

# MILITARY LAWYERS AND THE TWO CULTURES PROBLEM

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A military lawyer once joked that at professional meetings you can always tell which are the military lawyers and which the civilians. Military lawyers refer to the laws of war as ‘LOAC’—law of armed conflict—while civilians from the world of non-governmental organizations call the laws ‘IHL’—international humanitarian law. “They’re in the business of saving lives,” he cheerfully explained. “We’re in the business of killing.”<sup>1</sup>

The idioms are revealing. They dramatize what Eyal Benvenisti has rightly labeled a “cleavage between two visions of the law,” one that of armies aiming to “conciliate the necessities of war with the laws of humanity,” the other “a manifest of humanitarian fraternity.”<sup>2</sup> The LOAC vision of the law begins with armed conflict. It assigns military necessity and the imperatives of warmaking primary, axiomatic status.<sup>3</sup> In this vision, the legal regulation of warfare consists of adjustments around the margins of war to mitigate its horrors. Those adjustments occupy a noble and important role that must be honored and that militaries in fact want to honor. But it is logically secondary, and it yields to the *force majeure* of military necessity. The law of war dwells in the interstices of warfare.

The IHL vision begins with humanitarianism, and assigns human dignity and human rights primary status. It measures the progress of civilization in the enhanced protection of human dignity, views law as an indispensable instrument for advancing human dignity, and regards peace as the normal condition for human life. This vision regards war as a human failure—no doubt inevitable, in the way that poverty and injustice are inevitable, but, like poverty and injustice, not something that deserves legal priority over the protection of rights and dignity. This might sound like pacifism, but the IHL vision is not pacifist. It recognizes that human dignity and human rights need muscle to secure them—they are worth fighting for, and it is noteworthy that legal doctrines favoring humanitarian military intervention (doctrines like the “responsibility to protect” and the obligation to prevent genocide) grew out of IHL culture, not LOAC culture.

I will have much more to say about these two visions, but this is enough for now. The important point is that the difference in visions largely corresponds with a cultural divide among lawyers concerned with the laws of war—a divide between

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<sup>1</sup> Eyal Benvenisti comments on the same labeling phenomenon in *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 *Isr. L. Rev.* 81, 83 (2006).

<sup>2</sup> *Id.* at 82. The first quote, about conciliating military necessity and the laws of humanity, come from the preamble of the 1868 St. Petersburg Declaration.

<sup>3</sup> See, e.g., Michael A. Newton, *Modern Military Necessity: The Role and Relevance of Military Lawyers*, 12 *Roger Williams U. L. Rev.* 877, 885 (2007) (noting that the ideals of humanitarian law “are all achieved in the context of facilitating the accomplishment of military missions”).

what I shall call “humanitarian lawyers” and “military lawyers.” The terminology is stereotyped. I don’t mean to imply that every lawyer in the military accepts the military version of the law of war on all issues (which I will call the *LOAC version* or *LOAC vision*), nor that every lawyer working for an organization like the ICRC accepts the humanitarian version (the *IHL version*, for short) down the line. Some renowned experts have at different times in their careers worked for both military and humanitarian organizations, and some renowned scholars who represent the LOAC version of the laws of war are civilians.

Nor, for that matter, do military lawyers always say ‘LOAC’ rather than ‘IHL’—but the military lawyer I quoted was not being wholly facetious. The two visions of the law of war closely track organizational cultures. That, at any rate, is my conjecture as well as my concern. The concern, which I raise in the shadow of the “lawfare” debate, is that in the last decade military and humanitarian lawyers increasingly see themselves as competing teams whose goal is to ensure that their vision of law prevails.

A recent address by the eminent scholar Yoram Dinstein illustrates the two cultures problem in action. Professor Dinstein delivered the closing remarks at a conference on “International Law and the Changing Character of War” at the U.S. Naval War College. After congratulating the participants on an excellent conference, he warned of the “menace” posed by “human rights zealots and do-goodniks, whom I shall call ‘human rights-niks’ for short.”<sup>4</sup> Professor Dinstein explains:

Far be it from me to suggest that every human rights scholar or activist falls under this rubric. . . . But all too often today we encounter the unpleasant phenomenon of human rights-niks who, hoisting the banner of human rights law, are attempting to bring about a hostile takeover of LOAC. This is an encroachment that we must stoutly resist.

The human rights-niks in back are by no means to be confused with the barbarians in front: far from endorsing the methods of barbarism, the human rights-niks would prefer a non-violent solution to every conflict. Nevertheless, the danger that the human rights-niks pose is equally acute, since they threaten to pull the legal rug from under our feet.<sup>5</sup>

The “barbarians” are terrorists and militants who willfully violate the rules of warfare, and it is startling that Professor Dinstein regards the danger “human rights-niks” pose as “equally acute.” Concluding his speech, Professor Dinstein offers advice:

- (a) Keep up the good work on the application and interpretation of LOAC.
- (b) Keep poachers off the grass.<sup>6</sup>

This is a particularly blunt statement of the two cultures problem; but I have heard enough less blunt statements to become convinced that the problem is real.<sup>7</sup> I do

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<sup>4</sup> Yoram Dinstein, *Concluding Remarks: LOAC and the Attempts to Abuse or Subvert It*, 87 Int’l L. Studies, 483, 488 (Raul A. “Pete” Pedrozo & Daria P. Wollschlaeger eds., 2011), available at <http://www.usnwc.edu/Research---Gaming/International-Law/Studies-Series/documents/NavalWarCollegeVol-87.aspx> (accessed Dec. 20, 2011).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 493.

<sup>7</sup> For example, an eminent British lawyer recollected to me that the British government had been persuaded to issue the UK Military Manual (which had been stalled in the bureaucracy) because the

not mean to suggest that this adversarial attitude comes only from the military side. On the contrary, I believe that the phenomena that bother Professor Dinstein are real, even if his rhetoric is exaggerated and unusually belligerent. The phenomena on the side of humanitarian lawyers include an aggressive overreading of humanitarian protections in IHL, a tendency to presume that civilian casualties are probably unlawful, and a strategic approach to furthering their favored interpretation of the law.

The cleavage between visions of the law not only mirrors the cleavage in professional cultures, the two reinforce each other. Organizational cultures are interpretive communities; lawyers in them develop their own lore about what the law means and how to read it. That generates a problem for the professional responsibilities of lawyers. Among lawyers' most important roles is that of legal advisor and what is often labeled "compliance counselor" who reviews client plans to ensure their legality. In military organizations, the advisor's role appears in several disparate guises. At the upper echelons, military lawyers write manuals, directives, and operational handbooks that are, in effect, book-length advice on what the law means. Within combat units, military lawyers help train soldiers in the laws of war, a rather different form of legal advice. And in operations, lawyers provide case by case oral advice to commanders.

The legal advisor's basic ethical obligation is to offer independent and candid advice on what the law requires—not frivolous advice, not farfetched advice, and above all not advice that simply tells the client what he wants to hear.<sup>8</sup> A lawyer who blesses whatever transactions the client wants to undertake, and in the process writes a get-out-of-jail-free card for the client, is an unethical lawyer.

The problem is that the two visions of the law of war reflect a fundamental indeterminacy in the law, in which military lawyers and humanitarian lawyers systematically disagree about what independent, candid legal advice would say.<sup>9</sup> Interpretive communities set the inarticulate boundaries of legitimate legal disagreement, beyond which a legal opinion will seem frivolous or even outrageous. But what if the interpretive community itself has split into two interpretive communities? Then the views of each may seem outrageous to the other. The natural impulse of each will be to reject the other's conclusions more or less wholesale. That creates a problem of what role the alternative vision plays in the advice they offer their clients.

Legal advising is the most important thing that lawyers do, and lawyer advice, rather than judicial decisions, defines the law.<sup>10</sup> Each year, in hundreds of millions of confidential lawyer-client interactions that are almost never reviewed by anyone else, lawyers advise their clients about what the law requires of them. These conversations are the mosaic tiles that make up the law. Theorists err when they focus on judicial

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ICRC was about to issue its study of customary international humanitarian law and "we needed to get in our retaliation in advance."

<sup>8</sup> In U.S. ethics rules, the governing standard is that of ABA Model Rule 2.1, "Advisor": "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." Related rules are 2.3, "Evaluation for Use By Third Persons," the comments to which explain that such an evaluation cannot contain statements of fact or law known by the lawyer to be false, and rule 3.1, prohibiting lawyers from frivolous factual and legal assertions in judicial proceedings.

<sup>9</sup> Kenneth Anderson, *Who Owns the Rules of War?*, NY Times § 6 at 38 (Apr 13, 2003)

<sup>10</sup> So I have argued in David Luban, *Legal Ethics and Human Dignity* 131-61 (2007), ch. 4.

decisions as the heart of the law. Think of Holmes's famous dictum that "prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."<sup>11</sup> Judge-centered theorists focus on "what the courts will do in fact," as though the courts pervade the law—which they do not. A better reading of Holmes's dictum notices that, literally, he is saying that "*prophecies* of what the courts will do in fact" are what he means by the law. Holmes makes clear that the prophecies he has in mind take place in the lawyer's office, not the courtroom, whenever the lawyer discusses legality with her client. This is closer to recognizing the law-defining role of lawyer advice, but even Holmes focuses too much on predicting what judges will do and not enough on the lawyer's own choices—a point that will prove important in what follows, where the focus will be very much on lawyers' own choices.

Given the central importance of legal advising to the law itself, the ethics of legal advice turns out to have major significance for the integrity of law. The crucial requirement is one I mentioned earlier: the legal advisor is supposed to be candid and independent, and the ethical requirement of candor and independence is the same for military and civilian lawyers. Candor implies at the very least that the advisor gives the client her best interpretation of the law. It may require more than that, because if the lawyer's best interpretation of the law is controversial, and particularly if it represents a minority view, the lawyer must alert the client of that fact, for that too is part of candor. Independence reinforces the demands of candor: it means not tailoring the advice to what the client wants to hear.<sup>12</sup> The advisor has to have the guts to say no to clients, to give them unwelcome legal news. That makes the advisor's approach to legal interpretation very different from the advocate's. For those of us accustomed to thinking of lawyers as courtroom advocates, who resolve every uncertainty in favor of their clients and who argue forcefully for whatever interpretation of the law helps the client prevail, candor and independence from the client seem like unusual requirements.<sup>13</sup> Yet without them, the law will be twisted and subverted; it will barely exist.

That was the problem in the notorious "torture memos" written by lawyers in the U.S. Department of Justice between 2002 and 2005. They were subsequently withdrawn and condemned by the Department's Office of Professional Responsibility. The torture memos dealt with a host of legal issues connected with a dozen brutally "enhanced" interrogation techniques, and resolved every issue in favor of permissibility. The legal reasoning by which the lawyers conjured away the obligation not to torture was bizarre. Yet these opinions became the secret law of the land for several years, and they created an iron-clad legal defense for the CIA interrogators who waterboarded detainees, slammed them into walls, and kept them awake for as

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<sup>11</sup> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457 (1897).

<sup>12</sup> The American Bar Association explains its rule of candor thus: "Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, the lawyer endeavors to sustain the client's morale and may put advice into as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client." Model Rule 2.1, cmt[1]. I have argued that the rule of thumb in practice should be that the lawyer's advice is more or less the same as it would be if her client wanted the opposite outcome from the one she knows her client wants. David Luban, *Tales of Terror: Lessons for Lawyers from the 'War on Terrorism'*, in *Reaffirming Legal Ethics: Taking Stock and New Ideas* 56, 61 (Kieran Tranter et al. eds., Routledge, 2010)

<sup>13</sup> Not so unusual for lawyers in civil law systems, where independence from the client is one of the defining principles of legal ethics. German rules, for example, define the lawyer as an "independent organ of the administration of justice," and independence means independence from the client as well as from the state.

long as a week, stark naked and hanging in chains—as well as for the officials who authorized these interrogations in full knowledge of what they would involve. Ultimately, a prosecutor looking into the torture allegations dropped the investigation of 99 out of 101 cases, all but the two interrogators who killed the people they were interrogating.

Candid, independent legal advice can lead to awkward moments, because the lawyer works for the client and understands all too well that strong-willed clients do not like Cassandras. In frequently-quoted words, the American lawyer and diplomat Elihu Root wrote, “The client never wants to be told that he can’t do what he wants to do; he wants to be told how to do it, and it is the lawyer’s business to tell him how.”<sup>14</sup> Yet Root also famously remarked: “About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop.”<sup>15</sup> I am not sure why Root restricted himself to would-be clients. The same is true of actual clients, when they are eager to push boundaries and cut corners and the lawyer’s job is to tell them no.

The laws of war are, at bottom, constraints on warriors and war-fighting. Lawyers who interpret and enforce them are therefore instruments of constraint. If they are military lawyers—I will use the American expression ‘JAGs’—that places them in an unusual and sometimes awkward position. As military officers, JAGs share the military mission of their service. But as lawyers occupying the role of compliance counselor, their job is often to put on the brakes, not press the accelerator. The tension is obvious.

JAGs’ double role as military officers and lawyers amplifies the tension. Both roles are quintessentially partisan: they demand loyalty to *us*, to our side. It is hard enough for a civilian lawyer with a civilian client to comply with the ethical requirement of candid, independent advice. How much harder, then, for a military lawyer to veto a tactic or a targeting choice that a superior would like to use. And yet, sometimes, that is the JAG’s job.

To make matters worse, military lawyers must at times overcome the suspicion that they are not really part of the band of brothers—or, more insidiously, they must deal with their own suspicion that the combat soldiers may disdain them as “jobniks” rather than warriors even though that is not true.<sup>16</sup> That provides additional temptation for them to over-identify with their clients even when their professional duty calls for independence.

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<sup>14</sup> 1 Robert Swaine, *The Cravath Firm and Its Predecessors, 1819-1947* 667 (1946). Channeling Elihu Root, an Israeli JAG once commented, “Our job is to let the army operate.” Quoted in Amichai Cohen, *Legal Operational Advice in the Israeli Defense Forces: The International Law Department and the Changing Nature of International Humanitarian Law*, Conn. Int’l L.J. (forthcoming), at note 79. U.S. JAGs repeatedly told the same thing to Laura Dickinson. Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AJIL 1, 20 (2010).

<sup>15</sup> 1 Philip C. Jessup, *Elihu Root* 133 (1938). The same study of the Israeli Defense Forces’ International Law Division also reports instances of “courageous young lawyers who stood up to over-eager commanders, and halted some dangerous and illegal operations.” *Id.*, TAN 76.

<sup>16</sup> See Dickinson, at 18-19, discussing U.S. JAGs’ self-perception of the importance of convincing soldiers and officers that they belong to their common culture. Dickinson also quotes JAGs who were aware of the danger, and who criticized a JAG who “went native” by not reporting war crimes by members of his unit, because “his loyalty to the command trumped his ethical duty [in his own mind], and because he was in combat with them.” *Id.* at 26.

One question is what countervailing resources are available to JAGs to resist these multiple pressures. That, unfortunately, is a topic for a different paper. My question is whether they should resist the pressures at all, if the laws of war provide a valid (if controversial) case that what commanders want to do is legal.

It is here that the cultural divide within the law of war and the lawyers who interpret it becomes significant. The LOAC version of the laws of war is, as we shall see, less restrictive of combat activities than the IHL version, and systematically so. A military lawyer will find that the LOAC version lessens the strains of commitment. Even better, it does so without veering into the moral twilight zone of the torture lawyers, because the LOAC version is not frivolous, and in fact not particularly extreme. The professional community of military lawyers is not a band of zealots pushing an ideology. Its jurisprudence is more conservative than that of humanitarian lawyers, but it does not rest on eccentric or fantastic premises.

I have said that what makes this a real question is an indeterminacy in the laws of war, making them susceptible to systematically inconsistent interpretations. But is there such indeterminacy? At this point, it will be useful to describe the two visions of the law of war in more detail.<sup>17</sup>

### **The LOAC Vision**

*1. Taking Necessity Seriously.* The LOAC vision begins, innocuously enough, with the premise that in fact an armed conflict is going on—the regulation of armed conflict presumes armed conflict. Armed conflict is a serious enterprise, and the law of war presupposes that states and organizations engage in it for serious reasons. That won't always be true, and wars have often been waged for despicable reasons. But the law of war presupposes the opposite. Otherwise, there would be little point in regulating war, and no point in making rules for war fighters who are not assumed to be serious moral agents. The LOAC vision presupposes that the war fighters, as the primary audience of the laws of war, are deeply serious moral agents. That requires taking their job seriously and not simply denouncing the destruction it causes.

Warfare imposes its own physical and spiritual demands, what the 1880 Oxford Handbook (quoting Jomini) called “inexorable necessities.”<sup>18</sup> If the enterprise is a morally serious one, its inexorable necessities are equally serious, and the law of war cannot wish them out of existence. Whatever restraints the law imposes must accommodate themselves to military necessity and regulate around its margin.

That implies that any legal regime that would make it impossible, or even inordinately difficult, for fighters to wage war, cannot be serious. If taking the law at face value guarantees defeat for one side or the other in advance, then taking the law at face value cannot be the right way to interpret it.

This is not a merely hypothetical point. To take a current important example, the existing law on human shielding arguably violates the stricture of taking military necessity seriously. On the one hand, it forbids the use of human shields or the siting

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<sup>17</sup> For a similar version of the LOAC vision of law, see Kenneth Anderson, *The Role of the U.S. Military Lawyer in Projecting a Vision of the Laws of War*, 4 Chi. J. Int'l L. 443 (2003). Anderson proposes that the moral vision shared by U.S. military lawyers consists in a commitment to winning (what I am calling “military necessity”) coupled with a commitment to sovereign democratic governance. Id. at 445.

<sup>18</sup> The Laws of War on Land (Oxford, 1880)(quoting Jomini), accessed at [http://wwi.lib.byu.edu/index.php/Oxford\\_Laws\\_of\\_War\\_on\\_Land](http://wwi.lib.byu.edu/index.php/Oxford_Laws_of_War_on_Land)

of military forces among civilians—which, from the point of view of guerrillas or partisans, amounts to requiring the fish to leave the water voluntarily, the better to become prey for the fishermen. On the other hand, the law requires militaries confronted by an enemy that (illegally) uses human shields to maintain the principle of distinction, which would very likely require them to refrain from attacking partisans deeply embedded in a civilian population. The law may have looked like a plausible compromise to those who negotiated the treaties, but in reality it creates requirements that neither side can honor without accepting defeat.

Terrible things happen in wars. The point of the laws of war cannot be to abolish those terrible things. The point can only be to shrink them to what is necessary, where, awful as it is, necessity always means someone else's tears.<sup>19</sup> Any sane person wholeheartedly wishes that war itself could somehow be made unnecessary, but if that ever happens we will no longer need to talk about the law of war. So long as the law of war remains a subject matter, it must take necessity seriously.

2. *Treaty interpretation.* Taking Necessity Seriously carries implications for the way legal language gets interpreted. Treaties are agreements among states, and the LOAC vision presumes (perhaps only as a rule of thumb or a guiding hunch) that states would never give away powers that enable them to wage war successfully.<sup>20</sup> Thus, treaty language should be interpreted narrowly and formalistically. Interpreters must not fill gaps in humanitarian protections, because gaps are signs that the contracting parties, the states, never reached agreement on the subject and chose to retain their own unfettered discretion.<sup>21</sup>

Legal theorists often contrast narrowly formalist interpretation with so-called purposive or teleological interpretation—interpreting language through the lens of whatever purpose the legal instrument was supposed to serve.<sup>22</sup> One might guess that lawyers adhering to the LOAC vision will be skeptical of purposive interpretation, and they sometimes are, when the interpreter appears to be going off on a humanitarian tear, filling in treaty gaps that (military lawyers believe) the states-parties left in the treaties for a reason. However, nothing in the LOAC vision is in principle hostile to purposive interpretation. The real difference lies in what you take the purpose of laws of war to be. Is it to protect civilians, even at cost to military effectiveness, or is it to give full sway to military necessity and protect civilians (only) against military excess? Military lawyers assume the latter; it is part and parcel

<sup>19</sup> On this seemingly obvious point, surprisingly often ignored, see Henry Shue, *Laws of War*, in *The Philosophy of International Law* 511-16 (Samantha Besson & John Tasioulas, eds., 2010). “I think the fundamental attitude of the laws of war ... can be well captured with the contemporary pithy phrase ‘shit happens.’ We are dealing with war. ... The purpose of the laws of war is to constrain the ‘shit’ when the ‘shit’ happens.” *Id.* at 516. It is still shit.

<sup>20</sup> Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 *Va. J. Int'l L.* 795, 799 (2010).

<sup>21</sup> For an example of reasoning of the sort described here, see John B. Bellinger III & William J. Haynes II, *A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law*, 89 *Int'l Rev. Red Cross* 443, 453 (2007): “These limitations in treaty provisions... are not inadvertent, but reflect ... legitimate State and military concerns, making it very unlikely that States would acquiesce in the overbroad principle depicted in the rule [proposed by the ICRC].”

<sup>22</sup> In international doctrine, textualism and purposivism are co-equal, as evidenced by the Vienna Convention on the Law of Treaties, article 31(1): “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

of Taking Necessity Seriously. So even using purposive interpretation, they will be reluctant to fill treaty gaps in civilian protections.

For example, consider the differences between Additional Protocols I and II of the Geneva Conventions (1977). AP I was a milestone in the legal regulation of war, because it codifies the basic *jus in bello* rules for protecting civilians (the principles of distinction and proportionality). However, by its terms AP I applies only in international armed conflicts and anti-colonialist struggles (article 1). AP II applies to non-international armed conflicts like civil wars, and it too prohibits making civilians the “object of attack” (article 13). Unlike AP I, however, it provides no detailed rules protecting civilians, for example rules requiring warnings and prohibiting excessive collateral damage. Overall, AP II is briefer, leaner, and far more perfunctory than AP I. Furthermore, AP II applies only to a subset of non-international armed conflicts, those where the non-state party actually controls territory.

Clearly, the states negotiating the two Protocols were much less generous in protecting civilians during civil wars than in international armed conflicts; it seems likely that they wanted great latitude to put down rebellions. A treaty interpreter in the LOAC vision would be skeptical of efforts to imply the civilian protection rules of AP I into AP II; and she would emphasize that neither Protocol applies to an uprising where the rebels control no territory. In a conflict not explicitly covered by either Protocol, anything goes except for gratuitous savagery. If the *jus in bello* rules in the Additional Protocols are taken to represent customary international law, or if their widespread acceptance can be said to constitute it, the same difference would exist between the customary rules applicable in international and non-international armed conflicts.

The IHL vision, by contrast, is deeply reluctant ever to concede that anything goes, and is more likely to blur the treaty lines that LOAC lawyers highlight. The authors of the ICRC’s massive study of customary international humanitarian law complain that “[c]ommon sense would suggest that such rules [as those in AP I], and the limits they impose on the way war is waged, should be equally applicable in international and non-international armed conflicts.”<sup>23</sup> They continue: “The fact that in 2001 the Convention on Certain Conventional Weapons was amended to extend its scope to non-international armed conflicts is an indication that this notion is gaining currency within the international community.”<sup>24</sup> A lawyer in the LOAC vision would cite the same evidence to reach the opposite conclusion: the fact that states amended the Convention on Certain Conventional Weapons but *not* the Additional Protocols shows that they were not prepared to import AP I standards into AP II, or into parallel rules of customary international law. The UK Ministry of Defence’s *Manual of the Law of Armed Conflict* recognizes that LOAC applies in internal as well as interstate armed conflicts, but immediately notes: “Different rules apply to these different situations.”<sup>25</sup>

### 3. Customary international law.

Besides treaties, customary international law is the main source of the laws of war. The definition of customary international law is “a general practice accepted as law” or, in another influential formulation, “a general and consistent practice of states

<sup>23</sup> Jean-Marie Henckaerts & Louise Doswald-Beck, 1 Customary International Humanitarian Law xxix (2005). For a similar argument by an international tribunal, see the ICTY’s *Tadić* judgment, §97.

<sup>24</sup> *Id.*

<sup>25</sup> UK Ministry of Defence, *The Manual of the Law of Armed Conflict* 27 (2004), para. 3.1.

followed by them from a sense of legal obligation.”<sup>26</sup> Beginning law students are taught that customary international law therefore has two elements, state practice and *opinio juris* (the sense of legal obligation). Those who claim that a rule belongs to customary international law must demonstrate both elements.

The tricky part of customary international law is that no automatic way exists to tell if a rule has attained customary status. Interpreters may disagree about whether non-unanimous state practice has achieved sufficient “density” to be labeled a general practice, or whether states undertake niceties out of a sense of legal obligation or for other reasons. More than any other part of law, customary international law exists (or not) in the pronouncements of experts reading the tea leaves of diplomatic practice. The issue is, one might say, interpretive all the way down. That it makes it ripe for duels between experts.

A noteworthy illustration is the controversy between the United States government and the ICRC over the latter’s customary international humanitarian law study—a milestone of the IHL vision of the laws of war. The study took ten years and involved hundreds of researchers canvassing state practice and *opinio juris*. The final product includes a volume of rules accompanied by two volumes of supporting documentation, and it weighs in at 4,500 pages. Soon after it was published, however, the U.S. State Department’s Legal Adviser John Bellinger and the General Counsel of the Defense Department, William Haynes, wrote a skeptical letter to the ICRC. They complained that the state practice cited by ICRC is “insufficiently dense”; that it places too much emphasis on written materials like military manuals, “as opposed to actual operational practice by States during armed conflict”; that it gives “undue weight to statements by non-governmental organizations and the ICRC itself”; that it does not give due regard to the practice of “specially affected States” and “tends to regard as equivalent the practice of States that have relatively little history of participation in armed conflict and the practice of States that have had a greater extent and depth of experience....”<sup>27</sup>

Now, the last of these complaints might be discounted as special pleading for American exceptionalism. But overall, the Bellinger/Haynes article reflects the concern by military lawyers that humanitarian lawyers overreach in announcing customary international law and ignore actual military practice in favor of documents—and this concern is hardly special pleading.

4. *The very nature of international law.* Military lawyers have states as clients, and the LOAC vision of international law is statist in the traditional fashion represented by the 1927 *Lotus* dictum: “rules of law binding upon States...emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law.”<sup>28</sup> Period. The LOAC vision is skeptical of claims that states’ wills can be constrained by supposedly higher standards—“progressive” trends and tendencies, generalizations and extrapolations, *jus cogens*, and

<sup>26</sup> ICJ Statute, art. 38(1)(b); ALI Restatement (Third) of the Foreign Relations Law of the United States, §102(2).

<sup>27</sup> John B. Bellinger III & William J. Haynes II, *A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law*, 89 Int’l Rev. Red Cross 443, 444-46 (2007).

<sup>28</sup> Permanent Court of International Justice, *The Case of the S.S. Lotus (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), accessed from [http://www.worldcourts.com/pcij/eng/decisions/1927.09.07\\_lotus/](http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/) on June 14, 2011, p. 14.

pronouncements by activist tribunals and NGOs.<sup>29</sup> Thus, the UK Ministry of Defence recognizes only two sources of LOAC, customary law and treaty law, both of which depend on state consent.<sup>30</sup> Under the LOAC vision, a state that has not bought into a standard remains unbound regardless of what the NGOs or the IHL experts say.

5. *Deference and discretion.* One important consequence of Taking Necessity Seriously is that military lawyers want to leave the judgment calls about what is necessary to military commanders, without after-the-fact second guessing by courts, investigating commissions, or Human Rights Watch.

Consider proportionality calculations, which under the law require weighing the concrete and direct military advantage of an operation against the anticipated “incidental” damage to civilians and civilian objects. Everyone understands that “calculations” in a literal sense are out of the question. Different observers will assign different weights to military advantages and evaluate risks to civilian objects differently. For military lawyers, it is self-evident that commanders enjoy broad discretion and deserve significant deference. Military lawyers vigorously object to ex post second-guessing of command decisions.<sup>31</sup>

Here is an example of the kind of second-guessing that bothers military lawyers: In the ICTY’s 2011 *Gotovina* decision, the Trial Chamber found that a Croatian artillery officer named Rajčić indiscriminately shelled a city by firing at the enemy commander’s apartment in a civilian neighborhood. General Ante Gotovina, who had ordered Rajčić to shell the city, drew a 24 year sentence for war crimes.

The Trial Chamber has found above that firing at Martić’s apartment could disrupt his ability to move, communicate, and command and so offered a definite military advantage. Rajčić recognized that the chance of hitting or injuring Martić by firing artillery at his building was very slight. Rajčić testified that the HV sought to harass and put pressure on Martić and that the HV took the rules of distinction and of proportionality into account when deciding whether to target the apartment block. The Trial Chamber considers that Martić’s apartment was located in an otherwise civilian apartment building .... At the times of firing, namely between 7:30 and 8 a.m. and in the evening on 4 August 1995, civilians could have reasonably been expected to be present on the streets .... Firing twelve shells of 130 millimetres at Martić’s apartment and an unknown number of shells of the same calibre at the area marked R on P2337, from a distance of approximately 25 kilometres, created a significant risk of a high number of civilian casualties and injuries, as well as of damage to civilian objects. The Trial Chamber considers that this risk was excessive in relation to the anticipated military advantage of firing at the two locations where the HV believed Martić to have been present. This disproportionate attack shows that the HV paid little or no regard to the risk of civilian casualties and injuries and damage to civilian objects when firing artillery at a military target ....<sup>32</sup>

For military lawyers, it is outrageous for the Trial Chamber to second-guess Gotovina’s decision-making. Who were the judges to decide how important it was to

<sup>29</sup> See, e.g., Schmitt, *supra* note \_\_, at 798-99 (2010).

<sup>30</sup> UK Manual, § 1.11, p. 4.

<sup>31</sup> For worries about second-guessing command decisions in a different context, see Newton, at 896.

<sup>32</sup> Prosecutor v. Gotovina et al., case no. IT-06-90-T, ICTY Trial Chamber I, judgement of 15 April 2011, para. 1910.

disrupt Martić's "ability to move, control, and command"—which even the Trial Chamber calls a "definite military advantage"—or how likely the shelling was to injure civilians and civilian objects, or how to weigh the military advantages against the risks?<sup>33</sup>

It goes almost without saying that under the LOAC vision, external accountability for law of war violations is undesirable; state militaries should be relied upon to police their own. Universal jurisdiction is particularly deplorable, not to mention inadequately supported by state practice and *opinio juris*. This outlook represents more than military lawyers' professional protectiveness of their clients, and adoption of the clients' point of view (although that is undeniable). The mistrust of external accountability rests on principle, and flows from the conviction that military commanders deserve deference and discretion for decisions they make in the fog of war. The fog of war is one of the "inexorable necessities" that the law cannot wish out of existence.

6. *Human rights*. In the LOAC vision, human rights don't have much to do with the laws of war. Historically, the laws of war evolved along a separate track that pre-dates human rights law. That separate track comes from two sources: centuries-old traditions of chivalry and martial honor, and humanitarianism, meaning the desire to alleviate suffering. Humanitarianism has little to do with human rights; its source is compassion and pity, not recognition of individual humans as rights-bearers. Its philosophical motivation is the Benthamite desire to diminish pain and suffering, not the Kantian injunction to respect human dignity. Human rights law is for peacetime, and the LOAC vision emphasizes the laws of war as *lex specialis*, 'special law' that displaces more general law under the "rule of specialty."<sup>34</sup> That means it displaces human rights law whenever peace gives way to war.

Military lawyers hewing to the LOAC vision also emphasize the stringent jurisdictional restrictions in major human rights instruments, which underline that human rights are meant to bind governments within their own territory, not in foreign wars. For example, article 2 of the International Covenant on Civil and Political Rights reads:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant... (emphasis added).

The Covenant does not obligate a belligerent state outside the territory and jurisdiction of the state.<sup>35</sup>

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<sup>33</sup> Critiques of *Gotovina* include OPERATIONAL LAW EXPERTS ROUNDTABLE ON THE *GOTOVINA* JUDGMENT (Emory U. Int'l. Humanitarian Law Clinic 2012), available at [http://www.law.emory.edu/fileadmin/NEWWEBSITE/Centers\\_Clinics/IHLC/Gotovina\\_Meeting\\_Report.pdf](http://www.law.emory.edu/fileadmin/NEWWEBSITE/Centers_Clinics/IHLC/Gotovina_Meeting_Report.pdf) (accessed Jan. 27, 2012); Geoffrey S. Corn & Gary P. Corn, *The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens*, S. Texas L. Rev. (forthcoming), available on SSRN at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1913962](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1913962) (accessed Jan. 27, 2012).

<sup>34</sup> W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 NYU J. Int'l L. & Politics 769, 797-98 (2010).

<sup>35</sup> See Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AJIL 119, 122-27 (2005); *Banković and Others v. Belgium and 16 Other Contracting States*, 2001-XII Eur. Ct. H.R. 333 (Grand Chamber), 123 ILR 94, §§59-63 (holding that the European Convention on Human Rights' jurisdiction does not include a military adversary's territory, and therefore relatives of civilians killed in NATO bombing of a Belgrade television station have no cause of action for violation of human rights under the Convention).

The point is not that military lawyers denigrate human rights and human rights law. They do not. It is that they doubt its relevance in armed conflict, and see little conceptual or historical connection between human rights law and LOAC.

To summarize, the LOAC vision takes necessity seriously, favors wide discretion and deference to military commanders in judgment calls, reads treaties narrowly and formalistically under the assumption that states gave up as little as they could when negotiating them, interprets customary international law through a “hermeneutics of suspicion” about humanitarian overclaiming, adopts a statist view of international law, and doubts the relevance of human rights law to the laws of war. Military necessity is the keystone of the arch: all the other elements make sense because the necessities of combat are inexorable, and military lawyers regard LOAC as interstitial and narrow—a body of law designed to infuse the “principle of humanity” into the conduct of war, but only in those places that states are willing to let it impinge on military necessity.

### **The IHL Vision**

Where military necessity forms the unshakeable foundation of the LOAC vision, human rights and human dignity lie at the basis of the IHL vision. As the ICTY put it in its *Furundzija* judgment,

The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person.... The general principle of respect for human dignity is . . . the very *raison d'etre* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law.<sup>36</sup>

That does not mean that the IHL vision fixates on the rather specialized and technical body of human rights *law*, although as we will see the IHL vision gives human rights law a far larger place than the LOAC vision accepts. The point is rather that the IHL vision begins with individual human beings caught up against their will in a war—human beings who simply want to go about their daily business and whose human dignity confers upon them a right to do so without being blown up, maimed, brain damaged, driven from the ruins of their homes, or forced to bury their children. The aim of IHL is to secure them, to the maximum extent possible, against the violence and indignity of war—violence and indignity that the LOAC vision never minimizes. IHL offers a civilian’s-eye view of war, and gives ground grudgingly to claims of military necessity. Where legal restrictions operate in the margins of military necessity under the LOAC vision, IHL strains to relegate war to the margins of peacetime rights. As a result, its mode of legal interpretation is maximalist in just those places—the restraints and obligations of warriors—that LOAC is minimalist, and minimalist in the places that LOAC is maximalist: in discretion and deference to the military. Largely, both sets of lawyers read and accept the same body of jurisprudence, and both of them admit that war and human dignity belong to the human world. But they reach different conclusions because they assign military necessity and human dignity different logical priority.

A paradigm example of the IHL vision appears in one of the first decisions of the ICTY, the *Tadić* case. ICTY had a problem. Its statute empowers it to prosecute

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<sup>36</sup> Prosecutor v. Furundzija, No. IT-95-17/1-T, Judgment, Para. 183 (Dec. 10, 1998), *reprinted in* 38 ILM 317 (1999).

grave breaches of the Geneva Conventions, but grave breaches are defined only in international armed conflicts, and the Bosnian conflict was a civil war. If ICTY accepted the non-international character of the Bosnian war, it would be unable to prosecute one of its own statute's principal categories of crimes. A formalist reading of the Statute lends itself to that conclusion, and the principle that ambiguous criminal statutes must be construed in favor of the defendant reinforces that reading.

Instead, ICTY read the law broadly rather than narrowly. It devised a novel legal test of state control of military forces to conclude that the war was really an international armed conflict between Bosnia and Serbia. More noteworthy than the conclusion (which, legal novelty or not, accurately described the reality on the ground) was the reasoning. The Appeals Chamber explained that its conclusion is based not only on the letter but the spirit of the Geneva Conventions, and

is borne out by the entire logic of international humanitarian law. This body of law is not grounded on formalistic postulates. It is not based on the notion that only those who have the formal status of State organs, i.e., are members of the armed forces of a State, are duty bound .... Rather, it is a realistic body of law, grounded on the notion of effectiveness and inspired by the aim of deterring deviation from its standards to the maximum extent possible.<sup>37</sup>

The mode of interpretation employs the so-called “Principle of Effectiveness,” developed particularly by the European Court of Human Rights and holding that legal instruments aiming to protect people's basic rights must be interpreted to make them effective at achieving their object and purpose. In its 1989 *Soering* decision, the European Court wrote:

In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with “the general spirit of the Convention....”<sup>38</sup>

*Soering* treats the European Convention on Human Rights as an evolving document, one that expands its protections to fill gaps. *Tadić* treats humanitarian law exactly the same way. It appeals to the “spirit” and “logic” of humanitarian law. This is precisely the kind of gap-filling interpretation of legal instruments that lawyers in the LOAC vision reject. They see treaties as agreements representing the will of their parties, nothing more, not clauses in a “living constitution.” But for the IHL vision, human rights are different, special, and constitutional in their status.

Recall that adherents to the LOAC vision assume that states negotiating law of war treaties would never have given away war fighting powers that matter to them. The IHL vision understands the history of humanitarian treaties differently, as manifestations of states' desire—or at least the desire of important state constituencies—to break with the horrifying past. To suppose that governments and their Geneva delegates were uniformly hard-liners and realists (in the international-

<sup>37</sup> Prosecutor v. Tadić, ICTY Appeals Chamber, case no. IT-94-1-A (judgement of 15 July 1999), §96.

<sup>38</sup> *Soering v. United Kingdom*, [1989] ECHR 14 (7 July 1989), §87, reprinted in 28 I.L.M. 1066, 1091-92 (1989).

relations sense) begs the question, misunderstands politics, and falsifies a complex history.

The IHL vision of customary international law also differs dramatically from the LOAC vision. First of all, the roster of agents whose practice and *opinio juris* contribute to law formation has expanded to include international organizations like the UN Secretariat and the ICRC. As the ICRC points out, both have legal personality, and both have a military role: the Secretariat controls UN military forces, and the ICRC “has received an official mandate from States ‘to work for the faithful application of international humanitarian law applicable in armed conflicts and ... to prepare any development thereof.’”<sup>39</sup> Formalism aside, the Secretariat and the ICRC have institutional commitments to protecting civilians, and in the IHL vision that commitment belongs at the table in the formation of customary international law.

But the UN Secretariat and ICRC are hardly the only non-state actors who contribute to customary international law. The IHL vision recognizes that the process of international lawmaking has evolved substantially from the narrow statism of *Lotus*. Lawmaking now rightfully includes many actors, including international organizations and tribunals and NGOs. States may have created the IOs and tribunals, but in creating them, states endowed their creatures with the power to speak law on their own.<sup>40</sup> So too, NGO arguments operate indirectly by pressuring states to respond to them, but this gives them a genuine role in the formation of *opinio juris*.<sup>41</sup>

The IHL vision is therefore willing to include a variety of “soft law” instruments from multiple sources as evidence of *opinio juris*; and it treats official state statements—verbal practice as opposed to practice “on the ground”—as law-generative state practice.<sup>42</sup> After all, the practice on the ground might represent lawbreaking rather than lawmaking, so there is no reason to privilege it over states’ statements of the principles they stand for.<sup>43</sup> Of course states’ anodyne pro-humanitarian statements may be public relations hypocrisy, but that makes them no less a form of state practice. The maxim that hypocrisy is the homage that vice pays to virtue is never truer than in diplomacy, and paying homage to virtue *is* a form of state practice, possibly as old as warfare itself. The fact that a state practice is insincere does not weaken it as a source of customary international law.

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<sup>39</sup> Henckaerts & Doswald-Beck at xxxv, quoting the ICRC’s statute, article 5(2)(c) and (g).

<sup>40</sup> Military lawyers may reject this proposition, arguing that decisional law by international tribunals is not authoritative and represents, in the words of the ICJ’s statute, only “subsidiary means for the determination of rules of law.” Schmitt, at 816, quoting ICJ statute, art. 38(1)(d). However, this is not a knockdown argument. Technically speaking the article Schmitt quotes from the ICJ statute governs only the ICJ itself, not any other tribunal or interpretive body. Given the severely limited competence of the ICJ (only states may be parties before it, and its decisions are binding only on the parties to the case for that particular case), it is easy to see why its governing statute might give decisional law diminished status in ICJ practice. One might therefore conclude that the ICJ statute’s demotion of decisional law is idiosyncratic and lacks wider significance. No other tribunal is compelled by the ICJ statute to treat its own decisional law as “subsidiary,” or for that matter to treat any other tribunal’s decisional law as subsidiary. And so no competent lawyer advising a client should place decisive weight on Article 38(1)(d). Even the law governing sources of law turns out to be indeterminate.

<sup>41</sup> Eyal Benvenisti, *Toward a Typology of Informal International Lawmaking Mechanisms and Their Distinct Accountability Gaps* (unpublished ms 2011).

<sup>42</sup> *Id.* at xxxii-xxxiii.

<sup>43</sup> Jean-Marie Henckaerts, *Customary International Humanitarian Law: A response to US comments*, 89 *Int’l Rev. Red Cross* 473, 477 (2007).

In the same way that the IHL vision uses more expansive methods of treaty interpretation than the LOAC vision, it is more expansive in the domain of state practice and *opinio juris* it canvasses to identify customary international law. International courts and tribunals have ratified the methods favored by the IHL vision, and that means the IHL vision has gained a foothold in positive law—it is not simply wish-fulfillment fantasies of humanitarian reformers.<sup>44</sup>

To be sure, there has been pushback against giving too much credence to soft law as a source of customary international law. Almost thirty years ago, Prosper Weil warned that “the accumulation of nonlaw or prelaw is no more sufficient to create law than is thrice nothing to make something.”<sup>45</sup> A decade later, Bruno Simma and Philip Alston criticized “a cultured pearl version of customary international law” that operates “through proclamation, exhortation, repetition, incantation, lament.”<sup>46</sup> But traditionalist warnings like these miss the jurisprudential argument behind the IHL vision, which is that international law *rightfully* responds to broader constituencies than states. Legal accountability has become more pluralist and more populist than in the traditional state-centered view of international law. Today accountability runs to multiple institutions—public, semi-public, and private—which serve as surrogates for accountability to people. Accountability implies obligation, and obligation is the calling card of law. This is a point of decisive importance, to which I return shortly.

LOAC lawyers are “legal centralists,” a name for the jurisprudential school that recognizes only state-made law as genuine law; and they are positivists, granting legal validity only to norms that can trace their pedigree back to state consent. In IHL jurisprudence, legal centralism and positivism give way to legal pluralism, the view that even the most advanced societies contain multiple legal systems, some state-made but others not. IHL lawyers view international law as a pluralist system where states have lost their exclusive authority over the rule of recognition for customary international law. In the current environment the rule of recognition for international law is itself up for grabs, and under the IHL vision a progressive trajectory in state practice and *opinio juris* can be taken up by other articulators of law to demonstrate the emergence of new rules of customary international law.

Observers commonly attribute this change to the human rights revolution and its consequences. The shift away from the classical state-centered picture of sovereignty began when the Nuremberg Charter stripped away the act-of-state and obedience-to-law defenses and penalized crimes against humanity “whether or not in violation of the domestic law of the country where perpetrated.” It continued with the formation of the United Nations and the emergence of modern *jus cogens* norms. More recently, it manifested itself in the proposal that sovereignty is conditional on protecting the human rights of the state’s people, an interpretation suggested in 1999

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<sup>44</sup> E.g., ICTY, *Tadić* case, Case No.IT-94-AR72, Decision on the defense motion for interlocutory appeal on jurisdiction, 2 October 1995, §99 (“reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions”), quoted in Henckaerts & Doswald-Beck at xxxiii; “Notably absent from many of these cases [in which international tribunals invoke customary international law] is a detailed discussion of the evidence that has traditionally supported the establishment of the relevant rules as law.” See Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AJIL 817, 819 (2005); Kenneth W. Abbott, *Commentary: Privately Generated Soft Law in International Governance*, in INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: BRIDGING THEORY AND PRACTICE 166, 168-69 (Thomas J. Biersteker et al eds., 2007).

<sup>45</sup> Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AJIL 413, 417 (1983).

<sup>46</sup> Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 Austl. Y.B. Int’l. L. 82, 89 (1992).

by then-UN Secretary General Kofi Annan.<sup>47</sup> Once we subordinate state sovereignty to human rights norms, the consensualist theory of international law becomes at best incomplete and at worst incoherent.

In contrast to the LOAC vision, the IHL vision of human rights law perceives a strong connection with the laws of war. As we have seen, the LOAC vision rejects the application of human rights law in wartime as inconsistent with existing law and untrue to the very different historical paths on which the two branches of law have evolved. To both objections IHL has a response.<sup>48</sup> To begin with, the major law of war treaties incorporate what are plainly human rights protections. The most obvious is common Article 3 of the Geneva Conventions, frequently and correctly described as a mini-human rights convention embedded in Geneva. The same goes for Article 75 of Additional Protocol I, which offers a schedule of human rights protections for “persons who do not benefit from more favorable treatment under the Conventions or under this Protocol.” The Geneva edifice of “more favorable treatment” therefore rests on a conceptual floor of basic human rights.

Furthermore, IHL proponents can point to the ICJ’s holding that the “protection of the [ICCPR] does not cease in times of war ...”<sup>49</sup> unless states expressly derogate from it—and they cannot derogate from the most basic human rights. To be sure, the ICJ also points out that the law of war, as *lex specialis*, defines the meaning of human rights in wartime: the rights against arbitrary deprivation of life and liberty will be weaker in time of war because killing and imprisonment that would be “arbitrary” in peacetime may not be arbitrary under laws of war that take necessity seriously. But even with that important qualification, the ICJ conceptualizes the law of war as an interpretive guide to the law of human rights rather than a substitute for it. Human rights law may provide lesser protections in wartime than in peacetime, but its obligations don’t go away, and the *lex specialis* never supplants them.

What about the explicit jurisdictional limitation on the ICCPR? IHL reads the treaty language differently from the LOAC interpretation, under which the Convention applies only within a state’s own territory or jurisdiction. IHL reads it as indicated by the brackets I have inserted in the jurisdiction clause:

Each State Party to the present Covenant undertakes [to respect] and [to ensure to all individuals within its territory and subject to its jurisdiction] the rights recognized in the present Covenant....

On this reading, the territorial and jurisdictional limitation applies only to the obligation to ensure human rights, not the obligation to respect human rights, that is, not to violate them. Nor is this a strained reading. It makes sense that states can be expected to ensure human rights only on territory they control, but it also makes sense that they can respect human rights (by not violating them) anywhere. On the alternative LOAC reading, the requirement to respect rights, restricted to a state’s territory or jurisdiction, becomes redundant: Why include an obligation to respect rights if you already have an obligation to ensure rights? You cannot ensure rights if you are violating them. The virtue of the IHL reading is that by giving the duty to

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<sup>47</sup> Kofi Annan, *Secretary General Presents His Annual Report to the General Assembly*, Sept. 20, 1999, accessed from [http://www.un.org/News/press/docs/1999/statements\\_search\\_full.asp?statID=28](http://www.un.org/News/press/docs/1999/statements_search_full.asp?statID=28) on April 8, 2011.

<sup>48</sup> For a detailed discussion, see Theodore Meron, *The Humanization of Humanitarian Law*, 94 AJIL 239 (2000).

<sup>49</sup> ICJ Nuclear Weapons Advisory Opinion, §25.

respect a wider scope than the duty to ensure, it makes the duty to respect non-redundant and, as lawyers like to say, it gives effect to every word of the treaty language.<sup>50</sup> Thus, the IHL reading is better on textual grounds and entirely plausible on policy grounds. The ICRC and the European Court of Human Rights believe that human rights law applies whenever a belligerent state obtains “effective control” over an area, regardless of formal tests of territorial jurisdiction.<sup>51</sup>

Finally, the IHL vision does not defer to the judgment of military commanders. That would defeat the whole point of legal accountability. Deference to military commanders making life-and-death decisions in the fog of war signifies more than rightful acknowledgment of military necessity. It also means allowing whatever slack commanders cut themselves to define the common law for interpreting IHL standards. Deference also means trusting commanders to tell the truth about what guided their decisions, under circumstances where they have everything to gain by lying. Recently, for example, a U.S. military court acquitted the last suspect in the 2005 killing of unarmed civilians at Haditha, Iraq of the most serious charges. A news account offers an explanation gleaned from interviews with military law experts:

The Haditha case also fits another pattern: Many cases involving civilian deaths arise during the chaos of combat or shortly afterward, when fighters’ emotions are running high; they can later argue that they feared they were still under attack and shot in self-defense.

In those so-called fog-of-war cases, the military and its justice system have repeatedly shown an unwillingness to second-guess the decisions made by fighters who said they believed they were in danger, specialists say.<sup>52</sup>

The acquittal rate is high in U.S. trials for war crimes committed in combat zones as compared with comparable conduct outside of battle.<sup>53</sup>

The *Gotovina* decision quoted earlier helps illustrate what is at stake. Even though the Tribunal appears to second-guess the artillery officer’s proportionality decision, it turns out that the Tribunal really based its decision on something less controversial: it simply didn’t believe Rajčić, and concluded that Gotovina had ordered Rajčić “to treat whole towns... as targets when firing artillery projectiles.”<sup>54</sup> The Tribunal treats Rajčić’s disproportionate shelling as one among several pieces of evidence leading to that conclusion, and it uses its own proportionality analysis not to

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<sup>50</sup> This is the reading adopted by the UN’s Human Rights Committee in General Comment 31, §3. However, in §10 the Human Rights Committee offers an even broader reading. “States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.” This reading reads the phrase “to all individuals” distributively, in effect adding three words to the text:

3. Each State Party to the present Covenant undertakes (to respect and to ensure) to all individuals within its territory and [*to all individuals*] within its jurisdiction the rights [etc.]

Equivalently, in effect this changes “and” to “or” in the phrase “to all individuals within its territory and subject to its jurisdiction.”

<sup>51</sup> Cite to Henckaerts & Doswald-Beck; July 2011 ECtHR *Al-Skeini v. UK* decision.

<sup>52</sup> Charlie Savage & Elizabeth Bumiller, *An Iraqi Massacre, a Light Sentence, and a Question of Military Justice*, N.Y. Times, Jan. 27, 2012.

<sup>53</sup> *Id.*

<sup>54</sup> *Gotovina*, §1911.

substitute for Rajčić's judgment, but to conclude that Rajčić was lying when he testified that he "took the rules of distinction and of proportionality into account."<sup>55</sup>

Humanitarian lawyers believe that international law is already too deferential to military commanders. As a case in point, consider the report of a committee established by the ICTY prosecutor to review the NATO bombing campaign in the Kosovo war for possible war crimes. The committee used a relaxed standard of evidence: "credible evidence tending to show that crimes within the jurisdiction of the Tribunal may have been committed in Kosovo."<sup>56</sup> Under that standard, one would surely guess that borderline cases would be referred for further investigation. But one would guess wrong. In fact, the committee resolved every debatable case in favor of NATO, and in the end it recommended no investigations at all.

In one instance, a pilot was assigned to bomb a bridge. Too late to stop the bomb, he realized that a train was rolling onto the bridge, and his bomb hit the train. He nevertheless decided to complete his mission by circling back to drop a second bomb, which also hit the train. At least ten passengers were killed and another 15 injured. The Committee "had divided views concerning the attack with the second bomb in relation to whether there was an element of recklessness... Despite this, the committee is in agreement that... this incident should not be investigated."<sup>57</sup> In another instance, NATO bombed a Belgrade television station, killing 10-17 people, in order to "interrupt broadcasting for a brief period."<sup>58</sup> NATO argued that the bombing was justified in part because the station was broadcasting propaganda. The most the committee could say was that "if the attack on the RTS was justified by reference to its propaganda purpose alone, its legality might well be questioned by some experts in the field of international humanitarian law."<sup>59</sup> It is hard to imagine a more timid assertion than this, which declines to draw any legal conclusion at all in the committee's own name. To IHL lawyers, the decision to open no investigations of NATO is a poster child of how badly deference to military decisions undermines accountability.

As for universal jurisdiction, IHL lawyers think it is an indispensable complement to states' own spotty and self-serving efforts at accountability, and a powerful incentive to reluctant state militaries to investigate their own. Universal jurisdiction has a firm foundation in the Geneva Conventions, substantial state practice, and at least some support within the International Court of Justice.<sup>60</sup>

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<sup>55</sup> *Id.*, §1910, 1911. That seems right. A former naval commander with experience firing similar guns asserts that firing without a spotter on a target the size of an apartment from 25 kilometers away could not be accurate, because of variations in gunpowder, wind (impossible to calculate because the shells reach an altitude of over 30,000 feet), and gun wear from shot to shot. Private communication from David Glazier, May 23, 2011.

<sup>56</sup> Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (13 June 2000, PR/P.I.S./510-E), § 5.

<sup>57</sup> *Id.* at §62.

<sup>58</sup> *Id.*, §78, 71.

<sup>59</sup> *Id.* at §76.

<sup>60</sup> Geneva Conventions: GC I, art. 49, GC II, art. 50, GC III, art. 129, GC IV, art. 146—all of which obligate states "to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts." This represents a remarkable break from other international criminal treaties, which make universal jurisdiction merely a fallback option if extradition fails. State practice: several European states have prosecuted Balkan War defendants under universal jurisdiction, and Spain has made extensive use of universal jurisdiction. Even the United States, which is officially allergic to universal

At this point we can summarize the main features of the IHL vision in parallel to the summary offered earlier of the LOAC vision. The IHL vision takes human dignity seriously in the way that the LOAC vision takes necessity seriously: as a fixed parameter within which the law of war regulates. It grants commanders narrow discretion and little deference, reads treaties to fill gaps in the protection of civilians, expands the role of non-state actors and soft law in forming customary international law, favors legal pluralism over statism as the proper account of jurisprudence, and gives wide scope to human rights law even in armed conflict.

### **The Indeterminacy Problem**

At this point, the indeterminacy problem should be clear. The problem is not that humanitarian lawyers and military lawyers often arrive at different answers to vexed legal questions, for example the permissibility of targeted killings or how to deal with voluntary human shields. The problem is that the modes of argument themselves differ systematically, because the LOAC and IHL visions represent coherent systems of jurisprudence that turn on different Archimedean points, military necessity or human rights and human dignity.

This is bad news for those who find one vision of the laws of war vastly more compelling than its rival. It's straightforward to argue with particular bits of legal reasoning (which doesn't mean you will win the argument), but much harder to argue with axioms and unarticulated background assumptions. It is hardly a secret that people who see the world differently are likely to see the law differently as well; and perhaps the cultural divide I am describing is nothing more than another manifestation of this well-known phenomenon. Even so, its contours are distinctive.

In the conflict between the LOAC and IHL visions of the law of war, every step of the argument rests on premises (about treaty interpretation, customary law formation, the nature of international law, the role of human rights, and deference) that the other side rejects on principle; and the principles ultimately rest on the premises that I have called Archimedean points: military necessity and human dignity.

The result is practical indeterminacy—not in the sense that anything goes, that any legal answer is as good as any other, but in the more significant sense that the law can be understood through either of two structured systems that stand in opposition to each other. Both have ample support within recognized sources of law; neither is frivolous or tendentious on its face, although of course both can be used tendentiously (but all law can be used tendentiously).

It follows that a military legal advisor who offers an opinion grounded entirely in the LOAC vision has not violated the ethical standards governing the advisor's role, or the craft values of the legal profession. Such an opinion would not fall into the "torture memo" category of frivolous, result-driven lawyer games. (Hopefully, though, lawyers would set their sights higher than non-frivolity.)

If the opinion comes in the form of an official military manual or other authoritative directive, it has the additional advantage of counting—by the IHL vision's own favored criterion—as state practice and *opinio juris*, and in that way it

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jurisdiction, has used it in terrorism cases: *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991); *United States v. Rezaq*, 134 F.3d 1121 (D.C. Cir. 1998). ICJ: In its 2002 *Arrest Warrant (DRC v. Belgium)* decision, 10 judges discussed universal jurisdiction in non-binding separate opinions, dividing 5-4 in favor of it with one "abstention."

contributes to a more LOAC-oriented version of customary international law, which the military lawyer also believes is the correct version. That sounds like a win-win solution, hoisting the IHL adversaries, as it were, on their own petard. Insofar as the military manual guides JAG advice in combat situations, it also shapes state practice on the ground, further embedding the LOAC vision in customary law. An experienced military lawyer recommends that military lawyers stay “involved in the negotiation and discussion of emerging legal norms precisely because it is so vital to maintain ownership in the field of humanitarian law.”<sup>61</sup> What better way to maintain ownership over humanitarian law than to actively shape it according to the LOAC vision?<sup>62</sup>

The problem, it seems to me, lies in the idea that military professionals ought to own the laws of war. (Recall Professor Dinstein’s advice: “Keep poachers off the grass.”) That is like saying that Wall Street investment houses ought to own securities regulations. Militaries aren’t the only people in the battle space or the only ones war effects. It may be that in their origin the laws of war were an honor code for warriors who own the battlespace by force of arms—in other words, a concession by the strong to the weak, which the weak have by grace and not by right because what matters is not the rights of the weak but the power of the strong.

But that is no longer how most people regard the laws of war. In the past decades, war makers have had to come to terms with a political world in which their actions fall under the intense scrutiny of media and public opinion—and students of Clausewitz understand that public opinion makes or breaks military causes. The international tribunals give visible structure and focus to that public opinion, but it matters less that war makers might come under the ICC’s jurisdiction (they usually won’t) than that they come under CNN’s and YouTube’s jurisdiction. Their deeds will be on the Internet within minutes of engagement, captured by cell phones.

This phenomenon has become a source of frustration to military lawyers, because audiences assume that gruesome scenes of dead civilians always mean war crimes even when they are nothing of the sort. The lawyers’ complaint is correct, but public scrutiny and accountability is a fact of life, and at bottom it represents a larger truth that the complaint overlooks: the civilian world has staked a claim to the laws of war that is not going to go away, and that should not go away. The laws of war are now common property.

The implication for military legal advisors is both obvious and easy to misunderstand. It is obvious that legal advice is supposed to keep the client out of trouble, and that might mean counseling against courses of action that are “legal” under LOAC but will look horrific. But I put “legal” in scare-quotes for a reason. Even though the lawyer might think that cautionary advice is a concession to prudence or politics and not a matter of law, the fact is that the court of public opinion cares about civilians and it demands that the law governing battlespaces also care about them, as much as it cares about military concerns. To the degree that the IHL version of the laws of war articulate concern about civilians and the LOAC version

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<sup>61</sup> Newton, at 895.

<sup>62</sup> He adds: “Continued ownership of the legal regime by military professionals, in turn, sustains the core professional identity system of military forces. Failure to keep the legal norms anchored in the real world of practice would create a great risk of superimposing the humanitarian goals of the law as the dominant and perhaps only legitimate objective in times of conflict. This trend could result in principles and documents that would become increasingly divorced from military practice and, therefore, increasingly irrelevant to the actual conduct of operations.” *Id.* at 895-96. See also Anderson, *Who Owns the Laws of War?*, *supra* note 5.

does not, the IHL version sets the legal standard, not only the political standard.

Earlier I remarked that states have lost their exclusive authority over the rule of recognition, and what I meant was the legal pluralists' point: states no longer have a monopoly over law creation (if they ever did), and the rule of recognition in the law of war is not, *à la* H.L.A. Hart, a social practice of state officials alone.<sup>63</sup> It is a social practice among broader audiences who care about civilian interests as well as those of the military. They are audiences who will hold militaries accountable and who shape the political environment of military action.

The phenomenon I am describing might be called the civilianization of the laws of war, by which I mean simply that in the laws of war civilian interests matter as much as military interests. The phenomenon—twenty years ago, Theodore Meron called it the “humanization of humanitarian law”—is unmistakable, and it is a legal phenomenon. It might equally be called the legalization of public opinion.

Of course, the civilian-military schema is too simple. The people of the state fielding the army are also civilians—and they root for their own team, care little about the enemy's civilians, and stand firmly against holding their own army accountable for legal violations. So the civilianization of the laws of war will be uneven and inconsistent. On the other side of the ledger, it would be a disastrous mistake to assume that the military client doesn't care about the human dignity of civilians, so the term ‘civilianization’ might be a misnomer that wrongly denigrates the consciences of soldiers.

I will nevertheless stay with the name “civilianization,” which singles out the important fact that the laws of war have passed from exclusive ownership by warriors to joint ownership by the civilians in the battlespace whose fate they determine. As I now argue, the civilianization of the laws of war is right. What I shall argue is that military necessity, properly understood, itself requires taking civilian interests into account. Before offering that argument, it is worth previewing what it implies: that the indeterminacy may not be as complete as I suggested. To the extent the LOAC version ignores civilian interests in human dignity, its interpretation of the laws of war is inferior to the IHL version.

### **The Career of Military Necessity**

If the LOAC vision of the laws of war derives from the keystone principle that I have called “Taking Necessity Seriously,” it is worth our time to examine what military necessity means. As the following discussion demonstrates, the concept has evolved over time, and different formulations vary dramatically on crucial issues: whether military necessity is a legal concept or, on the contrary, a naturalistic concept outside the law that sets the boundary on the legal regulation of warfare; whether ‘necessity’ means what the literal language suggests—something unavoidable if war is to be waged successfully—or merely whatever the military finds convenient; and, above all, whether judgments of military necessity must take civilian interests into account.

In medieval just war theory, the principle of necessity “meant that the just side was permitted to use whatever degree of force was strictly necessary in the particular circumstances of the case to bring about victory. Beyond that point, *all* force became

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<sup>63</sup> I have argued that Hart's view is internally incoherent: see Luban, *Legal Ethics and Human Dignity* at 136-43.

unlawful.”<sup>64</sup> Under this conception, necessity serves both a prohibitive and a licensing function. It prohibits gratuitous, wanton violence—unnecessary violence. But it licenses all non-gratuitous violence, that is, violence essential to the military goal. In Suarez’s words, “if an end is permissible, the necessary means to that end are also permissible.”<sup>65</sup>

Medieval theory understood its just war doctrines as natural law, and so it makes sense to describe both the prohibitive and licensing sides of military necessity as legal doctrines, although positivists might put scare-quotes around “legal.” But starting with Hobbes another way of thinking about the relationship between law and military necessity appears. In war, “[t]he notions of right and wrong, justice and injustice have ... no place. Where there is no common power, there is no law: where no law, no injustice.”<sup>66</sup> Military necessity is not a legal concept because in war there are no legal concepts.<sup>67</sup> On the other hand, nothing prevents states from writing rules of warfare and agreeing to enforce them either directly or through the indirect mechanism of reciprocity. The resulting laws of war are positive, not natural law, because states write them on a Hobbesian legal blank slate. And military necessity represents the limit of rational regulation—Jomini’s “inexorable necessities” that states cannot expect each other to forego. Military necessity therefore lies outside the law.

The latter view represents the regulation of war in the nineteenth century. Consider the St. Petersburg Declaration of 1868, which explains its aim as follows:

[H]aving by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity, the Undersigned ... declare as follows:...

That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

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

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

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

That the employment of such arms would, therefore, be contrary to the laws of humanity.<sup>68</sup>

The argument proceeds from a technical analysis of the necessities of war to a state agreement to prohibit projectiles that exceed necessity, as “contrary to the laws of

<sup>64</sup> Stephen C. Neff, *War and the Law of Nations: A General History* 64 (2005).

<sup>65</sup> Suarez, *Three Virtues*, at 840 (quoted in Neff at 65).

<sup>66</sup> Thomas Hobbes, *Leviathan* 86 (Thomas Oakeshott ed. 1957), ch. 14. Hobbes was not entirely consistent in holding that war is not a law-governed activity. In *De Cive*, he wrote that “in the state of nature, it is lawful for everyone, by reason of that war which is of all against all, to subdue and also to kill men as oft as it shall seem to conduce unto their good.” P. 104; *Leviathan*, at 205.

<sup>67</sup> Neff cites Bynkershoek and Rousseau in this regard. Neff, at 148.

<sup>68</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868, Introduction, accessed at <http://www.icrc.org/ihl.nsf/FULL/130?OpenDocument>.

humanity.” Here, plainly, “the necessities of war” lie outside the purview of the laws of humanity, and set the “technical” limits to which “the requirements of humanity” must “yield.”

The most famous expression of this conception of necessity as an extra-legal limit to the law is the Prussian military maxim “*Kriegsraison geht vor Kriegsmanier*”: the necessities of war (*Kriegsraison*) take precedence over the rules of war. The translation loses the Enlightenment flavor of the maxim, the contrast between *raison* (reason) and *manier* (manner, style). Military necessity represents reason, which uncovers immutable scientific laws—the technical side of military science exemplified most famously by Clausewitz—whereas rules of war are merely stylistic. Under this doctrine, the licensing function of military necessity remains grounded in natural law, but natural law means scientific laws, not moral laws. Ought implies can: if it is technically impossible to win the war under a given prohibition, the prohibition has no force. As for the prohibitive doctrine of military necessity, it has no grounding in natural law at all. In effect, the doctrine of *Kriegsraison* dismisses law in the name of science.

The main feature of *Kriegsraison* on which I’m focusing is that it conceives military necessity as a limit to the law that stands outside it, not a doctrine within the law. This outlook changed in the wake of World War II, where victors and vanquished alike recoiled from the seemingly limitless violence the war inflicted. The post-War formula for military necessity appeared in the second round of Nuremberg trials, in the *Hostages* case:

Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.<sup>69</sup>

Call this the *Hostages* formulation.

As Yoram Dinstein notes, “The key words here are ‘subject to the laws of war’.”<sup>70</sup> Now, instead of law being subordinated to military necessity, the law comes first.<sup>71</sup> If a rule in the law of war provides an explicit exception for military necessity, well and good: the *Kriegsraison* principle applies. Thus, AP I allows states to restrict the movements of relief personnel “in case of imperative military necessity.”<sup>72</sup> But most rules provide no such explicit exception, and they represent absolute limits on what war fighters may do regardless of military necessity. For example, AP I states that “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack.”<sup>73</sup> This rule makes no exception for military necessity. In theory, at any rate, the *Hostages* formulation rejects Hobbes’s view of war as a law-free zone; now, law governs war everywhere, by decreeing which rules will bend to military necessity and which will not.

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<sup>69</sup> US v. List (American Military Tribunal, Nuremberg, 1948), 11 NMT 1230, 1253.

<sup>70</sup> Dinstein, at 18.

<sup>71</sup> See William Gerald Downey Jr., *The Law of War and Military Necessity*, 47 AJIL 251 (1953). An important contribution to the history of the legal concept of necessity is Brian Simpson’s magnificent book *Cannibalism and the Common Law: The Story of the Tragic Last Voyage of the Mignonette and the Strange Legal Proceedings to Which It Gave Rise* (1984). Simpson ties the prosecution of “lifeboat cannibalism”—after years in which such incidents were not prosecuted—as a change in outlook according to which the state of nature is abolished and the law’s empire rules the waves. In Simpson’s view, this legal imperialism was importantly tied to British imperialism of a more material variety.

<sup>72</sup> Article 71(3).

<sup>73</sup> Article 51(2).

Momentous as this change is, the *Hostages* formulation remains overwhelmingly slanted in favor of militaries, and grants them enormous latitude. Read literally, military necessity includes any lawful act that saves a dollar or a day in the pursuit of military victory. These are claims of military convenience, not military necessity. Conceiving necessity in this remarkably broad fashion is a far cry from (for example) the Lieber Code's definition of military necessity as "those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."<sup>74</sup>

As Michael Walzer perceptively comments on the *Hostages* formulation, "In fact, this is not about necessity at all; it is a way of speaking in code, or a hyperbolic way of speaking, about probability and risk."<sup>75</sup> It is worthwhile spelling out why. One argument is that anything that reduces risk to soldiers' lives in the slightest degree represents military necessity. Armies must place exceptional value on the life of each of their soldiers, and that is why steps taken to diminish risk to their soldiers' lives, even very slightly, are militarily necessary.<sup>76</sup> But time and money get equal billing with human life in the *Hostages* formulation, and it is impossible to justify cost-cutting and quickness as transcendent values on a par with human life. Here, the argument would have to run differently: saving money and time might conceivably spell the difference between defeat and victory. For want of a nail, the shoe was lost, so the horse was lost, so the rider was lost, so the battle was lost, so the kingdom was lost—"and all for the want of a horseshoe nail." You can't know; therefore don't take the risk.

Calling this military necessity is, indeed, a hyperbolic way of speaking about remote risks. Under the *Hostages* formulation, an air force can use non-precision-guided bombs rather than more discriminating precision-guided munitions merely because they are cheaper, or merely because commanders don't want to wait for a shipment of PGMs to arrive, and describe the choice as military necessity; that is because there is always a remote probability that the extra money or time might spell the difference between victory and defeat. This way of thinking has devastating implications in interpreting treaty-based protections of civilians against "incidental" damage of attacks: those protections require militaries to take "feasible" steps to protect civilians, and a plea of military necessity suggests that requiring the use of PGMs is infeasible.

It may be that the *Hostages* tribunal formulated its definition of necessity in such a latitudinarian way because the judges understood that they were in no position

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<sup>74</sup> Francis Lieber, U.S. War Dep't, General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863), reprinted in *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents 3* (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004), article 14. It is worth noticing that Lieber, like the *Hostages* formula, limits military necessity to lawful acts. In this respect, the Lieber code and the *Hostages* formula agree in rejecting Hobbesian skepticism about law as well as the doctrine of *Kriegsraison*.

<sup>75</sup> JUJW, p. 144; the legal doctrine is from the *Hostage* case, *US v. List* (American Military Tribunal, Nuremberg, 1948), 11 NMT 1230, 1253.

<sup>76</sup> Even this is debatable. See Luban, *Risk Taking and Force Protection* in Reading Walzer (Itzhak Benbaji & Naomi Sussman eds., forthcoming). Under this theory, armies could count force protection against remote dangers as an absolute value regardless of how much hardship achieving minute reductions in risk inflicts on civilians. In Gary Solis's words, "an attacker with superior arms would be free to annihilate all opposition with overwhelming firepower and call any civilian casualties collateral." Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* 285 (2010).

to set standards about how much risk and expense militaries must assume, and therefore left it to the discretion of states and commanders. Understood this way, the *Hostages* formula is not so much a redefinition of military necessity to mean military convenience as it is a doctrine of deference to military judgment about what really is militarily necessary. If so, however, it is a doctrine of nearly absolute deference, and that too is hyperbolic.

Essentially, the *Hostages* formula makes only a half-break from the doctrine of *Kriegsraison*. The distinctive feature in *Kriegsraison* is that it places the interests of the military beyond all regulation, in effect discounting the interests of civilians down to zero, the same as the suffering of enemy soldiers, which also counts for nothing or even less than nothing. The *Hostages* formula subordinates *Kriegsraison* to law, but simultaneously it inflates the concept of necessity to include anything the military finds helpful. Except to the extent built into explicit regulations, the interests of civilians and the suffering of the enemy are still discounted to zero.

Packaging anything the military finds helpful under the heading “necessity” is not only dangerous but dishonest; but it flows naturally from an outlook in which interests other than military interests are simply invisible.

Once civilian interests enter our moral deliberations—as they must—the *Hostages* formula becomes unacceptable. Instead, what counts as military necessity must be determined by weighing military importance against civilian damage. We already find this way of thinking in Vitoria:

[C]are must be taken to ensure that the evil effects of the war do not outweigh the possible benefits sought by waging it. If the storming of a fortress or town garrisoned by the enemy but full of innocent inhabitants is not of great importance for eventual victory in the war, it does not seem to me permissible to kill a large number of innocent people by indiscriminate bombardment in order to defeat a small number of enemy combatants.<sup>77</sup>

This would be true, presumably, even if bombarding the fortress or town would save time and money in pursuit of victory, or even if it slightly diminished risk to soldier lives.

Proportionality reasoning of this sort in fact follows the most recent law on military necessity, represented by the Israeli Supreme Court’s analysis of the separation barrier Israel constructed during the second intifada.<sup>78</sup> Representatives of Palestinians harmed by the barrier brought lawsuits challenging the legality of land seizures for the barrier as well as specific routing decisions. The Supreme Court found that under IHL, civilian property could be seized (with compensation paid) “[t]o the extent that construction of the fence is a military necessity.”<sup>79</sup> One disputed section of the fence was slated for a hill called Jebel Muktam. The Court deferred to the military commander’s judgment that alternative routes proposed by the plaintiffs offered less security than the Jebel Muktam route. Nevertheless, the Court rejected Jebel Muktam because “the security advantage reaped from the route as determined by the military commander, in comparison to the . . . route [proposed by the plaintiffs], does not stand

<sup>77</sup> Vitoria, *Law of War*, at 315-16, quoted in Neff, at 64-65.

<sup>78</sup> See H CJ 2056/04 *Beit Sourik Village Council v. Gov't of Israel (Beit Sourik)* [2004]; H CJ 7957/04 *Mara'abe v. Prime Minister of Israel (Alfei Menashe)* [2005].

<sup>79</sup> *Beit Sourik*, § 32.

in any reasonable proportion to the injury to the local inhabitants caused by this route.”<sup>80</sup>

Before examining the Israeli Supreme Court’s reasoning, it is worth noting the most important point: the form of analysis represents a step away from *Kriegsraison* just as momentous as the taming of military necessity by law in *Hostages*. Now, soldiers are no longer the only ones whose interests matter. A tactic that better meets the army’s security needs than any available alternatives is not militarily necessary if one of the alternatives is much better for civilians and only slightly worse for the army. Civilians, including the enemy’s civilians, count. To see how they count, we must delve a bit deeper.

The Israeli Court analyzes necessity claims in three steps.<sup>81</sup> First, it asks whether the chosen military tactic bears a rational relationship to its goal, and second, whether that goal might be attained by an alternative that inflicts less damage on civilians. The first is uncontroversial, while the second seems like mere common sense. (Common sense or not, it is incompatible with the *Hostages* formula, which permits “any amount and kind of force” to compel the enemy’s submission.)

Lastly, the Israeli Court weighs the gains to the military against the injury to civilians in marginal terms:

the ... act is tested vis-à-vis an alternate act, whose benefit will be somewhat smaller than that of the former one. The original ... act is disproportionate ... if a certain reduction in the advantage gained by the original act – by employing alternate means, for example – ensures a substantial reduction in the injury caused by the administrative act.<sup>82</sup>

If so, the original act is not militarily necessary.

The idea behind this “marginal” view of necessity—analyzed and defended in recent work by Seth Lazar—is that the true military significance of an act is the gain it provides over the next-best alternative; it is “necessary” only in the sense that it is necessary to achieve this marginal gain.<sup>83</sup> Necessity judgments are inherently comparative. If the advantage over less harmful alternatives is too small, the claim of military necessity lacks normative force.

The normative point of appeals to military necessity is that they are used to justify inflicting harms on others. To serve that purpose, they must answer the question, “Why won’t less damaging alternatives do?” The answer must take the form “The other alternatives don’t accomplish *X*,” pointing to some tangible advantage, “and *X* is necessary.” That raises the obvious question “Necessary for what?” The answer “Necessary to avert very small risks, delays, or expenses” simply doesn’t do the job. Or rather, it doesn’t do the job unless the injuries inflicted are even slighter. That is why in the end, claims of military necessity are not only disguised comparative judgments (with other alternatives), but also disguised claims of proportionality.<sup>84</sup>

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<sup>80</sup> Beit Sourik, § 61. For a detailed discussion, see Nobuo Hayashi, *Requirements of Military Necessity in International Humanitarian Law and International Criminal Law*, 28 B.U. Int’l L.J. 39 (2010).

<sup>81</sup> Beit Sourik, § 41.

<sup>82</sup> Id.

<sup>83</sup> Seth Lazar, *Necessity* (2011 unpublished).

<sup>84</sup> Lazar emphasizes this point.

Although the Israeli court's analysis is sophisticated, it is not idiosyncratic. In an important sense, denying the claim of necessity to small military advantages represents a return to the term's traditional meaning: in Vitoria's words, of "great importance for eventual victory in the war," and in Lieber's words, "indispensable for securing the ends of the war." Necessary, one might say, means necessary. It is the *Hostages* formula that should be regarded as idiosyncratic.

Kriegsraison, the *Hostages* formulation, and proportionality represent three different views of military necessity. The first sees necessity as a pursuit of victory in which a commander is unbound by law and the interests of other people. The second subordinates necessity to law, but within the limits of law it permits the commander to discount civilian interests completely. The third requires the commander to take civilian interests into account—and, I have argued, this is the best view of military necessity.

This final step means that, like it or not, the LOAC view of the world must incorporate the interests that the IHL worldview emphasizes. The possibility of sealing itself off from the IHL approach to the law of war no longer exists, for that view belongs to military necessity itself.

### **Conclusion**

My fundamental conclusion is that the IHL version of the laws of war rightly plays a role in military legal advice, and not only as prudential or political cautions that a military lawyer tacks on to an opinion that a choice is permissible under a controversial and hard line LOAC-version interpretation of the law.

This is not meant as a "refutation" of the LOAC version of the laws of war or anything resembling it. That would be silly. Military necessities are real, and law will not make them go away. States may no longer be the sole sources of international law, but we live in a world of states, which remain the preeminent international lawmakers. The laws of war must take the civilian point of view seriously, but it is still a long step from there to human rights. On all these points, humanitarian lawyers who pretend otherwise are fooling themselves both legally and politically. Legally, because the sources of law will not bear so much humanitarian weight, and politically because the only hope for the humanitarian project lies in militaries and military lawyers who believe in it and want to make it happen. Like it or not, the two legal cultures must live with each other, and that requires reasonableness, in the sense defined by John Rawls: a reciprocal desire for principles that could be accepted even by adherents of the other comprehensive view.