developments, a 'war amongst the great powers is now necessarily a world war'.[183]
2. Technology changed warfare: 'Instead of a small number of well-trained professionals championing their country's cause with ancient weapons ... we now have entire populations, including even women and children, pitted against one another in brutish mutual extermination."[184]
3. 'The war which we fight is an unprecedented war of global character ... because of the [current] age of modern technology and of world-wide interdependence."[185]

The first source is from 1848, referring to naval innovations. Its use of the term 'world war' seems odd to us. Current reference to the war of 1914–18 as the First World War often makes us forget earlier multi-continent, multi-partisan wars (such as the Napoleonic Wars 1803–15). The second source is Winston Churchill's 1930 autobiography, deeming the demise of battle warfare 'the fault of Democracy and Science'.[186] The third source is an article from the Second World War. These sources, similarly to current ones, depict new technologies as revolutionising warfare by obliterating either the principle of distinction or wars' spatial confinements.

We tend to assume that our era is exceptional in its technological achievements. But empirical data indicates that the innovation rate peaked sometime

[183] Hepworth Dixon, 'The American Republics: Part 1', *People's Journal* 4 (1848), 248–52 (250).
[184] Churchill, *A Roving Commission* 1930 (n. 93), 64–5.
[185] Hans Kohn, 'War Aims and Peace Patterns', *Saturday Review* (4 July 1942), 9–10 (9).
[186] Churchill, *A Roving Commission* 1930 (n. 93), 64–5.

between 1873 and 1914, and has been decreasing since.[187] Nearly all significant weapons today debuted by the First World War: automatic rifles, machine guns, tanks, submarines, biological weapons, chemical weapons, rockets and (manned and unmanned) aircraft; the most notable exception, atomic weapons, debuted in the Second World War.[188] This is not to say that weapons ceased to develop, only that advances are occurring at a slower pace. This is also not to say that recent technological developments did not cause changes in warfare, only that we tend to exaggerate the significance of current changes *relative* to those of the past. This is an expression of a well-known phenomenon, 'temporocentrism', the 'largely unconscious . . . tendency . . . to place . . . an exaggerated emphasis upon our own period'.[189]

Temporocentrism goes beyond our attitude to contemporary innovations: 'We assume always . . . that the crisis of our age is somehow more critical than the crises of other ages.'[190] This may explain our perception of contemporary wars, because the overall picture is actually 'far more positive than many suppose . . . [S]tatistics suggests that there has been a sharp decline over recent decades in the number of deaths directly resulting from wars'.[191] The main reason behind the decline in casualties is the reduction in the incidence of inter-State conflicts, which (counter-intuitively) have tended to cause *more* casualties than NIAC.[192] Since the 1990s, NIACs have also been (non-linearly) declining.[193] Specifically regarding the fight between the United States and

[187] Jonathan Huebner, 'A Possible Declining Trend for Worldwide Innovation', *Technological Forecasting & Social Change* 72 (2005), 980–6; Robert Gordon, *The Rise and Fall of American Growth* (Princeton University Press, 2017), 1–23.

[188] Michael Marshall, 'Timeline: Weapons Technology', 7 July 2009, available at: www.newscientist.com/article/dn17423-timeline-weapons-technology; 'A Timeline of Weaponry!', 24 August 2014, available at: www.historyandheadlines.com/cracked-history-timeline-weaponry; Oren Gross, 'The New Way of War: Is There a Duty to Use Drones?', *Florida Law Review* 67 (2016), 1–72 (17).

[189] Harlan Cleveland, 'The Future of the Past', *Minnesota History* 47 (1981), 200.

[190] *Ibid.*

[191] Bruce Pilbeam, 'Reflecting on War and Peace', in Peter Hough, Shahin Malik, Andrew Moran *et al.* (eds.), *International Security Studies: Theory and Practice* (London: Routledge, 2015), 87–118 (95); Therese Pettersson and Kristine Eck, 'Organized Violence, 1989–2017', *Journal of Peace Research* 55 (2018), 535–47 (535).

[192] Pilbeam, 'Reflecting on War and Peace' 2015 (n. 191), 96; Bethany Lacina and Nils Petter Gleditsch, 'Monitoring Trends in Global Combat: a New Dataset of Battle Deaths', *European Journal of Population* 21 (2005), 145–66 (155–8).

[193] Pilbeam, 'Reflecting on War and Peace' 2015 (n. 191), 97; Kendra Dupuy Scott Gates, Håvard Mokleiv Nygård *et al.*, 'Trends in Armed Conflict, 1946–2016', Peace Research Institute Oslo, 2 (2017); Thomas S. Szayna, Stephen Watts, Angela O'Mahony *et al.*, 'What Are the Trends in Armed Conflicts, and What Do They Mean for U.S. Defense Policy?' (RAND Corporation, 2017), available at: www.rand.org/content/dam/rand/pubs/research_reports/RR1900/RR1904/RAND_RR1904.pdf.

contemporary transnational terrorist groups: in 2016, US President Obama noted that US citizens are more likely to die from a fall in a bathtub than from a terrorist attack, suggesting that the perceived threat from such terrorism is inflated.[194]

Admittedly, NIAC's *percentage* among wars has increased. A popular account speaks of a ratio of two internal wars for every inter-State war prior to the Second World War, compared with a 4.7:1 ratio between 1945 and the 2000s.[195] Yet, the ratio change notwithstanding, inter-State wars remain a significant phenomenon (not to mention that another account speaks of a less drastic change, from a 3.2:1 ratio in 1816–1945, to a 4.4:1 ratio in 1945–2000s).[196] Likewise, even before 1945, internal wars were more common than inter-State wars; thus, clearly, a significant phenomenon. Statistical data indicates that during the last two centuries, even non-inter-State wars other than internal wars (e.g., colonialist wars and those against Al-Qaeda and ISIS), in and of themselves, have been 'much more common than inter-state wars, with 163 . . . [such] wars, compared with 95 inter-state wars'.[197]

Undeniably, each war has unique attributes, and current wars are not the same as they were several decades ago (change is, arguably, the only constant in history). But the characterisation of current transnational conflicts as wars of a new *kind* further assumes that they are *qualitatively* different than past wars.[198] Many scholars challenge this assumption, because:[199]

> [It] is based on an uncritical adoption of categories and labels grounded in a double mischaracterization. On the one hand, information about recent or ongoing wars is typically incomplete and biased; on the other hand, historical research on earlier wars tends to be disregarded.

This criticism has forced Mary Kaldor, the leading scholarly proponent of the new wars thesis, to qualify her position. Although still arguing that contemporary wars have new attributes, she adds:[200]

[194] Nicholas Kristof, 'Overreacting to Terrorism?', *New York Times*, 24 March 2016, available at: www.nytimes.com/2016/03/24/opinion/terrorists-bathtubs-and-snakes.html.

[195] E.g., Visser, 'Conflicts, New Wars and Human Rights' 2017 (n. 16).

[196] Jack Levy and William Thompson, *The Arc of War* (University of Chicago Press, 2011), 193–4, 206.

[197] Meredith Reid Sarkees and Frank Wayman, *Resort to War: 1816–2007* (Washington, DC: CQ Press, 2010), 333–5.

[198] Pilbeam, 'Reflecting on War and Peace' 2015 (n. 191), 95.

[199] Stathis Kalyvas, '"New" and "Old" Civil Wars: a Valid Distinction?', *World Politics* 54 (2001), 99–118 (99).

[200] Mary Kaldor, 'In Defence of New Wars', *Stability* 2(1) (2013), 1–16 (3).

> The most common criticism of the 'new wars' argument is that new wars are not new … Of course this is true. Many of the features of new wars can be found in earlier wars … But there is an important reason, which is neglected by the preoccupation with empirical claims, for insisting on the adjective 'new' … The term 'new' is a way to exclude 'old' assumptions about the nature of war …

Even Al-Qaeda's and ISIS's attributes (the sources of the current archetypal transnational conflicts), though far from identical to those of their predecessors, are not as exceptional as commonly assumed. After 9/11, Paul Berman noted that this terror assault followed the warfare pattern exhibited by anti-liberal movements worldwide since the First World War.[201] These 'movements were never fully synonymous with national States'.[202] The Second World War, for example, 'was complicated by Nazism's ability to call on sympathizers and co-thinkers all over Europe'.[203] 'Communism was likewise an international affair.'[204] Berman concluded that since it is waged through terror attacks by an anti-liberal movement with transnational attributes, Al-Qaeda's war is 'a war of an old kind'.[205]

Berman's description of Nazism may sound odd to us, but this is because of the tendency to retrospectively marginalise past wars' non-State-like attributes. During the Second World War, this description was commonly held. After all, the Nazis: (a) maintained a party apparatus parallel to that of the German State; (b) aimed for global domination; (c) considered Nazism, at least to some degree, the German manifestation of a universal ideology (non-liberal nationalism); and (d) maintained ties with adherents of that ideology elsewhere. Justice Pal, of the Tokyo Tribunal, accordingly, doubted whether the Nazis could be called a State rather than a 'Shapeless force without recognised political character.'[206]

Pal's depiction reveals an inaccuracy in Berman's choice of the First World War as the starting point for the warfare pattern he describes. Pal quoted from the 1818 treaty concerning Napoleon's detention.[207] The treaty parties (the European Powers) considered Napoleon as waging war not as the ruler of

[201] Paul Berman, 'Terror and Liberalism', *The American Prospect* 12(8), 19 December 2001, available at: http://prospect.org/article/terror-and-liberalism.
[202] *Ibid.*
[203] *Ibid.*
[204] *Ibid.*
[205] *Ibid.*
[206] IMTFE, *Dissentient Judgment of Justice Pal* (Tokyo: Kokusho-Kankokai, 1999), 698 (*c.* 1948).
[207] Protocole Séparé Relatif à Bonaparte (21 November 1818).

France and as aiming for global domination; accordingly, the treaty deemed him 'the leader of a Shapeless force without recognized political character'.[208]

Napoleon was not the era's only feared transnational global enemy. At the same 1818 international congress, the European Powers also formed the European Concert (the UN's 'grandfather'), influenced by a belief 'that the French Revolution, and all subsequent [remotely resembling] political developments … were part of [a single] international … revolutionary threat',[209] because the *Comité Directeur*, a 'central but secret body[,] was coordinating rebellions throughout Europe'.[210] The *Comité Directeur* did not exist; but, throughout the nineteenth century, European Concert members 'truly feared it'.[211] The element of truth in this fear lay in the fact that since the late eighteenth century, both liberal and anti-liberal revolutionary movements often included elements that wished to globalise.[212] Berman's account, therefore, inaccurately depicts a clear-cut contrast between liberal and anti-liberal movements.

Berman's description of Communism has merits. Communism had global ideological aims, Communist States supported Communist revolutions worldwide, and Communist rebels employed irregular warfare. Westerners, thus, perceived Cold War era actual wars as 'a new kind of war',[213] in which 'victory [was] not measurable in territorial terms or human material loss'[214] and '[b]attlefronts seldom existed',[215] because the enemy 'preferred terrorist tactics',[216] 'rarely wore uniforms',[217] and consisted of globally connected forces, 'difficult to define',[218] a global 'network of … terrorists'.[219] This history brings into

[208] *Ibid.*

[209] Andrew Benedict-Nelson, 'Political Revolutionaries, International Conspiracies, and the Fearful, Frenzied Elites', *The Los Angeles Review of Books*, 10 February 2015, available at: https://lareviewofbooks.org/article/political-revolutionaries-international-conspiracies-fearful-frenzied-elites.

[210] *Ibid.*

[211] *Ibid.* See also, Adam Zamoyski, *Phantom Terror* (New York: Basic Books, 2015).

[212] Mary J. Maynes and Ann Waltner, 'Modern Political Revolutions: Connecting Grassroots Political Dissent and Global Historical Transformations', in Antoinette Burton and Tony Ballantyne (eds.), *World Histories from Below: Disruption and Dissent, 1750 to the Present* (London: Bloomsbury, 2016), 11–46.

[213] Howard Jones, 'The Truman Doctrine in Greece: America's Global Strategy and the "New Kind of War"', *Journal of Modern Hellenism* 5 (1988), 9–21 (9).

[214] *Ibid.*

[215] *Ibid.*

[216] *Ibid.*

[217] *Ibid.*

[218] *Ibid.*

[219] US President Ronald Reagan, 'Address to the Nation on Events in Lebanon and Grenada', 28 October 1983, New York Times, www.nytimes.com/1983/10/28/us/transcript-of-address-by-president-on-lebanon-and-grenada.html.

perspective claims, such as those of US presidents Bush (2006) and Obama (2016), concerning: 'an unprecedented war',[220] whereby 'terrorists … defend no territory … wear no uniform';[221] a 'new reality'[222] of 'terrorist networks'.[223]

If you still think temporocentrism is overrated, consider the following pronouncements:

1. A 'new kind of war' (1795, a French Convention Member, The French Revolution);[224]
2. The 'case was exceptional' (1818, treaty concerning Napoleon's detention);[225]
3. A 'somewhat novel kind of warfare' (1863, US Minister to the UK Adams, privateer attacks during the American Civil War);[226]
4. 'All the wars I can remember were "unprecedented"' (1916, Russian General Skugarevski, regarding the 1853–6 Crimean War, 1866 Austro-Prussian War, 1870–1 Franco-German War and the First World War);[227]
5. '[T]he most novel kind of warfare that history can record' (1900, British Colonel Brookfield, Second Boer War);[228]
6. An 'unprecedented war' (1916, President Wilson, the First World War);[229]
7. A 'moment unprecedented' (1941, President Roosevelt, the Second World War);[230]
8. A 'new kind of war' (1949, influential reporter, Anne O'Hare-McCormick, Greek Civil War);[231]

[220] US President George W. Bush, 'Speech on Terrorism', *New York Times*, 6 September 2006, available at: www.nytimes.com/2006/09/06/washington/06bush_transcript.html.
[221] *Ibid.*
[222] US President Barack Obama, '2016 State of the Union Address', *New York Times*, 12 January 2016, available at: www.nytimes.com/2016/01/13/us/politics/obama-2016-sotu-transcript.html.
[223] *Ibid.*
[224] Comte de Boissy d'Anglas, *Trial of Messrs. Pitt* (London: Citizen Lee, 1795), 8–9.
[225] Protocole Séparé Relatif à Bonaparte 1818 (n. 207).
[226] Charles F. Adams, 'Letter to US Secretary of State (27 March 1863)', *Foreign Relations of the US: Diplomatic Papers* 1 (1863), 159.
[227] A.P. Skugarevski, 'The Future of War', *Journal of the Military Service Institution of the United States* 59 (1916), 473–8 (474).
[228] 78 *HC Deb.*, 202–3 (31 January 1900).
[229] US President Woodrow Wilson, 'Ultimatum to Germany's Foreign Minister', 18 April 1916, reproduced at: www.firstworldwar.com/source/uboat1916_usultimatum.htm.
[230] US President Franklin Delano Roosevelt, 'Four Freedoms Speech', 6 January 1941, reproduced at: www.presidency.ucsb.edu/ws/?pid=16092.
[231] As quoted in Jones, 'Truman Doctrine' 1988 (n. 213), 9.

9. 'The war in Vietnam is a new kind of war . . . not another Greece' (1965, US State Department);[232]
10. 'The world has changed' (1983, US President Reagan, the Beirut suicide attack and US intervention in Grenada).[233]

The similarity between these statements goes beyond contemporary temporocentrism. In all these sources, one or more of the following provoked the 'unprecedented war' cry: technological innovations; irregular fighting; transnational war aims; globalisation; atrocities; blurred peacetime–wartime divide.

II. NORMATIVE NOVELTY

Oddly, even some jurists who acknowledge that transnational conflicts are 'not historically new' still deem them to be 'new wars'.[234] Such jurists, just like those who believe that transnational conflicts are a new factual phenomenon, hold that normative novelty exists in IHL application to transnational wars, based on a premise that IHL was traditionally designed to regulate inter-State and, to a lesser degree, civil wars.[235]

That premise relies on a widely accepted historical account that traditional international law addressed only States. Only in response to twentieth-century horrors did international law gradually move away from its Statist model into areas that were traditionally left for States to regulate through domestic law. ICL, IHRL and NIAC law, each established in the mid-twentieth century, are the primary manifestations of this transition, as each penetrates the veil of State sovereignty and addresses entities other than States.[236] Many even believe that 'now for the first time in . . . half a millennium the State is on the way out'.[237]

Given the wide acceptance of this historical account, it is unsurprising that IHL application to transnational conflicts is widely deemed novel. More surprising is that each position with regard to the law that applies to

[232] US State Department, 'Aggression from the North', 27 February 1965, reproduced at: source books.fordham.edu/mod/USStateDept-vietnamfeb1965.asp.

[233] Reagan, 'Address to the Nation' 1983 (n. 219).

[234] Nicolas Lamp, 'Conceptions of War and Paradigms of Compliance: the "New War" Challenge to International Humanitarian Law', *Journal of Conflict and Security Law* 16 (2011), 225–62 (226).

[235] *Ibid*.; Sloane, 'Puzzles of Proportion' 2015 (n. 20), 334.

[236] Antonio Cassese *et al.*, *International Criminal Law* (Oxford University Press, 2011), 8; Dill, in this volume, 237.

[237] Frank Ankersmit, 'Political Representation and Political Experience', *Redescription* 11 (2007), 21–45 (36).

transnational conflicts is proclaimed by its proponents to derive from the accepted historical account.

First, some supporters of the position that a new, more constraining IHL applies to transnational conflicts, speculate regarding the larger normative implication of the (supposed) rise in these conflicts. Namely, they contemplate whether transnational conflicts signify not only that existing IHL ('devised for' 'wars between States') is 'becoming obsolete', but further that international law's traditional 'State-based model … is … losing its relevance'.[238]

Secondly, the torture memos also based their position on the accepted historical account, according to which NIAC law was created only in the mid-twentieth century, as traditional IHL was designed to regulate inter-State wars. Prior to the mid-twentieth century, internal wars were classified as either belligerencies or insurgencies. Belligerencies were conflicts in which the State-side made a discretionary decision to act as if it was fighting an inter-State war and apply IHL (granting its non-State rival 'belligerent status'). Insurgencies were all other internal conflicts, ungoverned by international law because States regarded them as falling under the sole jurisdiction of their domestic law. IHL began to shift away from its Statist phase with the development of the first customary NIAC laws, during the Spanish Civil War (1936–9) and with the adoption, a decade later, of Common Article 3 (the first NIAC multilateral treaty law). The torture memos relied on this accepted historical account and on Common Article 3's reference to NIAC 'occurring *in* the territory of *one* of the High Contracting Parties', to conclude that transnational wars 'could not have been within the contemplation of the drafters of [existing IHL]'.[239] The torture memos acknowledged that since the 1990s there have been efforts to move into a new phase, in which *all* conflicts would be extensively regulated by international law through attempts to expand the application of IHL to situations in which it did not originally apply, and of IHRL beyond peacetime into wartime situations. But the memos dismissed these efforts as illegitimate attempts to force upon States legal positions that disregard the phrasing and history of the relevant international law.[240]

Thirdly, as noted, in time, the United States moderated its position. It currently holds that NIAC law applies in transnational conflicts, because these conflicts are against non-State actors.[241] But the United States still holds

[238] Pfanner, 'Asymmetrical Warfare' 2005 (n. 26), 158.
[239] Yoo and Delahunty, 'Memo' 2002 (n. 14), 10.
[240] *Ibid.*, 9–11.
[241] Egan, 'International Law' 2016 (n. 18).

that existing NIAC law needs to be reinterpreted and even reformed, because it was not originally designed to address transnational conflicts.[242] Thus, disregarding the fact that it changed its legal position, the United States maintains that its *current* position derives from the accepted historical account.

Fourthly, unlike the United States, Israel classifies transnational conflicts as IAC, because they commonly cross borders. But Israeli motivation for legal reform is similar to that of the United States. The Israeli Supreme Court, in 2014, for example, called upon the international community to adopt a new, less restrictive IHL for transnational wars, holding that until such IHL is adopted, the existing relevant IHL (IAC law) must be interpreted less restrictively than before, because the traditional interpretations generally befit 'the old and known model of war between [State] armies'.[243]

Fifthly, in stark contrast to Israel and the United States, many jurists who argue that existing IHL, subject to adaptations, applies to transnational conflicts, find that the required adaptations must *increase* the restrictions on States, mainly by way of applying IHRL alongside IHL. Proponents' belief that this position derives from the accepted historical account is demonstrated by the minority opinion in the British *Serdar Mohammed* ruling.[244] The issue examined there was the international law applicable to the wartime detention of non-State fighters by British forces on Afghan soil. Unlike the United States, which considers the war in Afghanistan to be part of a larger transnational conflict, and unlike some jurists who consider it an IAC, the British courts classified it as a NIAC. Since IHL treaties do not address the authority to detain individuals in NIAC, the British judges looked for customary IHL for such authority, and were inclined to conclude that no such law exists.[245] The majority opinion, however, ruled that certain conflict-specific Security Council resolutions implicitly conferred detention authority to the British forces in the particular case.[246] The minority opinion disagreed and instead held that IHRL fills the gap in IHL; namely, they held that in NIAC no IHL constitutes a *lex specialis* that bars the IHRL pertaining to detention by State agents (that IHRL demands the *ex-ante* existence of a detention-sanctioning *domestic* law).[247] Their conclusion (shared by the majority) regarding the non-

[242] *Ibid.*

[243] E.g., HCJ, *HaMoked v. Minister of Defense*, Judgment of 31 December 2014, Decision of Justice Hayut, No. 8091/14, para. 2.

[244] UKSC, *Abd Ali Hameed Al-Waheed & Serdar Mohammed v. Ministry of Defence*, Judgment of 17 January 2017, UKSC 2014/0219.

[245] *Ibid.*, paras. 9–14, 158, 246.

[246] *Ibid.*, paras. 9–30, 68, 83, 94–8, 111–13, 134, 148, 158, 204–6, 224, 231, 235.

[247] *Ibid.*, paras. 233–75.

https://doi.org/10.1017/9781108674416.003 Published online by Cambridge University Press

existence of relevant customary IHL in NIAC was derived from the premise that '[t]raditionally, international humanitarian law, like other international law, was concerned almost entirely with the reciprocal relationships between states, and therefore with conflicts between states rather than internal conflicts'.[248]

In response to positions expanding IHRL wartime application, the US government asserted that: (a) in any war, IHL accords relevant States certain authorities (to kill, capture and detain enemy combatants), and that IHL constitutes a *lex specialis* that bars IHRL application; (b) IHRL is inapplicable to extraterritorial wartime State actions, because each State is bound by IHRL only regarding actions it commits within its 'jurisdiction', a term generally referring only to its sovereign territory.[249]

Recently, the United States has slightly relaxed its position on these two issues, illustrating the current diversity of legal positions.[250] Indeed, at this point in the debate, the floodgates open to many disagreements, including: (a) when does IHL constitute *lex specialis*?; (b) under what conditions and to what extent does IHRL apply in wartime irrespective of IHL?; (c) is a State under a duty to abide by IHRL only regarding actions it commits within its 'jurisdiction'?; (d) besides actions State agents commit within their State's sovereign territory, what actions are regarded as committed within a State's jurisdiction?[251]

Most of these disagreements began long ago and have implications far beyond transnational conflicts. But all of them have drastically intensified following the dispute over the law addressing transnational conflicts, increasingly transforming into 'weirdly metaphysical debates' over 'transcendental nonsense' that mistakenly regard legal concept as 'magic solving words'.[252] The discussion henceforth veers away from this transcendental nonsense by focusing on the more consensual issue: the history of international law.

As already discussed, consensual narratives are simplified accounts of reality, and critically examining them can reveal issues that these narratives suppress.[253] Accordingly, the discussion hereinafter critically examines the accepted historical narrative, exposing that past IHL was less Statist than assumed. Presently, based on the accepted historical narrative, a consensus exists that a clear divide

[248] *Ibid.*, para. 246; see also paras. 9–14, 158 (majority judges' reliance on that account).
[249] Ryan Dowdy *et al.*, *Law of Armed Conflict Deskbook*, 5th edn. (Charlottesville, VA: US Army J.A.G., 2015), 8.
[250] *Ibid.*
[251] See Section III.
[252] Luban, 'Human Rights Thinking' 2016 (n. 4), 64.
[253] Above nn. 10–13.

between IAC law and NIAC law has long been enshrined in IHL. This divide creates uncertainty and disagreements with regard to which law addresses transnational conflicts. Refuting the accepted narrative reveals that the wide consensus regarding an IAC law/NIAC law divide is rather recent. Such a divide approach has always existed. However, an opposite ('adaptation') approach has also long existed, holding that only one IHL corpus exists: that corpus applies in inter-State wars as is, while in all other wars it applies subject to (truly necessary) adaptation. The misguided belief in the age-oldness of the IAC law/NIAC law divide is, actually (as explained later), proof that support for the 'adaptation approach' did not weaken following a defeat in a reasoned debate to the 'divide approach', but as a result of much slyer actions.

A. *Westphalia*

Returning to our period identification game:

1. Given the predictions that we are only now nearing the Statist model's demise, when do you think the following was written?[254]

   [T]he improvement of communication and ... transport ... with its consequent interdependence and solidarity of interest between groups situated in different nations ... render[s] hostility based on the lines of political geography irrelevant ... State lines do not follow the lines of the respective conflicts ...
2. In the light of the accepted history of both ICL and NIAC law, identify the following conflict: (a) as a contemporaneous court noted, in a ruling that determined it was a 'war', the conflict was initiated by an ideological movement's 'armed forces dominated by the spirit of driving from th[eir] country or destroying all foreigners';[255] (b) that armed force also wished to exterminate compatriot members of a certain religion;[256] (c) a multilateral international declaration deemed these forces' 'murde[rs], tortur[es]', 'massacre[s] ... desecrat[ions]', 'pillag[e] and destr[uction]' to be 'crimes against the law of nations, against the laws of humanity';[257] (d) the conflict was fought between the aforesaid non-State forces and a multinational allied force; (e) during the conflict, an international military tribunal

[254] Norman Angell, *The Foundations of International Polity* (London: William Heinemann, 1914), xxv–xxvi.
[255] C.C.D., *Hamilton v. McClaughry*, Judgment of 12 April 1905, No. 136 F, 445, 450.
[256] Ziming Wu, *Chinese Christianity* (Leiden: Brill, 2012), 49.
[257] The Allies' 'Joint Note' (1900), as reproduced in Paul Clements, *The Boxer Rebellion* (New York: Columbia University Press, 1915), 207–8.

> tried some of the perpetrators of the atrocities;[258] (f) there was no state of war between the allies and the State in which the war was conducted, because that State officially considered movement members to be rebels.[259]

The source quoted above is from 1914, demonstrating that rumours about the demise of the Statist model have been (thus far) premature (together with prophecies about novel transnational conflicts being omens for that demise).[260] The aforementioned war is the Boxer War (1900–1). This conflict is rightly infamous for its Western atrocities and colonialist undertones. But it was also a multinational intervention aimed at stopping the massacre of 30,000 Chinese Christians and 200 foreigners. During the war, at Pao-Ting-Fu, an international military tribunal of British, German, Italian and French judges tried some of the perpetrators of the atrocities.[261]

The accepted history requires reassessment. Until a few decades ago, it was commonly held that traditional international law had formed, following the 'birth' of the modern State, at the 1648 Peace of Westphalia.[262] But historical research refuted the Westphalian myth, showing that the rise of States was a protracted process, having already begun in the late Middle Ages and culminating only in the late nineteenth century,[263] when the modern definition of the State was 'doctrinally consolidated'.[264] This modern 'European invocation [was then also] retrospectively backdated to the Peace of Westphalia and used to articulate an international order based on mutually recognized sovereign States'.[265] Positivist jurists, aiming to strengthen State sovereignty, contributed to the consolidation and back-dating.[266] The same aim also led them to embrace conceptual 'sharpening of distinctions … between international and … domestic law',[267] and between 'sovereigns and individuals'.[268] Today the Westphalian myth has been effectively debunked, but the full implications of its falsehood have yet to be internalised.[269]

[258] James Hevia, *English Lessons* (Durham, NC: Duke University Press, 2003), 224–9.
[259] C.C.D. Kan., *Hamilton v. McClaughry* (n. 255), 450.
[260] Quentin Skinner, 'A Genealogy of the Modern State', *Proceedings of the British Academy* 162 (2009), 325–70 (359).
[261] See nn. 255–9.
[262] Joseph Stromberg, 'Sovereignty, International Law and the Triumph of Anglo-American Cunning', *Journal of Libertarian Studies* 18 (2004), 29–93 (29–30).
[263] Andrew Phillips, *War, Religion and Empire* (Cambridge University Press, 2010), 136–7.
[264] Kennedy, 'History of an Illusion' 1998 (n. 112), 119.
[265] See Peter Wilson, *The Holy Roman Empire* (London: Allen Lane, 2016), 683.
[266] Kennedy, 'History of an Illusion' 1998 (n. 112), 100.
[267] *Ibid.*, 119.
[268] *Ibid.*, 131
[269] Wilson, *Holy Roman Empire* 2016 (n. 265), 682.

One such implication concerns the application of international law to individuals. Historically, there was no sharp distinction between international and domestic law.[270] Not only piracy, but also war crimes and even felonies (murder, theft, arson, robbery, rape, etc.) were considered crimes against humanity and crimes against the law of nations, whose perpetrators were enemies of mankind; many European courts even applied universal jurisdiction to such crimes.[271] Only under the influence of nineteenth-century Statist-positivism did Western domestic civilian judicial systems abandon this universalist view. In contrast, Western military justice systems, having primary jurisdiction over war crimes and wartime felonies, continued to consider customary international law to be a legal basis for prosecuting such crimes.[272] Even a practice, dating back to medieval times, of occasionally creating joint military tribunals continued; namely, the Boxer Rebellion tribunal is far from the only pre-Nuremberg international military tribunal.[273] The 1900 Boxer Rebellion tribunal is not even the sole *NIAC-related* pre-Nuremberg international military tribunal (which indicates that not only ICL but also NIAC law has a longer history than assumed); such NIAC-related tribunals were created, for example, in 1839–46,[274] 1882,[275] 1912[276] and 1918.[277] Until the 1950s, alongside sources echoing the

[270] Mark Janis, *Introduction to International Law*, 2nd edn. (Boston, MA: Little, Brown, 1993), 228; Jeffrey L. Dunoff, Steven R. Ratner and David Wippman, *International Law: Norms, Actors, Process* (Aspen, CO: Aspen Publishers, 2006), 441.

[271] Ziv Bohrer, 'International Criminal Law's Millennium of Forgotten History', *Law and History Review* 34 (2016), 393–485 (422–30).

[272] *Ibid.*, 464–71.

[273] *Ibid.*, 480–3; Ziv Bohrer and Benedikt Pirker, 'Nuremberg Was Not the First International Criminal Tribunal – By a Long Shot' (draft paper, on file with author).

[274] Joint Prussian–Russian–Austrian tribunals tried Polish revolutionaries during the joint occupation of Cracow; Meir Ydit, *International Territories* (Leyden: Sythoff, 1961), 95–107.

[275] In an 1882 rebellion in Egypt, anti-Christian atrocities were committed, triggering (together with colonialist aims) a British military intervention. Eventually Britain assumed the role of belligerent occupier. But, initially, it treated the Egyptian government as a sovereign ally, and some perpetrators of atrocities were tried by a joint British–Egyptian military tribunal. Some of the charges were explicitly for violations of wartime international law; G. S. Baker, *Halleck's International Law* (London: Trübner, 1908), vol. II, 350–1; Evelyn Baring, *Modern Egypt* (New York: Macmillan, 1916), vol. I, 331–9.

[276] During the First Balkan War, when Strumnitsa was under joint Bulgarian–Serb occupation, sham proceedings were conducted by a joint military tribunal of Serb and Bulgarian officers, local leaders and Bulgarian insurgents; *Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars* (Washington, DC: Carnegie Endowment, 1914), 73–4.

[277] During a military intervention by the First World War Allies in support of the White Russian forces, in a region jointly occupied by the White Russian and Allied forces, a 'special military court' was formed, consisting of four White Russian officers and a representative from each of

Westphalian narrative (depicting ICL as an innovation), other sources considered ICL a long-standing practice.[278] This narrative of continuity was forgotten during the Cold War, but norms originating from the aforesaid centuries-long practice are still part of ICL today.[279]

A second insufficiently internalised implication of the Westphalian falsehood concerns the application of international law to non-State entities. Originally, the (then) European system of international law was inapplicable to supposedly 'uncivilised' (i.e., non-Western) nations. According to the Westphalian myth, international law globalised gradually as evermore non-Western nations became States.[280] Presently, a competing narrative is gaining support, claiming that international law globalised rather abruptly at some time between the late nineteenth and mid-twentieth century, after Westerners abandoned their xenophobic 'standard of civilisation' for the application of international law.[281] The criterion adopted instead was statehood: a form of sovereignty that non-Western nations could attain.[282]

But history is less consistent and statehood-oriented than both narratives above assume. Throughout most of international law's history, various legal approaches existed concerning its application to non-Western nations.[283] The following are especially significant: (a) non-application approaches that authorised total war against 'uncivilised' nations based on the idea that international law did not apply there;[284] (b) punishment approaches that prescribed total war against 'uncivilised' nations as punishment for their supposed violation of international law;[285] (c) adaptation approaches that aimed to adapt the (then) Western international law to cross-cultural interactions (including

the three Allied armies; Leonid Strakhovsky, *Intervention at Archangel* (Princeton University Press, 1944), 46.

278 E.g., US Legal Memorandum, 'Trial of War Criminal by Mixed Inter-Allied Military Tribunals', 31 August 1944, 4, available at: www.legal-tools.org/doc/e5f070.

279 Bohrer, 'Forgotten History', 2016 (n. 271), 394–471.

280 Stromberg, 'Sovereignty' 2004 (n. 262), 29–30.

281 Cf. Carl Schmitt, *The Nomos of the Earth*, trans. G. L. Ulmen (New York: Telos, 2003), 226 (suggesting 1875–1919); Brett Bowden, 'The Colonial Origins of International Law', *Journal of the History of International Law* 7 (2005), 1–23 (21–2) (suggesting the Second World War); Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge University Press, 2001), 510–17 (suggesting the 1960s).

282 Gerrit Gong, *The Standard of 'Civilization' in International Society* (Oxford: Clarendon Press, 1984), 32–3.

283 Bohrer, 'Forgotten History' 2016 (n. 271), 409–18.

284 Elbridge Colby, 'How to Fight Savage Tribes', *American Journal of International Law* 21 (1927), 279–88 (285–7) (briefly contrasting non-application and punishment approaches).

285 *Ibid.*; Bohrer, 'Forgotten History' 2016 (n. 271), 410–11 (punishment approaches, unlike non-application approaches, authorised the prosecution of captured non-Western fighters for individual international law violations).

wars);[286] (d) minimalist-discretionary approaches that substituted the robust international law with an imperfect obligation to apply 'such rules of justice and humanity as recommend themselves in the particular circumstances of the case'.[287] Each approach was often considered by its supporters not only as *lex ferenda* (aspired law), but as *lex lata* (the actual existing law).

Historical evidence indicates that the likelihood that (some measure of) international law would be applied to wars against non-Westerners was influenced not only by case-specific, non-legal considerations, but also by the fluctuating support for competing legal approaches.[288] Support for adaptation approaches increased after the religious wars era (because that era's trauma increased aversion towards total war doctrines), culminating in the late eighteenth century.[289] Even later, that support remained considerable under the influence of a legal position that perceived both Western and non-Western communities as sovereign entities, simply of 'different sorts';[290] the latter supposedly formed based on 'race or nationality rather than territory'.[291] In the late nineteenth century, however, support for the applicability of international law to cross-cultural interactions drastically decreased under the influence, among other things, of rising support for the Statist-positivist position that the territorial State was the sole 'form of political [sovereign] authority'[292] and the sole 'subject [of] international law'.[293] The position considering international law as applicable only to Western sovereigns is not identical to the position considering it to be applicable only to States. But in an era in which very few non-Western sovereigns were considered by Westerners as having State attributes, the convergence between these two positions was considerable. Although these two positions enjoyed considerable support at the turn of the century, support for either was never unanimous, as demonstrated by the following two issues:

1. In some early twentieth-century interactions between Western States and non-Western, non-State entities, Westerners (or even both sides) considered as the applicable law one of the older approaches according

[286] Jennifer Pitts, 'Empire and Legal Universalisms in the Eighteenth Century', *American Historical Review* 117 (2012), 92–121.
[287] UK War Office, *Manual of Military Law* (London: HMSO, 1914), 235.
[288] Bohrer, 'Forgotten History' 2016 (n. 271), 409–18.
[289] Pitts, 'Empire and Legal Universalisms' 2012 (n. 286), 95; Parker, *Empire, War and Faith* 2002 (n. 151), 167–8.
[290] Kennedy, 'History of an Illusion' 1998 (n. 112), 127.
[291] Travers Twiss, *The Law of Nations*, 2nd edn. (Oxford: Clarendon Press, 1884), 444.
[292] Kennedy, 'History of an Illusion' 1998 (n. 112), 119.
[293] *Ibid.*, 127.

to which international law does address such interactions in some manner (i.e., minimalist-discretionary, adaptation or punishment approaches). One example is the Boxer War, as the joint military tribunal at Pao-Ting-Fu demonstrates.[294] Another example is the so-called 'Indian' wars; until about 1920, in some wars between the United States and Native American forces, the United States applied an adaptation approach and deemed much of IHL applicable, considering itself duty-bound to grant POW status to captured Native American combatants, and authorised to punish only those who committed *certain core* war crimes.[295]

2. Strong opposition to the Statist-positivist conceptualisation of the State and of international law appeared soon after the doctrinal consolidation of that conceptualisation. Rising support for State-sceptic positions was influenced by the creation of international legal organisations (notably, the 1899 and 1907 Hague Conferences, and the League of Nations in 1920) and by the contribution of hardline Statism to the outbreak of the First World War.[296] New international legal organisations (in which some non-Western sovereigns participated) and Western First World War barbarities also increased support for positions proclaiming international law's equal application to all nations, which helped some non-Western sovereigns attain Statehood.[297] However, not all non-Western entities attained statehood; regarding conflicts with such non-Western entities, the rising 'equal application' and 'State-sceptic' positions contributed to the eventual abolition of total warfare approaches and to the gradual merger of the minimalist-discretionary and adaptation approaches with similar legal approaches to internal conflicts.[298]

[294] The Allies differed on the approach they considered *lex lata*. The British applied a minimalist discretionary approach; UK, *Manual of Military Law* 1914 (n. 287), 235. The US approach placed greater IHL-related constraints on their forces than the British; A. S. Daggett, *America in the China Relief Expedition* (Kansas: Hudson-Kimberly, 1903), 57, 123, 128, 259–60. Germany applied a punishment-based total war approach, but kept it a secret to avoid opposition by its allies; Kaiser Wilhelm II, 'Hun Speech', 27 July 1900, available at: germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=755.

[295] Jordan Paust, 'Nonstate Actor Participation in International Law and the Pretense of Exclusion', *Virginia Journal of International Law* 51 (2011), 977–1004 (979–83); G. H. Williams, 'The Modoc Indian Prisoners', *Opinions of US Attorney General* 14 (1875), 252–3.

[296] Kennedy, 'History of an Illusion' 1998 (n. 112), 131–8; Skinner, 'Genealogy of the Modern State' 2009 (n. 260), 359.

[297] Gong, *Standard of 'Civilization'* 1984 (n. 282), 28, 71, 124–8.

[298] E.g., Quincy Wright, 'Bombardment of Damascus', *American Journal of International Law* 20 (1926), 263–80 (265–72). See also, Colby, 'How to Fight Savage Tribes' 1927 (n. 284), 287. This gradual convergence began even earlier.

Jordan Paust noted:[299]

> [During] the last 250 years, international law has not been merely State-to-State. At best, claims to the contrary have been profoundly mistaken. At worst, they have been part of layered lies and attempts by malevolent myth-mongers to exclude and oppress others, to deny responsibility, or to support radical revisionist ambitions.

However, not only Statist-positivists propagated the myth of traditional international law being Statist (originally an element of the Westphalian myth). Many State-sceptics also concurred, though they thought that the Statist world order was about to expire.[300] Due to the propagation of that myth by both camps, we tend to overlook that the Statist-positivist position was never universally adopted and forget the long history of various contemporary international laws that originate in positions that competed against the Statist-positivist position, such as various ICL norms and the adaptation approach. Our recollection of the past remains 'the memory of an illusion'.[301]

B. NIAC Law

The accepted history of NIAC law is even less accurate than that of international law's application to non-Westerners. Admittedly, the rise of nineteenth-century Statist-positivism led to strong support for the position deeming international law to be inapplicable to internal wars, unless a State made a discretionary decision to apply it. But the belief that this was the *traditional* international law is simply untrue; the original basis for the authority to wage total war against rebels was the belief that rebellion was a criminal violation of international law.[302] Moreover, the horrors of the religious wars motivated subsequent attempts to restrain total warfare, yielding a doctrine where, under certain conditions in internal wars – mainly, intense fighting and high-level organisation – a ruler had a legal duty to recognise belligerency. Cases in which this duty approach was applied can be found from the seventeenth century through to the mid-twentieth century. This approach competed with the 'unlimited discretion' approach, with support for the perception of either approach as *lex lata* fluctuating over time.[303]

[299] Paust, 'Nonstate Actor Participation' 2011 (n. 295), 1002–3.
[300] Kennedy, 'History of an Illusion' 1998 (n. 112), 133–8.
[301] *Ibid*., 138.
[302] Russell, *Just War* 1979 (n. 150), 7–19.
[303] George Mackenzie, *The Laws and Customs of Scotland in Matters Criminal* (Edinburgh: Anderson, 1699), 216; Graves, 'Lecture III' 1843 (n. 46), 266; Dov Levin, 'Why Following the Rules Matters: the Customs of War and the Case of the Texas War of Independence', *Journal*

Because historically there was no sharp distinction between international and domestic law, all situations meriting 'martial law' (aka 'state of siege'), including insurgencies, were regulated by the law of nature and nations, in the sense that the natural law principle of necessity applied.[304] Some understood this principle as allowing the ruler's forces to do as they pleased, but others regarded it as placing such forces under an imperfect obligation of moderation.[305] During the nineteenth and early twentieth centuries, Western States gradually shifted from international to domestic law for regulating emergencies short of war.[306] Yet, parallel to that shift, support increased for approaches that applied IHL, at least partially, in NIAC, even if the non-State side did not achieve belligerent status. By the late nineteenth–early twentieth century, the law pertaining to such NIAC had come to resemble the law pertaining to wars against non-State, non-Western entities. The following approaches competed for support: (a) an approach that authorised conducting internal wars as total war, on the basis of a Statist-positivist premise that international law did not apply to such wars, although in some cases still containing remnants of the idea that rebellions violate international law;[307] (b) a minimalist-discretionary approach, rooted in the imperfect obligations of necessity and humanity, which prohibited exceptionally cruel, clearly unnecessary measures (described by the *Institut de Droit International*, in 1900, as *lex lata*);[308] (c) an adaptation approach, according to which 'parties to . . . an insurrection shall observe, as far as possible, the rules of civilized warfare' (described by Wilson in his 1900 State practice survey, as *lex lata*).[309]

of Military Ethics 7 (2008), 116–35 (116–26); Ti-Chiang Chen, *The International Law of Recognition* (New York: Praeger, 1951), 253–308; Pallieri, 'General Report' 1971 (n. 62), 345.

304 H. W. Halleck, 'Military Tribunals and Their Jurisdiction', *American Journal of International Law* 5 (1911), 958–67 (958–60) (*c.* 1864); C. M. Clode, *The Military Forces of the Crown* (London: Murray, 1869), vol. II, 156–63, 500; T. E. Holland, *The Laws of War on Land* (Oxford: Clarendon Press, 1908), 14–17.

305 Gaines Post, *Studies in Medieval Legal Thought* (Princeton University Press, 1964), 3–24; H. M. Bowman, 'Martial Law and the English Constitution', *Michigan Law Review* 15 (1916/17), 93–126 (118–19).

306 Halleck, 'Military Tribunals' 1864 (n. 304), 960.

307 See Wilhelm Grewe, *The Epochs of International Law*, trans. Michael Byers (Berlin: Walter de Gruyter, 2000), 499, 569–71.

308 *Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectionnel, envers les gouvernements établis et reconnus qui sont aux prises avec l'insurrection*, Institut de Droit International (Session de Neuchâtel, 1900), Arts. 3, 4(2); *Britain v. Spain* 1924 (n. 119), 645; Francis Lieber, *Guerrilla Parties* (New York: Van Nostrand, 1862), 21.

309 Wilson, *Insurgency* 1900 (n. 48), 14. See also Wright, 'Bombardment of Damascus' 1926 (n. 298), 269–72.

Just as the NIAC-related minimalist-discretionary approach was a context-specific application of IHL's core principles, the NIAC-related adaptation approach was, likely, not aimed at creating a distinct IHL for internal wars, but rather a manifestation of the more general adaptation attitude discussed earlier. That general adaptation attitude, you may recall, is aimed at addressing the unavoidable absence of a neat fit between wartime reality and war-related legal classifications. Accordingly, the NIAC-related adaptation approach generally holds that in any non-inter-State conflict, 'regular' IHL must be applied *as far as possible* (namely, subject to the adaptations that are truly required by the particular attributes of the conflict); as James Garner noted in 1937: 'the statement . . . that the conduct of civil war is not governed by the same laws that apply to international war cannot be accepted – at least not without qualifications'.[310] This conceptualisation of IHL is quite different from that of the torture memos (and of many others today), which consider NIAC law and IAC law two distinct corpora.[311]

The attributes of the Spanish Civil War, designated by the torture memos as the birthplace of NIAC law, also weaken the memos' conclusions. Contemporaries considered that war to be part of a larger clash between global ideologies and it commonly crossed borders.[312] During that war, the prevailing view regarded the adaptation approach *lex lata*.[313]

The origins of NIAC law in the law pertaining to both internal wars and wars against non-Westerners, further weakens the torture memos' conclusions. Non-Westerners, such as Native American forces, were commonly perceived as belligerents that 'pay no regard to a mere imaginary [State] line'.[314] Moreover, as Geoffrey Corn noted (having nineteenth- and twentieth-century wars against non-Westerners in mind):[315]

> [T]he range of combat operations [that included such wars] . . . during this critical period of legal development is significant when assessing appropriate scope of application of the contemporary principles of the laws of war. This history supports the inference that regular armed forces historically viewed

[310] James Garner, 'Questions of International Law in the Spanish Civil War', *American Journal of International Law* 31 (1937), 66–73 (66).

[311] Yoo and Delahunty, 'Memo' 2002 (n. 14), 7–11.

[312] Philip Kunig and Johannes van Aggelen, 'Nyon Agreement', in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (online edn.), February 2015; Norman Padelford, 'The International Non-Intervention Agreement and the Spanish Civil War', *American Journal of International Law* 31 (1937), 578–603 (578).

[313] Garner, 'Spanish Civil War' 1937 (n. 310), 66.

[314] Lewis Cass (War Department), 'Letter to Major General Gains', Fort Jesup, Louisiana (4 May 1836) (supporting total war). See also Twiss, *Law of Nations* 1884 (n. 291), 444.

[315] Geoffrey S. Corn, 'Making the Case for Conflict Bifurcation in Afghanistan', *International Law Studies* 85 (2008), 181–218 (188).

> combat operations – or armed conflict – as an *ipso facto* trigger for principles that regulated combatant conduct on the battlefield.

Common Article 3 of the 1949 Geneva Conventions clearly intends to abolish total war approaches. It contains elements of the minimalist-discretionary approach and of the adaptation approach by: (a) defining its prohibitions as duties that 'each Party to the conflict shall be bound to apply, *as a minimum*'; and (b) adding that '[t]he Parties to the conflict *should further* endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention'. The Article's history, however, does not indicate an intention to form two distinct IHL corpora.[316]

More important, even after 1949, the adaptation approach was applied in various cases, such as *Tsemel* in Israel (1983).[317] In 1981, the Israeli army invaded Lebanon as part of a conflict between Israel and non-State forces that were launching attacks from Lebanon. Members of these non-State forces petitioned the Israeli Supreme Court, claiming a lack of legal basis for their detention by the Israeli army. The Israeli government, similarly to the British government in *Serdar Mohammed*, responded that the petitioners' detention on Lebanese soil was sanctioned by customary IHL.[318] The petitioners argued that no IHL authority exists to detain civilians, except in occupied territories. The Court rejected this argument, holding that they were not peaceable civilians but unprivileged combatants, and that IHL has always provided State forces with authority to detain such combatants.[319]

In a succeeding case, *Al-Nawar* (1985), the Court similarly held that:[320]

> The incapability of the State from which the terrorists act . . . [to] prevent the harming of its neighbour[-State], does not render the terrorists and their property immune from the measures that would have been taken against a regular enemy force. Whoever commits acts of hostility cannot wear the cloak of a private civilian whenever it sees fit. Namely, whoever maintains a complex organization that is engaged in terror and warfare cannot expect that when the military response arrives, it would enjoy the immunities and defences that the law of war provided to uninvolved civilian parties . . . [Its combatants also] cannot enjoy the privileges . . . of a POW . . .

316 See George Schwarzenberger, *International Law* (London: Stevens, 1968), vol. II, 717–19.

317 HCJ, *Tsemel v. Minister of Defence*, Judgment of 13 July 1983, No. 102/82 (Isr.) (trans. Ziv Bohrer).

318 *Ibid.*, para. 3.

319 *Ibid.*, para. 5: '[T]he detention of weapon-carrying insurgents and those who aid them has always constituted an execution of a legal authority by the belligerent and it remains such.'

320 HCJ, *Al-Nawar v. Minister of Defence*, Judgment of 11 August 1985, No. 574/82, para. 21 (Isr.) (trans. Z. B.).

Statements like those made in *Tsemel* and *Al-Nawar* are currently made by those who hold that States have an inherent legal authority to detain captured enemy fighters until the conflict ends, irrespective of whether the captured enemy fighters are regular soldiers or unprivileged combatants, and irrespective of conflict classification (the only difference is that POWs have various privileges that detained unprivileged combatants do not).[321] But that was not *Tsemel*'s ruling; it ruled that because the State did not grant these individuals POW status, nor did it prosecute them, only one legal basis remained providing authority to detain them: the IHL concerning detention of protected persons in occupied territories, as it applies, *subject to the necessary adaptations*, to non-occupation situations.[322] That law is quite constraining, demanding periodic review of each detainee's case and the release of anyone no longer *personally* posing a risk.[323]

Tsemel's ruling is preferable to the approach that IHL authorises States to detain unprivileged combatants (like enemy State soldiers) until hostilities end, but without POW privileges. The rationale behind detaining captured enemy combatants is to prevent them from serving the enemy. When States fight, they often find the end of active hostilities a congenial moment for the release of each other's detainees, because at that point neither side has strong fear of immediate threat from enemy soldiers. Occasionally, this mutual benefit could apply in cases where the State accords POW status to captured non-State enemy fighters, because some non-State forces can gain considerable political benefits from having their fighters treated as POWs, enabling States to incentivise such forces to adopt some State-like qualities.[324] However, in many conflicts, this is unlikely to become the case irrespective of whether the State accords POW status to the non-State fighters (which, also, means that States do not have an incentive to do so).[325] For various reasons, uncertainty regarding the end of a conflict is even greater in conflicts involving non-State forces than in inter-State wars. Hence, in conflicts involving non-State forces there is often no temporal benchmark to make prisoner release mutually beneficial. This means that authorising States to detain captured non-State fighters until hostilities end is likely to result in indefinite detention. Many captured non-State fighters would remain detained long after their *personal* risk of returning to serve the enemy abates.

Note that *Al-Nawar* ruled that IHL regarding an enemy State property, rather than private civilian property, applies to terrorist organisations'

[321] E.g., USSC, *Hamdi v. Rumsfeld*, Judgment of 28 June 2004, 517–24.
[322] HCJ, *Tsemel* 1983 (n. 317), paras. 5–8.
[323] *Ibid.*, para. 8.
[324] Aldrich, 'Human Rights in Armed Conflict' 1973 (n. 49), 880.
[325] *Ibid.*

https://doi.org/10.1017/9781108674416.003 Published online by Cambridge University Press

property, *subject to the necessary adaptations*.[326] Nevertheless, *Tsemel* and *Al-Nawar* are not contradictory; both applied the adaptation approach. The *Tsemel* ruling, regarding the legal basis for the detention authority, relied on the following note from the contemporary British *Manual of Military Law*: 'Although the rules here discussed apply primarily in "occupied territory", they should nevertheless be observed, *as far as possible*, in areas through which troops are passing and even on the battlefield.'[327] Moreover, *Tsemel* considered its 'as far as possible' (adaptation) approach to be deriving from a more general 'trend . . . that has . . . found its expression in the modern law of war'.[328] *Al-Nawar* similarly described its (adaptation) approach as a legal trend – developed because too many cases lacked a neat fit between the wartime reality and its legal classifications – that demands the application of some or all of IHL to circumstances that do not constitute war *senso stricto*.[329]

The United States also adhered to the adaptation approach. Since the 1960s, the US Department of Defense, Law of War Program Directives (and similar military instructions) have stated:[330]

> The Armed Forces of the United States will comply with the law of war during the conduct of all military operations and related activities in armed conflict, however such conflicts are characterized.

The US adherence to the adaptation approach is demonstrated in this Vietnam era statement by American military lawyer, Fred Green:[331]

> [T]he terms 'war', 'armed conflict,' and 'combatants' . . . have become increasingly blurred with each new technological advance and change in military strategy and political intent . . . (for example . . . guerrilla type forces) . . . [Nevertheless] the established concepts cannot be merely abandoned. The American practice has been to analogize, insofar as possible, and attempt to apply the provisions of the Conventions and

[326] HCJ, *Al-Nawar* 1985 (n. 320), para. 21.
[327] HCJ, *Tsemel* 1983 (n. 317), para. 7 (quoting UK War Office, *Manual of Military Law* (London: HMSO, 1958), 141 n. 1; emphasis added).
[328] *Ibid.*, para. 5.
[329] HCJ, *Al-Nawar* 1985 (n. 320), para. 21.
[330] Section 4.1, Directive 2311.01E (9 May 2006; recertified 22 February 2011); Section 4.1, Directive 5100.77 (9 December 1998); Section E(1)(a), Directive 5100.77 (10 July 1979); Section V(a), Directive 5100.7 (5 November 1974); Para. 4a, US Chairman of the Joint Chiefs of Staff Instruction 5810.01 (12 August 1966).
[331] Green, 'United States' 1971 (n. 44), 283–4.

> customary law so as to preserve the intent thereof and thereby diminish the evils of war ...

The following Vietnam era statement by US Deputy Legal Advisor, George Aldrich, further reveals a significant element of the US understanding of that approach:[332]

> [T]he Geneva Prisoner of War Convention ... accords to ... guerrillas involved in international conflicts the right to be treated as prisoners of war ... [only, if they] meet ... five criteria ... When viewed in the light of guerrilla war as we have known it in recent years, some of these criteria seem a bit quaint. In Viet-Nam, for example, thousands of the Viet Cong troops had no fixed sign, did not carry arms openly, and frequently did not abide by the laws of war. Nevertheless, except for terrorists, spies, and saboteurs, the United States and the Government of the Republic of Viet-Nam have treated them as prisoners of war ... In addition, we treated other guerrillas as POW's whenever they were captured with weapons in battle.

As this statement demonstrates, unlike Israel, US reliance on the adaptation approach went as far as to grant POW status to combatants who did not meet the treaty conditions.[333] The United States applied a similar approach regarding POWs in nearly all conflicts between 1949 and 2000, including Korea, Vietnam, Panama, Somalia, Haiti and Bosnia.[334]

The application of this approach regarding POWs in each of the aforesaid conflicts was discussed in one of the torture memos (the Bybee Memo).[335] The memo dismissed it as merely the result of conflict-specific policy decisions, and not a legal precedent (exhibited through continuous State practice) preventing categorical denial of POW status to all Taliban and Al-Qaeda fighters.[336] At first glance, US Department of Defense directives since 1998 seem to support classifying the adaptation approach as a mere non-obligatory policy; these directives (like some,[337] but not all,[338] earlier directives) place the instruction, to comply with IHL irrespective of an operation's classification, under a 'Policy' heading.[339]

[332] Aldrich, 'Human Rights in Armed Conflict' 1973 (n. 49), 879–80.
[333] *Ibid.*
[334] Jay Bybee, 'Memorandum for Alberto Gonzales and William J. Haynes, Re: Application of Treaties and Laws to Al Qaeda and Taliban Detainees' (22 January 2002), 25–8.
[335] *Ibid.*, 25.
[336] *Ibid.*
[337] 1974 Directive (n. 330), Section V(a).
[338] 1979 Directive (n. 330), Section E(1)(a).
[339] 1998 Directive (n. 330), Section 4; 2006 Directive (n. 330), Section 4.

But it is wrong to dismiss past applications of the adaptation approach as mere non-legal, non-obligatory policy actions. The Israeli Supreme Court clearly considered the application of the adaptation approach a legal duty. The same holds true for the US pre-torture memos position. The torture memos devoutly applied the hardline Statist-positivist conceptualisation of law, policy and morality as distinct concepts; thus, the classification of the 'adaption approach' as 'policy', reflexively led the memos to deem that approach non-legal and non-obligatory. In contrast, 'warrior' positions (with roots in nature-of-things jurisprudence) regard imperfect obligations, like chivalry, as obligatory legal norms and maintain a less sharp distinction between law, policy and morality. For such positions, applying the adaption approach is both a policy action and a legal duty: *policy action*, in the sense that commanders are viewed as having considerable discretion in determining the manner and extent of IHL application in each non-inter-State conflict (after all, it is an imperfect obligation); *legal duty*, in the sense that commanders are considered to be legally duty-bound to apply the adaptation approach and in the sense that blatant grave violations of that obligation merit legal sanctions. Given the strong influence of the 'warrior' position and the chivalry principle on US military culture, it is doubtful that most US military professionals would have regarded the adaptation approach as mere non-legal policy. Indeed, within the Bush administration, Secretary of State Colin Powell, a former Chairman of the Joint Chiefs of Staff, most strongly opposed the Bybee Memo's categorical denial of POW status. Powell rejected the memo's presumption of a sharp distinction between law and policy, arguing that declaring the Geneva Conventions inapplicable would 'reverse over a century of US policy and *practice*',[340] and that 'while no one anticipated the precise situation that we face, the GPW [the Third Geneva Convention] was intended to cover all types of armed conflict and did not by its terms limit its application'.[341] Department of State Legal Advisor William H. Taft added: 'even in a new sort of conflict the United States bases its conduct on its international treaty obligations and the rule of law, not just its policy preferences.'[342]

[340] US Secretary of State Colin Powell, Memorandum to Council to President, Re: Draft Decision Memorandum to the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (25 January 2002), 2 (emphasis added).

[341] *Ibid.*, 5.

[342] Department of State Legal Advisor William H. Taft IV, Memorandum to Counsel to the President Alberto R. Gonzales, Comments on Your Paper on the Geneva Convention (2 February 2002), Insert A.

Powell's demand that the Bybee Memo be reconsidered only resulted in yet another torture memo:[343]

> [T]he war against terrorism is a new kind of war. It is not the traditional clash between nations adhering to the laws of war that formed the backdrop for GPW. The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians . . . [T]his new paradigm renders obsolete Geneva's strict limitations on the questioning of enemy prisoners and renders quaint some of its provisions . . .

Some consider the above paragraph to be the strongest demonstration of an element of truth in the post-9/11 call for a new, laxer IHL.[344] However, there is nothing new in its line of reasoning that (a) terrorism is a new kind of war that (b) obviates existing IHL, as evident from the fact that (c) torture, which existing IHL prohibits, must be used in such a war, (d) because IHL has become irrelevant in the context of that new war, it no longer applies and, therefore (e) torture is permitted when fighting terrorists. Such a line of reasoning was adopted by French forces in Algeria and advocated by some in the United States during the Vietnam War.[345] But the US government during Vietnam rejected it and considered torture illegal;[346] moreover, it stressed the need to liberalise treaty criteria for POW status eligibility because '[w]hen viewed in the light of [contemporary] guerrilla war . . . some of these criteria seem a bit quaint'.[347] The above paragraph, therefore, does not demonstrate an element of truth in the torture memos' reasoning, rather only the stark contrast between those memos and the earlier US allegiance to the adaptation approach. The issue is not the 'quaintness' of existing IHL (which, often actually stems from the nearly inevitable incomplete fit between wartime reality and war-related legal classifications), but one's response to it.

The Bybee Memo relegated more than just POW status eligibility to the entirely discretionary realm of policy decisions. For example, it asserted that:[348]

[343] White House Counsel Alberto Gonzales, Memorandum to President Bush, Decision Re: The Application of the Geneva Convention on Prisoners of War to the Conflict with Al-Qaeda and the Taliban (25 January 2002), 2.

[344] E.g., Michael Schmitt, '21st Century Conflict: Can the Law Survive?', *Melbourne Journal of International Law* 78 (2007), 443–76 (447, 472); Avihai Mandelblit, 'Lawfare and the State of Israel', PhD thesis, Bar-Ilan University, 2015, 48–50 (in Hebrew).

[345] Pallieri, 'General Report' 1971 (n. 62), 349–50.

[346] *Ibid.*

[347] Aldrich, 'Human Rights in Armed Conflict' 1973 (n. 49), 879–80.

[348] 'Bybee Memo' 2002 (n. 334), 25.

> [E]ven though Geneva Convention III may not apply, the United States may deem it a violation of the laws and usages of war for Taliban troops to torture any American prisoners . . . [and] prosecute Taliban militiamen [that tortured] . . . for war crimes . . . [based on a] decision to apply the principles of the Geneva Conventions or of other laws of war as a matter of policy, not law . . .

This 'policy basis' for war crime prosecution is incompatible with ICL's accepted normative justifications, and constitutes downright victor's justice, in the light of the torture memos' assertion that the 'new [war] paradigm renders obsolete Geneva's strict limitations on the questioning of enemy prisoners'.[349] More importantly, there is a contradiction between this legal reasoning and the one presented only three months earlier, in another memo, specifically addressing the legal basis for US authority in the war against Al-Qaeda and the Taliban 'to try and punish terrorists':[350]

> The mere fact that the terrorists are non-state actors . . . poses no bar to applying the laws of war here. American precedents [exist from] factual situation[s] . . . more closely analogous to the current attacks . . . [than] civil war . . . Indian 'nations' were not independent, sovereign nations in the sense of classical international law . . . Nevertheless, the Supreme Court has explained that the conflicts between Indians and the United States . . . were properly understood as 'war' . . . Similarly . . . [an American] court concluded that the Boxer Rebellion in China was a 'war' . . . [e]ven though the Boxers were not a government . . . It is true that [unlike] many [past] situations involving application of the laws of war . . . [t]he terrorist network now facing the United States . . . operat[es] from the territory of several different nations . . . [However,] the Indian Wars . . . provide an apt analogy. Indian tribes did not fit into the Western-European understanding of nation-States . . . But that posed no bar to applying the laws of war when the United States was engaged in armed conflict with them. Moreover, there is nothing in the logic of the laws of armed conflict that in any way restricts them from applying to a campaign of hostilities carried on by a non-State actor with a trans-national reach. To the contrary, the logic behind the laws suggests that they apply here. Generally speaking, the laws are intended to confine within certain limits the brutality of armed conflict, which might otherwise go wholly unchecked.

You (the reader) were probably somewhat baffled earlier by my insistence on discussing the bygone 'Indian' and Boxer wars. But I did so primarily because of

[349] 'Gonzales Memo' 2002 (n. 343), 2.

[350] US Deputy Assistant Attorney General Patrick Philbin, Memorandum Re: The Legality of the Use of Military Commissions to Try Terrorists (6 November 2001), 1, 23–6.

the above-quoted *recent* application of the adaptation approach (not my history fetish).

The torture memos did not persuade everyone to adopt their position regarding the law applicable to transnational wars, but they were successful in framing the legal discourse. This success is evident in the wide acceptance of the characterisation of transnational conflicts as novel, forcing international jurists to endlessly struggle 'against the claim that [wartime] international law was "quaint"'.[351] Success is further evident in the adaptation approach being somewhat forgotten, despite being a long-standing legal approach specifically developed to address the unavoidable absence of a neat fit between war-related situations and their legal classifications. The adaptation approach's long history and importance were not enough to prevent the torture memos from framing the discourse in a manner that buried the adaptation approach under a pile of misleading narratives (many of them pre-existing in IHL). As a result, excavating it required a journey into the distant past, even though it still enjoyed significant support as recently as the aftermath of 9/11 (as the above-quoted memo demonstrates).

Stated differently, I am not attempting to resurrect an archaic legal approach, rather to point attention to an approach that until quite recently enjoyed considerable support. Even today, this approach still enjoys some support[352] and cases still exist in which it is applied.[353] Yet, as such current sources demonstrate, the following important aspects of the adaptation approach were wholly forgotten: its long history; its pivotal role in IHL development; and its jurisprudential footing. Without recollection of these aspects (which this chapter aims to retrieve), support for the adaptation approach has declined, replaced by a classification obsession. That obsession is bound to increase uncertainty and disagreements, because it fails to acknowledge the inevitable absence of a neat fit between war-related situations and their legal classifications. That obsession, due to its rigidity, is also bound to hinder IHL development, opening the door to claims of increasing gaps in IHL. Therefore, re-embracing the (never fully abandoned) adaptation approach can reduce legal uncertainty and disagreements, while providing IHL with a normative tool, necessary for its development and adaptability to changes.

[351] Modirzadeh, 'Folk International Law' 2014 (n. 15), 227.

[352] E.g., Ryan Goodman, 'The Detention of Civilians in Armed Conflict', *American Journal of International Law* 103 (2009), 48–74.

[353] E.g., FCA, *Amnesty International v. Canada*, Judgment of 12 March 2008, No. T-324-07; HCJ, *Ahmed v. Israel*, Judgment of 27 January 2008, No. 9132/07.

C. Lotus

An alternative narrative is, gradually, superseding the Westphalian myth; it insists that 'traditional' international law only addressed States, but posits that that traditional law was 'born' in the nineteenth century (not 1648).[354] Wartime conduct used to be regulated by moral (non-legal) norms and force-specific (domestic) legislation and, only following IHL's nineteenth-century treaty codification did these non-legal and domestic 'rules of war become laws of war'.[355] IHL's treaty codification, thus, marks a conceptual framework shift, transforming a customary regime of (status-based and universal) individual 'natural' obligations and (to a lesser degree) rights, into a regime of formal legal rules between States.[356] The *Lotus* ruling[357] is considered a primary manifestation of that Statist-positivist 'traditional international law',[358] by holding that States 'may act in any way they wish as long as they do not contravene an explicit prohibition'.[359]

The torture memos, proclaiming commitment to 'traditional' international law, asserted that because no IHL explicitly addresses transnational wars, States can do as they wish.[360] Even moderate Statists, based on that history, hold that IHL still 'does not confer rights or impose duties on individuals',[361] rather consists of 'obligations imposed on states'.[362] Therefore, IHRL and IHL have 'distinct . . . conceptual frameworks'.[363]

IHRL-oriented approaches agree that IHL traditionally had a Statist conceptual framework, but proclaim another shift: in the more recent IHL treaties, some articles are phrased as conferring individual rights, shifting IHL to an individual rights-based framework.[364] Presumably, IHRL's

354 E.g., Luigi Nuzzo and Miloš Vec, 'The Birth of International Law as a Legal Discipline', in Luigi Nuzzo and Miloš Vec (eds.), *Constructing International Law* (Frankfurt am Main: Vittorio-Klostermann, 2012), ix–xvi (ix).

355 Gary Solis, *The Law of Armed Conflict* (Cambridge University Press, 2010), 54.

356 Grant Doty, 'The United States and the Development of the Laws of Land Warfare', *Military Law Review* 156 (1998), 224–55 (224).

357 PCIJ, *Lotus* case (France v. Turkey), Judgment of 7 September 1927, Series A, No. 10.

358 James Larry Taulbee, *Genocide, Mass Atrocity and War Crimes in Modern History* (Santa Barbara, CA: Praeger, 2017), 32.

359 Mario Silva, *State Legitimacy and Failure in International Law* (The Hague: Martinus Nijhoff, 2014), 129.

360 See Modirzadeh, 'Folk International Law' 2014 (n. 15), 232–3.

361 Kate Parlett, *The Individual in the International Legal System* (Cambridge University Press, 2012), 180.

362 *Ibid.*, 182.

363 *Ibid.*

364 Amanda Alexander, 'A Short History of International Humanitarian Law', *European Journal of International Law* 26 (2015), 109–38 (110). See also Peters, *Beyond Human Rights* 2016

modern rise also produced a parallel framework shift throughout international law.[365] IHRL's rise and said related framework shifts (along with the morality of rights) further demand interpreting additional IHL norms, not phrased as individual rights conferring, as conferring such rights.[366] IHRL's rise also diminished (if not abolished) *Lotus*, because universal IHRL applies to all issues previously ungoverned by international law.[367] Jurists, like my colleague, Helen Duffy, hold that this not only rebuffs torture memo-like positions, but also the adaptation approach, which addresses perceived gaps in IHL by analogising from related IHL. They assert that if IHRL universally applies, then a gap in IHL no longer means a gap in international law and, therefore, recourse to analogies is unjustified.[368]

But, as critics point out, even today there are only few individual rights-conferring IHL treaty articles.[369] Also, oddly, a framework shift is not similarly concluded from the even greater amount of individual obligations-imposing IHL treaty articles; such IHL (presumably) remains exceptional.[370] Both issues indicate that the claimed rights-oriented shift is less an impartial account of the law and more an attempt to bring about such a shift.[371]

The account of a nineteenth-century Statist conceptual framework shift is, likewise, inaccurate. Historically, force-specific legislation was not entirely domestic, because it was expected to reflect the unwritten, international laws of war.[372] These unwritten norms were not mere rules of ethics, but legal rules; violators of these unwritten laws of war were often punished, even in the absence of any formal legislation.[373]

Because jurisprudential diversity was always extensive: '[in] most eras … practices and customary law constituted a more important source for the law of

(n. 120), 194–220 (which, based on a more nuanced analysis, reaches somewhat similar conclusions regarding existing IHL, and even more so regarding aspired IHL).

365 E.g., Marco Odello and Sofia Cavandoli, 'Introduction', in Marco Odello and Sofia Cavandoli (eds.), *Emerging Areas of Human Rights in the 21st Century* (Abingdon: Routledge, 2011), 1. See also Peters, *Beyond Human Rights* 2016 (n. 120), 11–34, 526–55 (which, based on a more nuanced analysis, reaches somewhat similar conclusions regarding existing international law, and even more so regarding aspired international law).

366 Peters, *Beyond Human Rights* 2016 (n. 120), 194–220.

367 Duffy, in this volume, 88.

368 *Ibid.*

369 Parlett, *Individual in the International Legal System* 2012 (n. 361), 176–228.

370 Peters, *Beyond Human Rights* 2016 (n. 120), 220–1. Peters considers the 'principle of legality' a primary reason for treating individualistic obligations as exaptational in IHL; *ibid.*, 76–85, 220–1. But much of that concern is resolved through the nature-of-things jurisprudential understanding of that principle; see above nn. 116–22.

371 Luban, 'Human Rights Thinking' 2016 (n. 4), 50.

372 Bohrer, 'Forgotten History' 2016 (n. 271), 430–1.

373 *Ibid.*

nations';[374] especially for the laws of war.[375] Thus, between these past unwritten laws and current IHL, there is a 'remarkable continuity'.[376] 'Most of the actions today outlawed by the Geneva Conventions have been condemned in the West for at least four centuries.'[377]

The belief that international law (IHL included) was 'born' in the nineteenth century originated in that century. Some contemporary Statist-positivists asserted that international law, including the 'so-called laws of war[,] are mere practices ... [that] impose, at most, moral and not legal duties'.[378] More moderate Statist-positivists also rejected the legal obligation of customary international law, but considered treaty international law obligatory and supported treaty codifications.[379] Many further endorsed the Statist-positivist view of international law as only addressing States (not individuals), as evident in the Statist phrasing of most treaty IHL.[380]

But positivism was never the only jurisprudential influence on IHL, therefore, the transition to a Statist framework was never more than partial. Non-positivist influence is evident in the adoption (beginning with the Martens Clause) of treaty IHL that asserts the continued obligatory force of customary IHL and IHL principles.[381] It is, further, evident in ICL's survival (as seen through continued war crime prosecution of individuals based on the customary unwritten laws of war).[382] Accordingly, when defendants at Nuremberg claimed that they were not liable for violating the State-addressed Hague Regulations, the tribunal responded:[383]

> For many years past ... military tribunals have tried and punished individuals guilty of violating the rules of land warfare ... The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts.

374 Lesaffer, 'Unrequited Love' 2007 (n. 174), 36.
375 Parker, *Empire, War and Faith* 2002 (n. 151), 167–8.
376 *Ibid.*
377 *Ibid.*
378 J. F. Stephen, *A History of the Criminal Law of England* (London: Macmillan, 1883), vol. II, 62–3.
379 E.g., Gortchacow, 'Observations' 1875 (n. 70), 5.
380 Bohrer, 'Forgotten History' 2016 (n. 271), 407.
381 Jan Klabber, *International Law* (Cambridge University Press, 2017), 223–4.
382 Bohrer, 'Forgotten History' 2016 (n. 271), 464–71.
383 IMT, *Trial of the Major War Criminals*, vol. I (Nuremberg: International Military Tribunal Nuremberg, 1947), 220–1.

IHL's codifying treaties, therefore, did not abolish customary IHL rules and principles. Likewise, treaty IHL (primarily) Statist conceptual framework did not abolish, rather supplemented the longer-standing individual obligations-oriented framework; accordingly, the Nuremberg Tribunal asserted:[384]

> It was submitted that international law is concerned with the actions of sovereign States and provides no punishment for individuals … [This] must be rejected. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized.

Thus, IHL has remained '*Binding on States and Individuals*'.[385]

The persistent non-positivist influence on international law is further demonstrated by the following neglected fact: *Lotus* was 'ruled in six-six split with President Huber casting the deciding vote'.[386] Even at the height of the 'traditional' era, the core Statist-positivist '*Lotus*' precept was contested. The six other judges expressed a non-positivist perspective that a gap does not necessarily exist whenever no explicit rule applies, because international law consists not only of rules but also of principles, and often one should 'invoke [these] "soft" norms, or draw on analogous areas of the law to find that, in fact, there is no gap in the law'.[387] That non-positivist perspective is also expressed in the adaptation approach and in the Martens Clause.

Indeed, the Martens Clause is commonly considered IHL's rejection of the *Lotus* principle.[388] Based on the clause, even before treaty IHRL, jurists deemed illegal torture memo-like ('*Lotus-ian*') assertions of States being wholly unconstrained in issues '[un]anticipated by the Convention[s]'.[389]

The long-standing influence of such non-positivist perspectives also means that, with regard to certain issues, IHRL advocates wrongly assume a gap in non-IHRL international law. Despite the non-existence of clear-cut legal rules in such cases, a gap does not exist (and did not exist even before modern IHRL) because these issues have long been regulated by normative principles and analogising legal approaches. One such issue that has been discussed throughout this chapter is the *perceived* IHL gaps that result from the nearly inevitable incomplete fit between wartime situations and the legal concepts

[384] *Ibid.*, 222–3.
[385] US Army, *Law of Land Warfare* (FM-27-10, 1956), 4. See also Fellmeth, *Paradigms* 2016 (n. 119), 27.
[386] Hugh Handeyside, 'The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?', *Michigan Journal of International Law* 29 (2007), 71–94 (74).
[387] *Ibid.*, 77.
[388] Klabber, *International Law* 2017 (n. 381), 223.
[389] Trainin, 'Questions of Guerrilla Warfare' 1946 (n. 49), 550–1.

aimed at addressing them. These are merely perceived gaps and not actual gaps because a long-standing IHL norm exists to address such incomplete fits: the adaptation approach. That norm has long played a pivotal role in IHL development, leading to (among other things) the current considerable convergence between the IHL in IAC and in NIAC. Abandoning it would hinder that convergence trend. More generally, it would harm IHL's ability to adapt to change.

III. CORE JURISDICTION STRUGGLE: THE ACTUAL CRISIS

The discussion thus far seems to suggest that the current sense of crisis has resulted from 'semi-innocent' factors (unconscious tendencies, the nature of law and of emergencies, long-standing misleading narratives, etc.) and the nature of lawyers, who tend to proclaim as law the legal position that best serves their purposes. Even the crisis outcry seems attributable to 'semi-innocent' factors, such as temporocentrism, and to the nature of international lawyers (who love constructing war-related crisis narratives).

But there is true cause for concern. When certain conditions exist in a legal system's normative universe, then that system is at risk of dissolution. Such conditions tend to result from a phenomenon herein called: a *core jurisdictional struggle*. In recent decades, the normative universe of wartime international law has been nearing these conditions.

As mentioned earlier, there are two opposite extreme accounts of the role of law in the normative universe of a legal system.[390] Hardline formalist accounts depict legal norms as external, objective social facts that autonomously determine legal actions. Hardline CLS accounts depict legal norms as having no independent influence on actions; these accounts hold that actions and their legality are determined by non-legal factors (power and interests) and legal norms are (at best) merely means to cloak the interests of the powerful. But these opposing accounts equally fail to appropriately depict the actual role legal norms usually play in the normative universe of a functioning legal system.

In a functioning legal system's normative universe, legal actions commonly result from a mixture of legal and non-legal factors: contrary to hardline CLS accounts, legal factors (norms and narratives) do have an influence and contrary to hardline formalist accounts, legal factors only have partial influence (non-legal factors do also play a considerable role). Stated differently, in such systems, the 'normative reality' (i.e., legal actions' prevailing nature)

[390] Above nn. 5–9.

occupies the vast middle ground between the two extreme accounts of hardline formalism and hardline CLS.[391] When the legal community is exceptionally homogeneous, the 'normative reality' resembles the formalist account.[392] But, usually, human diversity yields conflicting narratives in the normative universe, reducing the semi-objective element of the law.[393] Legal uncertainty and tense engagement between different factions are integral parts of a heterogeneous normative universe.[394] The normative reality can even come to match the hardline CLS account – namely, the legal system's norms cease to influence human behaviour – when members of a non-negligible faction within the legal community no longer feels obligated to defer to the legal system or share the normative universe with other factions;[395] although members of such factions tend to perceive themselves as followers of the law's 'true' meaning or of a 'superior' system.[396] The latter option echoes a related scenario, in which several legal systems (e.g., international law and a domestic legal system) simultaneously assert jurisdiction over the same group.[397] In practice, often the distinction between the inter- and intra-system scenarios is fuzzy and depends on opposing factions' narratives.[398]

Intra-system scenarios entail a clash between core jurisdictional narratives. *In its deepest sense*, 'jurisdiction' is concerned with the allocation of the power and authority to speak (*dictio*) in the name of the law (*juris*).[399] Within any legal system's normative universe, narratives exist that address this deep sense of jurisdiction.[400] These core jurisdictional narratives do not merely proclaim the basis for the system's, and its agents', authority, but establish, define and maintain the system itself, its community, agents and self-perceived boundaries.[401] These narratives determine the normative universe's core distinctions, setting apart: (a) the spatial, temporal and personal conditions under which the legal system exists;[402] (b) community members from non-

391 *Ibid.*
392 Cover, 'Nomos and Narrative' 1983/4 (n. 5), 14.
393 *Ibid.*, 17.
394 *Ibid.*
395 *Ibid.*, 22–52.
396 *Ibid.*, 22–8.
397 Bohrer, 'Obedience to Orders' 2012 (n. 69), 108–9.
398 Cover, 'Nomos and Narrative' 1983/4 (n. 5), 45–52.
399 Shaunnagh Dorsett and Shaun McVeigh, 'Questions of Jurisdiction', in Shaun McVeigh (ed.), *Jurisprudence of Jurisdiction* (Abingdon: Routledge, 2007), 3–18 (3).
400 *Ibid.*
401 *Ibid.*, 3–5.
402 *Ibid.*, 7.

members;[403] (c) authorised organs from those unauthorised to speak on behalf of the law;[404] (d) the legal from the political[405] and (more generally) from the non-legal.[406] The primary means used in core jurisdictional narratives to allocate legal authority is the 'categorization of persons, things, places and events'.[407]

When a core jurisdictional narrative is consensual, the legal community perceives its distinctions as 'organic' (clear-cut and nearly natural); the normative universe resembles the formalist account.[408] As diversity within the legal community increases, the organic conceptualisation of core jurisdictional narratives and their distinctions diminishes in several ways: (a) the placement of the boundaries defined by such narratives becomes disputed and less determinable;[409] (b) conflicting core jurisdictional narratives develop within the normative universe, each envisioning a different allocation of the power and authority to speak in the name of the law;[410] (c) because of the primary role of categorisations in allocating legal authority and power, contending factions propagate narratives that depict unfavourable distinctions and boundaries as 'synthetic' – that is, the products of policy or even of biased politics – which must be reformed. Note that the nature of a jurisdiction, distinction and boundary is usually neither organic nor synthetic in any objective sense; rather, its perception by community members determines it.[411]

In inter-system scenarios, the clash between conflicting core jurisdictional narratives is even more pronounced. To maintain their independence, normative systems must perceive themselves as superior to competitors. Therefore, the core jurisdictional narratives of contending legal systems clash, each one asserting superior or sole jurisdiction over the relevant people,[412] depicting its jurisdiction, with its related boundaries and classifications, as clear and organic, and that of its opponents as synthetic.[413] The shape of the jurisdictional wall, thus, 'differs depending upon which side of the wall our narratives place us'.[414]

[403] Costas Douzinas, 'The Metaphysics of Jurisdiction', in McVeigh (ed.), *Jurisprudence of Jurisdiction* 2007 (n. 399), 21–32 (23–4).
[404] *Ibid.*, 23–5.
[405] Lindsay Farmer, *Making the Modern Criminal Law* (Oxford University Press, 2016), 120.
[406] Douzinas, 'Metaphysics of Jurisdiction' 2007 (n. 403), 33.
[407] Dorsett and McVeigh, 'Questions of Jurisdiction' 2007 (n. 399), 5.
[408] Cover, 'Nomos and Narrative' 1983/4 (n. 5), 14.
[409] *Ibid.*, 31.
[410] *Ibid.*, 14–15.
[411] Ford, 'Law's Territory' 1999 (n. 12), 858.
[412] Bohrer, 'Obedience to Orders' 2012 (n. 69), 107–10.
[413] Ford, 'Law's Territory' 1999 (n. 12), 851; Douzinas, 'Metaphysics of Jurisdiction' 2007 (n. 403), 21–33.
[414] Cover, 'Nomos and Narrative' 1983/4 (n. 5), 31.

Diverging core jurisdictional narratives do not always lead to a CLS-like normative reality. Within a legal system's normative universe, such diverging narratives often exist because each faction, *ideally*, wishes to exclusively possess the legal power and authority to speak in the name of the system's law.[415] This narrative diversity unavoidably leads to some measures of legal uncertainty and tense cross-faction engagement.[416] But often, the different factions remain committed to sharing the normative universe. Narratives even develop that lead community members to accept unfavourable dominant narratives and norms because of second-order considerations (fairness, efficiency, pluralism, etc.).[417] Similarly, opposing legal systems often compromise, where each system accords primacy to some norms of the others.[418] Such compromises often include complementarity or *Solange* mechanisms: one system declares that it would grant primacy to *some* normative actions of the other even if they diverge from its preferred approach, as long as certain core principles are maintained.[419] Narratives, then, develop that enable people simultaneously addressed by both systems to accept the contradictions between the core jurisdictional narratives of the different systems. For example, various benefits are commonly presented in support of the coexistence of domestic and international law.[420]

In contrast, a *Core Jurisdictional Struggle* is likely, whenever factions attempt to fully realise their core jurisdictional narratives. Based on its core jurisdictional narratives, each faction dismissingly conceptualises its opponents' norms and narratives as non-legal (lacking the force of law) and even political (self-serving, unfair and biased).[421] The normative reality then matches the hardline CLS account: the factions are unconstrained by a shared normative corpus, and each perceives its opponents' actions as political and responds in kind. The law's semi-objective element vanishes: it no longer influences human behaviour. A core jurisdictional struggle, thus, places a legal system at a risk of dissolution.

There is an element of truth in the manner in which each side depicts its opponents. No legal system is perfect,[422] and no jurisprudential theory is

[415] *Ibid.*, 14–17.
[416] Orna Ben-Naftali and Rafi Reznik, 'The Astro-Nomos: On International Legal Paradigms and the Legal Status of the West Bank', *Washington University Global Studies Law Review* 14 (2015), 399–433 (409–10).
[417] Cover, 'Nomos and Narrative' 1983/4 (n. 5), 14–17.
[418] Bohrer, 'Obedience to Orders' 2012 (n. 69), 107–10.
[419] *Ibid.*
[420] See *ibid.*
[421] Ford, 'Law's Territory' 1999 (n. 12), 851; Douzinas, 'Metaphysics of Jurisdiction' 2007 (n. 403), 21–33.
[422] Asa Kasher, 'Refusals: Neglected Aspects', *Israel Law Review* 36 (2002), 171–80 (173).

consensual and flawless.[423] Therefore, any proclaimed basis for a legal system's authority can be 'shown to be of no value . . . from a certain point of view'.[424] There is also an element of truth in how each side depicts itself, downplaying its own flaws and considering them insufficient to permit disobeying its law; a wide consensus exists among jurisprudential scholars (irrespective of their school of thought) that 'under the legal systems we are familiar with [despite their imperfections], in most cases and for most individuals there is a moral obligation to obey the law'.[425] Since there is an element of truth in the manner in which each side depicts both itself and its opponents, an objective determination of which system should be preferred is often impossible; these decisions are guided instead by the narratives one comes to perceive as true.[426]

A. *US and International Law*

Before 9/11, IHL discourse was rather formalist.[427] Also, the domestic US legal system ascribed considerable primacy and respect to IHL.[428] After 9/11 this changed because the United States, as expressed in the torture memos, began to claim that: (a) it 'is faced with a new war . . . materially different from any [previous] war . . . [requiring] either new law or no law';[429] (b) '[i]nternational law does not apply as law, but rather (at most [and if at all]) as a matter of policy'.[430] Thus, the United States embraced legal positions that either dismiss wartime international law (as non-existent or not having the obligatory force of law), or assert complete authority to speak in its name. Additionally, two months after 9/11, the term 'lawfare' was coined by a high-ranking American officer.[431] Although this term is sometimes treated a neutral reminder that legal argumentation and advocacy are necessary for attaining one's wartime aims, it is mainly used as an accusation for inappropriate political manipulation of international law and wartime events.[432] In some cases, lawfare

[423] MacIntyre, *Whose Justice?* 1988 (n. 79), 1–11.
[424] Blaise Pascal, *Thoughts*, trans. C. Kegan Paul (London: Bell, 1901), 65 (*c.* 1669).
[425] Ruth Gavison, 'Natural Law, Positivism and the Limits of Jurisprudence', *Yale Law Journal* 91 (1982), 1250–85 (1279).
[426] MacIntyre, *Whose Justice?* 1988 (n. 79), 333; Ben-Naftali, 'Epistemology of the Closet of International Law' 2011 (n. 60), 534.
[427] Modirzadeh, 'Folk International Law' 2014 (n. 15), 235.
[428] *Ibid.*
[429] *Ibid.*, 233.
[430] *Ibid.*, 232.
[431] Charles Dunlap, 'Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts', 29 November 2001, available at: people.duke.edu/~pfeaver/dunlap.pdf.
[432] *Ibid.*; Orde Kittrie, *Lawfare* (Oxford University Press, 2015), 1–40.

accusations have merit.[433] In others, such accusations are merely a symptom of the lawyerly tendency to confuse one's *lex ferenda* with the actual *lex lata* (especially when the latter is 'objectively' unclear) and, consequentially, suspect that anyone thinking otherwise is intentionally distorting the law. Many cases are somewhere in between the two possibilities and their classification to either is likely to be disputed. But the United States bluntly exaggerated with its lawfare accusations, calling anyone criticising its disregard of wartime international law politically biased.[434] The US Ambassador to the UN, for example, stated that 'the goal of those who think that international law really means anything . . . [is] to constrict the United States'.[435] Even advancing international law-based justifications for US actions by the United States was merely considered 'a means of justifying [US] actions . . . in the world of international politics'.[436] An embrace of such legal positions by the most powerful member of the international legal community had to have a destabilising effect and invite counter-actions by other members. A core jurisdictional struggle was inevitable.

As noted, a legal system's core legal classifications are main battlegrounds during core jurisdictional struggles. Indeed, since 9/11, legal strategies have increasingly depended 'on diluting the boundaries between various fields of international law and diminishing the clarity of binding rules and fields of legal application'.[437] Thus, the current indeterminacy crisis concerning wartime international law distinctions is largely a manifestation of a core jurisdictional struggle over the power and authority to speak in the name of wartime international law.

Core jurisdictional struggles have grave side-effects. During a struggle the normative universe is inflicted with extensive uncertainty and cross-faction clashes. Even if won by a certain faction, such a struggle often results in the alienation of other factions, reducing their readiness to defer to the legal system.[438] But this does not mean that a core jurisdictional struggle should never be initiated; for the right cause, the aforesaid side-effects are worthwhile.

[433] E.g., 'UK Human Rights Lawyer Struck Off for Iraq War Allegations', Jurist.org, 2 February 2017, available at: www.jurist.org/paperchase/2017/02/uhKhuman-rights-lawyer-struck-off-for-iraq-war-allegations.php.

[434] Michael Scharf, 'International Law and the Torture Memos', *Case Western Reserve Journal of International Law* 42 (2009), 321–58 (328–9).

[435] Samantha Power, 'Boltonism', *New Yorker*, 21 March 2005, available at: www.newyorker.com/magazine/2005/03/21/boltonism.

[436] 'Bybee Memo' 2002 (n. 334), 23.

[437] Modirzadeh, 'Folk International Law' 2014 (n. 15), 229 (see also, pp. 299–303).

[438] Bordwell, *Law of War between Belligerents* 1908 (n. 98), 112; Cover, 'Nomos and Narrative' 1983/4 (n. 5), 31, 39.

Therefore, the question must be asked: why should we not embrace torture memo-like, hardline Statist positions? Many believe that 'attempts to regulate warfare based on humanitarian principles [are] doomed … and may exacerbate … violence'.[439] If true, are we not foolish to commit ourselves to IHL?

'Scepticism about the value of the law of war is nothing new.'[440] Carl von Clausewitz similarly believed that contemporary IHL did not truly restrict warfare, and opposed adopting restrictive IHL, because, in war, 'mistakes which come from kindness are the very worst'.[441] German General von Moltke stated in 1880 that IHL plays a limited role in lessening the evils of war and might even be counter-productive, because 'the greatest [humanitarian] benefit in war is that it be [quickly] terminated'.[442] During the nineteenth and early twentieth century, such positions influenced IHL, giving rise to considerably supported doctrines that promoted unconstrained warfare.[443]

But as a 2011 US military manual observed, the influence of such positions facilitated horrors that mark 'a dark era for the rule of law'.[444] As for von Moltke's claim, empirically, 'nobody has demonstrated that the presence or absence of IHL norms … causes or inhibits a speedy end to a war'.[445] Unconstrained warfare had in some past cases helped to achieve victory against non-State enemies; but in many others it backfired, only increasing popular support for the non-State enemy.[446] More generally, history demonstrates that often, once the commitment to IHL is abandoned, soldiers are swept up by the violence and commit horrific vengeful actions that are harmful to the war effort.[447]

Hardline Statist positions also undervalue IHL. A 2015 US military manual observed: 'Although critics of the regulation of warfare cite examples of violations of the law of armed conflict as proof of its ineffectiveness, a comprehensive view of history provides the greatest evidence of [its] overall validity.'[448] Past experience demonstrates that IHL moderates wartime actions more often than many assume.[449] The under-appreciation of many IHL

439 Gerald Steinberg, 'The UN, the ICJ and the Separation Barrier: War by Other Means', *Israel Law Review* 38 (2005), 331–47 (334).
440 Geoffrey Best, *Humanity in Warfare* (London: Weidenfeld & Nicolson, 1980), 10.
441 As quoted in Green, 'Enforcement of the Law' 1995/6 (n. 140), 286.
442 As quoted in Bordwell, *Law of War between Belligerents* 1908 (n. 98), 114–15.
443 Jeff A. Bovarnick *et al.*, *Law of War Deskbook* (Charlottesville, VA: US Army J.A.G., 2011), 14.
444 *Ibid.*, 14.
445 Steven Ratner, *The Thin Justice of International Law* (Oxford University Press, 2015), 388.
446 Molly Dunigan, *Victory for Hire* (Stanford University Press, 2011), 158.
447 Beer, 'Revitalizing the Concept of Military Necessity' 2015 (n. 136), 803–7.
448 Dowdy, *Deskbook* 2015 (n. 249), 8.
449 *Ibid.*; Best, *Humanity in Warfare* 1980 (n. 440), 9–11.

successes is probably the consequence of two related psychological biases: the 'availability heuristic' that leads individuals to overestimate the occurrence of vivid events (e.g., war crimes);[450] and the tendency to attribute insufficient importance to events that have not taken place ('non-events'), such as most cases in which IHL was not violated.[451] In sum, history illustrates that hardline Statist positions underestimate IHL's validity, overestimate the benefits of total warfare, and disregard the almost certain large-scale horrors of making no attempt to legally restrain warfare.

B. *The Second Eye of the Storm: IHRL*

As previously mentioned, popular history wrongly assumes that traditional international law did not address individuals. Its prevalence leads even most IHRL advocates to disregard pre-mid-twentieth-century influences of rights jurisprudence on IHL. The stronger influence of other jurisprudential narratives notwithstanding, over the centuries, various rights-oriented jurisprudential narratives influenced IHL.[452] But something has recently changed in that influence, because of the second instigator of the current core jurisdictional struggle: hardline IHRL advocacy rooted in a vision of IHRL as being at 'the heart of [all] international law'.[453] In IHL, this vision has found several expressions.

First, some IHRL advocates, like hardline Statists, reject the ability of international law to regulate combat behaviour. International law, they hold, should be as constraining as possible, because its only effective use is in politically denouncing and pressuring State agents to cease participating in wars. Extensively applying IHRL to wartime actions can enhance wartime international law as a denunciation means.[454] Although they would rarely admit it, *some* such IHRL advocates allow themselves to 'creatively' interpret legal norms and even the case-specific facts, so as to increase their ability to denounce State agents.[455] Such manipulations, which often accuse the relevant State agents of war crimes, have the potential to instigate a core jurisdictional struggle if used extensively, because

[450] See David Ahlstrom and Garry Bruton, *International Management* (Mason, OH: South-Western, 2010), 278–9.

[451] See James Parkin, *Judging Plans and Projects* (Ann Arbor, MI: Avery, 1993), 42.

[452] See Philip Alston, 'Book Review: Does the Past Matter? On the Origins of Human Rights', *Harvard Law Review* 126 (2013), 2043–81 (2068); Trainin, 'Questions of Guerrilla Warfare' 1946 (n. 49), 561; Maine, *Ancient Law* 1908 (n. 109), 105.

[453] Odello and Cavandoli, 'Introduction' 2011 (n. 365), 1.

[454] E.g., Samuel Moyn, 'From Aggression to Atrocity: Rethinking the History of International Criminal Law', in Markus D. Dubber and Tatjana Hörnle (eds.), *Oxford Handbook of International Criminal Law* (Oxford University Press, forthcoming).

[455] E.g., Jurist.org, 'Human Rights Lawyer Struck Off' 2017 (n. 433).

even State agents are likely to push back when increasingly vilified. Additionally, such manipulations can turn their makers' disbelief in IHL's validity into a self-fulfilling prophecy. Research indicates that soldiers are more likely to abide by IHL when they believe that it contains moral laws originating in a *fair* system.[456] Denunciation-motivated political manipulation of the law and facts can diminish soldiers' perception of IHL as such. Because of such concerns, traditionally, humanitarian NGOs, such as the ICRC, have been reluctant to use IHL as a means of denunciation.[457] But, rights-oriented organisations began making such use of IHL in the 1960s–1970s; both the influence of these organisations and their denunciation-use of IHL increased in the 1990s, and has been further increasing since the 2000s.[458] To be clear, too many denunciations are justified and most IHRL advocates do not support political over-manipulation of wartime law and facts. However, such denunciation-motivated manipulations have increased and that has contributed greatly to the current crisis: weakening IHL's normative force and serving as an excuse for hardline Statists to respond in kind.

Secondly, many IHRL advocates *do* believe that international law can influence combat behaviour, though they too believe that IHL is insufficiently effective in diminishing wartime suffering. Hence, they hold that IHRL should replace IHL in regulating wartime conduct.[459] Such views also have the potential of instigating a core jurisdictional struggle if a strong attempt is made to implement them, because they try to generate 'not merely a shift in emphasis[,] but a regime change'.[460]

An ostensibly more moderate IHRL advocacy favours the co-application of IHL and IHRL.[461] Its mildest version 'only' (a) considers IHRL the primary normative guide to interpreting IHL,[462] and (b) interprets the *lex specialis* doctrine (where IHRL applies in wartime, unless barred by specific IHL) in a manner that rarely considers IHL as barring IHRL. This interpretation of the

[456] Ziv Bohrer, 'Is the Prosecution of War Crimes Just and Effective? Rethinking the Lessons from Sociology and Psychology', *Michigan Journal of International Law* 4 (2012), 749–819 (788–800).

[457] Kennedy, 'Distinguishing the Military and Humanitarian Professions' 2007 (n. 112), 12.

[458] Moyn, 'From Aggression to Atrocity' forthcoming (n. 454), 28–32.

[459] Aurel Sari, 'The Juridification of the British Armed Forces and the European Convention on Human Rights: "Because It's Judgment that Defeats Us"' (2014), 20 March 2014, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411070.

[460] Yoram Dinstein, 'Concluding Remarks: LOAC and Attempts to Abuse or Subvert It', *International Law Studies* 87 (2011), 483–94 (492).

[461] Robert Kolb, 'Human Rights and Humanitarian Law', in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (online edn.), March 2013, paras. 27–43.

[462] *Ibid.*, paras. 35–7.

lex specialis doctrine gradually leads IHRL to become the primary normative source for addressing gaps in IHL, a role traditionally reserved for internal IHL norms (the Martens Clause principles, the adaptation approach, etc.).[463] Such actions are steadily changing the nature of IHL, making it increasingly rights-oriented. This 'righting' even increasingly leads IHRL advocates to hold that the correct way to conceptualise IHL is as 'IHRL in Times of Armed Conflicts'.[464] Or, as my colleague Helen Duffy phrased it:[465]

> The starting point for an assessment of the relationship between IHL and IHRL is what has been called the theory of complementarity, which … 'means that human rights law and humanitarian law do not contradict each other but, being based on the same principles and values, can influence and reinforce each other mutually.'

But, as David Luban points out, this 'righted' conceptualisation of IHL attempts to change the nature of IHL by retroactively reinterpreting IHL in a manner that transforms IHRL into the primary jurisprudence shaping wartime international law, disregarding other, stronger long-standing jurisprudential influences.[466] Thus, it constitutes an IHRL-motivated attempt to obtain primary, if not sole, power and authority to speak in the name of wartime international law. Therefore, both co-application and substitution approaches have the potential to instigate a core jurisdictional struggle if attempts are made to apply them extensively.

Such attempts have been made since the 1960s, with a significant breakthrough in the mid-1990s when international judicial forums began expressing support for such views.[467] Their realisation has drastically intensified since the early 2000s.[468] One likely reason for this intensification is the increasing support for rights-based moral philosophy; namely, it is possible that IHL sceptic, IHRL advocates are more influential today than in the past.[469] But other reasons have led many jurists to support extensive co-application and substitution approaches. Although the rise of modern IHRL began after

[463] *Ibid.*, paras. 33–4; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press, 2011), 249–60.
[464] Kolb, 'Human Rights' 2013 (n. 461), para. 38.
[465] Duffy, in this volume, 72 (quoting Droege).
[466] Luban, 'Human Rights Thinking' 2016 (n. 4), 50.
[467] Kolb, 'Human Rights' 2013 (n. 461), paras. 16–26.
[468] Oona Hathaway *et al.*, 'Which Law Governs during Armed Conflict? The Relationship between International Humanitarian Law and Human Rights Law', *Minnesota Law Review* 96 (2012), 1883–1943 (1884–5).
[469] See Dinstein, 'Concluding Remarks' 2011 (n. 460), 492.

the Second World War, until the 1990s the implications for a State being deemed an IHRL violator were much weaker than today.[470] IHL was also, arguably, weaker than today, nevertheless the stigma for violating IHL was non-negligible (following the trauma of the Second World War).[471] Therefore, States, wishing to evade legal scrutiny often employed a legal tactic of insisting that they were involved in violence that does not constitute an 'armed conflict', rather 'peacetime disturbance' (i.e., IHRL, but not IHL, applies).[472] Many of those wishing to counteract this evasion by States and to maximise legal scrutiny and civilian protection employed an opposite legal tactic of asserting that IHL, not IHRL, regulates borderline situations between 'armed conflict' and 'peacetime disturbance' – they preferred that tactic to expanding IHRL application because of 'the lack of a … human rights … operational body' (as ICRC Vice-President Pictet explained in 1975).[473] Ironically, after 9/11, the roles have, somewhat, switched. First, the influence of international judicial forums has been on the rise since the 1990s, and most international judicial forums to which those wishing to maximise legal scrutiny and civilian protection can, presently, turn to are regarded as having a subject-matter jurisdiction that is limited to IHRL. Secondly, the United States (and others) did not deny the existence of 'war' to evade legal constrains and judicial scrutiny; instead, they proclaimed engagement in a novel war that existing IHL is unfit to address. In the context of these two elements, many jurists have come to embrace extensive co-application and substitution approaches not out of a devout disbelief in IHL, rather out of fear that but for such an extensive IHRL-based framing of wartime actions, judicial scrutiny of these actions would be unavailable.[474] The fact that many have embraced such approaches for such reasons, means that they might embrace an alternative (non-IHRL) approach if it would bolster judicial scrutiny (and an attempt to present just such an alternative is made later herein). Yet, at present, the significant point is that, irrespective of the motivation behind one's support for extensive co-application and substitution approaches, the practical result is that international judicial forums increasingly scrutinise States' wartime actions and most of these forums are regarded as having a subject-matter jurisdiction that is limited to IHRL. As Rafi Reznik and Orna Ben-Naftali noted:[475]

[470] Niels Beisinghoff, *Corporations and Human Rights* (Frankfurt am Main: Peter Lang, 2009), 8–15.
[471] Pictet, *Humanitarian Law* 1975 (n. 33), 58.
[472] *Ibid.* Some States still employ such a legal tactic.
[473] *Ibid.*, 60.
[474] See Modirzadeh, 'Folk International Law' 2014 (n. 15), 299–303.
[475] Ben-Naftali and Reznik, 'Astro-Nomos' 2015 (n. 416), 409–10.

> Given that alternative visions . . . exist and that the normative world [of a legal system] . . . bridges . . . vision and reality, any attempt to advance a revisionist interpretation requires an engagement with alternative visions and the meaning they invest in the normative world. Such engagement, as tense and wrought with conflicts as it surely is, is nevertheless a *sine qua non* condition for sharing a [normative universe].

As wartime international law is being evermore shaped in forums where the influence of non-IHRL visions of that law is very weak, a revisionist legal interpretation is being increasingly forced upon IHL's normative universe through institutional mechanisms that do not facilitate engagement with long-standing alternative (non-IHRL) visions. This development has been a primary cause for the current core jurisdictional struggle.

But what is wrong with granting an IHRL-oriented approach primary authority to speak in the name of wartime international law? Supporters of this move, such as my colleague Helen Duffy, believe that it would increase civilian protection.[476] Yet it actually diminishes that protection. As explained below, this counter-intuitive result stems from a core difference between IHL and IHRL: the former being obligations-based and the latter rights-based. Stated differently, like my colleague Janina Dill (though for different reasons), my analysis shows that, in wartime, compared with IHRL, 'IHL currently offers a better, but far from morally ideal, law'.[477]

1. IHL versus IHRL: Obligations versus Rights

According to the Hohfeldian theorem, for every right there is a corollary obligation.[478] This theorem leads some to unreflectively assume that rights and obligations orientations are interchangeable.[479] This is false, if only because of the incompatibility between rights-orientations and 'imperfect obligations' (in the previously explained sense of that term).[480] A core premise of rights-oriented legal regimes is that individuals' rights are the root of, any and all, obligations of others. In sharp contrast to that core premise, the benefits of imperfect obligations are not allocated to any specified recipients (no one has a correlating 'right' to such obligations). Therefore, rights-oriented

[476] Duffy, in this volume, Chapter 1, *passim*.
[477] Dill, in this volume, 201.
[478] Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions* (New Haven, CT: Yale University Press, 1919), 38.
[479] Moodrick-Even-Khen, 'Obligations at the Border Line' 2005 (n. 115), 478.
[480] Above nn. 117–22.

legal regimes, unlike obligation-oriented regimes, simply cannot sustain imperfect obligations.[481]

There is also a less apparent reason that refutes even the narrower, more accepted assumption that rights and obligations orientations are interchangeable in relation to 'perfect obligations' and 'rights' (as they do correlate).[482] In practice, as Cover observed:[483]

> There are certain kinds of problems which a jurisprudence of [obligations] manages to solve rather naturally. There are others which present conceptual difficulties of the first order. Similarly, a jurisprudence of rights naturally solves certain problems while stumbling over others ... It is not ... that particular problems cannot be solved, in one system or the other – only that the solution entails a sort of rhetorical or philosophical strain.

The orientation of each legal system, rights or obligations, is related to certain fundamental jurisdictional narratives (the system's 'formative stories').[484] These narratives are so strongly embedded in the system's normative universe that community members tend to treat the jurisdictional landscape they create – rules, principles, institutions, distinctions, boundaries, etc. – as 'organic' (semi-natural and objective).[485] The problems that a legal system manages easily are those whose solution derives naturally from the landscape.[486] Solutions that do not derive naturally from the system's core narratives tend to be disputed and raise conceptual difficulties; the reasoning that could be presented for any potential solution involves rhetorical and philosophical strains.[487]

Rarely are formative stories fully coherent. Because they are the product of a continuous social discourse, they tend to incorporate elements of diverse jurisprudential origins. The conceptual difficulties and strains of some legal problems stem from such jurisprudential incoherence.[488] Incoherence can also be the result of communal diversity giving rise to diverging understandings of the fundamental jurisdictional narrative, and even to conflicting

[481] O'Neill, 'Rights, Obligations and World Hunger' 2008 (n. 109), 152.
[482] Hans Kelsen, *General Theory of Law and State* (Cambridge, MA: Harvard University Press, 1945), 77.
[483] Robert Cover, 'Obligation: A Jewish Jurisprudence of the Social Order', *Journal of Law and Religion* 5 (1987), 65–74 (70–1).
[484] *Ibid.*, 65; Cover, 'Nomos and Narrative' 1983/4 (n. 5), 54.
[485] Ford, 'Law's Territory' 1999 (n. 12), 850–1.
[486] *Ibid.*, 865.
[487] Cover, 'Obligation' 1987 (n. 483), 70–1; O'Neill, 'Rights, Obligations and World Hunger' 2008 (n. 109), 150.
[488] Maine, *Ancient Law* 1908 (n. 109), 19–38, 64–5.

narratives. Often a jurisdictional discourse has 'multiple, malleable and even contradictory [narrative effects]',[489] instead of 'straightforward … "logical consequences"'.[490]

Cover observed that the original 'story behind the term "rights" is the story of social contract':[491]

> The jurisprudence of rights … has gained ascendance in the Western world together with the rise of the national State with its almost unique mastery of violence over extensive territories … [I]t has been essential to counterbalance the development of the State with a myth which … establishes the State as legitimate only in so far as it can be derived from the autonomous creatures who trade in their rights for security …

This brief account already reveals incoherence. First, rights jurisprudence embraces two potentially conflicting visions of rights: (a) rights existing in the 'state of nature'; and (b) rights stemming from the social contract (thus not universal). The conflict between the universalist and Statist visions is further evident in the wide range of positions about classification of different rights, with some jurisprudential versions going as far as to perceive the 'state of nature' as being practically devoid of rights.[492] In IHRL's normative universe, this issue manifests in a tension 'between the universal aspiration of human rights to apply to everyone in all situations, and the fact that human rights discourse is built upon the model of a relationship between an accountable state and its citizens'.[493] Secondly, rights jurisprudence includes three potentially conflicting visions of the benchmark for defining a legal system's jurisdiction. *Citizenship-based* jurisdiction derives naturally from social contract jurisprudence;[494] *universal* jurisdiction derives naturally from universalist rights jurisprudence;[495] yet, currently, a *territorial* jurisdictional benchmark has priority, and it owes much of its development to non-rights jurisprudences that also contributed to the rise of modern States (notably, Statist-positivism).[496] Despite all these elements of incoherence, there is still considerable

[489] Ford, 'Law's Territory' 1999 (n. 12), 864.
[490] *Ibid*.
[491] Cover, 'Obligation' 1987 (n. 483), 66–9.
[492] Luban, 'Human Rights Thinking' 2016 (n. 4), 50.
[493] Aeyal M. Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?', *European Journal of International Law* 18 (2007), 1–35 (33).
[494] Lea Brilmayer, 'Consent, Contract and Territory', *Minnesota Law Review* 74 (1989), 1–35 (10–11).
[495] Milanovic, *Extraterritorial Application of Human Rights Treaties* 2011 (n. 463), 55.
[496] Richard Ford, 'Law and Borders', *Alabama Law Review* 64 (2012), 123–39 (134).

commonality between the different visions of rights and jurisdictions. Therefore, rights-based systems can solve various problems naturally.

What is IHL's formative story? (a) The humanitarian legend that 'modern IHL began when . . . Dunant visited . . . Solferino'?[497] (b) The Statist-positivist myth that modern IHL began once international law was acknowledged, 'through the Peace of Westphalia [treaties]',[498] as being based on the actual 'relations among States'?[499] (c) The credit-hogging knights' tale that IHL has been 'developed by warriors for warriors'?[500] (d) The 'righted' story about IHL becoming 'IHRL in Times of Armed Conflicts' (which 'drifts far from . . . [IHL's actual] history')?[501] A normative universe encompasses 'various genres of narrative[s] [including] history [and] fiction'.[502] Therefore, it is not inaccuracy, but insufficient dominance that prevents each of these narratives from becoming *the* formative story of IHL.

But IHL is not bereft of a formative story. As David Luban points out, nearly 'everyone who participates in the project of furthering humanitarian law shares . . . a commitment to eliminate unnecessary suffering and destruction'.[503] Military lawyers and commanders may consider it a matter of honour; IHRL advocates as a part of a larger human rights project; humanitarians also consider it a part of a human rights project or a distinct moral duty; and even cynics who do not think that individuals matter much may 'still favor regulating war to minimize suffering and destruction'.[504] IHL, thus, has a widely accepted, minimalist formative story, according to which a primary motivation for its formation has been a normative *obligation* to strive to reduce wartime suffering and destruction.

Another, less 'romantic', explanation also leads to the conclusion that IHL is primarily an obligations-based system. As discussed, IHL has its origins in the mainly obligations-oriented, medieval European status-based socio-legal structure, and because jurisprudential diversity has always been extensive, legal practices and customs constituted a more important source for IHL, leading IHL to exhibit remarkable continuity. Hence, to this day, IHL remains primarily obligations-oriented (and also, considerably, status-based).[505]

497 Luban, 'Human Rights Thinking' 2016 (n. 4), 50.
498 Dowdy, *Deskbook* 2015 (n. 249), 12.
499 *Ibid.*
500 Scott Morris, 'The Laws of War: Rules by Warriors for Warriors', *Army Lawyer* (1997), 4–13 (13).
501 Luban, 'Human Rights Thinking' 2016 (n. 4), 50.
502 Cover, 'Nomos and Narrative' 1983/4 (n. 5), 10.
503 Luban, 'Human Rights Thinking' 2016 (n. 4), 50.
504 *Ibid.*
505 See *supra*, Section II.C.

2. Extraterritorial Action

As noted, the formative story of rights-based systems incorporates two potentially conflicting visions of rights and three potentially conflicting jurisdictional visions. When it comes to State actions committed within its sovereign territory and affecting its citizens, all the aforesaid visions generally concur that a State is duty-bound to secure the rights of those affected. In contrast, the different jurisdictional visions commonly differ on extraterritorial State actions, and when non-citizens are the ones affected the two visions of rights potentially diverge. Stated differently, in the context of extraterritorial State actions that affect non-citizens, tension arises between the core Statist and the core universalist elements of the normative universe.[506] Therefore, in a rights-oriented system, attempts to resolve problems that arise in such a context will likely exhibit conceptual difficulties, vagueness, disagreements and strained reasoning.

For example, international human rights courts ruled inconsistently on whether pilots (State agents) exercise, during extraterritorial aerial warfare, sufficient public authority and control for *State* jurisdiction to come into existence and give rise to a duty to safeguard the rights of affected non-citizens. If such a duty does not arise for a State party to the treaty creating the IHRL tribunal, that tribunal does not have subject-matter jurisdiction over the case. One international human rights court was more influenced by the Statist elements of rights jurisprudence and interpreted the concept of 'State jurisdiction' as primarily referring to the State's sovereign territory; it, therefore, considered that concept inapplicable to extraterritorial aerial warfare actions.[507] Another international human rights court was more influenced by the universalist elements of rights jurisprudence, and was therefore inclined to regard 'State jurisdiction' as determined by the extent of the influence State agents exert on the relevant individuals; consequently, it ruled that such jurisdiction exists in extraterritorial aerial warfare actions.[508] Attempts to create an intermediate approach differentiating between degrees of control and authority have proven difficult and 'dra[w] arbitrary distinctions'.[509]

Obligations-oriented systems are much less influenced by territorial boundaries, because obligations are attached to the obligation-bearers and, as such,

[506] Milanovic, *Extraterritorial Application of Human Rights Treaties* 2011 (n. 463), 76–83.
[507] ECtHR, *Banković v. Belgium*, Grand Chamber Judgment of 12 December 2001, No. 52207/99, paras. 59–73.
[508] IACHR, *Alejandre v. Cuba*, Judgment of 29 September 1999, No. 86/99, para. 23.
[509] EWCA, *Al-Saadoon & Ors v. Secretary of State for Defence*, Judgment of 17 March 2015, para. 102.

tend to follow them.[510] Consider, the Israeli Supreme Court position regarding judicial review of extraterritorial air bombings. In the light of the obligations-orientation of IHL, that court has long ruled that 'every Israeli soldier carries in his backpack . . . the law of war' (i.e., Israeli soldiers are *obligated* by IHL wherever they go).[511] Additionally, that court has long regarded itself as having the constitutional 'role of safeguarding the rule of law . . . [which] means . . . that it must [always] . . . ensure that the [Israeli] government acts in accordance with the law'.[512] Based on these two obligations-based precepts, the Israeli Supreme Court easily saw itself as authorised to review Israeli extraterritorial air bombings (after all, if (a) the court is obligated to review all (Israeli) State actions that are regulated by law, and (b) IHL is a law that regulates wartime actions of State agents (obligates them) wherever they go, then (c) the court is obligated to review the IHL adherence of State wartime actions, wherever they are performed).[513]

According to some, the proper way to solve the indeterminacy arising when IHRL is used to regulate extraterritorial State actions is to embrace a purely universalist approach that holds each State duty-bound by IHRL in relation to whomever it affects (or at least harms).[514] But opponents argue that purely universalist approaches impose unrealistic demands on States, especially during war,[515] and fail to grasp the nature of rights (which, according to such opponents, presupposes a unique relationship between the rights-bearers and those duty-bound to protect them).[516]

Irrespective of the above dispute, purely universalist approaches are unlikely to improve legal clarity because of the nature of the benchmarks upon which they rely. What kinds of relations (proximal, temporal, physical and, also, normative) need to exist in order for one's actions to be regarded as (a) having affected, or (b) being responsible for, another's condition? Try to answer and you will quickly find yourself facing a terminological and conceptual

[510] Naz Modirzadeh, 'The Dark Sides of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict', *International Law Studies* 86 (2010), 349–410 (352–5).

[511] HCJ, *Jamait-Askan v. IDF*, Judgment of 28 December 1983, No. 393/82, 810.

[512] HCJ, *Ressler v. Minister of Defence*, Judgment of 12 June 1988, No. 910/86, para. 23. See also, *ibid.*; and *infra*, 192–4.

[513] HCJ, *B'Tselem v. Military Advocated General*, Judgment of 21 August 2011, No. 9594/03. This petition was rejected on its merits; but only after the Court pressured the military to considerably change its policy.

[514] Milanovic, *Extraterritorial Application of Human Rights Treaties* 2011 (n. 463), 55.

[515] Michael Dennis, 'Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict', *Israel Law Review* 40 (2007), 453–502 (473).

[516] Modirzadeh, 'Dark Sides of Convergence' 2010 (n. 510), 371–4.

maze. The theoretical disagreements regarding the proper basis for determining responsibility are extensive and so are those regarding the basis for determining causation; likewise, the practical difficulties in making such determinations in actual cases are often considerable. These issues are chronically fraught with indeterminacy.[517] This is not to say that a legal policy that demands the determination of responsibility or causation should never be adopted, only that such a policy should be expected to suffer from considerable indeterminacy.

Another problem with universalist approaches stems from their synthetic narratives of State jurisdiction, according to which international law can define and redefine that concept as it wishes.[518] Proponents of such synthetic narratives ignore the point that the formative stories of domestic legal systems conceptualise State jurisdiction as organic and primarily territorial.[519] As a result, most people are so 'accustomed to territorial jurisdiction . . . that it is hard [for them] to imagine that governments could be organized any other way'.[520] Thus, a strong attempt to implement the synthetic conceptualisation of State jurisdiction is likely to lead to a core jurisdictional struggle between IHRL and domestic legal systems.

Fully embracing a territory-oriented Statist vision of rights fares no better. According to this vision, the recognition of universal inalienable rights does not mean that agents of all States are under a duty to protect these rights. Each State is responsible only for securing the rights of individuals found in territories under its rule;[521] namely, its sovereign territory[522] and, according to many,[523] also territories it holds under belligerent occupation (as the occupier is the temporary ruler of the occupied territory).[524] The role of the IHRL regime is to ensure that no State shirks its territory-bound duty to protect human rights.[525] Supporters claim that reliance on such a territorial benchmark guarantees universal protection of rights and prevents indeterminacy about responsibility to secure the rights in each case, because it 'divide[s] between nations the space upon which human activities are employed, in

[517] Antony Honoré, 'Causation in the Law', in Edward N. Zalta (ed.), *Stanford Encyclopedia of Philosophy* (online edn.), winter 2010.
[518] Milanovic, *Extraterritorial Application of Human Rights Treaties* 2011 (n. 463), 23, 54.
[519] Ford, 'Law's Territory' 1999 (n. 12), 843, 852.
[520] *Ibid.*, 843.
[521] See Vattel, *Law of Nations* 1797 (n. 119), 107.
[522] Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights', *Leiden Journal of International Law* 25 (2012), 857–84 (859); ECtHR, *Banković v. Belgium* (n. 507), paras. 59–73.
[523] But see, e.g., Modirzadeh, 'Dark Sides of Convergence' 2010 (n. 510), 363–7.
[524] See sources cited in *Public Commission to Examine the Maritime Incident of 31 May 2010: Second Report* (Israel, 2013), 64, 67 ("Turkel Report').
[525] Besson, 'Extraterritoriality of the European Convention' 2012 (n. 522), 863–4.

order to assure them at all points the minimum of protection of which international law is the guardian'.[526] But this claim is false. Various State actions negatively affect the human rights of non-citizens abroad, and there are strong moral reasons against leaving such non-citizens unprotected.

Given the flaws of both fully universalist and fully Statist approaches, many support a middle-ground approach that (a) regards 'State jurisdiction' as a conceptual constraint, but attempts to define it broadly, or (b) applies only some rights in only some extraterritorial wartime situations.[527] But such approaches have proven to be ambiguous and normatively incoherent.[528] Namely, the legal solutions they offer suffer from conceptual difficulties and involve jurisprudential strains; unsurprisingly so, given that these approaches attempt to balance conflicting visions of rights and of jurisdiction.

If I must choose, I would prefer some ambiguous middle-ground approach over either two polar extremes of fully and of never extraterritorially applying IHRL in wartime. But such a choice is unnecessary, because there is still another alternative: rely primarily on IHL, having properly interpreted and developed it. IHL's indifference to extraterritoriality is but one advantage.

3. Focusing on Obligation-Bearers

Because obligations-based systems focus on the obligation-bearer, they tend to be more attentive than rights-based systems to delineating the agent responsible for performing each legally prescribed act (i.e., the obligation-bearer).[529] Therefore, situations where the law has prescribed an act but the identity of the agent responsible for performing it is unclear are more likely in rights-based systems.[530]

The case of *Jaloud v. the Netherlands* illustrates this issue:[531]

[526] Permanent Court of Arbitration, *Island of Palmas* (Netherlands v. USA), Arbitral Award of 4 April 1928, *Reports of International Arbitral Awards* II, 839.

[527] E.g., ECtHR, *Al-Skeini v. United Kingdom*, Grand Chamber Judgment of 7 July 2011, Application No. 55721/07, paras. 130–50.

[528] Besson, 'Extraterritoriality of the European Convention' 2012 (n. 522), 858; Modirzadeh, 'Dark Sides of Convergence' 2010 (n. 510), 370–3.

[529] O'Neill, 'Rights, Obligations and World Hunger' 2008 (n. 109), 149.

[530] Cover, 'Obligation' 1987 (n. 483), 71–2. Note that both Raz and Peters argue that this non-specification makes 'rights' a more flexible paradigm than 'obligations', because it enables the 'dynamic' creation of new correlative obligations and of new obligation-bearers; Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 170–1, 184; Peters, *Beyond Human Rights* 2016 (n. 120), 540–1. But, in practice, this non-specification leads to insufficient thought regarding who is obligated to fulfil the rights and in what manner; Cover, *ibid.*; Onora O'Neill, 'The Dark Side of Human Rights', *International Affairs* 81 (2005), 227–39.

[531] ECtHR, *Jaloud v. the Netherlands*, Grand Chamber Judgment of 20 November 2014, Application No. 47708/08, paras. 10–13.

> On 21 April 2004, at around 2.12 a.m., an unknown car approached a vehicle checkpoint (VCP) [located in] south-eastern Iraq [and] fired at the personnel guarding the VCP, all of them members of the Iraqi Civil Defence Corps (ICDC). The … car drove off and disappeared … [A] patrol of six Netherlands soldiers led by Lieutenant A. arrived on the scene at around 2.30 a.m. … fifteen minutes later a Mercedes car approached the VCP at speed. It hit one of several barrels … form[ing] the checkpoint, but continued to advance. Shots were fired at the car: Lieutenant A. fired … [and] shots may also have been fired by … ICDC personnel … At this point the driver stopped … Jaloud, [a] passenger [inside] the car [was] hit [and] died.

Dutch authorities investigated the incident, determining that there was no misconduct. But the investigation was flawed: evidence, documents and witnesses were mishandled.[532] The right to life places a State under a duty to carry out an effective investigation when its agents use deadly force. The European Court of Human Rights (ECtHR) had already ruled in earlier cases that this duty may arise even during war.[533] The Netherlands was found to have violated Jaloud's right to life.[534]

In reaching the intuitively correct outcome of holding the Dutch accountable for mishandling the investigation, the ECtHR faced grave conceptual difficulties. According to the European Human Rights Convention, State 'Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in … th[e] Convention.'[535] The United States was the belligerent occupier of Iraq at large. Britain was the occupier of the relevant region, and Dutch forces were merely assisting them, receiving their day-to-day orders from the British (the Netherlands relinquished operational control over its forces). Furthermore, the Dutch forces did not regularly operate the checkpoint, arriving only 15 minutes earlier to aid Iraqi forces.[536] On what basis, then, could it be concluded that Jaloud was within *Dutch* jurisdiction?

Traditionally, the ECtHR definition of State jurisdiction was primarily territorial: the Court was reluctant to hold a State responsible unless actions were committed within its sovereign territory or a territory under its belligerent occupation. Over time, an exception was acknowledged for cases where State agents detained individuals extraterritorially, because it was held that in such

[532] *Ibid.*, paras. 39–48, 183–228.
[533] E.g., ECtHR, *Al-Skeini v. United Kingdom* (n. 527), paras. 163–7.
[534] ECtHR, *Jaloud v. the Netherlands* (n. 531), paras. 226–8
[535] Article 1 [European] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221. Similar articles exist in most IHRL treaties; Milanovic, *Extraterritorial Application of Human Rights Treaties* 2011 (n. 463), 11–17.
[536] ECtHR, *Jaloud v. the Netherlands* (n. 531), paras. 10, 44–5, 53–63.

cases the State, through its agents, exerts such power and control over the detainees that it brings them *personally* under the State's jurisdiction.[537]

In *Jaloud*, however, the ECtHR ruled that Dutch jurisdiction existed although the action did not fall within its territorial or personal jurisdiction, as these concepts were traditionally defined.[538] The Court determined that a State does not become divested of its jurisdiction merely by deferring operational control to another State, particularly in the case at hand, because the Dutch retained the power to determine the overall policy of their forces and because they assumed sole responsibility for the area. But these elements of control were insufficient for Dutch jurisdiction to exist. The determining factor, it seems, was that the checkpoint was manned by personnel under Dutch command. Namely, it was ruled that the public authority exercised over the small territory of the checkpoint was sufficient to deem those passing through to be under Dutch territorial jurisdiction.[539]

Presenting a legal basis for such a definition of State jurisdiction demanded conflating three distinct concepts of 'control': (a) effective State control over a *territory*: the IHL benchmark for determining belligerent occupation (a situation widely held to fall under the definition of the State's *territorial jurisdiction* for IHRL purposes); (b) effective (or overall, according to some) State control over an *organ*: a benchmark of general international law for determining State responsibility for international wrongs (determining that perpetrators are *de facto* State organs); (c) State control and authority over a *person*: the IHRL benchmark for determining that an individual is *personally* within a State's jurisdiction.[540] Because of this conflation, as even some of the judges in *Jaloud* partially admitted, 'the judgment setting out the relevant international law is ambiguous' and 'conceptually unsound'.[541]

The ambiguity in *Jaloud* is not isolated.[542] It is the result of another tension within IHRL's normative universe. As d'Aspremont explains, IHRL's successful expansion rests on the jurisprudential coexistence of two potentially opposing claims: (a) 'exceptionalist claims', conceptualising IHRL as distinct from, and even superior to, general international law; and (b) 'generalist claims',

[537] See ECtHR, *Al-Skeini v. United Kingdom* (n. 527), paras. 130–50 (and sources cited there).
[538] Deviation from the traditional definitions began earlier, see, e.g., *ibid.*, paras. 130–50.
[539] ECtHR, *Jaloud v. the Netherlands* (n. 531), paras. 112–53 (the Court's ambiguous discussion may be open to other interpretations).
[540] *Ibid.* The conflation began earlier; see Milanovic, *Extraterritorial Application of Human Rights Treaties* 2011 (n. 463), 21–53.
[541] ECtHR, *Jaloud v. the Netherlands* (n. 531), Concurring Opinion of Judges Spielmann and Raimondi, paras. 5, 7.
[542] Milanovic, *Extraterritorial Application of Human Rights Treaties* 2011 (n. 463), 41.

conceptualising IHRL as being part of general international law.[543] Whenever the rules of general international law place an obstacle before expanding IHRL application, giving primacy to a competing (non-IHRL) international law, the exceptionalist claims help to override these formal rules. The generalist claims help to expand IHRL influence, whenever the rules of general international law do give primacy to IHRL over a competing international law. IHRL reasoning switches between the two types of claims, without sufficient concern for the ensuing inconsistency. Legal concepts like 'control', '*lex specialis*' and 'jurisdiction' are defined, redefined, embraced and discarded almost on a case-by-case basis, because, in each case '[l]egal categories … are consciously and carefully used in a way that inflates the size of IHRL'.[544]

But the ambiguity resulting from *Jaloud* goes further. The ruling makes it impossible to distinguish the Dutch case from that of the other States involved. This forced the ECtHR to accept the possibility that other States 'might have exercised concurrent jurisdiction'.[545] As noted, situations of indeterminacy regarding the identity of the agent responsible for performing the legally prescribed act are more likely to occur in rights-based systems. Often, in such situations, each potentially relevant agent tries 'to foist the responsibility off to someone else'.[546] The ECtHR's acceptance of the possibility that several States could be held responsible seemingly reduces this concern – but it does the opposite. Uncertainty regarding the conditions under which State jurisdiction materialises may tempt each State to assume that jurisdiction (i.e., a duty to investigate) has not materialised in its case. Moreover, simultaneous independent investigations of the same case are, usually, detrimental to truth-finding efforts; the aspiration to avoid such situations provides an excuse for each State not to start its own investigation.

In contrast, commanders' duty to enforce IHL is strongly embedded in IHL's normative universe,[547] as it was from its inception.[548] Historically, *ius in bello* was primarily under the jurisdiction of the military justice systems, and the original jurisprudential basis for creating these distinct systems was the convention that kings and commanders were not only domestic agents, but

[543] Jean d'Aspremont, 'Expansionism and the Sources of International Human Rights Law', *Israel Yearbook on Human Rights* 46 (2016), 223–42 (223).
[544] *Ibid.*, 242.
[545] ECtHR, *Jaloud v. the Netherlands* (n. 531), para. 153.
[546] Cover, 'Obligation' 1987 (n. 483), 71–2.
[547] Turkel Report 2013 (n. 524), 73–82.
[548] Oded Mudrik, *Military Justice* (Tel Aviv: Bursi, 1993), 17–21 (in Hebrew).

also high-ranking members of the transnational professional warrior guild, duty-bound, as such, to enforce *ius in bello* and maintain the discipline of those under their command; the authority to create military judicial systems was aimed to enable them to fulfil that duty.[549] Once it was determined that the checkpoint was manned by personnel under Dutch command, the naturally derived conclusion was that the Dutch forces had the primary responsibility to conduct the investigation. Indeed, they assumed that responsibility (the botching of the subsequent investigation notwithstanding).[550] The natural inclination exhibited by the Dutch command is likely weakened under the influence of the rights-oriented ruling that fails to acknowledge any normative basis for it, constructing instead an indeterminate normative landscape of concurrent jurisdictions.

4. The Disempowered

As Cover observed, the formative story of rights-based systems posits active participation by the rights-bearers, based on 'a myth of coequal autonomous, voluntary act[ors]'.[551] This myth is of great moral significance, as it conveys the strong humanist message that one's basis for making normative claims is independent of others because it is inherent in human nature.[552] Due to this myth, rights-based systems tend to easily solve the problems of individuals who are able to demand that their rights be protected.[553] But the myth has a downside, often making it difficult for rights-based systems to manage problems concerning disempowered individuals who cannot be expected to demand the protection of their rights.[554] Obligations-based systems tend to better address such situations because of their focus on obligation-bearers.[555]

Cover demonstrates this issue by discussing how rights-based and obligations-based (domestic) systems ensure that convicts' and indigents' garbs would not unconsciously affect decisions of judges and juries. Rights-based systems often poorly address this problem, because courts are likely to rule that if the defendant appears in convict's garb 'in the absence of timely objection by counsel the right [to be dressed properly would be] deemed waived'.[556] While some rights-

[549] *Ibid.*
[550] ECtHR, *Jaloud v. the Netherlands* (n. 531), paras. 39–48.
[551] Cover, 'Obligation' 1987 (n. 483), 73.
[552] Moodrick-Even-Khen, 'Obligations at the Border Line' 2005 (n. 115), 476.
[553] Cover, 'Obligation' 1987 (n. 483), 73.
[554] O'Neill, 'Rights, Obligations and World Hunger' 2008 (n. 109), 150.
[555] Moodrick-Even-Khen, 'Obligations at the Border Line' 2005 (n. 115), 475.
[556] Cover, 'Obligation' 1987 (n. 483), 72.

based systems try to solve this problem, such solutions (as Cover demonstrated) unavoidably entail rhetorical and philosophical strains.[557] Obligations-based systems, generally, resolve this problem, because they conceptualise judges as duty-bound, by their responsibility to assure a fair trial, to ensure that defendants are properly dressed.[558]

The ECtHR *Hassan* ruling further demonstrates this issue.[559] On 23 April 2003, British forces in Iraq arrested Hassan, who was suspected of being a combatant, in his home and detained him in a joint UK–US camp. In September 2003, Hassan's body was found far away from both the camp and his home. According to British records, camp authorities released Hassan on 2 May 2003, after concluding that he was not a combatant. What happened between May and September remains a mystery.[560]

Deviating from earlier IHRL case law, the ECtHR ruled that during his detention Hassan was under British jurisdiction, despite the detention centre being jointly run by the United Kingdom and the United States.[561] Therefore, *Hassan* is celebrated for its expansive approach to extraterritorial IHRL application. But no human rights protection was extended in *Hassan*. Based on doctrines originating in general international law (*lex specialis* and interpretational harmony), the court ruled that although during hostilities IHRL generally applies alongside IHL, when an issue is addressed by a particular IHL norm, the test for what constitutes an IHRL violation is determined by IHL (IHRL does not add any protection, as it is violated only when the relevant IHL is violated). Because Hassan's detention was ostensibly in accordance with IHL, the Court ruled that Hassan's liberty was not violated.[562] The United Kingdom was also not found to have violated Hassan's right to life, because evidence indicated that he was killed long after having been released.[563]

IHL-based judicial review would have likely held the United Kingdom accountable. IHL demands that States take reasonable measures to ensure the

[557] *Ibid*.
[558] *Ibid*.
[559] ECtHR, *Hassan v. United Kingdom*, Grand Chamber Judgment of 16 September 2014, Appeal No. 29750/09.
[560] *Ibid.*, paras. 10–29.
[561] Cf. *ibid.*, paras. 78–80 with ECtHR, *Hess v. United Kingdom*, Decision of 28 May 1975, Appeal No. 6231/73.
[562] ECtHR, *Hassan v. United Kingdom* (n. 559), paras. 96–109.
[563] *Ibid.*, paras. 62–3.

safe return of released wartime detainees.[564] Accordingly, the British military orders demanded the release of detainees close to their homes, 'in daylight hours'.[565] IHRL's focus on the rights-bearer and his right diverted the judges' attention from legal protections *Hassan* had not demanded and from the release moment, especially because Hassan was killed months later. An IHL-based judicial review, because of its obligations orientation which expects obligation-bearers to be proactive, would have likely taken greater notice of these issues. This would have led such a judicial review to recognise the unviability of the expectation (implicit in the ECtHR ruling) that Hassan (after being interrogated and detained) could have demanded daytime release upon discovering that he would be dropped off at night (according to British records he was dropped off in violation of the British military order at one minute after midnight).[566] Stated differently, an IHL-based judicial review would have, most likely, determined that the British forces violated their IHL obligation to reasonably ensure released detainees' safe return. British disregard of their own standards on the matter strongly indicates that the obligation was violated. Neither Hassan's consent to his night-time release nor the lack of direct link between the release manner and Hassan's death are relevant here.

Admittedly, certain rights-oriented courts would have scrutinised the British actions regarding Hassan's release and certain obligation orientation courts might not have. But narratives frame our thinking, pointing our attention to certain features and away from others.[567] Given this narrative effect, it is *likely* that, had the British forces been scrutinised based on IHL, they would have been more strongly reprimanded.

5. IHL's Status Basis

For centuries a battle was waged between rights and nature-of-things jurisprudence. Only in modern times did rights jurisprudence win, mainly because, unlike nature-of-things jurisprudence, it convincingly argues that all humans are equal.[568] But the focus on equality has its downside. It causes rights-based systems to face conceptual difficulties when attempting to justify agent-relative

[564] ICRC, Customary IHL Rule 128, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule128#Fn_81_31ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule128.

[565] ECtHR, *Hassan v. United Kingdom* (n. 559), para. 26.

[566] *Ibid.*, para. 28.

[567] See nn. 12–13.

[568] O'Neill, 'Rights, Obligations and World Hunger' 2008 (n. 109), 145–9; Maine, *Ancient Law* 1908 (n. 109), 64–99.

duties, including those that moral intuition tends to support. Notably, regarding public servants, more demanding duties derive naturally from nature-of-things rather than rights jurisprudence.[569] This is not to say that similar duties cannot be constructed based on rights jurisprudence, only that doing so often entails conceptual difficulties and jurisprudential strains; the result is also likely to be legally disputed, despite the wide, intuition-based, support for these duties. To avoid this downside, some legal systems, while adopting the rights-oriented formative story, have maintained elements of the nature-of-things jurisprudence in the construction of the formative ethos of certain public professions (judges, police, soldiers, etc.), and have been using these profession-specific formative stories to impose certain demanding ethical-legal duties on such professionals.[570]

Over the last two centuries, even before the recent rise in IHRL influence, 'warrior' narratives' contribution to the shaping of IHL has decreased.[571] Nonetheless, that contribution remained considerable, enabling using IHL as a basis for imposing certain demanding ethical-legal soldierly duties.[572] But IHRL's rising influence on IHL has exacerbated the decrease in the influence of 'warrior' narratives', which diminishes the ability to use IHL to impose such duties.[573] The imperfect obligation of 'necessity' – which has long 'impose[d] residual constraints'[574] (i.e., such that go beyond those of 'humanity') – is now becoming a 'hollow rule'.[575] 'Chivalry' (military honour) – soldiers' distinct imperfect obligation – until only few decades ago was still considered a core IHL principle that contained 'elements that go beyond humanity';[576] currently, chivalry has been entirely abandoned outside military circles, and even within these circles some have begun to consider it either anachronistic or a mere non-legal virtue.[577]

This process comes at a price. Consider the following scenario: a squad of soldiers approaches a house where enemy soldiers are using a group of enemy State citizens as human shields. In attempting to take

569 Mary Ann Glendon, *Rights Talk* (New York: Free Press, 1991), 76–108; Alexis de Tocqueville, *Democracy in America*, trans. Francis Brown (Cambridge: Sever & Francis, 1863), vol. II, 263–7.

570 Glendon, *Rights Talk* 1991 (n. 569), 76–108; James Whitman, 'Enforcing Civility and Respect: Three Societies', *Yale Law Journal* 109 (1999/2000) 1279–1398.

571 Bordwell, *Law of War between Belligerents* 1908 (n. 98), 112.

572 Gill, 'Chivalry' 2013 (n. 92), 36.

573 Antonio Cassese, *International Law* (Oxford University Press, 2005), 402.

574 Beer, 'Revitalizing the Concept of Military Necessity' 2015 (n. 136), 807–8.

575 *Ibid.*, 807.

576 Wallach, 'Pray Fire First' 2012 (n. 161), 432 n. 4 (quoting Garraway).

577 *Ibid.*, 431–44.

over the house, must the approaching soldiers offset risks posed to the civilians due to the fighting between them and the enemy soldiers by shouldering such risks themselves, and, if so, to what extent? This is only one example of the general combat-related issue of the allocation of combat risks between soldiers and civilians, often referred to as 'force protection'.

When IHRL advocates began propagating the self-evident truth that the right to life continues to apply in wartime, they did not have soldiers' lives in mind.[578] But, thereafter, others advanced the idea that soldiers are people too. According to the most extreme position of this type (the soldiers-first position), because compatriot soldiers are not only humans, with the right to life, but also part of the social compact, 'the State should favor the lives of its own soldiers over the lives of [foreign civilians] when it is operating in a territory that it does not effectively control'.[579] Currently, in rights-based discourse, a wide range of positions exist regarding 'force protection', ranging from soldiers-first to a position demanding that soldiers nearly sacrifice their lives to reduce any risk to civilians, irrespective of the civilians' nationality. Each position proclaims, with some merit, to be the correct IHRL interpretation of the matter.[580]

In contrast, the following is widely considered the customary IHL regulating force protection: 'In taking care to protect civilians, soldiers must accept some element of risk.'[581] This rule is undeniably vague, and a minority disputes that it is customary.[582] But neither this vagueness nor that disagreement lead to indeterminacy that is anywhere near that which arises when force protection is addressed based on IHRL.

The most straightforward normative basis for justifying this customary IHL is to conceptualise it as a legal-ethical professional obligation deriving from 'chivalry'[583] and 'necessity'.[584] Such a conceptualisation originates in the nature-of-things jurisprudence and is still echoed in current military sources,

[578] UKSC, *R (Smith) v. Secretary of State for Defence*, Judgment of 20 June 2010, paras. 145–6.

[579] Asa Kasher, 'Operation Cast Lead and Just War Theory', *Azure* 37 (2009), 43–75 (66).

[580] Ziv Bohrer, 'Protecting State Soldiers, Compatriot Civilians or Foreign Civilians: Proportionality's Meanings at the Tactical, Operational and Strategic Levels of War', *Israel Yearbook on Human Rights* 46 (2016), 171–222 (176).

[581] *Ibid.*, 204–6.

[582] *Ibid.*, 208–10.

[583] David Luban, 'Risk Taking and Force Protection', in Itzhak Benbaji and Naomi Sussman (eds.), *Reading Walzer* (Abingdon: Routledge, 2014), 277–301 (285).

[584] Beer, 'Revitalizing the Concept of Military Necessity' 2015 (n. 136), 806–7.

depicting '[t]his risk taking [a]s an essential part of the Warrior Ethos',[585] 'the essence of soldiering'.[586]

Regulating wartime actions solely based on IHL necessarily dismisses the soldiers-first position, whose practical implication is a drastic reduction of civilian protection, because that position violates the most fundamental, status-based IHL distinction: between civilians and combatants.[587] Indeed, the leading scholarly advocate of the soldiers-first position implicitly admitted that his aim is to reshape the IHL principle of distinction by conflating it with rights-oriented notions.[588]

Such conflation is not exceptional. IHRL proportionality analysis was originally designed to assess whether limitations imposed, due to public interests, on the rights of a member of that public, are proportional to the public interests at stake.[589] IHL 'proportionality analysis focuses on the effects of an attack against a legitimate target on surrounding people and objects to assess whether these effects are proportional to the objectives of military necessity at stake'.[590] As Gross demonstrated (through extensive critical examination of relevant case law), simultaneous application of IHL and IHRL leads to the conflation of these distinct proportionality analyses; public interests, other than military necessity, also come to be perceived as legitimate justifications for causing collateral harm: 'expanding the possibilities for limiting the humanitarian standards . . . beyond what is envisaged in IHL'.[591] Thus, the co-application of IHRL and IHL leads to the conflation of seemingly similar, but actually distinct concepts; the resulting hybrid norms 'provide more rather than less justifications for limiting rights'.[592]

One may respond that the *lex specialis* doctrine could be used to prevent co-application situations that lead to protection-reducing norm conflation. But such an argument ignores the flexible, inconsistent way the *lex specialis* doctrine has been used in IHRL reasoning, leaving it without an acceptable semi-objective meaning.[593] Such treatment stems from the tension inherent in

[585] US Army–Marine Corps, *Counterinsurgency Field Manual* (University of Chicago Press, 2007), para. 7-21.

[586] Luban, 'Risk' 2014 (n. 583), 285 (quoting an American officer).

[587] Avery Plaw, 'Distinguishing Drones', in Bradley Jay Strawser (ed.), *Killing by Remote Control* (Oxford University Press, 2013), 62.

[588] See Asa Kasher and Amos Yadlin, 'Military Ethics of Fighting Terror: An Israeli Perspective', *Journal of Military Ethics* 4 (2005), 3–32 (15); Amos Harel, 'Cast Lead Operation', *Haaretz*, 6 February 2009, available at: www.haaretz.co.il/news/politics/1.1244279 (in Hebrew) (interviewing Kasher).

[589] Gross, 'New Clothes' 2007 (n. 493), 8.

[590] *Ibid.*

[591] *Ibid.*

[592] *Ibid.*, 8; Aeyal Gross, 'The Righting of the Law of Occupation', in Nehal Bhuta (ed.), *The Frontiers of Human Rights* (Oxford University Press, 2016), 21–54 (23).

[593] See Milanovic, *Extraterritorial Application of Human Rights Treaties* 2011 (n. 463), 249–60.

IHRL, between exceptionalist and generalist claims, which over time drains non-IHRL legal categories and benchmarks of determinable meaning.[594]

Furthermore, the attempt to cherry-pick IHL and IHRL norms disregards the larger picture. The benefits of massive wartime application of IHRL are overrated: 'experience teaches that introducing human rights analysis … [does] not generate a jurisprudence granting better protection',[595] rather 'dilute[s] restrictions that are stronger in IHL'.[596] Beyond the dilution-conflation of any particular IHL norm, the massive wartime application of IHRL is 'righting' IHL, gradually causing IHL to cease being an obligations-oriented system. With the loss of that orientation, its benefits (discussed throughout this section) are also lost.

6. Enforcement

One additional argument could be raised for IHRL wartime application. Despite the potential harm from rights-oriented framing of wartime situations, such framing is necessary because otherwise international human rights courts would be unable to address these cases, and wartime actions would be insufficiently judicially scrutinised.[597]

Various domestic courts have dismissed petitions concerning IHL violations on the preliminary ground that IHL, supposedly, consists of State obligations that (as such) do not constitute a legal basis for individuals to raise claims against the violating State.[598] However, from such rulings one should not deduce that a rights-based conceptualisation of IHL is mandatory for juridical scrutiny. The scrutiny-barring element in such rulings stems not from their obligations-based conceptualisation of IHL, rather from their rights-based conceptualisation of the court's judicial review purview. This conceptualisation assumes that individuals have a legal basis to petition the court (aka 'standing') regarding a State's legal violation only when they can show that the violation harmed their rights. In contrast, obligations-based conceptualisation of the court's judicial review purview sees it as stemming from the judiciary's inherent role (and obligation) to maintain the 'rule of law'; as the Israeli Supreme Court held:[599]

[594] d'Aspremont, 'Expansionism' 2016 (n. 543), 242.
[595] Gross, 'New Clothes' 2007 (n. 493), 28.
[596] *Ibid.*, 31.
[597] See Modirzadeh, 'Dark Sides of Convergence' 2010 (n. 510), 390.
[598] See Peters, *Beyond Human Rights* 2016 (n. 120), 218.
[599] CA IsrSC, *Arpel-Aluminium v. Kalil*, Judgment of 15 July 1997, No. 733/95.

> locking access to the court – either directly or indirectly – and even partially, undermines the judiciary's raison d'être . . . In the absence of judicial review the rule of law collapses . . . Denying access to the court makes judges extinct and in the absence of judges the law itself become extinct.

As the Court further explained, this obligations-based (rule of law) conceptualisation greatly extends standing compared with a rights-based conceptualisation.[600] Accordingly, that Court recognised public petitioners' standing even when they 'cannot claim to have been personally affected . . . [as] part of a broader view of th[e] Court . . . as responsible for the rule of law, even outside the context of resolving individual conflicts'.[601] Likewise, rulings from various countries reveal that when judges maintain this obligations-based (rule of law) conceptualisation of the basis of their judicial review purview – as opposed to a rights-based conceptualisation – they exhibit greater readiness to scrutinise extraterritorial State actions for international law violations (IHL included).[602]

Another more practical reason is usually found at the base of the concern that but for rights-based scrutiny by international human rights courts, wartime actions would not merit sufficient scrutiny. In wartime, domestic courts often assume (voluntarily or under governmental pressure) 'a highly deferential attitude when called upon to review governmental actions'.[603] But that is not necessarily the case, with some current domestic courts exhibiting impressive judicial review capabilities regarding wartime State actions.[604]

Additional domestic courts could be steered away from the deferential mode. This is where the IHRL regime can play a crucial function in IHL's normative universe. As noted, when legal systems settle a jurisdictional dispute, the compromise often includes complementarity or *Solange* mechanisms. An added benefit of such mechanisms is that they reduce the likelihood that the system that was given primacy would shirk its obligation to uphold

[600] HCJ, *Ressler* (n. 512), para. 19.

[601] HCJ, *Association for Civil Rights v. Elections Committee Chairman*, Judgment of 21 January 2003, No. 651/03, para. 7.

[602] Chimene Keitner, 'Rights Beyond Borders', *Yale Journal of International Law* 36 (2011) 55–114 (66–8); Galia Rivlin, 'Constitution Beyond Borders', *Boston University International Law Journal* 30 (2012), 135–227 (137–96).

[603] Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?', *Yale Law Journal* 112 (2003), 1011–134 (1034).

[604] For the Israeli example, see Guy Davidov and Amnon Reichman, 'Prolonged Armed Conflict and Diminished Deference to the Military: Lessons from Israel', *Law & Social Inquiry* 35 (2010), 919–56 (922–6). But see Gidi Weitz, 'The Supreme Court Model 2016', *Haaretz*, 28 January 2016, available at: www.haaretz.co.il/magazine/.premium-1.2832782 (in Hebrew).

these core principles. International human rights courts should adopt such a mechanism, declaring that they would not scrutinise a State's wartime actions based on IHRL if the State's domestic courts actively scrutinise those actions based on IHL. Such an approach is likely to increase domestic courts' proactivity and decrease the incentive of the State's political branches to interfere. Given recent practice in human rights courts, States are likely to take seriously these courts' threat to interfere if domestic scrutiny is lacking. Lastly, if these courts are compelled to scrutinise wartime actions, they should (as some of them did in the past) directly apply IHL, without co-applying IHRL, to avoid 'righting' IHL.[605]

7. Back to the Adaptation Approach

Rights-based systems tend to treat the obligation-bearers' obligations merely as means to secure the rights-bearers' rights. In contrast, obligations-based systems conceptualise the obligation-bearers' observance of their obligations as intrinsically valuable.[606] This conceptualisation is based on the premise that moral individuals aspire to act with the right intentions, but because they might be tempted by desires and other biases, an external normative obligation is necessary to ensure that their intentions will remain right.[607] Reliance on imperfect obligations is the most complete expression of this unique perspective.[608] More generally, rights-based systems are only able to maintain obligations that give rise to a corresponding right (perfect obligations); in contrast, obligations-based systems are able to also maintain 'imperfect obligations, which are not allocated to any specified recipients'.[609] In short, reliance on imperfect obligations is a core feature of obligations-based systems.[610]

As noted, IHL is rooted in the imperfect obligation to attempt to reduce wartime suffering as much as possible. Thus, manifestations of this imperfect obligation are expected to be integral to IHL. They should not be easily dismissed as mere (non-legal) policy considerations or as residual juridical tools (to be utilised only when IHRL is silent); especially because IHL has been strongly influenced by jurisprudential positions that regard imperfect obligations as obligatory legal norms.[611] Therefore, obligations-based systems'

[605] IACHR, *Abella v. Argentina*, Judgment of 18 November 1997, No. 11.137.
[606] Moodrick-Even-Khen, 'Obligations at the Border Line' 2005 (n. 115), 2–481.
[607] *Ibid*.
[608] *Ibid*., 507.
[609] *Ibid*., 508; O'Neill, 'Rights, Obligations and World Hunger' 2008 (n. 109), 152.
[610] Moodrick-Even-Khen, 'Obligations at the Border Line' 2005 (n. 115), 119–22.
[611] Above nn. 119–22.

nature (generally) and IHL's nature (specifically) support the conclusion that the adaptation approach is an integral element of IHL; it is neither a residual juridical tool (secondary to IHRL) nor an optional policy. That approach is a necessary derivative of the imperfect obligation to reduce wartime suffering, which brings about its realisation under the unavoidable indeterminacy that results from the imperfect fit between wartime reality and wartime legal norms.

Embracing the adaptation approach diminishes the proclaimed gap-filling benefits of massive IHRL wartime application. Furthermore, IHRL application requires flexible treatment of legal distinctions and benchmarks, which induces indeterminacy. In contrast, the adaptation approach enhances determinacy, taking advantage of the normative guidance provided by existing IHL, and adding to it an imperfect obligation to 'analogize, insofar as possible [from existing IHL] ... to preserve the intent ... [of] diminish[ing] the evils of war'.[612]

Lastly, is my position anachronistic? My colleague, Helen Duffy, asserts that current opposition to IHRL wartime application is negligible and diminishing, because, although in the past IHRL wartime application 'was seriously questioned, international authority and opinion now overwhelmingly confirms that IHRL continues to apply in times of armed conflict'.[613] I am less certain. History teaches us that IHL's normative universe commonly houses opposing legal positions and, over time, support for each position fluctuates. Do I want IHRL wartime application to be abandoned? If the alternative is normative 'black holes' where States do as they wish – clearly: NO. But if the alternative is the adaptation approach and increased IHL-based judicial scrutiny – unequivocally: YES.

IV. CONCLUSION

One of my teachers repeatedly told a fable about Napoleon. While besieging a town, Napoleon issued an ultimatum to the mayor: if the town wished to surrender, he must immediately sound the church bell, otherwise the French forces would storm the town and execute the mayor. The bell remained silent and Napoleon's forces conquered the town. Begging for his life, the mayor said: 'We wanted to ring the bell, but we couldn't for four reasons'. Napoleon cut him short: 'The truth demands a single explanation; only falsehoods demand plenty.' I always loathed this tale, a bloody version of Occam's

[612] Green, 'United States' 1971 (n. 44), 284.
[613] Duffy, in this volume, 39.

https://doi.org/10.1017/9781108674416.003 Published online by Cambridge University Press

razor, because, as Immanuel Kant's anti-razor states: 'variety . . . should not be rashly diminished'.[614] Reality is complex.

What are the causes for the current abundance of indeterminacies in wartime international law, or for its perception as indeterminate?: (a) the US post-9/11 attempt to remove any legal constraint that might impede the 'global war on terror'; (b) the attempt by hardline IHRL advocates to remove any constraint that might impede universal IHRL application; (c) the blurry nature of wartime activities; (d) the blurry nature of emergency laws; (e) temporocentrism; (f) lawyers conflating *lex lata* and *lex ferenda* in service of their goal; (g) international lawyers constructing war-related crisis narratives; (h) Westphalian Myth residuals; (i) the recent neglect of the adaptation approach. The most accurate answer is: all these reasons, and additional ones, combined.

In a legal paper, one should generally disregard Kant's anti-razor and avoid multi-factor accounts; simple explanations are easily conveyed. But, this time, I feel compelled to crusade for complexity. For two decades, a core jurisdictional struggle has been waging within IHL's normative universe, driven by faction mentality. Each faction's positions are increasingly held by faction members as irrefutable truths; all the while, the struggle diminishes any actual semi-objective element of the law (i.e., its potential ability to have an independent influence on human behaviour), to the point where it would eventually vanish. This chapter is an attempt to push the discourse in the opposite direction. It does so by advocating for the adaptation approach and for accepting inevitable legal, factual and social indeterminacies. More generally, the chapter does so by questioning misleading dominant narratives and by celebrating the complexity of our normative universe: its norms, narratives, processes and people. I have no illusions about universal consensus or about IHL becoming pristinely clear. Indeterminacy and tense engagements are inevitable in a normative universe as diverse as ours. But we have gone too far. A dose of complexity is, therefore, in order.

[614] Immanuel Kant, *Critique of Pure Reason*, trans. Norman Kemp-Smith (London: Macmillan, 1929), 541 (*c.* 1781, in Latin).