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The accommodation, disjunction and felt experience of law in military operations

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The Accommodation, Disjunction and Felt Experience of Law in Military Operations

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The purpose of this paper is to reconcile the concepts of Security Council authority, the use of force and the rule of law into a workable synthesis of meaning. The key point of interest is the role law plays in accommodating the application of force and the manner in which this experience offers insight into how a rule of law paradigm applies.

Despite the ostensible dispersal of national military perspectives, the practice of military legal cultures when undertaking operations has become largely standardized in recent years. This is partly driven by the frequency of UN and Coalition operations, shared professional value sets and acting under largely common legal regimes. While the vocabularies and methodologies of applying and justifying force reflect a type of isomorphism, elusive questions of legitimacy and personal choice under the law reveal a deeper register of contestation. Hence, there is worth in examining the manner in which use of force and rule of law paradigms pragmatically apply within such cultures. This paper will interrogate the disjunction that occurs when legal methodologies mask moral intuitions. It is in this space that a meaningful rule of law concept might be authentically located.

It is a theme of this paper that the rule of law notion has less to do with any structural assessment of the quality of the law, than with the realization of an ethic that shapes legal military decision-making. An ethic that is both reflective of real world political and moral values, but also normatively distant from that very same reality. Such an ethic provides for a more self-aware application of force and acts to allow the invocation of the law to be a meaningfully felt experience.

Part 1 of this paper will examine the definition of the rule of law concept with particular reference to the legal framework underpinning the use of force. Part 2 will review theoretical models that seek to identify a rule of law paradigm with structural features of a legal system. In this part the perspectives of Fuller and Dworkin will be particularly examined, as will the perennial issue of legal indeterminacy. Part 3 addresses the dominant interpretative idiom of international legal interpretation, namely positivism. Both the challenges and opportunities that positivism represents in shaping a rule of law ethic will be canvassed. Modes of lawyer-client professional identity will also be particularly reviewed. The combination of positivist methodologies with such professional identity perspectives can promote an amoral technocratic perspective of legal practice. Such a result has obvious significance to realizing a viable rule of law ethic. Part 4 will examine aspects of just war theory to

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determine whether anything might be salvaged from such a tradition to inform modern day conceptions of a rule of law ethic. This Part will also include an examination of contemporary patterns of law and legitimacy assimilation to identify alternative inputs that might bolster the sustainability of a rule of law ethic.

Part 1. Rule of Law Definition

There exist numerous accounts within the academic and professional literature that seek to give meaning to the rule of law concept. Hence its explication from politico-legal theory is critical to assess the cogency of such assertions. At its most pragmatically narrow, rule of law requires that any military action derive its authority from a coherent legal framework. Within this operational constellation, it is essential that strategic planning and all rules of engagement that authorize the use of force, especially lethal force, trace their lineage to an accepted legal authority. Government sets mission goals and it is the daily work of government lawyers and policy makers to ensure that legal coverage is resolute enough to sustain such directed military action.

When undertaking such planning it matters within this particular management process whether the actions to be undertaken occur on the basis of Security Council authority, or under national self-defence, or perhaps within a slightly more exotic legal realm like the ‘rescue of nationals’ or even ‘humanitarian intervention’. At the tactical level there is a further need to understand whether any forceful action to be undertaken is a manifestation of ‘only’ individual self defence or whether a broader authority under a law of armed conflict paradigm applies. Moreover, there may be an identified authority to use less than lethal force deriving from more general international or domestic law. In these processes, first principles are carefully assessed and opinions of senior government lawyers closely parsed to determine whether the anticipated actions come within accepted bounds of reflected deliberation. Within this realm, a good lawyer is one who can point to necessary and sufficient legal authority to justify the actions taken in an operational context. From a very prosaic perspective, acting in accordance with a rule of law framework means that legal arguments are adequately constructed and ordered to allow relevant capacity for anticipated military action. Such ordering also has an eye to withstanding future legal challenge and political criticism that may be leveled at such actions.

Despite it logical form, the managerialist approach described above can tend towards casuistry. This will be discussed more fully in Part 3, but for now it is enough to acknowledge that there are necessarily deeper, more profound implications that attend the invocation of law to secure forceful military outcomes. It is evident that the rule of

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law concept can imply something more intrinsic to the practice of law than merely connecting ends and legal means.

Within prevailing legal theory, the rule of law concept has been proffered without a great deal of definitional precision. It has been equated with formal and procedural mechanisms such as independent courts, impartial police force and ‘modern’ legislation, as well as more substantive conceptions of internal values including protecting individual rights, respect for minorities and according substantive due process. In the context of international law, and particularly the use of force, translating domestic legal formulations is often problematic. However, there is one irreducible manifestation of the rule of law concept that applies in all contexts. That is the prohibition against arbitrary Government action, especially in the context of coercive force. This feature is a ubiquitous element of all rule of law formulations, usually expressed in the general notion that the point of the rule of law is to ‘control the use and abuse of power’. Within international legal discourse, this is formally manifested in positive statements of law, such as Article 6 (1) of the International Covenant of Civil and Political Rights that prohibits the arbitrary deprivation of life. It is also found in more ephemeral dictates such as the ‘Martens clause’ that finds expression in Additional Protocol I of the Geneva Conventions and which creates a bounded space of public conscience to govern gaps in the law applicable to armed conflict. It is also found in repeated invocation of the ‘elements of humanity’ maxim that features as a guiding principle in numerous International Court of Justice pronouncements concerning the application of force. Hence, the conditioning of the application of force and the demand of necessary restraint separates the legal from the political. The distinction is crucial in that the political is bounded by only considerations of prudence and instrumentalism, whereas a lawful application of force is contingent upon specifically constructed forms of argument and justification.

Part 2. Rule of Law and the Structure of the Legal System

Accepting that a meaningful rule of law conception includes a directed restraint in the exercise of coercive public power, the question that emerges is whether this is manifested as a feature of the legal system itself. This would mean that a rule of law ethic is not so critical to locate, as the legal regime itself would do the necessary work of imposing meaningful structural restraint on the application of force. Some theorists have sought to define a rule of law regime on the basis of a series of procedural and institutional requirements intrinsically tied to the legal system. Hence Lon Fuller, an influential commentator in this realm, stipulated that a system of law

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4 Charlesworth, note 2, 58.
5 Martens clause, Preamble, 1907 Convention (IV) Respecting the Laws and Customs of War on Land, as reproduced in DOCUMENTS ON THE LAWS OF WAR (3rd edition) (eds, A. Roberts and R. Guelff) at 70, 2000, reflected in Article 1(2) of Additional Protocol I to the Geneva Conventions and which provides: ‘In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience’.
was required to manifest certain attributes to constitute a credible regime. Such attributes also acted, indirectly, to realize an underlying morality. Fuller identified eight procedural elements that formed the basis of his conception. Hence laws were required to be general, to be widely promulgated, to be prospective, to be clear, to not be contradictory, to not require doing the impossible, to be constant and to be congruent between the declared rule and official action.\(^7\) While there is the implication that such procedural criteria might carry an underlying substantive content to the quality of the law, this has not been manifestly evident to a number of critics. Indeed, this perspective makes no overt judgment on whether a particular law is good or bad, but rather that it was adopted and is interpreted according to the nominated procedural requirements of a legal system. The prevailing criticism leveled at such requirements is that even those who seek evil ends can faithfully comply with such elements.\(^8\) Hence procedural rectitude is no bar to lawful tyranny.

Fuller advocated that a legal system relied upon broad underlying moral principles for its very possibility. Through his enunciation of procedural safeguards, outlined above, he thought that such forms had a relationship with promoting a substantive morality. Hence methods of interpretation needed to take account of a philosophy of restraint, of ensuring requisite congruence with unstated moral principles. He noted that such procedural regularity tended to have more affinity with goodness than evil.\(^9\) A central point of his fidelity to law concept was that a good legal system did not necessarily achieve moral ends, but that the system displayed sufficient moral quality to permit respect for all its participants.

Within the context of Security Council authorized operations contemplating force, the array of applicable legal regimes do seem to generally qualify under the criteria set by Fuller. Whether applying under a self-defence or a LOAC paradigm, there is ample evidence of generality, clarity, publicity etc. between the type of instruments that apply. Indeed, obtaining an effective inter-operability between coalition nations, despite differing legal obligations, has proven to be a largely successful exercise precisely because the regimes are clear, are general, the law prospective and the legal operational planning processes congruent and transparent. There is some evidence that coalition operations, in particular, do provide a level of self-restraint in the application of force largely driven by a need for internal justificatory discourse.\(^10\) It is difficult to establish though, whether such actions are an intrinsic attribute of the legal process or merely a reflection of external political realities attendant in preserving a military coalition.\(^11\)

Fuller did emphasize that his theory was not solely based upon procedural requirements but relied upon a calculus of ‘inner morality’ that necessarily shaped the interpretative exercise, but his reasoning remained opaque to many. For others, his claims were simply irreconcilable with positivist legal methodologies. It is clear that

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\(^7\) Lon Fuller, THE MORALITY OF LAW, 46-91 (1969).
\(^8\) Joseph Raz, AUTHORITY OF LAW, 211 (1979).
\(^9\) Lon Fuller, Positivism and Fidelity to Law – A Reply to Professor Hart, 71 Harvard Law Review, 630 at 636, 1957.
Fuller did provide an important illumination of the relationship between form and substance and perceptively identified the operation of moral acuity as a feature of legal rationalization. However, it is also safe to say that the Fullerian notion of procedural integrity as the primary means to realize deeper moral imperatives has not dominated conventional interpretative practice, especially in the LOAC context. Thus in seeking to identify an applicable rule of law ethic in the context of the use of force, the approach taken by Fuller does not promise much return.

ii. Quasi – Natural Law and the Interpretative Enterprise

Natural law advocates have always required that law contain or at least reflect a specific moral content to ensure requisite validity. To paraphrase Augustine’s famous axiom, an unjust law is not a law, provided a powerful and enduring epistemological foundation for this perspective. While classic natural law advocacy has waned as a mainstream force, there has emerged a modern derivation of this school. Within its modern incantation, quasi neo-naturalist theorists such as Ronald Dworkin represent a more nuanced position by invoking political morality as a key determinant in the interpretative enterprise. Dworkin’s ‘law as integrity’ focus is more upon interpretative technique than questions of ultimate validity and, in this regard, he advocates a ‘reasoned elaboration’ methodology. Thus law in its very essence is seen as an interpretative enterprise. Meaning is to obtain not only through a textual analysis of words, but through identification of a set of coherent social and political principles that underpin the relevant law. This requires a considerable amount of effort by the interpreter to develop firstly the historical and political reference point in which to then determine the applicable legal coherence. According to Dworkin, legal interpretation is a constructive exercise where there exist no gaps and through which a right answer will ultimately be divined. The methodology is an ongoing process of ‘fit’ and ‘justification’ to make the law cohere to political and historical facts and past practices by attributing a point, purpose or value to those practices.13

There do exist examples of this type of interpretative approach within the LOAC field. In the 2000 Kupreskic case,14 the International Criminal Tribunal (ICTY) for the Former Yugoslavia dealt with accused who were charged with attacking a village in Bosnia on 16 April 1993, where over 100 inhabitants were killed. The accused raised defences of tu quoque and reprisal. The Tribunal dismissed both defences and in so doing based their reasoning on what seem to be broader principles of political morality to shape their justification. The Tribunal embarked upon an analysis of customary international law and observed that ‘the absolute nature of most obligations imposed by the rules of international humanitarian law reflected the progressive trend towards the so-called ‘humanisation of international legal obligations’’. The Tribunal expressly invoked ‘elementary considerations of humanity’ as well as the ‘Martens clause’ as exemplars of this humanitarian underpinning and also invoked

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13 Id. at 254-63.
14 Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, Vladimir Santic; Case No. IT-95-16-T, Judgement of 14 January 2000, 2000 WL 34467833 (UN ICT (Trial)(Yug)), (hereinafter referred to as ‘Kupreskic case’).
15 Id. at para 518.
16 Id. at para. 524.
17 Id. at para. 525.
the rise of the separate regime of International Human Rights law to fortify their decision. The Tribunal further stated that the law ceased to be solely about State interests, but rather had decisively shifted away from its reliance upon reciprocity as the justification for its terms. What is particularly illuminating in the Tribunal’s methodology was that after a lengthy examination of the humanitarian underpinnings of LOAC, it waited until the final paragraph of opinion before observing that all the parties to the proceeding had ratified Additional Protocol II and thus ‘indisputably the parties to the conflict were bound by the relevant treaty provisions prohibiting reprisals’. This last point was determinative from the beginning, and yet the Tribunal went to great lengths to expound upon its interpretative theory sustaining its view of legal coherence.

Such an exposition as developed by the ICTY in Kupreskic represents a high water mark in this variation of the quasi-natural interpretative approach to a rule of law concept. Despite its ostensible focus upon interpretative technique, there is an unmistakable revelation of a deeper humanitarian commitment to the substance of the law.

The Kupreskic opinion itself has been subject to withering criticism for its departure from traditional interpretative techniques. Typical is the riposte provided by Schmitt who takes issue with four aspects of the decision, each of which he maintains undermines its efficacy, at least in relation to any broader reading on the structure and interpretative approach to LOAC. He notes firstly, that the decision made no attempt to analyze state practice and in that regard its findings were contrary to formal state declarations that sought to preserve the right of reprisal. Secondly, its reference to international human rights law was inappropriate due to the doctrine of lex specialis recognized by the International Court of Justice, which accords primacy to LOAC on issues of complementarity. Thirdly, its import is restricted only to its jurisdictional ambit, namely the territory of the former Yugoslavia and the Tribunal cannot so broadly re-engineer the whole corpus of the LOAC from the confines of this narrow jurisdictional authority. Fourthly, as outlined above, the matter could be determined on a plain reading of the treaty provisions, thus rendering all other observations merely otiose.

The response by Schmitt is compelling and persuasive upon the positivist framework under which traditional interpretative approaches are made. Nonetheless, the decision represents quite a stark moment in LOAC jurisprudence and it will continue to find its place within the pluralist marketplace of ideas and approaches. The reasoning of the ICTY and the response by Schmitt reveal the limited capacity of constructing a meaningful rule of law concept based upon considerations of the validity of norms. Perhaps this reflects an abiding suspicion of the subjectivity of invoking moral authority as a measure of legal validity or perhaps is a vindication of the complete dominance of contemporary positivist legal theory.

i. Indeterminacy and the Law

The response provided by Schmitt also reveals, yet again, the perennial indeterminacy of law. Such indeterminacy is realized not only through the ambiguity of language,
which will be discussed more fully below, but also in the context of identifying the applicable norm that will govern a particular legal resolution. Despite heroic efforts by early international scholars to construct a unifying model of international legal discourse,\textsuperscript{20} the fact is that the law remains porous, fragmented and diffuse.\textsuperscript{21} Multiple rules and maxims can always be invoked to resolve any legal issue. Such a perspective is not unique to international law nor is it a contemporary phenomenon. Rather, it found forceful expression within the American realist movement in the 1920’s where it was discovered that there was always a ready set, or cluster, of disparate rules that might apply to any ostensible legal problem.\textsuperscript{22} The choice of characterization of the issue went a long way to determining the ‘obvious’ rule that might apply.

In the context of armed conflict, we are seeing steady stream of scholarship and judicial attitudes that apply human rights norms to the battlefield. There are ongoing debates about the extent such international human rights law might apply. Arguments about relative displacement through the \textit{lex specialis} maxim, whether there is a type of fusion between LOAC and international human rights law, or whether there is an appropriate ‘separate but equal’ application in relevant spheres, are all featured in this discourse.\textsuperscript{23} Both the ICTY in the \textit{Kupreskic} case and Schmitt in his riposte deploy arguments in their logical form supporting conclusions that are diametrically opposed. Both rely on a set of methodological and rhetorical manoeuvres to justify the conclusions reached. However, as Oliver Wendell Holmes noted ‘[y]ou can give any conclusion a logical form’.\textsuperscript{24} According to Holmes, the real task is to understand the judgment that underpins the selection of legal argument deployed.\textsuperscript{25} Such judgment displays a preference for relative values that are to be advanced and even the form of legal argument utilized comprises part of an intrinsic appeal to relevant constituencies who are well placed to endorse or not a particular legal view. In this instance, the Tribunal was express in its desire to restrict military discretion on the battlefield, basing its reasoning on political and moral preferences relating to expanding civilian protections.\textsuperscript{26} In contrast, Schmitt seeks to preserve such military discretion by invoking well established interpretative methods, existing balancing requirements in the law and most importantly anchoring his response on State sovereign will, which remains the bedrock of the international legal system.

The issue of identifying a viable rule of law concept in the LOAC context actually relies less on the methodological efficacy of arguments made, and more on the

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\textsuperscript{20} Martti Koskenniemi, THE GENTLE CIVILIZER OF NATIONS, 2001, pp 353-411 relating to his discussion on Lauterpacht and his quest for a ‘complete system’.


\textsuperscript{22} Andrew Altman, Legal Realism, Critical Legal Studies, and Dworkin, 15 Philosophy & Public Affairs, 205 at 209 (1986).


\textsuperscript{24} Oliver Wendell Holmes, The Path of the Law, 10 Harvard Law Review, 457 at 466 (1896-1897).

\textsuperscript{25} Id.

\textsuperscript{26} The Tribunal noted ‘In the case under discussion, this would entail that the prescriptions of Articles 57 and 58 (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians’ \textit{Kupreskic} case at note 14, para. 525.
assumptions underpinning the deployment of such arguments. The difficulty is that current interpretive approaches, coupled with a professional sense of identity, mask a set of moral intuitions that do shape legal reasoning. The following section will review the nature of these constraints.

Part 3. Positivism and Rule of Law

Positivism remains the dominant interpretative idiom within international legal discourse and more specifically within military operational law. This has significance not only in the interpretative mechanisms applied to legal analysis, but also in the broader attitudes taken to questions of authority. The fact that such attitudes implicate and challenge a deeper set of personal intuitions will be addressed subsequently, but for now it is a given that positivism’s method is controlling in the planning and execution of military force. Accordingly, in seeking to identify a meaningful rule of law ethic to govern military legal action, it is important to map out the structural constraints as well as the opportunities resident within positivist legal theory.

When undertaking military operations, invocation of valid norms is the starting point in any planning evolution, but accompanied with that is the typical confidence that comes from the accepted meaning of words contained within such norms. As HLA Hart convincingly argued, we can assume a large core of settled meaning within words and can readily align our objectives and base our actions with such confidence. Words like ‘civilian’, ‘military objective’, ‘attack’ and ‘incidental injury’ all have a descriptive content that may be properly interrogated and deployed. Unlike the methodology of Dworkin discussed above, the interpretative process is non-directional. Thus when one is resolutely within the core meaning of legal expression there remains a requirement to follow the course of such wording to its necessary end to reach the mandated legal result. This is done notwithstanding that what occurs may in fact appear to be ‘a wrong or unjust or unwise or inequitable or silly result’. This differentiation between law as it ‘is’ and what it ‘ought’ to be is resolutely defended by many and is regarded as one of positivisms great strengths. Former U.S. Attorney General Michael Mukasey strenuously argued that government lawyers must ensure they only ‘do law’.

He outlines that a government lawyer’s primary duty is:

to define the space in which the client may legally act…there will be times when you will advise clients that the law prohibits them from taking their desired course of action, or even prohibits them from doing things that are, in your view, the right thing to do. And there will be times when you will have to advise clients that the law permits them to take actions that you may find imprudent or even wrong.

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27 Benedict Kingsbury, The Concept of Compliance as a Function of Competing Conceptions of International Law, 19 Mich. J. Int’l L. 345 at 350 (1997-8) (“most theories of law are directive, in the sense that the legal system as a whole is oriented toward particular goals or objectives.”)
30 Id. at 180.
Judge Higgins of the ICJ has expressed a defense in kind of this methodology in her assertion that law is best conceived as the application of ‘neutral principles’ to achieve predictable outcomes.\(^{31}\)

Coupled with the acceptance of the power of words, is the associated acknowledgement of the separation thesis, namely there is no necessary connection between legal validity and morality. This remains modern positivism’s greatest foundational claim. The consequence of this foundation is an efficient technocratic legal craft. Internalizing the dichotomy of primary and secondary rules proffered by Hart, government lawyers have become especially adept in ascertaining the pedigree of norms, of distinguishing those that do not support necessary action and highlighting those that do. There is of course the ever present and troublesome issue of under and over inclusive rules as well as the elastic nature of standards that always need to be corralled. In essence, however, the toolkit of precise legal calibration and associated functional vocabulary is well developed within government legal circles, as it is within humanitarian organizations that also engage within this discursive terrain. Within this jurisprudential space, good legal arguments can be distinguished from bad ones and there is the ever-present ‘invisible college’\(^{32}\) according subliminal value to the cogency of arguments as typified by the Schmitt response to the *Kupreskic* case.

In the contemporary military operational environment, the heavy density of legal regulation of force means that there is much that is rightly prohibited in the conduct of military operations. Though correlatively, what is expressly prohibited on the one hand is also implicitly permitted on the other. While attacks on civilians and civilian objects are strictly forbidden, the converse applies and who and what is not a civilian or a civilian object, may be *prima facie* attacked. Such binary distinctions based upon categorization are replete through the law. Accordingly, there is usually some authority, some interstitial norm or some line of legal reasoning that might be invoked to justify particular military action. There is in fact a strongly held view that the Law of Armed Conflict has more to do with facilitating and ordering death and destruction than with preventing it.\(^{33}\)

Along with the ascendance of positivism’s methodology and its emancipatory claims, it has been observed that such technical legal proficiency can lead to a disassociated state.\(^{34}\) As Kennedy notes ‘absolute rules can substitute for ethical discretion and can allow us to believe what is just or not’.\(^{35}\) Similarly, Blum has observed the tendency in certain liberal democracies to discern something as legal as being conflated with


\(^{33}\) Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 (2) Harv. Int. L. J., 387 (1994), who at 414 assert ‘[w]hile liberal jurists view law as a tool to influence belligerent conduct, the critical view adds the possibility that law may actually legitimize, and thereby encourage, the commission of atrocities’.

\(^{34}\) David Kennedy, *OF WAR AND LAW*, 2006, 169 (‘…modern law has built an elaborate discourse of evasion, offering at once the experience of safe ethical distance and careful pragmatic assessment, while parceling out responsibility, attributing it, denying it – even sometimes embracing it – as a tactic of statecraft and war rather than as a personal experience of ethical jeopardy’)

\(^{35}\) *Id.* at 104.
being moral or right, and illegal with evil or wrong, without any reflection on the underlying methodological tools used to arrive at the particular interpretation.  

It also raises the spectre of a violation of the central rule of law claim of guarding against arbitrariness, especially in the context of coercive power by the State. Hence, while the application of violence outside any ostensible legal authority will clearly be construed as violation of the prohibition against arbitrariness, so too can mechanical compliance with the law in circumstances where violence becomes so routinized as to become meaningless. In the context of LOAC, this would take the form of constant and repeated targeting upon legitimate targets, which while lawful, has no discernable military impact. The dispensation of routine violence under law, to both combatants and collaterally to civilians, to achieve a negligible military advantage, while lawful, can be tantamount to arbitrariness. Such an attitude relating the proceduralization of bloodshed also prompts an aversion to accepting responsibility for personal moral jeopardy in the engagement process. According a value to lives, both civilian and military, and making assessments of such relative values when dispensing public violence under the law allows for a dispassionate and calibrated use of force. However, it does also animate deeper moral instincts. Such instincts are masked by the mathematical precision that is invoked in the decision making process. However, it has been observed by many commentators that the dissimilarity of factors being balanced makes the exercise problematic. It is also clear that there is no universally acknowledged military advantage ‘unit’ of exchange in proportionality assessments under the law, nor is there one for ‘civilian loss’, indeed there is an intrinsic relativity as to how civilian loss is rated as ‘excessive’ by different military forces.

i. Modes of Legal – Client Identity

Coupled with the methodological constraints of positivism’s method, is the sense of professional identity of lawyers. The ‘dominant view’ of the professional role of lawyers within most western legal systems conceives a strong firewall between legality and morality. As indicated in the views of former Attorney General Mukasy above, the lawyer’s personal moral perspective is suppressed in order to ensure that a client’s legal position can be purely articulated. Preserving client autonomy remains a key aspect of professional behavior. There are difficulties in this perspective in that the law itself, particularly the Law of Armed Conflict, does require that legal and moral assessments be made. There are both utilitarian and deontological commitments in LOAC. Moreover, since at least the Nuremberg Trials in post war Germany, individual soldiers, sailors and airmen/women are required to disobey orders that are manifestly unlawful. Such orders necessarily animate moral

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37 Kennedy, note 34.
40 The principle of proportionality for example requires a utilitarian assessment of military advantage to be weighed against anticipated civilian losses, alternatively the prohibition on targeting non-combatants (or those civilians who are not taking a direct part in hostilities) represents a deontological commitment under the law. For a grater elaboration of the latter type of obligation see Eitan Diamond, *Before the Abyss: Reshaping International Humanitarian Law to Suit the Ends of Power*, 43 Israel Law Review 414 (2010).
sensibilities. It thus remains a complex exercise to differentiate and filter moral from legal perspectives when delivering legal advice.

Robert Vischer identifies three avenues of moral contestation within legal practice. These comprise personal, reflective and professional moral perspectives. In relation to personal perspectives, he asserts that individual lawyers necessarily bring their own moral position to bear when drafting and dispensing legal advice. Such an unavoidable predilection results in the creation of an artificial amorality that, in itself, ‘facilitates the tendency of clients to equate legality with permissibility.’\(^{41}\) It also creates an opportunity for self-delusion, especially when operating within the realm of legal indeterminacy. Hence personal moral perspectives may find their expression through the mechanical language of the law. Thus, legal arguments/opinions are made to conform with intrinsic personal moral positions that remain unacknowledged and hence only partially open to testing.

The reflective moral position functions as an element of a perceived sense of professional integrity. Thus lawyers anticipate client moral perspectives and craft legal opinions in the shadows of such perceptions. This results in two problematic outcomes, ‘it forgoes any opportunity by the client to correct the lawyers misperception … and it tends to allow clients to avoid coming to terms with the moral content of any arguably legal course of conduct’.\(^{42}\) Within Government legal practice it also blends the advocate with the advisor role, which activate different strategic choices in the construction of legal frameworks for action.

Thirdly, Vischer defines the professional moral perspective as one that amplifies the moral claims ‘embedded in the legal profession’s adversarial tradition’.\(^{43}\) Hence the practice of legal advocacy within the adversarial context shapes broad moral standards to conform to a sense of shared professional identity. Within this spectre, ‘[t]he lawyer generally is not speaking as an independent, rational agent, but as a product of a thick ideological community … to emphasize qualities like secrecy, defensiveness, and rights-maximization’.\(^{44}\)

These respective moral perspectives are not mutually exclusive, but collectively they do ensure that personally felt moral imperatives are either masked in the type of translated legal advice proffered or are consciously suppressed. This is to allow conformity with a shared sense of professional identity to act more faithfully as a lawyer within the dominant agency model of the advocacy role. Of course, Government lawyers do not always act in an advocate role, but do also assume an advisory role. Within this latter role broader questions of legal policy need to be developed to set a course that will ensure legal integrity to decisions adopted. Questions of ‘public interest’ routinely influence choices made within such practice that necessarily allow for the introduction of a level of moral and political acuity. The issue then becomes one of accountability, especially in a military context where civilian control of the military is a hallmark of modern liberal democratic societies. By what measure are military lawyers permitted to contest positivist methods to instill

\(^{42}\) *Id.* at 229
\(^{43}\) *Id.* at 230
\(^{44}\) *Id.*
a moral relativity to choices made? Nonetheless, there is no shortage of articulations of what core liberal democratic principles ought to apply when deciding in the public interest, especially when dealing with deprivations of liberty, a fortiori, with the application of public violence.

In the military context, recent doctrinal developments in the context of counter-insurgency (COIN) operations have required a re-examination of legal methodologies to ensure more optimal outcomes. While plainly instrumental in their application, such methodologies represent an opportunity for a more complete realization of the significance of the application of force. With that comes a specific focus on understanding the political and social consequences of the application of force and, indirectly, the importation of moral assessments of actions anticipated. Recognizing personal motivations and moral perspectives when deciding to use force overcomes some of the traditional objections identified by Vischer to professional legal identity. Plainly directed towards minimizing force to win ‘hearts and minds’, the telos of COIN also allows for the germination of a rule of law ethic that profoundly challenges traditional approaches.

ii. Counter Insurgency Doctrine

The coalition experience in Iraq prior to the 2007 ‘surge’ revealed the shortcomings of many of the assumptions that underpin conventional legal reasoning regarding the use of force. It also provides a tantalizing glimpse into the means in which violence can be experienced and responsibility accepted for its deployment. The conflict in Iraq at the relevant time was a non-international armed conflict and full reliance was made on the permission under law to target those taking a direct or active part in hostilities. An enormous amount of effort was expended lawfully targeting a multitude of groups and individuals with no discernible effect, by any measure, on securing stability.

Applying the cartesian logic of LOAC, which is based upon an attrition model of conflict, just did not achieve the outcomes sought. In fact, it was ultimately acknowledged that an insurgency is fundamentally a political struggle, where the centre of gravity is the population, who remain ‘the deciding factor in the struggle’. Violence is the primary currency of an insurgency where violation of counter-insurgent ethics is a desired outcome. Hence over-reaction by Government forces (and their coalition allies) is a strategic goal of an insurgent strategy in order to de-legitimize the Government and its supporting forces.

The US Counter Insurgency (COIN) doctrine was developed against the exigencies of the increasing violence in Iraq in 2005/6. General Petraeus and others reviewed counterinsurgency best practice over the past few decades and developed a strategy

45 Gabrielle Appleby identifies a number of ‘core Government Principles’ that inform choices made by the respective Solicitor General’s when acting in the ‘public interest’ as including the rule of law, the democratic principle and the federal principle, unpublished Ph.d dissertation.


for dealing with the increasingly pressing insurgency. It was in fact a blueprint for ‘a strategy waiting to be implemented as everything else failed in Iraq’.48

The resulting COIN manual deals with a number of legal propositions and directs an interpretive methodology that is decisively instrumental. The doctrine contains a number of paradoxes that seem counterintuitive to prevailing approaches to traditional legal interpretation. These include:

‘Sometimes, the more you protect your force, the less secure you may be’; 49

‘Some of the best weapons for counterinsurgents do not shoot’,50

‘Sometimes, the more force is used, the less effective it is’,51 and

‘The more successful the counterinsurgency is, the less force can be used and the more risk must be accepted’.52

The COIN doctrine does knowingly place greater physical risk on counterinsurgent forces. It fully concedes that choices will need to be made that will result in higher counterinsurgent casualties. It also requires that targeting questions be made not only in strict conformity with the law (‘active and direct part in hostilities’) but that the impact of such targeting also be viewed in terms of social and political alienation that might follow the application of violence.

The COIN strategy was implemented and had a decisive positive effect for coalition forces. Indeed, the success of the ‘surge’ in Iraq during 2006/7 has been directly attributed to the new approaches mandated by the COIN doctrine, including the revised manner of approaching LOAC interpretation.53 Anyone who served within the Iraqi area of operations would be palpably aware of the decisive change of approach that had been undertaken through this fundamental course correction. One aspect of the COIN doctrine is the emphasis upon understanding the impact of violence on the population and using force very sparingly to achieve identifiable social and political outcomes.

The COIN doctrine represents a glimpse at law’s vulnerabilities, especially in the context of LOAC. Koskenniemi has argued that ‘law’s power and attraction lie in offering what appears a universal point of view’.54 The challenge is then to situate a ‘universal standpoint’ to justify the exercise of institutional power to all contestants. The difficulty lies in the fact that there are different versions of universal. The COIN doctrine demanded the acceptance of consequence when making decisions about the application of force. It revealed a gulf of social, political and psychological risks that necessarily demanded investment of personal choice as to the effects of violence. This necessarily prompted a posture of self-reflection and correlatively of restraint.

48 Joe Klein, The Return of the Good Soldier, TIME, July 1, 28 (2010).
49 COIN Manual note 46 at 48 (para 1-149).
50 Id., at 49 (para 1-153).
51 Id., at 48 (para 1-150).
52 Id., at 48-9 (para 1-151).
54 Martii Koskenniemi, The Mystery of Legal Obligation, 3(2) International Theory, 319 at 324 (2011)
From the beginning there was a push back reaction to the COIN doctrine. For most it is seen as a temporary policy overlay to the law. A aberration that achieved specific results in a localized context. The invocation of ‘policy’ within legal discourse has a long history of marginalization and is usually rationalized as being part of the political world. Assimilation of policy into legal hegemony requires an overt act of transition and incorporation through legal processes. In general though, policy is ‘used to identify something that does not fully fit into the legal world’ and may (or may not) achieve its ‘transformational moment.’ It is evident that COIN and its approach to interpretative fidelity will not impact the prevailing architecture of prevailing interpretative approaches to LOAC. It does, however, reveal a precipitous moment when ethical choice was directly faced as part of the formal decision making process under law and the traditional distance between legal choice and personal moral responsibility shortened.

Part 4. Just War Theory, Ontological Gaps and Political/Social Inputs

For over a thousand years just war theory provided the political and moral authority for the conduct of warfare. Originally developed as a Christian theological conception, it subsequently drew directly upon natural law theory to sustain its content. While just war theory remains a viable part of modern academic discourse, it does not expressly form part of the decision-making calculus within contemporary government military legal decision-making. Notwithstanding this, within the schema of the applicable *jus in bello* are numerous principles and prohibitions that trace their genesis directly to just war theory. Basic core principles of necessity and proportionality, of non-combatant immunity, of prisoners of war, all find direct linkage within the just war tradition. It seems somewhat perverse therefore, that contemporary positivist scholars fiercely and vociferously reject any connection with just war theory when championing the modern *jus in bello*. Pictet himself, a key commentator on the Geneva Conventions, observes ‘…the well known and malignant doctrine of ‘just war’…embraced by St. Thomas Aquinas and a host of casuists…[which] did nothing less than provide believers with a justification of war and all its infamy’.

Just war theory can be somewhat elastic with a profusion of requirements and conditions that do not always reconcile. However, there do remain a series of elements that are universally recognized as coming within just war criteria. These are the requirements of Just Cause, Right Authority and Right Intent, which roughly

56 Id. at 6.
60 Christine de Pizan, note 59, at 221.
translate to the need for a valid legal claim, the authority of a sovereign to engage in the armed conflict and finally a requirement to be motivated not by malice or hate but by a sense of duty and moral propriety. This last element was mostly subjective and demanded vigilant self-reflection. As Aquinas emphasized, a lack of right intention would render a war unjust even if the cause is just.63 The commentator Neff notes that while the element of just cause was the province of the lawyer, the element of right intention was more properly that of the theologian.64

Within contemporary international legal discourse there are obvious secular parallels to the just cause element with the invocation of national or collective self defence or action through Security Council mandated action for the maintenance of international peace and security. In relation to right authority, this is also manifested in the modern day through the authority of national governments to initiate the condition of armed conflict. However, the requirement for right intention does not make the translation so readily. Within contemporary military legal discourse there is no particular attitude a participant is required to have other than faithful obedience to the law. That is, there is no ongoing requirement for a personal or introspective examination when applying force. Indeed, as discussed above, prevailing models of legal agency expressly marginalize personal moral orientation when assessing lawful avenues of action. Hence one can be completely motivated by malice, provided that ones actions conform with legal dictates. Alternatively, as already canvassed above, one can have a professional bearing of indifference and mete out routine violence consistent with the law. Within modern positivist formulations, personal motivation is irrelevant to the primary duty to comply with normative standards recognized as law.

The switch from just war theory to positivist theory to govern the conduct of warfare was completed by the end of the nineteenth century. This was seen as an emancipatory project of law’s progress. Without God or claims to naturalist theory to constrain human activity, we were free to construct our own destiny and to tame war or possibly even eradicate it according to our own dictates. The release from the perceived subjectivity of an imposed authority from on high, gives rise to a limitless range of rationalistic and empirical opportunities. However, it also leaves a void concerning an absence of external validation that we choose not to admit, but cannot quite shake. Reflecting on this contradiction, Arthur Leff rhetorically exclaims:

I want to believe – and so do you – in a complete, transcendent, and immanent set of propositions about right and wrong, findable rules that authoritatively and unambiguously direct us how to live righteously. I want to believe – and so do you – in no such thing, but rather that we are wholly free, not only to choose for ourselves what we ought to do, but to decide for ourselves, individually and as a species, what we ought to be. What we want, Heaven help us, is simultaneously to be perfectly ruled and perfectly free, that is, at the same time to discover the right and the good and to create it.65

Positivism simply does not supply the exogenous moral validation sought. Indeed, Hart’s project sought to decisively sever morality and any kind of commanding

63 Id. at 52.
64 Id.
authority as a controlling feature of legal validity. There was a stipulation for an inner perspective that he had, but that was more to do with a sense of legal duty than any kind of transcendent quality to the law. Kelson did focus on the issue of ultimate authority for law when formulating his famous Grundnorm concept. He was at pains though to emphasize that this was merely a legal fiction and it did not carry with it any kind of metaphysical property. This represents a quandary for some, as Leff notes whenever we do set out to find ‘the law’ we are able to locate nothing more attractive, or more final than ourselves’. Such an enigma leads some to an ‘ontological gap’ where we persist in a state of constant paradox, claiming a rationalist attitude to the law’s construction and authority, yet at the same time persisting in the belief that it possesses a range of moral authorities and constraints.

We have come to ‘enchant’ the law, to invoke its authority when we act in its name. We can do this without any deeper moral conviction or internal orientation as to the propriety of our acts. Such a paradox does require a level of self-examination that was once formally demanded through the just war requirement of right intention. A rule of law ethic must derive from a similar source of moral conviction, or alternatively, be grounded in a correlative sense of moral obedience. By acting in the name of the ‘law’ we are assuming a deeper register of commitment that is regularly denied but must be acknowledged.

i. Law and Legitimacy

Despite the institutional and professional imperatives that drive an internal examination of motivation, there also exists simultaneously an external counter influence that comes from the assimilation of law with political legitimacy. This is manifested most directly in liberal democratic states, but not exclusively. Within the decentralized nature of international legal practice, international norms are accorded relative weight in terms of their persuasiveness to relevant audiences. States, militaries and humanitarian voices routinely deploy arguments that seek to promote differing values concerning legal efficacy. The reality is that the legal nature of war, rather than being an exceptional state, is a constant that applies across all subsisting legal regimes and its vocabulary shapes the politics of law. The projection of arguments of validity and legitimacy become indistinguishable and what becomes critical is the ability to persuade. In describing this recent phenomenon Kennedy observes:

International lawyers became less interested in whether a rule was valid – in the sense that it could be said to be rooted in consent, in sovereignty or in the nature of an inter-sovereign

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66 Hans Kelsen, PURE THEORY OF LAW, 2009, 199 (‘The basic norm is the presupposed starting point of a procedure: the procedure of positive law creation. It is itself not a norm created by custom or by the act of a legal organ; it is not a positive but a presupposed norm’)
67 Id. at 202.
68 Id., note 65, 1229.
69 Steven D. Smith, LAW’S QUANDARY, 2004 174-76.
70 Roger Boyes, Angela Merkel on Defensive after Afghan Tanker Attack Blunder by German Forces, THE TIMES, Sept 9, 2009 (‘It was the end of Germany’s “Don’t Mention the War” election campaign. In an impassioned parliamentary session yesterday Angela Merkel, the Chancellor, was forced to fight off her critics and try to persuade a skeptical nation that German troops should stay in Afghanistan’) at http://www.timesonline.co.uk/tol/news/world/europe/article6826088.ece
community – than in whether it worked. International law was what international law did. The observations of sociologists or political scientists about what functioned as a restraint or a reason became more important than the ruminations of jurists in determining what international law was and was not. As one might imagine, it became ever less possible to say in advance or with precision what rules would, in fact, be effective as law. To do so was to make a predication about what would, in the end, be enforced. Acting under cover of law became a wager that the action’s legality would be upheld in the unfolding of state practice. Moreover, it became clear that the effectiveness of rules depended less on something intrinsic to the rule than on aspects of society – how powerful was its proponent, how insistent its enforcement, how persuasive its reasons to the broad public who would determine its legitimacy.71

The recognition of the interrelationship between legal validity and legitimacy is one gaining increasing exposure. The rationalization of the relativity of legal norms within international law has found expression in the notion of ‘compliance pull’,72 in theories of transnational politico-legal iteration,73 and ‘interactional theories’ of international law.74 Not all law is equal and particular norms have more or less resonance depending on prevailing political cultures.

Since at least the Vietnam conflict, it has been evident that modern liberal democracies are decisively impacted by public opinion (both internally and abroad) concerning the perceived legitimacy of participation and conduct within an armed conflict. Hence, as Dunlap has observed when addressing this issue in the context of the Vietnam War:

The United States has already seen how an enemy can carry out a values-based asymmetrical strategy. For example, one of the things that America’s enemies have learned in the latter half of the 20th Century is to manipulate democratic values. Consider the remarks of a former North Vietnamese commander: ‘The conscience of America was part of its war-making capability, and we were turning that power in our favor. America lost because of its democracy; through dissent and protest it lost the ability to mobilize a will to win’. By stirring up dissension in the United States, the North Vietnamese were able to advance their strategic goal of removing American power from South East Asia. Democracies are less-resistant to political machinations of

this sort than are the totalitarian systems common to neo-absolutists.  

These lessons have been fully absorbed by military professionals and especially by military lawyers. In modern warfare, the application of force, while always congruent with legal authority, is always subject to an additional layer of political oversight, either directly imposed or indirectly anticipated. Such oversight ensures that wide discretions permitted under the law are routinely checked. Ken Watkin records that during the 2003 Iraqi War for example, the US Secretary of Defence was to provide specific approval where an attack was anticipated to result in incidental injury of over 50 civilian casualties. This sends an unmistakable signal to military decision makers of the sensitivity of actions conducted under the law. We leave the smooth reassurance of the external validation coming from the application of a neutral law to enter ‘the domain in which the image of a single dead civilian can make out a persuasive case for violation that trumps the most ponderous technical legal defense’. 

Kennedy notes that ‘international law only rarely offers a definitive judgment on who is right’. From this perspective, Kennedy observes:

People are understood to take action against a backdrop of expectations about their prerogatives. When they exceed the authority they were thought to have, they pay the price – the action will be more difficult and might generate negative consequences because it is perceived by a relevant and potentially powerful constituency of other actors to be inappropriate. When states are perceived to have violated international law, it can affect the legitimacy of what they do. Of course, an actor might also get away with it, in which case the expectations of other actors would change, and this new action would become part of their understood prerogative. State behavior can also affect the legitimacy and change the terms of international law.

Reconciling positivism’s methodology, as well as questions of professional identity, personal moral conviction and political reaction all together requires deft navigation by both military and humanitarian actors. When law becomes the metric for measuring the legitimacy of war, different challenges arise that are sometimes only partially registered. Hence, leading Australian academic Hilary Charlesworth who was at the forefront of mainstream debate on the legality of the 2003 Iraqi war, subsequently reflected on the disquieting character of that experience. She acknowledged the potential need for a ‘new disciplinary self-image’ for international law by accepting that international lawyers are ‘active participants in intensely political and negotiable contexts and … must confront this responsibility without

77 David Kennedy, note 34, 97.
79 Id. at 272.
sheltering behind the illusion of an impartial, objective, legal order’.

Such an observation presents numerous challenges, but also opportunities for incorporating a rule of law ethic into formal decision making processes.

Part 5. Conclusion

Kennedy has observed that warfare remains a kind of ultimate challenge for international law. The steady legal regulation of armed conflict to realize high strategic and humanitarian goals might certainly be counted a success by most measures, but it also reveals many ambiguities, blind spots and uncertainties. There remain many sites of contestation in the legal regulation of armed conflict. Military, governmental, humanitarian, public and private voices all engage in ongoing and intense dialogue over the nature of legal regimes created and imposed. At the same time the impulses that sustained just war theory continue to find their inchoate realization in modern discourse. However, the dominant idiom of positivism remains the primary framework for legal engagement, but as usual, the issue of indeterminacy masks multiple underlying values and judgments that are advanced under the spectre of an assumed complete and closed legal system. Despite this, the growing recognition of the fact that some laws are more equal than others more readily allows for acceptance of the pervasive interrelationship between law and legitimacy.

If a rule of law concept is to be equated with compliance with procedural elements of legal propriety then military legal practice is a paragon of virtue. Literally, armies of lawyers have been able to develop comprehensive legal regimes that govern the application of force, especially in the context of an authorizing Security Council resolution. There is certainly a legal barrier to the untrammeled application of force, but at the same time there is also enormous capacity and licence for dispensing such force under the existing regime. The combination of positivism’s method with dominant views of professional legal responsibilities can produce a disassociated sense of personal investment in the military legal enterprise. This certainly allows for accountability to be properly vested in military commands as well as Governmental actors, but it also represents an unfortunate conflation of notions of the lawful with the morally right.

Rather than seeking any kind of structural interrogation of the law to base an externalized rule of law concept, a more profitable investigation requires an internal understanding of the felt experience of law. Understanding intrinsic personal moral orientation and recognizing the enduring ‘enchantment’ of law for what it is, offers a release of greater potential. Whether the inspiration for such personal felt experience comes from the liberation of an expressed internal moral conviction, acceptance of an external naturalist authority and/or reaction to the political and social realities of liberal democratic society, a rule of law ethic that is so derived has a more enduring quality to guide decision making. The COIN doctrine provides a glimpse of what a re-configured LOAC interpretative orientation looks like. While representative of an instrumentalist policy deviation, it requires the application of force to be understood through numerous political, social, moral and of course legal perspectives. Recognizing the moral consequences of decisions made in the application of force may not, in fact, result in any less death or destruction. However, it does offer a


81 Kennedy, note 71,158.
greater chance for this to occur. It will, necessarily, demand that moral jeopardy be fully embraced when deploying lethal force under the law. It is in this context, that a true rule of law ethic may authentically be located and the choices made be responsibly accepted when applying force in the battle space.