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LAW AND MORALITY IN HUMANITARIAN INTERVENTION

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ABSTRACT
This paper examines what prevents us from legally enforcing the moral imperative of protecting human rights during military operations carried out for distinctly humanitarian purposes. The answer, I argue, lies not in familiar objections to bringing the law into greater congruence with morality, but in international law's indeterminacy regarding the use of force. Preserving stability within the nascent international legal system comes at the cost of a law that eschews the protection of individual rights even in cases in which the protection of human rights is what justifies military action. The tension between state sovereignty and the protection of human rights thus not only generates well-known controversies about the lawfulness of military intervention. It also prevents us from devising laws to protect human rights during wars whose very purpose it is to stop human rights violations. Protecting human rights during humanitarian interventions may thus remain an undertaking as quixotic as it is morally urgent.

I. INTRODUCTION

International law prohibits states' use of military force on the territory of other states, except with the authorization of the territorial state or the UN Security Council, or in collective self-defense against armed attack.[1] Over the past two decades, the principle of the "responsibility to protect" has complicated this picture. Unanimously adopted by the UN General Assembly in 2005, this principle demands that all states protect the

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1. U.N. Charter, arts. 2(4), 42, 51.

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populations under their jurisdiction from atrocity crimes and that the international community assist states in this responsibility. The principle also asserts that, in cases in which a state "manifestly fails" in its responsibility to protect its own population from genocide, war crimes, crimes against humanity, and ethnic cleansing, the international community has a responsibility to intervene—militarily, if necessary, as a last resort.[2]

That the road to hell is paved with good intentions applies not least to the use of military force for humanitarian purposes. Despite their humanitarian aspirations, armed humanitarian interventions (AHI) carry an immense risk of doing more harm than good and of inflicting harrowing suffering on those whom they seek to protect.[3] NATO's bombing campaign during the intervention in Kosovo in 1999 killed between 500 and 1,500 civilians.[4] The 2011 intervention in Libya, having explicitly invoked the "responsibility to protect," killed over 1,000 civilians, in addition to leaving an entire geographical region in turmoil.[5] Strikingly, these interventions were carried out largely in compliance with the laws of armed conflict.[6]

AHI are regulated no differently from traditional military campaigns. Perhaps, then, it should be no surprise that they are no less devastating than other types of war. But is it morally appropriate for the law to regulate AHI no differently from other types of armed conflict? And what, if anything, should the law do about the contradiction inherent in the dropping of bombs to protect human rights?

Both the relationship between morality and the laws of war and the contested legality of AHI are the subjects of long-standing scholarly debates. By

2. The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (International Development Research Centre, 2001). These aspirations set out by the International Commission on Intervention and State Sovereignty (ICISS) were significantly constrained in the subsequent outcome document of the 2005 World Summit. *See* 2005 World Summit Outcome, U.N. Doc. A/60/L1 (Sept. 15, 2005). For discussion, *see* Alex J. Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, 20 Ethics & Int'l Affs. 143 (2006).

3. *See* Charles Beitz, *Nonintervention and Communal Integrity*, 9 Phil. & Pub. Affs. 385 (1980); Ken Booth, *Military Intervention: Duty and Prudence*, *in* Military Intervention in European Conflicts 56 (Lawrence Freedman ed., 1994). *See also* Benjamin A. Valentino, *The True Costs of Humanitarian Intervention: The Hard Truth About a Noble Notion*, 90 Foreign Affs. 60 (2011).

4. Human Rights Watch, *Civilian Deaths in the NATO Air Campaign – The Crisis in Kosovo* (archived Nov. 2016), https://www.hrw.org/reports/2000/nato/Natbm200-01.htm; *Civilian Deaths "Necessary Price"*, BBC News (May 31, 1999), http://news.bbc.co.uk/1/hi/world/europe/357355.stm; Richard Norton-Taylor, *How the Serb Army Escaped Nato*, Guardian (Mar. 9, 2000), https://www.theguardian.com/world/2000/mar/09/balkans1.

5. Human Rights Watch, *Unacknowledged Deaths: Civilian Casualties in NATO's Air Campaign in Libya* (May 14, 2012), https://www.hrw.org/report/2012/05/13/unacknowledged-deaths/civilian-casualties-natos-air-campaign-libya; C. J. Chivers & Eric Schmitt, *In Strikes on Libya by NATO, an Unspoken Civilian Toll*, N.Y. Times (Dec. 17, 2011), https://www.nytimes.com/2011/12/18/world/africa/scores-of-unintended-casualties-in-nato-war-in-libya.html; Dominic Tierney, *The Legacy of Obama's 'Worst Mistake'*, Atlantic (Apr. 15, 2016), https://www.theatlantic.com/international/archive/2016/04/obamas-worst-mistake-libya/478461/.

6. For discussion, *see* Ivan Shearer, *Rules of Conduct During Humanitarian Intervention*, *in* Legal and Ethical Lessons of NATO's Kosovo Campaign, International Law Studies 78, 82 (Andru E. Wall ed., 2002).

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contrast, comparatively little has been said about the relationship between morality and law *in AHI*.[7] For all our concern with determining under what, if any, conditions armed intervention on humanitarian grounds might be morally and/or legally permissible (the *jus ad bellum*), the legal rules that apply once an intervention is underway (the *jus in bello*) have escaped similarly intense scrutiny.[8]

This paper queries the law regulating the use of force during AHI in two steps. First, it advances a proposal for bringing the law into greater congruence with revisionist views of the morality of war. Revisionism hinges combatants' permission to use defensive force in part on whether they are acting in pursuit of a just aim.[9] While revisionism per se presents no viable alternative to existing law, the paper explores a different possibility: prohibiting attacks against just intervening combatants discharging the international community's "responsibility to protect."

Second, the paper elucidates what stands in the way of such an attempt at protecting human rights during armed interventions: the law's indeterminacy regarding the use of force, which seems indispensable to preserving stability within our nascent international legal system. So long as prohibiting attacks on combatants discharging the "responsibility to protect" would cause more problems than it would solve, we are caught in a quagmire. The price for relative stability is a law that eschews the protection of individual rights even in cases in which protecting rights is what justifies military action. The tension between state sovereignty and the protection of human rights, this reveals, does not just generate well-known controversies

7. For philosophical debate on the relationship between morality and law in war, *see* Jeff McMahan, *The Ethics of Killing in War*, 114 ETHICS 693 (2004); McMahan, *The Morality of War and the Law of War*, *in* JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS 19, 27–28 (David Rodin & Henry Shue eds., 2008); McMahan, *The Laws of War*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 493 (Samantha Besson & John Tasioulas eds., 2010); ADIL HAQUE, LAW AND MORALITY AT WAR (2017); VICTOR TADROS, TO DO, TO DIE, TO REASON WHY (2020), ch. 12. *See also* Henry Shue, *Do We Need a "Morality of War"?*, *in* JUST AND UNJUST WARRIORS 87 (David Rodin & Henry Shue eds., 2010); Henry Shue, *Laws of War*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 511, 519–522 (Samantha Besson & John Tasioulas eds., 2010); Janina Dill, *Should International Law Ensure the Moral Acceptability of War?*, 26 LEIDEN J. INT'L L. 253 (2013); Janina Dill & Henry Shue, *Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption*, 26 ETHICS & INT'L AFFS. 311 (2012). For recent articulations of the broader view that morality is relevant to how we should interpret and apply (international) law, *see* Ezequiel H. Monti, *On the Moral Impact Theory of Law*, 42 OXFORD J. LEGAL STUD. 298 (2022); Steven Ratner, David Luban, Carmen Pavel, Jiewuh Song & James Stewart, *International Law and Theories of Global Justice*, 114 PROC. AM. SOC'Y INT'L L. 1 (2020).

8. Exceptions include James Pattison, *The Ethics of "Responsibility While Protecting": Brazil, the Responsibility to Protect, and the Restrictive Approach to Humanitarian Intervention*, *in* BRAZIL AS A RISING POWER: INTERVENTION NORMS AND THE CONTESTATION OF GLOBAL ORDER 104 (Kai Michael Kenkel & Philip Cunliffe eds., 2016); Pattison, *Humanitarian Intervention, the Responsibility to Protect and* Jus in Bello, 1 GLOB. RESP. PROTECT 364 (2009); Pattison, *Humanitarian Intervention and International Law: The Moral Importance of an Intervener's Legal Status*, 10 CRITICAL REV. INT'L SOC. & POL. PHIL. 301 (2007).

9. For example, DAVID RODIN, WAR AND SELF-DEFENSE (2002); SIMON CANEY, JUSTICE BEYOND BORDERS (2005), chs. 6, 7; Jeff MCMAHAN, KILLING IN WAR (2009); CÉCILE FABRE, COSMOPOLITAN WAR (2012); HELEN FROWE, DEFENSIVE KILLING (2014); TADROS, *supra* note 7.

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about the lawfulness of AHI. It also prevents us from devising laws to protect human rights during wars whose very purpose is to stop human rights violations.

Section II outlines a set of moral criteria for the law governing the use of force. Section III makes a case for prohibiting attacks against combatants who carry out just humanitarian interventions, mandated under the banner of the responsibility to protect. This proposal, the Principle of Proximate Protection (PPP), occupies an intermediate position between conventional revisionist views that accept a wholesale divergence between law and morality and more radical revisionist views that advocate for greater convergence between the law and morality. Section IV defends the PPP against objections arising from both nonideal constraints and principled considerations. Section V discusses the chief obstacle to implementing the PPP: the international legal system's indeterminacy regarding the legality of AHI. Section VI makes a cautious case for rethinking the relationship between international humanitarian law and international human rights law, to ascribe greater weight to the latter at least in AHI than it is typically afforded in armed conflict. Section VII concludes.

Before we proceed, a few clarifications. As far as this paper is concerned, the "responsibility to protect" is, in the first instance, a moral principle that, under certain conditions, may justify military intervention. The paper aims neither to defend this responsibility as a general matter nor to take a stance on its contested legal status. The "responsibility to protect" is not itself a legally binding framework.[10] Whether it affects the permissibility of resorting to force to respond to large-scale human rights violations in the absence of UN Security Council approval is subject to a great deal of disagreement. It is also fiercely controversial whether the international legal system should accommodate exceptions to the legal prohibition on the use of force against another state in this context. While some scholars assume that the legality of AHI depends on how we interpret state practice, others hold that it is determined by whether customs can be taken to practically countermand treaties, which most, but not all, legal scholars deny.[11] By contrast,

10. But it has roots in existing international law, in the form of the Genocide Convention, the Geneva Conventions, and their Additional Protocols. Crimes against humanity are spelled out in the Rome Statute; they do not have their own designated convention or treaty, though specific elements (such as torture and slavery) have their own conventions. So, states have legal obligations through other treaties and conventions to prevent the same crimes that the "responsibility to protect" seeks to prevent.

11. For example, some people have argued that UN Article 2(4) can be interpreted to support the use of force for humanitarian purposes. *See, e.g.*, Fernando Tesón, Humanitarian Intervention: An Inquiry into Law and Morality (1997). *See also* Christopher Greenwood, *International Law and the NATO Intervention in Kosovo*, 49 Int'l & Compar. L. Q. 926 (2000). For critical discussion, *see* Michael Byers & Simon Chesterman, *Changing the Rules About Rules? Unilateral Humanitarian Intervention and the Future of International Law*, *in* Humanitarian Intervention: Ethical, Legal, and Political Dilemmas 177 (J. L. Holzgrefe & Robert O. Keohane eds., 2003). According to the Australian Red Cross, the principle of the "responsibility to protect" "does allow for the use of force under Chapter VII of the UN Charter for the

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this paper has no stake in debates about how we should interpret existing law. I will assume that resorting to military force to protect fundamental human rights is, under certain conditions, *morally* justified. I will discuss neither under what conditions this is the case nor to what, if any, extent this is reflected in the law. Rather than an exercise in legal exegesis, this paper is concerned with what the law should seek to achieve.

Finally, the revisionist assumption that combatants' permission to use lethal force is contingent on the justness of their cause applies not just to humanitarian interventions. In principle, the concerns this paper raises extend to any case in which we can broadly distinguish between combatants using lethal force with and without sound moral justification, including in just wars of self-defense against unjust aggression. Hence, I will say nothing to stop legal revisionists who wish to extend this discussion beyond AHI. In fact, I remain agnostic on what, if any, implications our moral assessment of international humanitarian law (IHL) in AHI should have for our moral assessment of IHL beyond AHI.[12] The aim of this paper is to explore the more modest case for bringing the law into closer alignment with revisionist morality *at least* in the context of just AHI. This illuminates a fruitful middle ground between the revisionist majority who accept the law as it is and more radical revisionists who think the law should be brought into greater congruence with revisionist morality as a general matter. As fraught an enterprise as philosophical reflection about contentious matters of international law can be, the paper's aim is to advance the debate about how the laws of war might be rethought to better protect human rights in humanitarian interventions in ways that are currently lacking.

II. THE PROBLEM OF UNRELIABLE PROXIES

The law should be able to do at least three things: (i) reduce unjust harm; (ii) account for the epistemic constraints under which combatants operate; and (iii) withstand profoundly nonideal conditions, including the possibility of noncompliance. The first criterion concerns the law's substance. Harms are unjust insofar as they fall on those who have moral rights not to be harmed.[13] Call this the *justice criterion*. The justice criterion is controversial, because a popular view says that the law should reduce harm in general, rather than harm that is unjust. We will return to this below.

protection of populations vulnerable to, or suffering from genocide, crimes against humanity, war crimes and ethnic cleansing." *See* RED CROSS AUSTRALIA, INTERNATIONAL HUMANITARIAN LAW AND THE RESPONSIBILITY TO PROTECT: A HANDBOOK (2001).

12. For discussion illustrating revisionism's moral appeal in the context of AHI, *see* Jeff McMahan, *Proportionality and Just Cause: A Comment on Kamm*, 11 J. MORAL PHIL. 428 (2014); McMahan, *War Crimes and Immoral Action in War*, *in* THE CONSTITUTION OF CRIMINAL LAW 151, 178 (Antony Duff et al. eds., 2013); McMahan, *Proportionality and Necessity in* Jus in Bello, *in* THE OXFORD HANDBOOK OF THE ETHICS OF WAR 418, §3 (Seth Lazar & Helen Frowe eds., 2017); MCMAHAN, *supra* note 9, at 107.

13. The one exception is harms for which there is a lesser-evil justification.

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The second criterion concerns the law's ability to be action-guiding. Legal rules must be followable under the specific conditions in which combatants operate in armed conflict—conditions that make it extremely difficult to engage in careful deliberation about the moral permissibility of using lethal force. To be effective, the law must be sensitive to the severe epistemic constraints under which individuals act. Call this the *individual constraints criterion.*

The third criterion concerns the law's enforceability at the institutional level. The rule of law depends on international institutions, such as international courts, to enforce the law impartially and consistently.[14] At the same time, the law must be able to withstand risks of noncompliance, abuse, and perverse incentives. Such eventualities should not render the law altogether ineffective. This criterion is different from the first two in that it concerns not just the law itself and those whose conduct it constrains, but the broader institutional context within which the law is administered. Call this the *institutional constraints criterion.*

In short, the law should be sensitive to considerations of justice, individual constraints, and institutional constraints. The justice criterion and individual constraints criterion together reflect the law's twofold purpose of reducing wrongful killing while accounting for the fact that combatants act under severe epistemic constraints. In addition, the individual and institutional constraints criteria together account for the fact that the law must fulfill its purpose in the face of profoundly nonideal conditions: it must be action-guiding even under the epistemically constrained conditions of armed conflict, and enforceable within the international legal system, imperfect though the system may be. In this way, the justice criterion and the individual constraints criterion aim to capture the law's constitutive properties, whereas the institutional constraints criterion is concerned with potential limits of the law's regulatory effects.

These three clusters of considerations are deliberately broad and do not purport to be comprehensive. Their purpose is to strike a balance between providing a basis for moral assessment on one hand while remaining sensitive to how international law actually works on the other. This provides a starting point for thinking about what the law ought to do within the bounds of what is feasible.

A. International Humanitarian Law and the Justice Criterion

The conduct of hostilities in all international and noninternational armed conflicts, including AHI, is governed by international humanitarian law (IHL). IHL's main aim is to protect persons not directly participating in hostilities.[15]

14. For discussion, *see* Geert De Baere, Anna-Luise Chané & Jan Wouters, *International Courts as Keepers of the Rule of Law: Achievements, Challenges, and Opportunities*, 48 N.Y.U. J. Int'l L. & Pol. 715 (2016).

15. The main instruments of IHL are the Geneva Conventions of 1949, which primarily protect combatants who are *hors de combat*, and the Additional Protocols of 1977, which strengthen

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A central principle, accordingly, is that of *distinction*.[16] The principle of distinction requires that the parties to an armed conflict at all times distinguish between civilians and civilian objects on one hand and combatants and military objectives on the other. IHL thus protects civilians from intentional attack based on their status as noncombatants.[17]

An upshot of the principle of distinction is the *legal equality of combatants*. So long as combatants distinguish themselves from civilians, IHL grants combatants the permission to "participate directly in hostilities."[18] The same permission to use lethal force consequently applies to all parties to an armed conflict regardless of the justness or legality of their respective goals.[19]

The legal equality of combatants is concomitant with the fact that the law governing the conduct of hostilities, the *jus in bello*, operates independently of the law governing the resort to military force, the *jus ad bellum*. This is sometimes referred to as the *ad bellum/in bello* dualism.[20] The *ad bellum/in bello* dualism captures the fact that the law specifies principles of just conduct *in bello* with no regard to the *jus ad bellum*. The legal principles governing the permissibility of killing in war are impervious to questions about whether combatants' use of force is morally justified to begin with.

Since all armed conflicts are governed by IHL, combatants' conduct in AHI is regulated no differently from traditional military campaigns in which both sides are equally permitted to use lethal force.[21] In AHI, the

the protection of civilian victims of international and noninternational armed conflicts and constrain the ways in which wars are fought. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977), Preamble. For discussion of IHL's main principles, *see* M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps, and Ambiguities*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 199 (1999); 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES (2005); DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 3d ed. 2000).

16. For discussion and defenses of the conventional principle of distinction, *see* HAQUE, *supra* note 7; SETH LAZAR, SPARING CIVILIANS (2016).

17. Combatants "shall at all times distinguish between [civilians or] civilian objects and military objectives and accordingly shall direct their operations only against military objectives." Protocol I art. 48. *See also* HENCKAERTS & DOSWALD-BECK, *supra* note 15, at 3.

18. Protocol I, 1125 U.N.T.S. 3, arts. 43 (2), 44; 1 INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2009), at II, 384.

19. Nothing in my argument hangs on whether we interpret the legal equality of combatants as symmetrical legal permissions to fight or as symmetrical legal prohibitions on ways of fighting and symmetrical legal immunities from criminal prosecution for certain acts. For discussion, *see* HAQUE, *supra* note 7, at 23–34. For justifications for using the language of permissions, *see* David Rodin, *Morality and Law in War*, *in* THE CHANGING CHARACTER OF WAR 446, 455 (Hew Strachan & Sibyelle Scheipers eds., 2011). *See also* JEREMY WALDRON, TORTURE, TERROR, TRADE-OFFS (2010), at 107, 109–111. Waldron has more recently endorsed Haque's view as the more accurate one (Waldron, *Responses to Zedner, Haque and Mendus*, 8 CRIM. L. & PHIL. 135, 137 (2014)).

20. For discussion and defense, *see* Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of* Jus ad Bellum *and* Jus in Bello *in the Contemporary Law of War*, 34 YALE J. INT'L L. 48 (2008). *See also* David Luban, *Just War Theory and the Laws of War as Nonidentical Twins*, 31 ETHICS & INT'L AFFS. 433 (2017).

21. *See, e.g.*, MARTIN SHAW, THE NEW WESTERN WAY OF WAR: RISK-TRANSFER WAR AND ITS CRISIS IN IRAQ (2005).

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law consequently makes no distinction between combatants acting on the "responsibility to protect" and those seeking to repel them. The law constrains unjust combatants targeting just combatants no more than it constrains just combatants pursuing a humanitarian mission. By treating all combatants as equals, the law does not prohibit combatants defending perpetrators of atrocity crimes from attacking intervening combatants seeking to prevent these crimes.[22] Unjust combatants may thus, without violating IHL, effectively enable the perpetration of atrocity crimes that other legal treaties and conventions prohibit.[23] Morality, by contrast, prohibits harmful acts that lack a sound moral justification. Those engaged in the perpetration of atrocity crimes are prohibited from using lethal force against just intervening combatants. Unjust combatants are also prohibited from defending perpetrators of atrocity crimes against just combatants.[24]

While revisionist just war theory has been criticized for "attuning the evils of war to the wrongs of the parties," the evils of war *are* inextricably intertwined with the wrongs of the parties in cases that trigger the "responsibility to protect."[25] It is morally worse for unjust defending combatants to kill just intervening combatants than it is for just combatants to kill persons, including noncombatants, engaged in the perpetration of atrocity crimes, who have thereby forfeited their rights against being defensively harmed.[26] In addition, unjust combatants' legal permission to target just combatants impedes just combatants' ability to carry out their duty to rescue people at threat of becoming victims of egregious human rights violations. Threats posed by unjust defending combatants may also require intervening combatants to increase their level of force protection. During NATO's Kosovo intervention, for example, this involved bombing targets from high altitudes rather than deploying ground forces, which significantly increased risks of harm to already vulnerable civilians.[27] The legal equality

22. For discussion, *see* Jeff McMahan, *The Just Distribution of Harm Between Combatants and Noncombatants*, 38 PHIL. & PUB. AFFS. 342 (2010); Alex Leveringhaus, *The Moral Status of Combatants During Military Humanitarian Intervention*, 24 UTILITAS 237 (2012).

23. While genocide and war crimes have been codified in dedicated treaties of international law, this is not yet the case for crimes against humanity. However, similarly to the prohibition of genocide, the prohibition of crimes against humanity is considered a peremptory norm of international law, which applies to all states and from which no derogation is permitted (*see* Article 7 of the Rome Statute).

24. For discussion, *see* Jeff McMahan, *Individual Liability in War: A Response to Fabre, Leveringhaus, and Tadros*, 24 UTILITAS 288, 291 (2012); CANEY, *supra* note 9, at 194; Leveringhaus, *supra* note 22.

25. Christopher Kutz argues that this is McMahanian revisionism's main mistake. *See* Kutz, *Fearful Symmetry*, in JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS 69, 75 (David Rodin & Henry Shue eds., 2008).

26. This also applies to situations of armed conflict in which one party's goal is clearly just and the other's clearly unjust. I make no assumption that the argument must be limited to AHI. The claim in question may be just as problematic in other types of armed conflict.

27. For discussion, *see* BRUCE CRONIN, BUGSPLAT: THE POLITICS OF COLLATERAL DAMAGE IN WESTERN ARMED CONFLICTS (2018).

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of combatants may thus heighten risks of "collateral" harm for the very civilians to whom protection is owed.

B. Unreliable Proxies

Even in military rescue operations aimed at protecting individual rights, the law eschews any distinction between those committing and those seeking to prevent egregious rights violations. IHL's principles—its premises, distinctions, and assumptions—thus look fundamentally at odds with the moral commitments of the "responsibility to protect."

While the conventional distinction between combatants and noncombatants may serve as a rough proxy for the distinction between morally liable and nonliable targets in some wars, this proxy's margin of error is significant in wars justified by the "responsibility to protect." Call this the *Problem of Unreliable Proxies*. That it is generally morally worse for combatants to kill civilians than to kill other combatants does little to distinguish morally liable from nonliable individuals in just AHI. In just AHI, the conventional combatant/noncombatant distinction gives no reliable indication of whom it is morally permissible to harm. It is so morally inaccurate as to be ineffective as a reliable proxy for distinguishing between morally legitimate and illegitimate targets.

The Problem of Unreliable Proxies explains why IHL fails to meet the justice criterion in AHI. By distinguishing between combatants and noncombatants, the law is optimized to reduce harm to noncombatants. But, in certain cases, one party's resort to force is justified precisely because it aims to protect the innocent, and the other party's is not, precisely because it poses or enables the threat to the innocent. In these cases, the law's remissness in not protecting combatants who retain their moral rights not to be harmed should give us pause.[28] Without just mechanisms to enforce the prohibition on unjust wars and rules of just conduct that are sensitive to the *jus ad bellum*, the law falls short of its potential to effectively protect the vulnerable.

III. THE PRINCIPLE OF PROXIMATE PROTECTION

While the Geneva Conventions and their Additional Protocols embody momentous advances in the international community's efforts to limit the harmful effects of armed conflict, the international legal system for the prevention and prosecution of atrocity crimes remains porous. We lack robust, independent, and legitimate international institutions to enforce the criminalization of atrocities and states' obligations to suppress

28. As stated earlier, the claim here is not that there is a categorical difference between just AHI and other just wars, such as just wars of self-defense against unjust aggression. The assumption is simply that the more direct the connection between the justness of a war aim and the justness of the threats posed by individuals, the more pronounced the Problem of Unreliable Proxies.

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them. To regulate AHI to protect the innocent more effectively, the international legal system would need to do two things it currently does not do. It would need to prohibit unjust wars of self-defense *against* just interventions; and it would need to protect individual rights *during* such interventions.

While states' legal right to wage wars in self-defense currently exists alongside their "responsibility to protect," egregious violations of the latter should, in principle, entail loss of the former. The current notion of the "responsibility to protect" grew out of an explicit desire to reconcile the traditional principle of state sovereignty with the moral imperative to respond to heinous international crimes—specifically, genocide, war crimes, crimes against humanity, and ethnic cleansing. If failing in this responsibility compromises state sovereignty, then it should also limit states' legal permission to launch a war of self-defense against just interveners. The assumption that state sovereignty is contingent on the protection of fundamental rights not only removes the ordinary constraint against intervention; it should also constrain target states' legal permission to use lethal force in these cases.

In the absence of globally just institutions and international enforcement mechanisms, this vision is wildly unrealistic. Whether prohibiting unjust wars of self-defense against just interventions would reduce or increase unjust violence is, in any case, a matter of speculation. But this does not make it any less true that effective international enforcement mechanisms for the prohibition of unjust wars, against interventions legitimately necessitated by the "responsibility to protect," would fill a gaping hole in the system.[29]

Revisionists have long claimed that, if there was an independent court to determine the justness of belligerents' war aims, this would give the law a basis on which to make asymmetrical demands on combatants.[30] While no such court currently exists, what matters for our purposes is that, to meet the justice criterion, the law would need to regulate the use of force in such a way as to effectively protect morally innocent persons.[31]

29. For discussion, *see* David Scheffer, All the Missing Souls (2012), ch. 14. *See also* Ronald Dworkin's discussion of international legitimacy in his *A New Philosophy for International Law*, 41 Phil. & Pub. Affs. 2 (2013). For discussion concerning the *jus post bellum*, *see* Cécile Fabre's proposal for an international compensation fund in her Cosmopolitan Peace (2016), at 152–170.

30. For example, Jeff McMahan, *The Prevention of Unjust Wars*, *in* Reading Walzer 233 (Yitzhak Benbaji & Naomi Sussman eds., 2014); *see also* Adam Thomas Betz, *Epistemic Authority, Sovereignty, and Selective Conscientious Objection: A Critical Revision of McMahan's "Jus Ad Bellum" Court*, 44 Soc. Theory & Prac. 507 (2018).

31. For accounts that defend a categorized approach to liability in line with what I describe as proximate protection, *see* Bradley Jay Strawser, *Walking the Tightrope of Just War*, 71 Analysis 533, 540–542 (2011), and *Revisionist Just War Theory and the Real World: A Cautiously Optimistic Proposal*, *in* Routledge Handbook of Ethics and War: Just War in the 21st Century 76 (Fritz Allhoff, Adam Henschke & Nick Evans eds., 2013); Gerhard Øverland, *Killing Soldiers*, 20 Ethics & Int'l Affs. 455 (2006). For more extensive proposals about how the LOAC might be brought into greater congruence with morality, *see* Tadros, *supra* note 7, ch. 12; Haque, *supra* note 7; Janina Dill, *Towards a Moral Division of Labour Between IHL and IHRL During the Conduct of*

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To meet the other two criteria, the law would also need to remain sensitive to the epistemic constraints under which combatants typically act and that render revisionism impracticable as a blueprint for legal reform. The law must also remain enforceable. The challenge is thus to (i) reduce unjust harms while remaining sensitive to (ii) the nonideal individual and (iii) institutional constraints set out earlier.

Consider, to this purpose, the *Principle of Proximate Protection* (PPP). The PPP seeks to limit unjust harm by treating the justness of each party's goal as a proxy for individuals' moral status. Hence the notion of *proximate protection*. The distinguishing feature of proximate protection is that it renders the *jus in bello* sensitive to the *jus ad bellum* by focusing on the justness of belligerents' respective war aims and prohibiting attacks against just combatants discharging the "responsibility to protect."

The PPP strikes a compromise between revisionism's moral appeal and IHL's practicability, by taking seriously the possibility of rendering the law sensitive to considerations of justice and individual rights at least in AHI.[32] What renders the PPP distinctive is that it occupies an intermediate position between mainstream revisionist views on which the relationship between the law and morality of war is one of wholesale divergence and more far-reaching revisionist views on which the law ought to converge to a greater degree with morality as a general matter.[33] My aim, in what follows, is not to defend the PPP as a basis for legal reform. My twofold aim is, first, to outline the case for the PPP as a principle able to meet the justice criterion, and then to identify what stands in its way.

Since the epistemically constrained circumstances in which combatants operate render individualized rights protection practically impossible, most revisionists treat the status-based protection intended by the conventional principle of distinction as a nonideal inevitability.[34] But this is not the only option. In the absence of individualized rights protection, the next best thing is proximate protection. Hence, the PPP rejects the law's wholesale divergence from morality, without going as far as advocating

Hostilities, *in* LAW APPLICABLE TO ARMED CONFLICT (Ziv Bohrer, Janina Dill & Helen Duffy eds., 2020). In contrast to the present inquiry, these accounts are concerned with the merits of legal revisionism in general.

32. In principle, the PPP has moral appeal whenever its margin of error regarding the protection of the innocent would be smaller than that of the traditional principle of the legal equality of combatants. I take it that all just wars, by definition, are justified on the grounds that they seek to protect basic human rights. Hence, in theory, the PPP may also apply in mandated rescue missions or cases in which international law permits the resort to force (that is, with UN Security Council approval). Since the PPP is not a proposal for legal reform, but part of a dialectical strategy to crystalize precisely what stands in the way of the justice criterion, we can set aside hypothetical questions about the PPP's applicability in different legal contexts. I am grateful to an anonymous reviewer for pressing me to clarify this.

33. Most revisionists assume the former; for a defense of the latter view, *see* TADROS, *supra* note 7, ch. 12.

34. For example, McMahan, *supra* note 22, and McMahan, *The Morality of War and the Law of War*, *supra* note 7.

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wholesale convergence.[35] Proximate protection offers a more morally appealing alternative than resigning ourselves to the conventional principle of distinction. While revisionism focuses on combatants' individual moral status, and the law disregards questions of moral status altogether, the proxy-based approach operates with a set of broader distinctions to differentiate between typically morally liable and typically nonliable targets in AHI.

Consider first combatants' conduct vis-à-vis other combatants.[36] The PPP rests on the assumption that a significant majority of just intervening combatants pose just threats and a significant majority of unjust combatants pose unjust threats, and that their moral permissions to use lethal force differ accordingly.[37] Proximate protection is thus not entirely individualized. Since it is possible for intervening combatants to pose unjust threats, and for combatants defending the target party to pose just threats, the proxy-based approach is necessarily less precise than revisionist individualism. It would protect some just intervening combatants who may pose unjust threats, and it would not prohibit attacks against unjust combatants, some of whom may not be liable to be harmed.

But proximate protection may still be substantially more morally accurate than the principle of legal equality, which indiscriminately permits the use of lethal force by unjust combatants in pursuit of manifestly unjust goals. The problem with the conventional principle of distinction, recall, is one of unreliable proxies. The standard assumption that it is generally morally worse for combatants to kill civilians than to kill other combatants presents no reliable proxy for distinguishing morally liable and nonliable individuals in AHI. So, the conventional combatant/noncombatant distinction gives no accurate indication of whom it is morally permissible to harm.

By contrast, distinguishing between the just and unjust side may more precisely distinguish morally legitimate from illegitimate targets than the combatant/noncombatant distinction. If the margin of error on the proxy-based approach is significantly smaller than that of the law's conventional principle of distinction in AHI, the PPP could limit unjust harms more effectively than the conventional status-based approach. At least to this extent, a rule aimed at proximate protection stands a significantly better chance of meeting the justice criterion in AHI than the conventional principle of distinction with the legal equality of combatants.

35. As noted earlier, though I am sympathetic to the project of legal revisionism, it is not my aim to defend this here.

36. I do not take this principle to bear on the treatment of noncombatants engaged in the perpetration of atrocity crimes. While I assume that these individuals are morally liable to defensive harm, I do not discuss what the law should say about them. I suspect that the existing legal provision for a permission to attack civilians directly participating in hostilities may plausibly extend to civilian perpetrators of atrocity crimes. For arguments that support the moral case for civilian liability, *see* Helen Frowe, *Civilian Liability*, 129 Ethics 625 (2019); Frowe, Defensive Killing (2014); Frowe, *Self-Defence and the Principle of Non-Combatant Immunity*, 8 J. Moral Phil. 530 (2011).

37. For discussion, *see* McMahan, *supra* note 9, 188.

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Objections to proximate protection on the grounds that it would be unfair to treat all combatants carrying out a just AHI as practically immune from attack and all combatants forcefully resisting the intervention as liable to attack would need to show that the alternative of the legal equality of combatants would be more effective in protecting those who have moral rights not to be harmed. That this is the case, however, is open to doubt. In just AHI, unjust combatants' choice is between (a) killing opposing intervening combatants and (b) allowing them to protect vulnerable civilians whose rescue unjust defending combatants have a negative duty not to prevent. The conventional principle of distinction is concerned primarily with how combatants treat their enemies—not with how combatants treat their fellow civilian citizens.[38] In AHI, the current law has little bearing on the extent to which unjust defending combatants will comply with their moral obligations vis-à-vis cocitizen civilians. Since unjust combatants repelling a just intervention are fighting on their own territory, all the conventional principle of distinction tells them is that they are prohibited from intentionally killing their fellow civilian citizens. But this is either beside the point or altogether pointless. It is beside the point if civilians' defense is part of unjust combatants' ostensible justification for waging a war against just interveners, and it is altogether pointless if members of the target party's armed forces themselves are committing, or complicit in, atrocity crimes against civilians.[39]

The question, then, is what the law should tell unjust defending combatants in AHI. And, really, what it should tell them is not to prevent the rescue of their fellow citizens whose fundamental rights are at stake. In cases in which an intervention is justified, unjust combatants should, as Gerhard Øverland put it, "lay down their weapons and go home."[40]

Some philosophers have argued that it would be delusional to seek to prevent rights violations in war. "Fundamental moral commitments," Henry Shue, for example, insists, "cannot be fully honoured because military necessity minimally requires actions that violate the rules (moral and legal) for peaceful domestic life – it requires extensively 'killing people and breaking things.' This is what makes it war."[41] But the contrast between principles that govern military violence and principles that apply in peaceful domestic life is misleading. The problem is not that, in war, combatants

38. For discussion, *see* Gabriella Blum, *The Laws of War and the "Lesser Evil"*, 103 PROC. AM. SOC'Y INT'L L. 274 (2009).

39. There may be cases in AHI in which unjust combatants morally permissibly defend fellow unjust combatants. But associative obligations to fellow unjust combatants are morally outweighed by duties not to kill just combatants preventing atrocity crimes, and would themselves need to be justified.

40. Gerhard Øverland, *High-Fliers: Who Should Bear the Risk of Humanitarian Intervention?*, *in* NEW WARS AND NEW SOLDERS: MILITARY ETHICS IN THE CONTEMPORARY WORLD 69, 70 (Jessica Wolfendale & Paolo Tripodi eds., 2011).

41. Henry Shue, *Laws of War, Morality and International Politics: Compliance, Stringency, and Limits*, *in* FIGHTING HURT: RULE AND EXCEPTION IN TORTURE AND WAR 469, 485 (2016).

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violate moral and legal rules that apply in domestic life. The problem is that combatants violate the moral rules that apply in war.[42] The mere fact that wars involve killing and destruction is not a reason for the law to disregard the difference between justified and wrongful instances of killing and destruction, even among combatants, to the extent that it can do so. And, at least in just AHI, this extent may be greater than typically assumed.

While some advocates of the existing law have argued that the aim of legally regulating conduct in war should not be guided by the aim of reducing rights violations because large-scale rights violations are inevitable, this is no challenge to the proxy-based approach. The proxy-based approach is under no illusion that wars, by force of circumstance, involve masses of serious rights violations. It just insists that the PPP can limit rights violations in AHI significantly more effectively than the conventional principle of distinction. The proxy-based approach thus does not deny that "even in an unjust war, there are rules worth following."[43] But it presumes that, even if the law cannot prevent all rights violations, it should seek to prevent unjust harms to the greatest extent possible. Rules geared toward proxy-based harm reduction are better suited to the task than IHL's conventional principle of distinction.

IV. OBJECTIONS

A. The Humanitarian View

According to the so-called "humanitarian" view, the law has positive reasons to separate the *jus in bello* from the *jus ad bellum*. On this view, the law's main aim must be "to restrain the destructive force of war, while recognizing its inexorable necessities."[44] Denying the validity of the justice criterion altogether, this view says that, to reduce the total amount of harm caused in war, the law should prohibit attacks on civilians and limit lawful attacks to militarily necessary attacks on combatants.[45]

Reflected in Vattel's *Law of Nations* (1758), the St. Petersburg Declaration (1868), and the fourth Hague Convention (1907), the humanitarian view takes IHL to embody a long-established commitment to "humanitarianism in

42. For discussion of this and related methodological issues, *see* Seth Lazar, *Method and Morality in War*, *in* The Oxford Handbook of Ethics and War 19 (Seth Lazar & Helen Frowe eds., 2015); Seth Lazar & Laura Valentini, *Proxy Battles in the Ethics of War*, *in* 3 Oxford Studies in Political Philosophy (David Sobel, Peter Vallentyne & Steven Wall eds., 2017); Linda Eggert, *Rights and Rules: Revisionism, Contractarianism, and the Laws of War*, Law & Phil. (2022), at §V.

43. Haque, *supra* note 7, at 48–49.

44. 1880 Oxford Manual, Preamble, cited in Henry Shue, *Laws of War, Morality, and International Politics: Compliance, Stringency, and Limits*, 26 Leiden J. Int'l L. 271 (2013); Shue, Fighting Hurt: Rule and Exception in Torture and War (2016), at 467–493.

45. *See* Dill & Shue, *supra* note 7; Shue, supra *note* 44, at 452, 454, 467 n.30; Haque, *supra* note 7, at 41.

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war," which, above all, seeks to reduce harm and suffering.[46] On this view, the law does precisely what it should do, and the justice criterion is altogether invalid.

Accordingly, the *ad bellum/in bello* dualism, and the concomitant legal equality of combatants, is justified by the fact that the law's primary purpose is to reduce violence in general, not killing that is morally wrong.[47] So, on the humanitarian view, far from being a regrettable feature of the law necessitated by nonideal considerations, the *ad bellum/in bello* dualism is a prerequisite for the law's ability to fulfill its purpose of reducing harm irrespective of anything else. The moral imperative to protect individual rights, by preventing morally wrongful killing, never enters the picture. Rather, the legal equality of combatants is premised in part on the assumption that the law is not meant to protect individual rights but to reduce harm as a general matter.[48]

What justifies the use of lethal force *in bello* on the humanitarian view is military necessity. Whether it is legally permissible to kill *in bello* depends on whether killing is necessary to gain some military advantage, not on whether this military advantage serves a just or an unjust war aim. This applies to both intentional attacks against enemy combatants and unintended, "collateral" harms inflicted on innocent civilians.

But the premise that permitting only militarily necessary force minimizes harm is dubious. In practice, militaries generally aim to minimize risks to combatants within the constraints of the law—not to minimize risks to civilians to the greatest extent possible. As Tony Pfaff puts it,

> when commanders and their soldiers determine what is necessary, they are always asking themselves how much force is *allowable*, not how little is *possible*. . . . The most force allowable then becomes the necessary force since it is what is necessary to preserve soldiers' lives without violating the law or morality of war.[49]

46. *See* David Luban, *Human Rights Thinking and the Laws of War*, *in* THEORETICAL BOUNDARIES OF HUMAN RIGHTS AND ARMED CONFLICT 52 (Jens David Ohlin ed., 2016); Dill & Shue, *supra* note 7.

47. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, Saint Petersburg, Nov. 29 / Dec. 11, 1868, cited in Dill & Shue, *supra* note 7, at 455; Dill & Shue, *supra* note 7, at 311, 319; HAQUE, *supra* note 7, at 20.

48. Dill & Shue, *supra* note 7, at 448, 454, 467. For discussion, *see* HAQUE, *supra* note 7, at 38–40. One might hold that the laws of war should neither aim to prevent merely harm in general nor merely unjust harm; rather, they should both prevent wrongdoing *and* reduce harm in general. For example, Victor Tadros argues that if the law could, through deterrence, prevent many people from posing unjust threats to others in the first place, it should do so. The harms the law should seek to prevent thus include those that it would be permissible to inflict on unjust combatants. *See* TADROS, *supra* note 7, at 279–280. This seems to me completely right. Indeed, that {deterring unjust threats} is preferable to {unjust threats being posed and then harmfully averted} is consistent with the claim that, once a war is underway and unjust threats are being posed, preventing unjust harms is, morally speaking, more morally urgent than preventing harm in general. Far from denying that deterring people from posing unjust threats in the first place would be preferable, the PPP's prohibition on attacking just combatants is itself meant to deter unjust combatants from posing unjust threats (on which more below). The PPP just presumes that, once a war is underway, the next best thing is to prioritize the prevention and reduction of unjust harms. Thanks to Victor Tadros for pressing me on this.

49. TONY PFAFF, PEACEKEEPING AND THE JUST WAR TRADITION (2000), at 2 (emphasis added); also discussed in JAMES PATTISON, HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT: WHO

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Insofar as AHI are regulated, and consequently conducted, like traditional military campaigns, intervening combatants will employ the most force permissible, not the least force possible. If this is true, as an empirical matter, it is open to question whether IHL actually minimizes harm to the greatest extent possible.

In addition, treating military necessity as the ultimate criterion for the permissibility of the use of lethal force effectively takes unjust ends to justify lethal violence for no better reason than that a warring party regards its unjust end as an end.[50] Consider what this implies for the protection of civilians. Article 51(5) of Additional Protocol I of the 1977 Geneva Conventions prohibits any "attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be *excessive in relation to the concrete and direct military advantage* anticipated."[51]

That the law determines the permissibility of harms to innocent civilians in relation to the advancement of military goals is striking for at least two reasons. Besides leaving significant room for interpretation of what harms count as "excessive," the law subordinates innocent persons' rights not to be killed to the advancement of even unjust war aims. The assumption that the law should be insensitive to whether a warring party's prospective military advantage would advance a just or an unjust aim ascribes undue justificatory force to unjust ends.

Finally, if success in terms of the "responsibility to protect" consists in protecting innocent people's rights, sheer military advantage provides no adequate baseline for proportionality calculations. Requiring interveners to weigh harms to the innocent against military advantage in the conventional sense disregards the fact that this military advantage should itself serve the purpose of protecting threatened people's human rights, and should be measured accordingly.

James Pattison has argued that the humanitarian aim of AHI requires intervening forces to exhibit "less aggressive conduct" than the standard legal requirement of proportionality permits.[52] But saying that principles governing just conduct in AHI ought to be more restrictive than in conventional wars of self-defense just because "the intervener is using force for

Should Intervene? (2010), at 106–107. While Pfaff's argument is primarily about the use of force in peace operations, Pattison suggests that, like in peace operations, AHI call for the use of "the least force" possible.

50. For discussion, *see* Rodin, *supra* note 19, at 455.

51. *1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, *in* Documents in the Laws of War 416 (Adam Roberts & Richard Guelff eds., 1982) (emphasis added).

52. Pattison, *supra* note 49, at 104–109. *See also* Alex J. Bellamy, *Motives, Outcomes, Intent and the Legitimacy of Humanitarian Intervention*, 3 J. Mil. Ethics 216, 229 (2004); Eric A. Heinze, *Humanitarian Intervention: Morality and International Law on Intolerable Violations of Human Rights*, 8 Int'l J. Hum. Rts. 471 (2004); George Lucas, *The Role of the "International Community" in Just War Tradition—Confronting the Challenges of Humanitarian Intervention and Preemptive War*, 2 J. Mil. Ethics 122 (2003).

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humanitarian purposes" is not fully satisfying.[53] After all, killing innocent people wrongs them regardless of whether one does so in pursuit of a humanitarian or a different just goal. As the PPP illustrates, we might instead question the *ad bellum/in bello* dualism altogether.

B. Noncompliance

Many unjust combatants are unlikely to comply with a law prohibiting attacks against just intervening combatants. Given the messy reality of war, many combatants lack the information necessary to make accurate judgments about individual enemy combatants' moral liability to harm. They are therefore in no position to distinguish morally liable from nonliable individuals in the way revisionism prescribes.[54] Most combatants are also convinced that they are fighting a just war. Since a prohibition on fighting unjust wars would likely be ignored, legally distinguishing between just and unjust combatants, and criminalizing participation in an unjust war, would likely be ineffective.[55] In addition, enforcing a prohibition on attacking just combatants might unfairly punish combatants who are not culpable for their participation in an unjust war.[56] After all, many unjust combatants may not be blameworthy for mistakenly believing that the war they are ordered to fight is a just one, especially if it is a war of self-defense. They may also be morally excused for fighting under duress or acting on perceived associative duties. Besides, the more demanding a law becomes, the less likely people will be to comply with it.

To be sure, combatants who are not morally blameworthy for posing unjust threats should not be punished for using defensive force. But enforcing a prohibition on fighting unjust wars need not result in the unjust punishment of morally excused unjust combatants. In cases in which combatants are not morally blameworthy for following orders to fight an unjust war, perhaps only high-ranking political and military decision-makers make themselves liable to punishment.

More broadly, a greater degree of compliance with the law does not automatically justify an unduly permissive law. In cases in which the law has good reason to be demanding, a greater degree of compliance with a less demanding law does not justify toothlessness, especially given the

53. PATTISON, *supra* note 49, at 100 (original emphasis).

54. For instance, MCMAHAN, *supra* note 9, at 61, 148–149; McMahan, *Duty, Obedience, Desert, and Proportionality in War: A Response*, 122 ETHICS 135, 138 (2011); Shue, *supra* note 41, at 473; Shue, *Do We Need a 'Morality of War'*, *in* FIGHTING HURT: RULE AND EXCEPTION IN TORTURE AND WAR 401, 414 (2016); Shue, *Laws of War, Morality, and International Politics*, *in* FIGHTING HURT 469, 476 (2016); Shue with Janina Dill, *Limiting the Killing in War*, *in* FIGHTING HURT 447, 459, 463 (2016); Shue, *Laws of War*, *in* FIGHTING HURT 429, 439–440 (2016).

55. McMahan, *The Laws of War*, *supra* note 7; McMahan, *The Morality of War and the Law of War*, *supra* note 7; MCMAHAN, *supra* note 9, at 190–191.

56. For example, MCMAHAN, *supra* note 9, at 148–149; *see also* McMahan, *supra* note 54, at 138.

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availability of other compliance-increasing measures including sanctions, more aggressive enforcement, and public international shaming.[57]

The question is how we should weigh the likely effects of compliance with a deficient law against the likely effects of noncompliance with a more morally adequate law. Even partial compliance with restrictions on attacks against morally innocent people might bring about a more just distribution of harm. Hence, likely noncompliance with a law aiming for proxy-based harm reduction is not necessarily an argument against such a law. In cases in which innocent lives are at stake, widespread compliance with laws that permit the killing of innocent people may be no more morally desirable than partial compliance with more restrictive laws, so long as this results in fewer innocent people suffering unjust harms.

Even if unjust combatants largely failed to comply with a prohibition on attacking just interveners, this would make little practical difference compared to how the current law demands that wars are conducted. Existing law, in any event, permits unjust combatants to attack just combatants and to kill considerable numbers of innocent civilians as a side effect. Noncompliance with a prohibition on attacks against just intervening combatants would thus result in no more harm than compliance with the conventional principle of distinction currently in place.

Noncompliance, moreover, need not damage the system's credibility. After all, making combatants act in a certain way *in bello* is not the law's only function. The rules governing the use of force *in bello* may have a critical impact on decisions about the resort to war, and on what measures will be available in the pursuit of justice *post bellum*. Since IHL gives governments no incentive not to order counterattacks against just interveners, a law prohibiting the use of military force against a legitimate intervention to prevent atrocity crimes may be more effective in deterring the target party's regime from ordering its military to wage an unjust war. Instances of noncompliance, then, would not necessarily render the law altogether ineffective, because noncompliance still provides additional grounds on which to hold certain perpetrators—primarily those in positions of power—accountable *post bellum*.[58]

It would, in any case, be a mistake to measure the law's effectiveness solely by its deterrent effect and the degree to which it constrains states' conduct. The law also serves as a vital basis for criticizing and justifying state conduct.[59] Even if a general prohibition on attacks against just intervening

57. Shue, *Laws of War, Morality, and International Politics*, *supra* note 54, at 484–486; Jeremy Waldron, *Deep Morality and the Laws of War*, *in* The Oxford Handbook of Ethics and War 80 (Seth Lazar & Helen Frowe eds., 2018).

58. For discussion of the effectiveness of holding political leaders criminally accountable for human rights violations, and an argument that such prosecutions may diminish human rights violations in the future, *see* Kathryn Sikkink & Hun Joon Kim, *The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations*, 9 Ann. Rev. L. & Soc. Sci. 269 (2013).

59. Monica Hakimi, *The Work of International Law*, 58 Harv. Int'l L. J. 1 (2017); Ian Hurd, How to Do Things with International Law (2017).

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combatants did little to deter atrocity-committing regimes from fighting unjust wars against just interveners, such a prohibition could still provide a critical basis for reckoning with wrongdoing and facilitating the pursuit of postintervention justice in the aftermath. Even if unjust combatants violated the prohibition on attacking just combatants *in bello*, such a law could still go a significant way toward facilitating the *post bellum* prosecution of military and civilian leaders who ordered their militaries to use lethal force against just interveners to hinder the prevention of atrocity crimes.

Another worry that sometimes arises is that criminalizing participation in an unjust war might incentivize unjust combatants to increase their use of unjust violence. If unjust combatants expect that they will be punished for violating a prohibition on fighting unjust wars, they may be more likely to attempt to win at all cost and less willing to surrender. This might result in combatants employing more unjust violence than if they did not have to fear being punished for fighting in an unjust war.[60]

This concern about perverse incentives assumes that combatants will equate winning their war with escaping punishment. But there is no reason to assume that either of the warring parties, including those carrying out an intervention, ought to settle questions of the *jus post bellum*. Despite exceptions as monumental as the Nuremberg trials, "victor's justice" is rarely justice.[61] Warring parties typically lack the just authority to enforce the law and to identify accountability practices appropriate for holding individual combatants, civilian and military leaders, and state institutions responsible for human rights violations. There is no reason to think that those carrying out just AHI should also enforce the laws of war.

In sum, neither of the main approaches to justifying the *ad bellum/in bello* dualism is fully satisfying in AHI; hence, neither satisfyingly addresses the Problem of Unreliable Proxies.

V. THE INDETERMINACY DILEMMA

The international legal system provides no clear indication of the circumstances in which conducting an intervention is justified, and when forcefully resisting it is not. The "responsibility to protect," as noted earlier, is not itself a legally binding framework. Whether it may justify breaching the laws pertaining to the initial use of force against another state is fiercely contested.[62] In practice, armed interventions that were widely seen as

60. Jeff McMahan, *The Ethics of Killing in War*, *supra* note 7; for discussion, *see also* HAQUE, *supra* note 7.

61. For discussion, *see* Seth Lazar, *Skepticism About* Jus Post Bellum, *in* MORALITY, JUS POST BELLUM, AND INTERNATIONAL LAW 204 (Larry May & Andrew Forcehimes eds., 2012).

62. *See* the 2018 UN Human Rights Committee's General Comment 36 on the right to life, which includes the statement that "States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate *ipso facto* article 6 of the Covenant." This has fueled debates about the relationship between human rights and the *jus ad bellum*. *See* United Nations Human Rights Committee (HRC), General comment No. 36 (2018) on

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morally justified were neither wars of self-defense nor authorized by the UN Security Council. As such, they were technically illegal. Examples include India's intervention in East Pakistan in 1971 in response to large-scale human rights violations, Vietnam's intervention in Cambodia in 1978 to remove Pol Pot, Tanzania's intervention in Uganda in 1979 to oust Idi Amin, and, more recently, NATO's intervention in Kosovo in 1999. While each of these interventions sought to suppress extreme human rights violations, many scholars see these interventions as having violated international law.[63] Others ascribe great weight to the fact that the UN's response was effectively to acquiesce in these interventions. For example, although the UN had not authorized NATO's intervention in Kosovo, it later rejected a resolution to condemn it and instead "retroactively endorsed" the intervention in the form of a number of resolutions toward the end of the conflict.[64] Some scholars hold that, since the UN deliberately refrained from condemning some military interventions, these interventions were not clearly illegal.[65] In short, the legality of AHI remains indeterminate.[66]

Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, U.N. Doc. CCPR/C/GC/36, Oct. 30, 2018 (GC 36). For discussion, *see* Dapo Akande & Katie A. Johnston, *Implications of the Diversity of the Rules on the Use of Force for Change in the Law*, 32 Eur. J. Int'l L. 679 (2021). For discussion of how the criminalization of aggression might affect the possibility of resort to force to protect human rights, *see* Kevin Jon Heller, *The Illegality of 'Genuine' Unilateral Humanitarian Intervention*, 32 Eur. J. Int'l L. 613 (2021). On Heller's view, AHI do not generate an exception to the prohibition on the use of force, because even "genuine" humanitarian interventions might violate the prohibition of the use of force and count as crimes of aggression as specified by the Rome Statute of the ICC.

63. The position that these interventions were illegal is based on standard interpretations of Articles 2(4) and 2(7) of the UN Charter. *See, e.g.*, Nigel Rodley, *Humanitarian Intervention*, *in* The Oxford Handbook of the Use of Force in International Law 775 (Larry May & Andrew Forcehimes eds., 2015). For discussion, *see* Allen Buchanan, *From Nuremberg to Kosovo: The Morality of Illegal International Legal Reform*, 111 Ethics 673 (2001), and Buchanan, *Reforming the International Law of Humanitarian Intervention*, *in* Humanitarian Intervention: Ethical, Legal and Political Dilemmas 130 (J. L. Hozgrefe & Robert O. Keohane eds., 2003). For the view that secondary rules of state responsibility do not provide a legal basis for AHI in cases in which the primary rules of international law do not permit resort to force for humanitarian purposes, *see* Federica Paddeu, *Humanitarian Intervention and the Law of State Responsibility*, 32 Eur. J. Int'l L. 649 (2021).

64. For discussion, *see* J. L. Holzgrefe, *The Humanitarian Intervention Debate*, *in* Humanitarian Intervention: Ethical, Legal and Political Dilemmas 15 (J. L. Hozgrefe & Robert O. Keohane eds., 2003); Neil A. Lewis, *The Rationale: A Word Bolsters Case for Allied Intervention*, N.Y. Times, Apr. 4, 1999; Christopher Greenwood, *Yes, But Is the War Legal?*, Observer, Mar. 28, 1999. *See also* Independent International Commission on Kosovo, Kosovo Report (2000), *available at* https://www.law.umich.edu/facultyhome/drwcasebook/Documents/Documents/The%20Kosovo%20Report%20and%20Update.pdf; Ruth Wedgwood, *NATO's Campaign in Yugoslavia*, 93 Am. J. Int'l L. 828 (1999); A. Cassese, Ex iniuria ius oritur*: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 Eur. J. Int'l L. 23 (1999).

65. *See* Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, *in* Humanitarian Intervention: Ethical, Legal and Political Dilemmas 204 (J. L. Hozgrefe & Robert O. Keohane eds., 2003). Others maintain that this did not amount to the positive authorization required by the Charter. *See* Simon Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law (2001), at 213.

66. Ian Hurd, *Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World*, 25 Ethics & Int'l Affs. 293 (2011). It is widely acknowledged that indeterminacy regarding the

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One resulting problem is that the law consequently lacks a basis on which to distinguish between combatants discharging the "responsibility to protect" and combatants defending perpetrators of atrocity crimes.[67] Another problem is that this very indeterminacy seems essential to preserving stability within the international legal system. So, rather than the considerations to which "humanitarian" defenses or revisionist concessions typically appeal, it is ultimately the law's own indeterminacy regarding the legality of AHI that sustains the *ad bellum/in bello* dualism and, in turn, prevents the protection of human rights during wars whose very purpose is to stop human rights violations. This requires some explanation.

Consider some of the reasons that militate in favor of eliminating the indeterminacy in question. First, clear legal grounds for AHI may prove essential to guiding states' behavior. Greater clarity might pressure states to fulfill their "responsibility to protect" in both relevant senses: by forcing states to protect their own citizens' human rights to avoid external intervention, and by moving the "international community" to intervene as a last resort. After all, it was partly uncertainty about what was required that led the Clinton administration to go to absurd lengths to avoid using the term "genocide," for fear that any mention would require decisive action, as hundreds of thousands of Rwandans were being hacked to death in 1994.

Second, a clear legal basis for AHI might reduce the risk of abuse. Clarity about the conditions under which the law prohibits, permits, or requires intervention on humanitarian grounds may prevent states from appealing to allegedly humanitarian reasons to justify opportunistic, nonhumanitarian interventions. Finally, clarity about the legality of AHI would provide a currently lacking basis for principles geared toward more effectively protecting those who retain their moral rights not to be harmed, including just combatants whose principal aim is to protect vulnerable civilians.

But this is not all that matters. Other weighty concerns militate in favor of preserving the law's indeterminacy about the *jus ad bellum*. For one, greater clarity might actually increase the risk of abuse. A law that allows states to intervene without the authorization of the UN Security Council, one might fear, is simply too dangerous. The mere possibility of legal AHI may increase the risk of states abusing such a provision, to engage in unjust interventions for nonhumanitarian reasons. In David Luban's words, "it gets hard in principle to distinguish self-appointed saviours . . . from mafias."[68] Paving the way

international law on the resort to force is a central obstacle to legally differentiating between just and unjust combatants. *See, e.g.*, MCMAHAN, *supra* note 9; Dill, *supra* note 7; Seth Lazar, *Complicity, Collectives, and Killing in War*, 35 LAW & PHIL. 365 (2016).

67. Several scholars have proposed mechanisms for institutionalizing procedures for assessing and authorizing the preventive use of force. *See* Allen Buchanan & Robert O. Keohane, *The Preventive Use of Force: A Cosmopolitan Institutional Proposal*, 18 ETHICS & INT'L AFFS. 1 (2004); McMahan, *supra* note 30; Betz, *supra* note 30.

68. David Luban, *Intervention and Civilization: Some Unhappy Lessons of the Kosovo War*, *in* GLOBAL JUSTICE AND TRANSNATIONAL POLITICS 79, 84–85 (Pablo de Greiff & Ciaran Cronin eds., 2002).

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toward legal AHI might loosen vital constraints against wars of aggression. For this reason alone, one might think, the law's fundamental indeterminacy regarding the legality of AHI is worth preserving.

A second concern is that the law's indeterminacy might be an advantage, and codifying the principles governing the *jus ad bellum* of AHI might backfire. Striving for clarity about AHI's ambiguous legal status might be counterproductive, insofar as such an enterprise might bring with it obstructive rigidity where flexibility is of the essence. Uncertainty, as Jane Stromseth puts it, offers "fertile ground for the gradual emergence of normative consensus, over time, based on practice and case-by-case decision-making."[69] Given the nature of international negotiations, codification would in any case be exceedingly difficult to achieve, and the rules on which states would be able to agree would likely be so vague as to be impractical and useless.[70]

In addition, it is one of international law's idiosyncrasies that it is continuously and case-specifically constructed. In some cases, it is only in invoking the law that states construct its very meaning. In this sense, states' *use* of international law *generates* it. Insofar as using the law may, counterintuitively, precede lawfulness in international legal practice, it may be a mistake to assume that the law can tell us what it requires in any given case to begin with.[71]

Finally, states lack incentives to resolve deep-rooted ambiguities in the international legal system. A small number of dominant states—the permanent five members of the Security Council—enjoy a disproportionate degree of power over the creation, application, and enforcement of international law. That this handful of states should establish what it is permissible to do in light of seemingly contradictory values of state sovereignty and the protection of fundamental rights is, put mildly, open to doubt.[72]

Where does this leave us? To limit morally unjust killing, the law needs a basis on which to distinguish just from unjust killing. But clarifying the legality of AHI might itself cause more problems than it solves. Legally prohibiting morally wrongful acts of killing might sacrifice a considerable degree of international security. The problem, then, is not only that the law is fundamentally indeterminate regarding the *jus ad bellum* of AHI, but that it is not at all obvious that we should seek to change this. Call this the *Indeterminacy Dilemma*: the law's indeterminacy regarding the use of force not only prevents us from legally enforcing the moral imperative

69. Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, *in* Humanitarian Intervention: Ethical, Legal, and Political Dilemmas 233 (J. L. Holzgrefe & Robert O. Keohane eds., 2003).

70. *See* Bellamy, *supra* note 2.

71. *See* Hurd, *supra* note 59.

72. For discussion, *see* Mohammed Ayoob, *Humanitarian Intervention and State Sovereignty*, 6 Int'l J. Hum. Rts. 81 (2002); Ian Hurd, *Legitimacy, Power, and the Symbolic Life of the UN Security Council*, 8 Global Governance 35 (2002). *See also* Buchanan, *supra* note 63, *Reforming the International Law*, at 162.

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of protecting human rights in humanitarian interventions —which is troubling. It also helps preserve stability within the international system—which is essential. The Indeterminacy Dilemma thus arises because the very indeterminacy that helps preserve relative stability within our nascent international legal system prevents us from throwing the law's weight behind the moral imperative of protecting human rights in humanitarian interventions.

While attempting to resolve the Indeterminacy Dilemma would exceed the scope of this paper, here is a starting point. Preserving the status quo comes at a real moral cost. Not only might a more definitive sense of the *jus ad bellum* prevent wrongful failures to rescue. It might also pave the way toward regulating just conduct in AHI in such a way as to better protect the innocent. Preserving a high degree of ambiguity about the legality of AHI might in any event not be our only option. An arguably more appropriate response to the risk of abuse of a legal provision for AHI would be to vigorously enforce rules against unjust wars of aggression.[73] Whether the occurrence of unjust interventions would increase or decrease if the law became more definitive about the legality of AHI is, in any case, a matter of speculation. Indeed, our current, indeterminate system has seen everything from unjust interventions, such as the 2003 invasion in Iraq and the recent Russian invasion of Ukraine; to arguably just interventions, at least in terms of the *jus ad bellum*, such as the 1999 intervention in Kosovo; to what we might describe as wrongful noninterventions, such as the failure to intervene in Rwanda in 1994. Given the risk of failure in the face of duties to rescue, and undue legal permissions to commit morally wrongful acts of killing, the moral case for preserving the law's indeterminacy concerning the *jus ad bellum* would be more compelling if there were less to gain from clearer principles regarding the legality of AHI.

VI. HUMAN RIGHTS AND THE CREAKY WHEELS OF INTERNATIONAL LAW

As humanity has moved from the mass mobilization of national armies to advanced precision-guided weapons technology and remote warfare, IHL seems, in critical aspects, too blunt a tool to effectively guide just conduct in different contexts. Not only is the idea that there may be an enforceable "responsibility" to protect individual rights a relatively recent phenomenon.[74] The way in which armed conflicts are fought has also developed far beyond

73. For example, CANEY, *supra* note 9.

74. Though states have, for a long time, abused the "humanitarian" justification as a pretext for furthering their national interests abroad. *See, e.g.*, AIDAN HEHIR, HUMANITARIAN INTERVENTION (2009); CHESTERMAN, *supra* note 65. But the doctrine of the "responsibility to protect," as noted earlier, was only adopted by the UN in 2005. For general discussion of the historical foundations of the laws of war, *see* PABLO KALMANOVITZ, THE LAWS OF WAR IN INTERNATIONAL THOUGHT (2020).

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what the existing laws were originally designed to regulate. As the character of war has evolved and diversified, our understanding and the legal enforcement of just conduct should advance accordingly. By falling back on a centuries-old understanding of what warfare is like, the law primarily does those a service who commit grave moral wrongs.

In the short term, moral progress might take the form of developments in customary international law, both regarding greater determinacy about the *jus ad bellum* and a more rights-focused *jus in bello* in contexts of the "responsibility to protect." Both philosophers and legal scholars have acknowledged that international human rights law (IHRL) better tracks revisionism's demands for the protection of individual rights than does IHL.[75] One step toward more effectively protecting individual rights, then, might take the form of affording IHRL a further reach and a stronger grip in situations of armed conflict.

The relationship between IHL and IHRL is notoriously nebulous.[76] Both bodies of law have separate origins and evolved in separate ways. While IHL was codified in the second half of the nineteenth century, with origins that date back much further, IHRL did not emerge in its current form until after the Second World War.[77] While the 1948 Universal Declaration of Human Rights (UDHR) first set out international human rights in a nonbinding General Assembly resolution, it was not until 1966–1967 that universal human rights treaties emerged as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The origins of IHRL, this is to say, are independent of and considerably more recent than those of IHL.

IHL and IHRL are also implemented by different agents and institutions and are generally understood to apply in different contexts. Technically, IHRL applies at all times, in peacetime and during armed conflict, but does not govern the conduct of hostilities.[78] In times of war, the standard assumption is that IHL, as the more applicable body of law, effectively

75. For discussions of how IHRL better tracks individualist commitments of revisionist theory, *see* Dill, *supra* note 31; Eliav Lieblich, *The Facilitative Function of* Jus in Bello, 30 Eur. J. Int'l L. 321 (2019); Haque, *supra* note 7; Luban, *supra* note 46; and Luban, *Just War and Human Rights* in his Military Ethics (2008).

76. For discussion, *see* Dill, *supra* note 31; Kenneth Watkin, Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict (2016), at 121–156; Lawrence Hill-Cawthorne, *Humanitarian Law, Human Rights Law and the Bifurcation of Armed Conflict*, 64 Int'l Compar. L. Q. 293 (2015); Oona A. Hathaway et al., *Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law*, 96 Minn. L. Rev. 1883 (2012); Christian Tomuschat, *Human Rights and International Humanitarian Law*, 21 Eur. J. Int'l L. 15 (2010); Robert Kolb, *The Relationship Between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions*, 38 Int'l Rev. Red Cross 409 (1998).

77. But similar fundamental ideas became prominent during the Enlightenment and profoundly shaped the US Declaration of Independence in 1776 as well as the French Déclaration des droits de l'homme et du citoyen in 1789.

78. It does, however, govern the use of force in law enforcement. For example, it prohibits the arbitrary deprivation of life and is based on central assumptions about the morality of

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trumps IHRL. After all, IHL aims to protect civilians specifically from the effects of hostilities, while IHRL generally aims to protect individuals from abuse by the state.

But that IHL should effectively trump IHRL in AHI is hardly self-evident. In cases in which AHI is justified precisely because a state failed in its duty to protect human rights, the assumption that IHRL should lose its applicability seems out of place. After all, the very reason why intervention is justified in any given case is that the target party failed in its obligation to protect its people's human rights. To declare IHRL, for all intents and purposes, irrelevant even in military operations carried out to suppress grave human rights violations therefore seems unduly deferential to IHL.[79]

The view that IHRL should not fall out of the picture in armed conflict is coherent with existing human rights norms and recent developments in international law.[80] While international law traditionally concerned relations among sovereign states, rather than relations between states and individuals, international law is now recognized as constraining not merely how states interact with other states but also how they interact with individuals, including their own citizens.[81] Both the UDHR and the Genocide Convention were early building blocks of a growing framework of human rights law that made "how a state treats individual human beings . . . a matter of international concern."[82] The "responsibility to protect" continues this trend, as a manifestation of the view that protecting human rights is everybody's business.[83]

Finally, given how much there is to gain from a more robust, consistent, and just international system, some risk may be worth taking.[84] The long-term goal of eradicating atrocity crimes, and impunity for their commission, may make it worth bearing some short-term costs of disrupting the performance of international institutions. It is hardly as though existing institutions were functioning flawlessly. And many existing laws and customs are simply not fit for the purpose of holding individual perpetrators, including civilian leaders, accountable for atrocity crimes.[85]

defensive harming, including considerations of necessity, proportionality, and just cause (for instance, International Covenant on Civil and Political Rights, Article 6(1)).

79. For lawyers, this is a matter of how we should interpret *lex specialis*. My concern here is with the moral case.

80. For the view that IHRL should prevail at least in some instances even in armed conflict, *see* HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS (3d ed. 2008), at 395. For general discussion, *see* HUMAN RIGHTS (Louis Henkin et al. eds., 2d ed. 2009), at 413–415.

81. For the traditional view concerning the "law of nations," *see* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 422 (1964).

82. Curtis A. Bradley & Jack A. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position,* 110 HARV. L. REV. 815, 832 (1997) (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ III cmt. d, 115 cmt. e (1987), pt. VII, Introductory Note, at 144–145).

83. A notion emphasized by Gareth Evans, cochair of the ICISS commission, on numerous occasions.

84. *See* TADROS, *supra* note 7, at ch. 12.

85. *See* SCHEFFER, *supra* note 29, at 426.

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Criticizing existing laws without offering a fully fledged alternative is a risky undertaking. One worry is that any challenge to the existing law of armed conflict threatens to undermine its all-too-easily-jeopardized influence.[86] But this need not be the case. By illuminating what the law should try to achieve, philosophical reflection may ultimately help fortify the law's moral foundations. Though advocating for reform is not this paper's mission, it is worth noting that even reform need not be destabilizing. Consider how the 1977 Protocols came about. At the time, the growing number of wars of national liberation and civil wars after decolonization and during the Cold War created a need for distinct laws to apply in those specific types of conflict. Given the worry that revising the 1949 Geneva Conventions might compromise some of their important advances, additional Protocols were adopted. Similarly, new texts in the form of Protocols additional to the Geneva Conventions might be considered for the legal regulation of AHI, to set out the rules that apply specifically in cases in which military force is used to enforce states' "responsibility to protect."[87]

But the wheels of international law are creaky. International justice is an unsystematic, inconsistent, sporadic, nonlinear, arduous ongoing process. The very set of crimes for which people can be held accountable is constantly evolving.[88] Especially concerning the prevention, suppression, and prosecution of atrocity crimes, international law is still in the making. Working toward more globally just institutions to enforce the prohibition on unjust wars, both of aggression and defense against just intervention, in the end, may just be part of an inherently messy process that may ultimately strengthen the international legal system's moral foundations.

VII. CONCLUSION

The perpetual tension between state sovereignty and the protection of individual human rights does not merely generate familiar controversies about the legality of military intervention in the absence of UN Security Council authorization.[89] It also carries far-reaching implications for the very

86. *See* Waldron, *supra* note 57.

87. One might also appeal to the notion of the "responsibility while protecting." *See* Oliver Stuenkel, *Responsibility While Protecting*, *in* The Oxford Handbook of the Responsibility to Protect 620 (Alex J. Bellamy & Tim Dunne eds., 2016).

88. For example, after World War I, there was no way to try the Kaiser, because there was not yet a crime of aggression. It was only because the Kellogg Briand Pact of 1928 made the crime of aggression illegal that it was possible to try the Nazis for this crime after World War II. For discussion, *see* Oona A. Hathaway & Scott J. Shapiro, The Internationalists: How a Radical Plan to Outlaw War Remade the World (2017). In addition, the term "genocide" was only coined in 1943–1944, after Polish-American lawyer Raphael Lemkin recognized the need for a word to capture the human destruction of the Holocaust and resolved to make it an international crime. For an account of Lemkin's monumental efforts, *see* Samantha Power, A Problem from Hell: America and the Age of Genocide (2002), at 47–60.

89. For example, Kofi Annan, Speech to the General Assembly, U.N. Doc. SG/SM/7136GA/9569: Secretary-G, Sept. 20, 1999, 2.

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possibility of codifying principles of just conduct during AHI. This paper took issue with the fact that the law regulates armed humanitarian intervention no differently from traditional military campaigns. Without rules of just conduct that are sensitive to the *jus ad bellum*, and just mechanisms to enforce the prohibition on unjust wars, the law falls short of its potential to effectively protect innocent persons. In the end, the regulation of just conduct in wars waged for distinctly humanitarian purposes goes to the very core of why armed humanitarian intervention carries an enormous risk of doing more harm than good. This paper offered a starting point for confronting this issue head-on.

To close, arguing for greater protection of human rights in armed conflict might sound like foolish fantasy. But it would be reckless to ignore the scope for debate this paper sought to illuminate. After all, states are capable of agreeing that not anything goes. Before the first Geneva Convention in 1864, the Additional Protocols over a hundred years later, the signing of the Genocide Convention and the UDHR a day later in 1948, and the signing of the Rome Statute in 1998, the enshrining of fundamental moral commitments in these international agreements may have seemed no less utopian than striving for a greater degree of human rights protection in cases in which protecting human rights is the very cause for military action.

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