Should International Law Ensure the Moral Acceptability of War?[1]

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Jeff McMahan's challenge to conventional just war theory is an attempt to apply to the use of force between states a moral standard whose pertinence to international relations is decreasingly contestable and which regulation by international law (IL) is, therefore, under pressure to afford: the preservation of individual rights. This compelling endeavour is at an impasse given the admission of many ethicists that it is currently impossible for international humanitarian law (IHL) to regulate killing in war in accordance with individuals' liability. IHL's failure to consistently protect individual rights, specifically its shortfall compared to human rights law, has raised questions about IHL's adequacy also among international lawyers.

This paper identifies the features of war that ground the inability of IL to regulate it to a level of moral acceptability and characterises the quintessential war as presenting what I call an 'epistemically cloaked forced choice' regarding the preservation of individual rights. Commitment to the above moral standard then means that IL should not prejudge the outcome of wars and must, somewhat paradoxically, diverge from morality when making prescriptions about the conduct of hostilities. In showing that many confrontations between states inevitably take the form of such epistemically cloaked forced choices, the paper contests the argument by revisionist just war theorists like McMahan that the failure of IL to track morality in war is merely a function of contingent institutional desiderata. IHL with its moral limitations has a continuing role to play in international relations.

Key words: International humanitarian law, just war theory, justifying killing in war, human rights in war, Jeff McMahan

[1] I am grateful to Cecile Fabre, Seth Lazar, Jeff McMahan, David Rodin, Henry Shue and Benjamin Valentino for their helpful comments as well as to the participants of the Annual Workshop of the Oxford Institute for Ethics, Law and Armed Conflict 2011, and the anonymous reviewers for this journal. All remaining errors are entirely my own responsibility

Introduction

Should we rely on law to render our conduct morally acceptable? In war, international law (IL) closely follows conventional just war theory (JWT) and permits the deliberate killing of combatants during the conduct of hostilities regardless of their individual liability to that fate.[2] JWT has recently come under intense criticism for, therefore, failing to ensure the moral acceptability of combat operations. What is referred to here as the revisionist critique of JWT has fallen on such fertile grounds, because it represents the bold yet compelling attempt to apply in war a moral standard whose pertinence to international relations (IR) is decreasingly contestable and which regulation by IL is, therefore, under pressure to afford: the preservation of individual rights.

The response by many lawyers and philosophers to the revisionist critique has proceeded from the intuition that it is practically impossible to uphold this standard during armed conflict. Michael Walzer, the most prominent proponent of the old orthodoxy, has summarized his criticism in the following words: 'What [the revisionist critique of JWT]... provides is a careful and precise account of what individual responsibility in war would be like if war were a peacetime activity.'[3] This paper accepts that preserving individual rights is the correct moral standard for IR and the touchstone of successful regulation by IL. The task at hand is hence to concretize Walzer's contention by uncovering the characteristics that make war 'not a peacetime activity', i.e. impossible to legally regulate in such a way as to avoid large-scale unjustified infringements of individual rights.

[2] In this paper I am concerned with international armed conflict.

[3] M. Walzer, 'Response to McMahan's Paper', (2006) 34 *Philosophia* 43, at 43

This paper shows that armed conflict between states often takes the form of what I refer to as an 'epistemically cloaked forced choice' regarding the preservation of individual rights. If it does, IL cannot – and should not attempt to – regulate conduct with a view to avoiding violations of individual rights. Introducing this concept, the paper hence definitively establishes what it is about war that makes IL unable to ensure its moral acceptability. Based on that knowledge the paper proposes to accept international humanitarian law (IHL)[4] with its current limitations for situations that resemble such a scenario, but to delimit its applicability. For any situation that is not a quintessential war, i.e. it does not present an epistemically cloaked forced choice, regulation by IL can and should aim to avoid unjustified infringements of individual rights, which means transcending IHL altogether.

The argument in this paper proceeds in four steps. I begin by outlining the logic combat operations would have to follow if they were to be morally acceptable according to the standard adopted here, meaning they do not involve the unjustified infringement of individual rights, and show that it is impossible for IL to impose this logic. Section two demonstrates that IL cannot guarantee that deliberate killings during hostilities can *ex ante* lay claim to a lesser evil justification either. Section three identifies the features of war that ground the inability of IL to regulate it to a level of moral acceptability and characterises such situations as presenting an epistemically cloaked forced choice regarding the preservation of individual rights. Indeed, given the moral standard adopted here, in such situations regulation by IL *should* not aim higher than IHL currently does. Section four shows that, even if IR underwent radical institutional progress, many confrontations between states inevitably would still take the form of an epistemically cloaked forced choice.

1. International humanitarian law and the individual liability justification

[4] I use the terms IHL, laws of war, and laws of armed conflict interchangeably, despite their slightly different evocations.

IHL, through the principle of noncombatant immunity, buys relative protection for a large segment of society in war – all civilians – by permitting deliberate lethal attacks on individuals belonging to another segment of society – all combatants.[5] In this respect IL is in tune with conventional JWT.[6] Walzer justifies this distinction with the explanation that combatants as 'a class are set apart from the world of peaceful activity; they are trained to fight, provided with weapons, required to fight on command.'[7] A combatant has 'allowed himself to be made into a dangerous man.'[8] According to conventional JWT, it is hence their increased threat potential/decreased vulnerability that warrants combatants' loss of immunity and their radically different treatment vis-à-vis civilians.

The distinction between combatants and civilians according to IHL is not fully congruent with a difference in threat potential/vulnerability of individuals.[9] But even if all combatants were in fact more threatening and less vulnerable than all civilians, that IHL is satisfied with these criteria as a justification for deliberate killing in war suggests that the preservation of individual rights is not its foremost concern. From a liberal, individual rights affirming point of view, the infringement of someone's right to life is only morally justified, if the individual is liable to being killed. If we ground the ethics of war in individual rights, deliberate attacks should be directed against, not all and only combatants, but against all and

[5] The goal of avoiding systematic unjustified infringements of individual rights in war makes it necessary to examine the legal regulation of not only deliberate attacks, but also the collateral damage or incidental harm inevitably inflicted in war. Given the limited space, this paper focuses only on the former and hence enquires into the ethical underpinnings and correct application of the principle of distinction, neglecting the principle of proportionality.

[6] The most popular exposition of conventional JWT can be found in M. Walzer, *Just and Unjust War; A Moral Argument with Historical Illustrations* (2006); see also A. Margalit and M. Walzer, 'Israel: Civilians and Combatants', *The New York Review of Books,* 14 May 2009, 21, at 2

[7] Walzer, *supra* note 5, at 144

[8] Ibid. at 145

[9] Combatants may be attacked even when they are too scared or incompetent to pose a threat or to effectively defend themselves. On the other hand, civilians, their threat potential/vulnerability notwithstanding, only lose their immunity through their actual conduct. The precise circumstances under which a civilian becomes a legitimate target due to direct participation in hostilities are subject to controversy. For comprehensive discussions of the issue see D. Akande, 'Clearing the Fog of War? The ICRC'S Interpretive Guidance on Direct Participation in Hostilities', (2010) 59 *International and Comparative Law Quarterly* 180; N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (2009)

only individuals liable to loss of their life.[10] While the logic according to which conventional JWT as well as IHL propose to distribute the deliberate harm that is inevitably inflicted in any war is one of 'mere distinction' (between combatants and civilians), revisionist critics propose a logic of distribution that takes account of individual liability.

According to McMahan '[t]o say that a person is morally liable to being harmed in a certain way is to say that his own action has made it the case that to harm him in that way would not wrong him, or contravene his rights.'[11] In peace-time an individual is generally considered liable to be killed only if she is 1) responsible for contributing to an 2) unjustified threat, and 3) lethal attack is a proportionate and necessary response to the threat.[12] Revisionists hold that this standard naturally also applies in war.[13] Combatants who fight without a just cause or who resist a just attack are responsible for contributing to an unjustified threat to the combatants on the other side and are hence liable to defensive harm, which may include lethal attack.[14] By implication, if combatants use force in defence of a just cause, they do not forfeit their right to life and should remain immune.[15]

If it were rigorously implemented, this 'logic of individual liability' would ensure that warfare, as far as deliberate attacks are concerned, does not involve the large-scale unjustified infringement of individual rights. The logic of individual liability, contrary to the logic of

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[10] This is the core of the revisionist critique of conventional JWT. It is mounted *inter alia* in C. A. J. Coady, 'The Status of Combatants', in D. Rodin and H. Shue (eds.), *Just and Unjust Warriors; The Moral and Legal Status of Soldiers* (2008), 153; C. Fabre, 'Guns, Food, and Liability to Attack in War', (2009) 120 *Ethics* 36; J. McMahan, 'Laws of War', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (2010), 493; J. McMahan, *Killing in War* (2009); J. McMahan, 'The Ethics of Killing in War', (2004) 114 *Ethics* 693; D. Rodin, *War Proportionality and Double Effect* (forthcoming); D. Rodin, 'The Moral Inequality of Soldiers: Why Jus in Bello Assymetry is Half Right', in D. Rodin and H. Shue (eds.), *Just and Unjust Warriors; The Moral and Legal Status of Soldiers* (2008), 44

[11] McMahan (2009), *supra* note 9, at 11

[12] Lazar identifies these three elements of liability as the common denominator among revisionist just war theorists. S. Lazar, 'The Morality and Law of War', in A. Marmor (ed.), *Routledge Companion to Philosophy of Law* (2012)

[13] J. McMahan, 'The Just Distribution of Harm between Combatants and Noncombatants', (2010) 38 *Philosophy & Public Affairs* 343, at 354

[14] McMahan (2009), *supra* note 9, at 234; also Rodin (2008), *supra* note 9, at 46

[15] '[U]nless they lose rights for some reason other than acquiring combatant status, just combatants are innocent in the relevant sense.' J. McMahan, 'The Moral Equality of Combatants', (2006) 14 *Journal of Political Philosophy* 377, at 379; likewise Rodin (forthcoming), *supra* note 9, at 167

mere distinction, can hence lay claim to attempting to provide a way to wage war in a morally justified manner, if the moral standard is the preservation of individual rights. Since I accept the latter as true, the next logical step would be to change IHL with the aim that it impose on combat operations the logic of individual liability rather than, as it currently does, the logic of mere distinction.

Since the logic of individual liability takes account of the cause for which a belligerent fights, implementing it would mean taking down the barrier between the legal regulation of the conduct of war and the resort to force, which would produce a number of widely discussed practical problems.[16] The only legal justification for resort to force without a mandate from the UN Security Council is self-defence.[17] If we set more restrictive requirements for the side fighting without a claim to self-defence, those would never be applied. Belligerents often enter into wars because they mistakenly believe they are legally permitted to do so. Even if one side was aware that they were in want of a legal justification, the decision to nevertheless go to war suggests that the stakes are high and that scruples that could prevent the unjust belligerent from using the law for just belligerents are in short supply.

Deliberate disregard or voluntary misapplication of a legal rule, even if it is likely and explicable, does not affect its validity. However, the question whether a belligerent in fact has a legal justification for resort to force is, even when approached in good faith, often difficult to answer. In order to attach legal significance to an individual's decision to fight for her state if the latter had no claim to self-defence we would in fairness need to overcome fundamental epistemic uncertainties around the concept of self-defence and its collective, pre-emptive and

[16] For an overview see D. Rodin and H. Shue, 'Introduction', in D. Rodin and H. Shue (eds.), *Just and Unjust Warriors; The Moral and Legal Status of Soldiers* (2008), 1, at 7

[17] The right to national self-defence under IL is far from congruent with JWT's concept of a just cause. However, in this section I only investigate the possibility of changing IHL without also challenging the prohibition of the use of force under general IL. I hence assume that self-defence in accordance with Article 51 UNC is the only just cause for resort to force and that individuals fighting on behalf of a belligerent state unable to avail itself of that justification are unjust combatants in the understanding of revisionist just war theorists.

preventive variations.[18] McMahan suggests the establishment of an international court that in a timely and effective manner adjudicates questions of just resort[19] – in this particular context it is immaterial that his understanding of legitimate resort, of course, implies the broader concept of just cause, rather than self-defence as permitted under IL.

It may, in theory, be feasible for an international court to authoritatively determine for every war which side has a claim to self-defence. However, even if that were the case, so that combatants on one side could be sure that they were contributing to an unjustified threat, it would still be farfetched to think that they all contribute enough either to the overall threat of waging an aggressive war or to individual battlefield encounters that threaten just combatants on the other side to warrant forfeiture of their right to life.[20] Besides the fact that individuals' causal connection to the overall war and/or threats to individual just combatants might be indirect or slight, in many cases death, wounds or trauma would not be necessary and proportionate responses. In Lazar's words: '[I]f the laws of war should mirror the liability view, then they must be not merely asymmetrical, but completely individuated both to the agent and to the specific act.'[21]

McMahan does not claim that a precise distribution of harm in accordance with each individual's liability is possible. He instead argues that since imposing harm is inevitable, small differences in liability among those we can target make all the difference and should determine who is harmed. In this context, Lazar has claimed that the logic of individual

[18] For an enquiry into the difficulties in determining the boundaries of the right to national self-defence under IL see G. P. Fletcher and J. D. Ohlin, *'Defending Humanity; When Force is Justified and Why'* (2008), 63ff. For a comprehensive account of the equally heavy epistemic burden faced by combatants that are expected to determine the justness of their cause see S. Lazar, 'The Responsibility Dilemma for Killing in War: A Review Essay', (2010) *Philosophy & Public Affairs* 180

[19] Amongst others McMahan (2010), *supra* note 9, at 358; McMahan (2008), *supra* note 9, at 42; see also J. McMahan, 'The Prevention of Unjust Wars', in Y. Benbaji and N. Sussman (eds.), *Reading Walzer* (2013)

[20] A combatant can incur liability either by contributing to the unjustified threat her state poses to another or in a battlefield encounter by threatening another combatant who defends a just cause.

[21] S. Lazar, 'War', in H. Lafollette (ed.), *International Encyclopaedia of Ethics* (2011); for a similar argument see J. Dill and H. Shue, 'Limiting the Killing in War: Military Necessity and the St Petersburg Assumption, (2012) 26 (3) *Ethics and International Affairs* 311

liability faces a dilemma 'borne out of the equally minimal responsibility of many combatants and noncombatants for the objectively unjustified threat posed by their belligerent state.'[22] If the threshold for liability to be killed is low enough to justify the intentional killings of a significant number of combatants on the unjust side, than many civilians lose their immunity from direct attack as well, because they can be expected to bear some responsibility for the initiation of the war. That combatants and civilians alike could be targeted, would create a scenario Lazar conceives of as total war.[23] On the other hand, if the liability threshold was so high that it would preserve noncombatant immunity, not enough combatants would be legitimate targets of attack either and we end up having to endorse pacifism.[24]

In my view, the fundamental problem does not lie with uncertainty about where to locate a threshold of liability to being killed. If it were at all possible to connect harm inflicted in war to individual moral status, even imperfectly with a simple threshold of liability past which one can be attacked, it is not at all the case that we would end up in anything resembling total war. It would merely be a group of different people who were permitted to be intentionally killed (not combatants as such, but all and only those civilians as well as combatants above the threshold of liability). If such an imperfect version of the logic of individual liability could be implemented, there would be no reason to *also* uphold the principle of noncombatant immunity.

The reason why McMahan is nevertheless reluctant to give up noncombatant immunity, and Lazar equates such a scenario with total war, is presumably that even an imperfect version of the logic of liability that merely directs all harm toward those liable above a certain threshold is impossible to implement. Identifying individuals' contributions would require the attacker to possess intelligence about the inner details of the adversary's society that warring states usually do not have. However, we could ask each belligerent to

[22] Lazar, *supra* note 17, at 210
[23] Ibid. at 188
[24] Ibid.

designate those contributing above a certain threshold among their own citizens, as they now designate some of them as combatants. Alternatively we could even delegate that task to an unbiased third party, for instance, a sort of international fact-finding commission. It might then in theory be possible to determine individuals' contribution to the war, i.e. their causal involvement in posing an unjustified threat.

However, I have so far brushed over the requirement that individuals not merely unwittingly or accidently, hence innocently, contribute to the threat that their state poses to another, but that they do so responsibly. What does it mean to be responsible for one's contribution to an unjustified threat in such a way that one forfeits one's right to life? On a spectrum of liability just above the innocent threat is the individual that voluntarily chooses to act in a way that foreseeably contributes to a threat – what Lazar refers to as agent-responsibility.[25] That is certainly the minimum requirement in order for a causal contribution to ground any liability. If we agree with McMahan that a court can legitimately and convincingly determine in advance which side in war is acting in self-defence, then all individuals on the other side who chose to take-up arms on behalf of their state knowingly contribute to an unjustified threat and are *prima facie* agent-responsible.

But is this minimum enough? We still know nothing about individuals' motives for fighting or potential excuses.[26] In other words, the culpability of the individual still eludes us.[27] It seems odd to discount excuses as part of a way to regulate war that derives its appeal from the claim to be giving the individual her moral due. However, if we required a culpable contribution to the unjustified threat, then regardless of whom we tasked with applying the

[25] S. Lazar, 'Responsibility, Risk, and Killing in Self-Defense', (2009) 119 *Ethics* 699, at 706

[26] For an enquiry into potential excuses of unjust combatants see Lichtenberg, 'How to Judge Soldiers Whose Cause is Unjust', in D. Rodin and H. Shue (eds.), *Just and Unjust Warriors; The Moral and Legal Status of Soldiers* (2008), 112, at 118

[27] While most ethicists would consider mere agent-responsibility insufficient to ground liability to lethal harm, some revisionists have lowered their standards from requiring culpability to mere agent-responsibility. See for instance J. McMahan, 'Duty, Obedience, Desert, and Proportionality in War: A Response', (2011) 122 *Ethics* 1, at 19. For a discussion of this trend among revisionist just war theorists see Lazar, *supra* note 24, at 706-2

logic of individual liability in a given scenario, the agent would require omniscience, rather than mere intelligence and good faith, to do so. The logic of individual liability, even if we accepted a threshold rather than a fully correct distribution of harm, would inevitably be misapplied.

What if we stripped down the logic of individual liability even further? Allocating harm according to individuals' (causal) contribution to the war effort without regard to the attending responsibility or under the assumption of merely their agent-responsibility is very close to what the principle of non-combatant immunity proposes to do anyway (allocating deliberate harm imperfectly in accordance with individuals' threat potential/vulnerability). Crucially, this stripped-down version of the logic of individual liability would lose much of its original appeal over the logic of mere distinction and could hardly lay claim anymore to avoiding unjustified infringements of individual rights by giving each individual her moral due.

Why IL cannot offer a connection between individual moral status and the distribution of deliberate harm that is deeper than the one provided by the principle of non-combatant immunity or the stripped-down version of individual liability becomes particularly evident, if we compare war to law enforcement in a domestic context. Focused on a single individual or a manageable group of delinquents, law enforcement is a vertical confrontation that is geared toward the individual in the first place. War, to the contrary, is fundamentally a horizontal physical confrontation between states, in which human beings are conceived of as members of a collective (their state), rather than as individuals who are to be treated according to their own liability.[28] Of course, human beings continue to exist as individuals with a moral status of their own, but in order for law to be able to distribute harm in accordance with the latter, it

[28] For an elaboration of the argument that the collective nature of war plays a crucial role in undermining the viability of revisionist JWT see Dill and Shue, *supra* note 20, *passim*

seems that we would have to make assumptions about the physical confrontation that place it outside the category of war.

2. International humanitarian law and the lesser evil justification

Maybe the moral standard geared toward giving each individual her moral due, meaning to avoid altogether the violation of individual rights, is too strict to uphold for law in war and IHL does not after all have to afford it. The intuition behind the prevalent view that war can be morally justified, even though it inevitably infringes individual rights – in other words the widespread reluctance to embrace pacifism even among revisionist just war theorists – is that war may sometimes present the least bad overall solution to urgent problems.[29] This immediately raises the spectre of a consequentialist justification, which for many philosophers is an incurable taint in any argument. Most revisionist just war theorists would eschew the notion that the infringement of some individuals' rights to life, which the logic of mere distinction allows, can be justified with the achievement of a morally very important goal to which it contributes (for example, to halt a dictator's genocide against parts of a population).[30]

But allowing a lesser evil justification for killing in war, does not necessarily amount to sanctioning the violation of individual rights for the purpose of general utility maximization. If we accept that war is only justified as the lesser evil when it preserves many individuals' rights while violating some, individual rights remain the touchstone of the justification. The fact that in war many individuals' right to life is at stake is generally considered a reason to doubt the applicability of consequentialist justifications. Yet, it can also be read as rendering consequences particularly important, specifically at the systemic level. In

[29] For an exposition of this view see H. Shue, 'Do We Need "A Morality of War"?', in D. Rodin and H. Shue (eds.), *Just and Unjust Warriors; The Moral and Legal Status of Soldiers* (2008), 87

[30] David Rodin has argued forcefully that the rights violations inflicted in war present so-called *mala in se* and should, therefore, never be levelled out with consequentialist reasoning. D. Rodin, 'Morality and Law in War', in H. Strachan and S. Scheipers (eds.), *The Changing Character of War* (2011) 455, at 460

Thomas Nagel's words 'within the appropriate limits, public decisions will be justifiably more consequentialist than private ones. They will also have larger consequences to take into account'.[31] A law endeavouring to regulate conduct in war has very large consequences to consider.

Terry Nardin has criticized the field of practical ethics for its assumption that systemic level decisions 'should be guided and judged by the same principles that govern individual conduct.'[32] He holds that the principles that guide public affairs are distinct from those guiding individual ethics.[33] If any differentiation is warranted, it is certainly that while the individual may not normally justify her rights-infringing actions on the basis that they contribute to a greater good, it is a desirable feature of a public policies, and by the same token of laws, that they are mindful of the consequences of their systematic implementation for individual rights. I propose that the infringement of individual rights can be justified as the lesser evil if the greater evil would consist of more violations of individual rights.

But can law ensure that killing in war is justified as the overall lesser evil? War does not seem to be a mechanism for distributing harms and goods in a morally meaningful way between belligerent states, that is, according to some principle other than material strength subject to considerable chance. Not even if the regulation of conduct could draw on belligerents' causes? Maybe this is where a stripped-down version of the logic of individual liability (that abstracts from responsibility and only looks at individuals' causal contribution to either a justified or an unjustified threat) still beats the logic of mere distinction, despite its similarity with the principle of non-combatant immunity. Contrary to the logic of mere distinction, the stripped-down logic of individual liability remains asymmetrical and can, if it is respected, therefore guarantee that the right side wins.

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[31] T. Nagel, *Mortal Questions* (1979), 84

[32] T. Nardin, 'International Ethics', in C. Reus-Smit and D. Snidal (eds.), *Oxford Handbook of International Relations* (2008), 594

[33] Ibid.

What does it look like if, rather than combatants (on both sides), only those individuals are permitted to be attacked who contribute to an unjustified threat? The absence of a claim to self-defence at *the level of the state* would imply that the individuals fighting on this state's behalf may inflict no harm at all, except perhaps in a very narrow set of self-defence situations that arise in individual battlefield encounters.[34] In a physical confrontation according to the stripped-down logic of individual liability the outcome would be guaranteed to reflect a difference in moral status between the belligerent states, but a physical confrontation fought by such a rule – all combatants on one side are legally required to 'hold still', meaning they are not allowed to use their weapons to inflict harm in the face of their opponents' attacks – hardly resembles war, a point to which I will return below.

Moreover, as soon as the individuals on the unjust side lay down their weapons (which this version of the logic of individual liability prescribes), they are not contributing to an unjustified threat anymore and therefore cease to be open to attack by the just side. The latter, as a result, very quickly runs out of legitimate targets for attack. Rather than regulating war, this version of the logic of individual liability implies its prohibition. In practice, a law for the conduct of war that requires unjust combatants to hold still imposes an obligation on soldiers not to enter an unjust war, in the first place. The logic of individual liability hence boils down to and is redundant of the prohibition of the resort to force for reasons other than self-defence.

What about a radically different logic? The goal is to guarantee that a war turns out to be the overall lesser evil in terms of unjustified infringements of individual rights: surely the best way to ensure that is to regulate conduct with a logic of efficiency that is geared toward the preservation of individual rights. Accordingly persons and objects would be legitimate targets of attack if their military engagement led to the direct and quick achievement of the end-state that was determined to involve overall fewer unjustified infringements of individual

[34] McMahan (2009), *supra* note 9, at 3

rights, for instance, self-defence against a tyrant, or humanitarian intervention in a country in which the ruling elite commits widespread genocide. Whether or not it would actually be possible to implement such a logic, the most efficient way to achieve the best end-state in terms of individual rights is for the other side not to inflict harm at all.

The conclusion is inescapable: the outcome of a physical confrontation does not necessarily, not even likely, reflect the moral standing of the belligerents.[35] It is only guaranteed that the 'right' side wins, if we allow the confrontation to be fundamentally asymmetrical (which excludes the logic of mere distinction). However, no matter how exactly we propose to get to the desired end-state to be achieved, if that end-state is the avoidance of individual rights infringements, an asymmetrical logic allows only one side to fight (if at all). As long as we talk about international armed conflict, i.e. a horizontal confrontation between states, law cannot reliably bestow victory and defeat on states in accordance with whether overall they fight in favour of or against the preservation of individual rights.

3. International humanitarian law and epistemically cloaked forced choices

Legalized warfare is the international community's response of choice to calls for intervention in humanitarian emergencies and civil wars. When individual rights affirming liberals choose not to be pacifists and to advocate that the use of force should be available in certain situations, they rely on IL to make war, which is widely accepted to be a morally problematic phenomenon, acceptable for the achievement of these very important goals in exceptional situations. This analysis suggests that this reliance on IL is to some extent misguided. All IL can do is distribute the harm inevitably caused in war among individuals on each side in accordance with the logic of mere distinction. IL cannot guarantee a moral

[35] Out of the factors which commonly decide who wins a war – technological superiority, more people or better strategies in hurting the enemy – none is connected to the preservation of individual rights.

standard in the outcome of the confrontation or even prejudge that outcome. Legalization leaves the moral question about war unanswered.

What is it about war that impairs morally successful legal regulation? The previous sections suggested that the impediment to implementing a logic for the conduct of hostilities that affords a lesser evil justification is related to the conception of war as a horizontal physical confrontation between states in which individuals on neither side are under an obligation to hold still. Holding still is the prescription that an asymmetrical logic premised on the preservation of individual rights inevitably boils down to.

Just war theorists would say that technically one side does have a duty to hold still, the side without a just cause. And, of course, the lack of an obligation to hold still in IHL stands in contrast to general IL and its prohibition of the use of force in cases other than self-defence. We (conventional just war theorists, most international lawyers, and some revisionists for now) only accept the symmetry of IHL, i.e. the absence of a duty to hold still for all individuals on the deviant/ unjust side, because of the lack of effective and legitimate adjudication of self-defence claims/ questions of just cause and ultimately the lack of law enforcement in the international order.

The role of this institutional desideratum in constraining IHL's regulation of war is universally acknowledged. However, does it mean that the limited reach of morality into war is a function of contingent features of the international order? Or is there something more fundamental about law and war and the moral standard of preserving individual rights that means they cannot come together? To specify the finding from sections one and two (because war is a horizontal confrontation between states it escapes legal regulation to a standard of moral acceptability) I propose to frame the question – why accept the symmetry of IHL – normatively: under which circumstances *should* law not appeal to all individuals on one side of a confrontation between states and command one belligerent state to hold still?

I argue that this is the case if a confrontation 1) presents a forced choice in terms of the infringement of individual rights, and 2) this forced choice is cloaked with an impenetrable veil of uncertainty as to which side in the confrontation ought to hold still in order for overall fewer unjustified infringements of individual rights to occur. These two characteristics (a forced choice and an epistemic cloak) limit the reach of morality into war and account for the inability of IL to raise conduct in war to a standard of moral acceptability. In turn, if a physical confrontation between states has these two characteristics, it qualifies as war, 'not a peacetime activity'. In that case, given the moral standard premised on the preservation of individual rights endorsed here, IL *should* not impose an obligation on one side to hold still. I will elaborate on these points in the following paragraphs.

What is a forced choice? An actor's choice is forced in situations in which, on the one hand, 'there is a risk of great harm or loss and a need to act immediately or decisively if the loss or harm is to be averted,'[36] and, on the other hand, attempting to avert the harm likewise carries a risk of great loss or harm. What some authors describe as a 'morally tainted environment'[37] or a moral dilemma[38] is best understood as a situation in which, whether an agent acts or refrains from acting, he will inevitably commit a moral wrong.[39] One might argue that in these situations, for instance, fighting (and killing some non-liable individuals) or not fighting in a war that is meant to halt ethnic cleansing (and letting some non-liable individuals die), making the choice constituting the overall lesser evil (the course of action that all things considered involves fewer unjustified infringements of individual rights) can mean acting in a fully justified way. Here the second characteristic of war becomes relevant.

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[36] T. Sorell, 'Morality and Emergency', (2003) 103 *Proceedings of the Aristotelian Society* 21, at 22

[37] Ibid. at 23

[38] P. Foot, Moral Realism and Moral Dilemma', (1983) 80 *The Journal of Philosophy* 7, at 379: Id. *Moral Dilemmas and Other Topics in Moral Philosophy*, (2002)

[39] If we attach great enough moral significance to the difference between actions and omissions, we should not do anything at all to avert the imminent major loss in a forced choice emergency with an epistemic cloak. I am inclined to think that, when the preservation of individuals' right to life is concerned, the difference between actions and omissions alone should not be allowed to tip the scales against action.

A well informed, impartial observer cannot determine with reasonable certainty, which course of action will in the end represent the lesser evil. This is what I refer to as an epistemic cloak

If legal regulation prejudged the outcome of an epistemically cloaked forced choice situation regarding the preservation of individual rights, it would necessarily do so according to a standard other than the moral standard endorsed here. It would hence potentially sanction an outcome that presents the greater evil in terms of individual rights violations. It is hence precisely because we stand fast on that moral standard that we should accept the symmetry of IHL in epistemically cloaked forced choice situations.

From an individual presented with an epistemically cloaked forced choice what we *morally* expect is good intentions (wanting to actually bring about the end-state that represents the lesser evil) and a good faith effort to do the right thing. If those obtain, we tend to think of any apparently wrongful actions or omissions as morally excused. Concerning whether the wrongfulness is actually illusory, we reserve our final judgement until the events have taken their course. If someone acts (or refrains from acting) with the right intentions, in good faith *and* his choice also turns out to contribute to the achievement of a lesser evil, he can be considered fully morally justified.[40] An individual faced with an epistemically cloaked forced choice is morally excused; whether she is justified is a question of hindsight.

What can we *legally* expect from an individual in an epistemically cloaked forced choice situation? While criminal law recognizes the difference between an excuse and a justification, a legal permission *ex ante* does not come in similar gradations. When law permits conduct, any apparent legal wrongfulness is illusory. Now, the killing of combatants

[40] It is beyond the scope of this paper to discuss the implications of numbers, meaning how many individuals' rights have to be protected in order to warrant the overriding of some other individuals' rights in the course of the use of force. Neither will I address whether it matters if we know who the respective individuals – beneficiaries and victims of the use of force – would be, whether their relationship to each other has any bearing on the justifiability of this reshuffling of harm or what likelihood of success the endeavour has to have. Scholars that juggle these parameters include A. Coates, 'Is the Independent Application of jus in bello the Way to Limit War?', in D. Rodin and H. Shue (eds.), *Just and Unjust Warriors; The Moral and Legal Status of Soldiers* (2008), 176; Fabre, *supra* note 9; Lazar, *supra* note 17; Rodin (forthcoming), *supra* note 9

in war is not merely legally excused, neither is the resort to force in self-defence. It is legally permitted. The closest analogy in law to granting an *ex ante* moral excuse is a legal prohibition of killing in war tied to an exemption from prosecution and punishment. Should law be changed to prohibit killing in war altogether and merely exempt it from prosecution given the nature of an epistemically cloaked forced choice? I argue that this analogy to the moral approach to warfare would make for poor law with regard to an important normative aim that legal regulation has besides rendering conduct morally acceptable: affording the rule of law. Understandings of the concept of the rule of law differ, but at its heart is the task of protecting the individual from the arbitrary power of the state. While it is hence tightly interwoven with the substantive moral goal of individual rights preservation, the rule of law also rests on certain formal characteristics of legal rules, one of which is that legal rules ought to be action-guiding. A law only protects the individual, if it tells her what she needs to do in order to avoid incurring prosecution or punishment. By permitting the killing of combatants IHL provides specific instructions about who falls under this category, how combatants are to be engaged, and where the permission to harm them ends.

But could a legal prohibition of killing in war and an exemption from prosecution specifically for killing combatants in certain ways and under certain circumstances not be similarly action-guiding? I think not. In law a state or society speaks to its individual members, expressing a societal consensus on what it means, all things considered, to act rightly in a certain situation.[41] Action-guidance is thus more than merely telling the individual more or less exactly what to do; ideally law also to a certain extent 'relieves the individual of the cognitive burden to form her own judgements.'[42] The latter is particularly difficult when facing an epistemically cloaked forced choice. IHL expresses the consensus that in such a situation killing individuals that are part of the category 'combatants' for the relative

[41] Strictly speaking, in IHL like in most IL the international community speaks to states. In fact, wars are fought by individuals and that is who IHL's rules regarding the conduct of hostilities ultimately address.
[42] J. Habermas, *Between Facts and Norms. Contributions to a Discourse Theory* (1996), 115

protection of civilians is preferred to a number of imaginable alternative courses of action. Sending mixed signals about that by first prohibiting the killing but leaving it without consequences later, undermines the rule of law.

Should the formal benefits of the rule of law, here that it relieves the cognitive burdens on individual decision-making, not be subordinate to law's ability to guarantee substantive outcomes? The question is moot, because the formal benefits are all law can afford in war. Is affording the formal benefits of the rule of law then itself a moral goal? According to the standard adopted here, for the individual to know what to do – to be able to rely on law that is action-guiding – is certainly a moral benefit. This conclusion points to a more fundamental question: if symmetrical IHL with all the limitations of mere distinction is all IL law can offer for the regulation of war and legally regulated war is better than unregulated war (especially if regulation establishes the rule of law), does IHL not enjoy moral traction?[43]

Henry Shue and Seth Lazar agree with the premise of this section: there is a non-contingent connection between the circumstances of war and the impossibility of consistently preserving individual rights; although neither of them offers a specification of what it is about war that grounds this impossibility.[44] Both Shue and Lazar then claim that morality absorbs the constraints of reality, meaning that specific or practical moral principles are those that take into account what is possible in the circumstances at hand.[45] In their view, the logic of mere distinction would hence accord with applied moral principles; the killings permitted by it would be all things considered morally justified.

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[43] For a conclusive argument that the logic of mere distinction is all IL can offer for the regulation of war, a more comprehensive enquiry into imaginable alternatives, which unfortunately is beyond the scope of this paper, would be desirable.

[44] 'Uncertainty is not a contingent feature of war; it is endemic, and radical. Perhaps [it is] sufficiently radical to discredit any attempt to transfer principles that govern extramilitary interpersonal conflicts from the sphere of ordinary life to that of war.' Lazar, *supra* note 17, at 211

[45] Shue, *supra* note 28, at 96; also Lazar, *supra* note 24, at 699; likewise Waldron, who grants that it is tempting to judge law by a pure external standard of morality, but then insists that ultimately morality likewise has to be 'viable'. J. Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?', (2011) 22 EJIL *315*, at 3 and 8

In opposition to this view, I agree with McMahan that a moral principle does not change in the face of likely involuntary systematic violation or impossibility of application. The observations that an individual cannot fight in a war without infringing other individuals' rights, and that any war cannot *ex ante* be guaranteed to constitute the lesser evil, do not change the fact that those infringements and the resort to war are morally unjustified. After all, 'morality is all of a piece';[46] our moral standards for evaluating action do not change depending on whether we are in war or in peace.[47] A moral 'ought' does not imply a 'can-in-the-circumstances-at-hand'.[48] Yet, it is one function of law that the 'ought' it spells out *does* imply a 'can-in-the-circumstances-at-hand' as suggested above. One function of morality certainly is that it remains stable and intact no matter the contingent constraints of specific circumstances. It thereby continues to be available as a standard by which to judge law.

Jeremy Waldron holds that law that merely repeats morality 'has an important ancillary role to play.'[49] That may under certain circumstances be true, but in the face of an epistemically cloaked forced choice, law that repeats morality merely repeats the latter's discomfiture. In an epistemically cloaked forced choice situation, which is *per definitionem* incurably morally tainted, law should diverge from morality, if it can thereby achieve action-guidance, i.e. fulfil one of its specific functions as law. While the goal of full moral justification for legal regulation cannot be met, the very important goal of affording the rule of law may still be within reach. Law can impose a standard other than morality, and it does

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[46] Shue, *supra* note 28, at 88
There is widespread agreement on this point see McMahan (2010), *supra* note 9, at 505; H. Shue, 'Laws of War', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (2010), 511

[47] However, legal standards for evaluating action most certainly change depending on whether we are in war or in peace.

[48] Similar J. McMahan, 'The Morality of War and the Law of War', in D. Rodin and H. Shue (eds.), *Just and Unjust Warriors; The Moral and Legal Status of Soldiers* (2008), 19, at 35
As related above, in the formation of public moral principles the consequences of their (correct) systematic implementation carry more weight than individual's actions' consequences do in the formation of moral principles addressed to the individual. But, once established, moral principles on neither level yield in the face of involuntary misapplication or impossibility of implementation.

[49] J. Waldron, *Vagueness and the Guidance of Action*, (2010) New York University Public Law and Legal Theory Working Papers 10-81, at 16

so in war. Acknowledging that it does, means acknowledging that effective, comprehensive and good faith legalization does guarantee that an activity is automatically morally acceptable.

4. The continuing role of international humanitarian law

The previous analysis suggests that IHL cannot and should not impose a logic other than the one of mere distinction when a confrontation presents an epistemically cloaked forced choice regarding the preservation of individual rights. But is conceiving of war as an epistemically cloaked forced choice even empirically pertinent? Do armed confrontations between states in the international realm regularly take the form of epistemically cloaked forced choice situations regarding the preservation of individual rights? I will demonstrate that they do by showing that, even if we had an effective executive and trusted judiciary in the international system – in other words, an institutional landscape approximating world government – epistemically cloaked forced choice situations could not be avoided. By extrapolation many confrontations in the current international order take such a form. The argument in this last section is that IHL hence has an important continuing role to play.

Avoiding epistemically cloaked forced choices would first and foremost require identifying and then preventing or redressing states' violations of their obligations under IL. That may mean dealing with states' wrongful treatment of individuals (most likely their own populations). For two reasons it also means tackling states' violations of their obligations toward other states: First, in the current international system the state still has a major role in protecting individuals' rights. Second, states' violations of their obligations under IL, even if those have initially no implications for individual rights, come to affect individuals if they result in an armed confrontation between states.

If we had institutions to authoritatively identify a state's violation of IL, for instance, one that also infringed individual rights, the state found guilty by the international judiciary might not accept the cease and desist verdict. Redressing the violation might hence have to

involve the use of force by an international executive. If during enforcement the state in violation of IL flouted its duty to hold still, we would then likely face a forced choice situation, in that necessarily many individual rights would be violatedin the confrontation, but at the same time, individual rights would be violated if the international executive refrained from intervening.

However, if the executive had the full weight of the international community behind it, the likelihood that the forced choice – whether or not to intervene – would also be epistemically cloaked would be significantly reduced. An intervention by a radically superior international executive would likely infringe fewer individual rights than a drawn-out battle between two states. It is important to note that a forced choice could only be considered epistemically cloaked if it was so even *with* the international community's backing of the side that did not violate IL.

Nevertheless, it is quite possible that the superiority of power afforded by international backing might be insufficient to lift the epistemic cloak. Alternatively, in a confrontation between two states that by itself forms an epistemically cloaked forced choice regarding the preservation of individual rights, it might genuinely be uncertain which side originally violated IL, or which one did so more seriously, so that it would be dubious for the international community to throw its weight behind one side. These scenarios would continue to present epistemically cloaked forced choice situations even under circumstances resembling world government.

Moreover, two scenarios are possible in which the goal of individual rights preservation would clash with the goal of redressing states' violations of IL. First, states may violate obligations under IL that do not initially implicate individual rights, but redressing those violations by force would involve the infringement of individual rights, if the violating state resisted enforcement. Standing by the moral standard of preserving individual rights might mean not redressing the violation of IL in this scenario. Second, a confrontation

between two states is imaginable, in which overall fewer unjustified infringements of individual rights would likely be achieved if the international executive backed the side that originally violated IL. For instance if a very strong, but ultimately benign aggressor annexed part of a neighbouring territory. Should the international community ever back-up a state that seriously violated IL, here the benign aggressor, in order to preserve individual rights, as this secondscenario would require?

It seems that as long as states are subjects of IL, i.e. their rights and infractions matter alongside individuals' rights, as long as the international community enforces IL vis-à-vis states rather than individuals directly, epistemically cloaked forced choice situations cannot be avoided. Revisionist just war theorists tend to point toward institutional desiderata in the international system as the reason for why the logic of individual liability cannot yet be translated into law and be applied in armed confrontations between states. The preceding paragraphs suggest that, unless institutional progress involved the abolition of the state system, epistemically cloaked forced choices regarding the preservation of individual rights will persist. This in turn means that there would be a continuing role to play for IHL even if the international order developed toward world government.

IHL's important function notwithstanding; that it fails to accord with the moral standard of preserving individual rights is not unproblematic; specifically since that means IHL is increasingly out of touch with general IL. It is almost 'commonplace'[50] that over the last half century the emergence of a universal legal system has started to supersede a traditionally much looser set of bilateral relations. Legal concepts such as obligations *erga omnes*, *jus cogens* and a presumption against persistent objectors bear testimony to the qualification of the role of state consent in IL.[51] This qualification has gone hand in hand with the gradual consolidation of the notion that the individual should be the ultimate beneficiary

[50] J. L. Cohen, Sovereignty in the Context of Globalization: A Constitutionalist Pluralist Perspective, in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (2010)
[51] G. Danilenko, *Law-Making in the International Community* (1993), 357

of international legal regulation.[52] While the state remains the law's main addressee, the consensus is ever wider that IL ought to be geared toward securing individual rights, a trend which is sometimes referred to as a humanization of IL[53] or its individualization.[54] Many international lawyers therefore concur that 'in our time, one cannot place full trust in traditional IHL'.[55]

One result of the fact that the cavalier approach of IHL to individual rights has rendered it increasingly unpalatable is the encroachment of Human Rights Law (HRL), the epitome of an international order geared toward the individual, on IHL's area of regulation. Traditionally IHL was considered *lex specialis* in relation to HRL, meaning that the latter ceased to apply in times of war.[56] However, this understanding no longer prevails. Though never definitely illuminating how exactly the two branches of IL are meant to interact, the ICJ has solidified the understanding that HRL continues to be relevant in armed conflict and that IHL is merely for the time of hostilities superimposed over it.[57]

The most significant challenge to IHL as providing the sole standard for the treatment of individuals in war has stemmed from the practice of HR bodies that adjudicate cases in the context of internal armed conflicts.[58] The ECtHR, for instance, has investigated countless cases in the context of internal armed conflict[59] using the language of IHL to put flesh on the

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[52] R.-J. Dupuy, *La communauté internationale entre mythe et l'histoire* (1986); also P. Allott, *Eunomia; New World Order for a New World* (1990), 32, at 244; B. Simma, 'From Bilateralism to Community Interest in International Law', (1994) 250 *Collected Courses of The Hague Academy of International Law* 217, at 247; C. Tomuschat, 'Obligations Arising for States Without or Against their Will', (1993) 241 *Collected Courses of The Hague Academy of International Law* 195, at 227

[53] T. Meron, *The Humanization of International Law* (2006), 6-3

[54] A.-M. Slaughter and W. Burke-White, 'An International Constitutional Moment', (2002) 43 Harv. Int'l L.J. 1

[55] C. Tomuschat, 'Human Rights and International Humanitarian Law', (2010) 21 EJIL 15, at 17

[56] Tomuschat interestingly makes the point that at least the ICCPR was likely drafted based on the conviction that it would cease to apply in war. Ibid. at 21

[57] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, 8 July 1996, [1996] ICJ Rep. 5, at 240, para. 25; see also M. Forowicz, *The Reception of International Law in the European Court of Human Rights* (2010), 314

[58] Ibid.

[59] Amongst others *Markovic and others v Italy,* Judgement, 14 December 2006, Reports 2006-, at para 100; *Isayeva and others v Russia*, Judgment, 24 February 2005, Reports 2005-; *Özkan v Turkey*, Judgment, 6 April 2004; *Ergi v Turkey*, Judgment, 28 July 1998, Reports 1998-IV, at para 77; *Güleç v Turkey,* Judgment, 27 July 1998, Reports 1998-IV, at paras 63–64

bones of what it means to satisfy the demands of HRL during internal armed conflict. By eschewing explicit reference to the Geneva Conventions and the First Additional Protocol the court has avoided resorting to legal instruments other than the European Convention and upheld the standard of HRL in internal armed conflicts.[60]

It is now majority opinion that HRL applies 'wherever a state exercises power, authority or jurisdiction over people and not simply in its national territory.'[61] As a result, HRL does not cease to apply in *international* armed conflict either. The case law of the ECtHR in this context is much thinner, but is bound to increase in the near future. The court investigated alleged HR abuses under the ECtHR in the context of the Turkish invasion of Northern Cyprus,[62] and the air war by NATO countries against the Federal Republic of Yugoslavia.[63] In late 2001 the court accepted the application of Georgia against Russia.[64] The former alleges indiscriminate and disproportionate attacks in Abkhazia and South Ossetia in an international armed conflict under the regulatory purview of the First Additional Protocol. Moreover, more than 2000 cases against Georgia related to the conflict with Russia are currently pending before the court.[65]

Some international lawyers hold that the application of HR standards in war and the enmeshment of the two systems mean that 'the long-standing separation of both systems may have outlived its usefulness' and the two systems should converge.[66] Others argue for a more

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[60] Forowicz, *supra* note 57, at 314

[61] T. Meron, 'Extraterritoriality of Human Rights Treaties', (1995) 89 AJIL 1, at 57; also A. M. Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation', (2007) 18 EJIL 1; F. J. Hampson, 'Using the International Human Rights Machinery to Enforce the International Law of Armed Conflict', (1992) 31 *Revue de Droit Militaire et de Droit de la Guerre* 119

[62] *Loizidou v Turkey*, Judgement, 18 December 1996, Reports 1996-VI, at para 62

[63] The court denied jurisdiction in the latter case, on the grounds that the use of air power does not amount to effective control by the attacker, suggesting that *air* warfare maybe the last bastion against the encroachment of the use of force by HRL. *Bankovic and Others v. Belgium and 16 Other Contracting States and 16 Other Contracting States,* Decision of Admissibility, 12 December 2001, Reports 2001-XII, at para 333

[64] *Georgia v Russia*, Decision of Admissibility, 19 December 2011, not yet reported

[65] Tomuschat, *supra* note 55, at 23

[66] M. Forowicz *supra* note 57, at 320; K. Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict', (2004) 98 AJIL 1, at 34

stringent interpretation of IHL, given the gravitational pull of a HR standard.[67] One such attempt is the interpretive guidance issued by the ICRC with regard to the notion of direct participation in hostilities stipulating that 'the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.'[68] Military practitioners have largely rejected this proposition insisting that in armed conflict IHL as it currently stands imposes the highest achievable standard.[69]

The argument presented in this paper carries two implications for this debate. First, changing IHL with a view to making it resemble HRL does not further the preservation of individual rights in war, if the armed confrontation presents an epistemically cloaked forced choice. Second, the best we can do for the preservation of individual rights in IR is directing our academic efforts toward institution building. The goal is to prevent as many as possible confrontations between states from descending into epistemically cloaked forced choice situations. Another goal should be to regulate those confrontations that do not present epistemically cloaked forced choices to a higher standard.[70] However, these are endeavours for a different paper. After all, I have not investigated whether IL is able to impose the logic of individual liability on those other confrontations.

How many epistemically cloaked forced choices can be avoided and the standard IL can impose on other confrontations is a function of the contingent features of the international legal order, namely its institutions. That not all epistemically cloaked forced choices can be

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[67] For instance F. F. Martin, 'The Unified use of force rule revisited: The penetration of the law of armed conflict by human rights law, (2002) 65 SASK LRev 406, at 408

[68] Melzer, *supra* note 8, at 77-2

[69] M. N. Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis', (2010) *Harvard National Security Journal* 5, at 14 and 40; also A. Cohen and Y. Shany, *A Development of Modest Proportions. The Application of the Principle of Proportionality in the Israeli Supreme Court Judgement on the Lawfulness of Targeted Killings*, International Law Forum, The Hebrew University of Jerusalem, Research Paper No. 5-07 (2007), at 8f; L. C. Green, 'The "unified use of force rule" and the law of armed conflict: A reply to Professor Martin, (2002) 65 SAS LRev 427, at 444

[70] This is specifically true for revisionist just war theorists whose attempts to make law for the conduct of war track an individual rights based morality are at a proper impasse.

avoided and that the best IL can do for those remaining is to impose IHL is more fundamentally a result of insisting on a moral standard that hinges on the preservation of individual rights in relations among states. In war we should not rely on law to make our conduct morally acceptable.