International Review of the Red Cross (2025), **107** (928), 140–175.
The Military
doi:10.1017/S1816383124000663

IRRC

The pseudo-kindness of wartime lawbreakers

Nobuo Hayashi*
Associate Professor, Department of International and Operational Law, Swedish Defence University, Stockholm, Sweden
Email: nobuo.hayashi@fhs.se

Abstract

It is sometimes said that cruel yet short wars are better for humanity than restrained yet lengthy ones. The idea finds sympathy among Francis Lieber and his Prussian contemporaries, as well as some modern writers who back selective non-compliance with international humanitarian law (IHL) on act-utilitarian grounds. This article refutes three underlying claims and reaffirms that IHL progressively narrows room for crude interest-balancing by its duty-bearers. First, it is claimed that toughening wars quickens them, whereas moderating wars prolongs them. This empirical claim overlooks how actions of the party resorting to brutality – the "brutalizer", for short – interact with the intention of its adversary. Although the brutalizer clearly controls the amount of violence that it chooses to inflict on its opponent, it does not control the opponent's will to resist and, consequently, the length of the war it fights. History abounds with instances where adding cruelty has stiffened the enemy's resolve rather than accelerating surrender. Second, it is claimed that ruthless but swift wars lessen net inhumanity. On this act-utilitarian view, it is

* The author gratefully acknowledges Heather Harrison Dinniss, Jann Kleffner, Stephane Ojeda and John Fabian Witt for their input. All errors found in this piece are strictly the author's.

normatively superior to hasten wars through barbarity than to lengthen them through moderation; it is therefore the brutalizer's responsibility to toughen fighting and the brutalized party's responsibility to refrain from resisting the brutalizer. Problematically, the brutalizer usurps authority by imposing its own utilitarian considerations upon the brutalized party. Moreover, the brutalizer blames its disobliging adversary for the extra bloodshed to which it resorts in the name of maximum utility. Third, it is claimed that IHL does or should permit non-conformity when non-conformity stands a reasonable chance of increasing net humanity. This position is inconsistent with IHL's functions, however. IHL does aim to reduce net wartime harm, but it would be a mistake to assume that utilitarian ends necessarily justify, let alone require, utilitarian means. When IHL enacts unqualified rules, it predetermines their conformity or non-conformity through processes that are distinctly not act-utilitarian. Nowhere in these processes do lesser-evil justifications naturally belong.

Keywords: Francis Lieber, sharp wars, Helmuth von Moltke, war's greatest kindness, act utilitarianism, task responsibility, blameless wrong, international humanitarian law, humanitarian necessity, *Humanitätsgebot*.

> One cannot … make war in a sentimental fashion. The more pitiless the conduct of war, the more humane it is in reality, for it will run its course all the sooner. The war which of all wars is and must be the most humane is that which leads to peace with as little delay as possible.
>
> Paul von Hindenburg[1]

Introduction

There is something enduringly attractive about the notion that cruel but short wars lead to greater net humanity than restrained but protracted ones. It found support in influential late modern texts, such as Article 29 of the 1863 Lieber Code: "The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief."[2] J. C. Bluntschli, a close friend of Francis Lieber's who played an instrumental part in the 1874 Brussels Conference, approvingly summarized the underlying thinking.[3]

1 James Wilford Garner, *International Law and the World War*, Vol. 1, Longmans, Green and Co., London, 1920, p. 281 fn. 4; see also pp. 281–282.

2 Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, General Order No. 100, US Department of War, 24 April 1863 (Lieber Code), Art. 29.

3 J. C. Bluntschli, "Lieber's Service to Political Science and International Law", in Francis Lieber, *Contributions to Political Science, Including Lectures on the Constitutions of the United States and Other Papers, Being Volume II of His Miscellaneous Writings*, J. B. Lippincott, Philadelphia, PA, 1881, pp. 12–13. But see Dietrich Schindler, "J. C. Bluntschli's Contribution to the Law of War", in Marcelo Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law/La*

The idea also resonated with senior Prussian Army leaders fighting in the Austro-Prussian War (1866) and the Franco-Prussian War (1870–71). Helmuth von Moltke, chief of staff of the Prussian Army during the latter war, credited with his kingdom's decisive battlefield victory over France, went so far as to call a war's speedy conclusion its "greatest kindness".[4] According to the *Kriegsbrauch im Landkriege*, published by the German General Staff in 1902,[5] military history will teach an officer "that certain severities are indispensable in war, nay more, that the only true humanity very often lies in a ruthless application of them".[6]

This sentiment was not limited to Germanic martial tradition.[7] In the late nineteenth and early twentieth centuries, several Anglo-American military practitioners[8] and writers[9] expressed similar views. The same was true of those advocating strategic aerial bombardment during World War II.[10] In 1999, although in a slightly different context of peacekeeping operations and relief activities, Edward N. Luttwak appealed to the world community to "give war a chance" rather than imposing ceasefires, because

> [u]ninterrupted war would certainly have caused further suffering and led to an unjust outcome from one perspective or another, but it would also have led to a more stable situation that would have let the postwar era truly begin.[11]

The post-9/11 era is no exception. The ensuing debates surrounding counterterrorism warfare and the permissibility of torture rekindled the deep-rooted frustration that some felt within Western policy-making circles about the bloc's unwillingness to inflict a swift and decisive blow on their enemies through unconventional methods.[12] Jeremy Rabkin, writing in 2012, stated: "Perhaps, for example, lives would be saved, overall, by pursuing a speedy victory, even if doing

promotion de la justice, des droits de l'homme et du réglement des conflits par le droit international: Liber Amicorum Lucius Caflisch, Martinus Nijhoff, Leiden, 2007, pp. 444–445.

4 "Letters from von Moltke to Bluntschli", in Thomas Erskine Holland, *Letters to "The Times" upon War and Neutrality (1881–1920)*, 3rd ed., Longmans, Green and Co., London, 1921, p. 25.

5 Coleman Phillipson notes how the *Kriegsbrauch* draws examples "almost exclusively" from the Franco-Prussian War. Coleman Phillipson, *International Law and the Great War*, T. Fisher Unwin, London, 1915, p. 136.

6 J. H. Morgan, *The War Book of the German General Staff: Being "The Usages of War on Land" Issued by the Great General Staff of the German Army*, McBride, Nast & Company, New York, 1915, p. 72.

7 James Wilford Garner quotes several other examples, including Julius von Hartmann and Paul von Hindenburg. J. W. Garner, above note 1, pp. 279–282. To this, one may add Wilhelm II, cited in Charles F. Horne (ed.), *Source Records of the Great War*, Vol. 3, National Alumni, 1923, p. 2.

8 These include Captain John P. Story of the US Army (John P. Story, *Elements of Elastic Strength of Guns: A Text Book for the Use of Student Officers at the U.S. Artillery School*, Artillery School Press, Fort Monroe, VA, 1894, p. 2), Colonel W. G. Macpherson of the British Royal Army Medical Corps (W. G. Macpherson, "The Geneva Convention", *Journal of the Royal Army Medical Corps*, Vol. 15, 1910, p. 607) and Major (ret.) John Bigelow of the US Army (cited in J. W. Garner, above note 1, p. 282 fn. 4).

9 H.G. Wells, "The Idea of a League of Nations, II", *The Atlantic Monthly*, February 1919, p. 266.

10 John Fabian Witt, "Two Conceptions of Suffering in War", in Austin Sarat (ed.), *Knowing the Suffering of Others: Legal Perspectives on Pain and Its Meanings*, University of Alabama Press, Tuscaloosa, AL, 2014, p. 143.

11 Edward N. Luttwak, "Give War a Chance", *Foreign Affairs*, Vol. 78, No. 4, 1999, pp. 37–38.

12 Karen J. Greenberg (ed.), *The Torture Debate in America*, Cambridge University Press, Cambridge, 2005; John Yoo, *War by Other Means: An Insider's Account of the War on Terror*, Atlantic Monthly Press, New York, 2006.

so risks more casualties in the short run."[13] As recently as 2021, Samuel Moyn mused:

> The American way of war is more and more defined by a near complete immunity from harm for one side and unprecedented care when it comes to killing people on the other. It is informed by the standards of international law that constrain fighting. More remarkably, America's operations have become more expansive in scope and perpetual in time by virtue of these very facts.[14]

Two related yet distinct claims are at stake here. First, to say that toughening wars quickens them and softening wars prolongs them is to advance an *empirical* claim that causally links war's brutality to its brevity. Second, by suggesting that harsh yet brief wars are better for humanity overall than subdued yet drawn-out ones, the idea's proponents espouse a *normative* claim that justifies – indeed, demands – the infliction of maximum violence in war.

Also implicit herein is a third, *legal* claim. International humanitarian law (IHL) concerns itself, *inter alia*, with moderating wartime brutality.[15] Insofar as IHL exerts a restraining influence on belligerent conduct, this body of rules inevitably becomes entangled in the causal and normative assertions just noted. In other words, odd as it may seem, obeying IHL arguably lengthens wars and diminishes net humanity as a result.[16] If so, IHL should permit non-conformity when non-conformity stands a reasonable chance of increasing net humanity.[17]

13 Jeremy Rabkin, "The Strange Pretensions of Contemporary Humanitarian Law", in Christopher A. Ford and Amichai Cohen (eds), *Rethinking the Law of Armed Conflict in an Age of Terrorism*, Lexington Books, Lanham, MD, 2012, pp. 56–57.

14 Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War*, Farrar, Straus and Giroux, New York, 2021, p. 15.

15 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, 11 December 1868 (entered into force 11 December 1868) (St Petersburg Declaration), Preamble; Hague Convention (II) Respecting the Laws and Customs of War on Land, 29 July 1899 (entered into force 4 September 1900) (Hague Convention II), Preamble; Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907 (entered into force 26 January 1910) (Hague Convention IV), Preamble.

16 J. Rabkin, above note 13, pp. 56–57.

17 Gabriella Blum, "The Laws of War and the 'Lesser Evil'", *Yale Journal of International Law*, Vol. 35, No. 1, 2010. In his recent posts, Rabkin has essentially reiterated this view, stating that "[i]f a tactic helps assure a speedier victory, that must matter, especially if a prolonged war will entail more civilian suffering". Jeremy Rabkin, "Why We Fight Matters to How We Fight", *Articles of War*, 29 March 2024, available at: https://lieber.westpoint.edu/why-we-fight-matters-how-we-fight/ (all internet references were accessed in December 2024). See also Jeremy Rabkin, "Who Speaks for Humanity?", *Articles of War*, 10 July 2024, available at: https://lieber.westpoint.edu/who-speaks-for-humanity/; Jeremy Rabkin, "'Humanity' Is Not Always the Highest Claim", *Articles of War*, 24 September 2024, available at: https://lieber.westpoint.edu/humanity-not-always-highest-claim/. This notion of permitted non-conformity is encapsulated in the doctrine of *Kriegsräson geht vor Kriegsmanier*, which asserts that "the military necessity of an act 'rights' or 'repairs' its unlawfulness that positive IHL rules may otherwise establish". To put it differently, "positive IHL admits military necessity pleas even in defence of conduct that deviates from its unqualified rules". Nobuo Hayashi, *Military Necessity: The Art, Morality and Law of War*, Cambridge University Press, Cambridge, 2020, pp. 3–4. It therefore stands to reason that *Kriegsräson* merely forms part of a broader claim that IHL should be set aside for the sake of greater net humanity where compliance with it hinders the pursuit of military necessities aimed at bringing the swiftest possible defeat to one's enemy.

This piece refutes each of these claims. It reaffirms that IHL progressively narrows room for rudimentary act-utilitarian calculations by its duty-bearers.

Empirical claim

Let us begin with the empirical claim that toughening wars quickens them, whereas moderating wars prolongs them. Is there any credence to it?

Does sharpening wars shorten them?

In his 1839 *Manual of Political Ethics*, Lieber noted:

> I am not only allowed … but it is my duty to injure my enemy, as enemy, the most seriously I can, in order to obtain my end, whether this be protection, or whatever else. The more actively this rule is followed out the better for humanity, because intense wars are of short duration.[18]

It is not clear whether Lieber was advancing this last point merely as "one of his favourite theories"[19] or as an empirical contention backed up with historical data.[20]

Moltke himself saw the idea vindicated in the Franco-Prussian War. Reported acts of Prussian forces above and beyond what might be considered standard wartime behaviour at the time included:[21]

- requiring the cooperation of inhabitants of occupied territory to help prevent persons joining French forces;
- burning French houses and villages and killing male residents punitively for aiding *franc-tireur* ambushes;

18 Francis Lieber, *Manual of Political Ethics Designed Chiefly for the Use of Colleges and Students at Law, Part II: Political Ethics Proper*, Charles C. Little and James Brown, Boston, MA, 1839, pp. 660–661.

19 Richard Baxter, "The First Modern Codification of the Law of War: Francis Lieber and General Order No. 100", in Detlev F. Vagts *et al.* (eds), *Humanizing the Laws of War: Selected Writings of Richard Baxter*, Oxford University Press, Oxford, 2013, p. 127. Baxter notes an observation that Lieber offered while lecturing on the law and usages of war at Columbia College Law School in 1861–62: "War being an exceptional state of things, the shorter it is the better; and the intenser it is carried on, the shorter it will be. The gigantic wars of modern times are less destructive than were the protracted former ones, or the unceasing feudal turbulences." Baxter sees a direct echo of this theory in Article 29 of the Lieber Code, above note 2, p. 138.

20 Lieber goes on to argue that "[f]ormerly, when there were so many wars, in which nations felt only the interest of suffering, and the belligerents themselves were conscious that wars, frequently, were undertaken for trifling or unjust causes, it was natural that many niceties should be considered as laws of war. Wars were somewhat like duels, or tournaments, and the [rules] which regulated them were carried over to the wars. … When nations are aggressed in their good rights, and threatened with the moral and physical calamities of conquest, they are bound to resort to all means of destruction, for they only want to repel. First, settle whether the war be just; if so, carry it out vigorously; nothing diminishes the number of wars so effectually." F. Lieber, above note 18, p. 661.

21 For further detail, see Percy Bordwell, *The Law of War between Belligerents: A History and Commentary*, Callaghan, Chicago, IL, 1908, pp. 93–96, 303–305; Michael Howard, *The Franco-Prussian War: The German Invasion of France, 1870–1871*, Routledge, London and New York, 1988, pp. 378–380; Geoffrey Wawro, *The Franco-Prussian War: The German Conquest of France in 1870–1871*, Cambridge University Press, Cambridge, 2003, p. 279.

- placing notable French locals on trains for protection against hostilities;
- decreeing severe punishment for inhabitants of Alsace and Lorraine attempting to join the French army; and
- levying extensive requisitions and contributions.

In an 1880 letter to Bluntschli, Moltke recalled:

> Thus energetically, and yet with a moderation previously unknown, was the late war against France conducted. The issue of the campaign was decided in two months, and the fighting did not become embittered till a revolutionary Government, unfortunately for the country, prolonged the war for four more months.[22]

Moltke advocated the employment of "all methods" except "those which are absolutely objectionable".[23] A degree of uncertainty remains as to what exactly Moltke's reservation entailed. In September 1870, he ordered the investment of Paris but refused to bombard the city. He made the latter decision, however, not on humanitarian grounds but because he believed that starvation alone would induce the city's surrender long before bombardment – a costly and logistically challenging method – might become necessary.[24] Perhaps somewhat more telling is how, while bombarding Paris subsequently on Kaiser Wilhelm I's orders,[25] Moltke responded to accusations that hospitals were being hit with artillery shells by noting that Prussian batteries would soon move close enough to recognize Red Cross flags.[26]

Despite Moltke's insistence to the contrary, heightening severity did not expedite victory in the Franco-Prussian War. Although relentless fighting by Prussian forces from July 1870 culminated in Napoleon III's capture at Sedan in September, it only prompted the formation of a Government of National Defence

22 "Letters from von Moltke to Bluntschli", above note 4, p. 25. Philip Henry Sheridan, a US military observer, concurred. Philip Henry Sheridan, *Personal Memoirs of P. H. Sheridan, General, United States Army*, Charles L. Webster, New York, 1888, p. 533: "With the hemming in of Bazaine at Metz and the capture of MacMahon's army at Sedan the crisis of war was passed, and the Germans practically the victors. The taking of Paris was but a sentiment – the money levy could have been made and the Rhone provinces held without molesting that city, and only the political influences consequent upon the changes in the French Government caused peace to be deferred."

23 The original German reads "alle nicht geradezu verwerifliche Mittel". "Letters from von Moltke to Bluntschli", above note 4, p. 25.

24 Helmuth von Moltke, *The Franco-German War of 1870–1871*, trans. Clara Bell and Henry W. Fischer, Harper & Brothers, New York and London, 1901, pp. 123–124. See also M. Howard, above note 21, pp. 352–356; G. Wawro, above note 21, pp. 279–280; Quintin Barry, *The Franco-Prussian War 1870–1871*, Vol. 2: *After Sedan: Helmuth von Moltke and the Defeat of the Government of National Defence*, Helion, Solihull, 2007, pp. 37–38, 63, 276–282.

25 Frederick William, Crown Prince of Prussia at the time, initially opposed the planning of this bombardment on grounds that were arguably humanitarian. Frederick III, *The War Diary of the Emperor Frederick III 1870–1871*, ed. and trans. A. R. Allinson, Frederick A. Stokes, New York, 1926, p. 225.

26 H. M. Hozier (ed.), *The Franco-Prussian War: Its Causes, Incidents, and Consequences*, Vol. 2, William Mackenzie, London, Edinburgh and Glasgow, 1872, p. 258; M. Howard, above note 21, p. 362; Stephen Badsey, *The Franco-Prussian War 1870–1871*, Osprey, Oxford, 2003, p. 76.

in Paris and the rise of *francs-tireurs* across France.[27] The thoroughness with which the Prussians carried out reprisals against the latter tactics and other acts of sabotage "did nothing to endear them to the inhabitants"[28] and sent the campaigns "spiral[ling] down to new depths of savagery" instead.[29] As noted by Michael Howard, "[i]f the French refused to admit military defeat, then other means [had to] be found to break their will".[30]

Moltke also discovered that Parisians were prepared to endure the hardship of investment long after their milk supplies had run out.[31] Not even the city's January 1871 bombardment catalyzed its fall.[32] By all accounts, it is the Battle of Buzenval (one last failed offensive by besieged French forces to break through the investment), combined with a botched uprising and an imminent food shortage inside the city, that did.[33]

One may argue that Hiroshima and Nagasaki offer a better example of how sharpening wars shortens them. Thus, it is often claimed in the United States and elsewhere that, brutal though they admittedly were, the two atomic bombs used during the end phase of World War II hastened Japan's decision to surrender.[34] On 9 August 1945, three days after Hiroshima and the day on which the United States reduced Nagasaki to ashes, Harry Truman stated:

> The world will note that the first atomic bomb was dropped on Hiroshima, a military base. That was because we wish in this first attack to avoid, insofar as possible, the killing of civilians. But that attack is only a warning of things to come. If Japan does not surrender, bombs will have to be dropped on her war industries and, unfortunately, thousands of civilian lives will be lost. … I realize the tragic significance of the atomic bomb. … *We have used it in order to shorten the agony of war*, in order to save the lives of thousands and thousands of young Americans. We shall continue to use it until we completely destroy Japan's power to make war. Only a Japanese surrender will stop us.[35]

27 P. Bordwell, above note 21, p. 89: "Driven by desperation by the catastrophes that had befallen them, the French people, or at least individual Frenchmen, resorted to an irregular warfare which gave rise to recriminations on the part of the Germans and caused the war to assume a bitterness that made the controversy inevitable."

28 M. Howard, above note 21, p. 378.

29 *Ibid*., p. 380.

30 *Ibid*.

31 *Ibid*., p. 352; Q. Barry, above note 24, p. 276.

32 H. M. Hozier (ed.), above note 26, pp. 257–258; M. Howard, above note 21, pp. 361–363; Q. Barry, above note 24, pp. 353–354.

33 H. Moltke, above note 24, p. 371; H. M. Hozier (ed.), above note 26, pp. 258–264; M. Howard, above note 21, pp. 365–370; Q. Barry, above note 24, pp. 356–360.

34 Our focus here is the causal claim linking the bombing of Hiroshima and Nagasaki to Japan's surrender. We do not consider the so-called "atomic diplomacy" school according to which Truman used the atomic bombs primarily to influence Soviet decisions, rather than to expedite Japan's surrender. See Gar Alperovitz, *Atomic Diplomacy: Hiroshima and Potsdam: The Use of the Atomic Bomb and the Confrontation with Soviet Power*, Vintage Books, New York, 1965.

35 Harry Truman, "Radio Report to the American People on the Potsdam Conference", Harry S. Truman Library and Museum, National Archives and Records Administration, 9 August 1945, available at:

Two 1946 US Strategic Bombing Surveys portray how Hiroshima helped break the pre-existing deadlock within the Japanese government in favour of those inclined to accept the terms of the Potsdam Declaration against those determined to continue fighting.[36] In 1947, Henry L. Stimson, US secretary of war during World War II, recalled: "The destruction of Hiroshima and Nagasaki put an end to the Japanese war."[37] A decisive causal link between the atomic bombings and the war's accelerated end has since become a widely accepted narrative among historians[38] and in the US nuclear deterrence doctrine.[39]

There is nevertheless reason to be sceptical about ascribing such singular weight to Hiroshima and Nagasaki in expediting Japan's decision to surrender. As early as 1955, Ernst R. May argued that the 9 August 1945 declaration of war by the Soviet Union is what forced Japan's ruling elites to accept Potsdam.[40] Some have even suggested that "the two atomic bombs on Hiroshima and Nagasaki alone were not decisive in inducing Japan to surrender. … The Soviet invasion was."[41]

As is the case with historical debates in general, the truth of the matter most likely lies somewhere in the middle. Considerable authority exists for the view that it is in fact the combination of the US atomic attacks and the Soviet entry that compelled Japanese leaders to surrender by mid-August 1945.[42] In other words,

www.trumanlibrary.gov/library/public-papers/97/radio-report-american-people-potsdam-conference (emphasis added).

36 *The United States Strategic Bombing Survey: The Effects of Atomic Bombs on Hiroshima and Nagasaki*, US Government Printing Office, Washington, DC, 1946, pp. 22–23; *The United States Strategic Bombing Survey: Japan's Struggle to End the War*, US Government Printing Office, Washington, DC, 1946, pp. 12–13. These reports contain virtually no material indicating any impact that Nagasaki might have had on Japan's decision to accept the Potsdam Declaration. Karl T. Compton cites Nagasaki as making it "clear that this was not an isolated weapon, but that there were others to follow. With dreaded prospect of a deluge of these terrible bombs and no possibility of preventing them, the argument for surrender was made convincing." Karl T. Compton, "If the Atomic Bomb Had Not Been Used", *The Atlantic*, December 1946, pp. 55–56. Compton offers no supporting material, however.

37 Henry L. Stimson, "The Decision to Use the Atomic Bomb", *Harper's Magazine*, February 1947, p. 107.

38 Robert James Maddox, *Weapons for Victory: The Hiroshima Decision*, University of Missouri Press, Columbia, MO, and London, 1995, pp. 146–164; Richard B. Frank, *Downfall: The End of the Imperial Japanese Empire*, Random House, New York, 1999, pp. 343–348; Sadao Asada, "The Shock of the Atomic Bomb and Japan's Decision to Surrender – A Reconsideration", in Robert James Maddox (ed.), *Hiroshima in History: The Myths of Revisionism*, University of Missouri Press, Columbia, MO, and London, 2007, pp. 46, 49–51, 56–57.

39 Walter B. Slocombe, "The United States and Nuclear War", in Barry M. Blechman (ed.), *Rethinking the U.S. Strategic Posture: A Report from the Aspen Consortium on Arms Control*, Ballinger, Cambridge, MA, 1982, p. 19.

40 Ernst R. May, "The United States, the Soviet Union, and the Far Eastern War, 1941–1945", *Pacific Historical Review*, Vol. 24, No. 2, 1955, pp. 172–173.

41 Tsuyoshi Hasegawa, *Racing the Enemy: Stalin, Truman, and the Surrender of Japan*, Belknap Press, Cambridge, MA, and London, 2005, p. 298. See also Barton J. Bernstein, "Compelling Japan's Surrender without the A-Bomb, Soviet Entry, or Invasion: Reconsidering the US Bombing Survey's Early-Surrender Conclusions", *Journal of Strategic Studies*, Vol. 18, No. 2, 1995, pp. 129–136.

42 Robert J. C. Butow, *Japan's Decision to Surrender*, Stanford University Press, Stanford, CA, 1954, p. 158; J. Samuel Walker, *Prompt and Utter Destruction: Truman and the Use of Atomic Bombs against Japan*, revised ed., University of North Carolina Press, Chapel Hill, NC, and London, 2004, p. 87; Sumio Hatano, "The Atomic Bomb and Soviet Entry into the War: Of Equal Importance", in Tsuyoshi Hasagawa (ed.), *The End of the Pacific War: Reappraisals*, Stanford University Press, Stanford, CA, 2007.

neither of the two alone did so. This undercuts the idea that the nuclear strikes themselves shortened World War II's Pacific theatre.

Controlling the sharpness of one's warfighting versus controlling the opponent's will to resist

What these examples reveal is twofold. The party resorting to brutality – let us henceforth refer to this party as the "brutalizer" – clearly controls the amount of violence that it chooses to inflict on its opponent. Just as clearly, however, the brutalizer does not control the brutalized party's will to resist and, consequently, the length of the war it fights.[43]

Carl von Clausewitz said as much in *On War*, published posthumously in 1832. Clausewitz defined war as "an act of force to compel our enemy to do our will",[44] and in his view, "force … is thus the *means* of war; to impose our will on the enemy is its *object*".[45] He acknowledged that not even the most effective application of force, *qua* means, necessarily breaks the enemy's will to resist:

> The fighting forces must be *destroyed*: that is, they must be *put in such a condition that they can no longer carry on the fight*. … The country must be occupied; otherwise the enemy could raise fresh military forces. Yet both these things may be done and the war, that is the animosity and the reciprocal effects of hostile elements, cannot be considered to have ended so long as the enemy's *will* has not been broken: in other words, so long as the enemy government and its allies have not been driven to ask for peace, or the population made to submit.[46]

Recall how Moltke, a soldier with well-known Clausewitzian leanings,[47] lamented that France's Government of National Defence "prolonged" the Franco-Prussian War "for four more months" after the issue of the campaign was decided "in two months".[48] Here we see Moltke effectively conceding that, far from accelerating that war's conclusion, the severity which Prussia initially brought to the battlefield in fact failed to enable it to impose its will on France.

43 It should be noted that the designation of one party as the brutalizer and its opponent as the brutalized party need not – indeed, it often does not – remain fixed throughout a conflict. In addition, both parties may well brutalize each other to some extent and therefore become brutalized by each other to that extent. The point here is merely that resorting to brutality shows one party's control over its own actions but not over the will of its opponent. The author is indebted to Stephane Ojeda for his input on this issue.

44 Carl von Clausewitz, *On War*, ed. and trans. Michael Howard and Peter Paret, Princeton University Press, Princeton, NJ, 1976, p. 75.

45 *Ibid*., p. 75 (emphasis in original). Clausewitz continues to observe that "[t]o secure that object we must render the enemy powerless; and that, in theory, is the true aim of warfare" (*ibid*.).

46 *Ibid*., p. 90 (emphasis in original).

47 Michael Howard, "The Influence of Clausewitz", in *ibid*., pp. 29–30; Antulio J. Echevarria II, "Moltke and the German Military Tradition: His Theories and Legacies", *Parameters*, Vol. 26, No. 1, 1996. The same may be said of Lieber, at least in some respects. See Adam Roberts, "Foundational Myths in the Law of War: The 1863 Lieber Code, and the 1864 *Geneva Convention*", *Melbourne Journal of International Law*, Vol. 20, No. 1, 2019, p. 17.

48 "Letters from von Moltke to Bluntschli", above note 4, p. 25.

To be sure, some recent wars do seem to suggest that fierce fighting by one party arguably weakens the other party's will to resist. Consider, for example, the Second Nagorno-Karabakh War of 2020, resulting in Azerbaijan's decisive win after forty-four days of active hostilities; and Azerbaijan's September 2023 offensive resulting in the capture of Nagorno-Karabakh in its entirety after one day of heavy fighting. Conversely, the increasing restraints under which Western forces found themselves in Iraq and Afghanistan have sometimes been blamed for the ineffectiveness of their military operations[49] and, by implication, their prolonged and ultimately inconclusive involvement in those countries.

These examples are, of course, only one part of the picture; other conflicts show that subjecting an enemy to brutality may not dent its will or ability to continue fighting. On the contrary, adding cruelty has in some cases been shown to harden rather than weaken the enemy's resolve, and to prompt reciprocation in kind instead. During World War II, news of the Malmédy massacre – an incident where elements of Joachim Peiper's Waffen SS unit killed more than eighty US prisoners of war[50] – "undoubtedly stiffened the will of the American combatants".[51] Hugh M. Cole noted: "There were American commanders who orally expressed the opinion that all SS troops should be killed on sight and there is some indication that in isolated cases express orders for this were given."[52] In March 2022, Ukraine's Special Operations Forces reportedly warned that they would "not spare Russian artillerymen in response to their 'brutal killing' of civilians and cities".[53]

The claim's stronger and weaker variations

As the foregoing observations make clear, Lieber's blunt assertion that "[s]harp wars are brief"[54] is empirically untenable. Indeed, just one sharp yet protracted war would be enough to invalidate it.

Perhaps not all is lost, though – for it is possible that the claim inadvertently overstates its case. What if the case was merely that *some* sharp wars are brief, or that sharp wars *can be* brief?[55] All that the claim would need, then, is at least one actual or potential example where a war's sharpness reduces its duration. Replacing the

49 Thomas Tugendhat and Laura Croft, *The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power*, Policy Exchange, London, 2013, p. 54: "Given the constraints that are beginning to be felt [under the European Court of Human Rights' judicial mission creep], the very utility of the UK's military instrument is in question." See also Richard Ekins, Jonathan Morgan and Tom Tugendhat, *Clearing the Fog of Law: Saving Our Armed Forces from Defeat by Judicial Diktat*, Policy Exchange, London, 2015.

50 Richard Gallagher, *Malmédy Massacre*, Paperback Library, New York, 1964, pp. 55–72; Stephen Wynn, *Joachim Peiper and the Nazi Atrocities of 1944*, Pen & Sword Books, Yorkshire, 2022, pp. 33–34.

51 Hugh M. Cole, *The Ardennes: Battle of the Bulge*, Department of the Army, Washington, DC, 1965, p. 261.

52 *Ibid*., p. 264. See also S. Wynn, above note 50, p. 34.

53 *Kyiv Independent*, 2 March 2022, available at: https://twitter.com/KyivIndependent/status/1499155936207908866. The newspaper later corrected the then-Twitter (now X) text to "Ukrainian special forces will no longer capture Russian artillerymen".

54 Lieber Code, above note 2, Art. 29.

55 As John Fabian Witt noted in a private correspondence with the author, "[i]t just depends".

claim's strong sharpness–brevity causal link with a weak one would make it evidentially much easier to defend.

Normative claim

The weak empirical claim also makes it reasonable for a party to expect that, at least in some cases, brutality could sufficiently demoralize its enemy and hasten victory as a result. Might brutalizing tactics be justified in such circumstances? And if so, would the brutalized party resisting capitulation be to blame for the war's prolongation?

Act utilitarianism

In its most elementary form, act utilitarianism holds that "[a]n act is right if and only if it results in at least as much overall well-being as any act the agent could have performed".[56] Consequently, "an agent acts rightly if she maximizes overall well-being, and wrongly if she does not".[57] If tough yet brief wars serve greater net humanity than tamed yet lengthy ones, then toughening warfighting is morally superior to taming it.

Three key aspects may be noted here. First, act utilitarianism calculates the *expected* utility of an act, rather than its *actual* utility.[58] William H. Shaw notes:

> Consequentialism instructs the agent to do what is likely to have the best result as judged by what a reasonable and conscientious person in the agent's circumstances could be expected to know. It might turn out, however, that because of untoward circumstances, the action with the greatest expected value ends up producing poor results – worse results, in fact, than several other things the agent could have done instead. Assuming that the agent's original estimate of expected value was correct (or, at least, the most accurate estimate we could reasonably expect one to have arrived at in the circumstances), then this action remains the right thing to have done.[59]

This introduces a shift in the focus of our discussion. Unlike the strong empirical claim examined earlier, act utilitarianism resonates with the weak empirical claim and therefore permits its underlying normative claim to be less causally

56 Ben Eggleston, "Act Utilitarianism", in Ben Eggleston and Dale E. Miller (eds), *The Cambridge Companion to Utilitarianism*, Cambridge University Press, Cambridge, 2014, p. 125.

57 *Ibid*. See also Brad Hooker, "Utilitarianism and Fairness", in B. Eggleston and D. E. Miller (eds), above note 56, pp. 283–284; William H. Shaw, *Utilitarianism and the Ethics of War*, Routledge, London and New York, 2016, p. 25: "An action is right if and only if no other action available to the agent has greater expected well-being; otherwise, it is wrong."

58 B. Eggleston, above note 56, p. 125; Elinor Mason, "Objectivism, Subjectivism, and Prospectivism", in B. Eggleston and D. E. Miller (eds), above note 56; Guy Fletcher, "Act Utilitarianism", in James E. Crimmins (ed.), *The Bloomsbury Encyclopedia of Utilitarianism*, Bloomsbury, London and New York, 2017, p. 4.

59 W. H. Shaw, above note 57, p. 22.

dependent as well. Under this view, it would no longer be so damaging for Lieber to concede that sharpening wars might not always shorten them; or for Moltke to admit that Prussia's initial campaigns failed to break France's will to resist; or for Truman to accept the possibility that Hiroshima and Nagasaki did not single-handedly hasten the end of World War II. What would matter to them here is rather that, under the circumstances, it was reasonable for them to expect that brutality would end their wars sooner and that severe yet brief wars would embody greater net humanity than mild yet protracted ones.

Second, only that kind of act which is likely to maximize overall welfare is right. Theoretically, the mere fact that act utilitarianism considers overall utility-maximizing acts "right" does not mean that it always praises their performance or blames every failure to perform them. Rather, appraising conduct is the subject of a separate utility calculation.[60]

For committed practitioners of act utilitarianism, however, whether their own conduct maximizes utility matters. Wherever harshness stands reasonable chances of forcing the enemy into submission quickly and, with it, of maximizing net humanity, one *must* harshen the way one fights. The end not only justifies but also obligates the means. Unsurprisingly, Lieber, Moltke and Truman spoke of what they deemed net humanity-maximizing acts in mandatory terms.[61]

The third, often overlooked aspect is also the most significant one for our present purposes. Act utilitarianism holds that one acts wrongly by behaving in a manner that is inconducive to maximum overall welfare.[62] Thus, in wars where brutality generates reasonable prospects of maximizing net humanity through swift victory, it is wrong not to resort to it.

That includes the party on the receiving end of humanity-maximizing brutality. By refusing to accept the inevitability of a looming defeat or by prolonging a war that is already lost, the brutalized party acts wrongly because it frustrates the brutalizer's net humanity-maximizing endeavour. This remains the case even when the brutalized party's refusal to submit would improve its own well-being, for at its core, act utilitarianism is "impartial", or "agent-neutral",[63] in the sense that "the good of any one individual is of no more importance, from the point of view … of the Universe, than the good of any other"[64] – including the agent's own good.[65] Applied to our scenario, it is wrong for the brutalized

60 *Ibid*., p. 30.

61 F. Lieber, above note 18, p. 660 ("it is my duty to injure my enemy, as enemy, the most seriously I can"); "Letters from von Moltke to Bluntschli", above note 4, p. 25 ("No, you must attack all the resources of the enemy's Government, its finances, its railways, its stores, and even its prestige"); H. Truman, above note 35 ("If Japan does not surrender, bombs will have to be dropped on her war industries").

62 W. H. Shaw, above note 57, p. 25.

63 Tim Mulgan, *The Demands of Consequentialism*, Clarendon Press, Oxford, 2001, pp. 38–39.

64 Henry Sidgwick, *The Methods of Ethics*, 7th ed., Palgrave Macmillan, London, 1962, p. 382. See also Lilian O'Brien, "Agency", in J. E. Crimmins (ed.), above note 58, p. 9, noting that act utilitarianism does not "permit agents to refrain from maximizing utility even if this is necessary to carry out their personal projects, thereby eliminating agent-centred *prerogatives*" (emphasis in original).

65 Shelly Kagan, *The Limits of Morality*, Clarendon Press, Oxford, 1989, pp. 2–4, esp. p. 2: "In a sense, neither my time, nor my goods, nor my plans would be my own."

party to refuse to sacrifice itself on the altar of greater net humanity.[66] Accordingly, if act-utilitarian brutalizers are right – and there is no reason to doubt that Moltke and Truman sincerely believed in the rightness of their net humanity-maximizing efforts – then it follows that the parties brutalized by them are wrong to resist them.[67]

Here, too, it is not an integral part of act utilitarianism to fault under-maximizers. Much depends on "whether it will best promote expected well-being to criticize someone for failing to maximize expected well-being".[68] Utility-maximizing or not, however, act-utilitarian brutalizers have not shied away from criticizing their disobliging adversaries. Moltke decried France's Government of National Defence for exacerbating acrimony, working against its own interests and, if tacitly, reducing net humanity, by protracting a lost war. France's refusal to lay down its arms "when the issue of the campaign was decided" in September 1870 subverted what for Moltke was "[t]he greatest kindness in war" – i.e., "to bring it to a speedy conclusion".[69]

Similarly, the United States counted on Japan's compliant behaviour in its net humanity-maximizing endeavours. If Truman was not explicit in this regard, others are. For instance, according to Herbert P. Bix,

> it was not so much the Allied policy of unconditional surrender that prolonged the Pacific war, as it was the unrealistic and incompetent actions of Japan's highest leaders. Blinded by their preoccupation with the fate of the imperial house, those leaders let pass every opportunity to end the lost war until it was too late.[70]

Wilson D. Miscamble is blunter:

> In moral terms surely the Japanese leadership had a responsibility to surrender at least by June 1945, when there existed no reasonable prospect of success and when their civilian population suffered so greatly. Instead, the twisted neo-*samurai* who led the Japanese military geared up with true *banzai* spirit to engage the whole population in a kind of national *kamikaze* campaign. Their stupidity and perfidy in perpetrating and prolonging the war should not be ignored.[71]

66 For analogous views, see Igor Primoratz, "Utilitarianism and Self-Sacrifice of the Innocent", *Analysis*, Vol. 38, No. 4, 1978; Brad Hooker, "Brink, Kagan, Utilitarianism and Self-Sacrifice", *Utilitas*, Vol. 3, No. 2, 1991.

67 By extension, *if* act-utilitarian brutalizers are right about this, *then* it is arguably wrong for the would-be brutalized party to resort to war against the would-be brutalizer *in the first place*. For, where "a more powerful state is bent on exterminating the people of a weaker nation, … resistance is absolutely futile, and … it is known that absolutely no good will come from it" (W. H. Shaw, above note 57, p. 76), the weaker must *not* resist the stronger. Shaw nevertheless envisions possibilities where promoting virtues such as resolve, courage and steadfastness in fighting for a just cause may be at least as utility-maximizing as outright capitulation (*ibid*., pp. 75–76).

68 *Ibid*., p. 30.

69 "Letters from von Moltke to Bluntschli", above note 4, p. 25.

70 Herbert P. Bix, "Japan's Delayed Surrender: A Reinterpretation", *Diplomatic History*, Vol. 19, No. 2, 1995, p. 223.

71 Wilson Miscamble, *The Most Controversial Decision: Truman, the Atomic Bombs, and the Defeat of Japan*, Cambridge University Press, Cambridge, 2011, pp. 120–121.

In effect, the brutalizer assimilates the brutalized party in its own net humanity-maximizing exercise and accuses the latter party of the exercise's underperformance.

Arrogation of authority and questionable utility of victim-blaming

There are two major problems here. One concerns how the brutalizer groundlessly co-opts the brutalized party into its vision of what maximizes war's net humanity and what each belligerent ought to do. The other involves the brutalizer effectively blaming the brutalized party for the cruelty that the former adds in the name of greater net humanity.[72]

That neither the brutalizer nor the brutalized party acts in isolation from each other goes without saying. The brutalizer takes the matter further, though. It presupposes that, albeit as adversaries, the brutalizer and the brutalized party are in a relationship of distributed responsibilities in pursuit of maximum net humanity. Robert E. Goodin calls such an arrangement a model of "task-responsibility",[73] stating that

> assigning responsibility amounts essentially to assigning duties and jobs. Different people have different responsibilities, ex ante, because they are allocated different duties and tasks. And people bear differential ex post responsibilities for outcomes, on this account, depending on the role that they played or should have played, pursuant to those ex ante task-responsibilities, in producing or averting those outcomes.[74]

One schematic example Goodin offers concerns how various adults are responsible *ex ante* for raising a child or avoiding its death and are held responsible *ex post* for the parts they played or failed to play in the child's fate.[75]

This model needs a broader societal set-up. For instance, a mutual benefit society[76] helps its members agree on certain utilities for which responsibilities should be assigned among them. Absent such a set-up, the individuals involved – even if they are all act utilitarians – risk failing to agree as to what outcome would embody their maximum welfare, let alone what they should each do to achieve it.[77] This risk is real because, left on their own, not even act-utilitarian philosophers can agree amongst themselves on such basic matters.[78]

72 In no way is it suggested that one party to the conflict always remains a brutalizer in all respects and its opponent always remains the party brutalized by it in all respects. Nor does this fundamentally affect the main thrust of the argument here. Of primary concern to us is the act-utilitarian *claim* that each party makes in relation to a given act of cruelty which it inflicts on its opponent in the name of greater net humanity. The author is indebted to Stephane Ojeda for his input on this issue.

73 Robert E. Goodin, *Utilitarianism as a Public Philosophy*, Cambridge University Press, Cambridge, 1995, p. 81.

74 *Ibid.*, p. 109.

75 *Ibid.*, pp. 109, 111–112.

76 *Ibid.*, pp. 277–280.

77 *Ibid.*, pp. 33–37.

78 W. H. Shaw, above note 57, p. 23.

Imagine how the brutalizer would describe wartime task-responsibilities. It would most likely run like this. For a given war that the brutalizer fights,

a. that war's speediest possible conclusion embodies its net humanity-maximizing outcome;
b. the brutalizer's *ex ante* responsibility is to toughen fighting; and
c. the brutalized party's *ex ante* responsibility is to refrain from resisting the brutalizer.

If the war lengthens, the brutalizer is responsible *ex post* for not fighting vigorously enough and the brutalized party for resisting swift capitulation.

The question is whether this is also how the brutalized party would describe wartime task-responsibilities. Three considerations militate against such a prospect. First, the brutalized party has no compelling reason to agree that shortening the war it is fighting with the brutalizer maximizes net humanity, for success need not always mean defeating one's opponent – in some cases, war aims may be accomplished by wearing the enemy down and making its efforts more costly.[79] In Clausewitz's words,

> [i]f we intend to hold out longer than our opponent we must be content with the smallest possible objects, for obviously a major object requires more effort than a minor one. The minimum object is *pure self-defense*; in other words, fighting without a positive purpose. With such a policy our relative strength will be at its height, and thus the prospects for a favourable outcome will be greatest.[80]

Clausewitz also adds that defence is a stronger form of war than attack[81] and that the object of a defensive war may entail "holding one's own until things take a better turn".[82] One distinct possibility that Clausewitz notes in this regard is where "[e]ither additional allies come to the defender's help or allies begin to desert his enemy".[83] Put differently, it may sometimes be reasonable for the would-be brutalized party to deem entrenching its resistance no less net humanity-maximizing than capitulating immediately.[84]

While under Prussian investment, Paris sent Adolphe Thiers out on "a tour of Europe to enlist the sympathy and, if possible, the aid of the neutral Powers for

79 C. von Clausewitz, above note 44, pp. 92–93.
80 *Ibid*., p. 93 (emphasis in original).
81 *Ibid*., pp. 358–366, 380.
82 *Ibid*., pp. 358–366, 601. This view also finds support in the writings of Jeremy Bentham: "For, though in case of perseverance on the part of the assailant, successful resistance may appear impossible; yet resistance, such as can be opposed, may, by gaining time, give room for some unexpected incident to arise, and may at any rate, by the inconvenience it occasions to the assailant, contribute in time or less, to weaken the mass of inducements which prompt him to similar enterprises." Jeremy Bentham, "Principles of International Law", in Jeremy Bentham, *The Works of Jeremy Bentham*, ed. John Bowring, Vol. 2, William Tait, Edinburgh, 1843, p. 545.
83 C. von Clausewitz, above note 44, p. 613.
84 One might say that Denmark saw its own situation differently on 9 April 1940. Having surrendered to Germany with little resistance, King Christian X stated to a visiting German general that "[h]e wished to spare his country further misfortune and misery". William L. Shirer, *The Rise and Fall of the Third Reich*, Simon and Schuster, New York, 1959, p. 629.

the new régime".[85] Thiers' efforts, though fruitless in the end, reportedly left Otto von Bismarck increasingly concerned:

> [W]ith one eye cocked on Thiers' progress round the courts of Europe and his finger on the languid pulse of the South German States, [Bismarck] was anxious for a rapid end to the war. If the French could prolong their resistance for long enough, not only might the Powers intervene but the whole German alliance might collapse. Only the fall of Paris could bring about the end of the war, and only bombardment, he was convinced, could hasten the fall of Paris.[86]

Writing in late December 1870 just before the city's bombardment, Frederick William, then Crown Prince of Prussia, also worried that

> [t]he longer this struggle lasts, the better for the enemy and the worse for us. The public opinion of Europe has not remained unaffected by this spectacle. We are no longer looked upon as the innocent sufferers of wrong, but rather as the arrogant victors, no longer content with the conquest of the foe, but fain to bring about his utter ruin. No more do the French appear in the eyes of neutrals as a mendacious, contemptible nation, but as the heroic-hearted people that against overwhelming odds is defending its dearest possessions in honourable fight.[87]

How much of Prussia's growing anxiety was known to France at the time is unclear. It would nevertheless have been reasonable for France to consider that prolonging its war with Prussia would have been at least as likely to maximize net humanity as shortening it. In other words, two act-utilitarian adversaries may reasonably disagree as to whether concluding their war speedily will maximize net humanity.[88]

Second, the brutalized party has no reason to accept *ex ante* responsibilities to refrain from resisting the brutalizer. While international society may be seen as a rudimentary mutual benefit society, "states will have conflicting aims; and this would be inevitable even if they were all consciously committed to the same utilitarian ideal, for they would differ about how to realize it".[89] International society itself privileges no one view about what maximizes welfare in war over any other view. Nor does international society help States agree that shortening wars through brutality is in fact a utility for which belligerents should be assigned different *ex ante* responsibilities.

85 M. Howard, above note 21, p. 225. See also G. Wawro, above note 21, p. 239.
86 M. Howard, above note 21, pp. 353–354.
87 Frederick III, above note 25, p. 240.
88 See also W. H. Shaw, above note 57, p. 109: "[T]here is a clear difference between the utility of victory for one side and its utility for everyone, even if belligerents are prone to confuse the two. Furthermore, although both sides are likely to believe that they are right to fight, they may not believe that their victory, although best for them, maximises the well-being of all."
89 Anthony Ellis, "Utilitarianism and International Ethics", in Terry Nardin and David R. Mapel (eds), *Traditions of International Ethics*, Cambridge University Press, Cambridge, 1992, p. 173. This remains so even though, "*as far as utilitarianism is concerned*, states should be committed ultimately to the positive pursuit of a common end, namely the general good, and their join actions and legal conventions should reflect this." *Ibid.* (emphasis added).

Here, John Stuart Mill's discussion of "feeling of justice" as a "consideration of general utility" is instructive.[90] "[A] people inferior in strength should fight to the death against the attempt of a foreign despot to reduce it to slavery", Mill contended, adding:

> For such iniquitous attempts, even by powers strong enough to succeed in them, are very much discouraged by the prospects of meeting with a desperate though unsuccessful resistance. The weak may not be able finally to withstand the strong if these persist in their tyranny, but they can make the tyranny cost the tyrant something, & that is much better than letting him indulge it gratis.[91]

Similarly,

> [t]here would be a great deal more tyrannical aggression by the strong against the weak, if those who knew they were not strong enough to succeed in the struggle, gave way at once and allowed the aggressors to carry their point without its costing them anything. A big boy will think twice before tyrannizing over a little one if he expects that the little fellow will fight to the last and make him pay for his victory. Spirit and obstinacy themselves count for much, and for how much can never be known till they are tried.[92]

Promoting such a feeling of justice may well maximize overall welfare. If so, fighting to the death may well be the brutalized party's *ex ante* responsibility in the promotion of such a feeling.[93]

Given its agnosticism on the matter, international society gives the brutalizer no authority to have the brutalized party's act-utilitarian view set aside and to substitute that view with its own. Consequently, international society gives the brutalizer no authority to have any *ex ante* responsibility imposed on the brutalized party to refrain from resisting it, either.[94] Nor, for the reasons noted earlier, is it self-evident that rough yet brief wars are in fact more humanity-maximizing than restrained yet protracted wars. The brutalizer has no monopoly of opinions over other agents, including the brutalized party, in the matter.

Third, the brutalized party has no reason to hold itself responsible *ex post* for prolonging its war with the brutalizer. Recall here that the wrongness of an

90 John Stuart Mill, "606. To William Thomas Thornton", in Francis E. Mineka and Dwight N. Lindley (eds), *The Later Letters of John Stewart Mill 1849–1873*, University of Toronto Press, Toronto and Buffalo, NY, 1972, p. 853.

91 *Ibid*., p. 854.

92 John Stuart Mill, "704. To Edwin Chadwick", in F. E. Mineka and D. N. Lindley (eds), above note 90, p. 947.

93 Shaw is somewhat more circumspect when he cautions how, "[e]ven when the stakes are extremely high, sober consequentialist calculations may well dictate capitulation. Utilitarians and other humane people disapprove of pointless loss. Only in the rarest of circumstances will they urge the suicidal taking up of arms or laud fighting to the last man." W. H. Shaw, above note 57, p. 76.

94 John Fabian Witt perceives possibilities that "IHL is committed to a certain institutional arrangement for the making of welfare calculations" (private correspondence with the author). That arrangement's "real objective is suffering management [rather than suffering minimization] via a certain institutional allocation of authorities embedded in the law of armed conflict" (*ibid*.).

agent's action and its blameworthiness involve separate utility calculations. Even if, *arguendo*, the brutalized party is wrong to prolong its war with the brutalizer, it still does not necessarily follow that it is also right to blame that party for it.

One can easily imagine how, when blaming the brutalized party for delaying surrender, the brutalizer most likely considers it also utility-maximizing to blame that party.[95] What is unclear is whether the brutalizer is actually correct. For one thing, blaming the brutalized party for resisting the brutalizer is likely to make what Mill called "tyranny"[96] less costly and more commonplace in the future. In act-utilitarian terms, this also means that the greater frequency of unopposed attacks may well offset any reduction made in the frequency of asymmetric wars. The appearance of extra humanity gained through tougher but quicker wars may well prove illusory, with net disutility simply transferred, if not amplified, from one set of outcomes (i.e., milder but lengthier wars) to another (i.e., more pervasive Millian tyrannies). Much of today's geostrategic nervousness surrounding Eastern Europe and East Asia is no doubt shaped by such prospects.

Furthermore, the wrongness in the brutalized party's refusal to capitulate may nevertheless be "blameless".[97] Blamelessness arises where, "while [an agent] did act wrongly, we do not blame her for acting wrongly since she did so out of a good motive".[98] We observed earlier that act utilitarianism is "impartial" in the sense that an agent's well-being has no greater weight than anyone else's. Blameless wrongdoing holds that we may occasionally decline to blame someone for acting wrongly when he or she exhibits dispositions that we consider utility-maximizing to promote. Though it may be wrong, *ex hypothesi*, to prolong its war with the brutalizer, in doing so the brutalized party arguably demonstrates worthy dispositions such as commitment to the protection of its citizenry and perseverance in the face of adversity.

By accusing the brutalized party of refusing to surrender, the brutalizer does two things. First, it arrogates to itself the authority to decide what the brutalized party's role is in maximizing net humanity. Second, it effectively blames the brutalized party for forcing its hand in cruelty for the sake of greater net humanity.[99] Act utilitarianism warrants neither.

95 Chastising the vanquished for their futile resistance may discourage weaker States from acting recklessly *vis-a-vis* their stronger opponents in the future, reduce the frequency of asymmetric wars over time, and lead to greater net humanity as a result.

96 J. S. Mill, above note 90, p. 854; J. S. Mill, above note 92, p. 947.

97 Derek Parfit, *Reasons and Persons*, Clarendon Press, Oxford, 1984, p. 31.

98 Julia Driver, "Global Utilitarianism", in B. Eggleston and D. E. Miller (eds), above note 56, p. 170.

99 Steven Lee describes William T. Sherman, general of the Union forces during the American Civil War, thusly: "Sherman surprisingly denies that he is to blame for the anti-civilian action he is about to undertake in burning Atlanta, and he claims that the fault for his actions lies with the Confederacy. Because they started the war, they are the unjust side, and only their choosing to end the war can stop him." Steven Lee, *Ethics and War: An Introduction*, Cambridge University Press, Cambridge, 2012, p. 230.

Legal claim

Act utilitarianism holds that, where toughening a war is likely to shorten it and therefore maximize net humanity, it is not only right but also mandatory to toughen warfighting. Now, hardening belligerent conduct for maximum utility may well include acting in non-conformity with IHL, but should IHL permit such non-conformity? Is act utilitarianism compatible with IHL, all things considered?

IHL conformity as utility

Though united in their ultimate concern for humanity in warfare, act utilitarianism and IHL could not be further apart from each other in the approaches they each take. IHL deems conformity with its rules "a compulsory minimum" for wartime humanity and "an invitation to exceed that minimum".[100] Fundamentally, IHL's core obligations embody elements of rule utilitarianism[101] or what Robert Nozik calls "side constraints" upon action which "reflect the underlying Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends without their consent".[102] In contrast, act utilitarianism attaches no intrinsic value to norm conformity; it is merely an instrument that is either conducive or inconducive to overall welfare. Act utilitarians cannot rule out *a priori* all possible circumstances where IHL non-conformity serves overall humanity better than conformity and consequently becomes justified, if not obligatory.

These differences leave IHL and act utilitarianism in awkward company. Jeoffrey P. Whitman criticizes act utilitarianism for favouring "a campaign of terror bombing against civilian population centers" in order to "secure victory over a brutal aggressor with a minimal loss of life".[103] Similarly, according to David Rodin and Henry Shue,

> [t]he [consequentialist] argument is at its most plausible when one thinks of a war with a supremely important moral purpose: a war to stop genocide, for example, or to prevent the invasion and destruction of a legitimate state.

100 Jean S. Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross (ICRC), Geneva, 1958, p. 37.

101 R. B. Brandt, "Utilitarianism and the Rules of War", *Philosophy and Public Affairs*, Vol. 1, No. 2, 1972, p. 147: "The rule-utilitarian, then, may take a two-level view: that in justifying the rules, utilitarian considerations are in order and nothing else is; whereas in making decisions about what to do in concrete circumstances, the rules are absolutely binding. In the rule-utilitarian view, immediate expediency is not a moral justification for infringing the rules." See also Stephen Nathanson, *Terrorism and the Ethics of War*, Cambridge University Press, Cambridge, 2010, pp. 194–211; Stephen Nathanson, "Are Attacks on Civilians Always Wrong?", in David W. Lovell and Igor Primoratz (eds), *Protecting Civilians during Violent Conflict: Theoretical and Practical Issues for the 21st Century*, Ashgate, Farnham, 2012, p. 17.

102 Robert Nozik, *Anarchy, State, and Utopia*, Basic Books, New York, 1974, pp. 30–31.

103 Jeoffrey P. Whitman, "Utilitarianism and the Laws of Land Warfare", *Public Affairs Quarterly*, Vol. 7, No. 3, 1993, p. 262. Whitman adds that "[t]he atomic bombings of Japan might be an example of this type of situation": *ibid*., p. 273 fn. 3.

> From a consequentialist perspective, it is difficult to understand why the just side in such a war should always be bound to observe *in bello* restrictions such as discrimination and proportionality if doing so might imperil victory. It is equally hard to understand why the unjust side should receive any *in bello* privileges, such as the right to kill enemy combatants, if this would aid their prosecution of evil purposes.[104]

Of the relatively few act-utilitarian defenders of civilian immunity, Shaw is perhaps the most outspoken and articulate. He contends that belligerents purporting to rationalize killing civilians on act-utilitarian grounds are "almost certainly wrong" and that there is a "good chance" that their victory through such methods will not maximize expected overall well-being.[105] On this view, "the danger of harming civilians when, on utilitarian grounds, one should not is significantly greater than the risk of missing a chance to harm them in those very rare cases when this would in fact be the correct utilitarian thing to do".[106] The probability of wartime utility miscalculation is so great that it is net utility-maximizing for States to train their soldiers "to see it as their duty always to respect civilian immunity".[107]

It is doubtful whether Shaw succeeds in his argument. Assume that, at time T, a State is to choose between training its soldiers always to respect civilian immunity and not training them to do so. The high risk of utility miscalculation mid-fighting at time $T + 1$ may well suggest, as Shaw does, that the former course of action maximizes expected overall well-being at T.[108] In most cases of hostilities at $T + 1$, respecting civilian immunity, as trained, also maximizes overall well-being.[109] In "those very rare cases" of hostilities at $T + 1bis$, however, it is attacking civilians that maximizes overall well-being and is therefore also the right thing to do. Conversely, at $T + 1bis$, respecting civilian immunity, as trained, diminishes overall well-being and is accordingly the wrong thing to do.

104 David Rodin and Henry Shue, "Introduction", in David Rodin and Henry Shue (eds), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, Oxford University Press, Oxford, 2008, p. 5.

105 W. H. Shaw, above note 57, p. 111. See also *ibid*., p. 129: "To begin with, directly attacking civilians will … *almost* always be wrong either because doing so lacks any military rationale whatsoever or because whatever military advantage it might bring is insufficient to justify the harm suffered by civilians. But even if there were a military case for attacking civilians in a particular set of circumstances, doing so would *almost* certainly fall short of the utilitarian goal of maximizing net, long-term well-being, taking everyone's interests into account" (emphasis added).

106 *Ibid*., p. 116.

107 *Ibid*. See also *ibid*., p. 129: "[C]ivilian immunity should be viewed as a distinct rule, not a mere entailment of the principles of necessity and proportionality [as they are understood in the ethics of war]. That means that it is to be respected and upheld *for its own sake* – even in the rare, but imaginable, case in which attacking civilians would not violate those principles" (emphasis added). And see William H. Shaw, "Utilitarianism and the Ethics of War", in B. Eggleston and D. E. Miller (eds), above note 56, pp. 322–323.

108 Shaw maintains that combatants "should, for instance, not even entertain the idea of directly and intentionally killing civilians even if, hypothetically, there were reasons for thinking this to be the welfare-maximizing course of action. Civilian immunity is not merely a rule of thumb. Rather, a commitment to it should be part of the intuitive moral code of all combatants." W. H. Shaw, above note 57, p. 72.

109 This corresponds to Shaw's assertion that "minimizing harm to civilian is almost always the welfare-maximizing course of action": *ibid*., p. 116.

This reveals four things. First, the act-utilitarian rightness of civilian immunity training at *T* does nothing to vitiate the act-utilitarian rightness of attacking civilians at *T* + *1bis*. Second, this is so even though, as noted earlier, praising or dispraising attacks on civilians at *T* + *1bis* is a separate matter from an act-utilitarian point of view. Third, the act-utilitarian rightness of civilian immunity training at *T* does nothing to repair the act-utilitarian wrongness of respecting civilian immunity at *T* + *1bis*. Fourth, the latter wrongness remains, although it may be made "blameless" on account of the respecter's prior training.[110] This blamelessness is arguably the only difference that Shaw's assertion makes.

Since act utilitarians cannot reject possibilities, no matter how remote, where IHL non-conformity maximizes overall well-being, they cannot bring themselves to uphold that such non-conformity is wrong *per se*, either. Act utilitarians are not alone here.[111] Even some thinkers who otherwise oppose act utilitarianism as a matter of principle concede that IHL non-conformity may need to be tolerated in truly exceptional situations.[112] Michael Walzer, for instance, uses the expression "supreme emergency" to convey and defend the position that "[u]tilitarian calculation can force us to violate the rules of war only when we are face-to-face not merely with defeat but with a defeat likely to bring disaster to a political community".[113] Igor Primoratz narrows the range of

110 Shaw invites us to imagine situations where "a well-intentioned agent … could have produced more happiness only by violating a generally accepted rule, the following of which usually produces good results". "In these cases", Shaw continues, "blame would seem to have little or no point. Indeed, if the agent brought about more good than most people do in similar situations, we may want to encourage others to follow her example. Praising an agent for an action that fails to live up to the utilitarian standard can sometimes be right." *Ibid*., p. 30.

111 Just consider the seven-to-seven vote inability of the International Court of Justice (ICJ) to "conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake": ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996* (Nuclear Weapons Advisory Opinion), p. 226, para. 105(2)(E). After all, international law, including IHL, is "not a suicide pact": Michael N. Schmitt, "21st Century Conflict: Can the Law Survive?", *Melbourne Journal of International Law*, Vol. 8, No. 2, 2007, p. 454; Nicholas Rostow, "Ukraine, Nuclear Weapons, and the Future of International Law", *Naval War College Review*, Vol. 76, No. 1, 2023, p. 16. Only a "rule-fetishist" would think that, "on grounds of humaneness itself, [a tactic that must be employed in order to win a war when the winning of that war is morally very important] must be subject to absolute prohibitions": Jens David Ohlin and Larry May, *Necessity in International Law*, Oxford University Press, New York, 2016, p. 75.

112 J. P. Whitman, above note 103, p. 273: "[T]here may be instances when we fulfil our moral obligations by acting contrary to the rules of [the war convention]."

113 Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed., Basic Books, New York, 2006, pp. 251, 268. Walzer cautions, however, that "these calculations have no similar effects when what is at stake is only the speed or the scope of victory": *ibid*., p. 268. John Rawls endorses Walzer, adding that "[t]his exemption allows us to set aside – in certain special circumstances – the strict status of civilians that normally prevents their being directly attacked in war": John Rawls, *The Law of Peoples: With "The Idea of Public Reason Revisited"*, Harvard University Press, Cambridge, MA, 1999, p. 98. Daniel Statman argues that Walzer's supreme emergency is in fact not a utilitarian claim: see Daniel Statman, "Supreme Emergencies Revisited", *Ethics*, Vol. 117, No. 1, 2006, pp. 60–61.

situations to which Walzer's supreme emergency is available down to "moral disasters"[114] such as genocide and the ethnic cleansing of an entire community:

> I therefore prefer to think of civilian immunity as an *almost* absolute principle that spells out one of the central and most stringent requirements of justice as it applies to war, and recognizes an *almost* absolute right of the vast majority of civilians – namely, all those who cannot be considered "currently engaged in the business of war" – not to be targets of deadly violence. The right and the principle trump other moral considerations with which they may come into conflict, with one exception: that of a (narrowly defined) moral disaster.[115]

Once the morality of norm conformity is relativized in this way, however, attempts to contain its repercussions are likely to be futile.[116] "Rather than severely restricting the abrogation of noncombatant immunity", Stephen Nathanson warns, the supreme emergency doctrine – and, by extension, any other doctrine like it – "opens the floodgates".[117]

Selective IHL non-conformity in the name of greater net humanity

When those floodgates are opened, act-utilitarian brutalizers await downstream. For them, any difference between preventing Walzerian-Primoratzian disasters such as genocide, wholesale ethnic cleansing and foreign tyrannical rule, on the one hand, and maximizing wartime net humanity, on the other, is only a matter of degrees. IHL must permit (if not obligate) non-conformity with its rules whenever non-conformity is expected to accelerate a war's end and maximize net humanity as a result.

Some lawyers are quite explicit in this regard. Consider Rabkin, for instance, who asserts that

> [s]trict adherence to rules, if it prolonged the conflict and substantially increased the casualty count – let alone if it inhibited a democracy's war effort enough to give victory to a brutal tyrant – might then be judged *less* humane.[118]

Elsewhere, Rabkin argues that "[i]f a tactic helps assure a speedier victory, that must matter, especially if a prolonged war will entail more civilian suffering".[119]

We may detect two versions of act utilitarianism in Rabkin's reasoning. In one, it is a democracy's victory over a brutal tyrant that maximizes net humanity. On this view, not all warring States enjoy equal normative standing and, accordingly, not all victories carry equal weight. A win for democracies counts

114 Igor Primoratz, "Civilian Immunity in War: Its Grounds, Scope, and Weight", in Igor Primoratz (ed.), *Civilian Immunity in War*, Oxford University Press, Oxford, 2007, p. 7; Igor Primoratz, "Civilian Immunity as an *Almost* Absolute Moral Rule", in D. W. Lovell and I. Primoratz (eds), above note 101.
115 I. Primoratz, "Civilian Immunity in War", above note 114, pp. 39–40 (emphasis in original).
116 C. A. J. Coady, "Terrorism, Morality, and Supreme Emergency", *Ethics*, Vol. 114, No. 4, 2004, pp. 787–789.
117 S. Nathanson, above note 101, p. 158.
118 J. Rabkin, above note 13, p. 57 (emphasis in original).
119 J. Rabkin, "Why We Fight Matters to How We Fight" above note 17. See also J. Rabkin, "Who Speaks for Humanity?", above note 17; J. Rabkin, "'Humanity' Is Not Always the Highest Claim", above note 17.

more for humanity overall than a win for tyrants. IHL must permit democracies to dispense with its rules where such dispensation improves their prospects of defeating tyrants.[120]

The other version treats the "casualty count", or the totality of "civilian suffering", as the benchmark for a given war's net humanity. Sometimes, an unrestrained war that has a short duration saves more lives than a restrained war that lasts for a long time. IHL therefore ought to permit belligerents to dispense with its rules where such dispensation improves their prospects of expediting victory.

Gabriella Blum is more vivid:

> [T]he taboo surrounding any mathematical calculation of deliberate killings necessarily detracts our attention from the would-be casualties of Operation Downfall [a land invasion of Japan that the American military would have pursued had the atomic bombs not been dropped and had Japan not surrendered]. Real victims are the only ones we can see and count. Their tragedy is visible and certain. Imaginary victims are, by definition, imaginary. The absolute rules of IHL exclude calculations that would allow us to prefer the welfare of would-be victims. Considerations for the latter would require us to accept, to some extent, the legitimacy of a deliberate infliction of harm on innocent people in order to avoid the infliction – deliberate or foreseen – of harm on still many more. We would have to accept, to some extent, the instrumentalization of innocent people.[121]

Blum proposes formalizing the underlying idea into a "humanitarian necessity" defence.[122] If pleaded successfully, this act-utilitarian defence would justify non-conformities with IHL's unqualified prohibitions,[123] including "assassinations of foreign leaders, the Early Warning Procedure, and, in some extreme cases, even the deliberate killing of civilians or combatants who are *hors de combat*".[124] Given the flatness of international society, with no monopoly of State power and no central authority to make lesser-evil choices for States, "we might well imagine a less constraining, more strictly utilitarian paradigm" when designing the

120 The normative asymmetry between belligerents as an idea – accorded growing credence since NATO's 1999 Kosovo campaign and the so-called War on Terror after 9/11 – broadly echoes the revisionist school in just war theory. According to this school, those responsible or fighting for an unjust cause *ad bellum* occupy a morally inferior position *vis-à-vis* their counterparts responsible or fighting for a just cause *ad bellum*. Unlike act utilitarians, however, revisionists do not quite see IHL in the same way. In the latter's view, although IHL should ultimately reflect normative asymmetries between just and unjust belligerents, it currently does not do so and, for the time being, it should not, for pragmatic reasons. See Adil Ahmad Haque, *Law and Morality at War*, Oxford University Press, Oxford, 2017, p. 20; Jeff McMahan, *Killing in War*, Oxford University Press, Oxford, 2009, pp. 95, 108–109, 234–235.

121 G. Blum, above note 17, pp. 26, 27–28. Blum continues to show anecdotal indications that, when calculating the total number of lives saved, US decision-makers "were not oblivious to the effect of the invasion and its alternatives on the Japanese": *ibid*., p. 28. See also *ibid*., pp. 28–30.

122 *Ibid*., p. 4.

123 *Ibid*., p. 33: "The necessity justification is thus an act-utilitarian framework."

124 *Ibid*., p. 67. The "Early Warning Procedure" mentioned by Blum refers to the Israel Defense Forces "employ[ing] local residents to aid in the arrest of suspected Palestinian militants in the West Bank", a practice observed during the second intifada: *ibid*., pp. 5, 15–19.

humanitarian necessity defence than would be the case for the necessity defence in domestic law.[125] Consequently, according to Blum,

> [a] workable definition of a humanitarian necessity justification might read as follows:
>
> A person shall not be criminally responsible if, at the time of that person's conduct:
>
> …
>
> The conduct that is alleged to constitute a crime was designed to minimize harm to individuals other than the defendant's compatriots, the person could reasonably expect that his or her action would be effective as the direct cause of minimizing the harm, and these were no less harmful alternatives under the circumstances to produce a similar humanitarian outcome.[126]

Five key aspects of this defence may be noted. First, according to Blum, humanitarian necessity is a justification located "within IHL, not outside it".[127] In other words, it is IHL itself that ought to permit non-conformity with its rules on account of humanitarian necessity. Second, Blum includes the welfare of enemy civilians and soldiers,[128] but not that of one's own civilians and soldiers,[129] in her lesser-evil calculus. It may be said that Blum's is a utilitarian argument that is more than impartial or agent-neutral – it is, in fact, *altruistic*. Third, when calculating the amount of reduced evil that this defence needs in order to work, Blum considers a "strict utilitarian" or act-utilitarian reduction but ultimately opts for a more demanding "significant" reduction.[130] The latter reflects our need to be "suspicious of the decisionmaker's ability to make lesser-harm determinations" and to counter risks of uncertainties, slippery slope exploitations, spillover effects and moral hazards.[131]

Fourth, Blum proposes to impose a "direct" causal link requirement between the violation and the harm abated.[132] At first, this may appear to exclude from the scope of eligible harm abatement a "military victory" and an "end to the suffering of enemy combatants and civilians".[133] The picture changes, however, when Blum continues:

> Undoubtedly designed to achieve victory and end the war, the attacks [on Hiroshima and Nagasaki] might nonetheless be justified if we were to

125 *Ibid.*, p. 36.
126 *Ibid.*, p. 67.
127 *Ibid.*, p. 54.
128 *Ibid.*, pp. 56–58.
129 *Ibid.*, pp. 58–60.
130 *Ibid.*, pp. 61–62.
131 *Ibid.*, pp. 61–62.
132 *Ibid.*, p. 65.
133 *Ibid.*, p. 65.

> determine that under the prevailing political and military circumstances, winning the war was the only thing left to do. Continuing well after Germany's surrender, the final active front of a six-year-old world conflict had withstood the fire-bombings of Tokyo and the invasion of Okinawa and the hundreds of thousands of casualties that it had left behind. Perhaps this is the *sui generis* case in which a military victory that ends the war is a warranted exception.[134]

Fifth, Blum adds a condition that, all else being equal, the evil chosen must be "the least possible harmful means that could avert the greater evil".[135] Whether this does anything to affect the defence's fundamentally utilitarian rationale is unclear, for, according to act utilitarianism, the right course of action at a given moment is that amongst the available options which is likely to maximize net utility. *Vis-à-vis* the common greater evil that the agent endeavours to avert, the least harmful means is, *by definition*, also the most net utility-maximizing means.

If the Franco-Prussian War had been governed by today's IHL, and if today's IHL had contained Blum's humanitarian necessity defence, Moltke would have pleaded that defence on the grounds that:

a. those acts committed by Prussian forces in non-conformity with IHL were designed to minimize harm to French combatants and civilians – not by securing their capitulation, but rather by bringing the inevitability of their capitulation forward;
b. Prussian commanders reasonably expected that their action would be effective as the direct cause of minimizing harm to French combatants and civilians through their accelerated surrender; and
c. there were no less harmful alternatives under the circumstances to produce a similar humanitarian outcome for French combatants and civilians.

This truly encapsulates Moltke's "greatest kindness in war".[136]

Utilitarian ends versus utilitarian means

Blum's humanitarian necessity defence has faced detailed rebuttals elsewhere.[137] At stake here is the notion's fitness with IHL, given what IHL is for and how it sets out to accomplish its goal. This should also be a matter of interest to Blum, since, as she claims herself, the defence should make sense "as judged by IHL's own standards".[138]

134 *Ibid*., p. 65.
135 *Ibid*., p. 66.
136 "Letters from von Moltke to Bluntschli", above note 4, p. 25.
137 Diane A. Desierto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation*, Martinus Nijhoff, Leiden and London, 2012, pp. 333–347; N. Hayashi, above note 17, pp. 222–223.
138 G. Blum, above note 17, p. 14.

It is evident that modern IHL's end state has been essentially utilitarian – i.e., a net reduction in wartime harm and suffering.[139] As early as 1868, States "by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity" and applied such limits to the use of lightweight explosive projectiles in the form of the St Petersburg Declaration.[140] Though somewhat less forcefully, both Hague Convention II of 1899 and Hague Convention IV of 1907 proclaim in their preambles that the wording of their provisions was "inspired by the desire to diminish the evils of war so far as military necessities permit".[141] In its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice held that "the principles and rules of law applicable in armed conflict – at the heart of which is the overriding consideration of humanity – make the conduct of armed hostilities subject to a number of strict requirements".[142]

Commentators agree. Writing in 1952, Hersch Lauterpacht observed:

> We shall utterly fail to understand the true character of the law of war unless we realize that its purpose is almost entirely humanitarian in its literal sense of the word, namely, to prevent or mitigate suffering and, in some sense, to rescue life from the savagery of battle and passion.[143]

Theodor Meron, meanwhile, highlights a shift in the weight assigned to military necessity and constraint on the conduct of belligerents: "Humanitarian restraint has been promoted more vigorously in normative developments and in the elaboration of new standards."[144]

It would be a mistake to assume, however, that utilitarian ends necessarily justify, let alone obligate, utilitarian means – including, in particular, act-utilitarian ones.[145] This is arguably where Blum errs, for she writes:

> IHL very clearly states its own goal as maximizing humanitarian protections from harms of inevitable wars. In other words, IHL, as it stands, is the epitome of the principle of lesser evil: the taming of warfare at the price of granting a legal imprimatur for all actions not strictly forbidden.[146]

139 Generally, see N. Hayashi, above note 17, pp. 60–66.
140 St Petersburg Declaration, above note 15, Preamble. The Declaration also recognized that "the progress of civilisation should have the effect of alleviating as much as possible the calamities of war".
141 Hague Convention II, above note 15, Preamble; Hague Convention IV, above note 15, Preamble.
142 Nuclear Weapons Advisory Opinion, above note 111, para. 85.
143 Hersch Lauterpacht, "The Problem of the Revision of the Law of War", *British Year Book of International Law*, Vol. 29, 1952, pp. 363–364.
144 Theodor Meron, "The Humanization of Humanitarian Law", *American Journal of International Law*, Vol. 94, No. 2, 2000, p. 243.
145 W. H. Shaw, above note 57, pp. 31–32.
146 G. Blum, above note 17, p. 36. See also *ibid*., p. 44: "IHL seems to lend itself more easily to a utilitarian, teleological analysis on the basis of its normative *grundnorm*: the maximization of humanitarian protections from harms of inevitable wars – the quintessential lesser evil."

If IHL really were act-utilitarian in the way it creates and administers its rules, then two things should follow. First, as noted earlier, act utilitarianism dictates that it is right to maximize general utility and that it is wrong not to do so. IHL would therefore *obligate*, rather than merely *permit*, *justify* or *excuse*, those acts that are covered by humanitarian necessity.[147] And yet, at no point does Blum suggest that this is so.[148] Her claim may rather be that IHL should permit, justify or excuse actions taken in humanitarian necessity insofar as they are what act utilitarianism morally obligates.[149] This, however, would still not make IHL itself a system of act-utilitarian rules.

Second, a truly act-utilitarian system of rules would keep the agent, as well as his or her choices and actions, at the centre of its evaluative focus.[150] Legislated norms are merely instruments at the agent's disposal. Weighty rules, typically couched in unqualified terms, signal to the agent how important and valuable it is for him or her to internalize them, *even non-instrumentally*, should that agent find him- or herself acting in a relevant situation.[151] What unqualified rules do *not* signify from an act-utilitarian point of view, however, is that the legislator has predetermined the unlawfulness of their non-conformity in advance or withdrawn the agent's competence to determine the matter him- or herself on the spot.

There is no indication that this is how IHL works. On the contrary, IHL development progressively narrows situations where "the cases not provided for should, for want of a written provision, be left to the arbitrary judgment of the military commanders".[152] Where unqualified rules are adopted,[153] modern IHL replaces its duty-bearers acting in specific situations with its legislators deliberating in advance, as the arbiters of competing

147 For further discussion, see the section below entitled "*Ultima Ratio Humanitatum*?".

148 Nor, for that matter, does Shaun P. Martin, to whom Blum refers, suggest that domestic criminal law obligates acts covered by the necessity defence. Shaun P. Martin, "The Radical Necessity Defense", *University of Cincinnati Law Review*, Vol. 73, No. 4, 2005, p. 1532.

149 It is not clear whether, in Blum's view, humanitarian necessity obligates acts to begin with. Here, too, there is no indication that, in Martin's view, acts covered by the necessity defence are in fact morally obligatory from an act-utilitarian point of view. *Ibid.*

150 After all, it is the rightness or wrongness of those choices and actions from the overall welfare point of view, and nothing else, that matters to act utilitarianism.

151 W. H. Shaw, above note 57, pp. 72, 74, 110–112.

152 Hague Convention II, above note 15, Preamble; Hague Convention IV, above note 15, Preamble.

153 Robert Kolb, "The Main Epochs of Modern International Humanitarian Law Since 1864 and Their Related Dominant Legal Constructions", in Kjetil Mujezinović Larsen, Camilla Guldahl Cooper and Gro Nystuen (eds), *Searching for a "Principle of Humanity" in International Humanitarian Law*, Cambridge University Press, Cambridge, 2013, p. 53: "Being part of the public order, the IHL obligations are protected against any attempts of evasion: reservations, reciprocity/reprisals, derogations by special agreements, evasion by applicability issues, all these tend to be eschewed by legal constructions guaranteeing the applicability of the protections stipulated for in all circumstances. It is undoubted that this effort often remains doctrinal; military practice is less inclined to be enthusiastic. But it cannot be doubted that this perspective and the practice to which it gives rise exerts pressure on the actors – humanitarian, political and military."

interests[154] – including utility considerations[155] – and, with it, as the deciders of rule conformity.

This transfer of agency can be discerned in several ways. At its most structural, it is implicit in the fact that IHL governs warfare, where necessity interests often reign supreme. Thus, the 2001 Articles on Responsibility of States for Internationally Wrongful Acts disqualify a State from invoking necessity as a circumstance precluding wrongfulness if "the international obligation in question excludes the possibility of invoking necessity".[156] This exclusion, according to the International Law Commission, encompasses "humanitarian conventions applicable to armed conflict".[157] The transfer may also manifest itself through the operation of IHL provisions themselves. For instance, under the 1954 Hague Cultural Property Convention, States may waive their obligations to respect cultural property "where military necessity imperatively requires such a waiver".[158] This rule itself contains no further details, leaving imperative military necessity determinations to each belligerent concerned. Cultural Property Protocol II of 1998 significantly tightens the scope and manner of such determinations by limiting when and what kind of cultural property may be subjected to a waiver, as well as which official is competent to take the decision.[159]

Perhaps more dramatically, IHL lawmakers may "with a stroke of the pen"[160] eliminate room for discretionary utility-calculation exercises by commanders on the ground. The preamble of the St Petersburg Declaration is a case in point, at least as far as the use of lightweight explosive projectiles is concerned. The preamble reads, in relevant parts:

> [T]he Undersigned are authorized by the orders of their Governments to declare as follows:

154 Jean de Preux, "Article 35 – Basic Rules", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, p. 395: "'Have confidence in the wisdom of the generals' was the only solution to limit the injury and suffering of war entertained by a number of authors following the Second World War. But it is not the solution which was chosen by the international community, as evidenced by the existence of [Additional Protocol I], and there is absolutely no reason to go back on this choice."

155 R. B. Brandt, above note 101, pp. 151–152.

156 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, in *Yearbook of the International Law Commission*, Vol. 2, Part 2, 2001, Art. 25(2)(a).

157 *Ibid.*, p. 84. The Commission continues: "As embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation … to the question of 'military necessity' … which is, in the first place, the underlying criterion for a series of substantive rules of the law of war and neutrality, as well as being included in terms in a number of treaty provisions in the field of international humanitarian law. … [W]hile considerations akin to those underlying article 25 may have a role, they are taken into account in the context of the formulation and interpretation of the primary obligations." *Ibid.*

158 Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954 (entered into force 7 August 1956), Art. 4(2).

159 Second Protocol to the Hague Convention of 1954 on the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999 (entered into force 9 March 2004), Art. 6.

160 Lauterpacht noted how Geneva Convention IV of 1949 "abolished reprisals against the civilian population and its property" and "did away with such customary rules as existed in the matter of taking hostages in occupied territory and elsewhere": H. Lauterpacht, above note 143, p. 361.

> Considering:
>
> That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
>
> That for this purpose it is sufficient to disable the greatest possible number of men;
>
> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
>
> That the employment of such arms would, therefore, be contrary to the laws of humanity …[161]

Step by step, these stipulations restrict the scope of rule conformity determination on the employment of arms that would remain open to *in loco* assessment by belligerents. States effectively *disempower* themselves – and, by extension, their soldiers – from evaluating

1. whether, in a given war, it is legitimate for them to endeavour to accomplish objects other than weakening the military forces of their enemy;
2. whether, in a given military engagement, disabling the greatest number of enemy combatants is sufficient for the aforementioned purpose, i.e., weakening the military forces of their enemy; or
3. whether, in a given case of enemy disablement, the use of lightweight explosive projectiles
    a. aggravates the sufferings of disabled enemy combatants or renders their death inevitable;
    b. exceeds the aforementioned sufficiency, i.e., maximum enemy disablement; or
    c. is contrary to the laws of humanity;

and, consequently, from justifying a given instance of non-conformity with the ban on the use of lightweight explosive projectiles.

France, Prussia and the North German Confederation were among the States that negotiated the St Petersburg Declaration and became parties to it on 11 December 1868.[162] Accusations of explosive bullets use by France and Prussia alike arose during the Franco-Prussian War.[163] Let us suppose that the St Petersburg Declaration did apply to that war,[164] and that Prussia did use such

161 St Petersburg Declaration, above note 15, Preamble.
162 See: https://ihl-databases.icrc.org/en/ihl-treaties/st-petersburg-decl-1868/state-parties?activeTab=undefined.
163 Taline Garibian, "Pain, Medicine and the Monitoring of War Violence: The Case of Rifle Bullets (1868–1918)", *Medical History*, Vol. 66, No. 2, 2022, pp. 157–159.
164 Which it most likely did not. The Duchy of Baden was not a party to the Declaration, which contained a general participation (*si omnes*) clause: *ibid*., p. 157.

munitions against French soldiers.[165] Prussia would have been precluded from pleading, *even if true in the particular circumstances of fighting*, that its commanders found the wounds which the explosive bullets inflicted on their opponents not uselessly aggravating, that this tactic weakened France's military forces, and so on.

This preclusion is markedly *not* act-utilitarian. It is little wonder, then, that Moltke – for whom IHL provisions ought to maintain "elasticity", with situation-sensitive qualifiers, lest they be "broken by inexorable reality"[166] – found the St Petersburg Declaration so disagreeable.[167]

Ultima ratio humanitatum?

It may be objected that no law can anticipate all eventualities and have the necessary rules ready for them in advance.[168] There will inevitably come a point where the legislator has not accounted for all relevant interests and where, for all its appearance of certainty, the resulting legal rule fails to provide authoritative behavioural guidance. Warfighting epitomizes situations where this may occur. States, *qua* IHL lawmakers, should perhaps restore a degree of agency to States and their soldiers, *qua* belligerents engaged in combat, in the assessment of competing interests and the determination of rule conformity on a case-by-case basis.

Two potential solutions present themselves. One involves affixing exemptions to principal IHL obligations. Indeed, some IHL rules explicitly envision flexibility that is broadly utilitarian. In Gary D. Solis' words,

> [t]hese allowances in the name of military necessity demonstrate that [IHL] remains cognizant that military necessity sometimes requires extreme measures. In these allowances, terms like "if possible," "as far as possible," and "if urgent," introduce elements of uncertainty and risks of arbitrary conduct. Without these concessions, which take reality into account, the allowances could not have been formulated and approved in the first place.[169]

Not only military necessity interests but also humanitarian interests are eligible for such allowances, depending on the circumstances and the conduct in question.[170]

165 Of which, French doctors involved in the treatment of wounded soldiers concluded, there was limited evidence: *ibid*., pp. 158–159.

166 "Letters from von Moltke to Bluntschli", above note 4, p. 26.

167 *Ibid*., p. 25.

168 H. L. A. Hart, *The Concept of Law*, Oxford University Press, Oxford, 1961, pp. 124–125: "Whichever device, precedent or legislation, is chosen for the communication of standards of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate. … [H]uman legislators [cannot know] all the possible combinations of circumstances which the future may bring. This inability to anticipate things brings with it a relative indeterminacy of aim."

169 Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press, Cambridge, 2010, p. 269.

170 See e.g. Regulations Respecting the Laws and Customs of War on Land, Annexed to Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907 (entered into force 26 January

IHL also contains provisions with clauses that expressly admit deviations on account of military necessity,[171] or humanity,[172] or both.[173] These examples denote instances where IHL lawmakers have specifically and deliberately elected to let the duty-bearer retain an element of agency to evaluate interests and determine rule conformity on their own. In such instances, act-utilitarian considerations may very well inform the duty-bearer's interest evaluations and rule conformity determinations.

The other potential solution concerns IHL rules that are unqualified. Our discussion thus far suggests that the absence of qualifiers indicates the inadmissibility of *de novo* pleas in defence of non-conformity with such rules. This remains so even when non-conformity proves to be the morally right thing to do – e.g., maximizing net humanity and fulfilling altruistic humanitarian imperatives.

Admitting *de novo* pleas in such situations somewhat resembles what the present author has called *Humanitätsgebot* elsewhere.[174] According to this idea, "compliance with [humanitarian imperatives] may be invoked as a ground for non-compliance with unqualified IHL rules".[175] *Humanitätsgebot* emanates from two possibilities, namely: (a) that IHL law-making may not have resolved in advance all genuine norm conflicts between its unqualified rules and contrary moral demands[176]; and, consequently, (b) that the latter "may operate as additional layers of lawfulness modification over and above positive law for particular acts".[177] Understood thus, it might appear as though *Humanitätsgebot* is functionally synonymous with the humanitarian necessity defence. After all, they both purport to facilitate deviations from unqualified IHL rules on account of weighty countervailing considerations of humanity.

Four key differences separate *Humanitätsgebot* from humanitarian necessity. Firstly, they do not treat the same kind of considerations as eligible. On the one hand, humanitarian necessity justifies the deliberate infliction of *evil* – such as assassinating rogue leaders, forcibly using residents of occupied territory for the occupier's military needs, or killing enemy civilians or

1910) (Hague Regulations), Art. 27 (obligating all necessary steps to spare, "as far as possible", certain buildings, monuments, hospitals, and so on, during sieges and bombardments); Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (entered into force 21 October 1950), Art. 17 (obligating careful pre-burial/-cremation examination of the dead, "if possible" by a medical examination).

171 See e.g. Hague Regulations, above note 170, Art. 23(g), prohibiting destruction or seizure of enemy property "unless … imperatively demanded by the necessities of war".

172 See e.g. Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (entered into force 21 October 1950), Art. 127, prohibiting seriously detrimental transfers of sick, wounded or infirm civilian detainees and maternity cases "unless their safety imperatively so demands".

173 See e.g. *ibid.*, Art. 49, prohibiting individual or mass forcible transfers, as well as deportations of protected persons from occupied territory, but total or partial evacuation of an area is permitted "if the security of the population or imperative military reasons so demand".

174 That is, as in *Humanitätsgebot geht vor Kriegsmanier* ("imperatives of humanity override rules of war"), a variation on the more familiar *Kriegsräson geht vor Kriegsmanier* ("necessities of war override rules of war"). N. Hayashi, above note 17, p. 242.

175 *Ibid.*, p. 242.

176 *Ibid.*, p. 241.

177 *Ibid.*

combatants who are *hors de combat*[178] – that passes a threshold characterized by altruism,[179] significant and causally proximate harm reduction,[180] and the absence of less evil alternatives.[181] On the other hand, *Humanitätsgebot* deals exclusively with opposing imperatives of which *none* are evil in themselves. This is evident in the two emblematic cases that *Humanitätsgebot* examines, namely:

- declining to repatriate those prisoners of war after the cessation of hostilities for whom *non-refoulement* concerns exist,[182] despite Article 118 of Geneva Convention III (GC III);[183] and
- interning those prisoners of war aboard military vessels at sea who lack access to suitable facilities on land nearby,[184] despite Article 22 of GC III.[185]

Secondly, the nature of the norm conflict involved is also different. It is exceedingly unlikely that, for Blum, assassinations, civilian killings and the like are imperatives (e.g., "you must assassinate") *vis-à-vis* which IHL's counter-prohibitions should be juxtaposed (e.g., "you must not assassinate"). Rather, humanitarian necessity's normative juxtaposition would be of the kind where an IHL prohibition (e.g., "you must not assassinate") frustrates the measure that the actor should be entitled to take (e.g., "you may assassinate"). Of concern to *Humanitätsgebot* are conflicts between mutually incompatible obligations (e.g., "you must repatriate" versus "you must not repatriate", "you must intern on land" versus "you must intern aboard vessels at sea").

Thirdly, dissimilar norm conflicts give rise to dissimilar consequences. The humanitarian necessity defence merely releases the actor from the normative burden of non-conformity with IHL. *Humanitätsgebot* would operate in such a way that IHL, all things considered, obligates non-conformity with its own rules.

Lastly, by the author's own admission, *Humanitätsgebot* is "no more than a hypothesis".[186] That this is so becomes evident given how *Humanitätsgebot* "arguably offers a more cogent explanation" about the non-conclusiveness of GC III Article 118's normative content, but only "if it does exist".[187] Also, *Humanitätsgebot*'s hypothetical existence is fundamentally an epistemic one ("does it exist?"), not a prescriptive one ("should it exist?"). A "careful scrutiny" of this hypothesis is advisable "in view of [its] potentially far-reaching ramifications".[188]

178 G. Blum, above note 17, p. 67.
179 *Ibid.*, pp. 56–60.
180 *Ibid.*, pp. 61–62, 65.
181 *Ibid.*, p. 66.
182 N. Hayashi, above note 17, pp. 243–248.
183 Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949 (entered into force 21 October 1950) (GC III), Art. 118: "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."
184 N. Hayashi, above note 17, pp. 248–250.
185 GC III, Art. 22: "Prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness."
186 N. Hayashi, above note 17, p. 15.
187 *Ibid.*, p. 248.
188 *Ibid.*, p. 257.

In contrast, Blum presents her humanitarian necessity defence as an overtly programmatic remedy to IHL's supposed defects:[189]

> I argue that the law's current absolutist stance prevents parties in conflict from lawfully pursuing actions that might lessen the harms of war. Specifically, I argue that it is possible to conceive of a humanitarian necessity justification, a variation on the necessity defense in domestic criminal law, which would exempt those who pursue such actions from criminal liability. Such an exemption, I hope and expect, could further the humanitarian goals of IHL without eroding its rules and status. What is required for such an exemption to work is a willingness on our part to shift the focus of care from the immediate, visible victims to would-be, invisible ones who are nonetheless just as real. We must not inertly accept certain victims as the necessary collateral damage of war, but instead make a positive and genuine choice to protect many by harming the few.[190]

IHL takes an absolutist stance on the issue of deliberately killing enemy civilians who take no direct part in hostilities. Blum's charge is that, if IHL's absolutism is deontologically driven, then it is:

a. a hard position to maintain amidst the prevalence of various kinds of evil in war;[191]
b. inconsistent with the permissibility of incidental harm and the deliberate killing of soldiers;[192]
c. a position that makes it difficult to explain unqualified prohibitions that do not appear deontologically grounded;[193]
d. unable to explain the existence of provisions subject to military necessity exceptions;[194] and
e. irreconcilable with the existence of those deontologists who concede the inevitability of utilitarian solutions in extreme cases.[195]

Plainly, none of these deontological defects, even if correct in themselves, shows why IHL should not take an absolutist stance on a particular matter. For the same reason, Blum's exposé of rule utilitarianism's shortcomings fails to explain why IHL should reject the prohibition of deliberate civilian killings in all circumstances and replace it with their occasional permissibility instead.[196]

Act utilitarianism is incompatible with IHL because, while both share an ultimate concern for net reduction in wartime suffering, IHL does not treat as justified – let alone obligatory – any means likely to contribute to that end.

189 See also D. A. Desierto, above note 137, pp. 334, 336, describing humanitarian necessity as "*de lege ferenda*".
190 G. Blum, above note 17, p. 68.
191 *Ibid*., p. 39.
192 *Ibid*., p. 40.
193 *Ibid*., pp. 41–42.
194 *Ibid*., pp. 42–43.
195 *Ibid*., pp. 43–44.
196 *Ibid*., pp. 44–53.

Incompatibility also emanates from the fact that IHL's unqualified obligations are not merely there to signal their elevated instrumental value to belligerents. On the contrary, these obligations indicate predetermined parameters of rule conformity from which their addressees are no longer entitled to deviate on account of utility considerations.

It is not beyond the realm of theoretical possibility that IHL may obligate non-conformity with its own rules when so demanded by contrary humanitarian imperatives. IHL justifying killing enemy civilians on act-utilitarian grounds – no matter how altruistic and restrictive – is.

Conclusion

> We had not been given any warning beforehand that our houses were going to be burned. No one in the whole ridge knew that we were to move. The police just came one day, and drove everybody out of their homes, while the Home Guards burned the houses right behind us. … During the move I got separated from my children, and I could not trace them. They had been in front, leading our remaining cattle, but I failed to find them. During the whole night I could hear a lot of shooting and screaming. I cried the whole night, knowing that my children were gone.
>
> Ruth Ndegwa[197]

In 1952, Kenya, then under British rule, found itself engulfed in an insurgency.[198] This protracted, increasingly violent and fast-expanding conflict pitched Britain's colonial forces against a group of national liberation guerrillas popularly known as the Mau Mau. These rebels were funded and coordinated primarily through extensive Kikuyu networks in Nairobi.[199] On 24 April 1954, British forces launched Operation Anvil. After four weeks of intense cordon and search action, 30,000 suspected Mau Mau members in the Kenyan capital were arrested, screened and "repatriated" to Kikuyu reserves in the Central Province.[200]

Two months later, the colonial War Council mandated mass forced resettlement, called "villagization", throughout the province.[201] Ruth Ndegwa, left alone to care for her children and elderly relatives following the arrest and detention of her husband, was removed from her homestead and detained at a "protected village" in Kiamariga, a site that was surrounded by armed guards and had no shelter, food, water, sanitation facilities or medical supplies.[202] At

197 Quoted in Caroline Elkins, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya*, Henry Holt, New York, 2005, pp. 237–238.
198 Generally, see David Anderson, *Histories of the Hanged: The Dirty War in Kenya and the End of Empire*, W. W. Norton, New York and London, 2005; C. Elkins, above note 197.
199 D. Anderson, above note 198, p. 275; C. Elkins, above note 197, p. 124.
200 These districts were already overcrowded with more than 100,000 Kikuyu who had been deported there since 1946. D. Anderson, above note 198, p. 73.
201 C. Elkins, above note 197, pp. 234–235.
202 *Ibid.*, p. 240.

Kiamariga, Ndegwa and her fellow detainees were forced to engage in hard labour. They first built huts for themselves and dug trenches around the village perimeters to be barbed-wired, then dug trenches and graves in the forest. Throughout this ordeal, village guards subjected their captives to rampant starvation, filth, disease, beating, humiliation, rape, torture and execution.[203]

The sudden and drastic deterioration in the circumstances of Ndegwa's life – as well as those of over 1 million Kikuyu forced into villagization[204] – was the result of a shift in the colonial administration's wartime utility calculus. Since the uprising began in 1952, it had taken the British almost three years to gain the upper hand in battle.[205] Colonial authorities introduced Kikuyu villagization in order to cut supplies to Mau Mau fighters in the forest[206] and break popular support for the group.[207] In the event, villagization proved instrumental in the Mau Mau's 1956 military defeat.[208]

If British colonial officials at the time were to offer any act-utilitarian rationale for villagization programmes, it would be something along the following lines:

> All else being equal, the acute yet short-term suffering to which the villagized Kikuyu would now be subjected is less inhumane overall than the moderate yet long-term suffering to which they had been subjected earlier in their Central Province reserves.

Our discussion exposes flaws in the empirical and normative underpinnings of such a claim. The notion that causally links toughening wars to shortening them has an uncertain evidentiary basis at best. It also conflates the control that a belligerent wields over the amount of violence it chooses to inflict on the enemy with the control it seeks to exert over the enemy's will to resist. More importantly, by claiming that brutal but swift wars are better for humanity than restrained but drawn-out ones, the party resorting to brutality usurps authority to decide what

203 *Ibid*., pp. 240–245. While at Kiamariga, Ndegwa was reunited with some of her children: *ibid*., p. 242.
204 *Ibid*., p. 235.
205 *Ibid*., p. 250. One year into the conflict, senior colonial officials in 1953 were still "convinced that [the uprising] would be over before it started – three months at best. Decapitate the movement and introduce a few more restrictive measures, they reasoned, and Mau Mau would fall apart." *Ibid*., p. 35.
206 D. Anderson, above note 198, p. 353; C. Elkins, above note 197, pp. 241, 250.
207 C. Elkins, above note 197, pp. 237, 240. It should be noted here that, at least officially, villagization also formed part of a broader "rehabilitationist" agenda. See *ibid*., p. 100: "The civilizing mission, Britain's raison d'être for colonizing the Kikuyu people, could be introduced to the masses of Mau Mau adherents through a program called rehabilitation. This strategy would offer social and economic change to those Kikuyu who confessed their oaths and then cooperated with colonial authorities in the detention camps, and eventually in the Emergency villages in the Kikuyu reserves. Rehabilitation would be the inducement needed to lure the Kikuyu away from Mau Mau savagery and toward the enlightenment of Western civilization. It would offer Mau Mau adherents opportunities far more alluring than those offered by their own movement. Rehabilitation was to become the colonial government's campaign for the hearts and minds of the Kikuyu."
208 Sorrenson considered forced villagization, rather than Operational Anvil, "the master stroke". M. P. K. Sorrenson, *Land Reform in the Kikuyu Country: A Study in Government Policy*, Oxford University Press, Nairobi, 1967, pp. 110–111, cited in D. Anderson, above note 198, p. 353. See also C. Elkins, above note 197, p. 250.

the brutalized party's role is in maximizing net humanity. In addition, the brutalizer unwarrantedly blames its opponent for the cruelty to which it resorts in the name of greater net humanity.

Legally, act utilitarianism – the moral framework upon which these empirical and normative claims rest – is incompatible with IHL. While it is indeed IHL's ultimate aim to reduce net wartime harm, when it enacts unqualified rules, it predetermines their conformity or non-conformity through processes that are *not* act-utilitarian. Despite some assertions to the contrary, nowhere in these processes do lesser-evil justifications naturally belong.

Inhumane though it admittedly was, the scale of hardship and IHL non-conformity that Ndegwa and others in her Kikuyu community had endured early in the insurgency paled in comparison to the scale of hardship and IHL non-conformity that they suffered through villagization. Explaining all that away by reference to act-utilitarian considerations would be bound to sound hollow. Indeed, much like Moltke's "greatest kindness", Britain's "benevolent trustee[ship]"[209] behind mass Kikuyu villagization revealed itself to be little more than the wartime brutalizer's unsubstantiated and self-serving pseudo-kindness.[210]

209 C. Elkins, above note 197, p. 236.

210 In 2013, William Hague, UK foreign secretary, acknowledged the suffering of over 5,000 Mau Mau veterans at the hands of British colonial officials and offered £19.9 million in compensation. "UK to Compensate Kenya's Mau Mau Torture victims", *The Guardian*, 6 June 2013, available at: www.theguardian.com/world/2013/jun/06/uk-compensate-kenya-mau-mau-torture. That offer failed to dampen further calls for formal apology and reparation, however. "Kenya's Mau Mau Veterans Seek Royal Redress from Charles III", *Africanews*, 26 October 2023, available at: www.africanews.com/2023/10/26/kenyas-mau-mau-veterans-seek-royal-redress-from-charles-iii//. See also Sean Coughlan and Anne Soy, "King Charles Says 'No Excuse' for Kenya Colonial Violence", *BBC News*, 31 October 2023, available at: www.bbc.co.uk/news/uk-67273676.