

---

# The Facilitative Function of Jus in Bello

Eliav Lieblich\*

Adil Ahmad Haque. **Law and Morality at War**. Oxford: Oxford University Press, 2017. Pp. 304. £50. ISBN: 9780199687

## Abstract

*In a recent book, Adil Ahmad Haque attempts to reconcile between jus in bello and ‘deep morality’, by constructing international humanitarian law (IHL) as a prohibitive system, the constitutive aim of which is non-consequentialist: to ‘serve’ combatants by providing them with rules that if followed would allow them to better conform to their moral obligations. After situating Haque’s approach within the current debate between traditional and revisionist just war theorists, this review essay asks whether constructing IHL as a prohibitive set of norms is indeed sufficient to reconcile it with morality. By utilizing insights from legal realism, I argue that when determining whether law prohibits or permits, it is not sufficient to analyse pure legal concepts but, rather, we have to ask how law functions. This analysis reveals that IHL can be facilitative of action – meaning, of war – even if it is construed as formally prohibitive. This, in turn, calls for two conclusions: on the ethical level, when considering the morality of IHL, its facilitative function should be taken into account. On the legal level, recognizing the facilitative nature of IHL might assist us in answering key unresolved questions – namely, whether the material, spatial, and temporal thresholds for the application of IHL should be high or low*

## 1 Introduction

In the last two decades, philosophers and lawyers have been increasingly preoccupied with the concept of war and its limits. Mainly, the USA’s argument for a ‘global war on terror’ generated much debate on the legal definition of war, including its spatial and

\* Associate Professor, Buchmann Faculty of Law, Tel-Aviv University, Israel. Email: [elieblich@tauex.tau.ac.il](mailto:elieblich@tauex.tau.ac.il). This research was supported by the Israel Science Foundation (Grant no. 1787/17).

temporal boundaries.<sup>1</sup> While war, in political and military terms, is a factual phenomenon, in international legal terms, its existence has normative implications. Crucially, whenever and wherever an armed conflict – as the term is defined in law – exists,<sup>2</sup> a legal threshold is crossed, and the international laws regulating the conduct of war (international humanitarian law or *jus in bello*) are triggered.<sup>3</sup> That the existence of an armed conflict has significant consequences in law requires that we move away from the descriptive discussion of what an armed conflict is, where it takes place and when it ends. Rather, what is needed is a normative discussion of what the definition – as well as the temporal and spatial limits – of a legally recognized armed conflict should be.<sup>4</sup> This question is not easy to answer. This is partly because we have not yet decided what the rules of international humanitarian law (IHL) actually do; do they constrain, or, rather, enable, belligerent action? Do they detract from, or, rather, add to, pre-existing legal protections? Only when we know what IHL does can we decide whether the scope of its application should be wide or narrow.

In *Law and Morality at War*, Adil Ahmad Haque engages the question of the nature of IHL as part of an ambitious and original attempt to mend a rift in contemporary thought on law and morality in war.<sup>5</sup> In broad terms, this rift concerns the morality of IHL and, specifically, whether the rules of positive IHL that regulate killing can be considered moral. Traditionalist philosophers of just war, by and large, view all soldiers – whether ‘just’ or ‘unjust’ – as morally equal, mainly because of the symmetrical threat they pose to one another. Since modern IHL acknowledges that all combatants are equal in their legal rights and obligations (legal equality), traditionalists think that positive law is perfectly in tune with what morality requires.<sup>6</sup>

Revisionists, however, reject the view that all combatants are morally equal. On their view, just as in regular life, aggressors and defenders are not morally equal, the same must also hold between soldiers in war. Now, since they view the very idea of legal equality under IHL as permitting unjust combatants to fight, law,

<sup>1</sup> See, e.g., Brooks, ‘War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror’, 153 *University of Pennsylvania Law Review* (2004) 675; O’Connell, ‘When Is a War Not a War? The Myth of the Global War on Terror’, 12 *International Law Students Association Journal of International and Comparative Law* (2005) 535.

<sup>2</sup> When this review essay uses the term ‘armed conflict’, reference is made to the legal meaning of the phrase. While every armed act of violence can be conceived as an ‘armed conflict’ in regular language, an armed conflict defined – and regulated – under international law refers to violence of a certain type or magnitude. International armed conflict is a conflict between states, while a non-international armed conflict is a prolonged conflict involving also non-state actors, crossing a threshold of organization and intensity. For an overview, see Akande, ‘Classification of Armed Conflicts: Relevant Legal Concepts’, in E. Wilmschurst (ed.), *International Law and the Classification of Conflicts* (2012) 32.

<sup>3</sup> The international laws regulating the conduct of war – *contra* the laws regulating the resort to force itself (*jus ad bellum*) – are known as international humanitarian law (IHL) or the law of armed conflict. In this work, I sometime refer to these laws also as *jus in bello*. Note that, when I do so, I refer to positive law rather than to the use of the term in just-war theory, which refers to moral principles.

<sup>4</sup> Compare A. Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (2017), at 9.

<sup>5</sup> A.A. Haque, *Law and Morality at War* (2017).

<sup>6</sup> The seminal traditionalist work is M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (1977).

to revisionists, is at odds with morality; as they see it, law directly authorizes the wrongful killings of just combatants, who are, after all, innocent.<sup>7</sup> Yet, the revisionist critique usually comes with a surprising concession; after attacking the case for the moral equality of combatants, revisionists resort to pragmatic, rule-consequentialist considerations to defend the current legal regime's embrace of legal equality. A prohibition on killing in an unjust war is therefore stowed away under what Jeff McMahan calls the 'deep morality' of war, beyond the reach of current law.<sup>8</sup> While traditionalists and revisionists differ on many things, both seem to assume that IHL permits all soldiers to fight, regardless of the cause of their war. The difference is that to traditionalists this is what morality requires, while to revisionists this is a major concession, leading to a divergence between law and 'deep morality'.

While Haque accepts the revisionist account on the moral asymmetry of combatants, he finds unsatisfying the resort to rule consequentialism to justify law as it is. This is because, from his view, rule consequentialism, by not speaking to soldiers as individual moral agents, only provides them with weak moral reasons to obey the law. As Haque argues, we can avoid this reliance on rule consequentialism by exposing that, contrary to what revisionists think, IHL does not in fact permit anything, but only prohibits certain acts. If this is correct, IHL does not authorize immoral killings to begin with, and, accordingly, law does not diverge on this issue from deep morality. If this is true, no rule-consequentialist concession is needed to defend law as it is. Rather, the door is now open to discuss law not as a moral concession but, rather, from an ideal point of view. Echoing Joseph Raz's 'Service Conception' for law's normative authority, Haque argues that IHL's strong claim to authority would be established if, by obeying law, combatants would more closely conform to their moral obligations than they would by relying on their individual moral judgments.<sup>9</sup> The task of the interpreter, therefore, is to present law in its 'morally best light' in order to ensure that it provides this guidance.<sup>10</sup>

And, indeed, throughout the book, this is the task that Haque takes upon himself, as he offers what he views as the morally best interpretations of some of the most difficult questions of IHL. Thus, for instance, he offers a non-consequentialist defence of the principle of non-combatant immunity – a principle that is currently challenged by some philosophers of war.<sup>11</sup> In the context of the principle of distinction, Haque

<sup>7</sup> For an outline of the debate, see Lazar, 'Just War Theory: Revisionists Versus Traditionalists', 20 *Annual Review of Political Science* (2017) 37.

<sup>8</sup> See, e.g., McMahan, 'The Ethics of Killing in War', 114 *Ethics* (2004) 693, at 730–733. Of course, revisionists do not necessarily resort to rule consequentialism as a substitute for morality; rather, if a certain law will enhance the overall good by departing from 'deep morality', then, from a consequentialist point of view, this law is indeed morally best (as a lesser evil). In short, when revisionists use the term 'deep morality', they seem to imply non-consequentialist morality. For further discussion, see Waldron, 'Deep Morality and the Laws of War', in S. Lazar and H. Frowe (eds), *The Oxford Handbook of Ethics of War* (2018) 80.

<sup>9</sup> Haque, *supra* note 5, at 19–55. J. Raz, *The Morality of Freedom* (1986), at 53.

<sup>10</sup> *Ibid.*, at 50.

<sup>11</sup> *Ibid.*, ch. 3. For leading accounts, see J. McMahan, *Killing in War* (2009), at 203–231; H. Frowe, *Defensive Killing* (2014), at 15–16. It should be noted that, for pragmatic reasons, neither argue that the law on non-combatant immunity should be changed. Rather, their argument is on the level of 'deep morality'.

advances a sophisticated theory on the level of certainty required for targeting decisions, which incorporates deontic and consequentialist considerations.<sup>12</sup> When discussing the precautionary measures – and, specifically, the level of risk that soldiers must take to minimize civilian harm – he draws from the moral asymmetry between killing and letting die in order to establish which precautions would be considered feasible.<sup>13</sup>

This review essay does not engage with Haque’s specific interpretations of law mentioned in the preceding paragraph, many of which are quite convincing. Rather, it asks whether the construction of IHL as a prohibitive set of norms is sufficient to mend the gap between law and morality. Utilizing insights from legal realism – and adopting a non-ideal perspective<sup>14</sup> – I argue that when determining whether law permits or prohibits action, it is not sufficient to analyse pure legal concepts. Rather, it is needed to adopt a broader point of view, which asks how law functions in society – both in relation to political discourse and to existing understandings of legal structures. This analysis reveals that law, mainly through its legitimating power, can be facilitative of action, even if we think of it as prohibitive. This realization, in turn, calls for caution; emphasizing IHL’s prohibitive nature, when it is in fact facilitative, might mask its power-enhancing functions. Two conclusions follow. First, in ethical terms, not only its formal logic, but also its facilitative function, must be taken into consideration when debating the morality of IHL. Second, in legal terms, when determining when and where IHL should apply, we should account for its facilitative function.

Before moving on, some clarification of the terms ‘permission’ and ‘facilitation’, as used here, is required. For the purposes of this review essay, when law permits something, it can be said that it authorizes an action that would otherwise be prohibited according to some default rule or, alternatively, that by not prohibiting it the action is presumed permitted – again, by the operation of some default rule.<sup>15</sup> Permission, therefore, is a formal attribution of law. Conversely, when law facilitates something, it means that law, through the manner it functions, legitimates action irrespective of its formal position. This is what is meant by the facilitative function of law.

The review essay proceeds as follows. Section 1 briefly explains Haque’s view on the prohibitive nature of IHL and introduces the basic realist challenge to this view. Thereafter, sections 2–6 elaborate on various aspects of the facilitative function of

<sup>12</sup> Haque, *supra* note 5, ch. 5. In short, Haque argues that, in all circumstances, we must ‘reasonably believe’ that a person is a lawful target before attacking her, and, above this threshold, an additional test that balances the level of certainty that the person is a combatant and the harm expected from that person, must be satisfied (the ‘deontic expectabilist approach’).

<sup>13</sup> *Ibid.*, ch. 7. Haque claims that because incidentally killing someone is much worse than letting others die (including yourself), a precaution will be considered unfeasible only if taking it will bring about loss to soldiers (letting die), which is substantially greater than the losses caused to civilians if the precaution is not taken (killing).

<sup>14</sup> Non-ideal in the sense of an assumption of significant abuse and non-compliance. See J. Rawls, *A Theory of Justice* (rev. edn, 1999), at 7–8. Interestingly, Rawls mentions just-war theory as one key example for a non-ideal theory.

<sup>15</sup> To a certain extent, this reflects Raz’s distinction between ‘strong’ and ‘weak’ permissions. J. Raz, *Practical Reason and Norms* (1999), at 96–97.

IHL, meaning the manner in which IHL – through a variety of political and legal phenomena – can enable action even if it is prohibitive in formal terms. As will be demonstrated, several mutually reinforcing factors generate IHL's facilitative function. Section 2 argues that IHL can be politically utilized to facilitate war because it is an integral part of the law of the exception. Section 3 claims that IHL's detailed content – specifically, in relation to *jus ad bellum* as an alternative source of authority – enhances its position as a source of legal justifications and, furthermore, that even formally prohibitive norms might outline what is *de facto* permitted. Thereafter, section 4 argues that IHL is facilitative because it is less constraining in relation to international human rights law (IHRL), as is evident in attempts by states to lower the threshold for IHL's application. Section 5 exemplifies the less-constraining nature of IHL by showing that, as opposed to IHRL, which allows lethal force only at last resort and upon the determination of an individual threat, IHL tolerates the targeting of combatants based on their legal status as such. Section 6, in turn, elaborates on the meaning of the 'right to fight' that IHL grants to combatants. One of Haque's central claims is that this 'right' does not permit soldiers to fight but merely grants them an immunity from prosecution – as long as they fight in accordance with the laws of war. This section argues that even if this were true (which is debatable), this immunity would be closer – in its nature and effects – to a full-fledged permission. The right to fight is therefore exposed as another aspect of IHL's facilitative function. The conclusion summarizes and offers some normative outcomes that should flow from the recognition that IHL is a facilitative body of law.

## 2 IHL as a Prohibitive Legal Framework and the Realist Challenge

What does IHL do? Does it permit certain actions while prohibiting others? Or does it only constrain actors during war? If it is correct, as Haque argues, that '*jus in bello* never authorizes acts of violence' but only prohibits certain things,<sup>16</sup> then it cannot be said – as revisionist just-war theorists claim – that law permits unjust belligerents to intentionally kill just combatants or to incidentally kill civilians (as 'collateral damage'). It would then follow that, at least in this context, IHL is not at odds with 'deep morality'.<sup>17</sup>

Haque's position on the prohibitive nature of IHL appeals to the logic and coherence of law. On his account, the rules regulating the targeting of persons under IHL must be prohibitive, since positive authority to fight can only be found under the international law regulating the resort to force or *jus ad bellum*. Since *jus ad bellum* provides

<sup>16</sup> Haque, *supra* note 5, at 30.

<sup>17</sup> Some claim that even if IHL is prohibitive, it might conflict with morality – for instance, IHL prohibits the killing of all civilians (non-combatant immunity); yet some philosophers think that, sometimes, killing some civilians might be morally (if not legally) permitted. See, e.g., Frowe, *supra* note 11, chs 6–7; but see Haque, *supra* note 5, appendix (and sources cited therein). The argument here focuses not on the morality of non-combatant immunity but, rather, on the rules that concern the targeting of combatants.

authority to fight only to the just party, it logically follows that IHL cannot permit the unjust party to do so; it simply cannot authorize single actions (each single attack *in bello*) that in aggregate would be unlawful (the resort to force *ad bellum*).<sup>18</sup> Indeed, this makes sense if we view international law as a coherent legal system, in which contradictory interpretations should be discarded.<sup>19</sup> It is also certainly correct that we cannot derive a positive justification to kill someone intentionally from IHL alone because IHL is triggered simply by the fact that an armed conflict exists, with no regard to the justness or legality of the resort to force itself.<sup>20</sup> That an armed conflict exists cannot grant the authority to fight – to kill – any more than the mere existence of a bar fight would grant people a justification to punch each other.<sup>21</sup>

Logic takes us this far, and, if so, there is certainly a case to be made that IHL, by being prohibitive, does not depart from ‘deep morality’. Yet revisionist just-war theorists – who, recall, believe that law indeed diverges from deep morality by permitting unjust combatants to kill – might find surprising allies in those that do not place ideals in the centre of their analysis at all: legal realists. In the following sections, I utilize insights from legal realism to show how IHL, through various political and legal phenomena, might serve a facilitative function, meaning that it can make fighting wars easier, even if it sets out to be prohibitive. Sections 2–6 demonstrate this function through five distinct, yet mutually reinforcing, attributions of IHL.

### A *The Facilitative Politics of IHL*

In general, legal realists warn that when analysing law we should emphasize its function in society rather than embark on transcendental explorations of abstract legal concepts.<sup>22</sup> In other words, we should not lose sight of what formal legal concepts actually do in real life. In our context, this requires us to remember that, apart from a neat logical analysis of IHL’s formally prohibitive nature, IHL remains a part of the political and legal phenomenon of war. The first facilitative function of IHL therefore emanates from its role in political discourse. As such, IHL can be utilized in a manner that brings about two, interrelating facilitating effects: legitimation of war in general and the empowerment of the executive.

IHL, even if conceived as a limiting body of laws, can be used to legitimate or obscure an immoral bigger picture.<sup>23</sup> When IHL is invoked, the discussion is often

<sup>18</sup> Haque, *supra* note 5, at 31.

<sup>19</sup> This is reminiscent of Kelsen’s coherency-based argument for the unity of international and domestic law. See H. Kelsen, B.L. Paulson and S.L. Paulson, *Introduction to the Problems of Legal Theory* (1992), paras 49(a), 50(d)–(e).

<sup>20</sup> Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287, Common Art. 2.

<sup>21</sup> Otherwise, we are guilty of the fallacy of deriving ‘ought’ from ‘is’.

<sup>22</sup> See Cohen, ‘Transcendental Nonsense and the Functional Approach’, 35 *Columbia Law Review* (1935) 809, at 812; for a recent application of the functional approach to the law of occupation, see Gross, *supra* note 4, ch. 2.

<sup>23</sup> See, e.g., the utilization of international IHL in the context of the Israeli occupation. D. Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (2002), ch. 4.

reverted to the ‘numbing’ technicalities of the law of armed conflict,<sup>24</sup> thus simultaneously portraying belligerents as guardians of the rule of law and diverting the discussion from a conflict’s root causes. As David Kennedy observes, ‘the law of armed conflict has become a vernacular for evaluation of the legitimacy of warfare’ and has thus merged, in the discourse, with the assessment of the legitimacy of the conflict as a whole.<sup>25</sup> In this sense, compliance with IHL can facilitate parties’ pursuit of their goals; after all, if they are at their moral best *in bello*, it becomes easier to defend their stance in the indeterminate world of *jus ad bellum*.<sup>26</sup> In this sense, IHL can generate public legitimacy that is facilitative of war.

Politically, IHL facilitates action through the ‘power premium’ acquired by the executive when designating a situation as war, irrespective of what the rules of IHL permit or prohibit.<sup>27</sup> As David Armitage notes, in the context of internal strife, the ‘very name “civil war” can bring legitimacy to forms of violence that would otherwise be suppressed or decried’.<sup>28</sup> This relates to Carl Schmitt’s famous observation that the possibility of war generates the only true political distinction – that between friend and enemy. This distinction, once made, brushes all other considerations to the side.<sup>29</sup> War enables the ultimate exercise of political power, both by making the friend–enemy distinction concrete and by constituting the quintessential state of exception, in which the sovereign is revealed in its most potent form.<sup>30</sup> It is not surprising, therefore, that ‘war’ is invoked by sovereigns, even if merely as a rhetorical tool, when extreme measures are contemplated.<sup>31</sup> Now, IHL applies in armed conflict, meaning, in war, as the term is generally understood. Invoking IHL is therefore tantamount to admitting that a certain society is in war – an admission that is particularly consequential in an era in which formal declarations of war are virtually extinct.<sup>32</sup> In this sense, the invocation of IHL becomes a key element of the state of exception.<sup>33</sup> IHL is therefore an integral part of the war discourse, which in itself is an enabling political phenomenon.

<sup>24</sup> See Blum, ‘The Dispensable Lives of Soldiers’, 2 *Journal of Legal Analysis* (2010) 115, at 120.

<sup>25</sup> D. Kennedy, *Of War and Law* (2006), at 156.

<sup>26</sup> Indeed, if IHL did not pack legitimating potential, we could not explain why national liberation movements fought to be recognized as full belligerents, subject to the entire corpus of *jus in bello*. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relation to the Protection of Victims of International Armed Conflicts (Additional Protocol I) 1977, 1125 UNTS 3, Art. 1(4).

<sup>27</sup> C. Schmitt, *Legality and Legitimacy* (2004), at 32; in the domestic American context, see Ingber, ‘International Law Constraints as Executive Power’, 57 *Harvard International Law Journal* (2016) 49.

<sup>28</sup> D. Armitage, *Civil Wars: A History in Ideas* (2017), at 236.

<sup>29</sup> C. Schmitt, *The Concept of the Political: Expanded Edition* (2007), at 19–80.

<sup>30</sup> Schmitt, *supra* note 27, at 32.

<sup>31</sup> For instance, the ‘war on drugs’ or the ‘war on terror.’ See Lieblich and Shinar, ‘The Case against Police Militarization’, 23 *Michigan Journal of Race and Law* (2018) 105, at 115–125.

<sup>32</sup> For empirical data, see Fazal, ‘Why States No Longer Declare War’, 21 *Security Studies* (2012) 557. Interestingly, Fazal posits that states refrain from declaring wars because of the high costs of complying with *jus in bello*. In this sense, she seems to embrace the view that IHL has a *de facto* limiting function. Yet, it is important to stress that IHL applies in armed conflict regardless of declarations of war, and, in this sense, such a tactic by states would be of limited value.

<sup>33</sup> See Lieblich, ‘Internal *Jus ad Bellum*’, 67 *Hastings Law Journal* (2016) 687, at 729–740.

To sum this point, *jus in bello* might legitimate and facilitate war, even if in pure jurisprudential terms it is not permissive. If this is true, then emphasizing the formal prohibitory aspect of IHL might sanitize and normalize the grave reality that it regulates and mask its legitimating functions.<sup>34</sup> These functions, in turn, should be taken into consideration in the debate on the morality of IHL; if IHL does not explicitly permit unjust soldiers to fight, yet might facilitate their war politically, do the real-world effects of IHL place it at odds with ‘deep morality’?

### 3 The Limited Scope of *Jus ad Bellum* and the Permissive/Prohibitive Dialectic

The preceding section highlighted the facilitative political implications of IHL as part of the general discourse of war. In this section, I move to the intra-legal sphere and show how jurisprudential problems also contribute to IHL’s facilitative function by affecting how IHL might be understood in practice. The first problem concerns the limited scope of *jus ad bellum* as a source of authority. Even if we assume, like Haque, that the only source for a positive authority to fight is found in the *jus ad bellum*, the general nature of the latter still leaves IHL in a facilitative role.<sup>35</sup> This is because the international law on the use of force, as it stands today, does not provide concrete and detailed guidance on how to act in war.

To see this, assume that we had no IHL. Would the law on the use of force be sufficient to guide just parties – or parties that think they are just – on what they can do in war? This seems far-fetched. Indeed, the law on the use of force is most commonly understood to establish three rules: (i) that interstate force is forbidden unless an armed attack occurs or an authorization by the UN Security Council is given; (ii) that recourse to force is permitted only at last resort (necessity) and (iii) force must be strictly tailored to counter the threat (proportionality).<sup>36</sup> In other words, the law on the use of force only tells us *when* we can resort to force against a state, and what the permitted scope of our reaction is.<sup>37</sup> Alone, it does not provide answers even for the most basic legal questions on how hostilities should be conducted. For instance, it does not tell us anything concrete about the principle of distinction and the legal status of combatants. Can combatants be killed simply by virtue of their formal legal status or, rather than targeting simple combatants, should we attack those most responsible

<sup>34</sup> Compare S. Moyn, *Toward a History of Clean and Endless War*, 9 October 2015, available at [www.justsecurity.org/26697/sanitizing-war-endlessness/](http://www.justsecurity.org/26697/sanitizing-war-endlessness/).

<sup>35</sup> On the basic vagueness of *jus ad bellum*, see Schachter, ‘The Right of States to Use Armed Force’, 82 *Michigan Law Review* (1983) 1620, at 1621.

<sup>36</sup> And even the contents of these standards remain controversial. See Akande and Liefländer, ‘Clarifying Necessity, Imminence and Proportionality in the Law of Self-Defense’, 107 *American Journal of International Law* (2013) 563.

<sup>37</sup> Note that positive *jus ad bellum* says nothing on resort to force within states, which raises questions on the source of authority to use force in this context. For an account, see Liebllich, *supra* note 33. This further limits its guiding power in comparison with IHL, which is relatively robust even in internal conflicts.



for the aggression or objects most valuable to the enemy? The principles of necessity or proportionality, under the law on the use of force, do not give us the tools to select between these possible interpretations. Rather, it is IHL that delineates the scope of lawful attacks *in bello*.<sup>38</sup> In sum, the legal rules of *jus ad bellum* cannot self-execute into *in bello* permissions, and, therefore, it is reasonable that IHL – even if only by virtue of its specificity – might be understood as a primary source of justification and authority.<sup>39</sup>

A second jurisprudential problem that contributes to IHL's facilitative function relates to the dialectic between prohibitions and permissions in law. Indeed, even if IHL is formally prohibitive, it is well known that even rules that set to prohibit (almost always) carve out their exceptions, to an extent that sometimes the 'exception' is as important as the prohibitive norm itself (if not more).<sup>40</sup> To see the liquidity of the prohibitive/permissive distinction, consider that often only changing the name of a legal regime, without changing its substance, affects our perception concerning its permissive or prohibitive nature. For instance, Article 2(4) of the Charter of the United Nations – the point of departure of the modern legal regime of *jus ad bellum* – prohibits states from using force 'against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'. The latter part of the provision is sometimes understood as positively permitting force when used for other ends.<sup>41</sup> Some attempt to solve this problem by referring to the provision as establishing a regime of *jus contra bellum*.<sup>42</sup> The laws regulating warfare also suffer from this liquidity; some refer to *jus in bello* as the law of armed conflict, while others use the more restrictively sounding international humanitarian law.<sup>43</sup> In other words, determining whether law is permissive or prohibitive is more a decision about which characteristic of law we choose to emphasize.

This permissive/prohibitive dialectic is clearly present when law uses double language. For instance, the First Additional Protocol to the Geneva Conventions (Additional Protocol I) provides that fighting parties 'shall direct their operations only

<sup>38</sup> See Aughey and Sari, 'Targeting and Detention in Non-International Armed Conflict: *Serdar Mohammed* and the Limits of Human Rights Convergence', 91 *International Law Studies* (2015) 60, at 92.

<sup>39</sup> For such an understanding of the function of *in bello* necessity, see, e.g., Beer, 'Humanity Considerations Cannot Reduce War's Hazard Alone: Revitalizing the Concept of Military Necessity', 26 *European Journal of International Law* (2011) 801. In a sense, the idea expressed here is reminiscent of, but not similar to, Thomas Franck's conception of legal determinacy as a source of perceived legitimacy. See T.M. Franck, *The Power of Legitimacy among Nations* (1990), at 67–68. My argument is more limited; because *jus ad bellum* does not tell us much about how force can be used, it cannot serve as the *ultima ratio* for battlefield decisions. This is where IHL steps in as a *de facto* source for justifications.

<sup>40</sup> Schmitt, *supra* note 29, at 51.

<sup>41</sup> Meaning not against the territorial integrity or political independence of states or in a manner not inconsistent with the purposes of the United Nations. See Schachter, *supra* note 35, at 1625.

<sup>42</sup> See, e.g., O. Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (2010), at 2.

<sup>43</sup> See Luban, 'Military Necessity and the Cultures of Military Law', 26 *Leiden Journal of International Law (LJIL)* (2013) 315, at 315–318; Benvenisti, 'The Legal Battle to Define the Law on Transnational Asymmetric Warfare', 20 *Duke Journal of Comparative and International Law* (2010) 339, at 348.

against military objectives'.<sup>44</sup> The permissive or prohibitive nature of this norm follows our choice of emphasis: 'shall direct' or, rather, 'only against'.<sup>45</sup> Unfortunately, making law more precise is hardly a solution for this problem since, in most cases, even when a prohibition is clear and precise it also becomes clearer in what it allows.<sup>46</sup> For instance, consider the St. Petersburg Declaration of 1868, which prohibits the use of exploding bullets weighing less than 400 grams.<sup>47</sup> It immediately signified that the use of projectiles that weighed 401 grams is allowed. Even more vexing is the role of the prohibition on disproportionate attacks, which was explicitly introduced into positive law only in 1977.<sup>48</sup> Granted, it is true that proportionality was introduced to limit the principle of military necessity, which was understood, in the past, as an overriding consideration. Simultaneously, however, the mere codification of proportionality took away our ability to argue that (incidentally) killing people is never lawful, for instance, in the pursuit of an unjust military advantage. Ironically, the mere legal designation of disproportionate attacks might encourage parties to cause (proportionate) collateral damage that, otherwise, they would have been reluctant to cause.<sup>49</sup> This is why during the drafting of Additional Protocol I, several states argued that the idea of proportionality in fact endangered the civilian population.<sup>50</sup> Haque concedes this double nature of law, but he argues that, logically, law in such cases grants (at most) a permission in the 'weak sense'.<sup>51</sup> Yet the problem here is not so much one of logic as one of law's function. A 'weak permission' is still a real-world permission.<sup>52</sup>

In sum, due to limited scope of *jus ad bellum* and the relatively detailed content of IHL, the latter might be relied upon, in practice, as a source of authority. Furthermore, prohibitive law might be understood formally as also implying what is allowed. In both of these senses, IHL, even if understood as formally prohibitive, can be facilitative of action.

## 4 The Facilitative Effects of the Relations between IHRL and IHL

Beyond the issues discussed in the previous section, IHL's facilitative function is also revealed when assessed in light of the more restrictive backdrop of IHRL. As I argue

<sup>44</sup> Additional Protocol I, *supra* note 26, Art. 48(1).

<sup>45</sup> Compare Aughey and Sari, *supra* note 38, at 93–94.

<sup>46</sup> For a related critique, see Kolb, 'The Main Epochs of Modern International Law since 1864 and Their Related Dominant Legal Constructions', in K.M. Larsen, C.G.G. Cooper and G. Nystuen (eds), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (2012) 23, at 65.

<sup>47</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, Saint Petersburg, 29 November 1868 and 11 December 1868.

<sup>48</sup> Additional Protocol I, *supra* note 26, Art. 51(5)(b).

<sup>49</sup> Compare Gneezy and Rustichini, 'A Fine Is a Price', 29 *Journal of Legal Studies* (2000) 1.

<sup>50</sup> J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (2005), vol. 1, at 46–57. I thank Galit Laniado for pointing this out.

<sup>51</sup> Haque, *supra* note 5, at 31–32.

<sup>52</sup> Interestingly, Raz himself, while discussing strong and weak permissions, noted that this distinction is 'troublesome' and that 'in the final analysis strong and weak permissions are permissions in precisely the same sense differing only in their source. ... They do not affect the normative character of the permissions themselves.' Raz, *supra* note 15, at 87, 88. Yet, perhaps, a case can be made that there is a difference between weak and strong permissions in the expressive sense.

here, it is precisely because IHL is perceived as being less constraining than IHRL that some states have attempted, in recent years, to lower the threshold for IHL's application and to argue for the unlimited geographical and temporal boundaries of armed conflicts. Indeed, if IHL was in fact prohibitive, we would have expected the opposite.

To illustrate this, consider the debate on the USA-led 'global war on terror', which dominated the post-9/11 international legal discourse. A central part of this discussion concerned the definition of the term 'armed conflict' for the purpose of determining when and where IHL applies. In this context, states involved in the war on terror advanced a wide definition of an armed conflict, which was virtually limitless in terms of the criteria for the identification of the parties involved as well as in its geographical and temporal scope. The result, in practice, was a lower threshold of the application of IHL.<sup>53</sup> Interestingly, however, critics concerned with human rights vigorously argued against lowering this threshold and urged that it was necessary to keep the boundaries of armed conflict narrow and well defined.<sup>54</sup> Now if IHL had a primarily constraining function, we would expect the exact opposite; security-minded states would argue for a high threshold for the application of IHL, while members of the human rights community – usually suspicious of wide-ranging security powers – would urge to lower this threshold. The fact that this was not the case is in itself strong evidence for the claim that, even if IHL is formally prohibitive, it is facilitative in practice. Relatedly, arguing that IHL is generally prohibitive – without examining its function – would also require us to accept the counter-intuitive conclusion that there is nothing inherently problematic in the notion of a global and endless armed conflict.<sup>55</sup> Precisely because of this, accounting for IHL's facilitative function must be part of any normative attempt to outline the desirable threshold for its application.

The dynamics discussed in the preceding paragraph imply that to properly understand the function of IHL – and also to construct its desired threshold of application – it is particularly necessary to examine the relations between IHL and IHRL.<sup>56</sup> Indeed, asking what a particular normative framework does requires us to also examine its relations to parallel bodies of rules. To the extent that, in practice, IHL is less constraining than IHRL – which, in general, regulates state violence in absence of armed conflict – IHL can be said to be relatively facilitative. If IHL is facilitative in relation to IHRL, then, again, we are confronted with the basic question: can it be said that IHL is not in tension with 'deep morality'?

Indeed, in recent years, the relations between IHL and IHRL have been addressed in vast literature, the analysis of which is beyond the scope of this review essay.<sup>57</sup>

<sup>53</sup> See Brooks, *supra* note 1.

<sup>54</sup> United Nations Human Rights Committee (UNHRC), *Report of the Special Rapporteur on Extra Judicial, Summary or Arbitrary Executions, Philip Alston*, UN Doc. A/HRC/14/24/Add.6, 28 May 2010, paras 46–48 (noting that the appeal for states to invoke the existence of an armed conflict is 'obvious'); see also O'Connell, *supra* note 1.

<sup>55</sup> Compare Moyn, *supra* note 34.

<sup>56</sup> This is because those that argue for a higher threshold of application for IHL usually invoke the possible circumvention of international human rights law as a key concern. See UNHRC, *supra* note 54.

<sup>57</sup> See, e.g., O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (2011); G. Oberleitner, *Human Rights in Armed Conflict* (2015); D. Murray et al., *Practitioners' Guide to Human Rights Law in Armed Conflict* (2016); J.D. Ohlin (ed.), *Theoretical Boundaries of Armed Conflicts and Human Rights* (2016).

Nonetheless, in the next section, I will address one particular aspect in which IHL has been clearly facilitative in relation to the backdrop of IHRL – namely, in its toleration of ‘status-based targeting’.

## 5 The Facilitative Aspect of Status-based Targeting

A basic characteristic of IHL is that it tolerates ‘status-based targeting’ – that is, the targeting of individuals based upon their legal status alone rather than on their conduct. IHL, in this context, constructs a formal group of presumed threats (a status) through its legal definition of combatants.<sup>58</sup> In doing so, it positively signifies who can be anticipatorily killed based on a legal presumption rather than on actual conduct. Importantly, this remains true even if IHL cannot be said to provide a formal justification for such killing. Under IHRL, it should be emphasized, there is no remotely comparable legal standard. Normally, people can only be killed in self-defence, upon individual threat and conduct and only at last resort.<sup>59</sup>

In recent years, much scholarship has attempted to narrow this gap between IHL and IHRL as part of an attempt to reconcile between what IHL allows and ordinary morality.<sup>60</sup> In this context, Haque concedes that a moral justification for targeting combatants in war can only be some form of anticipatory self-defence.<sup>61</sup> In his attempt to narrow the gap between IHL and ‘deep morality,’ he suggests that IHL should accept the anticipatory killing only of combat soldiers because only they have a threatening function.<sup>62</sup> Yet it is doubtful whether even killing combat soldiers only, merely on account of their general combat function, can be considered ‘anticipatory’ in a manner that would eliminate IHL’s relative facilitative nature.<sup>63</sup> Anticipatory self-defence is usually justified when the threat to self or other is factually and temporally imminent, which is not always the case in the battlefield. For instance, even a combat soldier might, in real time, desert, surrender or be too scared to charge and, therefore, not pose a threat in real time. Granted, the context of war might justify an epistemic discount, in the sense that during active hostilities a certain category of people – that is, combatants – can be presumed dangerous, and thus targetable, even when no individual threat is determined.<sup>64</sup> Yet IHL, by being the legal instrument that activates this epistemic discount, is again revealed in its facilitative nature.

<sup>58</sup> And, possibly, also in its definition of a legal status of members of non-state organized armed groups. Nils Melzer, International Committee of the Red Cross (ICRC), *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009), at 27–28.

<sup>59</sup> See United Nations Office on Drugs and Crime, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, UN Doc. A/CONF.144/28/Rev.1, 7 September 1990, Art. 9.

<sup>60</sup> For a critique of this endeavour, see Dill, ‘Should International Law Ensure the Moral Acceptability of War?’, 26 *IJIL* (2013) 253.

<sup>61</sup> Haque, *supra* note 5, ch. 4.

<sup>62</sup> *Ibid.*, at 89–90.

<sup>63</sup> See D. Rodin, *War and Self Defense* (2002), at 127.

<sup>64</sup> As Haque puts it, ‘outside of armed conflict, killing is almost always arbitrary unless it follows strict rules governing self-defense or law enforcement. During armed conflict, killing opposing combatants may seldom prove arbitrary’. Haque, *supra* note 5, at 37.

Furthermore, many, if not most, killings in contemporary wars are tactical rather than defensive to begin with, and the legality of these remains almost universally unchallenged. Seth Lazar, for instance, argues that diversion attacks – undoubtedly lawful under IHL – are opportunistic killings.<sup>65</sup> Other killings are at best acts of preventive self-defence, in the sense that many factors may intervene between the attack and the materialization of the threat. One can think of numerous examples: attacking withdrawing forces because they might regroup and continue fighting; attacking enemy units outside the immediate zone of hostilities in order to prevent them from joining the fighting later on or attacking defenceless combatants that cannot be captured because they will not remain defenceless for long. The point is not so much whether the latter are defensive killings (they might be) but, rather, that they are a far cry from the type of anticipatory defensive killings acceptable under IHRL.

Haque is aware of this and therefore proposes to mitigate the problem of status-based targeting by introducing an original reading of the relation between the right to life under IHRL and the law of targeting under IHL, whereby the right to life continues to apply as it is during war. Essentially, this reading extends the normal application of IHRL to the exceptional situation of war. If IHRL remains unaltered in war, then surely the laws of war cannot be permissive since they do not detract from any pre-existing protection. In legal terms, the argument here is that IHL cannot permit killings that are prohibited by other bodies of law, such as under the right to life's prohibition on arbitrary killings. It follows that killings that IHL does not prohibit – say, the killing of just combatants, of just civilians directly participating in hostilities, of unjust combatants who do not perform combat functions or of those who are defenceless and can be easily captured – might still be arbitrary and therefore prohibited under IHRL.<sup>66</sup>

Haque's position on this received a significant boost with the recent adoption of the United Nations Human Rights Committee's (HRC) General Comment 36 on the right to life.<sup>67</sup> In a previous draft, the HRC opined that IHL was indeed permissive in relation to IHRL by suggesting that:

[u]ses of lethal force *authorized* and regulated by and complying with international humanitarian law are, *in principle*, not arbitrary. By contrast, practices inconsistent with international humanitarian law ... violate article 6 of the Covenant [enshrining the right to life].<sup>68</sup>

Perhaps in line with a comment submitted to the HRC by Haque himself,<sup>69</sup> the final draft of the comment now holds that '[u]se of lethal force *consistent* with international humanitarian law *and other applicable international law norms* is, in general, not arbitrary'.<sup>70</sup> By omitting the word 'authorized', this wording is more careful on

<sup>65</sup> Lazar, 'Associative Duties and the Ethics of Killing in War', 1 *Journal of Practical Ethics* (2014) 3, at 35–36.

<sup>66</sup> Haque, *supra* note 5, at 35–38.

<sup>67</sup> UNHRC, General Comment no. 36 (2018) on Article 6 of the ICCPR, on the Right to Life (General Comment no. 36), Doc. CCPR/C/GC/36, 30 October 2018.

<sup>68</sup> *Ibid.*, para. 63, but see para. 70 (emphasis added).

<sup>69</sup> Adil Ahmad Haque, *Comment on Draft General Comment on Article 6*, available at [www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/AdilHaque.docx](http://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/AdilHaque.docx).

<sup>70</sup> General Comment 36, *supra* note 67, para. 64 (emphasis added).

the permissive or prohibitive nature of IHL, and, by replacing ‘in principle’ with ‘in general’, the committee implies that even uses of force consistent with IHL might be arbitrary deprivations of life under IHRL. This interpretation is augmented by the committee’s clear statement that killings in a war of aggression are *ipso facto* violations of the right to life even if, presumably, they are consistent with IHL.<sup>71</sup> Arguably, however, the committee’s approach does not seem to pronounce the arbitrariness of status-based targeting altogether but only when undertaken by the aggressor. If this is true, then IHL remains in a strong facilitative position, at least when defensive action is taken.

The existence of status-based targeting under IHL places it in a clear facilitative position in relation to IHRL and, therefore perhaps, in tension with ‘deep morality’. Although Haque’s proposed solution – adopted, to an extent, in General Comment 36 mentioned above – might mitigate this result, it does not eliminate it completely, and, in any case, time will tell whether this approach will be adopted in practice. Before moving on, a brief summary of the argument until now is required. Recall that Haque argues that IHL cannot be permissive because the authority to use force can only be found in *jus ad bellum*. Since IHL does not authorize anything itself, the argument goes, it cannot be in tension with ‘deep morality’, as revisionist just-war theorists claim. Sections 2–5 touched upon key aspects in which IHL – even if formally prohibitive – can still be said to be facilitative of action. If IHL is indeed facilitative, this should be taken into account when considering its morality and also when constructing its threshold of application. The next section complements this argument by discussing one central characteristic of IHL, to which – due to its seemingly permissive nature – Haque devotes much attention: combatants’ ‘right to fight’.

## 6 The Facilitative Function of the Right to Fight

Positive IHL recognizes that all combatants have a ‘right to fight’.<sup>72</sup> On its face, it is clear that the mere recognition of this ‘right’ challenges any attempt to construct IHL as a prohibitive system. For this reason, Haque devotes significant effort to reconcile this ‘right to fight’ with his general prohibitive view of IHL. The ‘right to fight’ is particularly important for Haque’s argument because the nature of this right ties in directly to the debate between traditionalist and revisionist approaches to the morality of IHL. Indeed, if this right entails a full-fledged right to kill for all combatants, then revisionists might be correct that law diverges from ‘deep morality’. This is precisely the result that Haque seeks to avoid. Haque presents, in this context, a sophisticated argument in an attempt to reconcile the putative ‘right to fight’ with morality. To him, the morality of IHL is not compromised by the ‘right to fight’ since, actually, law does not grant unjust combatants a true right to fight but only a procedural immunity against prosecution in the enemy’s domestic courts, provided they fight within the

<sup>71</sup> *Ibid.*, para. 70.

<sup>72</sup> Additional Protocol I, *supra* note 26, Art. 43(2).

confines of *jus in bello*. Since an immunity is never a permission, its existence does not challenge the prohibitive nature of IHL.<sup>73</sup>

Off the bat, an objection from legal realism can be made here. In the final analysis, even if Haque would be correct that the ‘right to fight’ is merely an immunity, its function would be an *en masse*, blanket bar from prosecution granted to all combatants. If, when analysing law, we must give due regard to its function in society, we must emphasize that, for all practical purposes, IHL provides to combatants, whether just or unjust, a legal environment that facilitates killing. Therefore, from a realist point of view, it seems that, regardless of the legal categorization of what IHL grants to combatants, its real-world effects are similar to those of a permission to fight. If this is so, then ‘immunity’ is at risk of becoming a ‘magic solving word’ of jurisprudence with little meaning in terms of real-world effects.<sup>74</sup> If the real-world effects of immunity facilitate fighting – whether in just or unjust wars – can we truly say that by merely switching legal categories from ‘permission’ to ‘immunity,’ law and ‘deep morality’ have been reconciled?

Yet, beyond this objection, there are also jurisprudential challenges in viewing the ‘right to fight’ as an immunity only. In the rest of this section, I discuss these challenges and also argue that even if IHL grants only an immunity, then – from a jurisprudential point of view – this immunity is remarkably close to a full-fledged right.

### ***A Between ‘A Right to Fight’ and ‘Immunity’***

Does IHL grant only an ‘immunity’ to soldiers? As a point of departure, Article 43(2) of Additional Protocol I provides that members of armed forces are combatants, adding casually, ‘that is to say, they have a right to participate directly in hostilities’. This phrasing suggests that this ‘right to fight’ is no less than a constitutive element of being a combatant. On the ‘immunity’ approach, this right amounts to no more than a symmetric shield from criminal prosecution in the courts of the enemy but not a positive permission to kill.<sup>75</sup> However, if this correct, Article 43(2)’s wording is quite peculiar. To exemplify this, we can try to reverse engineer the argument. Assume that Article 43(2) would have read that ‘combatants have an immunity from prosecution for directly participating in hostilities’. Would we be able to say that combatants now have ‘a right to fight’? This seems wrong; the concepts of ‘having a right’ and ‘enjoying immunity’ are simply not interchangeable. Indeed, we cannot normally deduce that Y has a ‘right’ to do X from situations in which it is clear that Y is only immune from prosecution if she does X.<sup>76</sup>

<sup>73</sup> Haque, *supra* note 5, at 23–30.

<sup>74</sup> Cohen, *supra* note 22, at 820.

<sup>75</sup> Haque, *supra* note 5, at 24.

<sup>76</sup> See Waldron, ‘Introduction’, in J. Waldron (ed.), *Theories of Rights* (1984) 1, at 7. Note, this does not mean that immunity cannot be a Hohfeldian right itself. But, in simple terms, it is a right not to be subject to some legal procedure or power, not a right to do the act to which the immunity attaches. It is perhaps for this reason that Hohfeld decried the indiscriminate and ‘overworked’ use of the term ‘right’ to denote immunities, while the correct synonym should be ‘exemption’. See Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’, 23 *Yale Law Journal* (1913) 16, at 30, 57.

Indeed, immunities are common in international law. There are immunities for states and their property, heads of states, diplomats and institutional organizations. Common to these, however, is that they are nowhere put in terms of a ‘right’ to do the immune act itself.<sup>77</sup> The international law on state immunity, for instance, grants a blanket immunity from domestic jurisdiction in relations to war damages, even if the damages are inflicted in an aggressive war, even if they are a result of violations of IHL and even if they constitute violations of peremptory (overriding) norms of international law. Precisely because of this, the International Court of Justice ruled in 2012 that Germany enjoyed immunity in front of Italian courts in relation to atrocities committed during World War II.<sup>78</sup> Can we rephrase the Court’s ruling by claiming that Germany had a right to do as it did? The answer must be negative.<sup>79</sup> To summarize this point, since the phrase ‘right to fight’ cannot be interchanged with ‘immunity for fighting’, the idea that black-letter IHL merely provides an immunity, or is understood as such in practice, is debatable.

## B A Peculiar Immunity

Let us assume that the ‘right to fight’, as recognized in Additional Protocol I, reflects an imprecise choice of words and that, properly understood, it should be seen as conferring no more than an immunity from prosecution. In this subsection, I argue that, even if this is so, this immunity is still quite peculiar, to such an extent that it comes remarkably close to a full right to fight. This is so for two reasons. First, as opposed to an immunity, which implies nothing about the character of the immune act, the right to fight under IHL confers special legitimacy to combatants. Second, while immunities usually belong to institutions and can be waved, the right to fight is non-alienable and non-derogable.

In Hohfeldian terms, immunity is not a permission but merely an exemption from a certain legal power (or liability).<sup>80</sup> It applies irrespective of the wrongdoing and blameworthiness of the actor.<sup>81</sup> At the outset, it is interesting to recall that the distinction between immunity and permission is historically contingent. Historically, state immunities were attached to the notion that the sovereign – the ‘mortal God’ – can do no wrong. This ‘mystique’ accounted both for domestic and international immunities.<sup>82</sup>

<sup>77</sup> See, e.g., United Nations Convention on Jurisdictional Immunities of States and Their Property, UN Doc. A/RES/59/38 (2004), Art. 5: ‘A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention.’ But see Herstein, ‘A Legal Right to Do Legal Wrong’, 34 *Oxford Journal of Legal Studies* (2014) 21, at 24 (viewing immunities as a ‘form of legal right to do legal wrong’). If Herstein is correct, however, it is clear that the combatant immunity does not rescue *jus in bello* from the moral pitfall of facilitating unjust killing.

<sup>78</sup> *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 3 February 2012, ICJ Reports (2012).

<sup>79</sup> As the Court itself emphasized, immunity does not imply any type of a right to do the act but merely a procedural barrier. *Ibid.*, para. 58.

<sup>80</sup> Hohfeld, *supra* note 76, at 55–58.

<sup>81</sup> Haque, *supra* note 5, at 27–28.

<sup>82</sup> M.N. Shaw, *International Law* (2017), at 507.



On this account, in war, combatants were immune simply since they were acting in the name of a sovereign. If the sovereign is a mortal God, the line between immunity and permission (or authority) becomes blurred.

Of course, modern immunity is mostly functional; it does not presume unlimited authority but is mainly based on pragmatic considerations. In other words, the fact that a person or action is immune does not imply anything concerning the nature of the specific act, but only that there are systemic reasons that justify granting immunity in such cases. Conversely, a permission – much more so than an authority – says something about the act itself: either that it is good or that, for some other reason, it should not be prohibited. Accordingly, one way to distinguish between immunities and permissions is to analyse the relations between the norm and the corresponding action. Arguably, when law grants an immunity only, it should not simultaneously approve of the action itself; this is because immunity and approval are tantamount, for all purposes, to a permission or authorization. In my view, one way that such approval can be signalled is by an implied show of respect for the immune action.<sup>83</sup>

In this context, IHL respects the actions of combatants in a manner that is uncharacteristic of how we usually think about immunities. Consider the international law on the rights of prisoners of war (POWs). The law on POWs is an important site in which to test the argument that the ‘right to fight’ is merely an immunity since POW status – and, namely, the bar from criminal prosecution that forms a central part of it<sup>84</sup> – would presumably be a key manifestation of such an immunity. Therefore, if there is something about POW status that goes beyond immunity by implying some respect for the immune action – meaning respect for the combatants’ fight itself – then the account of the right to fight as an immunity only is undermined.

This indeed seems to be the case. For instance, POWs cannot be forced to give information detrimental to the cause of their war.<sup>85</sup> This goes beyond mere immunity from prosecution; rather, it implies a measure of respect by ensuring that combatants are not put in a situation in which they have to place their fight in jeopardy. Similarly, all POWs can wear badges and decorations – even if they were earned during a blunt act of aggression – while in captivity.<sup>86</sup> While this seems, on first look, a mere courtesy, there is something deeper at work here – namely, an underlying assumption, with a powerful expressive effect, that even unjust combatants are entitled to be commended for battlefield valour. Consider also the rule on unsuccessful escape. Famously, IHL allows only mild disciplinary punishment for POWs that attempt escape.<sup>87</sup> This rule’s traditional justification was respect based since ‘attempts to escape should be

<sup>83</sup> For our purposes, respect is an expressive acknowledgement in law that one’s actions are legitimate or at least that one is entitled to believe they are.

<sup>84</sup> A combatant cannot be prosecuted merely for fighting, can only be detained for the duration of the hostilities and can only be prosecuted for violations of the laws of war. Geneva Convention (III) Relative to the Treatment of Prisoners of War 1949 (Geneva Convention III), 75 UNTS 135, Art. 99.

<sup>85</sup> *Ibid.*, Art. 17.

<sup>86</sup> *Ibid.*, Art. 40.

<sup>87</sup> *Ibid.*, Art. 90.

considered as a demonstration of patriotism and of the most honorable feelings'.<sup>88</sup> Last, the assumption in IHL that combatants – just or unjust – are somehow 'respectable', simply by virtue of fighting, reveals itself fully when juxtaposing the 'right to fight' against the treatment of mercenaries. The latter are deprived of POW status even if they abide by IHL because they are foreigners who fight for 'private gain' as opposed to soldiers who fight for a public cause.<sup>89</sup> The fact that the distinction between combatants and mercenaries hinges on this difference in motivations makes it difficult to argue that the 'right to fight' is a form of act-neutral immunity.

A further distinction between immunities, commonly understood, and the nature of combatant status relates to the non-alienable and non-derogable nature of that status. Immunities under international law are intrinsically tied to institutions. That is to say, immunities are meant to allow the institution to perform its public functions rather than to protect the personal rights of the official possessing them. They are the property, so to speak, of the institution, and, accordingly, the institution can waive them.<sup>90</sup> However, this is not the case concerning combatants. Pursuant to Geneva Convention III, the rights of POWs – including immunity from prosecution – are non-derogable, meaning that the combatants' state cannot waive them.<sup>91</sup> Furthermore, these rights are inalienable, meaning that they cannot be renounced by the POWs themselves.<sup>92</sup> While it is true that the latter rule can be explained as a means to shield POWs from pressure by their capturers to waive their rights, this cannot explain the former. Indeed, if the 'right to fight' was a usual immunity, we could have expected that the state could waive it. This non-derogable and inalienable nature of the 'right to participate in hostilities' pushes it further from the usual understanding of immunity and remarkably close to a personal right.

In sum, even if IHL is a generally prohibitive body of law, the nature of the 'right to fight', both in realist terms and in jurisprudential terms, is close to granting all combatants a true right to fight. In this sense as well, IHL can be viewed as being facilitative.

## 7 Conclusion

Adil Ahmad Haque's *Law and Morality at War* is a significant moment in the contemporary debate on just-war theory on the morality of law. It offers an elegant 'third way' between the traditional account of IHL as reflective of morality and the revisionist account of IHL as directly contradicting fundamental moral concepts – a system that is only defensible, at best, as a pragmatic concession. In doing so, Haque displays a rare command – even among international lawyers writing in the just-war tradition – of philosophical literature, analytic method and legal reasoning.

<sup>88</sup> ICRC, *Geneva Convention Relative to the Treatment of Prisoners of War: Commentary* (1960), Art. 90.

<sup>89</sup> Geneva Convention III, *supra* note 84, Art. 47(2)(c).

<sup>90</sup> See, e.g., Vienna Convention on Diplomatic Immunities 1961, 500 UNTS 95.

<sup>91</sup> Geneva Convention III, *supra* note 84, Art. 6.

<sup>92</sup> *Ibid.*, Art. 7.

Haque's contribution is also important in its taking of an explicit and reasoned stand on the nature of IHL as a prohibitive normative framework. This gives international lawyers an opportunity to reflect on, and to gain a better understanding of, the role that this particular body of law plays in the complex web of law, morality and politics. This review essay has offered such a reflection, arguing that even if IHL is prohibitive in formal terms – and even if it grants soldiers no more than an immunity from prosecution – it can still be facilitative of action in practice.

In normative terms, this entails two main conclusions. The first is in the realm of ethics and relates to the wider problem of the moral assessment of laws – both generally and specifically in relation to the debate between traditionalists and revisionists on the morality of IHL. Even if Haque is successful in showing that, conceptually, IHL does not grant combatants a formal 'right to kill' – and that, accordingly, there is no gap between IHL and 'deep morality' – the discussion should not end here. It seems that the manner in which law operates in society – both in relation to politics and to other, more constraining legal regimes – should have a significant role in our assessment of law's morality. In other words, the consequences of law itself, in a non-ideal world, should be taken into account in this assessment. Importantly, this is not an exercise in meta-ethics. Rather, it is a call not to ignore the politics of law when assessing the virtues of law. Otherwise, by emphasizing the prohibitive nature of what is in fact facilitative, we might mask the way law in fact operates in the world.

The second conclusion is about the interpretation of law itself. Many questions on the proper scope of IHL remain unanswered because we do not seem to have a firm enough grasp of the role that it plays in the larger context of international law – chiefly, whether it sets out to constrain actors by introducing additional protections during wartime or, rather, to grant them additional powers in order to enable them to fight. This phenomenon is part and parcel of IHL's Janos-faced allegiance to both humanitarianism and military necessity. Indeed, as I have shown here, many norms of IHL can be convincingly construed as either protective of individuals or as facilitative of military needs. In this context, Haque offers a compelling argument in defence of the constraining conception, based on the internal logic and coherence of law. Yet, if this was the whole story, it would have been expected, for instance, that the international human rights community would rally in support of the US argument for a global armed conflict. After all, why not be content about applying a normative system that only constrains violence? More recently, we witnessed the same dynamics in relation to events in Gaza. There, Israel invoked the law of armed conflict, while explicitly denying the application of IHRL, in order to justify its rules of engagement on the Gaza–Israel fence. Critics, unsurprisingly, urged Israel to adhere strictly to the standards of the use of force enshrined in human rights law.<sup>93</sup>

<sup>93</sup> E. Lieblich, 'Collectivizing Threat: An Analysis of Israel's Legal Claims for Resort to Force on the Gaza Border', *Just Security* (16 May 2018), available at [www.justsecurity.org/56346/collectivizing-threat-analysis-israels-legal-claims-resort-force-gaza-border/](http://www.justsecurity.org/56346/collectivizing-threat-analysis-israels-legal-claims-resort-force-gaza-border/); compare G.S. Corn and P. Marguiles, 'Use of Force at the Gaza Border: A Hybrid Approach to Tactical Challenges', *Lawfare* (20 June 2018), available at [www.lawfareblog.com/use-force-gaza-border-hybrid-approach-tactical-challenges](http://www.lawfareblog.com/use-force-gaza-border-hybrid-approach-tactical-challenges).

Understanding IHL's facilitative function, both in politics and in relation to other legal frameworks, should play a guiding role in the interpretation of IHL standards across the board. Perhaps most importantly, it should inform the construction of IHL's threshold of application – that is to say, the norms that define the notion of 'armed conflict' as well as its spatial and temporal dimensions. Chiefly, the facilitative function of IHL requires a cautious approach. After all, even if IHL alone cannot make an unjust war just, it can facilitate undertaking one.