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Laws for War

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Introduction

I will assume that international human rights law (IHRL) aims in part to prohibit violations of basic moral rights that all human beings enjoy simply in virtue of their humanity. Of these rights, the most fundamental is the right not to be killed. The most important legal recognition of this right is found in Article 6 of the International Covenant on Civil and Political Rights (ICCPR), which states that “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”¹

Of course, such gentle words confront a harsh reality. Each year, thousands of women, men, girls, and boys are killed by military operations. Some of these military operations conform to international humanitarian law (IHL). This obvious fact raises a troubling question: Might some killings that conform to IHL nevertheless violate human rights?

There are at least three contexts in which this question might be posed. First, a state engaged in an internal armed conflict with an organized armed group needs to know if IHRL constrains its military operations. Second, a state engaged in a noninternational armed conflict with an organized armed group operating from the territory of another state needs to know if the territorial state can consent to military operations on its territory without violating its own human rights obligations. Finally, a state’s legal duty to respect human rights may apply extraterritorially, in which case even a state engaged in an international armed conflict with another state needs to know if its military operations are constrained by IHRL.

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¹ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, art. 6(1).

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There are four ways in which we might resolve apparent conflicts between IHL and IHRL. The first is to define the problem away by maintaining that killings that conform to IHL are *ipso facto* not “arbitrary” within the meaning of the ICCPR and therefore cannot violate IHRL. The second is to maintain that IHL displaces or prevails over IHRL such that killings that conform to IHL are lawful even if they violate IHRL. The third is to maintain that IHRL prevails over IHL such that killings that violate IHRL are unlawful even if they conform to IHL. The last is to maintain that neither IHL nor IHRL prevails over the other, such that some killings are both lawful (under IHL) and unlawful (under IHRL).

The first, comforting reply that a lawful act cannot be arbitrary is belied by Article 17 of the ICCPR, which states that “No one shall be subjected to *arbitrary or unlawful* interference with his privacy, family, home or correspondence, nor to *unlawful* attacks on his honour and reputation.”² Assuming, as we must, that legal terms are not redundant but instead carry distinct meanings, it follows that an action can be lawful but still arbitrary. More precisely, an action can be arbitrary within the meaning of the ICCPR even if it conforms to some other legal norm.

Of course, one could simply assert that while some acts can be both lawful and arbitrary, acts that are lawful under IHL are necessarily not arbitrary. But such a definitional fiat renders the idea of arbitrary killing morally unintelligible. After all, IHL and IHRL developed along parallel but separate tracks and were informed by different interests and constituencies. The resulting legal norms were crafted by human beings and therefore could have been quite different than they are. For example, it is hard to accept that the 1977 Additional Protocols did nothing to make IHL more respectful of human rights or to limit arbitrary killing in war. Similarly, it is hard to accept that if Protocol I had omitted important provisions then this would not have affected its human rights credentials. It can hardly be an *a priori* or conceptual truth that IHL, *whatever its content*, prohibits arbitrary killing. If IHL prohibits even most arbitrary killing in armed conflict, then this is a contingent and reversible human achievement.

The better view seems to be that, in principle, IHL and IHRL can conflict, the former permitting what the latter forbids. One task, then, is to interpret specific norms in a way that avoids or reduces potential conflict between them. Another task is to revise existing norms and design additional norms to narrow the gap between the two legal regimes. Ideally,

² *Id.* art. 17(1).

legal conflicts between IHL and IHRL would be resolved by reference to a shared moral aim. For example, if both IHL and IHRL aim to prohibit morally unjustified killing then conflicts can be avoided by interpreting their respective norms in light of this shared aim; residual conflicts can be resolved by privileging the specific norm that best achieves this shared aim in the context of armed conflict; and new norms can be developed to realize this shared aim. This is the approach I shall pursue.

We have seen that lawfulness alone does not necessarily negate arbitrariness. What might? Moral justification. Moral rights are infringed but not violated if their infringement is morally justified. Since human rights are moral rights that human beings enjoy in virtue of their humanity, human rights are violated only if they are infringed without moral justification. In particular, morally justified deprivations of life may infringe but do not violate the human right not to be killed. Since IHRL declares that “arbitrary” killings violate the human right not to be killed, it follows that morally justified killings cannot be “arbitrary” within the meaning of IHRL.

What does this mean for the relationship between IHRL and IHL? It means that killings that are lawful under IHL are lawful under IHRL to the extent that they are morally justified. In other words, IHL and IHRL are consistent to the extent that IHL prohibits morally unjustified killing in armed conflict. The right way to reconcile IHL and IHRL is not by definitional fiat or by privileging one over the other, but by enhancing the moral credentials of IHL.

On my view, IHL should aim to prohibit morally unjustified killing and thereby protect human rights.³ However, many insist that IHL should instead aim to balance military and humanitarian considerations, permitting types of killing that generally are necessary for military victory and prohibiting types of killing that generally are not. In this way, IHL will reduce killing in armed conflict to the greatest extent practically possible. On this view, IHRL and IHL have very different aims, the former to *respect* human rights and *prohibit* their violation and the latter to *promote* human rights and *minimize* their violation. Conflicts between these two aims will prove impossible to avoid and possible to resolve only by privileging one aim over the other. Toward the end of this chapter, I argue that we should reject this familiar but flawed view.

³ I pursue this project in greater depth in *LAW AND MORALITY AT WAR* (OUP, forthcoming 2016).

IHL and *Jus ad Bellum*

Before evaluating the moral credentials of specific IHL norms, we must first address a threshold objection to the view that IHL aims to prohibit morally unjustified killing. By design, IHL applies symmetrically to all sides of a conflict, independently of the *jus ad bellum* morality and legality of their resort to military force. As a result, it is no violation of IHL for combatants fighting for an unjust cause (say, territorial conquest) to kill combatants fighting for a just cause (say, national self-defense). Yet it seems morally impermissible to kill combatants fighting for a just cause, since such combatants have done nothing to forfeit their moral right not to be killed.⁴

More worrisome still, it is not necessarily a violation of IHL for combatants fighting for an unjust cause to unintentionally, but foreseeably kill civilians as a side-effect of their military operations. According to IHL, all sides of a conflict are capable of satisfying *jus in bello* proportionality. Yet it seems morally impermissible to kill civilians, even unintentionally, in pursuit of an unjust cause.

At one level, it seems undeniable that the moral status of killing in armed conflict depends in part on the aims of the opposing parties. If one party's aims are unjust, then the pursuit of those aims cannot justify initiating or continuing armed conflict. Ideally, that party should instead seek an immediate ceasefire and offer restitution for any wrongful harm already inflicted. Now, if the opposing party continues to use military force, either in retaliation or to extract unjust concessions, then the first party might acquire, for the first time, a moral justification to use military force in self-defense. But if the opposing party would accept a just peace then the attacking force may not simply continue to fight and kill.

We should therefore concede that IHL alone cannot prohibit all morally unjustified killing in armed conflict. The achievement of this aim also requires that international law prohibit the morally unjustified resort to military force, for example through Articles 2(4) and 51 of the United Nations Charter as well as through customary international law. The legal prohibition of morally unjustified killing is the shared aim of the law governing the resort to force and IHL, and requires a division

⁴ Elsewhere I argue that it can be objectively permissible to kill just combatants in order to protect civilians from unintended and proportionate harms to which they are not morally liable. See ADIL AHMAD HAQUE, *Rights and Liabilities at War*, in CRIMINAL LAW CONVERSATIONS 395 (Paul H. Robinson, Stephen Garvey & Kimberly Ferzan eds., 2009).

of labor between the two. The former prohibits all killing pursuant to a morally unjustified resort to force, while the latter prohibits killing that is morally unjustified even pursuant to a morally justified resort to force. If both bodies of law are functioning properly, compliance with each body of law will be individually necessary and jointly sufficient for moral justification.

More precisely, IHL has two aims. IHL aims to prohibit morally unjustified killing pursuant to a morally justified resort to force and to prohibit the morally worst killings pursuant to a morally unjustified resort to force. IHL claims that, by complying with its demands, combatants who fight for a just cause will avoid morally unjustified killing. As we have seen, IHL cannot make the same claim regarding combatants who fight without a just cause. However, IHL can claim that combatants fighting without a just cause will act *less wrongfully* if they follow IHL than if they violate IHL. In other words, IHL can claim that killings pursuant to a morally unjustified resort to force are *morally worse* if they also violate IHL than if they conform to IHL.

For example, targeting civilians is morally worse than targeting combatants even when neither have done anything to forfeit their moral rights not to be killed. Combatants often pose or directly contribute to threats to civilians who retain their moral rights as well as threats to combatants who may forfeit their rights not to be killed or injured but who nevertheless do not deserve death or injury. In addition, combatants are more likely than civilians to place themselves in harm's way; are better equipped than civilians to defend themselves; and often become combatants precisely to draw fire away from the civilian population.⁵

Similarly, it is morally worse to kill civilians as a side-effect of preventing less or no harm to others than to kill civilians as a side-effect of preventing substantially greater harm to others. There is always some moral reason to protect civilians, so an act that prevents substantially more harm to civilians than it inflicts is always partially morally justified. Of course, collateral harm inflicted in pursuit of an unjust cause can never be fully morally justified. However, ordinary combatants fighting for an unjust cause generally lack the ability to end the conflict as a whole and instead must choose between killing just combatants and foreign civilians or allowing just combatants to kill their fellow soldiers and their own civilians. By respecting *jus in bello* proportionality, these combatants

⁵ See SETH LAZAR, *SPARING CIVILIANS* (OUP 2015).

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can at least ensure that their own actions prevent substantially greater harm to their own forces and civilians than they inflict on the civilians of the opposing party.⁶

It follows that IHL gives combatants on all sides of an armed conflict decisive moral reasons to respect rather than ignore both civilian immunity and proportionality. Ideally, all IHL norms will do the same.

Objective Moral Justification

There are three primary senses in which an act can be morally justified. An act is objectively justified only if the act is supported by undefeated moral reasons. In these cases, there is no decisive moral reason not to perform the act. Generally, the fact that an action infringes a moral right is a decisive reason against its performance. However, individuals can forfeit some of their moral rights through their own voluntary actions; in such cases, the reasons ordinarily generated by their rights are cancelled or suspended. In other cases, the reason generated by a right may be outweighed or overridden by competing reasons; these rights are infringed but not violated.

Many scholars maintain that, outside of armed conflict, IHRL only permits killing individuals who pose an imminent threat to the lives of others. This position is probably too strong, since many legal systems permit killing that is immediately necessary to prevent an individual from carrying out a nonimminent threat to the lives of others, as well as to prevent greater harm to others (in so-called “choice of evils” cases).⁷

Still, there is no question that the scope of lawful killing is broader in war than in peace. Under IHL, individuals who pose no serious threat nevertheless voluntarily forfeit their legal right not to be killed by directly participating in hostilities, by assuming a continuous combat function within an armed group, or by joining the armed forces of a state. Roughly, taking direct part in hostilities means threatening to directly harm the armed forces or civilians of one party to a conflict on behalf of the opposing party; assuming a continuous combat function means making it one’s job to take direct part in hostilities; and joining an armed

⁶ See ADIL AHMAD HAQUE, *A Theory of Jus in Bello Proportionality*, in *WEIGHING LIVES: COMBATANTS & CIVILIANS IN WAR* (Jens David Ohlin, Larry May, Claire Finkelstein eds., forthcoming 2016).

⁷ See, e.g., American Law Institute, *Model Penal Code and Commentaries* §3.02 & §3.04 (1985).

force involves, among other things, making it one's job to take direct part in hostilities if ordered to do so.⁸ However, under IHL, direct participation in hostilities need not involve "the infliction of death, injury, or destruction on military personnel and objects, but [encompasses] essentially any consequence adversely affecting the military operations or military capacity of a party to the conflict."⁹ Even "clearing mines placed by the adversary" constitutes direct participation in hostilities under IHL.

To be clear, the problem is not that IHRL does not permit the peacetime killing of direct participants in hostilities who pose no imminent threat. After all, in peacetime, there are no hostilities in which one can participate. It is only in wartime that opposing parties deploy their respective armed forces to achieve their political objectives through organized violence. Individuals fighting within or alongside these armed forces are killed not (necessarily) to repel the threat they individually pose but (also) to defeat the armed force for whom they fight. The relevant question, then, is whether it is morally justifiable to kill individuals who fight on behalf of an armed force as a means of defeating that armed force.

There are two main possibilities. The first possibility is that all combatants, or at least all unjust combatants, forfeit their moral right not to be killed. The second possibility is that combatants only forfeit their moral right not to be killed when they participate in lethal military operations.¹⁰ At the same time, support personnel – including cooks, mechanics, and lawyers – attenuate their moral rights in a variety of ways, most notably by placing themselves in harm's way and by preparing to fight if so ordered. The distinction between civilians and combatants is therefore preserved, albeit in modified form. On this second view, it is morally permissible to kill support personnel only if their rights are overridden, but their attenuated rights are also more readily overridden than the unattenuated rights of civilians. Intentionally killing support personnel might be permissible to prevent much greater harm to others, while unintentionally killing support personnel might be permissible to prevent comparable harm to others.

⁸ See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 16 (Nils Melzer ed., 2009).

⁹ *Id.* at 47.

¹⁰ On "low threshold" views, even small causal contributions to an unjust threat are sufficient to forfeit one's moral right not to be killed. See JEFF McMAHAN, *KILLING IN WAR* (2009). On "high threshold" views, forfeiture requires either large causal contribution to an unjust threat or high culpability. See Seth Lazar, *Responsibility, Risk, and Killing in Self-Defense*, 119 *ETHICS* 699 (2009).

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If the first view is correct then IHL requires no modification: just combatants are morally justified in killing unjust combatants and, as we have seen, unjust combatants act less wrongfully when they kill just combatants than when they kill civilians. In contrast, if the second view is correct then IHL may require modification: since killing support personnel seldom prevents much greater harm to others, it seems that IHL should prohibit intentionally killing *known* support personnel.¹¹ Such a prohibition would allow the attacking force freedom of action when combat and support personnel cannot be easily distinguished and imposes no new precautionary obligations. Nevertheless, even a subjective, knowledge-based standard could prevent at least some morally unjustified killing.

In addition, under IHL the legal right of civilians not to be killed may be overridden if their deaths are a necessary and proportionate side-effect of pursuing an otherwise legitimate military advantage. Much as before, the problem is not that IHL does not permit peacetime killing in pursuit of military advantage, since in peacetime there is no opposing armed force against which military advantage might be sought. The relevant problem is that *jus in bello* proportionality calls for a comparison between apparently incommensurable values, namely civilian losses and military advantage.¹²

Some revisionist scholars argue that the moral value of a military advantage lies in its contribution to the achievement of a just cause.¹³ There are many problems with this view. First, the value of a just cause (such as collective self-determination) also may be incommensurable with the value of civilian losses. In addition, it is often impossible to even roughly quantify the contribution of a particular military advantage to the achievement of a just cause. Finally, on this view combatants who fight without a just cause cannot satisfy *jus in bello* proportionality and therefore have no reason to try.

¹¹ ADIL AHMAD HAQUE, *Criminal Law and Morality at War*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 481 (R.A. Duff & Stuart P. Green eds., 2011).

¹² See, e.g., Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L.J. 143, 151 (1999) ("Optimally, balancing tests compare like values. However, proportionality calculations are heterogeneous, because dissimilar value genres—military and humanitarian—are being weighed against each other. How, for example, does one objectively calculate the relative weight of an aircraft, tank, ship, or vantage point in terms of human casualties?")

¹³ See McMAHAN, *KILLING IN WAR*; Thomas Hurka, *Proportionality in the Morality of War*, 33 PHILOSOPHY & PUBLIC AFFAIRS 34 (2005).

Instead, I argue elsewhere that the value of a military advantage lies in the losses to combatants and civilians that achieving that advantage will prevent or avoid over the remainder of the conflict.¹⁴ Since doing harm is substantially morally worse than allowing harm, inflicting civilian losses in pursuit of a military advantage is proportionate only if achieving that military advantage will prevent or avoid substantially greater losses over the remainder of the conflict. If other norms of *jus ad bellum* and *jus in bello* are respected, the rights of civilians killed by a proportionate attack are overridden and therefore justifiably infringed rather than arbitrarily violated. Indeed, as we have seen, even unjust combatants would act less wrongfully by complying with *jus in bello* proportionality.

Epistemic Moral Justification

Clearly, not all acts that conform to IHL are objectively permissible. For example, IHL requires soldiers to “do everything feasible to verify” that their targets are combatants or military objectives.¹⁵ However, even soldiers who satisfy this requirement will sometimes make mistakes, erroneously attacking civilians and civilian objects, and thereby act objectively impermissibly. Similarly, IHL requires soldiers to refrain from launching attacks if the *expected* harm to civilians is excessive in relation to the military advantage *anticipated*.¹⁶ Unfortunately, soldiers often overestimate the likelihood or magnitude of potential military advantages and underestimate the likelihood or magnitude of potential harm to civilians. As a result, soldiers often launch attacks that inflict disproportionate harm on civilians and are therefore objectively impermissible.

Such cases bring us to the second sense of moral justification. An act is *epistemically* justified only if the actor reasonably believes that the act is objectively justified. More precisely, epistemically permissible acts are based on reasonable beliefs that, if true, would render the acts objectively permissible. In these cases, the actor has no decisive *epistemic* reason to believe that there is decisive *moral* reason not to perform

¹⁴ HAQUE, *A Theory of Jus in Bello Proportionality*.

¹⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 57(2)(a)(i), June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter Protocol I].

¹⁶ Protocol I art. 51(5) & art. 57(2)(a)(iii).

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the act. For example, a soldier who kills a civilian whom the soldier reasonably believes is a combatant is objectively unjustified but may be epistemically justified.¹⁷

Now, since human rights exist in virtue of facts about putative rights-holders (namely their humanity and their voluntary conduct), there is one important sense in which all objectively unjustified killings violate human rights. In this sense, a killing that is epistemically justified but objectively unjustified also violates human rights. On the other hand, a killing violates the ICCPR only if it is *arbitrary*, and an epistemically justified actor does not act arbitrarily. Epistemically justified actors are appropriately guided by moral considerations, and such guidance is the antithesis of arbitrariness. An epistemically justified soldier does not deprive others of life arbitrarily (even if some turn out to be civilians) any more than an epistemically justified judge deprives criminal defendants of liberty arbitrarily (even if some turn out to be innocent). So to the extent that IHL permits only epistemically justified killings, soldiers who conform to IHL will conform to IHRL as well.

To ensure that soldiers act with epistemic justification, IHL should be interpreted so that an attack is lawful only if the attacking force *reasonably believes* that the object of attack is a lawful target and *reasonably believes* that the military advantage they will gain will outweigh the civilian losses (if any) they will inflict. On this interpretation, soldiers should launch attacks only if the object of their attack is *probably* a combatant or military objective and only if they will *probably* prevent substantially greater harm than they will unintentionally inflict on nearby civilians. So interpreted, IHL would prohibit many wartime killings that are morally arbitrary because they are epistemically unjustified.

Some moral philosophers hold that reasonable belief is both necessary and sufficient for epistemic justification.¹⁸ However, this view ignores the fact that often the moral risks of action and inaction are asymmetrical.¹⁹ Indeed, other things equal, intentionally doing harm to the innocent is

¹⁷ Derek Parfit writes that an act may be permissible or impermissible in the “fact-relative sense,” the “evidence-relative” sense, or the “belief-relative” sense. DEREK PARFIT, 1 ON WHAT MATTERS, 150–51. In my terminology, an act is epistemically justified if it is permissible in both the evidence-relative sense and the belief-relative sense. My understanding of epistemic justification coheres nicely with the legal standard that reasonable belief in objective justification relieves one of criminal liability.

¹⁸ See, e.g., *id.* at 151.

¹⁹ Adil Ahmad Haque, *Killing in the Fog of War*, 86 SOUTHERN CALIFORNIA LAW REVIEW 63 (2012).