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Strategies of Restraint: What Are The Prospects For Humanitarian Principles In Armed Conflict?

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Abstract

However good an idea restraint may be, it is harder to implement than proponents would like. Great power interests simultaneously encourage and stymie development of the institutions necessary to enforce the rules of warfare. IHL as applies between states is "basically fine" despite this. However, the problem is elsewhere: 'new wars' actually being fought today operate under a political logic that is antagonistic to the recognition of humanitarian principles. International criminal law is still too unreliable and narrowly applicable to seriously prevent unnecessary human suffering in low-intensity conflicts being fought today throughout, for example, the Middle East and northern Africa. Something must be done to safeguard and enhance the relevance of the rules of warfare.

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> It would be futile–even wrong–to try and shut one's eyes to what war really is from sheer distress at its brutality. If wars between civilized nations are far less cruel and destructive than wars between savages, the reason lies in the social conditions of the states themselves and in their relationships to one another.
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> Carl von Clausewitz, *On War* (1832)[1]

I   *Introduction*

International humanitarian law (IHL) is the modern incarnation of an old idea that, when faced with the prospect of violence checked only by the belligerents' ephemeral whims, each party ought to observe certain restraints on their behaviour for the good of all involved. It is an undeniably attractive idea. Absolute war becomes subjugated to principles of *jus in bello*, ensuring respect for human dignity. Thus the law speaks, even in war.

However good an idea restraint may be, it is harder to implement than proponents would like. Great power interests simultaneously encourage and stymie development of the institutions necessary to enforce the rules of warfare. IHL as applies between states is "basically fine" despite this.[2] However, the problem is elsewhere: 'new wars' actually being fought today operate under a political logic that is antagonistic to the recognition of humanitarian principles.[3] International criminal law is still too unreliable and narrowly applicable to seriously prevent unnecessary human suffering in low-intensity conflicts being fought today throughout, for example, the Middle East and northern Africa. Something must be done to safeguard and enhance the relevance of the rules of warfare.

Part II outlines the natures of armed conflict and law, and illustrates their similarity as tools to express authority. Part III discusses the notion of 'old war' that dominated throughout the development of IHL, arguing that armed

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1   Carl von Clausewitz *On War* (David Campbell, London, 1993), at 84.

2   Gabor Rona "Interesting Times for International Humanitarian Law: Challenges from the 'War on Terror'" (2003) 27(2) Fletcher Forum of World Affairs 55 at 69.

3   Mary Kaldor *New and Old Wars* (2nd ed, Polity Press, Cambridge, 2006), at ch 5 [*New and Old Wars*].

conflict between states is a form of bargaining which tends to have restrained military aims. Therefore, there are good reasons to conclude that IHL can continue to develop between states and in treaty law. However, Part IV goes on to analyse how 'new war' has upended settled understandings of war as "political intercourse carried on by other means".[4] As war has decentralised from the state to non-state actors, including criminals, the prospects for control and unified purposes in conflict are declining.

Most significantly the strategic logic of new wars sees violence as both means and end, raising the probability that tactics would be used in contravention of IHL in pursuit of unlimited political objects.[5] The implications for the law of armed conflict from this particularly concerning development are discussed in Part V. There are some opportunities for IHL to adapt to new warfare, mainly involving better enforcement of existing rules. However, success is likely to be temporary because the law develops reactively.

Saving succeeding generations from the "scourge of war" is a Sisyphean task because the nature of warfare is not fixed to specific institutional frameworks such as states.[6] It changes over time and across places. IHL must be sensitive to the context of particular conflicts since its successful application depends on its acceptability to belligerents. On the whole there are reasons to be both pessimistic and optimistic; though arguably undeserving of the label 'law', IHL is still very much more than wishful thinking.

II   *Conflict and Restraint*

Strategic studies involve study of the political origins, applications, and implications of organised violence and conflict.[7] It includes the use of threats. This paper discusses use of armed conflict as a tool of strategy, where strategy is in a special sense synonymous with military strategy. On the other hand, IHL is a system of rules seeking to restrain conflict behaviour by limiting certain classes of means and requiring certain other ends. Where strategy asks what is to be done, IHL says what is not to be. As such, their intellectual traditions diverge.

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4   Clausewitz, above n 1, at 99.
5   See Parts III and IV for a discussion of new and old wars.
6   Charter of the United Nations, preamble.
7   Robert Ayson "Strategic Studies" in Christian Reus-Smit and Duncan Snidal (eds) *The Oxford Handbook of International Relations* (Oxford University Press, Oxford, 2008) 558 at 559.

This Part analyses the respective nature of these fields and conclude that they have more in common than first appears. Though with different focusses, war and law are political expressions of power purposively constructed by their practitioners. As such, IHL is not only a field of positive law but an attempt to contribute to strategic thought. Though armed conflicts at international law must be of a non-transitory nature, this paper does not analyse legal issues that may arise from violent but temporally constrained conflicts. Similarly, the existence of a legal declaration of war is not considered and references to war should be read as references to violent conflict.

A   Armed Conflict and Strategy

Strategy is "the connecting ligament between war [the trinity as a whole] and politics".[8] It is, in a word, generalship. To be strategic is to judiciously and intentionally use power via conflict or the threat of conflict to gain desired outcomes.[9] It is a branch of planning. An optimal strategy is one which achieves desired outcome for least cost.[10] When deciding how to act, strategists seek to answer four questions: why, how, how much, and for how long? Answering these questions separately requires analysis of one's interests and the strategic landscape. Interests are discussed in Part III. As for the full strategic landscape, the "marvellous trinity" of primal enmity, interplay of luck and skill, and political purpose covers much ground.[11]

Enmity is the hostile feelings of hatred and violence, and is typically linked to the population supporting a state. It is generated through use of strategic narratives and propaganda. The interplay of luck and skill refers to military strength and influence in relation to the environment, and the degree of conscious control by the military of its exercise of power, and is comprised by characteristics of the army such as equipment and morale.[12] The last element of the trinity is political purpose, to which capacities and wills are directed. The overall purpose of war is what makes it "a continuation of

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8   Gray cited in Ayson, above n 7, at 559; but see Lawrence Freedman "Strategic studies and the problem of power" in Thomaas Mahnken and Joseph Maiolo (eds) *Strategic studies: a reader* (Routledge, New York, 2008) 22 at 32.

9   Ivan Arreguin-Toft "How the Weak Win Wars" (2001) 26(1) International Security 93 at 99.

10   Gian Gentile "A Strategy of Tactics: Population-centric COIN and the Army" (2009) US Army War College Quarterly 5 at 7.

11   Michael Howard *Clausewitz: On War* (Library of Congress, Washington DC, 1997) at 19 [*On War*]; Edward Villacres and Christopher Bassford "Reclaiming the Clausewitzian Trinity" (1995) 25(3) Parameters 9 at 9.

12   Villacres and Bassford, above n 11, at 13.

political intercourse, carried on with other means".[13] All three parts are needed in any analysis of actually existing armed conflict.

Clausewitz associated enmity with the people, chance and skill with the army, and purpose with the state.[14] This heuristic is useful in understanding relationships between each part—the people as the power, the army as the means, and the government as the cause or reason. However, adopting this "Summersian trinity" [of people, army, and government] is overly reductive because it implies a fixed relationship between the limbs of the trinity. On the contrary, the relationship between chance, reason, and enmity are fundamentally non-linear and unpredictable, like an object suspended between three magnets.[15] In that way each element of the trinity is present in an ideal form of war, operating according to their own separate but interdependent rules.[16]

B   *Restraint and International Humanitarian Law*

IHL is a body of norms which protect certain persons and properties from attack during armed conflict and which regulates the acceptable means of warfare.[17] It is a form of "fair play".[18] IHL is animated by:[19]

> the idea that, if there are to be wars, and so long as wars go on,
> it is certainly better for the warring parties, and probably better
> for mankind at large, that the persons fighting should observe
> some prohibitions and restraints on how they do it; the idea, to
> put it at its briefest, of humanity in warfare.

Many older examples of humanity in war are associated with religion, such as early Islamic and Christian practices.[20] Now, this project of 'humanising

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13   Clausewitz, above n 1, at 99.

14   Villacres and Bassford, above n 11, at 10.

15   Clausewitz, quoted in Howard, *On War*, above n 11, at 19.

16   At 19.

17   M Cherif Bassiouni "The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities" (1998) 8 Transnational Law & Contemporary Problems 199 at 200. See also Geoffrey Best *War and Law since 1945* (2nd ed, Clarendon Press, Oxford, 1997) at 247 [*War and Law*]. The Hague rules tend to address the permitted means of war where the Geneva Conventions and their Protocols primarily focus on the protected of non-combatants and valuable places.

18   Theodor Meron "The Continuing Role of Custom in the Formation of International Humanitarian Law" (1996) 90 American Journal of International Law 238 at 240.

19   Geoffrey Best *Humanity in Warfare* (Weidenfeld and Nicolson, London, 1980) at 1–2 [*Humanity in Warfare*].

20   Deuteronomy 20:19, Bible English Standard Version; Youssef H Aboul-Enein and Sherifa Zuhur *Islamic Rulings on Warfare* (US Army War College, October 2004) at 21–24.

warfare' now entails a more focus on the individuals most directly affected by war and the minimum standards to which they are entitled.[21]

Modern rules of war are international public law.[22] States are the primary actors to which IHL applies, but in some circumstances individuals are bound by, for example, international criminal law. IHL's sources are treaties such as the Geneva Conventions and related Protocols, customary international law, and the principles which underlie both bodies of law.[23] While treaties are law by agreement, customary law emerges over time through state practice and the recognition of *opinio juris*.[24] The development of IHL has been guided by four related and now well-recognised principles: distinction between legitimate and illegitimate targets, doing only what is necessary to achieve a military objective, avoiding unnecessary suffering, and only inflicting harm in proportion to military necessity.[25]

These principles outline the compromise between restraint and excess which is the hallmark of IHL.[26] Distinction requires belligerents distinguish themselves from civilian populations and infrastructure, and that belligerents do not target these protected groups. Military necessity is, broadly, the idea that a state may do anything that is not unlawful to defeat an enemy. An urge to avoid unnecessary suffering underpins regulations banning, for example, blinding laser weapons.[27] Though grievous harm will often result from war, weapons should be banned if their effects are "of a nature to cause superfluous injury" among belligerents. The related principle of proportionality holds that even lawful means, for lawful ends, must be limited by prospects of civilian casualties.[28] IHL is intended to be "more influential in the planning of war, of the campaign, and often even of the battle."[29] It exists to temper the hostile feelings and intentions inherent to

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21   By this I refer to the growing link with human rights.

22   Advisory Service on International Humanitarian Law "What is International Humanitarian Law?" (International Committee of the Red Cross, July 2004).

23   The Geneva Conventions, have nearly universal application, and there are growing parts of these treaties which begin to have customary force as well. Advisory Service on International Humanitarian Law, above n 22, at 1.

24   See generally Jean-Marie Henckaerts "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict" (2005) 87(857) International Review of the Red Cross 175.

25   See generally Gary Solis *Law of Armed Conflict and International Humanitarian Law: A Framework* (Cambridge University Press, Cambridge, 2010), at ch 7.

26   Meron, above n 18, at 247.

27   Protocol No I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of the Victims of International Armed Conflicts (Protocol I) (8 June 1977) 1125 UNTS 3, art 35.2.

28   This is not about unnecessary overuse of force, but what is most risky to civilians.

29   Clausewitz, above n 1, at 732–733.

warfare, by introducing ethical perspectives and articulating an alternative policy perspective on strategic means.

C   *A Similarity of Logic*

That IHL and strategy might come from different ethical perspectives is obvious; one seeks less harmful war and the other more effective war. Clausewitz argued that in an ideal conflict, the most important aspect of the trinity is the policy object for which conflict is undertaken. Sacrificing war aims to prevent atrocities risks making war particularly futile: all that loss would be for nothing. Avoiding destruction in vain is a key part of why states claim there can be *no substitute for victory*, establishing one aspect of the fundamental tension between restraint and excess in war. That tension is reflected in IHL, as a dialectic between the perspectives of international constitutionalism and the inherent anarchy of a self-help system.

A rather more interesting difference is their relationships between the means they use, and their ends. Strategy is an instrument of no particular virtue just like Raz famously argued law to be. That is, we judge strategy and general law by their effectiveness in their purpose and not the worthiness of that purpose. This shows that the logic of resort to armed conflict and the use of legal authority are both instrumental. In principle they should be able to be reconciled rather than assumed to be at cross-purposes. 'New wars' are so problematic because of the breakdown in this affinity;[30] Whether the international system will adapt remains to be seen.

IHL has a relatively fixed aim of reducing humanitarian losses in armed conflict. It entails a thoroughly normative perspective that is neither means- nor ends-neutral. However, whether one fights for national security, authority, pride, glory, self-defence, or freedom of action the precise ends of conflict does not matter as a point of principle,[31] showing a more amoral internal logic. The divide is reminiscent of that in jurisprudence between positivism and natural law. Similarly, the aim of strategic studies is to describe conflict as it is being fought, whereas IHL seeks to describe how conflict ought to be fought.

Comparing IHL and strategy in this way usefully exposes the shared logic of control underpinning them. Law has been described as a command

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30   Rona, above n 2, at 56; see also Mary Kaldor "In Defence of New Wars" (2013) 2(1) Stability 4 [*In Defence of New Wars*].

31   Clausewitz saw the purpose of armed conflict as destruction of the opposing armies because rendering them more powerless would bring about the conditions in which power could be exercised over the enemy people: Clausewitz, above n 1, at 83. See also Part III.

backed by force.[32] Though the command aspect has been critiqued, subjects comply with law because they have respect its authority. Alternatively, a subject fears punishment: states frequently use force domestically in response to breaches of the law. Conflict operates by a similar logic because war is rarely the first resort of strategic actors. Instead, in practice, force is often preceded by threats or negotiations much like law seeks to control behaviour through obligations.[33] That the logic of force deployed in pursuit of regulating others' behaviour is so clearly mirrored between law and war suggests force in international relations is no more special than force in domestic law enforcement.

A comparison is not to draw an inappropriate equivalence, however; the authority of law is much better than use of force.[34] Rather, it is often precisely because the domestic law has social acceptance that the use of force to enforce it is said to be justified. Whether there is an equivalent international society sufficiently well-developed to support similar authority is less clear.

III   Old Wars

Clausewitz famously encouraged students of strategy to see conflict as a true political instrument, as continuation of political intercourse by other means.[35] As an*other* means of intercourse, conflict is the continuation of diplomacy but through means of violence.[36] That is, states use both words and force of arms as diplomacy; armed conflict is political bargaining "all the way down".[37] Force and the threat of force, therefore, are forms of bargaining.

On this view, IHL becomes a form of procedural rules which help to facilitate the process of resolving a conflict in mutually beneficial terms. Perceiving conflicts as a process of bargaining suggests restraint is more likely to be served because political objects of 'negotiating parties' are limited and, as such, they have little reason not to observe principles of *jus in bello* or otherwise escalate their war.

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32 Though I have not cited my sources in this paper, I am relying on Austin, Raz, Fuller, Hart and Bennett among others.

33 See generally Thomas Schelling *The Diplomacy of Violence* (Yale University Press, New Haven, 1966) at ch 1 [*Diplomacy of Violence*].

34 Freedman, above n 8, at 32.

35 Clausewitz, above n 1, at 99.

36 Dan Reiter "Exploring the Bargaining Model of War" (2003) 1(1) American Political Science Association 27; see generally Schelling, *Diplomacy of Violence*, above n 33.

37 Reiter, above n 36, at 27.

This is a comforting insight, even though it strips the principles of humanity in war of their normative glamour. It encourages a view, necessary to effective operation of law, that behaviour can be controlled. However, the position entailed by Clausewitz's trinity is not that war is incapable of internalised control necessary for restraint, but that this dimension of control cannot be present all the time. Excesses in war may happen due to uncertainty, lack of trust, or unrestrained political objects. So long as the cause of excess is not the latter then IHL should be capable of being stably observed. Part IV analyses how new wars undermine this view of war.

A   Old Wars as Bargaining

Old wars, prosecuted using mass mobilisation of a state's resources, have ironically only recently emerged.[38] The most well-known example of an old war is the Second World War. Fighting a war on that scale required each main belligerent to possess a uniquely intense level of social organisation that was "centralized, totalizing, and autarchic".[39] In such a state:[40]

> [a]dministration is centralized to increase the efficiency of the war and to maximize revenue to pay for the war. As many people as possible are mobilized to participate in the production of arms and necessities.

Old war is intrinsically state-centric because states are the main actors and targets of military action. Old wars may occur for two purposes.[41] The first is where one or both belligerents are fighting for an unrestrained political object, such as total surrender of the enemy or even their destruction. These wars are defined by their indivisible aims, in that there is no such thing as partial success and there is no capacity for bargaining since there is no common interest to bargain over.[42]

The other type of war is a more restrained process of bargaining. Conflicting interests must exist to begin of a process to negotiate settlements of any kind, and bargaining or trading off those interests will be central to finding the best balance of them.[43] An interest is defined relative to its alternatives; to have an interest in security, for example, is to express a devaluation of the

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38   Best, *War and Law*, above n 17, at 370.

39   Kaldor, *New and Old Wars*, above n 3; Michael Howard "Temperamenta Belli: Can War be Controlled?" in Michael Howard (ed) *Restraints on War: Studies in the limitation of armed conflict* (Oxford University Press, Oxford, 1979) 1 at 1 [*Temperamenta Belli*].

40   Kaldor, *New and Old Wars*, above n 3, at 95.

41   Reiter, above n 33, at 30.

42   Thomas Schelling "The Retarded Science of International Strategy" (1960) 4(2) Midwest Journal of Political Science 109 at 116 [*The Retarded Science*].

43   Reiter, above n 33, at 28.

absence of security. Any interest can be understood in this way. For example, interests secured by law are sometimes expressed as certainty, against uncertainty. Strategy and the use of armed force often seeks power, as against powerlessness. Similar interests are understood differently by different people and across time.

Accordingly, actors' understandings of their interests and the common interest diverge. This causes many international disagreements because it is often not possible for actors to simultaneously achieve all of their goals.[44] For example, the threats from climate change are now being taken seriously but the timeframe for action is now so small that many developing nations will have to rely on more expensive energy resources to power their development than the West had to rely on. Another example is that states frequently work together to balance against emerging regional threats, but the availability of the veto power for permanent members of the United Nations Security Council means that China's voice carries more weight in respect of North Korea than South Korea's does. States often work together for their mutual interests but dividends of co-operation are not always shared equally.

States will often (attempt to) co-operate to the extent that they have common interests.[45] Even though there are common interests in each case, individual states' interests affect the decisions collectively reached.[46] This is significant because it shows that restraint will not be always seen by everyone to be in their interests. Or, alternatively, everyone may see an interest in restraint, but conceptions of restraint and commitment to restraint will vary.

B   *Restraint in Armed Conflict*

Armed conflict will occur when belligerents prefer it to peace.[47] Despite believing in the ability to influence the conduct of war, Clausewitz noted that conflicts naturally tend to extremes.[48] Restraint is less likely to occur when there is an incomplete understanding of the strategic landscape, where

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44   At 28.

45   Hedley Bull "Strategic Studies and its Critics" (1968) 20(4) World Politics 593 at 598.

46   Alberto Costi "The Parallax View: A Critical History of the Origins of the Geneva Conventions" (2004) 11 RJP/NZACL Yearbook 2004 213 at 215.

47   Bueno de Mesquita cited in Reiter, above n 33, at 29.

48   Clausewitz, above n 1, at 83–86.

the parties cannot trust each other's word, or where the parties' interests are indivisible and the conflict is a zero sum game.[49]

First, actors tend to escalate conflicts when one party miscalculates the respective ability or resolve of parties to fight, leading to a decision which may not have been made had the parties had full information.[50] For example, miscalculating opponents' ability to fight were key to both the British decision not to surrender in 1940 and the German decision to invade Russia in 1941. In either case, had the parties been more informed it is possible the Second World War would have ended differently. States frequently do not share information to reduce the chances of conflict because appearing strong is key to securing a good bargain for oneself.

For this reason, bargaining theory sees armed conflict as a means of discovering more information about the capacity or resolve of an opponent. For example, the American campaigns at Okinawa and Iwo Jima were bloody enough to cause the United States command to reassess casualty estimates significantly upwards.[51] Combat is thus an iterative process of information gathering about each party's bargaining position.

Secondly, states escalate when prospects of restraint are not credible because of a lack of trust. As above, each party would like to maintain a limited conflict but may be concerned that the other party seeks to exploit some strategic weakness restraint entails. This fear might include a belief that they will act contrary to IHL, for example in a nuclear first strike or by denying quarter to prisoners of war. When strategies of brinkmanship are executed poorly, they often result in escalation for similar reasons.[52] A race to the bottom and an escalation of conflict results from this.

Alternatively, parties may perceive the balance of power shifting in favour of one party in the near future. It would not necessarily be in the considered interests of that party to agree, resulting in delays to conflict cessation.[53] Similarly, threatening to use force is an attempt to bring about better negotiation outcomes. For example, dropping of the atomic bomb on Hiroshima and Nagasaki forced Japanese surrender because Japanese

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49   Reiter, above n 33.
50   At 29.
51   These estimates formed part of the basis of the military argument for dropping atomic weapons at Hiroshima and Nagasaki: Reiter, above n 33, at 31.
52   'Brinkmanship' is deliberately risking an outbreak of war through uncontrolled behaviour, with the intent of forcing your opponent to back down: Schelling, *The Retarded Science*, above 42, at 125.
53   Clausewitz, above n 1, at 92–93.

leadership understood an implicit promise that they would be used again.[54] Though the relationship between threats and compliance is poorly understood,[55] a belief that it is genuine increases likelihood of success.[56]

IHL is supported by an ethics of restraint for two key reasons. First, using conflict as an information-gathering exercise implies a party's war aims are limited,[57] suggesting that they will not use means likely to escalate an armed conflict further than is strictly necessary. On that basis, conflict bargaining theory suggests that most wars will be limited.[58] Secondly, predictable and transparent behaviour is a stabilising influence in the conduct of violent bargaining. When consistently followed, IHL manufactures reliability and reciprocity; by the same reasoning, in a virtuous circle, increased reciprocity improves the probability IHL will be observed.

The possibility of self-control in the application of violence allows for mutual recognition of the law's application,[59] and for the actions of parties to carry moral and legal responsibility for the results of conflict they participate in. As such, unrestrained war aims are the biggest risk to humanity in war because a conflict in that type of interest is the hardest to manage. Hostile feelings erode the ethic of restraint by reducing the prospects of trust and by increasing the possibility that one party will adopt unlimited war aims. In such cases, the efficacy of IHL depends on strict and unyielding enforcement because belligerents do and will self-justify the use of extreme tactics.[60]

C   Limits of Restraint

If parties seek to bargain over indivisible things such as security, or if political legitimacy is at stake for one party, then they are likely to see the bargaining process as zero-sum and strictly distributive.[61] In that situation, unless parties can come to a compromise or recast the situation as a positive-sum game then conflict is likely to continue until victory accrues to one side. The existential threat posed by nuclear weapons is one example of this. New wars are another.

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54   Schelling, *Diplomacy of Violence*, above n 33, at 17–18.
55   Richard Betts "Is Strategy an Illusion?" (2000) 25(2) International Security 5 at 47.
56   Robert Ayson and Manjeet Pardesi "Asia's Diplomacy of Violence: China-US Coercion and Regional Order" (2017) 59(2) Global Politics and Strategy 85 at 88–89.
57   Reiter, above n 33, at 30.
58   At 28.
59   Schelling, *The Retarded Science*, above 42, at 136; see also Freedman, above n 8, at 29.
60   Best, *War and Law*, above n 17, at 235.
61   Reiter, above n 33, at 30.

1   Nuclear weapons control

Nuclear strategies are an excellent example of the logic of old wars, as a form of diplomacy through (threatened) violence.[62] They are also a good example of how seeing interests as distributive inhibits the prospects for restraint, showing individual states still control a large portion of the development of IHL.[63]

Nuclear weapons deserve to be banned if any ever did. A weapon is likely to be banned if it fails to discriminate between protected and legitimate targets, causes superfluous injury or unnecessary suffering, or causes severe or long-term environmental damage.[64] Humanitarian law has banned many weapons under these rules, including blinding laser weapons, anti-personnel mines, and exploding bullets. A weapon that can kill a hundred thousand people in an instant in a metropolitan area, causes cancer in the next generation, and can have environmental effects for decades seems to be prima facie covered by all of these criteria.[65]

Nuclear weapons are the first weapon to be able to do "monstrous" damage *prior* to victory.[66] They have not been banned as a part of a "melancholy paradox" of mutual terrorism.[67] A doctrine of mutually assured destruction is maintained for the purposes of ensuring the security of nuclear weapons states.[68] Precisely because survival is the interest at stake, states with nuclear weapons are not going to be particularly amenable to reductions in their supplies unless those are matched by other states.

Interestingly, if a state is open and cosmopolitan it is less likely to seek nuclear weapons of its own.[69] This is because it sees its threat calculus differently from other states, and so for them the question of nuclear weapons is *not* existential. For similar reasons, nuclear weapons have limited effectiveness as a conventional deterrence to conventionally asymmetrical challengers due to the unlikelihood of nuclear retaliation from

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62   See generally Schelling, *Diplomacy of Violence*, above n 33.

63   Costi, above n 46, at 215.

64   Advisory Service on International Humanitarian Law, above n 22, at 2; see also Solis, above n 25.

65   *Legality of the Threat or Use of Nuclear Weapons (General Assembly of the United Nations)* Advisory Opinion [1996] ICJ 96/23.

66   Schelling, *Diplomacy of Violence*, above n 33, at 22. That is not to say that nuclear weapons are the first weapon able to monstrous damage; Schelling notes that an ice-pick would do just as well *once* victory is assured.

67   Albert Wohlstetter "The Delicate Balance of Terror" (1959) 37(2) Foreign Affairs 211 at 212.

68   Nuno Monteiro and Alexandre Debs "The Strategic Logic of Nuclear Proliferation" (2014) 39(2) International Security 7 at 47.

69   At 47–48.

the nuclear weapon state.[70] Both observations underlines the ultimate point that restraint is more likely to occur when an actor sees that they have options that do not unduly risk their interests.

2   Unlimited war aims

When the political purpose of an armed conflict is not limited, however, there is a serious risk its means will not remain limited either, because the political object determines what is militarily necessary.[71] This is a necessary consequence of war as a form of political intercourse *carried on by other means*. Similarly, attempts to limit the means of armed conflict must be understood as limitations on what sort of ends are permissible. It might well be that wars of extermination, by definition, breach the Geneva Conventions.[72] However, restraint will be undermined in wars prosecuted by actors who do not support the political aims of IHL.

Unfortunately, conflicts based on extermination, barbarism and genocide happen regardless of their legality. There are a number of situations in which particularly savage tactics could be pursued rationally. The most relevant may be in asymmetric conflicts where a larger power fights a much smaller power, because strategies of barbarism tend to be more effective for the larger actor.[73] For example, these types of tactics were central to British victory in the Malayan Emergency (1948–1960), to French victory in Algeria (1950s), and are likely to continue to be useful in counterinsurgency situations if military superiority is the political goal.[74]

There is another category of more concern. As the next Part discusses, new wars are differentiated from old wars because, in new wars, armed conflict is simultaneously the means to the belligerent's political purpose and the end in itself. Adopting a teleological approach to warfare where war manufactures the political identity upon which new war combatants act is fundamentally incompatible with restraint. As new wars are the wars being fought now, the humanitarian project IHL represents is vulnerable to this change in political affairs.

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70   T Paul *Asymmetric Conflicts: War Initiation by Weaker Powers* (Cambridge University Press, Cambridge, 1994) at 175.
71   Best, *War and Law*, above n 17, at 242.
72   Specifically, common Article 3. See Part IV for discussion.
73   Arreguin-Toft, above n 19, at 112.
74   See generally Arreguin-Toft, above n 19; in respect of Malaya, see also Karl Hack "'Iron claws on Malaya': the historiography of the Malayan Emergency" (1999) 30(1) Journal of Southeast Asian Studies 99–125.

IV   New and Future Wars

The nature of armed conflict is not static throughout history. The social conditions between actors, states and nations are always in flux. Armed conflict has developed from bare survival, to an agonistic and ritualistic purpose under chivalry, to a modern behemoth involving mobilisation of the state as exemplified in the methods of warfare and war economies that occurred in the world wars.[75]

The highly militarised wars of the twentieth century are not like armed conflicts that predominate today. Since 1800, weaker actors have begun to win asymmetric conflicts, such as insurgencies, with increasing frequency.[76] Wars are becoming less numerous between states, less intense, less deadly, and far longer.[77] Conflict today is the "opportunistic and improvisatory clash" of smaller actors, less so than direct warfare between major powers.[78] As such, the state and the army is becoming less and less relevant to conflict.[79] This change in the praxis of conflict leaves IHL vulnerable because the actors of conflicts are changing, and the strategic logic of the wars IHL responds to is no longer relevant.

A   New Logic of New Wars

New wars often emerge as an insurgency against an existing state. Insurgencies are classically defined as organised movements aimed at the overthrow of a constituted government through use of subversion and armed conflict."[80] Initiative lies with non-state actors, and that insurgencies arise in order to challenge weak but functional states for legitimate authority.[81] However, the 'constitutional' or 'revolutionary' aspect of classical insurgency can give way to patterns of predation as insurgents fight over resources against a failed state.[82] This forms a contest for control of disputed political

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75   Howard, *Temperamenta Belli*, above n 39, at 5.
76   Arreguin-Toft, above n 19, at 97.
77   See generally Kaldor, *In Defense of New Wars,* above n 30; see also Arreguin-Toft, above n 19.
78   See for example John Mueller *The Remnants of War* (Cornell University Press, Ithaca NY, 2004) at 115.
79   Van Creveld cited in Howard, *On War*, above n 11, at 22.
80   Celeste Gventer et al "Deconstructing counter-insurgency: COIN discourse and the devaluation of strategy" (2015) 28(3) Cambridge Review of International Affairs 348; see also United States Army *Counterinsurgency field manual* (Chicago University Press, Chicago, 2007) at 1.2.
81   See for example Galula, cited in David Kilcullen "Counter-insurgency Redux" (2006) 48(4) Survival 111.
82   Kaldor, *New and Old Wars*, above n 3, at 113–116.

space below the level of the formal state, between a (coalition of) state(s) and one or more popularly-based non-state actors.[83]

Sometimes insurgencies can be reactive if the state coalition seeks to facilitate or forestall political changes—such as, for example, occurred in post-invasion Iraq up until the first elections in 2004 and since then with consent of the new government.[84] Other examples of new war include the Aghanistan and Syrian conflicts. Insurgencies are constrained in scale to be of an intensity above mere law enforcement or internal unrest, while being below full international armed conflict. Accordingly, new wars are usually classified as non-international armed conflicts under IHL because they rarely involve two states directly fighting on each side.[85]

Notably, insurgencies are one of the least regulated types of armed conflict under IHL.[86] Only a small number of treaties apply to non-international armed conflicts, and thus many insurgencies. Article 3 common to the four Geneva Conventions is perhaps the most prominent but its content is less detailed than the rules to apply to international armed conflict. Additionally, those treaties that do apply only apply to states that have signed and ratified them. Different rules therefore apply to different conflicts depending on who the parties are. For this reason, customary international law is of special importance to new warfare.

The low level of regulation may be in part because combatants are frequently not associated with traditional military forces, and include police, criminals, civilians and private military contractors.[87] A proliferation of belligerent actors erodes the principle of distinction;[88] now, civilians are often deliberately targeted in conflicts through, for example, the use of terrorist tactics.[89] Despite a proliferation of actors, participation rates among affected populations are historically low.[90] Though low public support seems to suggest a low perception of legitimacy for the insurgents' cause, the purpose of new wars is to manufacture that legitimacy for participants.[91]

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83   Kilcullen, above n 81, at 112.
84   At 112.
85   International Committee of the Red Cross "How is the term 'armed conflict' defined in international humanitarian law?" (Opinion Paper, March 2008).
86   Henckaerts, above n 24, at 177–178.
87   Kaldor, *In Defence of New Wars*, above n 30, at 2.
88   At 8, 11.
89   At 9.
90   Kaldor, *New and Old Wars*, above n 3, at 95.
91   Kaldor, *In Defence of New Wars*, above n 30, at 6–7.

Due to decentralisation of policy processes, lack of widespread participation amongst the population, and a 'democratisation' of military activity, new wars are sometimes described as post-Clausewitzian.[92] State actors have changed their military practices to account for the new style of warfare. Counterinsurgency practice, for example, has changed from being focused on the technical military skills and capacities of belligerents to being explicitly population-centric.[93] Just as insurgencies and other new wars aim to maximise the legitimacy of their causes, counterinsurgency is about counteracting these strategic narratives. However, this argument is based on seeing Clausewitz's trinity as fixing the relationship between enmity, skill and chance, and politics in war, which it does not.

Instead, new wars are a re-imagination and revival of low intensity warfare. They are the "opposite" of old wars—native to a globalised world where states are fragmenting and power is decentralising away from old centres of authority.[94] Instead, new wars are fought in the name of new centres of authority such as tribal, religious or ethnic identities.[95] It is precisely the process of globalisation which makes new wars more possible, in that the erosion of old identities is part of why new wars are an attempt to manufacture the new authority upon which people will mobilise.

Because identity is constructed in opposition and conflict, armed conflicts are both the means of manufacturing identity, and by being so intimately related to identity, also become the ends.[96] This is a fundamental change in the logic of conflict because identity formation is not a political object capable of limitation, or being bargained with. An actor cannot know when they have 'enough' identity, what their identity should look like, or answer any of the four questions that strategy asks.[97] As such, it is one type of 'unlimited war aim' referred to in the previous part.

B   New Chances for Friction

Philosophies of restraint such as IHL will be endangered in armed conflict when the parties do not have enough information about each other's capacity and resolve to reach an agreement, when relationships of reciprocity and

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92   At 10–14.
93   See for example United States Army *Counterinsurgency field manual*, above n 80, at ch 1.
94   Kaldor, *New and Old Wars*, above n 3, at 116.
95   Kaldor, *In Defence of New Wars*, above n 30, at 6–7.
96   For an excellent exposition of the link between identity politics and violence see generally Armartya Sen *Identity and Violence: The Illusion of Destiny* (Allen Lane, London, 2006) at chs 2, 5.
97   Referring to Part II: why, how, how much, and for how long should I act?

trust break down, and most significantly when one or both parties pursue war aims inconsistent with IHL. New wars introduce additional friction on each of these grounds. In particular, the tendency of new wars to use armed conflict both as a means to political mobilisation and the ends thereof means that the instrumental logic of armed conflict breaks down.

1   Reduced information

A rise in the distribution of actors, including into cells, destabilises the centralised control mechanisms that typified old warfare. In terms of the Clausewitzian trinity, the role of the people is enhanced. Though state militaries remain well organised, the same cannot be said of actors like Al-Qaeda. Absent centralised control, individual factors become more important. This raises the risk that the efficacy of military organisation will break down such that belligerents' behaviour becomes unpredictable and ungovernable. If this occurs, conflict will no longer serve as well as an information-gathering tool in a conflict process. Restraint is undermined in that way.

2   Reduced interest in restraint

Though new wars involve the manufacture of legitimacy in a space, there are two ways to go about it. One is to 'win hearts and minds' in a population-centred approach.[98] However, actors prosecuting new warfare are far more likely to resort to means such as population displacement in contravention of Article 2 of the Geneva Convention.[99] Examples include systematic murder of other groups as occurred during the Rwandan genocide, ethnic cleansing as occurred during in Bosnia and Herzegovina, and policies of deprival which resulted for example in starvation in South Sudan.[100] Crimes against humanity have been argued to be mainly crimes of state due to the intense social organisation that they required.[101] The number of forcibly displaced people worldwide reached a 15 year high of 43.7 million in 2010 people and this has since increased.[102]

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98   Gentile, above n 10, at 5.
99   Kaldor, *New and Old Wars*, above n 3, 107.
100   At 105–106.
101   Bassiouni, above n 17, at 203.
102   Kaldor, *In Defence of New Wars*, above n 30, at 9; see also Adrian Edwards "Global forced displacement hits record high" (20 June 2016) United Nations High Commissioner for Refugees <www.unhcr.org>.

The more powerful and inspiring the motives for conflict:[103]

> [t]he more they affect the belligerent nations … the more important will be the destruction of the enemy [and] the more closely will military aims and the political objects of the war coincide.

A reduced interest in restraint is particularly damaging for the observance of IHL because it represents a move away from the ethics underpinning of it—it is a move away from accepting that IHL binds one's behaviour.[104] That is, rather than being a hindrance to the implementation of IHL as reduced information and reciprocity are, disinterest in restraint is a pure rejection of values that support humanity in armed conflict. It is more absolute.

3   Reduced trust and reciprocity

Restraint is the fundamental principle of IHL. However, it takes two to prosecute a limited conflict.[105] As it was put by Clausewitz:[106]

> The fact that slaughter is a horrifying spectacle must make us take war more seriously but not provide an excuse for gradually blunting our swords in the name of humanity. Sooner or later someone will come along with a sharp sword and hack off our arms…

The dilemma is that if one party will not reciprocate it is not possible to force them to reciprocate; only forced compliance will achieve what bargaining cannot.[107] Further, the party that is constrained by the rules of warfare is therefore at a major disadvantage—not just because they cannot resort to savage behaviour to even the bargaining process, but because they are predictable.[108]

Differing obligations are likely to apply to non-state actors under IHL than apply to state parties.[109] Non-state actors generally have not made any promises to observe the rules of IHL.[110] Apprehended terrorists in particular rarely shown reciprocity.[111] As such, there is a risk that some states will not observe the rules of war because they do not consider them to apply to

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103   Clausewitz, above n 1, at 99.
104   Rona, above n 2, at 57.
105   Howard, *On War*, above n 11, at 18.
106   Clausewitz, above n 1, at 260.
107   Schelling, *Diplomacy of Violence*, above n 33.
108   Howard, *On War*, above n 11, at 16.
109   See generally Henckaerts, above n 24.
110   Meron, above n 18, at 248.
111   Torsten Stein "Who much humanity do terrorists deserve?" in Astrid Delissen and Gerard Tanja (eds) *Humanitarian Law of Armed Conflict: Challenges Ahead* (Martinus Nijhoff, Dordrecht (NL), 1991) 567 at 567–568.

belligerents.[112] In this context, defining who is and is not a party to a new war has become a recurrent problem for the rules of war.[113] Determining whether or not an opponent who has not shown reciprocity deserves the benefit of general rules is likely to remain a challenge.

Separately, the rise of individuals and small-group emphases raises issues around whose interests will be pursued by the group. Even if it is in the wider group's interest to prosecute a limited means conflict, this may not reflect individuals' ideas of how the conflict should be fought.[114] However, it is the outliers that do not show reciprocity that set the standard of trust for the entire group.[115] Therefore, it is harder to know whether trust can be placed in any more moderate members of a belligerent group. Though this is already an issue today between states, the absence of a clear chain of command in new war makes reciprocity more difficult.

V   *Implications*

New wars represent an end to, or refusal to adopt, the instrumental view of war. This breaks down conceptions of armed conflict as a deliberate and controlled form of bargaining through violence. As such, IHL inappropriately privileges the rationality of conflict *as a means to an end* over the idea of war as *a means in itself*.[116] Though viewing war as an end in itself is more likely to lead to unlimited warfare, IHL's failure to address the logic of new wars means that it is vulnerable to the political changes that result from that kind of warfare. Simply because IHL and preferences for limited war exist now, there is no reason to assume that it will always survive through some kind of progress in history.[117]

That IHL has not already adapted to low intensity warfare demonstrates a conceptual rigidity at the heart of IHL which inhibits the prospects of it being applicable across time and to future forms of warfare. Built as it is on international armed conflict and in a manner which tends to bind states over individuals, current understandings of humanitarian law reflect a fixed relationship between the elements of Clausewitz's trinity. In particular, the

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112   See for example the treatment of prisoners in Guantanamo Bay by the United States in Alberto Costi "Human Rights before the US Supreme Court: Lessons from Guantanamo Bay" in P Morris and H Greatrex (eds) *Human Rights Research* (Victoria University, 2004) 1.

113   Best, *Law and War,* above n 17, at 247.

114   See for example an analysis of terrorist organisations as solidarity-maximising actors: Max Abrahms "What Terrorists Really Want: Terrorist Motives and Counterterrorism Strategy" (2008) 32(4) International Security 78.

115   See generally Sen, above n 96.

116   Villacres and Bassford, above n 11, at 12–14.

117   Costi, above n 46, at 216.

linkage between the civilian government and its political aims and a well-organised military is one that has changed irrevocably in the context of decentralised warfare. A new conception of IHL is needed which better reflects the chimerical nature of armed conflict and the changing relationships between enmity, skill and purpose.

As a direct consequence, the doctrinal formalism implied by public international law is not an adequate way of securing IHL's longevity because armed conflicts actually occurring evade clear definitions. Rather, armed conflict is thoroughly different in any given context, and is not a mere "chameleon" that changes its colours according to legal definition of the parties.[118] As outlined in Parts III and IV, the specific political object of the parties to a conflict matter and have significant theoretical consequences for the prospects of limited warfare.

Similarly, a corpus of law that relies on treaty law will always focus on state actors and the responsibilities of states and will not be flexible enough to adapt to new wars. The effectiveness of treaty law should not be overestimated.[119] Only law which is of universal application, to individuals as well as states, seems to be applicable in enough situations that could arise in modern armed conflicts. Unfortunately, IHL currently regulates non-international armed conflicts in inadequate detail.[120]

Enforcement is similarly limited. Proponents of IHL need to encourage the further development of the International Criminal Court in order to enforce the law. Without this, there are limited prospects for impartial international enforcement against individuals who are nationals of, or commit their crimes in, states that have not signed and ratified the Rome Statute.[121] Relevantly, these states include Iraq, Pakistan, South Sudan, Turkey and the United States. The result is that nationals of those countries, and crimes committed within them, do not fall within the jurisdiction of the main permanent international body enforcing IHL.[122] That does not inspire confidence in prospects of IHL's enforcement, and is a major hole in coverage of the legal regime.

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118   Villacres and Bassford, above n 11, at 12.
119   Marco Sassoli "State responsibility for violations of international humanitarian law" (2002) 84(846) International Review of the Red Cross 401 at 433.
120   Henckaerts, above n 24, at 178.
121   Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002).
122   Art 8.

To date, *jus in bello* has depended on a stable humanitarian consensus.[123] That consensus has been challenged, and:[124]

> [o]nce barriers—which in a sense consist only in man's ignorance of the possible—are torn down, they are not easily set up again. At least when major interests are at stake, mutual hostility will express itself…

Although a lot can be gained from acting *as if* the rules of war will be enforced,[125] theatre is not enough to develop IHL to the level that it needs to address the humanitarian concerns posed in non-international armed conflicts and new warfare. IHL can be strengthened through political commitment to independent institutions that can enforce the law, in spite of great power interests and if necessary in conflict with them.[126] A deliberate and conscious political effort will be required to overcome the diverging interests of interested states, but if IHL to be considered as true "law" it must be reliably enforced in as wide a series of circumstances as possible.

VI   Conclusion

Where otherwise there might have been a 'moral drift' towards absolute warfare, IHL has attempted to chart a middle course between excess and unrealistic expectations. Its strength is that is taps into widespread anxieties about the horrors of warfare to make actors want to regulate conflict. It sets minimum standards of humanitarian relief and expectations that certain classes of people will be protected. IHL also taps into the instincts of limited warfare as a means of bargaining through violence, and in doing so becomes a type of procedural rules.

Its weakness, however, is that it was designed for international armed conflicts, a type of war which is declining today. Old wars are becoming less prominent due to the rise of non-state actors, who do not have the resources and means to mobilise on the scale of wars seen in the twentieth century. The fracturing of military control contributes to failures to observe limited warfare by reducing the ability and willingness of other actors to respond in a limited fashion. However, the abandoning of limited war aims entailed by new wars as a form of political mobilisation for the sake of identity formation is particularly dangerous because it relies on a fundamentally different logic.

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123   Costi, above n 46, at 216.
124   Clausewitz, quoted in Howard, *On War*, above n 11, at 18.
125   Best, *Law and War,* above n 17, at 252.
126   Costi, above n 46, at 228–229.

So far, IHL has not managed to respond appropriately. The content of rules addressing non-international armed conflicts are sparse, and enforcement in impartial international courts is sporadic—even when the International Criminal Court has jurisdiction, which it often does not. The overall impression is that IHL is a system of rules developed reactively, not proactively. Beginning to right this balance is the first step to a properly flexible law of war. Still, that compliance has been as high as it has been shows there is room for real optimism.[127] It also shows that just because IHL only amounts to custom that it still ought to be taken seriously.[128]

A more comprehensive political settlement that passes additional authority to the International Criminal Court is required, as a part of a recommitment to humanitarian principles. This is imperative for IHL to conform to the rule of law in a meaningful sense, and be worthy of the label 'law'. However, the difficulty of the path ahead should not be underestimated:[129]

> Let every individual citizen do his best to keep the claims of his own country within just limits, and to advocate on each occasion, ever after that, a disposition not to insist on the last farthing, and arbitration where possible. Let every individual State do its best to prevent injustice between its neighbours, either on entering a war or in the terms of peace by which a war may be concluded, by not shrinking from expressing an opinion of from supporting that opinion by the needful pressure.
>
> If its citizens have not the courage and States have not the unselfishness for this, no machinery will help the case. In they have, machinery will not be wanted or will be arranged easily so far as wanted.

This is a lofty goal. Yet, that attitude is what justice in war really requires.

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127   James Stegenga "Humanity in Warfare by Geoffrey Best" (1982) 76 American Journal of International Law 208 at 209; Costi, above n 46, at 228, footnote 86.

128   Best, *Law and War,* above n 17, at 249–250.

129   Westlake, quoted in Geoffrey Best "The restraint of war in historical and philosophical perspective" in Delissen and Tanja, above n 111, 3 at 26.

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