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BEFORE THE ABYSS: RESHAPING INTERNATIONAL HUMANITARIAN LAW TO SUIT THE ENDS OF POWER

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In the increasingly legalized landscape in which armed conflicts are now waged, international humanitarian law has become an integral and ever more central part of military strategy. States can and do use it to gain advantage over their adversaries, but must also contend with challenges that arise when it is wielded against them. In their efforts to respond to these challenges official and unofficial advocates of State powers have advanced modes of argumentation which question the fundamental structure of international humanitarian law. This Article takes issue with one such argument that mobilizes the theologico-political principle of the “lesser-evil” to conclude that acts which are absolutely prohibited under international humanitarian law should nevertheless be deemed legally permissible when their foreseen consequences are less harmful than lawful alternatives. The Article demonstrates that this argument threatens to blur IHL’s sharp boundaries and expand its zone’s of elasticity thereby undermining its structural principles. More specifically, the Article maintains that the argument in question rests on exaggerated faith in the judgment of belligerent parties, that it fails on its own utilitarian logic and that it ignores deontological reasoning fundamental to international humanitarian law. The Article contends that accepting this argument would severely compromise IHL’s capacity to limit violence and preserve human dignity and therefore advocates that it be rejected.

[I]t is particularly important not to lose confidence in our absolutist intuitions, for they are often the only barrier before the abyss of utilitarian apologetics for large-scale murder.¹

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¹ Thomas Nagel, *War and Massacre*, 1 PHIL. & PUB. AFF. 123, 126 (1972).

To kill 278,966 civilians (the number is made up) in order to avoid the deaths of an unknown but probably larger number of civilians and soldiers is surely a fantastic, godlike, frightening and horrendous act.²

INTRODUCTION

International humanitarian law (IHL) is shaped by a delicate balance between bright line rules and elastic standards. The former establish absolute prohibitions on certain conduct, while the latter give actors leeway to pursue the best, or least harmful, outcomes. This Article takes issue with an argument that threatens to upset the balance between these structural principles, erasing some of the law's bright lines and expanding its zones of elasticity. The argument in question mobilizes the logic of the theologico-political principle of the "lesser-evil" to suggest that acts which are absolutely prohibited under IHL should nevertheless be deemed legally permissible when their projected consequences are less harmful than lawful alternatives. The Article contends that accepting this argument would severely compromise IHL's capacity to limit violence and preserve human dignity and therefore advocates that it be rejected.

* * *

On March 28, 2010, the Israeli High Court of Justice (HCJ) issued its judgment on a petition that challenged the Israeli authorities' practice of holding Palestinian detainees in facilities located in Israel rather than the occupied West Bank, as well as that of conducting legal proceedings against such individuals in military courts located within Israel.³ The petitioners had argued that these practices are in direct contravention of specific provisions of the Fourth Geneva Convention.⁴ Reaffirming decisions it had reached when similar cases were brought before it in the past,⁵ the

² MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 262 (4th ed. 2006).

³ HCJ 2690/09 *Yesh Din v. Commander of the Military Forces in the West Bank* (Mar. 28, 2010) Nevo Legal Database (by subscription) (Isr.).

⁴ The provisions alluded to prohibit the transfer of protected persons from occupied territory and mandate that the occupying powers' military courts must be located in the occupied territory and that protected persons accused or convicted of offences shall be detained in the occupied territories. *See* Articles 49, 66 and 76 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *Geneva Convention IV*].

⁵ In HCJ 253/88 *Sejadia v. Minister of Defense* 43(3) PD 801 [1988] (Isr.) the Court had dismissed a petition contesting the practice of detaining Palestinian residents of the West Bank in

Court rejected the petition on the grounds that the challenged practices were duly authorized by domestic law which, in Israeli jurisprudence, overrides conflicting international law. However, the Court did not stop there and went on to note that the Geneva Conventions should in any case be interpreted and applied in light of their underlying humanitarian purpose suggesting that this would in some cases justify a deviation from specific formal provisions contained in the Conventions.⁶

Since this latter suggestion is alluded to only briefly in *obiter*, its practical ramifications may not be significant. Still, if the Court's reasoning were to be followed through, it could have far-reaching implications. Indeed, by this reasoning application of any provision of IHL ought to be assessed against the law's underlying humanitarian purpose. Even the most clear-cut rules would thus become subject to a proviso, binding only if the humanitarian benefits deriving from adherence to them might be expected to outweigh the humanitarian costs this might entail. It is most unlikely that the HCJ actually would be willing to pursue such a drastic position. In fact, in a previous decision it had disqualified a practice that was at odds with the law even while it arguably served a humanitarian end.⁷ However, a recently published article does venture where the HCJ was unwilling to go. In this article, titled "The Laws of War and the 'Lesser Evil'," Gabriella Blum provides a robust argument in favor of a "humanitarian necessity justification" that would exculpate actors who violate IHL in the name of a greater humanitarian good not only when they do so by pursuing acts such as the "Neighbor Procedure" that was disqualified by the HCJ, but even when this entails the deliberate killing of many thousands of civilians as in the case of the atomic bomb dropped on Hiroshima.⁸

Israel. A petition against the practice of holding arrest hearings for Palestinian detainees before military tribunals in Israel was rejected in HCJ 6504/95 Wajiyi v. The State of Israel (Nov. 1, 1995) Takdin Legal Database (by subscription) (Isr.).

⁶ In its judgment the Court noted that insistence on strict compliance with the aforementioned articles of Geneva Convention IV would be to the detriment of Palestinian protected persons (since this would require seizing private Palestinian land for the purpose of constructing detention facilities in the West Bank) as well as that of the detainees themselves (since conditions of detention in Israel are better secured than those that could be provided in the West Bank). See *Yesh Din*, *supra* note 3, para. 14.

⁷ This was the case in relation to a procedure, officially called the "Early Warning Procedure" and colloquially referred to as "Neighbor Procedure," which was implemented by the Israeli army to obtain the assistance of local Palestinian residents during arrest operations conducted in the West Bank. The HCJ deemed this practice unlawful despite claims that it served to reduce the risk of civilian and military casualties. See HCJ 3799/02 Adalah—Legal Center for the Rights of the Arab Minority in Israel v. The GOC Central Command, IDF 60(3) PD 67 [2005] (Isr.), available at http://elyon1.court.gov.il/files_eng/02/990/037/a32/02037990.a32.pdf.

⁸ See Gabriella Blum, *The Laws of War and the "Lesser Evil,"* 35 YALE J. INT'L LAW 1 (2010). Blum has acknowledged that her interest in the question of why IHL does not recognize a lesser

On the face of it, a humanitarian justification *for* dropping an atomic bomb seems a most unlikely proposition, and yet Blum's detailed and thorough argument in favor of this proposition cannot easily be dismissed. Her argument rests on the logic of lesser evil which, far from being alien to IHL, is in fact inherent to it. IHL, after all, does not aspire to end the evil of war (a task left to the *jus ad bellum*), but instead accepts this evil as an unfortunate fact and seeks merely to lessen the human suffering it entails and to preserve certain fundamental values. Likewise, the utilitarian cost-benefit calculus that Blum advances is not dissimilar from those that IHL itself regularly directs actors to employ (e.g., when implementing the principle of proportionality). Moreover, inherent in the appeal for a humanitarian necessity justification is the idea that the essential purpose of the law, its *telos* or spirit, should be given precedence over its formal dictates, an idea that has much appeal and many eminent advocates.⁹

The present Article nonetheless takes issue with the lesser evil argument (LEA) for violation of IHL focusing in particular on Blum's articulation thereof. This argument, it is maintained, subordinates IHL to a utilitarian ethic that is prone to abuse and misapplication and which—even if applied accurately and in good faith—would undermine core values that should override conflicting consequentialist considerations.

The Article is comprised of two principal parts each containing subsections.

Part I places LEA in a broader context linking it to other modes of argumentation that are employed to rebuff criticism of States. Rather than taking issue with this or that particular rule of IHL, these approaches challenge the fundamental structure of the law in order to release the State from its constraints.

The Article points to historical, jurisprudential, and other factors that may have contributed to the emergence of this radical stance and describes some of its manifestations.

Part II focuses on LEA. It demonstrates that in effect this argument renders even the unequivocal rules of IHL conditional, essentially replacing the law with a utilitarian cost-benefit analysis. The Article then explains why this is problematic. For this purpose, observations about the application of legal norms to complex reality

evil justification for its breach “was sparked by the Israeli Supreme Court’s decision to strike down the ‘Early Warning Procedure’ employed by the Israel Defense Forces in the West Bank.” See Gabriella Blum, *The Laws of War and the ‘Lesser Evil’*, YJIL ONLINE SYMPOSIUM (Oct. 18, 2010), <http://opiniojuris.org/2010/03/02/yjil-online-symposium-the-laws-of-war-and-the-lesser-evil>.

⁹ See, e.g., AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* (Sari Bashi trans., Princeton University Press 2005); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) (Dworkin famously argues that legal rules must be interpreted in light of governing legal principles).

and about the nature of lesser evil reasoning are put forward and deontological as well as utilitarian, rule-consequentialist arguments, with which Blum contends, are examined.

On this basis it is argued that, despite qualifications and counter-arguments presented by Blum, LEA ought to be rejected because it fails on its own utilitarian logic; because it is founded on an inadequate account of IHL's purpose and therefore applies calculations of utility where these have no place; and because, as a consequence of these other flaws, it jeopardizes the law's humanitarian project.

I. STATES AND THEIR ADVOCATES' RADICAL STANCE

The contention of this Article is that LEA should be understood against the backdrop of other arguments about the nature of IHL that, like it, radically challenge the law and have the effect of reducing its capacity to constrain belligerent State action. This part of the Article explores such arguments. It first reviews the context from which they emerged and then describes some examples.

Some clarifications are in order.

First, the purpose here is to contextualize LEA, there is no presumption to present an exhaustive overview of the various arguments discussed. A comprehensive critical appraisal of these arguments is beyond the scope of this article. Accordingly, discussion in this part is primarily descriptive in nature.

Second, the Article does not presume to provide an all-inclusive account of the diverse array of radical challenges to which international law in general and IHL in particular are subjected. Instead, it focuses only on some arguments, with which LEA can be associated, that are advanced by States and their advocates. Such arguments merit particular attention. While it is to be expected that non-State actors opposing State hegemony might wish fundamentally to question a law they had no part in creating, that this should be done by States or on their behalf is both more remarkable and more significant. After all, it is States who make international law, and it is they who can unmake it. When they, the authors of IHL, challenge the validity and aptness of IHL rules, the implications are likely to be more far-reaching than when any other actor does so.

A. THE EMERGENCE OF RADICAL CHALLENGES

Modern IHL originated in the 19th century at a time when legal thought was dominated by a positivist-formalist approach that conceived law as a closed system distinct from

politics and ethics.¹⁰ Sovereign will, rather than any extra-legal conceptions of justice, was seen as the source of legal validity.¹¹ The legal order that took shape under this approach purported to guide human conduct without recourse to additional normative and policy considerations and was therefore replete with formal distinctions and detailed rules that were thought to deliver determinate outcomes.¹² This jurisprudential approach still has its adherents in contemporary legal discourse and its traces are still very much in evidence in the field of IHL.¹³ Indeed, the humanitarian project as a whole, in action as well as in law, has consistently striven to divorce itself from politics and ideology.¹⁴

Over time, however, wave upon wave of competing outlooks have challenged the formalist conception of law eroding its sharp distinctions and undermining its core assumptions.¹⁵ While differing from one another in many aspects, these competing outlooks are united in their rejection of the view that legal reasoning is or can be grounded solely on the black letter of the law. They maintain that applying law to fact always requires the exercise of discretion. This view carries emancipatory potential—if there is an inevitable gap between the legal text and its practical application then the author of the law can no longer exactly dictate conduct. The shift away from formalism thus creates place for dissent.¹⁶

In domestic affairs, it is naturally those who seek to challenge State power who embrace the emancipatory potential of non-formalistic approaches to law.¹⁷ By contrast, outside of a revolution, state officials, such as military and governmental legal advisers, typically are not inclined radically to challenge the domestic legal

¹⁰ See, e.g., DAVID KENNEDY, *THE DARK SIDE OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* 237-53 (2004).

¹¹ See, e.g., JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (W. Rumble ed., Cambridge Univ. Press 1995) (1832).

¹² See, e.g., DAVID KENNEDY, *OF WAR AND LAW* 83-84 (2004).

¹³ *Id.* at 47.

¹⁴ See Daniel Warner, *The Politics of the Political/Humanitarian Divide*, 833 INT'L REV. RED CROSS 109 (1999).

¹⁵ In general legal thinking, many diverging schools of thought have rejected formalist approaches to law. Notable examples include Legal Realism, Constructivism, Critical Legal Studies, diverse forms of Feminist Legal Theory and Critical Race Theory, Pragmatism and Postmodernism. See, e.g., BRIAN BIX, *JURISPRUDENCE THEORY AND CONTEXT* (5th ed. 2009). Similar developments have occurred in the field of international law. See, e.g., MALCOM N. SHAW, *INTERNATIONAL LAW* 44-53 (4th ed. 1997).

¹⁶ See Jacques Rancière, *Who Is the Subject of the Rights of Man?*, 103 S. ATL. Q. 297 (2004).

¹⁷ Proponents of various critical approaches to law, such as Critical Legal Studies, Feminist Legal Theory and Critical Race Theory, challenge hegemony by exposing how politics and power shape the law. See, e.g., Bix, *supra* note 15, at 231-50.

order. On occasion, they may present innovative interpretations of domestic law, but it is almost inconceivable that they would advocate ignoring the law or violating its core provisions.¹⁸

To be sure, where the rule of law is respected, State authorities are themselves subject to domestic law, but since this law is created by the State and State authorities have considerable capacity to shape it to serve their interests, reflect their values and advance their concerns, agents of the State would not generally be inclined to resist the resulting constraints. Indeed, such agents have every reason to maintain strict fidelity towards the legal order from which they derive their authority and which they are charged to uphold.

However, when the discourse between the advocates of the State and those who seek to challenge the exercise of State power shifts from the domain of domestic law to that of IHL (and perhaps international law more broadly), a striking reversal of roles can be discerned.

Humanitarian actors taking issue with State policies and practices on the basis of IHL frequently employ a conservative, formalistic, approach insisting on fidelity to *lex lata*.¹⁹ The International Committee of the Red Cross (ICRC), for example, is very particular to base its actions and representations strictly on the law as it stands and not upon extra-legal, political, ethical and ideological considerations.²⁰ While conscious of the need to respond to challenges in the application of the law arising in the wake

¹⁸ However, it must be acknowledged that State officials do quite often call into question the applicability of domestic law provisions by citing exceptional circumstances. This is particularly noticeable in relation to the “war on terror.” See GIORGIO AGAMBEN, *STATE OF EXCEPTION* (Kevin Attel trans., UP Chicago, 2005).

¹⁹ Even public intellectuals who could hardly be characterized as “formalists,” have appealed to an idealized vision of international law in which it is portrayed as standing outside of politics and constraining power. See Martti Koskeniemi, Book Review, 4 GERMAN L. J. 1087, 1090 (2003) (reviewing *PHILOSOPHY IN A TIME OF TERROR: DIALOGUES WITH JÜRGEN HABERMAS AND JACQUES DERRIDA* (Giovanna Borradori ed., 2003)), who attributes such an approach to Jacques Derrida and Jürgen Habermas. Koskeniemi has himself written favorably about the use of formalism as a strategy of resistance. See Martti Koskeniemi, *The Lady Doth Protest Too Much: Kosovo, and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159 (2002). See also, Aeyal M. Gross, *After the Falls: International Law between Postmodernity and Anti-Modernity*, in *Regards d’une génération sur le droit international* 183, 201-08 (Hélène Ruiz-Fabri, Emanuelle Jouannet, & Jean-Marc Sorel eds., 2008).

²⁰ See JEAN PICTET, *THE FUNDAMENTAL PRINCIPLES OF THE RED CROSS: COMMENTARY* (1979). See also, Speech titled *Humanitarian Principles—The Importance of their Preservation during Humanitarian Crises* delivered by Angelo Gnaedinger, Director-General of the ICRC, at the conference: *Humanitarian Aid in the Spotlight: Upcoming Challenges for European Actors* (Oct. 12 2007) available at <http://icrc.org/Web/Eng/siteeng0.nsf/html/humanitarian-principles-statement-121007>.

of changing circumstances, the ICRC has consistently maintained that parties to an armed conflict must act in conformity with existing IHL and has rejected claims that novel circumstances or competing considerations render the law inapplicable or justify liberal interpretations thereof.²¹

Conversely, when faced with an international legal standard over the content of which the State has little control, State officials as well as unofficial advocates of the State, regularly pursue lines of argument which deviate from the plain language of the law, blur its formal distinctions or justify ignoring it all together. Alluding to such arguments which he attributed to them, one prominent Israeli human rights advocate went so far as to describe Israeli military lawyers as “anarchists against international law” suggesting that they actively subvert IHL.²² Governmental lawyers from other contexts have been described in a similar vein.²³

While an individual State cannot itself amend international conventions, it must be acknowledged that in going beyond IHL’s currently accepted boundaries States and international law experts who speak on their behalf may nevertheless aspire to effect a change in the law. This is so because by establishing State practice and by voicing *opinio juris* States and their advocates can contribute towards the formation of new international custom. The following statement attributed to a former senior Israeli official is revealing in this regard:

What we are seeing now is a revision of international law ... If you do something for long enough, the world will accept it. The whole of international law is now based on the notion that an act that is forbidden today becomes permissible if executed by enough countries. If the same process occurred in private law, the legal

²¹ See, e.g., ICRC, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS (2003), available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5XRDCC> (submitted on Dec. 2-6, 2003 at the 28th International Conference of the Red Cross and Red Crescent). The ICRC submitted a second report by the same name at the 30th International Conference of the Red Cross and Red Crescent (Nov. 26-30, 2007), available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/ihl-30-international-conference-101207>.

²² This statement was made in a public lecture by advocate Michael Sfard, Accountability, Impunity, the Goldstone Report and the Role of Government Lawyers, Address at Securing Compliance with International Humanitarian Law: The Promise and Limits of Enforcement Mechanisms Conference (Nov. 24, 2009).

²³ PHILIPPE SANDS, TORTURE TEAM: DECEPTION, CRUELTY AND THE COMPROMISE OF LAW (2008) (providing a detailed account relating to U.S. government lawyers who gave legal approval for harsh interrogation techniques implemented in Guantánamo Bay.) See also José E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT’L L. 175 (2006); Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145 (2006).

speed limit would be 115 kilometers an hour and we would pay income tax of 4 percent. So there is no connection between the question 'Will it be sanctioned?' and the act's legality. After we bombed the reactor in Iraq, the Security Council condemned Israel and claimed the attack was a violation of international law. The atmosphere was that Israel had committed a crime. Today everyone says it was preventive self-defense. International law progresses through violations. We invented the targeted assassination thesis and we had to push it. At first there were protrusions that made it hard to insert easily into the legal moulds. Eight years later it is in the center of the bounds of legitimacy.²⁴

Examples of advocates of the State exhibiting a radical stance toward IHL have been particularly apparent in the context of contemporary discourse surrounding armed conflicts between States with a strong official commitment to the rule of law and non-State armed groups. As has been shown by recent experience, such as that of the ongoing hostilities in Afghanistan and Iraq as well as those between Israel and armed groups in Lebanon²⁵ and Gaza,²⁶ and as has been repeatedly explained in an ever-growing body of literature on the subject of "asymmetric warfare,"²⁷ during confrontations of this type both parties' incentives to comply with IHL are undermined.²⁸ Faced with a militarily superior foe which in any case regards all its belligerent actions as unlawful and which it cannot hope to defeat in the open battlefield, the weaker non-State party is motivated to adopt unlawful methods of war

²⁴ See Yotam Feldman & Uri Blau, *Consent and Advise*, HA'ARETZ MAGAZINE, Jan. 30, 2009 at 15-6, quoting Col. (Ret.) Daniel Reisner. See also Col. (Ret.) Pnina Sharvit Baruch, *The Debate Surrounding the Compatibility of the Laws of War to the Struggle against Terror Organisations*, THE JERUSALEM CENTER FOR PUBLIC AFFAIRS STRATEGIC FORUM BLOG (June 22, 2009) [in Hebrew], <http://www.jcpa.org.il/JCPAHeb/Templates/showpage.aspFID=602&DBID=1&LNGID=2&TMID=99&IID=22867>.

²⁵ This occurred during the armed conflict between Israel and Hezbollah forces that took place between July 12 and Aug. 14 2006. Commonly referred to as the 2006 Lebanon War, this armed conflict is known in Israel as the Second Lebanon War, while in Lebanon it is referred to as the July War.

²⁶ This occurred most notably during the armed conflict between Israel and Hamas forces that took place between Dec. 27, 2008 and Jan. 18, 2009, which the Israeli authorities dubbed "Operation Cast Lead."

²⁷ The term "asymmetric warfare" is not confined to conflicts between States and non-State actors and is used more broadly to describe any armed conflict, including conflicts between States, in which there is a significant disparity in the military might of the belligerent parties.

²⁸ For a detailed analysis see, e.g., Toni Pfanner, *Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action*, 87 INT'L REV. RED CROSS 149 (2005); Robin Geiss, *Asymmetric Conflict Structures*, 88 INT'L REV. RED CROSS 757 (2006); Michael Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 A.F. L. REV. 1 (2008).

such as perfidy and indiscriminate attack. From the perspective of the stronger State party to the conflict, IHL then comes to be seen as an unfair constraint, subjecting the State to burdensome obligations while not affording any reciprocal gains. But even while pragmatic, utilitarian, considerations of reciprocity cease to function as an effective incentive to comply with its rules, IHL plays a significant role in asymmetric armed conflicts of this nature. Indeed, at a time when such conflicts can readily be subject to the most intense and relentless scrutiny, each of the warring parties have strong pragmatic reasons to demonstrate the legitimacy of its own actions and to discredit those of its adversary.²⁹ This is all the more so in light of the ascent of international criminal law and the resulting proliferation of forums in which severe violations of IHL can be addressed.³⁰ Thus, a new battlefield has emerged where belligerents vie for legitimacy before a diverse array of actors (including States, international organizations and elements of civil society) that potentially can influence their campaign. IHL occupies an ever more central place on this battlefield, so much so in fact that a new term—"lawfare"—has been coined to describe the use of law as a tool of war.³¹ When it is envisioned as a weapon, IHL increasingly functions as an integral component of military strategy. States can and do use it to gain advantage over their adversaries,³² but they must also contend with challenges that arise when it is wielded against them. This is often accomplished by contesting the facts to maintain that allegations are unfounded, or by insisting that on a proper reading of the law, no violations were committed.³³ Sometimes, though, the law itself is put into question and it is then that the radical stance referred to above becomes evident.³⁴

²⁹ See KENNEDY, *supra* note 10, at 272-77 (inter alia, describing a "CNN effect"). See also Eyal Benvenisti, *The Law on Asymmetric Warfare*, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN (Mahmoud Arsanjani, Jacob Katz Cogan, Robert D. Sloane & Siegfried Wiessner, eds., 2010).

³⁰ For discussion on the manner in which the rise of international criminal law has influenced the appliance of IHL see, e.g., Blum, *supra* note 8, at 3-4; Orna Ben-Naftali, *A Judgment in the Shadow of International Criminal Law*, 5 J. INT'L CRIM. JUST. 322 (2007).

³¹ See Charles J. Dunlap Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts*, 2001 WORKSHOP PAPERS: HUMANITARIAN CHALLENGES IN MILITARY INTERVENTION (Oct. 19, 2010, 9:32 AM), <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>. See also KENNEDY, *supra* note 10, at 125; Eyal Weizman, *Lawfare in Gaza: Legislative Attack*, OPEN DEMOCRACY, <http://www.opendemocracy.net/article/legislative-attack> (last visited Oct. 19, 2010).

³² See, e.g., ISRAEL MINISTRY OF FOREIGN AFFAIRS, THE OPERATION IN GAZA 27 DECEMBER 2008-18 JANUARY 2009: FACTUAL AND LEGAL ASPECTS 52-76 (2009), detailing "Hamas' Breaches of the Law of Armed Conflict and War Crimes."

³³ *Id.* particularly 124-45.

³⁴ Radicalism of this nature is likely to be masked. In this context the following statement by an unnamed Israeli "expert in international law" quoted in Dan Izenberg, *What's a Lawyer Doing*

Such radicalism takes many forms. Typical manifestations can usefully be grouped into one of the following argumentative approaches:

1. IHL is (or is misused as) a normative guise for politics;
2. IHL rules are over-ridden by higher, meta-legal, norms;
3. IHL contains no relevant rule or is otherwise inapplicable;
4. IHL rules may/must sometimes be breached in order to achieve the law's underlying humanitarian purpose.

Before focusing on LEA, which is associated with the fourth category, a few observations about the other three categories are in order.

As a preliminary remark, it should be acknowledged that the arguments described here were articulated by commentators who were not necessarily writing in an official capacity and who may not have been purposefully seeking to serve the interests of the State. These authors are nevertheless referred to here as advocates of the State, because—whatever their motivations—they do provide justifications (convincing or otherwise) for reducing constraints on State power.³⁵

B. MANIFESTATIONS OF THE RADICAL STANCE

A common feature of all four categories of argumentation identified above is that they challenge the architecture of IHL, in one way or another seeking to subvert its rigid contours and render it more elastic and malleable.

The first of these categories groups together various lines of argumentation that reject IHL-based criticism of State practices on the grounds that such criticism uses normative rhetoric to mask what are in fact political and ideological considerations.

in a War Zone, THE JERUSALEM POST UP FRONT WEEKEND MAGAZINE, Apr. 15, 2005, at 34 is perhaps revealing:

As long as you claim you are working within international law and you come up with a reasonable argument as to why what you are doing is within the context of international law, you're fine. That's how it goes. This is a very cynical view of how the world works. So, even if you're being inventive, or even if you're being a bit radical, as long as you can explain it in that context, most countries will not say you're a war criminal.

³⁵ For a discussion on the possible motivations of academics defending State policies and practices, see José E. Alvarez, *The Closing of the American Mind*, in PROCEEDINGS OF THE 32D MEETING OF THE CANADIAN COUNCIL OF INTERNATIONAL LAW 74, 98 (2004) (suggesting that many leading American academics do so “simply because they want to have the ear of the prince”). For individual case studies, see Anat Matar, *Asa Kasher - How Is He Possible?* 6 MITAAM.1 (2006) [in Hebrew]; DERRICK O'KEEFE, MICHAEL IGNATIEFF: THE LESSER EVIL? (forthcoming 2010). For a more general account of intellectuals' role in the service of power see, e.g., Pierre Bourdieu, *The Corporatism of the Universal: The Role of Intellectuals in the Modern World*, 81 TELOS 99 (1989).

This is done not only by faulting those who criticize the State, who are accused of misrepresenting the law to promote an extraneous agenda,³⁶ but often, also by explicitly or implicitly faulting IHL itself. A typical example of such an assault, which can be linked to variants of the 'realist' school of thinking,³⁷ is to be found in the argument that international law, including IHL, is void of normative force.³⁸ On this reasoning "international humanitarian law" is a misnomer.³⁹ Lacking independent authority, IHL does not curb political power, but is instead a manifestation of such power misleadingly assuming the legitimizing guise of "law."⁴⁰ Alternatively, it is argued that IHL is a vague or primitive body of law that is particularly prone to biased manipulation in the service of influential actors.⁴¹ Interestingly, to some extent this alternative argument mirrors the critical observations that have been advanced by scholars affiliated with the political left. Proponents of critical legal theory, to say nothing of late and postmodern thinking more broadly, also challenge law's normative

³⁶ Alan Dershowitz has been particularly industrious in mounting such criticism against those who have accused Israel of unlawful conduct, publishing multiple newspaper articles as well as a number of books towards that end. See, e.g., ALAN M. DERSHOWITZ, *THE CASE FOR MORAL CLARITY: ISRAEL, HAMAS AND GAZA* (2009). Similar criticism is frequently voiced by organisations such as NGO Monitor and UN Watch which have been established specifically for the purpose of exposing alleged bias and misrepresentation of international law on the part of human rights NGOs and international organizations. See NGO MONITOR, <http://www.ngo-monitor.org> and UN WATCH, <http://www.unwatch.org>. Both of these organizations have themselves been accused of a political bias. See, e.g., Kathleen Peratis, *Diversions Strike on a Rights Group*, THE WASHINGTON POST, Aug. 30, 2006; Ian Williams, *Casting the First Stone*, THE GUARDIAN, Apr. 4, 2007.

³⁷ See, e.g., HANS J. MORGENTHAU AND KENNETH W. THOMPSON, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (6th ed., 1985).

³⁸ See, e.g., Eric Posner, *Do States Have a Moral Obligation to Obey International Law?* 55 STAN. L. REV. 1901 (2003).

³⁹ See, e.g., John R. Bolton, *Is There Really 'Law' in International Affairs?*, 10 TRANSNAT'L L. & CONTEMP. PROBS. 1 (2000).

⁴⁰ While describing how international law oscillates between apology and utopia, Martti Koskenniemi provides a compelling account of the view of international law as a mere apology for power (which he then complicates with a contrasting and yet complementary utopian view). See MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989). See also JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005) (contending that international law is simply a product of States pursuing their interests on the international stage) and compare with Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265 (2006).

⁴¹ Examples of this line of argumentation are cited and criticized in Orna Ben Naftali, *The Epistemology of the Closet of International Law and the Spirit of Law*, in DOES LAW MATTER: LAW, CULTURE AND SOCIETY (forthcoming, 2010) [in Hebrew]. Alan M. Dershowitz, *Double Standard Watch: The Phony War Crimes Accusation against Israel*, JPOST.COM, Jan. 21, 2009, http://cgis.jpost.com/Blogs/dershowitz/entry/the_phony_war_crimes_accusation (including reference to "that vaguest of notions called 'international law' or the 'law of war.'").

account, exposing the workings of power.⁴² Though, of course, the latter do so to challenge hegemony, “speaking truth to power,” while advocates of the State speak in a context in which it is not quite so easy to distinguish the meek from the mighty.

The second category refers to arguments that, while not necessarily denying that IHL has normative force, insist that actions taken during the course of armed conflict must be judged first and foremost on the basis of other, higher, normative principles such as those grounded in morality or religion. This position serves as a justification for State action when it is accompanied with the assertion that such action was mandated under a normative order which takes precedence over any conflicting rules of IHL.⁴³ Thus, it has been argued that when engaged in hostilities with armed groups which deliberately target civilians or systematically commit indiscriminate attacks and who pursue perfidious methods of warfare, a State cannot properly and effectively respond by acting within the framework of existing IHL. Instead, and in order to discharge its moral obligations towards its own population, the State must act in accordance with different rules that, among other things, shift risks from the State’s own forces to the civilian population associated with (and under the effective control of) the opposing belligerent. In the process, fundamental principles of IHL—such as the principle of distinction and proportionality and the duty to take precautions in attack—are thoroughly redefined.⁴⁴

⁴² Indeed, in the article that first used the term “New Stream” to describe the approach which translated the techniques of the critical legal studies movement onto the international plane, one of the originators and most influential proponents of that approach already observed that his own position “often seems to fade quite easily into neo-conservatism.” See David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT’L L.J. 1, 8 (1988).

⁴³ Of course, one can maintain that IHL is not relevant to a moral assessment of actions taken during the course of armed conflict and still be critical of the State if its actions are judged to have been immoral. See David Enoch, *Mahshavot al Milhemet Aza*, A2 MISHPATIM AL ATAR 2-3 (April 2009) [in Hebrew], <http://law.huji.ac.il/upload/mishpatimonline01.pdf>.

⁴⁴ See Asa Kasher & Amos Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, 4 J. MIL. ETHICS 3 (2005). See also Asa Kasher, *Irregular Wars: A Philosophical Perspective on International Law and Universal Jurisdiction*, 47 JUSTICE 22 (2010); Asa Kasher, *The Principle of Distinction*, 6 J. MIL. ETHICS 152 (2007). Kasher and Yadlin’s proposed new doctrine has generated considerable philosophical and legal debate, much of which revolved around the question of its application to Israel’s conduct during the December 2008 and January 2009 armed conflict in Gaza. See, e.g., Avishai Margalit & Micahel Walzer, *Israel: Civilians & Combatants*, THE NEW YORK REVIEW OF BOOKS, May 14, 2009 at 21; Asa Kasher & Amos Yadlin, *‘Israel & the Rules of War’: An Exchange*, N.Y. REV. BOOKS, June 11, 2009 at 77; Asa Kasher, *Operation Cast Lead and the Ethics of Just War: Was Israel’s Conduct in its Campaign against Hamas Morally Justified?*, 37 AZURE 43 (2009), <http://www.azure.org.il/download/magazine/az37kasher.pdf>; Roi Konfino & Mordechai Kremnitzer, *Legitimiut HaPgi’ah be-Hafim mi-Pesha ba-Milhama ha-Acharona be-Aza – He’arah al Qdimut Musarit, Sikun ve-“Ruach Tzahal,”* ISRAEL DEMOCRACY INSTITUTE OP-ED (July 26, 2009) [in Hebrew], <http://www.idi.org.il/BreakingNews/Pages/128.aspx>.

The assertion that IHL is somehow inapt is also at the core of the third category identified above. The focus in this case however is not on a supposed contradiction with an external normative standard, but rather on the law's internal lacunae. It is claimed that IHL does not provide appropriate guidance in relation to the particular confrontation in which the State is engaged and, consequentially, that (at least some of) its provisions do not place any relevant constraints on the State's actions.⁴⁵ In this vein, senior public officials from States engaged in armed conflicts against organized armed groups have stated that IHL does not adequately regulate such conflicts suggesting, variously, that it is obsolete or that its rules should be changed or extended to meet contemporary challenges.⁴⁶ A similar position has been advocated by many commentators.⁴⁷ Some have claimed that since IHL does not apply to "non-traditional" armed conflicts States are free to advance creative interpretations of the law in order to adapt it to the novel, unregulated, conflicts in which they are engaged. Alternatively, it has been argued that States may add new principles, rules and distinctions to existing IHL.⁴⁸ Thus, for example, it has been suggested that the traditional dichotomy between "combatants" and "civilians" should be supplemented with a new intermediate category of "unlawful combatants,"⁴⁹ and that a new legal

⁴⁵ See, e.g., Alen Dershowitz, *The Laws of War weren't Written for This War*, WALL ST. J. EUR., Feb. 12, 2004 at A10.

⁴⁶ A January 25, 2002 memorandum signed by then White House Counsel Alberto Gonzales concerning the armed conflict in Afghanistan referred to the "war on terrorism" as a "new paradigm" that "renders obsolete Geneva's strict limitations on questioning of enemy prisoners" In a speech to the Royal United Services Institute on April 3, 2006 then UK Defence Secretary John Reid said that sweeping changes to IHL were needed in order to counter the threat of "barbaric global terrorism." In an Israeli Cabinet meeting held on October 20, 2009, Israeli Prime Minister Benjamin Netanyahu, with the support of his Minister of Defense, Ehud Barak, instructed various officials in the government ministries to examine the possibility of advancing an international initiative to "change the laws of war due to the spread of global terror."

⁴⁷ For a selection of commentaries on this theme, see NEW BATTLEFIELDS/OLD LAWS: CRITICAL DEBATES FROM THE HAGUE CONVENTION TO ASYMMETRIC WARFARE (William C. Banks ed., forthcoming 2010). This publication is the product of an ongoing research project called "New Battlefields, Old Laws," organized jointly by the Institute for National Security and Counterterrorism (INSCT) at Syracuse University and the Institute for Counter Terrorism (ICT) at the Interdisciplinary Center (IDC) in Herzliya. See http://www.insct.syr.edu/Projects/new_battlefields_old_laws/overview.htm.

⁴⁸ For a discussion on both these alternatives, see, e.g., Asa Kasher, *A Moral Evaluation of the Gaza War—Operation Cast Lead*, 9(18) JERUSALEM CENTER FOR PUBLIC AFFAIRS BRIEF (Feb. 4, 2010), <http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DBID=1&TMID=111&LNGID=1&FID=378&PID=0&IID=3345>.

⁴⁹ See Memorandum from President George W. Bush to Vice President et al., *Humane Treatment of Al-Qaeda and Taliban Detainees* (Feb. 7, 2002), available at http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf. See also John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA J. INT'L L. 207 (2003). Contra Mark David "Max" Maxwell & Sean M. Watts, 'Unlawful

regime should be developed to regulate a third type of armed conflict alongside the recognized categories of international and non-international armed conflicts.⁵⁰

A related argument, which can also be linked to the second category discussed above, deliberately conflates considerations of *jus ad bellum* with those of *jus in bello* to suggest that IHL is not binding, or not fully binding, on a party waging a “just war.”⁵¹ Without delving here into the reasons that can and have been put forward for rejecting this argument, it is perhaps worth noting that others who question the traditional distinction between *jus ad bellum* and *jus in bello* have done so not to justify reduced constraints on the belligerent who is acting with just cause, but rather to assert that the unjust party would not be justified in harming its adversary even in circumstances in which IHL permits it to do so.⁵²

In professing allegiance to IHL, while at the same time maintaining that it does not apply in the exceptional circumstances at hand, the arguments falling within the third category identified here pursue a strategy of creating what Giorgio Agamben, following Carl Schmitt, has called a “state of exception.”⁵³ Though not a point that can be developed within the confines of this Article, it is nevertheless apposite to note that Agamben and others have argued that this strategy—which State power pursues to relieve itself from legal constraints—has the potential to transform democracies into totalitarian regimes.⁵⁴

* * *

Its detractors’ charges of inadequacy notwithstanding, IHL has deliberately been designed to allow belligerents considerable leeway to respond appropriately to the

Enemy Combatant’: Status, Theory of Culpability, or Neither?, 5 J. INT’L CRIM. JUST. 19 (2007); Gabor Rona, *Enemy Combatants in the “War on Terror”? A Case Study of How Myopic Lawyering Makes Bad Law*, 30 ABA NAT’L SEC. L. REP. 1 (2008); Jelena Pejic, *Unlawful Enemy Combatants: Interpretations and Consequences*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 338 (Michael Schmitt & Jelena Pejic eds., 2007).

⁵⁰ See Roy S. Schondorf, *Extra-State Armed Conflicts: Is There a Need For a New Legal Regime?*, 37 N.Y.U. J. INT’L L. & POL. 1 (2004).

⁵¹ See Richard J. Arneson, *Just Warfare Theory and Noncombatant Immunity*, 39 CORNELL INT’L L.J. 663 (2006). For a critique of this view, see Ruti Teitel, *The Wages of Just War* 39 CORNELL INT’L L.J. 689 (2006) and Burke Hendrix, *Defending Non-Combatants: A Reply to Richard Arneson*, 39 CORNELL INT’L L.J. 705 (2006).

⁵² See JEFF McMAHAN, *KILLING IN WAR* (2009).

⁵³ See AGAMBEN, *supra* note 18.

⁵⁴ *Id.* at 2-3. See also JEAN-CLAUDE PAYE, *GLOBAL WAR ON LIBERTY* (James H. Membrez trans., Telos Press, 2007).

exigencies of battle. This is achieved by the inclusion of many broad standards, using open ended terms like “proportionality” and “military necessity,” that provide a framework for judgment that can be exercised flexibly.⁵⁵ Where it employs standards, as opposed to black and white rules, the law creates a zone of indeterminacy, a grey area in which different courses of action are tolerated.⁵⁶ While this zone of indeterminacy undoubtedly allows for diverging views as to the legality of certain actions,⁵⁷ it must be acknowledged that by any reasonable reading IHL does contain some provisions which clearly delineate what may and may not be done. This is so because, alongside standards, the law also contains precise rules absolutely prohibiting certain conduct.⁵⁸ Recognizing that there are boundaries beyond which the law does not leave room for discretion, Daniel Reisner, former Head of the IDF’s International Law Department, is reported to have said the following:

We defended policy that is on the edge: the “neighbour procedure”, house demolitions, deportation, targeted assassination; we defended all the magic formulas for dealing with terrorism... The army says, “Here is a magic formula, is it within the bounds of what is possible?” To which I will reply, I am ready to try to defend it, but I am not sure I will succeed. If it’s white I will allow it, if it’s black I will prohibit it, but in cases of grey I will be part of the dilemma: I do not stop at gray.⁵⁹

As is shown in Part II below, LEA, affiliated with the fourth of the aforementioned categories, offers its own brand of magic. If it were to be accepted, belligerents could cross “the bounds of what is possible” and need not stop even at black.

⁵⁵ Standards allow for judgment to be exercised not only by the parties to the conflict, but also by third parties reviewing their actions, such as courts and humanitarian actors. See KENNEDY, *supra* note 10, at 87-89, 103-06, 115-17. See also Amichai Cohen, *Rules and Standard in the Application of International Humanitarian Law*, 41 ISR. L. REV. 41 (2008), in particular, 57.

⁵⁶ A certain measure of discretion is required even in the application of clear-cut rules to concrete cases. This point is illustrated in Martti Koskeniemi, *Occupied Zone — ‘A Zone of Reasonableness’?* 41 ISR. L. REV. 13 (2008). Still, the application of general principles and broad standards obviously engenders a greater degree of uncertainty. See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1689-90 (1976).

⁵⁷ Such disagreements regularly arise in relation to the interpretation of “proportionality” and “necessity.” See, e.g., JUDITH GARDAM, *NECESSITY AND PROPORTIONALITY IN INTERNATIONAL LAW* ch. 4 (2004); W.J. Fenrick, *Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia*, 12 EUR. J. INT’L L. 489, 499 (2001).

⁵⁸ See, e.g., Blum, *supra* note 8, at 9; Cohen, *supra* note 55, at 48-49.

⁵⁹ Feldman, *supra* note 24, at 15.

II. "LESSER EVIL" VIOLATIONS OF IHL

This part of the Article is comprised of five subsections. Section A describes LEA focusing on Blum's refined and comprehensive articulation of the argument. The remaining four sections expose various structural failures in LEA and explain why it ought to be rejected.

A. OUTLINE OF LEA

While the arguments that are reviewed in Part I dismiss IHL as irrelevant or stress its inadequacies, LEA embraces it. However, this is a strangling embrace which has the propensity to loosen IHL's hold upon States and their agents.

The core purpose of IHL is commonly understood to be that of limiting human suffering resulting from armed conflict.⁶⁰ Advocates of LEA do not seek to challenge this noble goal, but instead purport to advance it. They maintain that allegiance to IHL's humanitarian drive mandates recognition of a lesser evil justification that would allow belligerents to violate IHL with impunity when the actions they take in doing so are expected to cause less (or significantly less) suffering than any lawful alternative course of action. Unlike arguments which give extra-legal norms precedence over IHL (discussed in Part I(B) above), LEA works within the law. Its concern is not with the question of when agents are morally required or permitted to breach IHL rules, but rather with the proposition that IHL itself ought to recognize a justification for doing so.

IHL currently recognises no such lesser-evil justification for breaking its rules. Blum's article takes issue with this "absolutist stance" arguing that it undermines IHL's humanitarian purpose and that IHL would do well to abandon its absolutism and incorporate a "humanitarian necessity justification" for violating its rules. As Blum puts it:

[I]f IHL is designed to minimize humanitarian suffering within the constraints of war, then it is not at all clear why measures intended to further minimize suffering—as opposed to measures intended to promote the effectiveness of the war at the cost of more suffering—cannot serve as a justification for violation of IHL rules. The puzzle, in other words, is not why IHL rejects military necessity but why

⁶⁰ See Blum, *supra* note 8, at 7. Sections C and E below posit that this is only a partial portrayal of IHL's humanitarian purpose.

it rejects *humanitarian necessity*—a choice of a lesser evil—as a justification for breaking the laws of war.⁶¹

Blum identifies three possible explanations for this “puzzle.”⁶² The first is based on deontological moral reasoning that would reject a humanitarian necessity justification on the grounds that it would permit the commission of inherently repugnant acts in violation of a Kantian moral imperative that deems such acts absolutely impermissible. The second employs utilitarian analysis using traditional rule-consequentialist arguments, including concerns about uncertainty, slippery slopes, and spill-over effects, to conclude that the negative consequences of incorporating a humanitarian necessity justification would outweigh the benefits. The third focuses on institutional considerations, including the process of lawmaking, adjudication, and enforcement of IHL rules to conclude that the introduction of an exception to IHL’s absolute rules might lead to the gradual erosion of the entire project of IHL. Blum argues that none of these accounts can convincingly explain IHL’s wholesale exclusion of humanitarian necessity as a justification for violating its first-order rules.⁶³

In order to demonstrate the possible implications of recognizing or excluding a humanitarian necessity justification, Blum describes three real cases involving a claim that a State’s armed forces violated IHL in order to avoid greater human suffering: the “Neighbor Procedure,” the paradigmatic case of interrogational torture, and the atomic bombings of Hiroshima and Nagasaki.

As noted, the Israeli HCJ ruled that the “Neighbor Procedure” was unlawful because it violated IHL rules which explicitly prohibit the Occupying Power from using Protected Persons in security operations. Blum points to humanitarian considerations that arguably justify allowing the continued implementation of the procedure even if it is indeed unlawful. In this context, she notes that the procedure’s stated goal was to reduce potential casualties, both among Israeli soldiers and local civilians, during the implementation of arrest operation in occupied Palestinian territory;⁶⁴ and that there is some evidence to suggest—albeit speculatively and inconclusively—that the procedure was in fact effective in reducing civilian casualties.⁶⁵

⁶¹ *Id.* at 3.

⁶² These are explored *id.* at 39-53.

⁶³ *Id.* at 5.

⁶⁴ See quotation from Israeli Defense Forces, Operational Directive, Early Warning (Nov. 26, 2002) quoted in *Adalah v. GOC Central Command*, *supra* note 8, para. 5.

⁶⁵ See Blum, *supra* note 8, at 19, referring to findings of the Israeli human rights NGO B’Tselem about Palestinian casualties in arrest operations conducted after the “Neighbor Procedure” was

In relation to the second case-study she examines, Blum notes that international law contains an absolute prohibition on torture and that this prohibition is considered *jus cogens*—a peremptory norm that cannot be overridden or derogated from by any other norm of international law. Blum nevertheless maintains that “if we were willing to examine [cases of torture] through a utilitarian prism, assessing their practical feasibility, expected value, direct and indirect costs, and foreseen or unforeseen risk,” then “it is not impossible to conceive of a rare hypothetical where torture would be justifiable provided its humanitarian benefit could be proved.”⁶⁶ Blum stresses that, even while theoretically possible, it would be difficult, if not impossible, to actually prove such benefit.⁶⁷

Blum uses the atomic bombings of Hiroshima and Nagasaki “as an extreme metonymy for all deliberate infliction of civilian casualties in the effort to spare a greater number of casualties.”⁶⁸ The bombings constituted direct, or at the very least indiscriminate, attacks on civilians and civilian objects. Such acts are clearly prohibited under present day IHL and were most probably also unlawful at the time.⁶⁹ Despite this and despite the fact that these bombings caused hundreds of thousands of casualties the vast majority of whom were civilians, there have been numerous attempts to justify the bombings on humanitarian grounds. Blum articulates the lesser-evil justification emerging from these sources as follows:

[M]ore Japanese civilians would have lost their lives in an American land invasion into Japan—a lawful course of action in the midst of an armed conflict (and provided other laws of war were also observed)—than in the nuclear bombings. If this is so, then breaking the laws of war—that is, intentionally targeting civilians—was

abandoned. Blum acknowledges that it is impossible to assess how many of these casualties might have been avoided had the “Neighbor Procedure” been implemented. The evidence she refers to is thus, highly speculative.

⁶⁶ *Id.* at 23–24.

⁶⁷ This is because it is unlikely that it would be possible to prove that torture was resorted to in order to alleviate the suffering of the enemy or that it was the least harmful means available, two of the requirements that Blum includes in her blueprint of a humanitarian necessity justification. *See id.* at 58 & 66.

⁶⁸ *Id.* at 5.

⁶⁹ *See* Additional Protocol Relating to the Protection of Victims of International Armed Conflicts, arts. 51(2), 51(4) & 52, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. These provisions are considered reflective of customary international law and had arguably already attained customary status by the time of the atomic bombings in August 1945. *See* JEAN-MARIE HENCKAERTS & LOUISE DOSWELD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME 1: RULES chs. 1–3 (2005).

likely to result in fewer Japanese civilian casualties than following the laws of war; and it should therefore be upheld as lawful under a humanitarian necessity justification.⁷⁰

It should, of course, be added that this argument would work only if it is presumed that there was no alternative course of action that would have been both lawful and less harmful than the atomic bombings.

Relying on these three case studies and building on a comparison to the necessity defense in domestic criminal law, Blum develops a “blueprint for defining a humanitarian justification for *prima facie* violations of the laws of war.” She acknowledges the challenges of tampering with IHL in such manner and states that her aim in doing so is to “find a place for a humanitarian necessity justification that would allow parties in conflict to engage in welfare-increasing actions without collapsing the entire project of IHL.”⁷¹ Accordingly, Blum designs a blueprint definition which, she submits, makes it possible to distinguish the “right” case from all the wrong ones. The definition she proposes is as follows:

A person shall not be criminally responsible if, at the time of that person’s conduct: . . . The conduct which is alleged to constitute a crime was designed to minimize harm to individuals other than the defendant’s compatriots, the person could reasonably expect that his action would be effective as the direct cause of minimizing the harm, and there were no less harmful alternatives under the circumstances to produce a similar humanitarian outcome.⁷²

Some aspects of Blum’s blueprint definition merit attention.

The first point that must be stressed is that Blum is proposing to remedy a (supposed) deficiency in IHL, not by amending IHL itself, but rather by obtruding on another area of international law. Her blueprint justification amounts to a defense against liability under international criminal law. However, the addition of a new criminal defense is an inadequate way of overcoming the fault which Blum attributes to IHL. After all, States’ are obliged to abide by IHL for reasons completely independent of the desire that their agents avoid the risk of individual criminal liability. It is one thing to recognize the possibility of exculpating individuals who offer a lesser-evil justification for their actions. It is quite another to suggest that it would be acceptable for a State to establish and regularly act upon a procedure or internal rule which entails breach of IHL simply because its agents could not be convicted of war crimes for their part in

⁷⁰ Blum, *supra* note 8, at 28.

⁷¹ *Id.* at 5-6.

⁷² *Id.* at 67.

such practices. Accordingly, if it is accepted that the “Neighbor Procedure” violates IHL, it is difficult to see how Blum’s LEA might justify implementing this procedure. Insisting on such an argument appears to betray the view that IHL is binding only where it has teeth, but if IHL is law it should be adhered to even when international criminal law does not reinforce it with a bite.

A second point to highlight is that under the proposed definition the humanitarian necessity justification would not apply in relation to violations committed *solely* for the benefit of the actor’s fellow soldiers or civilians. Blum reasons that this stipulation is necessary in order to make the humanitarian necessity justification compatible with the project of IHL that is concerned primarily with the manner in which belligerents treat those whom they would otherwise have no interest to protect and whom they may indeed be motivated to harm. Consequently, Blum maintains that the paradigmatic case of interrogational torture, most commonly used to avert an attack on one’s own people, would be difficult to justify on the basis of a humanitarian necessity. On this reasoning it would, however, be possible to recognize a humanitarian necessity justification in cases in which it could be shown that the act of torture made it possible to avoid an alternative course of action that would have caused a greater degree of harm to individuals who are not compatriots of the torturer. Moreover, this would be the case even if torture was conducted for non-interrogational purposes and irrespective of any culpability on the part of the person subjected to torture. To illustrate this point Blum gives the hypothetical example of torturing Saddam Hussein’s two sons as a means of inducing Hussein to withdraw Iraqi troops from Kuwait in the fall of 1990.⁷³ However, it should be noted that for the purpose of Blum’s analysis the culpability of Hussein’s sons is an irrelevant factor and a humanitarian necessity justification might be applied even if the hypothetical were changed so that an innocent individual (sufficiently dear to Hussein) was the one subjected to torture.

In order to “protect IHL from unjustified transgressions and to genuinely realize its goals, as well as emphasize its humanitarian message,” the definition requires that the breach of IHL be committed with *intention* to minimize harm.⁷⁴ To satisfy this condition it would be necessary to produce evidence that would make it possible to ascertain the actor’s intentions. Since this may well be difficult to do, it is important to note that in Blum’s model the *burden of proof* for this, and all other conditions for the

⁷³ *Id.* at 58-59.

⁷⁴ *Id.* at 63.

application of the humanitarian necessity justification, is borne by the actor seeking to invoke the justification.⁷⁵

The definition further requires that there be a *direct causal connection* between the breach of law and the minimizing of harm. Accordingly, a breach of IHL the direct purpose of which is something other than minimizing harm would not fall under the humanitarian necessity justification even if it had a secondary effect of reducing suffering. Thus, for example, the justification would not apply to a violation of IHL committed to secure military victory, even if victory would bring an end to hostilities and a resulting reduction in human suffering. This condition is again deduced from the internal logic of IHL that does not allow for unbounded cruelty in the name of hastening the end of hostilities. As Blum herself acknowledges, the “direct casual connection” formula by no means guarantees that unbounded cruelty will in fact be avoided, since actors may well be able to artificially point to such a connection in order to free themselves to pursue unlawful acts with impunity.⁷⁶

The stipulation that a breach of IHL could fall under the humanitarian necessity justification only if there was no less harmful alternative to produce a similar outcome is intended as a further means to ensure that the lesser-evil justification will not be used to mask unnecessary atrocities. Blum notes that in light of this condition, whatever one’s judgment of the atomic bombing of Hiroshima, the bombing of Nagasaki—just three days after Hiroshima and without testing alternative means of securing Japanese surrender—could not be justified under a humanitarian necessity.⁷⁷ Blum does not offer clear guidelines as to the types of alternatives that need be considered in order to meet this condition. In particular, and as will be elaborated below, she does not address the possibility that an actor faced with a choice between a course of action that violates IHL and an alternative that is lawful but which would produce more human suffering might elect to do neither and assume the resulting risks.

* * *

Blum is a careful writer whose argument contains many qualifications. Her article identifies and offers rebuttals to possible objections to her argument and when facts are unclear or other considerations are ambiguous she acknowledges that open questions remain. However, despite her vigilance, Blum’s LEA raises deep concerns. These are addressed in the following sections.

⁷⁵ *Id.* at 67.

⁷⁶ *Id.* at 65.

⁷⁷ *Id.* at 66-67.

B. FROM LAW TO ETHICS

LEA follows a utilitarian sensibility that holds that the right course of action is that which maximizes good and minimizes evil (for LEA's purposes this is understood to mean maximising humanitarian protections and minimizing human suffering in war), and that if faced with the possibility of preventing a great evil by producing a lesser one, one should choose the lesser evil.⁷⁸ Much of IHL has been constructed in light of such thinking the imprint of which is evident in many of its provisions.⁷⁹ What LEA proposes, however, is that utilitarian considerations should inform the law even where they have not been incorporated into it. As a consequence LEA, even in Blum's refined version of it, introduces a question mark where there would otherwise be an exclamation mark. If it were accepted, torturing, intentionally killing civilians, using civilians as human shields, and just about any other action that IHL deems absolutely unlawful would no longer be unequivocally prohibited. Instead, belligerent parties would be invited to conduct complicated calculations weighing projected evils against each other possibly to conclude that actions prohibited by law may nevertheless be pursued.

But if such evaluations serve only to lessen human suffering, what grounds are there to object to them?

Three interrelated general objections might be thought of:

First, by replacing clear guidelines with a zone of discretion, LEA reduces IHL's determinacy and objectivity thereby eroding its capacity to direct human conduct.

Second, LEA invites calculations that are difficult to do and easy to manipulate and so there is good reason to fear that it would lead to violations of IHL that do not actually produce the lesser evil and which are therefore unjustifiable even on utilitarian grounds.

Third, IHL incorporates deontological moral intuitions alongside utilitarian ones. LEA entrenches the former and expands the latter thereby destabilizing the law's internal architecture and undermining its most basic ends.

Each of these objections is expanded upon in turn in the following sections.

C. GENERAL NORMS APPLIED TO THE COMPLEX REALITY OF BATTLE

Legal norms do not mirror all of the complexities of real life. Since they are composed before the fact and are general in nature, they cannot give due account to the subtleties

⁷⁸ See, e.g., Nagel (1972), *supra* note 1, at 125. See also *id.* at 44.

⁷⁹ See, e.g., Anthony E. Hartle, *Humanitarianism and the Laws of War*, 61 PHIL. 109 (1986).

and nuances of every particular incident to which they are applied.⁸⁰ The conundrum of how to reconcile rules which necessarily have a general form with “the act of justice that must always concern singularity”⁸¹ is exacerbated when law seeks to regulate armed conflict. The battlefield, enveloped by the fog of war, is a particularly unpredictable environment where unforeseen events frequently unfold. In such an environment, rigid rules of law are likely to prove especially inapt.

On the other hand, it is precisely because they can be applied across diverse cases without requiring infinite re-evaluation, that legal norms—particularly when they take the form of binary rules—are able effectively to govern social conduct. In comparison to ethical evaluations and assessments of utility and necessity, which depend on subjective judgment and are likely to yield inconsistent outcomes, rules of law have the advantage of (relative) objectivity and determinacy.⁸² Because they provide decisive answers, instructing actors exactly how they should or should not behave, rules are also easier and swifter (“cheaper”) to implement than open standards.⁸³ In conflict situations, where life and death decisions are constantly called for and where erred judgment can be very costly, this is a decidedly valuable quality.

In assessing IHL’s response to these conflicting considerations, it is necessary to distinguish between IHL norms that limit the means and methods which warring parties can implement towards rival belligerents (sometimes labeled “Hague Law”) and between other IHL norms designed to protect individuals who are not or are no longer participating in hostile action (“Geneva Law”). Giving clear preference to the interest of determinacy, the former generally take the shape of bright line rules allowing little discretion.⁸⁴ The latter, on the other hand, are designed to include both rules, which form clear lines of absolute prohibition beyond calculations, and standards, which create zones of elastic indistinction where value judgement and calculation are called for. This division between rules and standards is not arbitrary.

⁸⁰ See, e.g., Kennedy, *supra* note 56, at 1689.

⁸¹ See Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority”* (Mary Quaintance trans.), 11 CARDOZO L. REV. 919, 949 (1990).

⁸² See, e.g., Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT’L L. 907, 915 (2005).

⁸³ See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L. J. 557, 569-70 (1992) as well as Cohen, *supra* note 55, at 43-44 (using law and economics thinking to illustrate that legal norms with a high level of specificity are cheaper to apply than norms whose application calls for value judgment and the consideration of diverse factors).

⁸⁴ In this these norms, largely codified in the Hague Conventions of 1899 and 1907, seem to reflect the positivist-formalist approach discussed in Part I(A) above, which dominated legal thinking at the time.

It is the result of the interplay between two foundational humanitarian principles.⁸⁵ The first of these principles, which exemplifies Kantian deontological ethics, insists that *individual persons deserve respect as such*. Accordingly, acts which violate human dignity, treating persons as a mere means rather than an end unto themselves, must be absolutely prohibited.⁸⁶ The second principle is consequentialist and follows utilitarian reasoning; it holds that *human suffering ought to be minimized*. While specific provisions of IHL can often be attributed to both these principles, there are also provisions that exemplify one or the other. Thus, for example, the first principle is given clear preference when IHL absolutely prohibits acts such as subjecting a person to torture or inhumane treatment;⁸⁷ intentionally directing attacks against civilians or civilian objects;⁸⁸ or the use of human shields.⁸⁹ The second principle is evident in those IHL standards which establish a framework within which belligerents are given discretion to select the course of action which, in their judgment, would deliver the best (meaning the least harmful) outcome all things considered.⁹⁰

LEA gives the second principle priority over the first and advocates that belligerent actors be permitted to exercise judgment even in relation to acts absolutely prohibited under the law. To put this point differently, LEA is built upon two premises:

P1: In applying IHL the law's underlying purpose should be given precedence over conflicting formal rules

P2: IHL's underlying purpose is to minimize human suffering

The contention here is that accepting the conclusion arising from these premises would render IHL less objective and determinate than it is at present and would therefore undermine its capacity to regulate situations of armed conflict effectively.

⁸⁵ See, e.g., Hartle, *supra* note 79, at 109; Blum *supra* note 8, at 68. See also W. Michael Reisman, Editorial Note, *Holding the Center of the Law of Armed Conflict*, 100 AM. J. INT'L L. 852 (2006) (arguing that *jus in bello* is composed of two parts – "Part A" consists of principles allowing belligerents a significant margin of appreciation while "Part B" contains a set of absolute prohibitions).

⁸⁶ For explication of the links between deontological thought and IHL rules see Th. A. van Baarda, *Moral Ambiguities Underlying the Laws of Armed Conflict: A Perspective From Military Ethics*, 11 Y.B. INT'L HUM. L. 3, 12-17 (2008).

⁸⁷ See, e.g., Geneva Convention IV, *supra* note 4, arts. 32 & 147.

⁸⁸ See Additional Protocol I, *supra* note 69, arts. 48, 51(2), 52 & 85(3)(a).

⁸⁹ See, e.g., Geneva Convention IV, *supra* note 4, art. 28 and Additional Protocol I, *supra* note 69, article 51(7).

⁹⁰ This is the case in relation to many provisions of IHL which call for the weighing and balancing of competing military and humanitarian considerations. Perhaps the most noticeable amongst the many examples to be found in the law is the provision concerning proportionality in attack codified in Articles 51(5)(b) and 57(2)(a)(iii) of Additional Protocol I (*supra* note 69).

Section D below reinforces this contention and demonstrates that accepting P1 would lead to undesirable outcomes and that LEA should therefore be rejected even by those who accept P2 and embrace utilitarian thinking. Section E takes issue with P2 arguing that LEA's dismissal of IHL's deontological foundations would radically disrupt the law's designs.

D. ABUSE AND MISUSE OF "LESSER EVIL" REASONING

IHL is undeniably, inextricably and inherently linked to the pursuit of the lesser evil. A separate body of law, *jus ad bellum*, is tasked with preventing the evil of war. IHL on the other hand only comes into play within that evil, accepting it as a fact and seeking to limit its effects and preserve certain fundamental values. When peace eludes us and "good" is unattainable, humanitarian law and humanitarian actors strive to at least lessen evil. But even while it is pursued with good intentions, the lesser evil is nonetheless evil. As such it must be avoided except when really necessary. Accordingly, lesser evil reasoning ought to be regarded with much caution. This is particularly true in the case of LEA which advances humanitarian considerations not as a constraint on violence, but rather as a justification for it.

To avoid unnecessary evil it is important to understand how lesser evil arguments can mislead. These arguments are rhetorical devices. They do not present real dilemmas, but rather pose rhetorical questions. When presented with such a question, the challenge is not to find the self-evident answer but instead, to look critically at the question itself.⁹¹

Two points in particular merit attention:

First, it must be noted that even while the lesser evil "dilemma" is presented as though emerging from an imagined neutral and impartial perspective, in fact it is posed by a particular agent with a particular set of interests. A critical analysis must ask—who is that person? What are those interests?

Second, the formulation of the "dilemma," suggesting a choice between an evil and a lesser-evil, rests on assumptions that should be exposed and questioned - are these really the only alternatives, or has something been left out of the equation? Is it really possible to calculate evils and determine which is lesser or greater? How accurate are such calculations and how much faith should we place in them? What

⁹¹ For a rigorous exposition of the lesser evil idiom, see EYAL WEIZMAN, LESSER EVILS: SCENES OF HUMANITARIAN VIOLENCE FROM ARENDT TO GAZA (forthcoming, 2011). See also Eyal Weizman, 665/*The Lesser Evil*, ROUNDTABLE: RESEARCH ARCHITECTURE (Aug. 7, 2008), <http://roundtable.kein.org/node/802>.

other costs and benefits ought to be taken into account? Can they be calculated and balanced against each other? Have they been?

When LEA is subjected to such critical analysis, it does not fare well.

1. ABUSE

Under LEA it is the belligerent parties who are to be entrusted with the task of posing (and answering) the lesser evil question. In Blum's model, we are expected to have faith that in defining the evils between which they must choose and in making their choice warring parties will genuinely be guided by the desire to minimize harm to individuals other than their compatriots, including those affiliated with the opposing belligerent. The obvious difficulties with this proposal do not escape Blum. She acknowledges the concern that allowing the humanitarian necessity justification she proposes as a rule "might open the floodgates to inappropriate actions" and that "[I]f left to their own devices, actors will interpret every exception in the broadest possible manner, quickly leading to abuse."⁹² Blum further accepts that this "slippery slope" problem is particularly pronounced in the context of armed conflict:

In war, inflicting harm on the enemy by definition increases the benefit to the actor-state. Given this assumed *mens rea*, I acknowledge that the risk of exploitation in the world of war may be higher than in the domestic sphere, and that it is possible that states would try to interpret or apply a necessity justification in ways that would tend to promote their own welfare at the expense of their enemies.⁹³

Blum's efforts to dismiss these concerns are not reassuring.

The question that arises from concerns about abuse is whether belligerents *ought* to be entrusted with the discretion to determine whether there is a lesser evil justification to violate IHL. Rather than grappling with this question Blum attempts to push it aside. She postulates that since agents are already entrusted with discretion in implementing IHL standards⁹⁴ and the necessity defense in domestic criminal law,⁹⁵ there is no reason to question whether belligerents ought to be trusted to implement the lesser evil calculations she advocates.

Logically this move from factual observation to normative conclusion is not valid—a question about what ought to be cannot be brushed aside simply by reference to what

⁹² Blum, *supra* note 8, at 47.

⁹³ *Id.* at 48.

⁹⁴ *Id.*

⁹⁵ *Id.*

is.⁹⁶ Giving her the benefit of the doubt, Blum may be assuming (though she does not say so) that the fact that discretion *is* permitted in other areas of law indicates that it has already duly been determined that there is no reason why it *ought* not to be. Blum does not offer any arguments in support of such an assumption, but even if it were accepted and the is-ought problem were thereby avoided; the inference Blum makes from IHL standards and from domestic criminal law would remain unconvincing.

The inference from IHL standards fails because it reflects backward logic. The humanitarian necessity justification Blum proposes would add to the scope of discretion already established by IHL standards. Even if the dangers of the slippery slope introduced by standards are deemed acceptable, it cannot logically be deduced that the addition of still more dangers would be acceptable as well. If a very slippery slope were tolerated, one could deduce from that, that a less slippery slope ought to be tolerated as well—but this logic does not work the other way around!

The inference from domestic criminal law fails because there are relevant differences between the two cases. As aforementioned, Blum herself recognizes that there is greater risk of exploitation in the context of armed conflict than in the domestic sphere. Moreover, and as Blum again recognizes, the domestic paradigm of necessity offers a much narrower exemption from criminal culpability than the proposed lesser-evil justification for violating IHL.⁹⁷ While the former can be used to justify an individual act in violation of the law, the latter provides justification for establishing and adhering to a rule (say in the form of a policy, or a procedure) which entails a violation of the law.⁹⁸ To deduce that a broad exemption ought to be tolerated because a narrow one is, is again an example of upside down logic.

In addition to the above non sequiturs, Blum claims that the danger of abuse “may be mitigated by designing the justification in a way that would substantially weaken [the] inherent bias of the state.”⁹⁹ Blum attempts to substantiate this claim—which she confesses she cannot prove empirically—in the design of her blueprint lesser evil justification. However, this attempt is not convincing.

To illustrate, a belligerent might claim to be acting with the *intention* to minimize harm to *individuals other than his compatriots* even when in fact acting out of self-interest. The bombing of Hiroshima, for example, might have been presented as being motivated by a desire to avoid an alternative that would have been more

⁹⁶ See DAVID HUME, A TREATISE OF HUMAN NATURE Book III, Part I, Sect. 1 (1740).

⁹⁷ Blum, *supra* note 8, at 32.

⁹⁸ *Id.* at 45.

⁹⁹ *Id.* at 48.

harmful to Japanese civilians, even if it was in fact motivated—as commentators have suggested¹⁰⁰—only by the desire to avoid American casualties. As already noted above,¹⁰¹ Blum herself acknowledges that the requirement that there be a *direct causal connection* between the action taken and the minimizing of harm is open to abuse. As demonstrated below,¹⁰² the requirement that the justification be invoked only when there is *no less harmful alternative* is also not an effective guard against abuse, since some alternatives will very probably be ignored.

Placing the *burden of proof* on those wishing to invoke the justification would also not suffice to prevent abuse. This is partly because even in the unlikely event of such a case actually being brought before a court, the party invoking the defense will invariably have an advantage of knowledge and expertise (e.g., in relation to its intentions or the alternative outcomes that were foreseen) that would quite easily enable it to satisfy the requisite burden of proof and create reasonable doubt as to its guilt. More significantly, States and their agents are far more likely to be concerned about how their actions will be judged in the court of public opinion—where the burden of proof requirement would be meaningless—than about criminal liability before a court of law. After all, actors implementing State policy hardly need fear prosecution in their State’s domestic courts.¹⁰³ Moreover, agents of the States which are most deeply engulfed in “lawfare” and which are most concerned with rebuffing IHL based criticism and defending the legitimacy of their actions, face little threat of being brought to justice before an international tribunal or the International Criminal Court.¹⁰⁴ Universal jurisdiction, exercised parsimoniously and riddled with difficulties at the best of times,¹⁰⁵ is also unlikely to be resorted to particularly in cases in which States and their agents are able to present reasonable justifications for their actions. Although phrased as a criminal defense, if accepted, Blum’s humanitarian necessity justification will no doubt be employed as part of the struggle for legitimacy.

¹⁰⁰ See *id.* at 29 citing J. Samuel Walker, *The Decision to Use the Bomb: A Historiographical Update*, in *HIROSHIMA IN HISTORY AND MEMORY* 11, 23 (Michael J. Hogan ed., 1996).

¹⁰¹ See *supra* p. 435.

¹⁰² See *infra* pp. 443–46.

¹⁰³ For a detailed analysis demonstrating domestic courts’ limited capacity to exercise effective judicial review over security related state practice, see DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* (2002).

¹⁰⁴ Nationals of the USA and Israel, for example, are not subject to the jurisdiction of such courts.

¹⁰⁵ See, e.g., Henry J. Steiner, *Three Cheers for Universal Jurisdiction—Or Is It Only Two?*, 5 *THEORETICAL INQ. L.* 199 (2004); Katherine Gallagher, *Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-Level United States Officials Accountable for Torture*, 7 *J. INT’L CRIM. JUST.* 1087 (2009).

Belligerent parties would then be able to violate clear cut rules of IHL without necessarily compromising the legitimacy of their campaign. Rather than having to make spurious arguments to deny that they had violated IHL, they could instead claim that their actions were in fact “humanitarian.” In the court of public opinion—the only instance that they really need fear—belligerents voicing such a claim may well avoid the label of “criminal” even without producing evidence that would satisfy a court of law.

2. MISUSE

Even if concerns about *disingenuous* assessment of the lesser evil justification could be set aside, there are grave reasons for concern that *mistaken* assessment may lead to breaches of IHL which do not in fact produce the lesser evil. Mistaken assessment may result from a failure to place all relevant factors into the lesser evil equation, from miscalculation of the factors put into the equation or from a combination of both these errors.

a. CONSIDERATIONS LEFT OUT OF THE EQUATION

Two types of omissions are likely to occur in the implementation of the lesser evil justification: alternative courses of action may be overlooked and certain costs may be neglected.

i. OVERLOOKED ALTERNATIVES

LEA purports to solve a dilemma that supposedly arises when an actor faces a choice between two alternative courses of action: one which is lawful, but which is likely to cause a certain degree of harm, and another which is unlawful but which is expected to cause less harm. The argument neglects to take into account the possibility of not taking any action at all. Of course failure to act may come with a price and this price may exceed the costs of either of the alternative courses of action, but this is not necessarily so and cannot simply be assumed. When all options are properly considered, it may well emerge that the dilemma LEA seeks to resolve is wholly or largely artificial.

To be sure, Blum’s blueprint for a lesser evil justification does include a requirement that “there were no less harmful alternatives under the circumstances to produce a similar humanitarian outcome,” but even with this requirement in place it is more

than likely that those implementing the justification would overlook the option of refraining from action. Indeed, Blum herself completely neglects to consider this option while analyzing the test cases she presents.

Blum fails, for example, to consider the possibility that when faced with a choice between conducting an arrest operation likely to endanger nearby Palestinian civilians or the supposed lesser evil of violating IHL and implementing the "Neighbor Procedure," the Israeli army might instead refrain altogether from conducting an arrest operation. The reason for this omission on Blum's part appears to be that she is willing to apply lesser evil reasoning only in one direction. It is used only to permit that which the law prohibits, but not to prohibit that which the law permits. Since arresting is lawful, Blum is not willing to state that lesser evil considerations mandate refraining from arrest. Thus, in circumstances in which refraining from arrest is likely to cause relatively little harm (say x) and in which the "Neighbor Procedure" is projected to be more harmful ($x+y$) and lawful arrest more harmful still ($x+y+z$), Blum would not be willing to say that the army must refrain from arrest and instead argues that it should be allowed to breach the law to achieve the "lesser evil." Since the harm which the arrest seeks to avert is presumably harm to the army's compatriots, whereas the harm caused by the arrest is harm to non-compatriots, it is difficult to square this position with Blum's argument that considerations pertaining to the wellbeing of non-compatriots of the actor should be decisive in lesser evil calculations.

Similarly, when discussing the atomic bombing of Hiroshima and Nagasaki Blum does not address the possibility that the United States might have refrained altogether from dropping the atomic bomb and also from conducting a land invasion of Japan, and might instead have made do with a conditional Japanese surrender. In notable contrast, Michael Walzer has argued that morally it was necessary to settle for the latter option:

The war aims of the American government required either an invasion of the main islands, with enormous losses of American and Japanese soldiers and of Japanese civilians trapped in the war zones, or the use of the atomic bomb. Given that choice one might well reconsider those aims... Even if we assume that unconditional surrender was morally desirable because of the character of Japanese militarism, it might still be morally undesirable because of the human costs it entailed. But I would suggest a stronger argument than this... unconditional surrender should never have been asked ... In any case, if killing millions (or many thousands) of men and women was militarily necessary for their conquest and overthrow,

then it was morally necessary - in order not to kill those people - to settle for something less.¹⁰⁶

By opening up the option of violating the law and giving them a humanitarian justification to do so, LEA may in fact induce States to take military action in circumstances in which they might otherwise have refrained from doing so. Like other radical challenges which question traditional dichotomies, LEA seeks to expand the legal options available to States engaged in armed conflict. Instead of having to choose between acting lawfully and thereby causing severe damage (and risking public condemnation and criminal liability), or refraining from action (and thereby potentially compromising security or other State interests), LEA offers belligerents a tempting third option. Paradoxically, by permitting actors to pursue an unlawful "lesser evil" LEA could well lead them to discard lawful options which are still less evil and which may even be good. To illustrate, it is possible to conceive of a situation in which the following alternative outcomes are foreseen:

Course of action	Expected casualties among the State's own civilians and soldiers	Expected casualties among civilians affiliated with the opposing belligerent
Lawful military offensive	100	100
No action	20 (could be reduced if defensive action taken)	0
Unlawful military offensive	0	50

In such a situation a State may well decide to forsake the lawful military offensive because its expected costs are intolerable and outweigh the expected benefits. As things stand at present, if the State in question has genuine respect for the rule of law, or if it wishes to be perceived as acting lawfully and to protect its agents from criminal liability, it would also be disinclined to undertake the unlawful alternative course of action. Instead of attacking, it might adopt defensive measures to reduce risks to its nationals.¹⁰⁷ However, if LEA were accepted, the State might very well pursue the

¹⁰⁶ WALZER, *supra* note 2, at 267-68.

¹⁰⁷ Such measures might be financially costly to implement, but for the purposes of simplification these costs, as well as others which could arise in relation to each of the alternative options considered in the example, are ignored. As explained below, such costs would have to be figured into a utilitarian calculus and this may well give rise to problems of incommensurability.

unlawful alternative and as a result a greater number of people would suffer.

It might be suggested that this objection could be overcome by adopting a refined version of the LEA argument articulated by Blum, one that explicitly stipulates that an unlawful offensive may be pursued only when its expected outcome would be less harmful than *any* lawful alternative, including that of refraining from offensive action and of implementing defensive measures. However, even in this refined form, LEA would remain objectionable because of the propensity for abuse described above and for other reasons specified in the remainder of this Article.

ii. NEGLECTED COSTS

In order to evaluate accurately which of a number of alternative courses of action represents the lesser evil, it would be necessary to consider all of the costs and benefits associated with each of the available alternatives. However, Blum's blueprint justification suggests a much cruder method of evaluation which focuses primarily on one criterion—the minimization of harm to individuals other than the actor's compatriots.

While there may be good reasons why an actor seeking to implement the lesser evil justification should be required to give particular consideration to harms likely to be incurred by individuals other than his compatriots, there are surely other values that ought to be considered. As Walzer observed, even if we do nothing more than calculate utilities we need not be concerned only with the preservation of life: "There is much else that we might plausibly want to preserve. The quality of our lives, for example, our civilization and morality, our collective abhorrence of murder, even when it seems, as it always does, to serve some purpose."¹⁰⁸

The considerations that are likely to fall out of the calculus that LEA calls for include both (a) act-utility considerations, and (b) rule-utility considerations. The former refer to costs and benefits arising from specific cases in which unlawful acts are committed on the basis of a lesser evil justification. The latter look beyond the immediate expediency of accepting such a justification in a given case and evaluate the broader implications of creating an exception to IHL's rules.¹⁰⁹ To be fair, Blum acknowledges and addresses concerns that arise from each of these types of considerations.

¹⁰⁸ WALZER, *supra* note 2, at 262.

¹⁰⁹ See R. B. Brandt, *Utilitarianism and the Rules of War*, 1 PHIL. & PUB. AFF. 145, 147 (1972).

In relation to act utility considerations, Blum recognizes that the application of a lesser evil justification might cause negative “spillover effects” beyond the immediate intended consequences.¹¹⁰ She says very little to clarify what spillover effects she has in mind but asserts that “[t]o the extent they can be estimated, spillover effects can be introduced into the lesser-evil calculus” adding that “it would seem that governments, whose business it is to make choice-of-evils decisions domestically, are better at considering spillover effects than individuals are.”¹¹¹

These passages stimulate dispute. They begin with a brisk qualification (“to the extent they can be estimated”) which in fact amounts to an admission that it may indeed be impossible to conduct the utilitarian calculus needed in order to evaluate accurately what constitutes the lesser evil. The assertion that (if calculable) spillover effects could be incorporated into the lesser evil calculus is not accompanied by any analysis and so how this might affect the eventual outcome of the calculus is left to speculation. Blum evidently thinks that it would not defeat the possibility of a humanitarian necessity justification, but it is not clear why.

The trust which Blum expresses here, and elsewhere in her argument, in governments’ capacity to give due consideration to spillover effects can provide little comfort to those who do not share her faith in the judiciousness of States. Moreover, Blum’s suggestion that the choice-of-evil decisions she is concerned with are to be implemented by “governments” as opposed to “individuals” is difficult to reconcile with the fact that her argument advocates introducing a defense against *individual* criminal liability. What Blum is implying is that it is States or governments, rather than the individuals who act as their agents, who exercise discretion in making the choice-of-evil decisions under discussion and that it is individuals, rather than States, who are charged with upholding IHL. However, the exact opposite is true. Decisions are made by individuals who are no less prone to error than anybody else. Responsibility for ensuring compliance with IHL rests with the State.

In relation to rule utility considerations, Blum recognizes the concern that creating an exception to IHL’s absolute rules may compromise the clarity of IHL’s normative message and erode at its expressive force and that this, in turn, might undermine the entire project of IHL.¹¹² While acknowledging that such “institutional considerations” pose a challenge to LEA, Blum attempts to play down their significance. To this

¹¹⁰ “Spill over effects” could also be considered from a rule-utility perspective as the introduction of an exception to IHL rules, might have the indirect effect of compromising the overall benefits derived from IHL.

¹¹¹ Blum, *supra* note 8, at 49.

¹¹² *Id.* at 50-51.

end she argues, first, that recognizing a lesser evil justification would not necessarily render IHL more ambiguous. IHL, she maintains, is already ambiguous because it contains exceptions and tradeoffs that are designed to protect military interests and so the weighing of the humanitarian considerations required under the lesser evil justification would not be likely to cause any greater ambiguity.¹¹³ This argument is unconvincing—the fact that the law already contains ambiguities is no justification for making it even more ambiguous. If anything the opposite is true—since much of the law is ambiguous it is all the more important to maintain the integrity of its clear cut provisions.

Blum goes on to argue that recognizing a humanitarian necessity justification as an exception to IHL would not necessarily increase the incidence of unjustifiable violations. While accepting that recognizing the justification might bring about a change in the rhetoric of accounting for unjustified violations (from “we committed no breach of the law” to “we breached the law in reliance on a humanitarian necessity justification”), she asserts that “there is no proof that allowing justifications on humanitarian necessity grounds would also motivate more unjustified violations.”¹¹⁴ This too is hardly a convincing argument. Since the humanitarian necessity justification has never been put into practice, the statement that there is no empirical proof of its harmful effects is a vacuous point. However, even while empirical proof is impossible, common sense does give good grounds for concern that the justification in question would prove harmful if it were accepted. Belligerents who committed acts that are clearly and absolutely prohibited under IHL (such as directing attacks against civilians, using human shields, or committing acts of perfidy) would have difficulty maintaining that they did not breach the law.¹¹⁵ Indeed, it is for this very reason that LEA was devised—it would enable agents to provide legal justification for their actions in the very circumstances in which this would otherwise not be possible.

Blum further argues that the danger that the justification she advocates might obscure the normative message of particular rules of IHL, “should be countered by upholding the justification only when a violation is found to further IHL’s overall goal of humanitarian welfare, thereby working to reinforce the humanitarian message, not weaken it.”¹¹⁶ This argument begs the question—who will uphold the justification in

¹¹³ *Id.* at 51.

¹¹⁴ *Id.* at 53.

¹¹⁵ They might try lying about the facts, but if the facts are known it is difficult to see how they might legally defend their actions.

¹¹⁶ Blum, *supra* note 8, at 53.

the manner suggested? As already observed, it can by no means be taken for granted that there will be a judicial authority with the capacity to adjudicate claims about the application of the humanitarian necessity justification. Policy and jurisdictional restrictions substantially decrease the likelihood that an individual will be tried for violations of IHL (war crimes) before a foreign court, and individuals will rarely be prosecuted before domestic courts in relation to acts committed at the instruction of the State. Nor is there reason for confidence that courts, particularly domestic courts, could be trusted properly to apply the justification.

In this context, Blum again expresses trust in certain State authorities. She argues that it is not immediately clear why domestic courts, such as the HCJ, which “enjoy a high reputation as credible, legitimate and professional institutions,” should not ever be trusted to apply the humanitarian necessity justification. By contrast, she maintains that for “less trustworthy systems” the implications of recognizing the justification will in any case be of little importance. In such systems, she claims, “[t]he chances that anyone could successfully challenge a government’s actions or policies as contrary to IHL are slim to begin with, and whether the government wins on the basis of the justification or because the action is approved on different grounds makes no real difference.”¹¹⁷

Blum places faith not only in (certain) State authorities’ capacity to identify all of the considerations that need to be included in the lesser evil calculus, but also in their ability to weigh these factors against each other and to produce an equitable balance. For reasons elaborated in the following section, the contention of this article is that such faith is misbegotten.

b. MISCALCULATION

Even if they act in good faith and overcome the pitfalls described in the previous section, successfully identifying all relevant costs and benefits, belligerents are likely to fail accurately to evaluate which course of action would lead to the lesser evil.

In order to distinguish lesser from greater evil, the costs and benefits associated with each alternative must be added up and weighed against each other. To illustrate why this would be difficult it is as well to consider just how costs might be compared (adding benefits to the mix would obviously make things even more difficult).

¹¹⁷ *Id.* at 52. KRETZMER, *supra* note 103, gives reason to question Blum’s expressed confidence in the HCJ.

Many different types of costs can be expected, but for the purpose of simplification it might be assumed that only the following are under consideration: deaths, injuries, destroyed property, and forecasted spillover effects.

Before considering the problem of incommensurability, which arises when costs between these various categories are compared, it should be noted that even the relatively simple task of comparing costs within each category would present challenges. A first complication would arise from the need to distinguish between different categories of people—determining, for example, how deaths among ones' own soldiers ought to be measured against fatalities among civilian non-compatriots. Setting that complication aside (say by looking only at costs to non-compatriot non-combatants), the comparison within a given category would still require more than a straightforward measurement of harms.¹¹⁸ Since the comparison is between projected future costs, probabilities would have to be accounted for. Determining probabilities is an exercise in conjecture at the best of times. In the context of armed conflict, where uncertainty reigns, the chances for misevaluation are particularly high.¹¹⁹ Consequentially, forecasts are not likely to be so accurate and may well point to ranges of possibility. Comparing costs on the basis of such forecasts may be no simple matter. How, for example, is one to compare a case in which 10-30 casualties are foreseen against one where 15-20 are expected? Assuming, however, that probabilities were somehow accurately calculated, there would remain a challenge of determining how to compare, say, the 90% chance that 100,000 civilians will be killed if an atomic bomb were dropped on their city, against the 31% chance that 300,000 would be killed in a ground invasion. Just going by the odds in such a case would mean gambling on thousands of human lives.

When turning to compare between categories it would be reasonable to establish a hierarchy of evils. Thus, deaths could be considered to be a greater evil than injuries and injuries a greater evil than damaged property. Spillover effects could perhaps also

¹¹⁸ A strict calculation of utilities would actually mandate a calculation that is far from straightforward. Assessing the cost of an injury, for example, would arguably require comparing the utilities of everything every injured person could have been expected to achieve if not for the injury, against the utilities they expected given the injury. At the very best, only a rough approximation of this could hope to be achieved.

¹¹⁹ See Blum, *supra* note 8, at 45-46. Blum suggests that the problem of uncertainty could be overcome by shifting the risks to the actor. However, as already noted, it is unlikely that actors invoking a lesser evil justification for violating IHL could actually be effectively challenged before a court of law. This is so both because they would have the advantage of knowledge and expertise that would make it difficult to disprove their claims and because it is doubtful that they would ever be tried before a non-partisan court.

be placed somewhere within the hierarchy. However, even if such a hierarchy were established, determining how to compare between cases involving different types of harm would remain a challenge.

How, for example, is a course of action expected to kill one person and maim ten more to be weighed against an alternative expected to result in two deaths and a destroyed house? Moreover, if one of these alternatives is unlawful, how are the spillover effects that might arise from adopting it to be factored in?

The challenge of weighing heterogeneous values against each other is not alien to IHL. Indeed, this challenge is inherent in the application of the principle of proportionality that lies at the foundation of IHL.¹²⁰ However, by expanding the problem beyond the principle of proportionality and across all of IHL, LEA threatens to subject the law to insurmountable demands.

* * *

The problems of uncertainty, incalculability and incommensurability described here cast grave doubts on the possibility of distinguishing lesser and greater evils.

When, it is further observed, as previously, that certain costs are likely to be neglected and that alternative courses of action will invariably be overlooked, there is still more cause to question the prudence of accepting LEA.

Considering, on top of all this, that lesser evil justifications invite abuse, there is more than enough reason to conclude that LEA would not serve to minimize human suffering and that it ought to be rejected. The following section solidifies that conclusion, arguing that even if a lesser evil justification could minimize suffering, this would come at an unacceptable price.

E. BEYOND CALCULATION

IHL seeks to lessen the evils of armed conflict, but the lesser evil is not its only structural principle. At its very core IHL is about preserving the fundamental value of human dignity that mandates that people be treated as an end unto themselves.¹²¹ Accordingly, there are certain acts which IHL prohibits no matter what the expected

¹²⁰ A copious body of literature grapples with the calculation problems posed by the principle of proportionality sometimes suggesting how they might be overcome. *See, e.g.*, Hamutal Esther Shamash, *How Much is Too Much? Examination of the Principle of Jus in Bello Proportionality*, 2 IDF L. REV. 103 (2005-2006).

¹²¹ *See, e.g.*, Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Civilians*, 39 ISR. L. REV. 81, 85-87 (2006).

outcome. Civilians and civilian objects may not be made the target of an attack, protected persons may not be used as a human shield or compelled to serve in the forces of a hostile Power, captured combatants may not be denied quarter, and no one may be raped, tortured or otherwise subjected to inhumane treatment. These and other absolute prohibitions form red lines that may not be transgressed even in pursuit of the lesser evil.¹²²

IHL then reflects a marriage of two distinct moral outlooks. When it instructs belligerents to balance expected military gains against humanitarian costs, as it often does, it calls for consequentialist, utilitarian thinking. Its absolute prohibitions, on the other hand, derive (in many if not all cases) from non-consequentialist, deontological considerations that delineate boundaries beyond which utilitarian calculations are no longer permitted.¹²³ Thus, for example, a party to an armed conflict would be absolutely prohibited from holding a person hostage and subjecting her to rape or torture even if this act would enable it to avert an alternative course of action that might cost many lives (including those of civilians affiliated with the opposing party).

LEA ignores IHL's deontological foundations and seeks to breach its red lines and make it utilitarian all the way through.¹²⁴ To support such an argument is, therefore, to support a radical change in the law. However, Blum does not acknowledge the radical nature of her argument and instead insists that it "works within the legal framework of IHL."¹²⁵ She concedes, as she must, that LEA is incompatible with deontology,¹²⁶ but does not present a substantial argument to refute deontological objections to her approach. As elsewhere in her argument, instead of contending with the question of what *ought* to be, Blum bypasses it by making an observation about what *is*. In this

¹²² See, e.g., Reisman, *supra* note 85.

¹²³ See, e.g., Hartle, *supra* note 79, at 109. See also BRIAN OREND, *WAR AND INTERNATIONAL JUSTICE: A KANTIAN PERSPECTIVE* 4 (2000). Some of the clear cut prohibitions established in the law do perhaps derive from consequentialist, or at least, non-deontological considerations. Thus, for example, a rule prohibiting the use of a certain weapon could more easily be attributed to prudence or to utilitarian considerations about minimizing human suffering than to the requirement to respect people as such. The contention here though is that those provisions of IHL that establish absolute prohibitions in relation to the treatment of persons not participating in the hostilities *are* informed by deontological principles and for that reason are binding irrespective of any considerations of utility.

¹²⁴ In this LEA may be deviating from the pursuit of lesser evil, which may in fact require considering deontological constraints: "Determining what is a lesser evil is not solely a matter of comparing consequences. How those consequences are brought about is also important." (quoting Larry Alexander, *Lesser Evils: A Closer Look at the Paradigmatic Justification*, 26 L. & PHIL. 611, 616 (2005)).

¹²⁵ Blum, *supra* note 8, at 6.

¹²⁶ *Id.* at 43.

case, the observation she presents is a misguided account of IHL. She mistakenly asserts that IHL's overriding purpose is to minimize human suffering,¹²⁷ while failing to note that IHL also seeks to preserve human dignity and that it in fact gives the latter goal priority over utilitarian considerations.¹²⁸ By disregarding IHL's deontological structural principle, Blum is able to maintain that even while it is incompatible with deontology, LEA is compatible with IHL and that deontological objections to LEA need not be considered because deontology and IHL are in any case "hard to square."¹²⁹

Blum presents four points in support of her claim that deontology and IHL are incompatible: (1) war makes an uneasy fit for deontology; (2) deontology cannot account for all IHL rules; (3) the degree to which deontology could ever be assigned as a moral paradigm to governments, as opposed to individuals, is under much debate; (4) all but the very pure deontologists recognize that in extreme cases of weighing harms, absolute principles must make way for some consequentialist calculations.

None of these four points in fact supports the claim that there is no room for deontology in IHL.

The first two reflect faulty logic. It is indeed true that deontological principles are compromised by war¹³⁰ and that IHL contains rules that reflect utilitarian rather than deontological reasoning. However, all that can be deduced from these observations is that not *all* of IHL is deontological. It does not follow from this that *none* of it is deontological. In the same manner, it could be inferred from the fact that IHL contains absolute prohibitions, which do not allow for consequentialist considerations, that not all of IHL is utilitarian, but this would not give valid grounds to conclude that *none* of it is.

Whatever validity the third point might have in other contexts, it is irrelevant to IHL. States conduct war through human agents and it is these individuals who are bound by deontological requirements. Here, as elsewhere, Blum's argument

¹²⁷ *Id.* at 7.

¹²⁸ As illustrated in Hartle, *supra* note 79.

¹²⁹ *Id.* at 39.

¹³⁰ Though even a deontologist may accept that there are certain circumstances in which it may be just to resort to war, deontologists address problems of conflicting rights as conflicts between different "grounds for duty." When facing conflicting grounds for duty, an agent must act on the more compelling of the two. See BARBARA HERMAN, *THE PRACTICE OF MORAL JUDGMENT* 218 (1993). While there are certainly grounds for a duty not to go to war, it is conceivable that there may be circumstances in which there are still more compelling grounds for going to war that would lead a deontologist to conclude that there is a moral duty to do so.

selectively shifts focus from governments to their individual agents. If—as she implies here as well as when she speaks of governments’ superior capacity to make choice-of-evils decisions— it is governments who are charged with implementing IHL, then it is even more difficult to understand why Blum advocates introducing a lesser-evil justification designed to exculpate individuals.

As for the fourth point, it should be noted, first, that Blum is not advancing an argument to explain that LEA is valid even though incompatible with deontology, but is merely pointing to authorities who—she claims—share her view that deontology can sometimes be overlooked. Rather than mentioning that there are threshold deontologists, Blum ought to have focused on their arguments and, if she agrees with them, she ought to have given reasons why. Moreover, threshold deontologists recognize that there might be place for an exception to absolute prescriptions only in “extreme” cases. Blum is quick to note that “extreme” is a “subjective determination,”¹³¹ however it is clear from the examples Blum herself cites that not all threshold deontologists would be receptive to LEA. Walzer, for example, has this to say:

Utilitarian calculation can force us to violate the rules of war only when we are face-to-face not merely with defeat but with a defeat likely to bring disaster to a political community. But these calculations have no similar effects when what is at stake is only the speed or the scope of victory. They are relevant only to the conflict between winning and fighting well, not to the internal problems combat itself. Whenever that conflict is absent, calculation is stopped short by the rules of war and the rights they are designed to protect. Confronted by those rights, we are not to calculate consequences, or figure relative risks, or compute probable casualties, but simply to stop short and turn aside.¹³²

Clearly, the threshold that Walzer is referring to here is several orders higher than that which Blum advocates incorporating into the law. The difference between the approaches is not simply quantitative, Walzer in fact directly negates cost-accounting of the kind inherent in LEA. It is one thing to say that in times of “supreme emergency”¹³³ absolute prohibitions may give way to “overpoweringly weighty and extremely certain”¹³⁴ utilitarian considerations. It is quite another to accept an argument that would normalize and make a legal rule of the exception.

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¹³¹ Blum, *supra* note 8, at 43.

¹³² WALZER, *supra* note 2, at 268.

¹³³ See MICHAEL WALZER, ARGUING ABOUT WAR 35-40 (2004).

¹³⁴ Nagel, *supra* note 1, at 126.

The balance that IHL strikes between competing moral outlooks may not be perfect. Perhaps it retreats too quickly from absolutism and perhaps it does not do so quickly enough. However, because so much is at stake, any decision to shift the balance ought to be based on careful consideration of the arguments that pull in each direction. Blum's LEA does not satisfy this requirement. It considers the issue only in light of the utilitarian goal of minimizing human suffering. This is not enough. Human dignity must be accounted for as well. Without such an account, there is no reason to concede "the only barrier before the abyss of utilitarian apologetics."¹³⁵

CONCLUSION

*What is difficult for us to realize is that a war machine which used law more strategically might, in fact, be far more violent, more powerful, more ... well, legitimate.*¹³⁶

Contemporary armed conflicts, particularly asymmetric confrontations between States and non-State armed groups, wage on well beyond the battlefield. Subjected to intense and relentless scrutiny by their own nationals, by their allies and by influential third parties ("background elites"),¹³⁷ much of the warring parties' efforts are invested in a struggle for legitimacy. As a result, humanitarian concerns no longer function merely as rival considerations to be balanced against military necessity. To the contrary, since ignoring them might well doom a campaign to failure, they can almost be seen as a military necessity in themselves.

The humanitarian project obviously stands much to gain from these developments, but there are also dangers that must be guarded against.

This is particularly apparent in relation to humanitarian law. Seen as a yardstick for legitimacy, IHL has been gaining greater clout and is becoming an integral and ever more central part of military strategy. There is reason to hope that by thus internalizing the law military forces will become more attentive to its requirements and that as a consequence human dignity will be better protected and human suffering reduced. However, there are also grounds for concern that as belligerents come to master IHL they will not necessarily be more inclined to act justly, but will instead

¹³⁵ *Id.*

¹³⁶ David Kennedy, *Apogee and Epitaph: Celebrating the 60th Anniversary of the Universal Declaration of Human Rights*, Keynote Address at the Minerva Biennial Conference on Human Rights at Tel Aviv University (Dec. 9, 2008).

¹³⁷ KENNEDY, *supra* note 10, at 16-17.

become more adept at justifying their actions and that as a consequence more, rather than less, violence will be carried out.

LEA provides particularly striking illustration of how embracing IHL might enable belligerent States to perpetrate acts of violence they would otherwise avoid. Accepting that “no state or individual may violate the laws of war in the name of military necessity—i.e., in the name of promoting the effectiveness of the military operation—since that necessity has already been incorporated into the balance struck by the legal rules,”¹³⁸ LEA seeks to justify violations by appealing not to military considerations but to the law’s underlying humanitarian drive. By placing humanitarian considerations alongside considerations *for* using force, LEA proposes to tip the balance in a way which purely military considerations could never accomplish. To deliberately kill hundreds of thousands of civilians for the sake of military advantage is clearly indefensible, but when such killing is said to have been perpetrated for “humanitarian” reasons, to avoid a greater evil, it is less plainly so. LEA asserts that in such circumstances an act—even one violating the most fundamental humanitarian values and causing devastating humanitarian consequences—should not only be deemed forgivable, but ought to be considered lawful as well.

As this Article has shown, there are pressing reasons to reject such argument. It would replace clear cut rules of law with a utilitarian cost benefit analysis, opening space for discretion and thereby undermining the law’s objectivity and rendering it less determinate. Placing misguided faith on the judgment of belligerent parties and failing duly to consider possibilities of abuse and misuse, it is likely to lead to the greater rather than lesser evil and therefore falls flat even on its own utilitarian logic. Moreover, it rests on a mistaken account of IHL, failing to recognize that alongside the goal of minimizing human suffering IHL’s core purpose is to safeguard human dignity. Thus, despite its advocates’ claims that it would advance the law’s humanitarian purpose, LEA in fact threatens to disrupt IHL’s structural principles and to flout the humanitarian project. It would free belligerents from crucial constraints and unleash violence perfidiously assuming the guise of legitimacy. Those who wish to guard humanity must deny warring powers any such guise.

¹³⁸ Blum, *supra* note 8, at 3.