

# Behaviour in war: The place of law, moral inquiry and self-identity

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## Abstract

*Daniel Munoz-Rojas and Jean-Jacques Fresard's study "The Roots of Behaviour in War" (RBW Study), which came out in 2004, provided very useful insight into how compliance with international humanitarian law may be better ensured. In essence, it emphasized the role of "the law" and associated enforcement mechanisms in achieving optimal results. Emphasis on "persuasion" regarding the values underpinning the law was identified as having a possibly corrosive effect and was to be de-emphasized, if not avoided. Such conclusions raise serious questions. The study's reliance on neutral normativity of "the law" can be overstated. The issue may be less one of checking aberrant behaviour under the law and more one of ensuring that unnecessary harm is curtailed within the law. The assumptions made by the RBW Study concerning the efficacy of the law are too narrow in their avoidance of the moral and ethical questioning that can accompany legal interpretative approaches. The role of identity and professional culture offers an effective means of ensuring restraint under the law. This article argues that the RBW Study has not stood the test of time and that operational developments have transcended the conclusions made in the study.*

**Keywords:** IHL interpretation, military legal culture, legal theory, counter-insurgency, ethics and identity.



## Introduction

In 2004, Daniel Munoz-Rojas and Jean-Jacques Fresard's study "The Roots of Behaviour in War" (RBW Study)<sup>1</sup> provided a profoundly important insight into the role of law and the assimilation of social and psychological factors that conditioned violence within the battlespace. The study was revealing in its interdisciplinary approach, relying upon both empirical and qualitative methods of analysis. It exposed much that had remained hidden in understanding the motivations that acted to propel violations of international humanitarian law (IHL). Despite the richness of its interdisciplinary methodology, it was surprisingly formal and narrow in its conclusions. The study concluded that compliance with IHL was best obtained through a combination of (1) ensuring that the normative role of law was emphasized over efforts to proselytize the underlying values of that law; (2) ensuring that "bearers of weapons" were properly trained in IHL and that compliance was underpinned by a strict regime of orders, with correlative disciplinary sanction; and (3) ensuring that the International Committee of the Red Cross (ICRC) was clear in its aims in undertaking instruction, by relying less upon strategies of persuasion regarding acceptance of the values underpinning IHL in favour of a more formalistic regime of orders, directions and policies that would direct the behaviour of such "bearers of weapons" on the basis of a hierarchical authority.

The conclusions made by the RBW Study might be perceived as uncontroversial and even predictable. They are also somewhat simple and unimaginative in their prosaic emphasis. The central message from this study is that strict compliance with the law, backed up by a regime of effective disciplinary action, is the critical focus necessary to ensure that soldiers and other "bearers of arms" act correctly. The implication from these conclusions is that soldiers cannot be trusted to exercise any kind of applied judgment regarding underlying values and that only a strong reliance on "the law", and a strict regime of enforcement, will ensure that behaviour is effectively conditioned. Given the time that has passed since the publication of this important work, it is opportune to ask whether the conclusions made by the authors are "durable" in the sense that they should remain the exclusive focus of compliance strategies relating to IHL instruction and practice. The purpose of this article is to provide that level of review and to take issue with aspects of the RBW Study's assessment.

It will be submitted that the emphasis on moral neutrality and the strong faith placed in the normative integrity of the law to promote compliance can be perilous. Moreover, a humanitarian strategy that asserts an emphasis on mechanical compliance with the normative quality of law assumes much about the nature of such normativity. In addition, such a perspective is deficient in expressly discounting the power and usefulness of a constructed identity that comes from internalizing the values underpinning IHL. It also seems to be

1 Daniel Munoz-Rojas and Jean-Jacques Fresard, "The Roots of Behaviour in War: Understanding and Preventing IHL Violations", *International Review of the Red Cross*, Vol. 86, No. 853, 2004 (RBW Study).

needlessly counterproductive to the general goal of promoting IHL compliance, by denying alternative strategies that can underpin meaningful application of IHL. The law does rightly condemn violations of its rules and standards, but it also allows much violence to be undertaken in its name. In essence, the central claim of this article is that too much faith can be placed in “the law” and its methods for ameliorating violence, and that a strategy which advocates such a singular focus is susceptible to rightful critique. There is a place for ethical and moral inquiry. Identification of the underlying values implicit in the corpus of IHL can have a more sustained impact on behaviour than merely relying upon “the law” and potential prosecutions for its violation.

## Law and moral/cultural disengagement

The RBW Study concludes that while cultural and moral factors influence perception about the universality of IHL, these do not translate to greater compliance. Indeed, the authors concluded that there is a process of moral relativism and disengagement that occurs. Hence, when participating in an armed conflict, participants can often subjectively consider themselves as victims<sup>2</sup> or view the opposing side as having committed violations of the law, thus allowing them to reconcile their own reciprocal violations as being justified.<sup>3</sup> Such disengagement is identified by the authors as cumulative, leading to greater levels of self-justification. Hence, the RBW Study authors’ note: “Each action taken by the individual exerts an influence on the next one and makes change of behaviour more difficult because the individual will have to admit that if he ceases to behave reprehensively, everything he has done hitherto will have been bad.”<sup>4</sup>

Given this phenomenon of self-justification identified in the RBW Study, the authors strongly contend that a solution is to emphasize the normative force of IHL and rely upon applied legal methodology to break down the potential subjectivity that underpins particular attitudes. Indeed, the authors decisively observe, “the perception that there are legal norms is more effective than the acknowledgement of moral requirements in keeping combatants out of the spiral of violence”.<sup>5</sup> The approach recommended in the RBW Study is a very recognizable one in the context of understanding the power of perceiving an objective and neutral set of standards that must be complied with. In the “rule-bound” culture of the military, such a strategy can have particular purchase. However, it comes with its own troubling consequences regarding the acceptance of legal neutrality.

2 *Ibid.*, p.198.

3 *Ibid.*

4 *Ibid.*, p. 200.

5 *Ibid.*, p. 203.

## Legal hegemony and its consequences

By any objective measure, IHL has been a wildly successful project within the international legal panoply. The four 1949 Geneva Conventions<sup>6</sup> still rank as the only treaty series to have obtained universal ratification by States throughout the entirety of the world. Similarly, the 1977 Additional Protocols<sup>7</sup> are widely subscribed to within the international community.<sup>8</sup> There is also an extensive body of customary international law that applies liberally to regulate all aspects of armed conflict.<sup>9</sup> Added to these is a comprehensive array of treaties dealing with specific weapons systems, including conventional weapons, chemical weapons, biological weapons, cluster munitions and anti-personnel landmines. All the rules that relate to land warfare also find generalized counterparts in both air and naval warfare. Furthermore, while existing rules are comprehensive in dealing with contemporary means and methods of warfare, there is a constant pressure to ensure that developing weapons and means are also covered. Hence, on the close horizon, nanotechnology, cyber-weapons and autonomous weapons systems represent emerging realities, and efforts are already under way to ensure that the law's reach is complete in these new arenas. The breadth and depth of legal regulation of armed conflict seems to know no limit. The legal colonization of land, sea, air and now cyberspace environments continues unabated, and the methodologies and techniques of the interpretative process are now well rehearsed within military and humanitarian groups. For most, this system fosters a confidence that violence is contained, controlled and regulated according to a strong regimen of legal proscription.

The fact is that current military operations take place in an environment saturated with law. The “juridification of the battlespace”<sup>10</sup> has seen a tremendous rise in the number and influence of military and other government (and non-government) lawyers that dispense advice on compliance. There exist

6 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II); Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV).

7 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (AP I); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (AP II); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem, 8 December 2005, 2404 UNTS 261 (entered into force 14 January 2007) (AP III).

8 As of March 2014, there were 173 States party to AP I, 167 to AP II and 66 to AP III.

9 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, and Vol. 2: *Practice*, Cambridge University Press, Cambridge, 2005, available at: [www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/index.jsp](http://www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/index.jsp).

10 This term was originally used by Gerry Simpson, *Law, War and Crime: War Crimes, Trials and the Reinvention of International Law*, Polity, Cambridge, 2007.

no gaps, no areas of battlefield practice, no moments of “free discretion” that are not subject to some level of legal control. Commanders and politicians and lawyers all speak in legal terms to justify and reinforce compliance. There is a natural relief felt by many that battlefield violence is conditioned and perhaps even tamed by the force of such overwhelming legal proscription.

It may be timely to ask whether too much is asked of the law. The enormous array of legal regulation brings with it a sense of misplaced hope that wartime violence is acceptably corralled. Indeed, so complete has been this sense of legal conquest that Professor David Kennedy of Harvard has observed: “The legal language has become capacious enough to give the impression that by using it, one will have ‘taken everything into account’ or ‘balanced’ all the relevant competing considerations.”<sup>11</sup> Such legal language finds strategic alliance with the tenets of political liberalism, which emphasizes the virtues of reasoned elaboration of the law. The Rawlsian sense of the strength of such political liberalism resides not in the content of any meta-narrative, but rather in the process of achieving outcomes on core political principles through mechanisms of rationalized reasoning and consensus. Rawls’ reliance upon the ideal of public reason<sup>12</sup> ensures that legitimate decision-making and law creation may be maintained on the basis of commonly shared public reasons and justifications. A consequence of this reliance is the emergence of an iterative proceduralism that is focused on fair process and “taking everything into account”, of a kind identified by Kennedy as highlighted above.

Within IHL, the discourse is heavily impacted by the alliance between political liberalism and legal positivism. The density of “black-letter law” rationality and reasoning that has been generated by this alliance has become its main product. Much rests on legal method; indeed, in this space enormous attention is paid to the nuances and tone of the words and phrases used in every asserted rule. Hence, one commentator has recently noted:

IHL lawyers, as a whole, are very fond of rules and rules-talk. For other international lawyers, IHL lawyers often seem remarkably positivist. They spend a great deal of time debating and discussing black-letter rules, their interpretation, their manifestation, and the consequences of their violation. They take such talk very seriously, and it has fueled, for many decades, the vast bulk of scholarship and debate within this relatively insular field.<sup>13</sup>

Such a tradition and adherence drives particular outcomes. “Rules-talk” dominates this discourse, defining both the methods of legal reasoning used and the vocabularies employed to channel reasoned argument. The point here is not to criticize legal positivism as an interpretative method, or political liberalism as a concept, but rather to reveal what is missed in the blind faith in “more law” as

11 David Kennedy, *Of War and Law*, Princeton University Press, Princeton, NJ, 2006, p. 143.

12 John Rawls, *Political Liberalism*, Columbia University Press, New York, 1993, pp. 7, 9 and Chap. 6.

13 Naz K. Modirzadeh, “Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance”, *Harvard National Security Journal*, Vol. 5, No. 1, 2014, p. 235.

always being the rightful solution to the current challenges faced in armed conflict. This is the key solution advanced in the RBW Study, but what does it mean to place total faith in the law and to minimize, or in fact marginalize, other factors such as the moral, ethical or even social commitment to temper decisions to kill in the battlespace?

The conduct of war necessarily animates deep passions, but contemporary legal method seeks to marginalize these very same forces from the decision-making process. This is something the RBW Study identifies as a necessarily optimal outcome; however, there is an inevitable loss in such a paradigm. As noted international legal theorist Martti Koskenniemi has observed, in “translating natural languages—the language of passions and fears that are involved in a dispute—into judicial language, something automatically gets lost, is *reduced*. This is perhaps the very point of law.”<sup>14</sup> Such a “reduction” and transformation of meaning in the context of IHL closes off broader considerations that might temper targeting decisions.

For the authors of the RBW Study this reduction is a positive outcome<sup>15</sup> because it represents a surer foundation for decision-making, one that is less amendable to self-justification. The prospect that decisions might be made not to target a particular person or objective, or to otherwise ameliorate violence through the application of applied social or moral inquiry, is outweighed by the relativism and subjectivity that such a moral application might generate, and which the authors condemn. All faith is placed in “the law” to ensure that the rightful, calibrated exercise of violence is undertaken legitimately.

### Legal neutrality: Is it real?

The dominant idiom of legal interpretation in the IHL field remains “soft positivism” of the H. L. A. Hart variety.<sup>16</sup> Hence, consistent with this approach, IHL, like all other law, is assumed to comprise a large core of settled meaning with a smaller penumbra of open language. On the whole, this approach holds that there is sufficient semantic certainty to ensure that legal rules are given their due and meaningful application in the battlespace. Allied to this formulation is the view that legal validity is not necessarily dependent on any kind of moral authority, but rather is generated through a process of accepted rules of external recognition. Given this paradigm, the IHL “rules-talk” process, observed from outside this field, reveals the moments of semantic precision that are being achieved. These assumptions about the law are what gives the RBW Study conclusions their force, a supposed process of neutral rules providing an objective standard of behaviour.

14 Martti Koskenniemi, “The Silence of Law/The Voice of Justice”, in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, The International Court of Justice and Nuclear Weapons*, Cambridge University Press, Cambridge, 1999, p. 501.

15 RBW Study, above note 1, p. 198.

16 H. L. A. Hart, *The Concept of Law*, 2nd ed., Oxford University Press, Oxford, 1994.

Such a conclusion is fraught with difficulties. The assumptions of legal positivism have been critiqued from many different sides and genres over the decades. Theorists as diverse as Carl Schmitt<sup>17</sup> and Ronald Dworkin<sup>18</sup> have taken to task the notion of semantic certainty and integrity of the assumed interpretative process. For both Schmitt and Dworkin there is enormous discretionary capacity inside and outside the law, and each has sought to identify the means to channel such discretion. For Schmitt the answer lay in the “jurispathic”<sup>19</sup> moment – the crystallization of will, and therefore legal decision, from an endless cascade of potential norms. For Dworkin it derived from a self-assessed moment of principled coherency that relies on a sense of political morality.<sup>20</sup> To each, though from radically different perspectives, the exercise of freedom arose from criteria quite outside the semantic “certainties” of the black-letter law advanced by the Hartian model. These are two theorists that sought to give conditioned meaning to the broad discretions they identified within the law, but there exist numerous other approaches<sup>21</sup> that have identified the same deficiencies. There has, in fact, been over a century of sustained critique regarding the integrity of the legal interpretative enterprise.<sup>22</sup> Such critique takes fundamental issue with the simplistic conclusion that “the law” is some kind of self-contained authority that compels neutrally predictable outcomes of the type assumed in the RBW Study.

The reality is that there is much that is unsettled in the law, and despite the assertions of certainty that underpin the dominant interpretative method, the process is often freewheeling and unpredictable. Moreover, marginalizing any kind of moral or social content that might underpin the interpretative enterprise surrenders enormous authority to lawyers and legal process.

Within the contemporary debates about legal meaning, the central concepts of IHL, including those of distinction, proportionality and precautions in attack, have all been the subject of considerable discussion and confrontation. Words like “excessive” and “extensive”, for example, which condition the number of civilians who may be killed or the amount of civilian property that may be destroyed “proportionately” to the military advantage resulting from an attack,

17 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, George Schwab (ed), University of Chicago Press, Chicago, 2005 (originally published as *Politische Theologie: Vier Kapitel zur Lehre von der Souveranität*, 1922).

18 Ronald Dworkin, *Law's Empire*, Belknap Press of Harvard University Press, Cambridge, MA, 1986.

19 Paul W. Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty*, Columbia University Press, New York, 2012, p. 78.

20 R. Dworkin, above note 18, pp. 247–248.

21 A useful outline of these methods is found in Steven Ratner and Anne-Marie Slaughter, “Appraising Methods of International Law: A Prospectus for Readers”, *American Journal of International Law*, Vol. 93, No. 2, April 1999, p. 291; a fictional IHL problem was used to reveal different modes of analysis and outcomes from, *inter alia*, the positivist school, the New Haven school, the international legal process school, critical legal studies, international relations/international law approaches, feminist jurisprudence and a law and economics perspective.

22 A famous example is Oliver Wendell Holmes, “The Path of the Law”, *Harvard Law Review*, Vol. 10, 1896–97, p. 457.

have been the subject of much disagreement over many years.<sup>23</sup> That words can have such significance is a natural result of the ascendancy of the legal method in the determination of questions of lawful violence. Unlike the resolution of almost all other legal questions, however, the resolution of the interpretative struggle in this field carries with it fatal consequences for many. The stakes could not be higher. Equally, newer concepts such as that of direct participation in hostilities (DPH) have brought forward significantly different views as to their correct interpretation.<sup>24</sup> DPH underpins the targeting decisions made in many contemporary conflicts, and remains a term that has significantly contended meaning. The ICRC Interpretive Guidance<sup>25</sup> on what DPH means has been subject to considerable academic riposte by a number of leading legal voices in this field; against such disagreement, States have necessarily determined their own calibration of meaning in their often-classified Rules of Engagement, which are undoubtedly informed by the power of legal argument advanced from both sides.

There seems something unsettling in the fact that life, death and the application of lawful violence are so dependent upon the cleverness, or technical proficiency, of a given legal argument. The process of reduction that Koskeniemi identifies often leads to a dispassionate list of binary choices. Standard checklist-type considerations are scrutinized and outcomes reached based on a cascade of ceaseless classification, where decisions are made according to the “lawful”/“unlawful”, “combatant”/“civilian”, “protected”/“not protected” dichotomy. Internalized moral or social commitment that might operate to further inform such decision-making is rendered legally irrelevant. The consequence of complying with the “law”, then, is the routine dispensation of violence to achieve political goals in a manner that is formally unresponsive to any type of introspective analysis. Enormous death and destruction are manifested through an entirely lawful application of force in which individuals are all neatly allocated into categories and the formulas and maxims of law operate to dispassionately permit the application of force. As will be outlined below, this can have a deleterious effect not just on preserving humanitarian priorities, but also on achieving effective military outcomes in particular circumstances. There is a limit to just how many people can be killed (lawfully) and how much property can be destroyed (lawfully) before the limits of “the law” are appreciated.

### Interpretive choice and policy preference

None of the above analysis is to suggest that there is any kind of malevolent force at play in the application of “the law”; it is intended merely to highlight the nature of

23 Yoram Dinstein, “The Principle of Distinction and Cyber War in International Armed Conflicts”, *Journal of Conflict and Security Law*, Vol. 17, No. 2, 2012, p. 272.

24 See “Forum: The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law”, *New York University Journal of International Law and Policy*, Vol. 42, No. 3, 2010.

25 Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009.

the interpretative enterprise. Acting within the current interpretative framework, the law might be seen as seeking to reconcile two conflicting visions, namely military advantage/military necessity and humanitarian protection/human dignity. These are not easily reconciled and thus create two competing modes of understanding; such a conundrum leads to an inevitable practical indeterminacy. David Luban has interrogated this phenomenon in a classic liberalist manner.<sup>26</sup> He contextualizes his approach through deployment of similar but subtly differentiated descriptive terms, namely the “law of armed conflict” (LOAC) and “international humanitarian law”, to frame his perspective. In a very rough taxonomy, he advances the notion that military voices mostly adhere to the first view of the law (LOAC), whereas humanitarian voices principally adhere to the second (IHL). These are purely descriptive terms used by Luban to differentiate between the emphasis on military necessity (LOAC) and on humanitarian priority (IHL).<sup>27</sup>

Under this dichotomy, the particularized view of LOAC (preferred by the military) imagined by Luban draws upon classic legal methodological reasoning, giving great weight to the resonance of the *Lotus* case,<sup>28</sup> drawing on a close examination of State practice and the identification of the elusive *opinio juris* as well as judicious reading of hard sources of the law to locate normative effect. Such a perspective draws more heavily on what States actually do than on what they say.

In contrast, IHL devotees (pro-humanitarian under the Luban formula) are more willing to review soft-law instruments in their identification of relevant *opinio juris*, are less enamoured with the implications of *Lotus*, and focus on what States say rather than what that do to discern legally relevant State practice. Such an IHL methodology constructs a very respectable corpus of law that advantages humanitarian outcomes.

The clash, then, is one of competing visions of what the law requires. Luban notes that

the result is practical indeterminacy – not in the sense that anything goes, that any legal answer is as good as any other, but in the more significant sense that the law can be understood through either of two structured systems that stand in opposition to each other. Both have ample support within recognized sources of law; neither is frivolous or tendentious on its face, although, of course, both can be used tendentiously.<sup>29</sup>

Luban observes that the modes of argument used in developing a response to a legal problem under the law applicable to armed conflict will necessarily dictate the likely outcome. This includes identification of the premise used in the initial framing of the issue, the assessment of particular facts to underpin categorization, and the

26 David Luban, “Military Necessity and the Cultures of Military Law”, *Leiden Journal of International Law*, Vol. 26, No. 2, 2013, p. 1.

27 *Ibid.*

28 Permanent Court of International Justice, *The Case of the S. S. Lotus (France v. Turkey)*, Ser. A., No 10, 7 September 1927.

29 D. Luban, above note 26, p. 23.

values attributed to the inherent variables, all of which lead to an inevitable conclusion. Such inevitability may take the form of a “LOAC” (as defined by Luban) or an “IHL” (as defined by Luban)-based formula. The axioms and “unarticulated background assumptions”<sup>30</sup> that underpin the methodological moments of construction are incapable of rational reconciliation. Both military and humanitarian voices would undertake such analysis under the common framework but can, in good faith, arrive at dramatically different outcomes. In essence, the two are speaking the same language but have profoundly different ideas about what that language means, while employing interpretative techniques that may be at cross purposes.<sup>31</sup> This is manifested in numerous sites of agency and interpretative discretion.

The significance of the Luban analysis is in the counter-intuitive understanding that a good-faith application of “the law” can result in a myriad of outcomes on the battlefield. The outcomes achieved when applying “the law” turn on the methodological approach adopted. Within the command and control framework of modern military processes, there are usually policy directives from government that stipulate desired outcomes. These directions necessarily condition the interpretative trope applied, resulting in a more humanitarian or military-advantage emphasis in any given situation. In the absence of such direction, there is no governing driver that mandates one set of methodological criteria over the other—both are perfectly acceptable manifestations of “the law”. Given the possibility of a range of outcomes, it is curious that the RBW Study would place so much emphasis on “the law” as the singular means of ensuring compliance. To do so with an express avoidance of incorporating underpinning values, as emphasized by the RBW Study, seems a particularly risky approach.

Multiple rules and maxims can always be invoked to resolve any legal issue and can take on a particular hue depending on the context.<sup>32</sup> Such a perspective is not unique to international law, nor is it a contemporary phenomenon. Indeed, it found forceful expression within the American realist movement of the 1920s, when it was discovered that there was always a ready set, or cluster, of disparate rules that might apply to any ostensible legal problem.<sup>33</sup> The underlying ethos of the interpreter influenced the choice of characterization of the issue, which went a long way to determining the “correct” rule or standard that would apply to a given set of facts.

30 *Ibid.*, p. 22.

31 Allan C. Hutchinson, “A Postmodern’s Hart: Taking Rules Sceptically”, *Modern Law Review*, Vol. 58, No. 6, 1995, p. 803.

32 Rob McLaughlin, “‘Giving’ Operational Legal Advice: Context and Method”, *Military Law and Law of War Review*, Vol. 50, No. 1–2, 2011, p. 110.

33 Andrew Altman, “Legal Realism, Critical Legal Studies, and Dworkin”, *Philosophy and Public Affairs*, Vol. 15, 1986, p. 209.

## Moral and ethical contribution to legal analysis

The authors of the RBW Study are on reasonably solid ground in heralding the normative quality of the law over any kind of moral argument to ground choices made in the battlespace. That there are external moral or social obligations that should also condition decision-making is not readily evident within the law itself, or in its dominant interpretative method. Looking through the entire body of IHL instruments, it is difficult to identify any place where moral or ethical values may be directly incorporated into decision-making. There does exist the famous Martens Clause,<sup>34</sup> which speaks of using “laws of humanity” and the “dictates of public conscience” to guide decision-making, but its impact has been minimized through assertions by both States and academics that this clause offers no independent source of authority.<sup>35</sup> At best, the overwhelming sentiment is that it may assist as an aid to interpretation, something that might prompt a more humanitarian outcome in a particularly novel instance.

Hence, within the existing system and modes of interpretation, the challenge may be to find sound interpretative arguments for indirectly infusing decision-making with values that prompt a greater humanitarian emphasis. This requires redressing the structural framework of the black-letter legal foundation. Such an approach might be able to “smuggle” in the values about which the RBW Study seems so sceptical.

The International Criminal Tribunal for the former Yugoslavia (ICTY) *Kupreškić* case in 2000 offers an example of this kind of legal “engineering” being used to manifest such an outcome. In the *Kupreškić* case,<sup>36</sup> the ICTY dealt with individuals who were charged with carrying out an attack on a village in Bosnia, on 16 April 1993, in which over 100 inhabitants were killed. The accused raised defences of *tu quoque* and reprisal. The Tribunal dismissed both defences and in so doing based its reasoning on what might seem to be the Luban “IHL” (pro-humanitarian) vision.

The ICTY embarked upon an analysis of customary international law and observed that “the absolute nature of most obligations imposed by the rules of international humanitarian law reflects the progressive trend towards the so-called ‘humanisation’ of international legal obligations”.<sup>37</sup> The Tribunal expressly invoked elementary considerations of humanity<sup>38</sup> and the Martens

34 The Martens Clause first found expression in the Preamble to Convention (II) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning Laws and Customs of War on Land, 29 July 1899, 187 CTS 429, 1 Bevans 247 (entered into force 4 September 1900), as reproduced in the ICRC database, available at: [www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=9FE084CDAC63D10FC12563CD00515C4D](http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=9FE084CDAC63D10FC12563CD00515C4D).

35 Antonio Cassese, “The Martens Clause: Half a Loaf or Simply Pie in the Sky?”, *European Journal of International Law*, Vol. 11, No. 1, 2000, p. 187.

36 ICTY, *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić*, Case No. IT-95-16-T, Judgment, 14 January 2000, available at: [www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf](http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf).

37 *Ibid.*, para 518.

38 *Ibid.*, para. 524.

Clause<sup>39</sup> as exemplars of this humanitarian underpinning. It also invoked the rise of the separate regime of international human rights law to buttress its decision. The Tribunal further stated that the law ceased to be solely about State interests, but rather had decisively shifted away from its reliance upon reciprocity as the justification for its terms. The Tribunal expressly sought to minimize military discretion in favour of achieving greater humanitarian outcomes. The priority accorded to humanitarian considerations underpinned a structural renovation of interpretative method that self-consciously highlighted such goals to the detriment of military advantage and its attendant discretion. What is particularly illuminating in the ICTY's methodology was that after a lengthy examination of the humanitarian underpinnings of IHL, it waited until the final paragraph of its opinion before observing that all the parties to the proceeding had ratified Additional Protocol II and thus "indisputably the parties to the conflict were bound by the relevant treaty provisions prohibiting reprisals".<sup>40</sup> This last point was determinative from the beginning, and yet the Tribunal went to great lengths to expound upon its interpretative theory sustaining its view of legal coherence, plainly with a view to creating a sustainable foundation for future legal reference.

The *Kupreškić* case was subsequently subject to withering criticism for its departure from traditional interpretative techniques. The methodologies employed and conclusions reached in such critiques invoked established axioms and accepted canons of conventional interpretation. Typical was the classic response provided by Michael Schmitt.<sup>41</sup> He took issue with four aspects of the decision, each of which, he argued, undermined its efficacy, at least in relation to any broader reading on the structure and interpretative approach to the applicable law. He noted firstly that the decision made no attempt to analyze State practice, and that in this regard its findings were contrary to formal State declarations which sought to preserve the right of reprisal. Secondly, its reference to international human rights law was inappropriate due to the doctrine of *lex specialis*. Thirdly, its import was restricted only to its jurisdictional ambit, namely the territory of the former Yugoslavia, and the Tribunal could not so broadly re-engineer the whole corpus of IHL from the confines of this narrow jurisdictional authority. Fourthly, as outlined above, the matter could be determined on a plain reading of the treaty provisions, thus rendering all other observations otiose.

The response by Schmitt is compelling and persuasive – it was a classic riposte based on well-established grounds of hard law and interpretative convention. Within this framework, there are acceptable channels and frames of argument that produce outcomes which have an internal consistency. The *Kupreškić* case, on such grounds, overreached in its ambition and reasoning. Suffice to say, the approach favoured by the ICTY in the *Kupreškić* case found no

39 *Ibid.*, para. 525.

40 *Ibid.*, para. 536.

41 Michael N. Schmitt, "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance", *Virginia Journal of International Law*, Vol. 50, No. 4, 2010, pp. 795, 820–822.

subsequent expression in hard references such as military manuals, Rules of Engagement or other open-source governmental publications.

## War and psychological distance

Participation in armed conflict generates intense emotion and a range of ethical and moral commitments that are unavoidable. Within the context of armed conflict, there is significant empirical evidence which confirms that killing is not an easy thing to do<sup>42</sup> and that most soldiers experience an aversion to the highly intimate task of killing another. In an effort to develop more effective fighting capacity, it is little wonder that governments are expending enormous efforts to optimize biotechnology and associated performance-enhancing drugs that render killing by soldiers a more effective and efficient process. The point is to maintain a level of psychological distance between the soldier and the act of killing. As Chris Coker observes:

Killing does not seem to come naturally in all situations to all soldiers, even the most highly trained. Natural born soldiers are not made; they are born – and there are very few of them. That is why the military has preferred the discipline of collective units such as gun crews, which are more easily controlled and which, being often distant from the battlefield, are also less emotionally involved – in a word, they are more ‘mechanical’. The greatest cruelties in war have been the impersonal ones of remote decision, system and routine.<sup>43</sup>

Within this desired condition of generating psychological distance, the law naturally acts to underpin a strong sense of moral disengagement. As previously outlined, the methodology of positivism is pointedly agnostic about the role of morality in its function. Despite this, the authors of the RBW Study place enormous faith in the normativity of the law. This is done in order to deliver outcomes that ensure better compliance with objective standards and avoid the relativism that can contribute towards violations of the law. There is, however, a price to be paid for such legal systematicity.<sup>44</sup> Ironically, because of the marginalization of social and moral inquiry, we are left with a world in which elaborated reason and unalloyed positivism lead to outcomes that permit the routine application of violence in a very generic manner. To this end, the issue isn't so much avoidance of the possibility of violations of IHL (i.e. “compliance”), but the consequences of a routine dispensation of legally articulate but morally agnostic decisions that mete out considerable violence. In a world saturated with law, where every social and political decision is rooted in a norm from some higher legal authority, we can

42 See, generally, Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society*, revised ed., Back Bay Books/Little, Brown & Co., New York, 2009.

43 Christopher Coker, “Biotechnology and War: The New Challenge”, *Australian Army Journal*, Vol. 11, No. 1, 2004, p. 134.

44 See generally Fleur Johns, “Guantanamo Bay and the Annihilation of the Exception”, *European Journal of International Law*, Vol. 16, No. 4, 2005, p. 613.

lose the capacity for authenticity; indeed, as one commentator has noted, “[l]awyers and not philosophers are kings”<sup>45</sup> in such a world.

The rise of unmanned aerial vehicle (UAV) warfare is sometimes heralded as an ideal method of ensuring legal compliance. Operating at a safe distance, UAV pilots are afforded time to assess the facts on the ground; to determine who is a combatant and who is not, who is taking a direct part in hostilities and who is not; and to calibrate what the right number of innocent civilian deaths shall be for the military advantage anticipated in any given attack. Yet such distance also ensures that the possibility of empathy and compassion is reduced, as are the qualities of mercy and forbearance. This distance, while probably ensuring better legal compliance, also has the effect of disorienting some operators. After a successful drone strike in Afghanistan, for example, one US-based drone pilot was congratulated, though it was reported that the soldier felt uneasy about his role:

[O]ne of the things that nagged at him, and that was still bugging him months later, was that he had delivered this deathblow without having been in any danger himself. The men he killed, and the marines on the ground, were at war. They were risking their hides. Whereas he was working his scheduled shift in a comfortable office building, on a sprawling base, in a peaceful country. ...

“[T]his was a weird feeling,” he said. “You feel bad. You don’t feel worthy. I’m sitting there safe and sound, and those guys down there are in the thick of it, and I can have more impact than they can. It’s almost like I don’t feel like I deserve to be safe.”<sup>46</sup>

The disquiet felt by the soldier draws upon a deeper well of understanding of the nature of war that is deflected under the legal method. The sense of honour that comes from lethal combat, the sense of mutuality of risk, has underpinned conceptions warfare from ancient Greek times.<sup>47</sup> Such risk acts to heighten the senses and validates the cognitive process. It also allows the underlying humanity of the exercise proper consideration.

While not explicit in the sources of IHL, there does seem to be an implicit recognition, and perhaps even reliance, that the exercise of judgment under the law will recognize such humanity—and hence, when making operational decisions under IHL, that civilians will be acknowledged as individuals with their own identities, anxieties, hopes and dreams, and that questions of military advantage will take into account the lives (and anticipated deaths) of people in a manner that is not reduced to a banal formula of cost–benefit analysis. It is a well-recognized phenomenon within neurology that good decision-making

45 Simon Critchley, *The Faith of the Faithless: Experiments in Political Theology*, Verso, London, 2012, p. 104.

46 Mark Bowden, “The Killing Machines: How to Think about Drones”, *The Atlantic*, September 2013, available at: [www.theatlantic.com/magazine/print/2013/09/the-killing-machines-how-to-think-about-drones/309434/](http://www.theatlantic.com/magazine/print/2013/09/the-killing-machines-how-to-think-about-drones/309434/).

47 Cian O’Driscoll, “A ‘Fighting Chance’ or Fighting Dirty? Irregular Warfare, Michael Gross and the Spartans”, *European Journal of Political Theory*, Vol. 11, No. 2, 2011, p. 112.

involves the exercise of both emotion and logic.<sup>48</sup> If emotions are the basis for moral reasoning, as contended by some,<sup>49</sup> then it follows that the legal requirement of marginalizing emotion runs counter to good decision-making.<sup>50</sup>

## Counter-insurgency, the law and military tactics

In addressing one of the key areas of IHL breach, the authors of the RBW Study observe that the basic rule of distinction between combatants and civilians is frequently one that is not respected. This is done partly through the blurring of the identity of so many actors within the contemporary battlespace, but is also “more often the result of a deliberate intention to attack the civilian population rather than any objective difficulty in distinguishing the one from the other”.<sup>51</sup> This alarming claim is apparently based upon reasoning that invokes reciprocity arguments which permit such recourse because of the failure of the opposing side to respect the tenets of IHL.

This assertion, which the RBW Study authors acknowledge requires further investigation, does seem to be another reason proffered by them as to why strict adherence to the normative expression of IHL is required. In this context, the study is perhaps showing its age and has decisively been overtaken by developments in contexts such as the counter-insurgency (COIN) and stability operations doctrines of many States. Such doctrines, contrary to the authors’ claims, consciously seek to avoid civilian loss and increased risk to one’s own military forces. The doctrines do seek expressly to deliver greater humanitarian outcomes and require an inversion of conventional interpretive approaches to the law, albeit for instrumental reasons, to achieve both military and humanitarian outcomes at the same time.

The COIN doctrine was (re)developed by US forces during the conflict in Iraq in order to address the phenomenon of insurgency warfare. Such warfare is a feature of the contemporary environment and requires a highly calibrated and somewhat counter-intuitive application of IHL to achieve desired outcomes. The US COIN Manual was developed during a tenuous time during the conflict in Iraq and painstakingly describes that an insurgency is fundamentally a political struggle, in which the centre of gravity is the population, who remain “the deciding factor in the struggle”.<sup>52</sup> Violence is the currency of an insurgency and

48 Antonio Damasio, *Descartes’ Error: Emotion, Reason and the Human Brain*, Vintage, New York, 2006, Introduction.

49 Joshua Greene, “The Secret Joke of Kant’s Moral Psychology”, *The Neuroscience of Morality, Emotion, Disease and Development*, Vol. 3, 2007, pp. 35, 48.

50 In light of this legal requirement, it seems supremely ironic that in the development of autonomous systems, including autonomous weapons systems, considerable attention is given to creating algorithms that include a component for emotion. Sandra Clara Gadanho and John Hallam, *Emotion Triggered Learning in Autonomous Robot Control*, University of Edinburgh, 2001, pp. 2–3, available at: [http://homepages.inf.ed.ac.uk/rbf/MY\\_DAI\\_OLD\\_FTP/rp947.pdf](http://homepages.inf.ed.ac.uk/rbf/MY_DAI_OLD_FTP/rp947.pdf).

51 RBW Study, above note 1, p. 202.

52 *The U.S Army/Marine Corps Counterinsurgency Field Manual*, University of Chicago, Chicago, IL, 2007 (COIN Manual), p. xxv.

destabilizing the legitimacy of the host nation government and the supporting counter-insurgent forces a strategic goal.<sup>53</sup>

A number of key points need to be made about this doctrine. Firstly, it will be repeated for the sake of clarity that it is an instrumental doctrine which serves to deliver successful military outcomes in the context of insurgency. It is not about being “nice”—it is about being effective.<sup>54</sup> It is also subverting normal assumptions about legal interpretation by excising the anonymity of potential targets and according them an accessible identity.

The military experience of coalition forces in Iraq and Afghanistan through the 2000s was one of continuous insurgency. This is actually the historical norm of most conflicts.<sup>55</sup> Hence, those taking a direct part in hostilities were targetable under IHL. While it is obviously the case that the law does not compel such targeting, the binary nature of the choice under the law and the operational imperative was to do just that. The law permits it, and it was done extensively.

Paradoxically, this was actually a means to an end for insurgent forces, for whom the key is to provoke violation of counter-insurgent ethics and values.<sup>56</sup> As already outlined, “the law” is agnostic about such values, which therefore lends itself to exploitation by insurgent forces. Where the strategic goal of an insurgent force is to generate considerable repeated (lawful) violence within a population base, the law and its dominant interpretative approach do not act to restrain such an outcome, at least where DPH and other lawful targeting criteria are manifested. Hence the COIN doctrine is revolutionary in demanding new skills and approaches. Qualities such as patience, self-reflection on ethical commitments and tolerance of military casualties from one’s own military force are all critical for success in a COIN environment.

The strategies and tactics for COIN operations are profoundly more nuanced than what IHL anticipates on face value. The COIN doctrine counsels greater restraint when confronting and targeting individuals who would otherwise come squarely within the DPH criteria as permissible targets. It has become clear that functional categorization of individuals and the validity of the norm are not the most effective answer for targeting. The success of the Iraqi surge in 2007 was dependent on an extremely nuanced and politically aware strategy of engagement, where efforts were made to reconcile with those who were otherwise targetable under the DPH formula. The COIN Guidance applicable to the Multi-National Force–Iraq (MNF-I) at the time made it clear that discretion is to be carefully exercised with respect to the application of force. The MNF-I commentary noted:

We cannot kill our way out of this endeavor. We and our Iraqi partners must identify and separate the “reconcilables” from the “irreconcilables” through

53 *Ibid.*, pp. 37–39, 42–43, 49–50; *The U.S. Army Stability Operations Field Manual*, 3-07, University of Michigan Press Edition, 2009 (Stability Operations Manual), pp. 1–29.

54 David Kilcullen, *The Accidental Guerrilla: Fighting Small Wars in the Midst of a Big One*, Oxford University Press, Oxford, 2009, p. 145.

55 Stability Operations Manual, above note 53, pp. 1–1, 1–2, 1–3.

56 D. Kilcullen, above note 54, pp. 30–34.

engagement, population control measures, information operations and political activities. We must strive to make reconcilables a part of the solution, even as we identify, pursue, and kill, capture or drive out the irreconcilables.<sup>57</sup>

Who may be “reconcilable” within the policy is not defined with any great clarity. The criteria nonetheless require greater consideration of individual identity and broader socio-political considerations relating to the individual and the sectarian/tribal/regional connections he/she may be entwined within. Kilcullen identifies such potentially “reconcilable” persons as “accidental guerrillas”,<sup>58</sup> individuals who find themselves manipulated into insurgent activity but without the hard ideological drive.

When the objective of a successful COIN/stability operations campaign is to “win the population”,<sup>59</sup> rather than “kill/capture” the insurgents, a different orientation to legal interpretation is required. Issues of legitimacy and recognition of moral and ethical orientation in the battlespace become critical. Significantly, one of the COIN premises is “Lose Moral Legitimacy, Lose the War”.<sup>60</sup> Rather than blurring the line between combatants and civilians, which the RBW Study observes as an apparent consequence of military operations, the COIN doctrine requires greater consideration of status. Hence, even when an individual civilian is ostensibly targetable under IHL, further consideration is required as to the social and political effect of such targeting. This requires consideration of variables of individual identity, affiliation and role, and socio-political context, and to a degree, self-examination of motive. It demands acceptance of responsibility, albeit in instrumental terms, but the imposition is unmistakable. Once these elements are put into the balance, the rule regarding distinction becomes less an empirical exercise and more an evaluative process. The rule begins to transform into a standard. On the one hand, there is the requirement to determine whether or not the person is in fact targetable under the general DPH formula, and the subsequent requirement to determine individually specific criteria, to decide whether or not the person is “reconcilable”. Broader regard to the social and political consequences of the (lawful) application of violence is required, as these condition the application of force in a manner that reduces civilian casualties. Hence, while “the law” permits continued targeting of all those taking a direct part in hostilities, “reconcilables” and “irreconcilables” alike, COIN adds extra layers of analysis that further reinforce ethical commitments, which in turn generate good decision-making. All of this is undertaken against an instrumentalist background—that of military success—but it also evidences a decisively new way to apply the law in a less formal or doctrinal manner. To be clear, COIN is itself often marginalized at military legal conferences as being

57 MNF-I Guidelines, in *MNF-I Commander's Counterinsurgency Guidance*, 21 June 2008, reproduced in Thomas E. Ricks, *The Gamble: General David Petraeus and the American Military Adventure in Iraq, 2006–2008*, Penguin Press, New York, 2009, Appendix D, pp. 369–371.

58 D. Kilcullen, above note 54, p. 38.

59 Ganesh Sitaraman, “Counterinsurgency, War on Terror, Laws of War”, *Virginia Law Review*, Vol. 95, No. 5, 2009, p. 1779.

60 COIN Manual, above note 52, p. 252.

epiphenomenal, but it was devised in a moment of urgency. It represents a counter to the assertions of the RBW Study concerning battlefield practice, and it challenges traditional approaches to “the law”. It serves to promote both military success and humanitarian priority. It also offers a glimpse of what is possible in this field.

## Identity, military legal ethics and compliance with IHL

### Constructivism

The question of compliance with IHL is one that generates a special sense of anxiety. The content of the law is unique in its character, simultaneously permitting and restricting the application of destructive violence. The authors of the RBW Study assert that the solution is to regard IHL “as a legal and political matter” and not as a moral one.<sup>61</sup> The emphasis is decisively upon the normative strength of the law, its effective enforcement and strategies which ensure that external validities are imposed upon actors to condition behaviour. Such an orthodox approach, while itself sound, nonetheless seems particularly self-limiting in its avoidance of alternative strategies of legitimation of IHL through the decision-making process.

In this regard, the concept of constructivism that comes from international relations (IR) theory provides a useful basis for examining behaviour and providing a powerful account of social agency. Constructivism is an ideational theory of IR which posits that national interests are shaped by international structures. Thus, a conception of self-identity emerges from identification with legal norms that are internalized through various processes of social agency. Importantly, what then follows is an attitude towards international legal concepts that is motivated by a “logic of appropriateness” which induces a particular legally compliant behaviour and set of choices in any given instance. This is in contrast to a “logic of consequence” that is attributable to a politically realist perspective.<sup>62</sup>

Constructivism is conceived in non-instrumental terms and seeks to “endogenize national interests”,<sup>63</sup> arguing that nations’ interests are constructed from the international structure in which they operate and that, accordingly, “realism and [liberal] institutionalism get it backwards in seeking to explain international behavior”.<sup>64</sup> Constructivism provides a useful bridge between IR theory and international law, partly because of the belief held by both fields that “international legal and other norms constitute the state’s identity”.<sup>65</sup>

Constructivism provides explanatory power for why politically advantageous actions in armed conflict are not taken, notwithstanding that the

61 RBW Study, above note 1, p. 202.

62 Jack Goldsmith, “Sovereignty, International Relations Theory, and International Law”, *Stanford Law Review*, Vol. 52, 1999–2000, p. 984.

63 Jack Goldsmith and Daryl Levinson, “Law for States: International Law, Constitutional Law, Public Law”, in *Harvard Law Review*, Vol. 122, No. 7, 2009, p. 35.

64 *Ibid.*

65 *Ibid.*

law may not prohibit such activity. The non-use of nuclear and particular chemical weapons<sup>66</sup> at a time when their legality was unclear is usually cited as an example of a constructivist mindset in action. If identity is indeed constructed through structural processes and conditioned by cognitive and social pressures, there is particular benefit in assessing its impact in relation to IHL. Studies of norm compliance have identified a tipping point for “norm cascade” that comes with treaty ratification.<sup>67</sup> Commentators point to the premise that once a treaty receives ratification by about 33% of States,<sup>68</sup> there is typically an exponential increase in further ratifications/accessions, with a concomitant accelerated norm internalization process. Given that the 1949 Geneva Conventions have received universal world ratification/accession, there is a greater likelihood that their underpinning norms have been internalized to a greater degree. While empirical evidence is difficult to gather, those external reports that are available point (in contrast to the views expressed in the RBW Study) to a high level of compliance with IHL norms in the field, particularly in relation to avoiding injury to non-combatants.<sup>69</sup>

The role of self-identity played out most graphically in the early years of the Bush administration, in relation to the question of law applicable to Afghanistan. During the debates as to whether the Geneva Conventions would actually be applied *de jure* to the war in Afghanistan, the Chairman of the Joint Chiefs of Staff, General Myers, resisted administration legal advice regarding their non-application, stating that “[t]he Geneva Conventions were a fundamental part of our military culture and every military member was trained on them ... Objectively applying the Conventions was important to our self image.”<sup>70</sup> This sentiment was echoed subsequently by other military members, who asked who “owned” the Geneva Conventions<sup>71</sup> – the civilian lawyers or the military? Such questioning suggests a strong sense of internalization of norms associated with the legal framework.

## Dispensation of military advice and the shaping of behaviour

It remains an enduring truism that law is “done” daily in the thousands upon thousands of transactions that take place between practitioners and clients across the globe. While review of judicial decisions forms the corpus of most external assessments of law’s social role, a truer sense of the sociology of law is resident within the dispensation of advice that occurs in the multiple venues and contexts

66 Richard Price, *The Chemical Weapons Taboo*, Cornell University Press, New York, 1997, p. 110.

67 Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change”, *International Organization*, Vol. 52, No. 4, 1998, p. 895.

68 *Ibid.*, p. 901.

69 Colin H. Kahl, “How We Fight”, *Foreign Affairs*, Vol. 85, No. 6, 2006, p. 103.

70 General Richard Myers, *Eyes on the Horizon: Serving on the Front Lines of National Security*, Threshold Editions, New York, 2009, p. 203.

71 Mark Osiel, *The End of Reciprocity: Terror, Torture and the Law of War*, Cambridge University Press, Cambridge, 2009, p. 335. (“In conversations among themselves, JAGs sometimes speak in candidly guild-like terms. ‘Who owns the law of war?’ rhetorically asks former My Lai prosecutor William Eckhardt at one such gathering. ‘We do: the profession of arms’, he immediately answers. ‘It’s time to take it back,’ he adds, alluding to the Office of Legal Counsel’s temporary, recent hijacking of the field.”)

of everyday life. This was a motivating intuition of legal realism,<sup>72</sup> and it finds enduring contemporary expression today. Luban notes, for example, that “legal advising is the most important thing lawyers do, and lawyer advice, rather than judicial decision, defines the law”.<sup>73</sup>

The rise of the influence of the military lawyer over the past thirty years has been unprecedented. Members of the respective US service Judge Advocate General’s (JAG) Corps, for example, serve in numerous operational roles, from the most tactically pedestrian to the most strategically significant, and their contributions have been generally welcomed and sought by planning and operational staffs;<sup>74</sup> hence, they are well positioned to dispense advice and to decisively shape military outcomes. The rise in influence of the US JAG officer has been replicated in other military forces across the globe.<sup>75</sup> This is partly attributable to the positive requirements of specific instruments such as Additional Protocol I,<sup>76</sup> and also to the recognition of the role that law plays in the broader framework of legitimacy which underpins evaluation of contemporary military operations. As a government lawyer, a JAG officer shares many of the same ethical and professional commitments as her or his counterparts in government service. This generates a set of possibilities concerning individual and professional attitudes to the role. Locating and understanding such attitudes is critical to anticipating the modes of advice subsequently dispensed,<sup>77</sup> which necessarily impact upon the nature and quality of compliance with IHL.

In recent years, many parties to armed conflict have proclaimed how legally compliant their military operations have been.<sup>78</sup> This emphasis reflects a contemporary realization of the connection between legal validity and legitimacy. It is also a product of the reactions by professional military forces to the loss of credibility that comes from a sense of social and professional rupture occasioned by too far a departure from values underpinning contemporary IHL. Following

72 Mauro Zamboni, *Law and Politics: A Dilemma for Contemporary Legal Theory*, Springer, Berlin, 2008, p. 90.

73 D. Luban, above note 26, p. 5.

74 Jack Goldsmith, *Power and Constraint: The Accountable Presidency after 9/11*, W. W. Norton & Co., New York, 2012, pp. 125–128.

75 In the Royal Australian Navy, for example, the number of permanent uniformed lawyers went from thirteen in 1989 to over fifty by 2012.

76 AP I, Art. 82 provides: “The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.”

77 Noting that the so-called “war on terror” has spawned a considerable literature on locating various models of ethic commitment within public legal roles: see, generally, Jesselyn Radack, “Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism”, *University Of Colorado Law Review*, Vol. 77, 2006, p. 1; W. Bradley Wendel, “Professionalism as Interpretation”, *Northwestern University Law Review*, Vol. 99, No. 3, 2005, p. 1167.

78 Chris Jochnick and Roger Normand, “The Legitimation of Violence: A Critical Analysis of the Gulf War”, *Harvard International Law Journal*, Vol. 35, No. 1, 1994, p. 395, citing, *inter alia*, General Colin Powell: “‘decisions were impacted by legal considerations at every level. Lawyers proved invaluable in the decision-making process’. At the war’s conclusion, the Pentagon boasted that Coalition forces had ‘scrupulously adhered to fundamental law of war proscriptions’ in conducting ‘the most discriminate military campaign in history’” (citations omitted).

the Vietnam War, and especially the My Lai incident, the US military undertook a profound revision of its law of war programme.<sup>79</sup> The JAG Corps in all branches of the US military assumed new responsibilities for providing training to the US military and refining US doctrine through numerous publications. Such programmes not only impacted US forces but also had a profound effect in galvanizing military allies to revise their own law of war programmes and enhancing their military lawyers with a sense of professional commitment beyond just technical application of “the law”.<sup>80</sup> The undertaking of these broader programmes of instruction did assist in realizing broader levels of commitment to notions of professional integrity and reputation.<sup>81</sup>

In the contemporary environment, JAG officers have assumed a key institutional role in training, advising and ensuring compliance with IHL. Recent reviews of organizational theory regarding the optimization of compliance with external standards provide a reassuring endorsement of the ability of military lawyers to achieve desired outcomes that reinforce compliance. Dickinson’s analysis<sup>82</sup> of this phenomenon in particular notes the capacity for JAG officers to create a positive culture for compliance that derives from a number of factors. These revolve around sociological stimuli relating to the internalization of norms from shared experiences in the battlespace,<sup>83</sup> a recognition of institutional reputation coming from the reinforcement of values underpinning the law, formal points of intersection and engagement within the decision-making process,<sup>84</sup> and externalized criteria relating to applicable disciplinary systems that can reinforce behaviour.<sup>85</sup> This last aspect is highlighted as a key feature that separates JAG officers from other in-house counsel, namely the capacity to formally enforce compliance within an established quasi-criminal (disciplinary) justice system. It also necessarily shares the same perspective as the authors of the RBW Study in that respect, but it is in addition to the many other features of professional military legal engagement that rely upon underpinning values and professional integrity.

While reviews such as Dickinson’s do provide a useful endorsement from the perspective of “best practice” organizational theory, there is still the lingering question of the optimal broader professional persona and/or role that a JAG

79 J. Goldsmith, above note 74, p. 126; see also W. Hays Parks, “The Gulf War: A Practitioner’s View”, *Dickinson Journal of International Law*, Vol. 10, No. 3, 1992, pp. 393, 394, 396–397. “Operational law is an area of the law born from the U.S. experience in the Vietnam War ... [A]s a result of the My Lai massacre and subsequent investigations of it, in 1974 the Department of Defense ... issued its first overall law of war directive. DoD Directive 5100.77 has set forth specific duties and responsibilities for law of war training for military personnel and the reporting of suspected violations of the law of war committed by or against U.S. personnel.”

80 Within the Australian Defence Force there exists a suite of operational law courses that are now mandatory as well as those that may be taken as an elective. See, generally, Australian Department of Defence, Military Law Centre, available at: [www.defence.gov.au/legal/mlc.html](http://www.defence.gov.au/legal/mlc.html); Asia Pacific Centre for Military Law, available at: <http://apcml.org>.

81 David Graham, “A Long, Hard Fall from the Pedestal”, *Joint Force Quarterly*, Vol. 54, 2009, p. 30.

82 Laura Dickinson, “Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance”, *American Journal of International Law*, Vol. 104, No. 1, 2010, p. 1.

83 *Ibid.*, pp. 6, 8, 16, 18.

84 *Ibid.*, pp. 10–11, 16.

85 *Ibid.*, p. 24.

officer should adopt. The nature and practice of IHL operations isn't the clinical technical process that seems to be idealized within the RBW Study. As Australian academic Hilary Charlesworth has observed in the wake of the debate surrounding the 2003 Iraq invasion, international lawyers should relinquish the illusion of an "impartial, objective, legal order" if there is to be effective engagement with statecraft.<sup>86</sup> Understanding such a sentiment and reorienting professional attitudes regarding the provision of legal advice thus becomes a critical exercise. Concepts such as constructivism, but also the role of virtue ethics and professional commitments to dispensing advice that do take into account moral and social consequences, must be recognized as having a key place in orienting legal advice and conditioning battlespace behaviour alongside positivist articulations (of chosen versions) of normative law.

The issue of conscience and ethical decision-making within the battlespace reveals a recognition of the lawyer's capacity to translate self-embraced martial qualities of honour, courage and chivalry into a modern framework. This translation has resulted in the replacement of an internalized "warrior's code" of social and moral behaviour in armed conflict from times past with a decisively legal one today. There is a sense that something has been lost in this bargain. The very term "warrior" carries with it a notion of commitment to deeper codes of conduct that are suppressed, or at least eroded, in the transition to "professional soldier".<sup>87</sup> It is striking that a recent suggestion by a European military force to reintroduce the term "warrior" into their public self-reference was met with a negative public reaction.<sup>88</sup> This is made all the more remarkable given that in history, a warrior's code was designed to preserve a "shield of humanity"<sup>89</sup> so as to avoid descent into unprincipled violence.

## Conclusion

The RBW Study is right to focus on strengthening law through numerous means of agency and correlatively ensuring that its violation meets with effective sanction. It would be an unusual ICRC-sponsored review that did not seek to bolster the law applicable in armed conflict. It does, however, assume much about the power of the normativity of law on the one hand, and the incapacity of bearers of arms to respond to anything but criminal sanction for breach on the other. There remains an attitude of enchantment associated with the law and a tendency to equate lawfulness with moral agency, but their correlation is not necessarily aligned.<sup>90</sup> Normative law can create an unlimited vocabulary of meaning that can generate

86 Hilary Charlesworth, "Saddam Hussein: My Part in His Downfall", *Wisconsin International Law Journal*, Vol. 23, No. 1, 2005, p. 143.

87 Hanne A. Kraugerud, "Shields of Humanity: The Ethical Constraints of Professional Combatants", *Journal of Military Ethics*, Vol. 10, No. 4, 2011, p. 266.

88 *Ibid.*, p. 271.

89 *Ibid.*, p. 268.

90 Gabriella Blum, "The Role of the Client: The President's Role in Government Lawyering", *Boston College International and Comparative Law Review*, Vol. 32, No. 2, 2009, p. 278.

its own kind of internal rationality, one that acts to anesthetize authentic experience. Hence, despite the recommendations made by the authors of the RBW Study, the resort to values and deeper registers of meaning can and should be applied to condition the application of force under the law. This is to be celebrated, not marginalized as the study suggests, despite the risk of moral relativism that might be occasioned. It is clear that that the law itself can generate its own kind of moral relativism which pervades unnoticed. The point is not to undermine “the law”, which remains the ultimate limit on the application of force, but to condition its interpretative application and to allow for the incorporation of moral and ethical reasoning in decision-making.

The RBW Study asks rhetorically that the ICRC reflect on what it is seeking in its aims and methods of instruction. It advances the view that rather than seeking to persuade audiences or impart knowledge, the focus should be more utilitarian and should deal with the external modification of behaviour. The law provides the force for conditioning this behaviour. Whereas the RBW Study argues against efforts to persuade relevant audiences of the values underpinning the law, this article has argued that such mechanisms offer a greater chance for traction of the legal norms themselves. The law is not as normativity-neutral as presumed, nor are its interpretative mechanisms so benign that desired results will necessarily be realized through the strategies advanced in the RBW Study. Since the publication of the RBW Study, the rise of the COIN doctrine represents a key moment of insight into assimilating military outcomes with humanitarian outcomes. Although developed for plainly instrumental reasons, this doctrine represents a decisive moment at which traditional targeting criteria were modified in order to allow for a greater sense of individual identity, and hence humanity, to inform decision-making. The paradox of the conflation of humanitarian priority and military success may be ironic, but the experience should be grasped for the significance of its transformative power.

The RBW Study provides a profoundly important and useful analysis of the mechanisms of agency and is right to call upon the ICRC to focus on what strategies work best in fostering respect for IHL. However, the conclusions made and the arguments advanced in the RBW Study do seem quite insular and counter-productive in their very narrow focus. It is not surprising that the study invests greatly in “the law” as the means for ensuring compliance. Such investment carries with it great ambition that the law will provide the level of external objectivity and neutrality hoped for. As the author Arthur Allen Leff notes, however, “whenever we do set out to find ‘the law’ we are able to locate nothing more attractive, or more final than ourselves”.<sup>91</sup>

The underpinning values, sense of identity and power of legitimacy that are resident within the law, particularly the humanitarian provisions, are worthy of effective proselytization. These factors can decisively act to reinforce the ethical application of force in a manner that, despite the views of the RBW Study, should be more fully relied on by the ICRC and others in their training and dissemination programmes.

91 Arthur Allen Leff, “Unspeakable Ethics, Unnatural Law”, *Duke Law Journal*, Vol. 6, 1979, p. 1229.