Introduction

Tales of 'dropping artillery on people's homes',[1] of 'shooting down [fleeing] men and women',[2] of intimidation and looting[3] and mutilated children's bodies[4] have emerged from US military operations in Iraq. These accounts of brutality refer to a military that only twelve years earlier conducted what was then hailed as 'the most legalistic war . . . ever fought'.[5] They describe a war that prominent military commentator Michael Schmitt called 'undoubtedly the most precise in the history of warfare',[6] during which US forces 'went to great pains to comply with the applicable norms of international humanitarian law';[7] US forces that the famous investigative journalist Seymour Hersh denounced as more 'violent and murderous'[8] than any American military before them.

Two themes dominate the popular and academic discussion of US military operations: criticism that US military practices inflict unacceptable harm on civilians, on the one hand,[9] and praise for the subjection of

[1] Massing (2007) 20; also Wright (2005).
[2] Farrell (2008); also Fick (2005).
[3] Bellavia with Bruning (2008).
[4] Wright (2005); also Zoepf and Dagher (2008).
[5] Colonel Raymond Rupert, staff judge advocate to General H. Normand Schwarzkopf, quoted in Keeva (1991) 77; similar Jochnick and Normand (1994) 49: 'the cleanest and most legal war in history'; Schmitt (1997/98) 255: 'the most discriminate and controlled air campaign in history'; also Parks (1991/92) 393.
[6] Schmitt (2008) 36.
[7] Schmitt (2003) 108; similar Farrell (2005) 179; Kahl (2006) 12; Shaw (2005) 15.
[8] Quoted in Lukacs (2006).
[9] Research that criticises the human costs imposed by contemporary US military practices includes Bothe (2001); Conetta (2002); Cordesman (2003); Dougherty and Quénivet (2003); Gardam (1993); Heintschel v. Heinegg (2003) 284; Human Rights Watch (1991); Human Rights Watch (2003); Jochnick and Normand (1994); Ratner (2002) 913; Sassòli (2005); Shue (2011); Shue and Wippman (2002). For non-academic accounts of the 2003 war against Iraq that highlight civilian suffering see Bellavia and Bruning (2008); Fick (2005); Massing (2007); Raski and West (2008); Wright (2005).

every aspect of combat operations to legal review, on the other hand.[10] The criticism is reinforced by media reports of widespread outrage about US military operations among the populations under attack.[11] The praise seems vindicated by a closer examination of the military's institutional set-up and organisational culture. An increasing number of professional lawyers have seen their involvement in decision-making grow, and legal terminology has gradually infused military discourse.[12] Where once the law was considered to be silent – on the battlefield of war – today its voice, or at least its vocabulary, is omnipresent. Some commentators consider this an indication of the effectiveness of international humanitarian law (IHL), and indeed the normative acceptability of US warfare, notwithstanding the vigorous reprobation of just that warfare by their colleagues.

Of course, different professional angles generate distinct emphases in the assessment of war. None the less, the coincidence of these two themes – widespread condemnation for the harm inflicted during hostilities and commendation for war's comprehensive subjection to regulation by international law (IL) – is puzzling. The thought that the subjection of US warfare to IL may have gone hand in hand with its brutalisation appears counterintuitive. We tend to associate law with order and restraint. We would therefore expect the penetration of war

[10] Studies of the US military that stress the importance of legalism in its organisational culture and the crucial role played by lawyers in recent wars include Blum (2001); Coe and Schmitt (1997); Dunlap (2001a); Dunlap (2001b) 15; Dunlap (2008); Kahl (2006); Kahl (2007); Keeva (1991); Kramer and Schmitt (2008); Lewis (2003); Parks (1990); Parks (1991/2); Roberts (1994); Rogers (2004); Schmitt (1992); Schmitt (1998); Schmitt (2003); Schmitt (2004); Schmitt (2010).

[11] For media reports about public protests against civilian suffering allegedly inflicted by coalition forces in Iraq and Afghanistan see among others Faiez (2012); Farrell (2008); Raski and West (2008). The coverage of US targeted killings in Pakistan features a similar theme. Bergen and Tiedemann argue that the perception that air strikes kill innocent civilians accounts for the fact that 'nearly two-thirds of those polled in Pakistan's tribal areas said that suicide attacks against US military targets are justified'. Bergen and Tiedemann (2011); similar McClatchy (2010); Rohde (2012); Salopek (2012); Shanker (2008); Tavernise and Lehren (2010) A1.

[12] Bowman (2003); Centre for Law and Military Operations (2004) 5f.; Fontenot (2005); for a detailed account of the gradual increase in the importance of legal considerations in US military decision-making see also Chapter 5. For observations of this trend in modern militaries in general, consider, among others, Kennedy (2006); Kennedy (2012) 160; Mégret (2011).

by IL to result in fewer deaths and less destruction. That combat operations subjected to law are widely considered worthy of intense criticism or even moral reprehension betrays these expectations.[13]

There are two ready ways of explaining this puzzle. One option is to point to individual instances in which it appears that the US has broken the law and to argue that, its legalistic façade notwithstanding, the US military in fact disregards IL whenever it contradicts its interests. The problem would then lie in the unlawful behaviour of the US military. An alternative hypothesis would draw attention to the fact that states are not only the addressees of international legal regulation but also its creators. Any betrayal of our expectations could be explained not by a lack of respect for the law, but by the fact that the law itself is seriously at odds with our normative standards. In this scenario states have created IL which, rather than constraining their behaviour in war, accommodates military imperatives and permits conduct that public opinion deems problematic.

These two possibilities raise a crucial question: what does it mean for warfare to be subject to legal regulation? 'War is about killing people and breaking things.'[14] Or in other words, it inevitably jeopardises individual rights on a large scale. War often marks a breakdown of international order and stability. Yet the current international system is anarchic in the sense that it lacks an overarching authority. As a result, the use of force by states against states is sometimes the only available means to maintain order or protect human life. IL seems to offer a way out of this dilemma. How can states reconcile non-pacifist foreign policies with their identity as benevolent members of an international society that undeniably has liberal human rights-affirming tendencies? They count on IL to render warfare, at least in a basic sense, normatively acceptable. Should they not?

The strikingly dichotomous commentary on US military operations gives us reason to investigate more closely what is ultimately one of the

[13] This work by no means rests on the ready assumption that US conduct in war is in fact normatively problematic, or for that matter, that the US military always duly adheres to its obligations under IL. The commentary, both popular and academic, on US military practices is highlighted because it presents the conundrum that initially inspired this project. Both questions, whether the US adheres to the laws of war as well as whether and according to what criteria contemporary US combat operations are condemnable, are addressed in the chapters to come.

[14] Roat (2000) xi.

most fundamental questions in the study of international relations: can war, the seemingly endemic phenomenon in which international relations temporarily take the form of a confrontation involving the use of force, be effectively regulated by IL? This book is not primarily concerned with the equally important issue of whether war is indeed an inevitable occurrence in interstate relations. Nor does it explore the possibility of overcoming the use of force through a legalisation[15] or 'constitutionalisation' of these relations.[16] The focus is on the question of whether, once states have resorted to the use of armed force, IL can be effective in regulating their conduct.[17]

International armed conflict, the purposeful use of force between states for the achievement of political goals,[18] is a hard case for testing IL's capacity to influence state behaviour. The stakes for the belligerent states will generally be high. The fact that a conflict has escalated to the point of an armed confrontation furthermore suggests that common ground is hard to come by. States at war seek relative gains over each other so that the interaction of belligerents necessarily takes the form of a zero-sum game. Indeed, armed conflict most resembles the realist 'ideal type'[19] of international relations, where the very survival of states is on the line.[20] As a result, adages such as *Kriegsraison geht vor Kriegsmanier*[21] or *inter arma silent leges*[22] strike many as compelling truths.

Yet since the end of the Second World War the development of the law of armed conflict, IHL or *jus in bello*[23] seems to have defied these

[15] I use the term legalisation as shorthand for the subjection of an activity to regulation by IL. The term does not imply a judgement on the legality of the activity in question.
[16] The debate about a possible constitutionalisation of IL is addressed in section 8.2; for the most widely cited works see Bogdandy (2006); Bryde (2003); Cohen (2010); Kumm (2004); Schilling (2005); Slaughter and Burke-White (2002).
[17] Although the primary intellectual interest of this book is the regulation of the *conduct* of war by IHL, some chapters necessarily touch on questions of resort.
[18] Kagan (2006) xvi; also Gray (2006) 30. [19] Weber (1949) 90.
[20] Grieco (1988a) 487; for outlines of the realist conception of international relations see also Donelly (2010); Mearsheimer (1995); Waltz (1979); Wohlforth (2010).
[21] 'The necessities of war take precedence over the rules of war.' Commentary to the Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts, adopted 8 June 1977 (API), 390, §1368.
[22] 'When weapons speak the law is silent.' For the origins of the quotation that is usually attributed to Cicero see Roberts and Guelff (2002) 31.
[23] I use these three terms interchangeably despite their slightly different evocations.

assumptions about its inevitably limited role.[24] Though one of the oldest areas of IL, it was only with its codification in the four Geneva Conventions of 1949 (GC I–IV)[25] that IHL developed into a coherent regime dealing with important issues on the periphery of war, such as prisoners, civilians, soldiers *hors de combat* and belligerent occupation. It took the API of 1977[26] for IHL to reach states' behaviour during actual combat with detailed positive regulation.[27] IHL now proscribes and prescribes states' conduct in hostilities in a number of legal instruments. Participation in these treaties has spread and their reception into customary law has been consolidated. Today most states in the international system are bound by a relatively uncontested set of core legal norms regarding their conduct in war.[28] Moreover, the last decades have seen a dramatically raised profile of law in international relations in general.[29] As a result, legal terminology has

[24] This book discusses warfare between states only. Unfortunately, this is largely untrue for non-international armed conflicts.

[25] First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field, first adopted in 1864, last revision in 1949 (GC I); Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, first adopted in 1906, last revision in 1949 (GC II); Third Geneva Convention Relative to the Treatment of Prisoners of War, first adopted in 1929, last revision in 1949 (GC III); Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, first adopted in 1949 (GC IV).

[26] See note 21.

[27] Earlier treaties contain provisions on means and methods of injuring the enemy. However, these legal instruments merely stipulate general principles that proscribe certain methods of combat, such as the bombardment of undefended towns. In contrast to the API, they do not prescribe courses of action for engaging the enemy. See the Convention on the Laws and Customs of War on Land of 29 July 1899 (The Hague II), revised in The Hague IV of 18 October 1907; the Convention of the Bombardment by Naval Forces in Time of War of 18 October 1907 (The Hague IX); and the Declaration on the Launching of Projectiles and Explosives from Balloons of 29 July 1899.

[28] There are important caveats to this statement both regarding the unambiguousness of these rules as well as their universality. Particularly relevant in the context of this work is the fact that the US has to this day not ratified API. This issue is further discussed in section 4.2. Here it deserves emphasis that in less than sixty years arguably the most essential rule regulating conduct in war, the legal norm of noncombatant immunity, understood as a prohibition against directly targeting civilians, has reached a level of internalisation at which it is rarely openly contested.

[29] Similar Abbott *et al.* (2000) 408; Byers (2010) 976; Crawford and Koskenniemi (2012) 15; Keohane (2012a) 128; Reus-Smit (2004a); Sloane (2010) 561.

gradually permeated military discourse. The battlefield set-up of inter-state wars has started to reflect this 'move to law'.[30] In David Kennedy's words, '[l]aw now shapes the institutional, logistical and physical landscape of war and the battlespace has become as legally saturated as the rest of modern life'.[31]

As adumbrated, the development of warfare into 'a legal institution'[32] has led many commentators to the conclusion that IL in war is after all effective, that indeed IHL is one of few branches of IL that can claim victory over anarchy in its area of regulation.[33] The observation that IL has penetrated warfare, in turn, serves as a forceful argument against the realist dogma of the eternally unchanging nature of international relations.[34] If IL can regulate war, where social and moral norms against the use of violence have broken down, surely no part of international relations is beyond its grasp. In parallel to its increased importance in reality, IHL has thus evolved from a neglected and seemingly invidious field of IL to one of the most prominent issues on the academy's research agenda.[35]

US military practices present the most striking example of radical change. Not five years before the entry into force of the API, the US waged war against North Vietnam (from 1965 to 1972) largely without considering IHL in military decision-making. In contrast, during the war against Iraq in 1991, legal considerations did play a role in shaping combat operations. Twelve years later, the invasion into Iraq to topple Saddam Hussein was thoroughly and comprehensively subjected to law. If IL can successfully regulate the conduct of war, this ability will most probably be manifest in contemporary US combat operations. In

[30] Goldstein *et al.* (2000) 385. [31] Kennedy (2012) 161. [32] *Ibid.*, 162.
[33] For instance, Belt (2000) 136; Canestaro (2004) 431; Dunlap (1999) 28; Kahl (2007) 36; Kennedy (2006) 7.
[34] For a dismissal of this realist premise of the impossibility of fundamental change in international relations see Keohane (2012a) 127.
[35] Hersch Lauterpacht famously said that 'if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law' (Lauterpacht (1952) 382). This verdict and the implied scepticism regarding IHL's qualification as law used to mean that any scholar studying IHL had to overcome an even higher threshold of doubt about her subject than other international lawyers before her research could hope to meet with the interest of peers. This is the case no longer. Scholars of IHL are like other international lawyers, as Thomas Franck observed, largely 'emancipated from the constraints of defensive ontology . . . [and] now free to undertake a critical assessment of its [IL's] content' (Franck (1995) 6).

2003, the air war was arguably the most exhaustively legalised part of the invasion. A comparison of earlier US bombing campaigns that were not subjected in the same way to IL with the air war of 2003 is a researcher's best bet to shed light on whether IL makes a difference in war. This book's theoretical propositions are therefore tested with a comparative study of US air warfare from 1965 to 2003.[36]

Against the backdrop of the traditional, deeply rooted scepticism towards the ability of IL to regulate interstate war and the recent hailing of its triumph in precisely this endeavour, the academic stakes in showing whether IHL is effective appear high. Of course, much higher are the stakes that parties to an actual armed conflict have in IL's ability to regulate it. The vital importance of IL's restraining capacity for the populations under attack is immediately obvious. However, whether IHL effectively constrains state behaviour during combat operations is also crucial for the legitimacy of the attacking powers' use of military force. It is thus relevant in humanitarian as well as in political terms. For the fulfilment of IHL's humanitarian and political purposes the ability to delimit *that* part of a state and society at war that may be engaged in combat operations is particularly important. Indeed the determination of what is fair game for and what is immune from attack is the litmus test of effectiveness for IL in war. The book hence focuses not just on the role of IHL in US air warfare generally, but specifically on the influence of the legal definition of a legitimate target of attack on what the US chooses to bomb.

To sum up, the subject of enquiry of this book – the effectiveness of IHL in defining a legitimate target of attack in US air warfare – is the result of three deliberate choices. First, IL is studied with a hard, possibly the hardest, case for showing its ability to be effective in international relations: interstate war, in particular the conduct of hostilities. If the analysis could show that IL makes a difference in combat operations, then that would bode well for IL's ability to regulate international relations in general. This ability is in international relations scholarship (references to the discipline herein IR) as well as popular perception still often in doubt. Second, IHL is studied with, as war goes, the easiest specific case for showing its ability to effectively regulate war: comprehensively legalised US air warfare. If IL can render war an acceptable policy choice at all, that capacity should be on display

[36] For a more detailed explanation of the case selection see Chapter 5.

in contemporary US combat operations from the air. Third, IHL's effectiveness is studied in the light of the task that in humanitarian and political terms is its most important: to define a legitimate target of attack.

What does effectiveness mean when it comes to IL? That states rarely defy the largely non-enforceable rules of IL tends to surprise jurists and scholars of IR. These low expectations explain the standard account that equates effectiveness of IL with recourse to it: a rule of IL that is widely drawn upon in decision-making is deemed effective.[37] The dichotomous assessment of current US military practices, illustrated at the beginning, however, suggests that we should demand more of IL before we call it effective. A concept of legal effectiveness needs to take account of IL's ability to actually make a difference for behaviour and of the normative implications of adherence to a legal rule.[38]

The book therefore first explores whether international legal norms can have an impact of their own on behaviour. States presumably create law that reflects their interests. Moreover, non-legal social or moral norms may well influence state action. In order to be able to call IL effective, we have to establish that the law has *some* impact on behaviour that is not merely attributable to a state's interests or shaped by other (non-legal) norms. When an actor recurs to law in decision-making, does she behave differently compared with how she would have behaved according to her interests and pre-legal normative beliefs alone? The book endeavours to determine whether the subjection of interstate armed conflict to IHL can make a distinguishable difference for behaviour. Does recourse to the legal definition of a legitimate target of attack have what I call 'an impact of its own' on what the US attacks?[39]

We generally believe that law guides behaviour in the direction of what is right. Yet we cannot simply assume that recourse to IL leads to normatively acceptable behaviour. After all, congruence between IL

[37] For instance, Alter (2000); Byers (1999); Chayes (1974); Chayes and Chayes (1995); Franck (1992); Koh (1997); Young (1979).

[38] Chapter 1 provides a detailed discussion of the relevant debates between scholars of law and IR. It finds that both disciplines lack enquiries into IL's effectiveness understood in this way.

[39] This is not meant to suggest that IL can be independent of underlying interests or norms. The next two chapters elaborate on what IL having 'an impact of its own' or 'a counterfactual added value' or law 'making a distinguishable difference' means.

and non-legal – for instance, moral – prescriptions for proper conduct cannot be taken for granted. While many laws can be traced back to a higher principle, other considerations, such as military imperatives in the case of IHL, also shape a legal regime.[40] This then raises the question of whether the behaviour that results from resort to IHL in decision-making accords with our pre-legal normative expectations regarding warfare. In other words, it is insufficient to show that IHL has *some* impact of its own on behaviour. We also need to know whether the difference that it makes leads to normatively acceptable behaviour, in this case combat operations that are perceived as legitimate. Whether an attack in war is legitimate is a matter of perception. Determining the effectiveness of IL hence requires the identification of a relevant audience and the extra-legal normative standard this audience brings to bear when judging behaviour and by implication when evaluating IL.

To recapitulate, assessing the effectiveness of IL in a given issue area comprises two tasks: first, showing that the law has an effect on behaviour beyond what interests and non-legal normative beliefs would have led an actor to do anyway; second, enquiring whether this counterfactual difference leads to normatively acceptable behaviour. I refer to these two aspects of legal effectiveness as IL's behavioural relevance and its normative success respectively.[41] Behavioural relevance concerns the relationship between the legal definition of a legitimate target of attack and what the US in fact attacks. Normative success concerns the relationship between what the US targets (to the extent that this is determined by law) and what is a legitimate target of attack according to an audience yet to be identified and the extra-legal normative standard guiding expectations of what IHL should accomplish in war. Behavioural relevance describes a causal mechanism;[42] normative success judges the mechanism's result. Together they are necessary and sufficient conditions for calling IHL effective in regulating the conduct of hostilities.

[40] Moreover, the notion that law can have an effect that is distinguishable from the effects of an actor's other normative beliefs (and her interests) presupposes conceptual separateness of law from other normative codes.

[41] This book develops various innovative concepts that do not occur in the existing literature. While these concepts are carefully introduced and discussed in detail over the course of the book, they are also defined in the appendix for easy reference.

[42] I discuss the notion of causality underlying this analysis in detail in section 7.4.

Do we really need two new terms in order to study the role of IL in international relations? How do the behavioural relevance and normative success of IL relate to 'compliance', the most commonly used concept to judge the performance of IL? The answer to this question depends on what exactly one means by compliance, which is not at all self-evident. The following paragraphs relate different ways of understanding compliance to the notions of behavioural relevance and normative success respectively and define compliance for the purposes of this book. They show that an enquiry into the effectiveness of IL, as undertaken here, differs fundamentally from a study of compliance.[43]

Compliance can mean conformity of behaviour with a legal rule. Conformity as such, of course, says little about the actual role that law plays in bringing it about. This is why scholars have pitted compliance against convergence: behaviour that happens to conform to law for reasons other than recourse to law is considered to be due to convergence. In this view, compliance only describes behaviour that would not have occurred had it not been for IL. This in turn means that any claim that states comply with IL already contains the assumption that recourse to IL makes a difference for behaviour, because compliance signals an adjustment of behaviour due to law rather than other factors. However, I suggest that we do not yet know whether and how IL can make a difference for behaviour. The concept of compliance as 'conformity of behaviour that does not count as convergence' does not purport or imply a particular theory about the 'whether' or the 'how'. An enquiry into IL's behavioural relevance affords both.

The other assumption made by the understanding of compliance as conformity of behaviour with law is that the putative difference that law makes corresponds to the content of the law. However, it is a problematic notion that a legal rule has 'one content' and a certain corresponding behaviour that can be expected to result from recourse to it. The meaning of a legal provision arises partly in its interpretation, during which an actor's prior normative beliefs and interest-driven considerations play a role. It follows that we can only theorise in the abstract about whether and how IL can make a difference (behavioural relevance), not what kind of difference a specific legal rule will in fact make (normative success).

[43] For discussions of the various partly diverging conceptions of compliance in IR literature and legal scholarship see, among others, Downs, Rocke and Barsoom (1996); Guzman (2002); Kingsbury (1997/8); Simmons (1998).