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School of Government and International Affairs/Law School

On the coherence of a duty to surrender with just war theory and the laws of war

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Submitted in fulfilment of the requirements for the degree of Doctor of Philosophy

November 2022

Statements and Declarations

Declaration

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Henry Padden
20 November 2022

Abstract

This thesis conducts an interdisciplinary analysis of the obligation for states and individuals to surrender as an emerging phenomenon in just war theory and international law. It seeks to establish the humanitarian value of a duty to surrender and extrapolate it from the principles of these two disciplines, arguing that the lack of a previous in-depth analysis of surrender is not just an absence, but an oversight. After conducting a historical analysis of surrender it explores the doctrinal basis of such a duty in related bodies of international law: the law on the use of force, international humanitarian law, human rights law, aggression and international criminal law, and peace treaties in international law.

This thesis then explores the orthodox and revisionist schools of just war theory gradually assessing the themes which coalesce around the determination of justice in surrender. It argues that the duty to surrender must, in order to avoid the pitfalls of empire and appeasement, draw its normative force from popular sovereignty and the right of self-determination. It establishes the value of referenda and conscientious objection as important mechanisms in the duty to surrender. Equipped with these ideas, the thesis finally turns to a discussion of the parameters of the right of self-determination in international law. Ultimately, it fully theorises the source and requirements of the duty to surrender for individuals and states, and how they interact. It positions the duty to surrender as an obligation with the potential to not only be coherent with just war theory and international law, but which allows them to better achieve their humanitarian promise.

Acknowledgements

Throughout the process of researching and writing my doctorate, I have had the great fortune to have benefitted from the support of many individuals who, in their own way, have made it an enjoyable process and more straightforward than it would otherwise have been.

Firstly, I would like to extend my thanks to my incredible supervisors, Professor Christopher Finlay and Professor Aoife O'Donoghue for not only taking on my project in the first place, but in providing steady and insightful mentoring, advice and humour throughout. Professor Catherine O'Rourke provided much needed support at a crucial stage in my PhD journey and I'm very grateful to her too.

My examiners, Professor Catherine Turner and Professor Cian O'Driscoll, also deserve thanks for their helpful comments on my thesis.

A PhD is sometimes described as a lonely experience and it had all the more potential to be during lockdown. Fortunately, the incredible PGR community at SGIA has meant this couldn't be further from the truth. For the company, I'm grateful to Ahmet, Alex M, Dan, Dave, Emil, Evert, Georgia and Maja, and to Alex C, an ever-present source of conversation, ideas and reassurance.

I'm extremely grateful to Sam, who has been present throughout all my years at university, has never wavered in his true friendship, encouragement, and belief in me.

I'd like also to express deep gratitude to my parents, who gave me the confidence and curiosity to pursue this project. My education, in more ways than one, has only been possible with their sacrifices.

My greatest thanks go to Sonal, my fiancée and better half. More than anyone she has been my daily source of support, and has always been there to offer a beaming face, love and confidence.

I will be forever grateful to each and all of these wonderful people.

Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
API	Additional Protocol 1 (to the Geneva Conventions)
APII	Additional Protocol 2
APIII	Additional Protocol 3
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FARC-EP	Fuerzas Armadas Revolucionarias de Colombia—Ejército del Pueblo
GA	General Assembly (of the UN)
GCI-IV	Geneva Conventions 1-4
HCJ	(Israeli) High Court of Justice
IAC	International Armed Conflict
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross/Red Crescent
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IED	Improvised Explosive Device
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
IRA	Irish Republican Army
IS	Islamic State
JWT	Just War Theory

MBF	*Militärbefehlshabers in Frankreich*
MOD	(UK) Ministry of Defence
NATO	North Atlantic Treaty Organisation
NIAC	Non-International Armed Conflict
OJWT	Orthodox Just War Theory
PLO	Palestine Liberation Organization
POW	Prisoner of War
R2P	Responsibility to Protect
RJWT	Revisionist Just War Theory
RUF	Revolutionary United Front (Sierra Leone)
SC	Security Council (of the UN)
TWAIL	Third World Approaches to International Law
UDHR	Universal Declaration of Human Rights
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNAMIR	United Nations Assistance Mission For Rwanda
US	United States (of America)
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention on the Law of Treaties
WMD	Weapons of Mass Destruction

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Chapter 1: Introduction

> ‘It would be unworthy of a solider!’ Paulus burst out before Dyatlenko had finished his translation.
>
> ‘Is it possible to say’, asked Voronov, ‘that to save the lives of your subordinates is behaviour unworthy of a soldier when the commander himself has surrendered?’
>
> ‘I didn’t surrender. I was taken by surprise.’
>
> This “naïve” reply did not impress the Russian officers, who were well aware of the circumstances of the surrender. ‘We are talking of a humanitarian act,’ Voronov continued. ‘It will take us only a couple of days or even just a few hours to destroy the rest of your troops who continue to fight on. Resistance is useless. It will only cause the unnecessary deaths of thousands of soldiers. Your duty as an army commander is to save their lives’[1]

This passage, taken from Antony Beevor’s *Stalingrad*, describes the surrender negotiations between Friedrich Paulus, Field Marshal of the German Army in the 1942-43 Battle of Stalingrad, and Nikolay Voronov, USSR Chief Marshall of the Artillery. It illuminates the sense of shame faced by a soldier and the pejorative sense of the word “surrender”, but also the responsibility of a leader when surrender might be such a humanitarian act, and indeed the interplay between the surrender of a commander and the surrender of subordinates. It presents an intuitive case for a duty to surrender – its humanitarian value – in spite of its absence in the landscape of international law and normative political theory.

This absence is further highlighted by trends in this landscape that would seem to demand such a duty: the humanitarianisation of war, the framing of sovereignty as responsibility rather than license, and even the attempts made to replace war with quasi-judicial procedures. The Covenant of the League of Nations attempted to create arbitration procedures instead of war[2].

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[1] Antony Beevor, *Stalingrad* (London: Penguin, 2011). p.390
[2] Article 12, League of Nations, *Covenant of the League of Nations*, (28 April 1919).

The 1924 Protocol for the Pacific Settlement of Disputes stated that 'The signatory States agree in no case to resort to war either with one another or against a State which, if the occasion arises, accepts all the obligations hereinafter set out'[3]. The 1927 Declaration Concerning Wars of Aggression stated: 'every pacific means must be employed to settle disputes'[4]. And the Kellogg-Briand Pact included that the signatories 'condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy'[5]. It further stated, 'The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means'[6].

Yet while this humanitarian drive has brought these instruments about, it has not also produced an obligation on one party to a conflict to surrender, in spite of the purpose it would serve. Surely, if international law cares about these things, it is natural to expect of it some procedure which terminates conflict and – crucially – makes it the responsibility of (at least) one party to bring about that war termination.

If international law does not satisfactorily produce an answer to the question, one might also turn to just war theory, a doctrine premised on the atrociousness, but sometimes justifiability, of war. Here some inroads have been made. Works by Cecile Fabre, Darrell Moellendorf and Carsten Stahn discuss *jus ex bello*[7] and Cian O'Driscoll discusses just war theory's relationship with victory, but surrender is not directly dealt with. Even before modern just war theory, the question about where the right end point for war was theorised, but this makes the absence of a duty to surrender in international law all the more surprising. Nor can it be said that the delineation of justifiable uses of force can amount to delineation of a duty surrender. In other words, it may not be said that just war theory, by stating that in any particular given situation the use of force is not justified, is also saying that surrender is obligated. Such a theory needs to be made explicitly, purposefully and positively.

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[3] Article 2, League of Nations, *Protocol for the Pacific Settlement of International Disputes*, (2 October 1924).
[4] *Declaration Concerning Wars and Aggression*, (1927).
[5] Article 1, League of Nations, *General Treaty for Renunciation of War as an Instrument of National Policy (Pact of Paris or Kellogg-Briand Pact)*, United Nations, Treaty Series, vol. 94, No. 2137, p.57 (27 August 1928).
[6] Article 2, ibid.
[7] Justice in war is split into four phases: *jus ad bellum* (justice in war entry), *jus in bello* (justice during war), *jus ex bello* or *jus terminatio* (justice in war exit) and *jus post bellum* (justice in the aftermath of war).

1.1 Research Questions

This thesis stipulates that the non-existence of a duty to surrender is not just a non-presence, but a deficiency, in need of a remedy; not just an absence, but an oversight. It asks whether the norms of international law and justice are in some sense *incomplete* without such a framework of a duty to surrender, whether they are unable to provide what they promise. There are thus two research questions that present themselves:

To what extent can a duty to surrender be considered to be "emergent" from international law and just war theory?

What would a maximally coherent duty to surrender look like?

The first of these questions is more cautious and wants to drastically limit the extent of the departure from doctrinal international law and just war theory. The second of these is less restrained and aware that it is creating something new, albeit something that coheres. It still does not want to stray from the law and just war theory, in that it stimulates an argument that a duty to surrender in no way presents a radical idea that should concern just war theorists or international, but the question starts from the acknowledgement that a duty of surrender must be *extrapolated* and not *conjured*.

In order to answer these major questions, other minor questions will be addressed: Whose is the decision to surrender? What does surrender entail, particularly for the surrendering party? On what must the decision to surrender be based? What role does sovereignty play for a duty surrender?

1.2 Methodology and the case for interdisciplinarity

This thesis has a "recommendatory research objective"[8]. That is, it aims to determine how the law *should* be. It wishes to arrive at a 'proposal to enact, complete, modify or abolish law'[9]. The recommendatory research objective in this case is to *complete* international law by articulating a duty to surrender which is a manifestation of the other principles of international law. In a sense, it aims to triangulate the duty from these other principles. The sources it draws

[8] Lina Kestemont, *Handbook on Legal Methodology: From Objective to Method* (Intersentia, 2018).
[9] Ibid.

on to meet this challenge are reflected in Article 38 of the ICJ Statute[10], though does not take it to be exhaustive. In particular, it is concerned with the bodies of law that are most directly related to the issues that would shape justice in surrender and which come to the fore in consideration of the themes that characterise the modern context (below): the law of peace, the law on treaties, the law on the use of force, international humanitarian law, international criminal law and human rights law.

In aiming to complete rather than modify or abolish, it aspires to produce a theory in *coherence* with the landscape of international law and normative political theory and therefore needs normative criteria to judge this recommendation by. Such normative criteria can be either internal or external. Internal criteria come from the legal system itself. External criteria come from outside law. This thesis will use both, and it is the use of external normative criteria which makes this research interdisciplinary. As such, coherence is sought not only within disciplines but also across disciplines, on the assumption that a greater degree of such coherence would more likely lead to an acceptable proposal.

The internal criteria are teleological and arise out of the modern context. On the teleological aspect, Chapter Three will seek to outline what international law already says on obligated surrender, but in doing so it will arrive at several principles which motivate the law. In other words, Chapter Three will be aimed at describing the law on peace treaties and war termination, as well as a host of other related areas of law which speak to what actions in armed conflict are prohibited and what are not. This will provide a set of principles against which the recommendation will be judged. But some are contextual in that they arise from considering the question of whether there should be a duty to surrender *now*. Overall, these normative criteria include the balance between humanity and military necessity; relatedly, the prevention of unnecessary suffering; the reframing of statehood in terms of responsibility and not only license; the rights-centricity of the law; the prevalence of non-state actors and the commonality of intrastate conflict; and the attempts to replace war with "quasi-judicial procedures", as discussed above and in more depth in Chapter Three.

The external criteria are provided by just war theory, a doctrine or tradition within political theory which deals with how war could be legitimately started and fought. It postulates that war is a moral calamity but which nonetheless may be more just than alternatives in some

[10] *Statute of the International Court of Justice*, (18 April 1946).

circumstances. In the first instance, the orthodoxy of just war theory shares many of the same assumptions – the independence of *jus ad bellum* from *jus in bello*, centralised but derived state authority and the principle of distinction between combatants and non-combatants. International legal agreements are held hostage to state interests where just war theory is not. The Genocide Convention, for example, contains many morally arbitrary compromises[11]. This is also to say nothing of the very much non-consensual way in which the law was written to benefit some states and exclude others[12].

The revisionist family may also provide normative criteria that is external to a greater degree. Indeed, the tension between the state and the individual that is likely to permeate many of the arguments in this thesis also demonstrates the necessity of a framework that does not depend on top-down enforceability. Theodor Meron notes that a challenge to some interpretations of the Martens Clause (see below) remains how to produce an authoritative determination of public conscience moderated by humanitarian views, give that the public conscience can also be characterised by hatred and less humanitarian views[13]. As such, the framework of a duty to surrender would benefit from room to explore more internal and reflective guidelines which do not depend on a framework created by and for states. This is also why resolving the question exclusively within just war theory is worthwhile. Though this thesis is seeking interdisciplinary coherence, in the absence of a settled law, just war theory may assist in providing a useful moral code to shape individual decisions. Indeed, a discussion of the duty within just war theory benefits from the ability to draw on a very long tradition of engagement with questions of justice in war.

In many cases just war theory has shaped international law. For example, the modern form of proportionality as a legal restraint on the use of force finds its derivation in just war theory[14]. More generally, many prominent just war theorists are also crucial figures in the history of

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[11] For example, political groups were excluded as one of the protected groups on the basis of lack of permanence of the groups, though religious groups are one of the four groups mentioned, and groups defined by gender, sexuality were not.

[12] See 'Third World Approaches to International Law'. For a detailed guide on using international law against some states see Antony Anghie, *Imperialism, sovereignty, and the making of international law*, ed. ProQuest, Cambridge studies in international and comparative law (Cambridge, England: 1996), (Cambridge, UK: Cambridge University Press, 2005). For a critique of consent theory and a discussion of non-consensual forms of international law, see: Andrew Guzman, "The Consent Problem in International Law," *Andrew T Guzman* (2011)

[13] Theodor Meron, "The Martens Clause, principles of humanity and the dictates of public conscience," *The American Journal of International Law* 94, no. 1 (2000)

[14] Judith Gail Gardam, *Necessity, proportionality, and the use of force by states*, Cambridge studies in international and comparative law (Cambridge, England: 1996), (Cambridge: Cambridge University Press, 2004). p.8

international law: Hugo Grotius, Francisco de Vitoria, Alberico Gentili and Emer de Vattel are a few. In finding international law incomplete, therefore, it would make sense to turn to the philosophical tradition that contributed to the production of it.

The two disciplines have much in common, in that both have ample to say about *jus ad bellum* and *jus in bello*, and both share the same ends, in that they both accept war as reality, but seek to constrain and sanitise it as far as possible. They seek to limit the harm, just as the doctrine of a duty to surrender would do. As such, part of the method for arriving at the duty to surrender, as a species of the *genus jus ex bello*, is to glean what can be gleaned from what the disciplines say about *jus ad bellum* and *jus in bello*. This is a key part of answering the second research question, using both disciplines to extrapolate from their common points to a duty to surrender.

The methodology for the just war theory element recommends an addition that it expects to be acceptable to central tenets of just war theory. Indeed, one of the claims of this thesis is that, despite divergence on key issues, the inclusion of a duty to surrender should be acceptable to both orthodox and revisionist just war theorists, and even derived from complementary foundations. Where this thesis is concerned with just war theory, as opposed to the just war tradition (though, elsewhere, the two terms will be used interchangeably), it will be supplemented with the methodology of analytic philosophy.

Though the motivation is similar to that of Rawlsian reflective equilibrium[15] and coherence in legal reasoning, it is also somewhat different. Firstly, whereas reflective equilibrium is supposed to explain the process by which one arrives at their own stable convictions after their initial convictions are introduced to a new stimulus and a choice is made whether to revise those convictions or not, coherence here is less personal. For the legal element, these convictions are the totality of doctrinal international law rather than personal convictions. For the just war theory element, these convictions are themes of just war theory. However, in comparison to the examination of international law, it is not just the canon that is appealed to. A sense of justice and other principles are appealed to. Part of this results from the belief that the criticism of international law is very much legitimate in some places.

[15] Joseph Raz suspects that the popularity of coherence in legal reasoning owes something to Rawls' concept. See: Joseph Raz, "The Relevance of Coherence," in *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, ed. Joseph Raz (Oxford University Press, 1995).

Secondly, coherence in legal theory refers to the desirability that a judicial decision is consistent with the law whereas coherence here refers to the desirability that an addition to the law is consistent with the law as it is, or what it professes to be. In other words, the coherence which is sought for this theory of a duty to surrender is not only as an interpretation desiring to be coherent with the interpreted law and interpreted just war theory, but also as an independent idea desiring to be coherent with the law and themes of just war theory and aspiring to be held equal to them.

1.3 The significance and necessity of the research

This thesis seeks to provide an original contribution in both international law and political theory with an in-depth study of the nature of surrender and its normative and legal dimensions. Its originality lies in this interdisciplinarity, its focus and the depth of analysis of a concept that has so far only received cursory attention. The necessity of this research also arises from the current context of international law which suggests that the duty to surrender is a natural next step and therefore demands greater attention.

1.3.a Humanitarianisation and humanisation

The period from 1949 to the present day, what Kolb and Del Mar call the second phase of interpretation of international law treaties, is characterised by a more flexible interpretive approach, a shift away from state-centricity and the use of *jus cogens* norms[16]. The period has seen war law becoming more humane as well as more human-centric and features the steady development of humanitarian treaties, human rights law, and the influence of the principle of humanity in international law.

Agreements such as the St Petersburg Declaration (before 1949) are noteworthy because they demonstrate the existence of the sentiment that some measures, *even though they might help to*

[16] Robert Kolb and Katherine Del Mar, "Treaties for Armed Conflict," in *The Oxford Handbook of International Law in Armed Conflict*, ed. Andrew Clapham and Paola Gaeta (Oxford University Press, 2014). *Jus cogens* norms are peremptory norms of international law. Treaties that conflict with *jus cogens* norms are void under the terms of the VCLT.

win a war, are prohibited regardless[17]. Plenty of other measures represent this trend, more fully described in Section 3.4. That "elementary considerations of humanity" permeate international law has been acknowledged by the ICJ in the *Corfu Channel* case and the *Nuclear Weapons* and seems uncontroversial[18].

A substantial role in the humanisation of war has been played by the growth of human rights law and this can be seen in the creation of important cases and treaties[19]. A French proposal for the preamble for the Geneva Conventions demonstrates that concern for the protection of human rights shaped the drafting of it[20]. Australia's oral submissions in the *Nuclear Weapons* case emphasised the role of human rights in shaping the "dictates of public conscience," arguing that '[i]nternational standards of human rights must shape conceptions of humanity and have an impact on the dictates of public conscience'. Moreover, '[i]nternational concern for human rights has been one of the most characteristic features of this era of international law'[21]. Such language echoes the Martens Clause in the Hague Conventions, which itself symbolises the remnants of natural law, including precepts of the just war tradition, in positivist international law:

> Until a more complete code of the laws of war is issued…populations and belligerents remain under the protection and empire of the principles of international law…established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

Judge Weeramantry's dissenting opinion in the *Nuclear Weapons* case recognised the role of the human rights movement in shaping the dictates of public conscience, while recognising the 'ancient lineage' of international humanitarian law and custom, and the philosophies of many

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[17] Henry Shue and Janina Dill do observe, correctly, that it is not the case that increasing the number of combatants killed translates into greater chance of success. However, it is also correct to note that the use of some weapons, such as the use of mustard gas, are now prohibited where before they were considered to increase the chance of military success. See Janina Dill and Henry Shue, "Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption," *Ethics & International Affairs* 26, no. 3 (2012)

[18] See Michael N. Schmitt, "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance," in *Essays on Law and War at the Fault Lines*, ed. Michael N. Schmitt (The Hague, The Netherlands: T. M. C. Asser Press, 2012). International Court of Justice, ICJ, *Corfu Channel Case (United Kingdom v. Albania); Merits*, I.C.J. Reports 1949, p. 4; General List No. 1 (9 April 1949). p.22 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, (International Court of Justice (ICJ) 8 July 1996) I.C.J. Reports 1996, p. 226.§79

[19] Theodor Meron, *The Humanization of International Law*, The Hague Academy of International Law, (Leiden: Martinus Nijhoff Publishers, 2006). p.5

[20] Ibid.

[21] *Legality of the Threat or Use of Nuclear Weapons, Oral Statements, Verbatim record 1995/22*, (International Court of Justice (ICJ) 30 October 1995). §27 Meron, *The Humanization of International Law*.

civilisations that have contributed to the humanisation of war[22]. Likewise, Judge Shahabudeen observed the relationship between the Martens Clause and the principle of humanity, and further noted its potential to change the law as demanded by such principles, something relevant for this thesis:

> In effect, the Martens Clause provided authority for treating the principles of humanity and the dictates of public conscience as principles of international law, leaving the precise content of the standard implied by these principles of international law to be ascertained in the light of changing conditions, inclusive of changes in the means and methods of warfare and the outlook and tolerance levels of the international community[23]

The Geneva Conventions employ a version of it[24], as do the Protocols Additional[25]. The Martens Clause is not only noteworthy for this reason, but because it provides an interesting insight into the role of natural law *within* positivist law, which adds weight to the idea that just war theory may speak more directly to international legal norms. However, one should be cautious not to argue that the Martens Clause represents license to make radical changes to international law based on notions of morality there was general agreement in the pleadings in the *Nuclear Weapons* case that the clause should be interpreted to mean that customary international law continues to apply after the codification of norms[26].

There is plenty of evidence that suggests an undercurrent of the development of the humanitarianisation of war law. The law on war has become more humane and human-centric. Even crimes that exist in international criminal law rather than human rights law, such as aggression, are also measures designed to protect the rights of individuals[27].

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[22] Meron, "The Martens Clause, principles of humanity and the dictates of public conscience." *Legality of the Threat or Use of Nuclear Weapons, Dissenting Opinion of Judge Weeramantry*, (International Court of Justice (ICJ) 8 July 1996). See in particular p.478 and p.488

[23] *Legality of the Threat or Use of Nuclear Weapons, Dissenting Opinion of Judge Shahabudeen*, (International Court of Justice (ICJ) 8 July 1996). p.406

[24] Theodor Meron, "On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument Notes and Comments," *American Journal of International Law* 77, no. 3 (1983) p.80 quoting Georges Abi-Saab, "The specificities of humanitarian law," (1984).

[25] Article 1 (2), International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 1125 UNTS 3 (8 June 1977).

[26] Meron, "The Martens Clause, principles of humanity and the dictates of public conscience."

[27] Tom Dannenbaum, "Why Have We Criminalized Aggressive War?," *The Yale Law Journal* 126, no. 5 (2017)

1.3.b Sovereignty as responsibility

Human rights also represents the latest in a trend of changing the relationship between the state and the individual. Human rights protection extends to combatants and does apply in wartime, as Chapter Three will demonstrate, and it does so in such a way as to demonstrate the very real force behind the question: why are states allowed to continue a war that harms their populations and does not benefit them rather than surrender?

Not only does human rights *law* represent a limitation on state license in itself, the language of human rights has also changed the norms of international humanitarian law. Under the doctrine of Responsibility to Protect, states have a responsibility to protect their populations from genocide, ethnic cleansing, crimes against humanity and war crimes[28]. Although the crime of aggression is not included in the doctrine, not only are there good moral reasons for doing so[29], the populations are protected from actions which could be seen as equivalent to the persecution of war beyond its natural end point. States also have a duty to their populations to provide self-determination. Indeed, the Belgian representative at the San Francisco conference – the conference that produced the UN Charter – actually objected to the inclusion of the right of self-determination on the grounds that it marked a departure from the traditional state-centred approach[30].

Elsewhere, the decline of the doctrine of superior orders, most notably in the Nuremberg and Tokyo International Military Tribunals, represented 'one of the highest points ever reached by the new juridical conscience' because 'until that moment, individuals had to obey the imperatives of their own national laws…this was a veritable revolution both in the field of law and ethics'[31]. Even before the growth of human rights law the preamble to the Hague Convention demonstrates that cases 'should [not] want of a written provision to be left to the

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[28] United Nations General Assembly, *2005 World Summit Outcome: Resolution/adopted by the General Assembly*, A/RES/60/1 (24 October 2005). §138-40

[29] Vito Todeschini, "The Place of Aggression in the Responsibility to Protect Doctrine," in *Beyond Responsibility to Protect: Generating Change in International Law*, ed. Barnes Richard and Tzevelekos Vassilis (Intersentia, 2016).

[30] Antonio Cassese, *Self-determination of peoples: a legal reappraisal*, Hersch Lauterpacht memorial lectures, (Cambridge: Cambridge University Press, 1995). p.39

[31] Robert Cryer, "Superior orders and the International Criminal Court," in *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey*, ed. Justin Morris, Nigel D. White, and Richard Burchill (Cambridge: Cambridge University Press, 2005). p.53 referencing: Antonio Cassese, *Violence and law in the modern age* (Princeton, N.J: Princeton University Press, 1988). pp.131–2

arbitrary judgment of the military commanders'[32]. Indeed, although many leaders may be acutely cognizant of the suffering inflicted on their population by war, room should not be left for the incognizant commanders, and international humanitarian law has historically not done so. Generally, a study of IHL reveals that developments in the protections offered to all victims of armed conflict, both combatants and non-combatants, have been in spite of the military rather than at its instigation[33].

This change in relationship between the state and the individual not only asks how a state may better protect its population, but may also provide the answer to the question of this thesis. This is put succinctly by Hew Strachan: 'France surrendered because Frenchmen surrendered. Moreover…they did so in sufficient numbers to convert defeat on the battlefield into defeat in the war itself'[34]. Of the 2.3 million French casualties in the Second World War, two million were prisoners of war[35].

1.4 Structure

Before this thesis can engage with the just war tradition and international law and its recommendatory research in earnest, some preliminary work needs to be done. Chapter Two will review cases of state-level and individual-level surrender over the past two millennia. It does not aim to be comprehensive. Rather, it aims to provide useful snapshots to serve as a real-world basis to explore the issues associated with a duty to surrender. It will examine how surrender was viewed in Classical Rome, the Byzantine-Arab Wars, the Crusades, the Ottoman Empire, the Napoleonic Wars and in Japan at the close of World War II. These cases provide some insights on the association between surrender and conquest, what has motivated individual surrender and how states have sought to exert influence. The chapter also enables the provision of a transhistorical and transcultural definition of state-surrender, or *terminative concession agreements* and individual-surrender. It is argued, for example, that definitions of

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[32] Second International Peace Conference, The Hague, *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, (18 October 1907); International Peace Conference, The Hague, *Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, (29 July 1899).
[33] Gardam, *Necessity, proportionality, and the use of force by states*. p.18
[34] Hew Strachan, "Surrender in Modern Warfare Since the French Revolution," in *How fighting ends: a history of surrender*, ed. Holger Afflerbach and Hew Strachan (Oxford Scholarship Online, 2012). p.213
[35] Henri Michel, *The Second World War* (London: Deutsch, 1975).

surrender that use more absolute language to describe the state of defeat of the surrenderer do not fully take into account the ways that the victor has exhibited their newly acquired power.

Chapter Three is devoted to the doctrinal international law around surrender and its "cousins". Whereas Chapter Two discusses surrender up until 1945, Chapter Three is very much situated in the modern context and is chiefly, though not exclusively, concerned with international law since the UN Charter. Put differently, where an in-depth discussion of actual surrender is not present, this thesis attempts to extrapolate a framework from themes in the law that relate closely to surrender in international law: peace treaties, war termination, *debellatio*, the crime of aggression, the law on the use of force, human rights in armed conflict and international humanitarian law. How each of these can speak to surrender in international law will be described in Chapter Three itself. Recommendatory research first has to describe the subject matter and Chapter Three also serves this purpose[36].

With the preliminary work completed, and having not found a satisfactory legal framework of surrender or *terminative concession*, the thesis now turns to just war theory. As previously noted, the two disciplines share many of the same goals and structures, and it is precisely this fact that allows them to be put in dialogue with one another. As Chapter Three moves into Chapter Four, so the opportunity presents itself for the first time for the two disciplines to have dialogue. The topics of conversation in Chapter Four will reflect this, as the common themes emerge: the link between *jus ad bellum* and *jus ex bello*, the responsibility of the state to its population, the limits of conduct *in bello*, and the right way of terminating conflict have shaped the just war theory chapters just as they have emerged in Chapter Three's "cousins". Likewise, what will emerge from the just war theory chapters – the role of consent, self-determination, rights and the relationship between the state and the individual, will be speak to the content of Chapter Six.

Chapter Four addresses orthodox just war theory, defined by its adherence to the principle of distinction and the independence of *jus ad bellum* from *jus in bello*, represented by Emer de Vattel and Michael Walzer. It argues that *jus ex bello*, and by extension a duty to surrender, cannot be completely reduced to *jus ad bellum*. Instead, the duty should be based on the expectation of rights protection after the war and by popular sovereignty. Both Walzer and Vattel see military service as a contract between the state and individual, and that rights can

[36] Kestemont, *Handbook on Legal Methodology: From Objective to Method*.

only be waived by consent. As such, the social contract can be void if the state does not discharge its duties and the individual can withdraw their obedience. The chapter thus starts to shape the framework of the duty to surrender.

Chapter Five engages with the revisionist school, worth engaging with because it has already made some progress on war termination and also because of what they say about related issues in modern conflict. Though the orthodox just war tradition has more in common with international law, it could be argued that the tools revisionist just war theory provides are better able to make sense of modern conflict, namely a more human-centric rather than state-centric morality, and intrastate conflict, and is more accepting of the right of the individual to disobey the state. In places, the chapter is also infused with the idea of republican freedom as non-domination[37], contestation and the necessity of the right to resist as this thesis' conception of a duty to surrender starts to be built.

Armed with principles derived from just war theory, Chapter Six re-enters the realm of international law, but less doctrinally; it is the *lex ferenda* to the *lex lata* of chapter 3. Specifically, it engages with self-determination as a normative criterion for justice in surrender. The role of consent and rights protection as the determinative factor in a duty to surrender has taken centre stage in discussions of both orthodox and revisionist just war theory. In keeping with the theme of state-centricity and human-centricity, Chapter Six will also discuss the individual's role, focusing on conscientious objection, *levées en masse* and the doctrine of superior orders as issues that have arisen out of a discussion of just war theory.

Lastly, Chapter Seven provides some concluding thoughts and opportunities for further research as well as summarising the themes throughout the thesis, also functioning as a summary of the thesis as a whole. It contends that the duty of surrender, particularly if it is to guard against the facilitation of conquest, must put the right of self-determination at its core and must allow the retention of the right to resist beyond this point. Such a duty to surrender, so conceived, would complete international law in that it would pursue the principles of humanity and the protection of individuals against state excesses.

This form of the doctrine of justice in surrender, or *terminative concessions*, marks a different and original perspective compared to just war theory even where the latter has started to broach

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[37] As per Philip Pettit, *Republicanism: a theory of freedom and government* (Oxford: Oxford University Press, 1999). Also see Quentin Skinner, *Liberty before Liberalism*, Canto Classics, (Cambridge: Cambridge University Press, 2012).

the topic of war termination. It might be expected, for example, that the argument that states are bound by an *in bello* "proportionality budget", even where they do satisfy the *jus ad bellum* criteria, might also amount implicitly to an argument of war termination at the point where this budget is exhausted. Importantly, this is does not approach the theory of *terminative concessions* set out below as 'even if one warring party is required to stop a war on proportionality grounds it might not follow that another may not take up the cause'[38].

In contrast, the theory presented in this thesis sets out exactly what is required and why. Rather than set guiding principles, it arrives at a set of duties that comprise the duty to surrender as a *system* aimed at reducing the suffering of war, involving obligations around referenda, conscientious objection and desertion, to empower individual soldiers to make rights-based assessments on war termination, and limits state license in war continuation. This system is supported by the range of legal and philosophical arguments employed also to demonstrate that it presents an extrapolation, a fulfilment of the humanitarian promise made by law and justice rather than an overhaul or departure.

Therefore, while it will emerge as a largely deontological theory, it incorporates consequentialist elements; its moral force comes from the humanitarian aims. It is primarily a duty of states, but this deontological quality is multi-faceted in that, in order to be fully discharged, the state is required to develop procedures to facilitate conscientious objection (and therefore avenues for the individual aspect to this duty), and ensure that it seeks periodic and sustained permission from the population to persist in its martial efforts. Positioned in this way, the more surprising claim is not that such a duty can be achieved with such a great level of coherence but that, given this great coherence, a duty of surrender has not been fully articulated.

[38] Darrel Moellendorf, "Two Doctrines of *Jus ex Bello*," *Ethics* 125, no. 3 (2015)

Chapter 2: The Nature of Surrender

2.1 Introduction

This chapter is aimed at providing a transhistorical and transcultural definition of state-level and individual-level surrender and giving an account of its practice. In arriving at this definition, the chapter aims to achieve multiple purposes. Firstly, it aims to provide context to the debates that take place over the following chapters. Such context assists in reifying what otherwise has the potential to be a largely abstract and theoretical analysis of surrender.

Secondly, it diversifies the concept of surrender. A particularly critical issue that exists within just war literature and international law is their Western- and Christian-centric nature. The just war tradition has firm roots in Christianity and, likewise, international law has been used as a tool for imperialistic purposes by the West[39]. It is thus important that this project begins with a definition of surrender that reflects the need to not further entrench this. In keeping with this aim, a selection of historical examples will be chosen to ensure that several combinations of continents, religions and time periods are included such that analysis within, and both across these illustrations are possible: Ancient Rome, the Byzantine-Arab Wars, the Crusades, the Ottoman Empire, the Napoleonic Wars, the Japanese surrender of 1945.

Thirdly, it illuminates particular themes that will shape the thesis beyond. In brief, these themes include how the expectations of prospective POWs shaped individual surrender, the recognition of states of the moral value of surrender, and the various ways in which power is given away in surrenders and peace negotiations. It will proceed by examining surrender agreements, and particularly the terms of surrender, their contexts, how they varied and the attitudes towards surrender.

[39] Anghie, *Imperialism, sovereignty, and the making of international law*.

2.2 Individual-level surrender

Surrender shall be divided into state surrender and individual surrender, reflecting the bifurcation of aggression (see Chapter Three). Guidance on the latter is provided by the 1977 Official Commentary to Article 41(2) of Additional Protocol I, noting that 'in land warfare, surrender is not bound by strict formalities':

> a soldier who wishes to indicate that he is no longer capable of engaging in combat, or that he intends to cease combat, lays down his arms and raises his hands. Another way is to ceasefire, wave a white flag and emerge from a shelter with hands raised[40]

Further descriptions of the procedure of surrender are given for surprised soldiers, and sea and air warfare. This accords with the ICRC commentary to Rule 47, basing its conclusions on military manuals[41]. State practice is also consistent with the raising of one's hands and laying down one's weapons, though it is more complicated in regards to the display of the white flag[42]. A number of states' military manuals do not accept the white flag as an act of surrender. Some, such as the United States, consider it to indicate the intention to negotiate but others simply reject it as a symbol of surrender[43].

The Official Commentary to the Additional Protocols further notes that individual 'surrender is unconditional, which means that the only right which those who are surrendering can claim is to be treated as prisoners of war…no argument of military necessity may be invoked to refuse an unconditional surrender'[44]. For an individual, the actual raising of a white flag (or the analogous actions as described in IHL) is not yet an agreement with the intended recipient of the surrender. However, when the duty to surrender is being referred to in relation to individuals this is the action that is required by the duty, that of raising the white flag or holding one's arms in the air and throwing aside weapons.

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[40] Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann, *Commentary to Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ed. International Committee of the Red Cross (Netherlands: Martinus Nijhoff, 1987). p.487

[41] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, ed. International Committee of the Red Cross (ICRC) (Cambridge: Cambridge University Press, 2005).

[42] Russell Buchan, "The Rule of Surrender in International Humanitarian Law," *Israel Law Review* 51, no. 1 (2018)

[43] Ibid.

[44] Sandoz, Swinarski, and Zimmermann, *Commentary to Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. p.487

What the soldier is therefore doing is conducting an exchange with their opponent which is mutually beneficial: they agree to lay down their weapons, thereby making it easier for the other party to achieve whatever goal they were pursuing, and they are granted rights. That being said, the moral demand to accept this agreement has already occurred. There is a prior agreement that occurs implicitly at a much earlier stage and through intermediaries. The soldiers both agree to be bound by the laws of war and military convention on entry to the army in the sense they are assenting to the principle that should the situation occur they must act in a particular way. Shooting the surrendering soldier after surrender would be a violation of an agreement not directly with them, but with the principles they agreed to be bound by.

2.3 State-level surrender

Finding a definition of state-level surrender is more complicated with less formal legal answers provided by modern instruments. It is a process; it may include the issuing of orders to lay down arms or it might be the signing of a treaty (or equivalent agreement that is not written down as not all cultures consider the formality and "written-down-ness" of agreements to be important). The duty of the state to surrender applies to both of these actions because they are both actions of the state and because they are part of the surrendering/peace-making process.

In some cases, identifying an agreement as surrender is straightforward. The German surrender in 1945 after the Second World War was called the *instruments of surrender* and contained comprehensive principles aimed at the disarmament of Germany. In other cases it is less explicit, but still uncontroversial. The 1919 Treaty of Versailles[45], which ended World War I, is famously one-sided. Article 231 details the affirmation of the Allied Powers and the acceptance by Germany that German and its allies caused 'all the loss and damage…as a consequence of the war imposed upon them by the aggression of Germany and her allies'[46].

A central difficulty in defining surrender is that it requires a judgement in denoting (at least) one party a loser and (at least) one party as the victor, which has deep emotional and political consequences. Describing an agreement as surrender may entail the labelling of one party as weak or pusillanimous. Take, for example, the 1918 Treaty of Brest-Litovsk. The peace treaty itself does not contain the word 'surrender' though it does contain common themes of

[45] *The Treaty of Versailles*, UKTS 4 (Cmd. 153) (1919).
[46] Ibid. Article 231

surrenders as well as ending Russia's part in World War I. It requires the 'full demobilization' of Russia's army and the disarmament of Russian warships[47]. Furthermore, Leon Trostsky, then the People's Commissar for Foreign Affairs for the newly created Soviet Russia, demonstrates both that he treated the Treaty as a surrender and also the emotional weight of this admission. He quotes, as a collective, politicians who up until that point did not want to sign the peace treaty with Germany:

> our signature would have been looked upon by the English and French workingmen as a shameful capitulation, without an attempt to fight. Even the base insinuations of the Anglo-French chauvinists to the secret compact between the Soviet Government and the Germans, might in case that treaty had been signed find credence in certain circles of European laborers. But after we had refused to sign the treaty, after a new German invasion, after our attempt to resist it, and after our military weakness had become painfully obvious to the whole world, after all this, no one dare to reproach us for surrendering without a fight[48]

Despite these difficulties, some definitions have been proffered. Paul Kecskemeti defined surrender as:

> When a military engagement or a war is terminated by an agreement under which active hostilities cease and control over the loser's remaining military capability is vested in the winner[49]

Taking Kecskemeti's definition of surrender literally might not produce exactly the right image, at least not for non-unconditional surrender. The capacity of the surrenderer's military capability to be directed towards the victorious party is usually neutralised, but it is not always neutralised entirely. Several of the examples that follow, such as the Treaty of Safar, permit the continued existence of the surrenderer's army and its continued use; the victorious Byzantines stipulated that the armies of Aleppo need not fight Muslim enemies of Byzantium. Likewise, although there are examples of full demilitarisation, it is more accurate to speak of

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[47] *The Treaty of Brest-Litovsk*, (3 March 1918).
[48] Leon Trotsky, *From October to Brest-Litovsk* (Project Gutenberg, 1919). pp.77-78
[49] Paul Kecskemeti, *Strategic Surrender: The Politics of Victory and Defeat* (RAND Corporation, 1958). p.5

partial demilitarisation, or military limitation. Austria's army after its defeat at Wagram was limited to 150,000 soldiers, but was not entirely removed.

It is clear that any definition of surrender needs to encompass more practices, but the crucial elements are that it ends the conflict, and that it involves giving away power. Beginning with these two crucial elements, and armed with the discussion above, this chapter will now enter into a transcultural, transhistorical analysis of practices of and attitudes towards surrender, ultimately arriving at a more precise definition.

2.4 The Classical Period: *Vae Victis* and surrender in Ancient Rome (400 BCE – 104 AD)

Cicero's famous maxim that 'the law stands silent in times of war' does not seem to be entirely accurate, and even at the time there were some prohibitions that restrained war[50]. These included those against the use of concealed and poisoned weapons and against attacking religious figures[51]. There are also at least practices and common elements that allow us to discuss what the Romans thought of surrender and how they practiced it, how the Romans surrendered and how they accepted surrender.

One particular Roman surrender is mythologised and is the alleged source of the maxim *vae victis* (woe to the conquered), encapsulating the Roman doctrine of *deditio*. In 390 BCE, as the story goes, the Gaulic general Brennus, after having captured most of Rome, besieged the Capitoline Hill, the only part of the city remaining in Roman hands. The Romans agreed to ransom and the Gauls brought balances and weights to measure the amount of gold required for the ransom. When the Romans complained that the scales were rigged, Brennus threw his sword onto the weights and proclaimed *vae victis*[52].

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[50] Marcus Tullius Cicero, *Pro Milone, In Pisonem, Pro Scauro, Pro Fonteio, Pro Rabirio Postumo, Pro Marcello, Pro Ligario. Pro Rege Deiotaro*, trans. N. H. Watts, Loeb Classical Library, (Cambridge: Harvard University Press, 1931); Ben Kiernan, "The First Genocide: Carthage, 146 BC," *Diogenes* 51, no. 3 (2004/08/01 2004); ibid.

[51] Buchan, "The Rule of Surrender in International Humanitarian Law."

[52] Livy, *History of Rome*, ed. Julius Obsequens et al., Loeb classical library, (Cambridge, MA: Harvard University Press, 1919). 5.36-48, especially 48.

This attitude was also present in Rome's treatment of its enemies. *Deditio* was a process that indicated the absorption of the defeated states into the Roman Empire. The actual procedure is described by Livy when he discusses the surrender of the Collatini:

> [T]he king asked, "Are you the legates and spokesmen sent by the People of Collatia to surrender yourselves and the People of Collatia?" "We are." "Is the People of Collatia its own master?" "It is." "Do you surrender yourselves and the People of Collatia, city, lands, water, boundary marks, shrines, utensils, all appurtenances, divine and human, into my power and that of the Roman People?" "We do." "I receive the surrender."[53]

The practice was for states to completely submit to the sovereignty of Rome. Their possessions became Rome's. Such a surrender was total; the conquered party ceased to exist as a state, even to the point that Roman commanders could make surrender agreements with cities which they would not be concerned about honouring because the conquered party would therefore no longer exist[54]. *Deditio* was one of several types of peace treaty, distinguished from treaties between states of different types, again described by Livy:

> one, when in time of war terms were imposed on the conquered; for when everything was surrendered to him who was the more powerful in arms, it is the victor's right and privilege to decide what of the conquered's property he wishes to confiscate; the second, when states that are equally matched conclude peace and friendship on terms of quality…the third exists when states that have never been at war…pledge mutual friendship in a treaty or alliance[55]

In practice, the terms Rome imposed on those it defeated varied, even where the peace treaties were only of the first category. For example, Polybius recalls the Treaty of Lutatius made between Carthage and Rome after the First Punic War after what was certainly a Carthaginian defeat. Hamilcar Barca was keen to distance himself from the admission of defeat and so sent an officer in his place to the negotiations[56]. Polybius describes the terms of the treaty:

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[53] Ibid. 1.38
[54] Loretana de Libero, "Surrender in Ancient Rome," in *How fighting ends: a history of surrender*, ed. Holger Afflerbach and Hew Strachan (Oxford Scholarship Online, 2012).
[55] Livy, *History of Rome*. 34, 57, 7-9 Taken from Christian Baldus, "Vestigia pacis. The Roman peace treaty: structure or event?," in *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One*, ed. Randall Lesaffer (Cambridge: Cambridge University Press, 2004). p.114
[56] Adrian Keith Goldsworthy, *The Punic wars* (London: Cassell, 2001).

> The Carthaginians are to evacuate the whole of Sicily and all the islands between Italy and Sicily. The allies of both parties are to be secure from attack by the other. Neither party is entitled to impose any contribution to construct public buildings, or to enrol soldiers, in the dominions of the other, nor to form alliances with the allies of the other. The Carthaginians are to pay twenty-two hundred talents within ten years, and a sum of a thousand talents at once. The Carthaginians are to give up to the Romans all prisoners free of ransom[57]

It was largely, but not wholly, one sided: the Roman and Italian soldiers who had been hired as mercenaries in Hamilcar's army were not, as the Romans wished, handed over to Rome for punishment[58].

It is perhaps additionally notable in its stark contrast with the Roman treatment of Carthage after the Third Punic War, after the Romans had defeated Hamilcar's son Hannibal Barca, and after the Romans had overcome the city of Carthage. The Roman senator, Marcus Porcius Cato ("the Elder") had ended every Senate speech, on any matter, with the words *delenda est Carthago* (Carthage must be destroyed)[59]. 150,000 of the 200,000-400,000 population of Carthage died during the Roman razing of the city and 55,000 survivors were sold into slavery, including 25,000 women, despite the Carthaginians complying with Rome's demand to surrender their 200,000 individual weapons and 2000 catapults[60].

The Romans themselves were expected to not surrender. When the army of a former consul, Hosilius Mancinus, was surrounded after a recent defeat in the territory of the Numantines in modern-day Spain in 137 BCE, he surrendered. But he received only indignation from Rome on his return and the Roman Senate declared the treaty null and void[61]. The indignation became so great as to eventually lead him to the belief that the only way to recover from the disgrace was to be delivered, naked, to the Numantines[62].

Further detail can be provided by Caesar's accounts. Julius Caesar describes one instance of the pattern of surrender on the battlefield during his civil war against another Roman general, Pompey Magnus. As always with Caesar's famous work, it should be considered propaganda,

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[57] Livy, *History of Rome*. 3.27
[58] Goldsworthy, *The Punic wars*.
[59] Ben Kiernan, *Blood and soil: A world history of genocide and extermination from Sparta to Darfur* (Yale University Press, 2008).
[60] Kiernan, "The First Genocide: Carthage, 146 BC."
[61] Libero, "Surrender in Ancient Rome."
[62] Ibid.

written by Caesar referring to himself in the third person, keen to portray his triumph and magnanimity, for a Roman audience. Nonetheless, it at least describes the Roman attitude to surrender and the *ignominia* it entails.

> Caesar ordered all those…to come down from the higher ground to the plain and to throw down their arms. When they did this without demur and, flinging themselves on the ground in tears, with outstretched hand begged him for safety, he consoled them and bade them rise, and addressing a few words to them about his own lenity to lessen their fears, preserved them all safe and commended them urging that none of them should be injured and that they should not find any of their property missing[63]

Multiple non-Roman tribes also surrendered to Caesar in the Gallic wars. The Atuatuci "surrendered" twice to Caesar. He reports that they originally surrendered at the sight of the Roman siege weapons, and requested a surrender, which was granted. Caesar notes that the Atuatuci made mention of the Roman reputation for humanity. Even though this is Caesar's account it might at least suggest the recognition on the part of the Romans that a policy of treating prisoners well leads to greater willingness to surrender or that being gracious in surrender is ethical. But the Atuatuci then surprised the Romans. Caesar ultimately defeated them and killed, he says, 4,000 and sold 53,000 into slavery[64]. After the first surrender, the Atuatuci had cast their weapons from the walls, and had had to make use of concealed weapons in the surprise attack.

More broadly, the intention to surrender could be indicated by 'by waving *velamenta*, olive branches surrounded with bandages of wool, and *infulae*, white woollen headbands'[65]. Of course, for the decision to embark on individual surrender much turns on the what the soldiers believed lay in store for them after the surrender. With no protection for prisoners of war, the surrendering party would be at the mercy of the conquerors. Restraint could be shown but it was discretionary. Roman commanders were morally required to exhibit self-restraint towards the vanquished, and there is some evidence to suggest that this occurred in practice. The *Tabula Alcantarensis* from 104 BCE details the terms of surrender for the Spanish tribe of the Lusitani,

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[63] Julius Caesar, *Civil wars*, ed. A. G. Peskett, Loeb classical library, (Cambridge, MA: Harvard University Press, 1914). p.335-6 §98
[64] Julius Caesar, *The Gallic War*, trans. H. J. Edwards, vol. 72, Loeb Classical Library, (Cambridge, M.A.: Harvard University Press, 1917). 2.31-33
[65] Libero, "Surrender in Ancient Rome." p.36

giving back all lands, rights, laws and buildings that had been bequeathed to Rome by *deditio*[66]. Though, as we have seen, this is far from universal.

The wars of the Romans reveals a number of themes of surrender that will develop in the later historical periods. Firstly, the willingness of individual soldiers to surrender was directly tied to what they expected their post-war treatment would be like. Although the Romans believed their custom was to be 'severe in the season of defeat, and most lenient after success', as Polybius has it, the Roman practice varied wildly[67]. The attitudes reflected the idea that, regardless of what they chose to do, the conquering state was not actually bound by any duty, legal or otherwise, to show mercy or observe any particular principles. They might choose to give back territory and power, as they did with Lusitani, or the conquered might technically cease to exist, absorbed into the Roman Empire. Secondly, there are some patterns of individual surrender which the modern practice now reflects: it commonly involves the laying down of arms and a gesture to denote a willingness to cease hostilities. Thirdly, the Roman attitude to surrender clearly evokes a deep sense of shame and was one of the ways by which they sought to demonstrate their cultural superiority. Curiously, this cultural superiority was also, they believed, evident in their merciful and magnanimous treatment of the vanquished – that it is a humanitarian act – even though this did not necessarily accord with their practice. Lastly, although the doctrine of *deditio* seems to imply that a surrendering party was always absorbed under Roman hegemony entire, this was not the case. The case of the surrender of Carthage after the First Punic War (and the surrender of Rome to Brennus, fictionalised as it may be) demonstrate that surrenders may not always involve entire subjugation. This is a point worth bearing in mind for the surrender practices in the next section, which discusses surrender agreements between the Byzantine Empire and its Muslim neighbours and attitudes to surrender in these two cultures.

[66] Ibid.
[67] Polybius, *The Histories*, ed. W. R. Paton et al., New ed. / revised by F.W. Walbank and Christian Habicht. ed., Loeb classical library, (Cambridge, MA: Harvard University Press, 2010). 27.8

2.5 The Post-Classical Period: The Byzantine-Arab Wars (628-1102) and the Crusades (1187-1245)

William of Tyre, a contemporaneous chronicler of the Crusades from the Latin perspective, noted that 'war is waged…less vigorously between [people] who hold the same law and faith'[68]. One might therefore expect that surrender and peace agreements were less forthcoming between the Byzantines and Arabs. There are indeed accounts of the brutality and violence of the period, but there was also room for some prudence and the actual practice did not reflect the ideological or religious requirements, or at least they allowed for flexibility.

Treaties with Muslims were indeed met with Christian reservations; the Church coined the term 'impious treaty' as a result: *impium foedus*[69]. However, the Church also established a practice that was confirmed by medieval canon law that treaties could be concluded with non-Christians. Christians could appeal to particular Bible passages, such as Deuteronomy 20:10-15:

> When though commest neere unto a citie to fight against it, though shalt offer it peace. And if it answere thee againe peaceably and open unto thee, let all the people that is found therein, bee tributaries unto thee, and serve thee. But if it will make no peace with thee, but make warre against thee, then shalt thou besiege it. And the Lord thy God shall deliver it into thine hands, and thou shalt smite all the males thereof with the edge of the swrd. Only the women, and the children, and the cattell, and all that is in the citie, even all the spoile thereof shalt though take unto thy selfe, and shalt eate the spoile of thine enemies, which the Lord thy God hath given thee[70]

It was much more this idea of a defensive, just war, left over from the Romans, that motivated Byzantine armies, rather than the idea of a holy war, upon which they did not place much

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[68] William of Tyre, *A history of deeds done beyond the sea*, ed. Emily Atwater Babcock, August C. Krey, and Societies American Council of Learned, Records of civilization, sources and studies, (New York: Columbia University Press, 1943).
[69] Karl-heinz Ziegler, "The peace treaties of the Ottoman Empire with European Christian powers," in *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One*, ed. Randall Lesaffer (Cambridge: Cambridge University Press, 2004).
[70] *The Bible*, (Edinburgh: Andro Hart, 1610). Deuteronomy 20:10-14

emphasis, despite the use of similar rhetoric[71]. War was, at least in theory, a last resort and peace was to be pursued, and was the entitlement of everyone provided they remained within "their" own borders (overlooking the Roman conquest of the lands)[72]. Specifically, if a treaty was made, it should be honoured, and while the Byzantines ought to be guarded, they should conduct themselves peacefully, both for the sake of justice and prudence[73].

Vital to the understanding of the post-classical Muslim conception of the surrender is the *jizya*, which was exchanged for Muslim protection[74]. The *jizya* was a tax paid by non-Muslims to their Muslim conquerors which allowed them to continue to inhabit the land and have their property. The primary verse concerning the *jizya* in the *Qur'ān* is verse 9:29:

> Fight those who do not believe in Allah nor the Last Day, nor hold that forbidden which has been forbidden by Allah and His Messenger, nor acknowledge the Religion of Truth, (even if they are) of the People of the Book, until they pay the Jizya with willing submission, and feel themselves subdued[75]

Some interpret the reference to those of 'the Book' to include Jews, Christians and Zoroastrians, where others interpret it as including Muslims only[76]. Nesrine Badawi, upon whose works on Sunni jurists of the classical period this section has leant considerably, notes that the general jurisprudence was that it is acceptable to engage in a peace agreement with non-Muslims provided it is not open-ended, but that al-Shāfi'ī argues that a truce can be made, even without the *jizya*, if it is prudent[77]. Once the *jizya* was paid, the non-Muslim signatories

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[71] Angeliki Laiou, "The Just War of Eastern Christians and the Holy War of the Crusades," in *The ethics of war: shared problems in different traditions*, ed. Richard Sorabji and David Rodin (Ashgate Publishing, Ltd., 2006). There appears to be some disagreement on this. Georgios Theotokis cites frequent references to Byzantian soldiers as performing a holy duty: 'heavenly support for the imperial armies is constantly repeated in every military treatise we read'. See Georgios Theotokis, *Byzantine Military Tactics in Syria and Mesopotamia in the Tenth Century: A Comparative Study* (Edinburgh University Press, 2018). p.115

[72] Laiou, "The Just War of Eastern Christians and the Holy War of the Crusades." See also Heinz-Gerhard Justenhoven, "The Concept of Just War in Christianity," in *The Concept of Just War in Judaism, Christianity and Islam*, ed. Georges Tamer and Katja Thörner (De Gruyter, 2021).

[73] Leo VI appeals to justice, but is largely concerned with prudence: Leo VI, *The Taktika of Leo VI*, trans. George T. Dennis (Dumbarton Oaks Research Library and Collection, 2014). See also Laiou, "The Just War of Eastern Christians and the Holy War of the Crusades."

[74] Catherine Holmes, "Treaties between Byzantium and the Islamic world," in *War and Peace in Ancient and Medieval History*, ed. John France and Philip de Souza (Cambridge: Cambridge University Press, 2008).

[75] Abdullah Yusuf Ali, *The Qur'an: translation*, 7th U.S. ed. ed., Qur'an translation, (Elmhurst, N.Y.: Tahrike Tarsile Qur'an, 2001). Verse 9:29

[76] Nesrine Badawi, "Sunni Islam, Part I: Classical Sources," in *Religion, War, and Ethics: A Sourcebook of Textual Traditions*, ed. Gregory M. Reichberg, Henrik Syse, and Nicole M. Hartwell (West Nyack: Cambridge University Press, 2014).

[77] Ibid. John France also notes that Islamic law forbade permanent treaties between Islam and its enemies. However, there was still room for peace agreements. See: John France, "Surrender and Capitulation in the

were considered to have signed a *dhimma* contract with the *Imām*: in return for protection and the right to continued habitation on their lands and possession of their property, they must pay the *jizya* and must abide by Muslim law[78]. Shaybani argued that no harm was done if Muslims entered into an agreement that required them to pay a tribute if they faced a threat to their existence[79]. Seizure of property and captives were both accepted practices[80]. Shaybani states that, where an *Imām* conquers territory, they are free to distribute it to the soldiers that conquered it or to make it state-owned land[81].

The payment of tribute was not only a financial transaction but a testament to the political subordination of non-Muslim powers to Islamic powers[82]. The emir al-Muzaffar ibn al-Aftas was persuaded to conclude a pact including a heavy tribute to the king of Castile in 1045CE[83]. Humiliation was extracted in other ways; high-profile prisoners of war were forced to participate in imperial triumphs involving the trampling on the neck by the Byzantine emperor[84]. However, the tribute was also a key part of the language of humiliation.

When considering the treaties between the two powers themselves, there are historical problems, noted by scholars of the period[85]. But the Treaty of Tudmir in 94AH/713CE is considered at least somewhat representative of the treaties at the time[86]. The treaty stipulated that the Christians surrendering to the Umayyad caliph could keep their lords, possessions and religion in exchange for military intelligence, a ban on harbouring fugitives and a *per capita* tribute[87]. In other cases, such as Armenia and Cyprus, tribute was paid without a Muslim

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Middle East in the Age of the Crusades," in *How fighting ends: a history of surrender*, ed. Holger Afflerbach and Hew Strachan (Oxford Scholarship Online, 2012).

[78] Badawi, "Sunni Islam, Part I: Classical Sources."

[79] Majid Khadduri, *The Islamic Law of Nations: Shaybani's Siyar* (Johns Hopkins University Press, 2001).

[80] Badawi, "Sunni Islam, Part I: Classical Sources."

[81] Khadduri, *The Islamic Law of Nations: Shaybani's Siyar*.

[82] Michael Lower, "Tribute, Islamic Law, and Diplomacy: the Legal Background to the Tunis Crusade of 1270," in *Papacy, Crusade, and Christian-Muslim Relations*, ed. Jessalynn L. Bird (Amsterdam University Press, 2018). See also Nadia Maria el Cheikh, *Byzantium viewed by the Arabs* (Cambridge, MA: Harvard University Press, 2004). for the use of *jizya* to humiliate the Byzantines in poetry after the emperor Nicephorus was defeated after breaking a truce, p.97

[83] Nicholas Drocourt, "Christian-Muslim diplomatic relations: An overview of the main sources and themes of encounter (600-1000)," History of Christian-Muslim Relations (2010).

[84] Catherine Holmes, "Basil II the Bulgar-slayer and the Blinding of 15,000 Bulgarians in 1014: Mutilation and Prisoners of War in the Middle Ages," in *How fighting ends: a history of surrender*, ed. Holger Afflerbach and Hew Strachan (Oxford Scholarship Online, 2012).

[85] See, for example, Walter E. Kaegi, "Confronting Islam: Emperors Versus Caliphs (641–c.850)," in *The Cambridge History of the Byzantine Empire c.500–1492*, ed. Jonathan Shepard (Cambridge: Cambridge University Press, 2019); Milka Levy-Rubin, *Non-Muslims in the Early Islamic Empire: From Surrender to Coexistence*, Cambridge studies in Islamic civilization, (New York: Cambridge University Press, 2011).

[86] Holmes, "Treaties between Byzantium and the Islamic world."

[87] Ibid. Barbara H. Rosenwein, *Reading the Middle Ages: sources from Europe, Byzantium, and the Islamic world* (University of Toronto Press, 2013).

garrison[88]. When extra dominance needed to be demonstrated, it was also expressed this way. Harun imposed an annual tribute of 100,000 dinars by the Byzantines in 782CE after defeating them at the Bosporus, and kept the many prisoners of war taken. Harun also imposed a poll tax on the emperor Nikephoros I and his son, after capturing Heraclea-Cybistra and Tyana in 806CE with terms of peace[89].

The Truce of Safar was agreed between Byzantium and the emirate of Aleppo in 359AH/969CE. After Byzantine armies had taken nearby Antioch and besieged Aleppo, the Hamdanid secretary and Byzantine commander reached an agreement that stipulated that the inhabitants (including property-owning Christians) had to pay an annual tribute. The agreement itself is only known through a 7th-century AH/13th-century CE Arab writer, Kamal al-Din, rather than through a primary source, but I will defer to others on the trustworthiness of this source, who observe that it is sufficiently similar to other agreements of the period[90]. The Byzantine emperor Constantine VII (905 – 959CE) also referenced the practice of tribute, describing a 'convention of peace' made in Syria 'on the basis of an agreed annual tribute of gold, prisoners and horses[91]. It should be noted that Aleppo was neither put under the jurisdiction of a Byzantine governor nor occupied by Byzantine troops, despite often failing to pay its tribute, but it was nonetheless typical of what Byzantines expected of the cities they conquered[92]. The paying of tribute, then, was central to expressions of surrender for both sides.

The terms of the agreement are also particularly interesting, given that the definition of surrender must be sensitive to the ways control, or sovereignty, is expressed. The people of Aleppo were required to prevent Muslim armies passing through the territory, supply Byzantine armies where required, to fight against non-Muslim armies (but were not obliged to fight Muslims) and to maintain the fortress[93]. They were obliged to try and prevent Muslim armies from entering the area but the emir of Aleppo was left in place, retaining some autonomy; the truce was, in Jonathan Shepard's words, a 'blueprint for coexistence', though partially

[88] Holmes, "Treaties between Byzantium and the Islamic world."
[89] Kaegi, "Confronting Islam: Emperors Versus Caliphs (641–c.850)."
[90] Holmes, "Treaties between Byzantium and the Islamic world."; Drocourt, "Christian-Muslim diplomatic relations: An overview of the main sources and themes of encounter (600-1000)."
[91] Constantine Porphyrogenitus, *De administrando imperio*, trans. R.J.H. Jenkins, ed. G.Y. Moravcsik (Washington D.C.: Dumbarton Oaks, 1985). p.87 From the *Chronicle of Theophanes*
[92] Holmes, "Treaties between Byzantium and the Islamic world."
[93] Ibid.

favouring Byzantium[94]. The Byzantine emperor could also choose future emirs and *qadis* beyond the secretary and his immediate successor[95]. Aleppo itself became a Byzantine protectorate and subject to its control in external matters, though able to maintain control over its internal administration[96]. Muslim and Christian converts were to be protected[97]. However, the geographer, Ibn Hawqal, writing about 370AH/980CE, did express concern that the Muslims living in northern Syria, forced to pay a heavy tax, would not resist converting to Christianity under Byzantine rule[98].

Turning to individual surrender, routines emerged between the Byzantine and Arab worlds about the exchanges and the practice of ransom of prisoners were developed[99]. The exchange of prisoners, when the balance of power between Muslims and Christians was roughly equal, began to become a feature of diplomatic activity between the two peoples around the ninth century CE[100]. Indeed, Christian religious orders developed in Iberia that were dedicated to securing and raising funds for the release of Byzantine prisoners of war, and there was equivalent infrastructure in the western Mediterranean Islamic world[101].

Byzantium, in contrast to western Christians, aimed for limited objectives and had rules about the treatment of civilians and prisoners of war[102]. They could be sold but not killed[103]. Leo VI's injunction to never refuse a messenger testified to the importance of maintaining diplomatic relations[104]. However, it is also noteworthy that a common Arab stereotype of the Byzantines was that of being perfidious[105].

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[94] Jonathan Shepard, "Byzantium expanding, 944–1025," in *The New Cambridge Medieval History: Volume 3: c.900–c.1024*, ed. Timothy Reuter, The New Cambridge Medieval History (Cambridge: Cambridge University Press, 2000).
[95] Holmes, "Treaties between Byzantium and the Islamic world."
[96] Ibid.
[97] Ibid.
[98] R. Humphreys, "Syria," in *The New Cambridge History of Islam: Volume 1: The Formation of the Islamic World, Sixth to Eleventh Centuries*, ed. Chase F. Robinson, The New Cambridge History of Islam (Cambridge: Cambridge University Press, 2010).
[99] John France, "Siege conventions in Western Europe and the Latin East," in *War and Peace in Ancient and Medieval History*, ed. John France and Philip de Souza (Cambridge: Cambridge University Press, 2008).; Holmes, "Treaties between Byzantium and the Islamic world."
[100] Yvonne Friedman, *Encounter between Enemies: Captivity and Ransom in the Latin Kingdom of Jerusalem* (Leiden: Brill, 2002).
[101] Holmes, "Basil II the Bulgar-slayer and the Blinding of 15,000 Bulgarians in 1014: Mutilation and Prisoners of War in the Middle Ages."
[102] Laiou, "The Just War of Eastern Christians and the Holy War of the Crusades."
[103] See, for example, Leo VI, *The Taktika of Leo VI*.
[104] Ibid.
[105] Cheikh, *Byzantium viewed by the Arabs*.

There are also examples of extraordinary post-conflict brutality by the Byzantines. One such example, though not against Arabs, is the aftermath of the battle of Kleidion in which the Byzantine emperor Basil II systematically blinded Bulgarian prisoners of war[106]. Although the numbers are likely exaggerated, it does seem to indicate a policy of increasing persuasive power, and imperial power specifically, through the use of fear[107]. This was a routine punishment within Byzantium for those rebelling against the Byzantine emperor. In an imperial around the tenth century, the Byzantine emperor trampled on the neck of a high-profile Muslim prisoner[108]. However, the use of violence against prisoners was rare and it was far more common to ransom prisoners or else absorb them into the imperial structures[109].

A more representative example, from a later point, is the surrender of two knights in the battle of Ramla in 495AH/1102CE, who, after inflicting 'extraordinary slaughter' on Egyptians, were offered terms by the Egyptians themselves, which were accepted[110]. High-status soldiers were, in general, able to make formal surrenders in exchange for a ransom and while common soldiers were vulnerable to the whims of their enemies, they were largely able to flee[111]. Generally speaking, the practice between both the Byzantines and the Arabs was that each would pressure the other for good treatment of their imprisoned nationals, and hold their own prisoners of war as ransom[112].

In the Sunni jurisprudence, there was a consensus among classical jurists that men, women and children alike could be captured although women and children could not be harmed, and they could be excused from paying the *jizya*[113]. There was more general debate about whether men could be killed after capture, with some arguing that only dangerous captives could be killed[114]. Generally, it is accepted that Islam aimed to abolish slavery by outlawing justifications for it, but it was permissible after armed conflict[115]. Debate instead focussed on their treatment. Notably, once the fighting between Muslim rebels and their previous leaders ended, Muslim

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[106] Holmes, "Basil II the Bulgar-slayer and the Blinding of 15,000 Bulgarians in 1014: Mutilation and Prisoners of War in the Middle Ages."
[107] Ibid.
[108] Ibid.
[109] Ibid.
[110] France, "Surrender and Capitulation in the Middle East in the Age of the Crusades." AA IX: 6 and see the comments of Friedman, *Encounter between Enemies: Captivity and Ransom in the Latin Kingdom of Jerusalem*., p.106.
[111] France, "Surrender and Capitulation in the Middle East in the Age of the Crusades."
[112] Friedman, *Encounter between Enemies: Captivity and Ransom in the Latin Kingdom of Jerusalem*.
[113] Badawi, "Sunni Islam, Part I: Classical Sources."
[114] Ibid.
[115] Ibid.

rebels could not be killed and could not be taken as captives[116]. The *fida',* the exchange of prisoners, was considered an honourable pretext for peace treaties initiated by Muslim powers and an acceptable excuse to suspend *jihad*[117]. The redemption of Muslim prisoners was highly important at the time, evidenced not only by the frequency of such redemption but also the diligence with which the exchanges of prisoners were recorded.

Ṣalāḥ ad-Dīn (532-589AH/1137–1193CE), the founder of the Ayyubid dynasty, had a reputation as a particularly humanitarian leader[118]. In 583AH/1187CE Ṣalāḥ ad-Dīn defeated the Crusader army at the battle of Hattin. Guy de Lusignan was taken prisoner and was ransomed, but Reynald of Châtilllon, deeply hated by Muslims thanks to the role he had played in raids, was executed by Ṣalāḥ ad-Dīn himself[119]. The common soldiery was largely slain or made captive[120].

The terms of the surrender of Jerusalem by Balian of Ibelin to Ṣalāḥ ad-Dīn in 583AH/1187CE seem to follow the familiar paths, but with some changes. Balian demanded that the Franks be given quarter, threatening to kill the several thousand Muslim prisoners in the city and to destroy all the Muslim shrines, including the al-Aqsa Mosque and Dome of the Rock[121]. Those who could pay the ransom – ten dinars for men, five for women and one for children – were allowed a forty day grace period. Those who could not pay could be taken as slaves. While the terms of the surrender did not guarantee the protection of church property, Ṣalāḥ ad-Dīn looked the other way, and had also given away most of the ransom money[122]. Other arrangements were reciprocal: Richard I of England (1189-99) executed 2,600 hostages captured after the surrender of Acre in 587AH/1191CE leading Ṣalāḥ ad-Dīn to execute Frankish prisoners. Then when Richard I defeated Ṣalāḥ ad-Dīn at the battle of Arsuf in 1191, both sides realised that the conflict between the two would be long and that stopping the executions would be mutually beneficial[123].

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[116] Ibid.
[117] Friedman, *Encounter between Enemies: Captivity and Ransom in the Latin Kingdom of Jerusalem*.
[118] France, "Surrender and Capitulation in the Middle East in the Age of the Crusades."
[119] Ibid.
[120] Ibid. Referencing Bahā' al-Dīn Yūsuf ibn Rāfi' Ibn Shaddād, *The rare and excellent history of Saladin, or, al-Nawādir al-Sulṭāniyya wa'l-Maḥāsin al-Yūsufiyya*, ed. D. S. Richards, Crusade texts in translation, (Aldershot: Ashgate, 2001). pp.74–5
[121] Paul M. Cobb, *The race for paradise: an Islamic history of the crusades* (Oxford: Oxford University Press, 2014). Marshall W. Baldwin, "The Decline and Fall of Jerusalem, 1174-1189," in *A History of the Crusades, Volume 1: The First Hundred Years*, ed. Marshall W. Baldwin and Kenneth Meyer Setton (University of Pennsylvania Press, 2016).
[122] Cobb, *The race for paradise: an Islamic history of the crusades*.
[123] France, "Surrender and Capitulation in the Middle East in the Age of the Crusades."

It is worth finishing this section with the al-Azraq treaty of 642AH/1245CE as the only surviving bilingual Christian-Islamic surrender treaty[124] in which Al-Azraq surrendered to King James' crusade. The Arabic and Castilian versions of the treaty are not direct translations, and in fact demonstrate quite different attitudes to the same instance. King James believed it to demonstrate the victory of the Valencian crusade the making of al-Azraq (Abii 'Abd Allah Muhammad ibn Hudhayl) into a permanent vassal, though the latter considered it only a temporary truce; the Arabic text does not mention vassalage, allegiance or obedience[125]. The peace in the Arabic text also lacks the permanent quality of the Castilian text. Nonetheless, both texts observe the handing over of the castles of Pop and Tárbena, as well as the payment of revenue from some further conquests; James would receive half of the revenue from al-Azraq's conquests over the following three years.

The Byzantine-Arab wars track the themes of surrender that have so far emerged. Both sides made heavy use of tribute as a language of victory, to express humiliation or not, and both sides absorbed surrendered states or cities into their empires in a variety of ways. The treatment of prisoners of war also cannot have been said to be regularised, although there was a tendency to hold them for ransom. Both sides spoke of the morality – or humanitarianism – of not killing certain types of prisoners of war but both also executed male prisoners of war. There are also hints at "refusal to surrender" attitude: Constantine XI refused to surrender despite being heavily outnumbered. Another theme is that the victor chose to exert control by a more subtle way than direct governance. To be sure, the installation of officials by the victor did feature, but the victory was often expressed through the payment of a tribute. Another key point is that notwithstanding religious differences there was plenty of room to pursue peace. In spite of the expected religious enmity, surrenders were not the picture of the absolute subjugation that Keckskemetti's definition would predict; they were much more limited, allowing for the continuation of local government and military arrangements. To continue with a theme emerging from Ancient Rome, both civilizations sought to demonstrate their superiority in their benevolence in victory.

Patterns had developed in the treatment of prisoners of war during the period but there was still an element of uncertainty, which persisted further in the following period. Crucially, Holmes

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[124] Robert Burns and Paul Chevedden, "A Unique Bilingual Surrender Treaty from Muslim-Crusader Spain," *Historian* 62, no. 3 (2000)
[125] Robert Burns and Paul Chevedden, "Al-Azraq's Surrender Treaty with Jaume I and Prince Alfonso in 1245: Arabic Text and Valencian Context," *Islam-zeitschrift Fur Geschichte Und Kultur Des Islamischen Orients* 66, 1 (01/01 1989)

notes that 'the use of mutilation and violence against prisoners was, in fact, never so frequent or universal as to act as a bar to surrender'[126]. Both cultures had ethical frameworks on post-war relations, but in practice these were not the primary determinant of what happened, with the possible exception of the permanency of peace.

2.6 The Early Modern Period: The Ottoman Empire (1453-1700) and Hugo Grotius

Insofar as historical narratives on the Byzantine Empire can be marked as ended by a single event, a common one is the capture of Constantinople in 857AH/1453CE. Beginning where the previous section left off allows for a comparison within cultures but across time periods, a thorough tracing of the themes of surrender, as well as an understanding of surrender characterising the early modern period. The terms offered by Mehmed II in 857/1453 to the Byzantine emperor Constantine XI shortly before the fall of Constantinople to the Ottoman Empire followed the familiar pattern as those so far discussed: the Byzantines could surrender the city and remain in Constantinople and pay tribute, or leave[127]. The Ottoman Empire under Mehmed II had besieged the city with naval support and large cannons which the walls of Constantinople, despite being in good condition, were not able to withstand. The defenders of the city were vastly outnumbered; estimates put the numbers at 80,000 Ottomans against around 5,000 Byzantines[128]. Despite this, Constantine XI refused to surrender, perhaps due to the reinforcements arriving from revolts in Asia Minor, which gave Mehmed the right under Muslim law to plunder the city after the conquest, which is what transpired[129].

The expansion of the Ottoman Empire into Europe was accompanied by much diplomatic activity. A number of treaties were signed between the Ottoman Empire with the Republic of Venice which proclaim peace and friendship between the two parties[130]. Ziegler reports that

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[126] Holmes, "Basil II the Bulgar-slayer and the Blinding of 15,000 Bulgarians in 1014: Mutilation and Prisoners of War in the Middle Ages." p.94
[127] Timothy E. Gregory, *A history of Byzantium*, Second edition. ed., Blackwell history of the ancient world, (Malden, Massachusetts: Wiley-Blackwell, 2010).
[128] Ibid.
[129] Ibid.
[130] Ziegler, "The peace treaties of the Ottoman Empire with European Christian powers." The treaties are from 1446 published and commented on by Franz Babinger and Franz Dölger, *Mehmed's II. frühester Staatsvertrag (1446) Mehmed II Orientalia Christiana Periodica. Vol. 15.1949,N. 3-4* (Pont. Institutum orientalium studiorum, 1949, 1949).

genuine peace treaties would have been rare; if the Christians were not defeated or did not become an Ottoman vassal they could only be given a truce or armistice[131]. As such, for example, there is currently no peace treaty reported between the Ottomans and Hungary for the Middle Ages[132].

In 923AH/1517CE the Ottoman army under Selim I defeated the Mamlūk army at Raydānyya, just north of Cairo. The victorious Ottoman empire installed the former Mamlūk viceroy of Aleppo as the first Ottoman governor of Egypt, with Egypt becoming a province of the Ottoman Empire[133]. In both Egypt and Damascus (which Selim I had also recently taken), the Ottomans began the process of implementing Ottoman rule in the region. Mamlūk emirs who defected to Selīm were appointed as governors. In the case of Egypt, this was Khāyrbak who, despite the revolt of his compatriot in Damascus against Selim, remained loyal to the Sultan. After the death of Khāyrbak, he was replaced as governor of Cairo by career officers from the Ottoman military itself and it would have Ottoman governors for the entire three centuries of Ottoman rule[134]. The exercise of Ottoman rule varied, as its agricultural lands were not surveyed and its revenue, large as it was, was farmed out[135]. Judges from the Ottoman capital were appointed as legal authorities in the former Mamlūk territories and the Hanafī interpretation of Islamic law was favoured, rather than the Shāfi'ī interpretation that the Mamlūks had patronised.

The practice of tribute payments continued. The Truce of Adrianople in 1547 was concluded between Sultan Suleiman I, the son of Selim I, and Emperor Charles V with his brother Ferdinand I of Hungary. The time limit was five years and it was agreed that 30,000 florins would be brought to Constantinople each year[136]. The Treaty of Zsitvatorok in 1606 created a 20-year peace and while the requirement of payment was lifted, it was agreed that the 'Roman' emperor would pay Sultan Ahmet I a one-off 'gift of honour' of 200,000 florins[137].

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[131] Ziegler, "The peace treaties of the Ottoman Empire with European Christian powers."
[132] Ibid.
[133] Amalia Levanoni, "The Mamlūks in Egypt and Syria: the Turkish Mamlūk sultanate (648–784/1250–1382) and the Circassian Mamlūk sultanate (784–923/1382–1517)," in *The New Cambridge History of Islam: Volume 2: The Western Islamic World, Eleventh to Eighteenth Centuries*, ed. Maribel Fierro, The New Cambridge History of Islam (Cambridge: Cambridge University Press, 2010).
[134] Bruce Masters, "Egypt and Syria under the Ottomans," in *The New Cambridge History of Islam: Volume 2: The Western Islamic World, Eleventh to Eighteenth Centuries*, ed. Maribel Fierro, The New Cambridge History of Islam (Cambridge: Cambridge University Press, 2010).
[135] Ibid.
[136] Ziegler, "The peace treaties of the Ottoman Empire with European Christian powers."
[137] Ibid.

Another important treaty was the Peace of Karlowitz, 26 January 1699CE/111AH, signed between Sultan Mustafa II on the one hand, and the diplomats of Emperor Leopold I and King Augustus II of Poland, and the Republic of Venice, on the other. The Treaty of Karlowitz was arguably the first treaty signed by an Ottoman Empire not in a position of strength[138]. Thus, it was negotiated by civil servants where before the Ottomans had been victorious on the battlefield and sent military representatives to dictate terms[139]. The negotiations of the Treaty were preceded by the failed siege of Vienna in in 1094AH/1683CE and the defeat at the Battle of Zenta in 1109AH/1697CE in which between 25,000 and 30,000 Ottoman soldiers were killed and the Sultan organised elaborate scenes of humiliation in Constantinople[140]. Notably, while the Treaty between Leopold I and the Sultan follow the familiar patterns, in that the peace was stipulated for 25 years, the one between Sultan and King Augustus states that 'the peace and reconciliation concluded…shall, by God's mercy, remain *perpetual*, stable, firm and inviolable'[141]. Indeed, when during the negotiations of a later treaty it was suggested by the Holy Roman Emperor that Poland should be included, the sultan's diplomats replied that this would be unnecessary as the two nations already enjoyed a constant peace[142]. The Sultan also signed a thirty-year peace with Sultan Mustafa II, in the Treaty of Constantinople in 1112AH/1700CE, which provided for the 'prolongation of the truce'[143].

As Mehmet Sinan Birdal observed, 'the signing of a peace treaty with a Christian state and the adoption of an international rule represented a radical break with imperial unilateralism. The ensuing treaties, which were negotiated for the first time by Ottoman diplomats of scribal rather than military origin, set clearly demarcated political boundaries and imposed respect for territorial integrity'[144].

The peace agreements made by the Ottoman Empire continue to reflect the themes of surrender outlined in this chapter, those of control being expressed through more subtle means, religious

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[138] Daniel O'Quinn, *Engaging the Ottoman Empire: Vexed Mediations, 1690-1815*, Material Texts, (Philadelphia: University of Pennsylvania Press, 2018).
[139] Ibid.
[140] Ibid.
[141] Ziegler, "The peace treaties of the Ottoman Empire with European Christian powers." Article 11, taken from: Gale Thomson, *A general collection of treatys of peace and commerce, manifestos, declarations of war, and other publick papers, ... Vol.IV. ... To which is subjoin'd, a compleat list of all the treatys and publick papers in these 4 volumes*, Eighteenth Century Collections Online, (London: Printed for J. J. and P. Knapton, J. Darby, D. Midwinter and A. Ward, A. Bettesworth and C. Hitch and 7 others in London, 1732). p.307. Emphasis added.
[142] Ziegler, "The peace treaties of the Ottoman Empire with European Christian powers."
[143] Ibid.
[144] O'Quinn, *Engaging the Ottoman Empire: Vexed Mediations, 1690-1815*.

frameworks moderated by pragmatism (in the case of the Karlowitz, which included the possibility of perpetual peace).

The period also saw Hugo Grotius, a key figure in the development of international law in Europe, pen his thoughts on justice in war and peace, which included some pertaining to justice in surrender. He drew his insights from Christian scriptures, but also Ancient Geek and Roman thought, which prompted claims that he secularised international law, though his theology played a central role in his thought[145]. He agrees with Aristotle that 'It is much better to part with some of our Substance to those that are stronger, than being overcome to perish with all we have', demonstrating the history of the "duty to surrender" argument and its place in just war theory, though in contrast to this thesis arises here from superior military strength[146].

Grotius' work also highlights the acceptance of practices detailed throughout the chapter. He acknowledges the practice of tributes: 'The imposing of Tributes is oftentimes not so much to reimburse the Charges of a War as for the Security both of the Conqueror and Conquered, for the future'[147]. And he talks about the treatment of individuals after they have surrendered. He states that those who have surrendered do not have the right to postliminy because agreements with the enemy are valid in international law[148]. Likewise, 'Postliminy in Peace (unless it be otherwise stipulated) belongs to those who were not overcome in War by force of Arms'[149]. Of course, this is assuming that the terms of peace do not reflect the return of what was taken.

He argued that the victor had full rights over prisoners of war, but also argued that moderation was beneficial to the victor[150]. The conditions under which soldiers surrendered should be honoured and those that sought fair terms should have their surrender accepted[151]. Perhaps the most important illustration of the change that has taken place between the current period and Grotius' for the purpose of surrender is that he stated that surrender gave sovereign authority to the captor[152]. He is also keen to advocate for moderation, detailing the praise that had been directed to classical figures who showed moderation. But this last thought highlights the link

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[145] Anthony F. Lang Jr., "Hugo Grotius (1583-1645)," in *The Ethics of War: Classic and Contemporary Readings*, ed. Gregory M. Reichberg, Henrik Syse, and Endre Begby (Oxford: Blackwell Publishing, 2006).
[146] Hugo Grotius and Richard Tuck, *The Rights of War and Peace* (Indianapolis, IN, UNITED STATES: Liberty Fund, Incorporated, 2005). Nk3, ChXXV, IV. (p.1641)
[147] Ibid. BkIII, ChXV, VI (p.1503)
[148] Ibid. Bk 3, Ch IX, VIII (p.1390)
[149] Ibid. Bk 3, Ch IX, IV (pp.1384-5)
[150] John Childs, "Surrender and the Laws of War in Western Europe, c. 1660–1783," in *How fighting ends: a history of surrender*, ed. Holger Afflerbach and Hew Strachan (Oxford Scholarship Online, 2012).
[151] Ibid.
[152] Ibid.

between conceptions of sovereignty and justice in surrender. This link points to the dangers of endorsing conquest and imperialism (which Grotius has also been criticised for) and, potentially, thereby, the importance of the empires and popular sovereignty of the long nineteenth century for a duty to surrender.

2.7 The Long Nineteenth Century: the French Empire and the Campaigns of Napoleon Bonaparte

> One of the distinguishing features of these [long nineteenth century] conflicts is the role played by negotiated surrender in hostilities at every level: at that of diplomacy; of the strategic theatre; of operational theatres; and at that of the direct, frontline engagement. Bellicose rhetoric rapidly became the preserve of ideologues, as even serving politicians came to accept surrender in practice; it was a reality for all the participants[153]

The association of the French Revolution with stress on the rights of individual humans and the idea that the state represented the nation is not an uncommon one. Some argue that the former in particular led to the pattern of mass surrender[154]. Others argue that the French Revolutionary Wars mark a watershed moment in practices around treatment of prisoners of war and that, whereas the practice in 1790 would be alien to modern eyes, the one in 1900 would be recognisable[155].

But where the French Revolution gave, in stating in 1792 that (in the words of the National Assembly), 'prisoners of war are safeguarded by the nation and under the special protection of the law', from various forms of violence, it also it took away; Robespierre said that those resisted France's war of liberation, a cause in the best interests of all humanity, should be attacked as assassins and rebel brigands[156]. There is further reason to doubt the association

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[153] Michael Broers, "'Civilized, Rational Behaviour'? The Concept and Practice of Surrender in the Revolutionary and Napoleonic Wars, 1792–1815," in *How fighting ends: a history of surrender*, ed. Holger Afflerbach and Hew Strachan (Oxford Scholarship Online, 2012). p.230 See: Grotius and Tuck, *The Rights of War and Peace*. BkIII, ChXV, I

[154] Strachan, "Surrender in Modern Warfare Since the French Revolution."

[155] Stephen Neff, "Prisoners of War in International Law: The Nineteenth Century," in *Prisoners in war*, ed. Sibylle Scheipers (Oxford: Oxford University Press, 2010).

[156] Geoffrey Best, Humanity in Warfare: The Modern History of the International Law of Armed Conflicts (London, 1980), p.78, David Avrom Bell, *The first total war: Napoleon's Europe and the birth of modern*

between individual rights and the French Revolution as it is not so characterised by cosmopolitanism and human rights as is sometimes suggested. Inhabitants of the French colony of Haiti, for example, did not receive nearly the same level of respect as that given to white, property owning men in the Rights of Man[157]. So too with Algeria. Aoife O'Donoghue uses the term "Janusian", after the two-faced god, to describe the European attitude to such concepts including citizenship, equality before the law, human rights and popular sovereignty, in that the European powers, and France among them, espoused ideals towards their own citizenry but did not give the same rights to those in the periphery of its empire, or recognise these ideals in their populations[158]. Chakrabarty additionally notes that: 'The European colonizer of the nineteenth century both preached Enlightenment humanism at the colonized and at the same time denied it in practice'[159]. This is particularly true of the imperialist exercises of Napoleon Bonaparte, who once remarked that: 'At 5 o'clock, we were masters of the town [of Jaffa] which, for twenty-four hours, was given over to pillaging and all the horrors of war, which have never seemed so hideous to me...troops were put to the sword…part of the civilian population was massacred'[160].

Napoleon achieved the surrender of Toussaint Louverture in Haiti in 1802 partly by placing a significant army in Saint Domingue but also partly by consolidating the alienation of plantation workers from Toussaint's governance of Haiti[161]. However, it must be noted there is also reason to believe that his generals were surprised when it became clear that Napoleon wanted to reimpose slavery, and there is dispute about when he decided to reimpose it[162]. Louverture was to give up his military and political office and retire to a plantation[163]. The surrender did precede disarmament of the rural population. However, many chose to seek refuge in the mountains than accept the surrender[164]. Cruelty featured on both sides and the French 'became almost genocidal' in the final stages[165].

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warfare (London: Bloomsbury, 2008)., pp.143–4 Also see Strachan, "Surrender in Modern Warfare Since the French Revolution."

[157] Michel-Rolph Trouillot, *An unthinkable history: The Haitian Revolution as a non-event* (Routledge, 2012).

[158] Aoife O'Donoghue, *On Tyranny and the Global Legal Order*, Global Law Series, (Cambridge: Cambridge University Press, 2021).

[159] Dipesh Chakrabarty, *Provincializing europe: postcolonial thought and historical difference*, Princeton Studies in Culture/Power/History, (Princeton, NJ: Princeton University Press, 2009). p.4

[160] Bruno Colson and Gregory Elliott, *Napoleon: on war* (New York: Oxford University Press, 2015).

[161] David Geggus, *The Haitian Revolution: A Documentary History* (Indianapolis: Hackett Publishing Company, Incorporated, 2014).

[162] Ibid.

[163] Johnhenry Gonzalez, *Maroon Nation*, A History of Revolutionary Haiti, (Yale University Press, 2019).

[164] Ibid.

[165] Geggus, *The Haitian Revolution: A Documentary History*. p.169

Post-war treatment of soldiers has already played an important role in the analysis of surrender, so it would make sense to continue it here. The reconceptualization of the state, again in theory, led to the decreased acceptability of press-ganging prisoners of war into fighting for the opposite side. As the soldier-citizen surrendered, instead they would be held in camps or gaols and given rights[166]. The change was not immediate, and soldiers who surrendered still might be killed in the Napoleonic wars. In the later part of the long nineteenth century, however, the Lieber Code inspired fifteen states meeting in Brussels in 1874 to consider prisoners of war as lawful enemies, changes that were eventually incorporated into the Hague Conventions of 1899 and 1907[167].

As well as the "inducement to switch sides" method of dealing with prisoners of war, the other common methods, being exchange and the parole system, by which prisoners were allowed to go free provided they gave their word that they would not return to the conflict, were also replaced by the practice of holding prisoners of war in large numbers. International law developed alongside, not only with the Lieber Code, above, but also with the work of Swiss lawyer Kaspar Bluntschli[168].

In spite of the total nature of the war, the political rhetoric of the French Revolution acknowledged the rights of the soldier by equating them with citizens[169]. Even while there were strong aspirations towards military discipline, the relationship in between the state and the individual became more contractual and more flexible[170]. Nonetheless, 'the pattern of mass surrender, and whether it triggered a national collapse, goes to the heart of the relationship between the individual and the modern state'[171], even in the face of the 'total war' of the Napoleonic wars.

The 1801 *Articles of Capitulation* or *Capitulation of Alexandria* contains many of these themes. They were the negotiated terms that surrendered Alexandria, then occupied by the French, then besieged by combined forces of the Ottomans and British, bringing to an end Napoleon's wars in Egypt[172]. The treaty itself restored the *status quo ante bellum* and Ottoman sovereignty over

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[166] Strachan, "Surrender in Modern Warfare Since the French Revolution."
[167] Ibid.
[168] Neff, "Prisoners of War in International Law: The Nineteenth Century."
[169] Strachan, "Surrender in Modern Warfare Since the French Revolution."
[170] Ibid.
[171] Ibid. p.213
[172] Available in Robert T. Wilson, *History of the British Expedition to Egypt: To which is Subjoined, a Sketch of the Present State of that Country and Its Means of Defence: Illustrated with Maps, and a Portrait of Sir Ralph Abercromby*, vol. 1 (London: Sold by T. Egerton, 1803). pp.346-53

Egypt. Article 12 stated that the French troops would be allowed passage to France and the food required would be at the expense of the allied powers (the Ottomans and British). The text of the 1802 Treaty of Paris declared that the 'hostilities shall for the future, and for ever, cease between the two states'[173]. Prisoners of war were to be freed without ransom, though the *Capitulation* stipulated that hostages would be exchanged to guarantee the execution of the surrender. Under the *Capitulation*, they were allowed to keep their property and personal effects, and even their arms on their journey back to a French port. The text of the *Capitulation* was assented to by the Ottomans in the 1802 Treaty of Paris. To continue the imperialism theme, it was also a treaty with European powers on both sides and, characteristically, did not consider the wishes of the occupied nation. In Article 16, France proposed that the historical documents and collections of Egypt should be carried away by the French, and Britain insisted that it would go to Britain. Indeed, it was this treaty which decided that the Rosetta Stone would be taken by Britain.

The 1809 Treaty of Schönbrunn laid out the terms of Austria's surrender to Napoleonic France after the defeat at Wagram. Under it, large parts of the territory of the Austrian Empire was ceded. Austria also agreed to limit the size of its army to 150,000. The victory was so extensive that Napoleon contemplated demanding the abdication of the Austrian emperor and its separation into the three components of Austria, Bohemia and Hungary. Napoleon also annexed Rome, leading to his excommunication by the Catholic Pope, in turn leading to Napoleon arresting the Pope[174]. The text of the treaty does envisage 'peace and friendship…for ever'[175]. Article 13 stipulated that prisoners of war taken by France should be released if not already done so.

The battlefield formations also continued to facilitate only collective surrender and not individual surrender. Whole garrisons might surrender or a battalion might surrender, but a column, in close formation with their officer close by, did not lend itself to an individual surrendering unless within a battle[176]. Napoleon himself suggested that surrender in open countryside was never acceptable: 'in open countryside there is only one way for brave folk to

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[173] Article 1, *Definitive Treaty of Peace between the French Republic and the Sublime Ottoman Porte*, (25 June 1802).
[174] Mark Jarrett, *The Congress of Vienna and Its Legacy: War and Great Power Diplomacy after Napoleon*, vol. 80 (London: London: I. B. Tauris & Company, Limited, 2013).
[175] Article 1, *The Treaty of Schönbrunn*, (14 October 1809).
[176] Strachan, "Surrender in Modern Warfare Since the French Revolution."

surrender and that is…in the middle of the melee and under the blows of musket butts'[177]. Though, his attitude was the same towards surrender in garrisons: 'a capitulation must stipulate bad terms for the garrison. There is always a negative presumption against a garrison that leaves a place on a golden bridge'[178].

Despite this, he was forced to seek surrender on several occasions in addition to the capitulation in Alexandria, above. In 1812, after the battle of Borodino, Napoleon's *Grand Armée* was in a deserted and burning Moscow and the difficulties in gathering supplies forced Napoleon to attempt to open negotiations with Tsar Alexander I[179]. Russian casualties after Borodino were around 45,000 and French were around 30,000. Indeed, both Kutuzov (the general of the Russian army) and Napoleon claimed victory after the battle, though Napoleon complained to those close to him that despite, he felt, having won every battle against the Russians, that seemed to be meaningless[180]. Napoleon had proposed peace obliquely, ostensibly to avoid destruction and death, though Napoleon's position in Moscow was desperate[181]. He waited for a month without a response and was forced to retreat. The *Grand Armée's* numbers decreased from the 600,000 that had entered Russia to the 40,000 who returned[182]. According to Russian records, around 170,000 French soldiers were captured[183]. And in total, around 500,000 fewer returned from Russia than had entered it[184].

The Napoleonic Wars culminated in a series of surrenders, both France's and Napoleon's, while the armies of the Sixth Coalition and Napoleon manoeuvred against each other on French territory. Napoleon having delayed for too long to accept the Frankfurt proposals, which would have reduced France only to its 1801 borders, the Allies (the Austrian Empire, the Kingdom of Prussia, the Russian Empire and the United Kingdom), in the March 1814 Congress of Châtillon, offered Napoleon the 1792 boundaries of France in return for peace. This amounted to a reduction of French territory and he refused. Before Napoleon could reach the capital, Paris had been surrendered in the Convention of Saint-Cloud. It stipulated that the French

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[177] Colson and Elliott, *Napoleon: on war*. pp.114-5
[178] Ibid. p.274
[179] Jarrett, *The Congress of Vienna and Its Legacy: War and Great Power Diplomacy after Napoleon*, 80.
[180] Owen Connelly, *The wars of the French Revolution and Napoleon, 1792-1815*, Warfare and history, (Milton Park, Abingdon, Oxfordshire, New York, N.Y.: Routledge, 2006).
[181] Ibid.
[182] Jarrett, *The Congress of Vienna and Its Legacy: War and Great Power Diplomacy after Napoleon*, 80.
[183] Connelly, *The wars of the French Revolution and Napoleon, 1792-1815*.
[184] Ibid.

Army would march beyond the Loire river with all its arms. The injured and those that could not be moved could remain under the protection of Prussia and England.

As he aimed to march on Paris, the senior French diplomat Talleyrand had persuaded the French senate to depose Napoleon and form a provisional government[185]. Napoleon wanted to continue but his senior officers mutinied. Napoleon abdicated in favour of his son but the French senate and Allies refused to recognise him, and two days later, on 6 April 1814, Napoleon abdicated unconditionally and was exiled to Elba.

The 1814 Treaty of Fontainebleau was signed between the Allies and Napoleon. It stipulated that Napoleon would renounce 'all right of sovereignty and domination' over France and the crown jewels and his estates would be returned to France. Napoleon was to be given sovereignty over Elba and an income. The 1814 Treaty of Paris, signed between the Allies and France recognised Louis XVIII, restoring the Bourbon monarchy in France. It returned to France its borders of 1792 with some increase, stipulated a 'perpetual peace and friendship' and produced the Congress of Vienna in 1815. The terms of the surrender having been laid out in previous treaties, the Congress of Vienna could be freer to set the conditions of the balance of power in Europe. In seeking a compromise between the challenges posed by the French revolution to legitimacy by custom on the one hand, and the conservative backlash against those ideas and the anxiety of European states towards further revolutionary upheaval, the conception of sovereignty was hybrid: states were legitimate if they were grounded in popular sovereignty, but also if they could provide order and stability and were recognised by the major European powers[186].

Napoleon then escaped, beginning the Hundred Days but, after the Battle of Waterloo, was facing another abdication. Again, he tried to abdicate in favour of his son, but then Louis XVIII was restored to the French throne. Napoleon still had access to a reserve army of 120,000 after Waterloo but, according to Jarrett, said 'I did not return from Elba to see Paris washed in blood'[187]. This statement speaks to some sort of recognition of a duty of the sovereign to the nation, though his practice did not seem to reflect this. The preamble to the 1815 Treaty of Paris (not to be confused with the 1814 Treaty of Paris) started with 'The Allied Powers having by their united efforts, and by the success of their arms, preserved France and Europe *from* the

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[185] Jarrett, *The Congress of Vienna and Its Legacy: War and Great Power Diplomacy after Napoleon*, 80.
[186] Ian Clark, "Revolutionary and Legitimate Orders: Revolution, War, and the Vienna Settlement," in *Legitimacy in International Society*, ed. Ian Clark (Oxford Scholarship Online: Oxford Scholarship, 2008).
[187] Jarrett, *The Congress of Vienna and Its Legacy: War and Great Power Diplomacy after Napoleon*, 80.

convulsions with which they were menaced by the late enterprise of *Napoleon Bonaparte*, and by the Revolutionary system reproduced' (emphasis added)[188].

It stipulated, under Article 1, that the French border should be the same as it was in 1790, with some modifications, amounting to an overall reduction from the territory at that date. France was also required to pay substantial indemnities and cover the cost of the Allied occupation force of 150,000. It was noticeably more punitive than previous treaties, expressed in the amount of territory taken from France.

The peacemakers in 1815 had wanted to return to a pre-Napoleonic past where, from their perspective, war was limited rather than total, and where states negotiated terms at the end of war, rather than surrendered and to argue that it had not been defeated in the field, which was more important than war[189]. The Napoleonic Wars reversed the relationship between strategy and tactics for Clausewitz's On War: where he had described the conversion of tactical success to strategic success, and the exploitation of the battle for the purpose of the war, this had been inverted[190]. It was this, Strachan argues, that led to the perception that the German army was left seemingly undefeated, in France, after the surrender[191]. Indeed, it was always Napoleon's plan to force the enemy to one decisive battle, though he was not always successful[192].

Substantial change in the patterns of surrender took place during the French Revolutionary Wars. In particular, the framework of regime change is one that persisted. The Japanese instrument of surrender, which will be explored in the next section, also had this theme in common as well as the placement of an occupying force. Interestingly, despite the total nature of the conflict, the totality was not directed at the French population after the defeat of Napoleon. Furthermore, it was this period which witnessed more regulation and predictability in the treatment of prisoners of war compared to the periods before it, leading to greater numbers of prisoners of war. Before this point soldiers were left to the whims of the leaders and though the post-classical period saw a shift to the practice of ransom, this still could depend on the wealth of the individual captive. Notably, though, these changes still exhibited the Janusian approach to humanitarian principles; while a French monarch was allowed to gain the French throne, Egypt was turned over to another imperial power and its heritage plundered. In

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[188] *Treaty of Paris*, (20 November 1815).
[189] Strachan, "Surrender in Modern Warfare Since the French Revolution."
[190] Ibid.
[191] Ibid.
[192] Broers, "'Civilized, Rational Behaviour'? The Concept and Practice of Surrender in the Revolutionary and Napoleonic Wars, 1792–1815."

other words, the ideals of popular sovereignty did not extend into the non-European case here; neither France nor Britain extended them.

Napoleon similarly saw surrender as something shameful. Though this could be dismissed as the frustrations of a tyrant with a population that was not perfectly loyal, he also did not accept his own surrender. One of the most important features of the era was the role of the population. The Napoleonic wars, in part due to the policies of Napoleon toward the *Grand* Armée, were total, and also featured mass surrender. Individual former slaves in Haiti also did not accept the surrender of Louverture.

2.8 The Japanese instrument of surrender and its context

The surrender of Japan in 1945 is pertinent for two reasons. Firstly, it is a case that leads directly into the post-WWII world order, which will lead neatly into Chapter Three. Secondly, the case might be presented by some as a counter to the themes that have so far emerged. Some might point to the practice of kamikaze warfare or the case of Hiroo Onada as counterpoints to the idea that some cultures might consider death preferable to defeat or surrender[193]. A transcultural definition of surrender would have to reflect this, and so this section is concerned with analysing, in depth, the Japanese surrender in WWII and the Japanese attitudes to surrender.

In September 1943, Rear Admiral Takagi was ordered to conduct a study of the Japanese war situation and he concluded that Japan could not win[194]. But, the idea that Japan had not been defeated by a foreign power until 1945 was one that was built into the national consciousness leading up to World War II. The association with an idealised and romanticised historical past, of heroism, self-sacrifice and the honour codes of the samurai, bushido, shaped both the Japanese imperial endeavours and its refusal to surrender after United States dropped atomic bombs on Hiroshima and Nagasaki, and was shaped by it. In 1966, Frank L Klingsbery suggested that losses of 3-4% of total population would be enough to induce surrender in most

[193] Hiroo Onada was a Japanese intelligence officer in the Philippines who only surrendered in 1974, 29 years after the end of WWII. See: Hiroo Onada, *No Surrender: My Thirty-Year War*, trans. Charles S. Terry (Maryland: Bluejacket Books, 1999).
[194] Kecskemeti, *Strategic Surrender: The Politics of Victory and Defeat*.

cases but that the Japanese losses in World War II would have to be between 8-12% to generate a crisis in morale[195].

The first bomb was dropped on Hiroshima on 6 August 1945. A cabinet meeting met on 7 August and Nagasaki was bombed on 9 August. No consensus emerged, and it was recommended that the Potsdam terms would be sent back with four conditions that would have been interpreted by the US as a rejection of the Potsdam terms. The Potsdam terms themselves required unconditional surrender and the limitation, but not annihilation, of Japanese sovereignty. But it also included unashamed moralistic language: 'The time has come for Japan to decide whether she will continue to be controlled by those self-willed militaristic advisers whose unintelligent calculations have brought the Empire of Japan to the threshold of annihilation, or whether she will follow the path of reason'[196].

After further discussion, Hirohito compared himself to the Emperor Meiji, saying that he could not bear to see the Japanese people suffer any further[197]; Japan would accept the Potsdam terms with the proviso that the emperor's prerogatives would not be compromised[198]. The US provided a counter-proposal adding that: 'the ultimate form of government of Japan shall, in accordance with the Potsdam Declaration, be established by the freely expressed will of the Japanese people'[199].

Debate continued for several days. Hirohito accepted the terms and had to intervene directly with the Supreme War Council when it was clear it was divided, telling them 'it is my belief that a continuation of the war promises nothing but additional destruction'[200]. Some, such as General Okamura, suggested that the 'humiliating' peace terms should be rejected while the Japanese empire was 'shining in all its glory'[201], and others had observed that asking Japan to decide on its form of government was at odds with Japan's basic system[202]. Indeed, still at this point there were threats of a coup from ministers which only failed when Anami, the War Minister, himself an advocate for continuing the war, nonetheless refused to disobey the

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[195] Frank L. Klingberg, "Predicting the termination of war: battle casualties and population losses," *Journal of Conflict Resolution* 10, no. 2 (1966)
[196] Article 4, *Proclamation Defining Terms for Japanese Surrender*, (26 July 1945).
[197] Wilson D. Miscamble, *The Most Controversial Decision: Truman, the Atomic Bombs, and the Defeat of Japan*, Cambridge Essential Histories, (New York: Cambridge University Press, 2011). p.98
[198] Ibid.
[199] Ibid.
[200] Ibid. p.105
[201] Ibid. p.104
[202] Gerhard L. Weinberg, *A World at Arms: A Global History of World War II* (Cambridge University Press, 2005).

Emperor[203]. Anami was among a number of military officials to commit ritual suicide to avoid the disgrace of surrender[204]. The broadcast made by Hirohito on August 15 never mentioned 'defeat', 'surrender' or 'capitulation'[205]. Sakomizu, the Japanese chief cabinet secretary, stated that:

> The Atomic bomb was a golden opportunity given by Heaven for Japan to end the war. There were those who said that the Japanese armed forces were not defeated. It was in science that Japan was defeated, so the military will not bring shame on themselves by surrendering[206]

Indeed, Asada argues that a number of officials shared the same perspective and that the common association between the atomic bomb and the end of war assisted in the idea that 'they were defeated by the power of science but not because of a lack of spiritual power or strategic errors'[207].

Kazuo Kawai argues that the decision in July 1945 to send Prince Fumimaro Konoye to the USSR to request the Soviets intervene with the United States on how to end the war is clear evidence of the Japanese intention to seek surrender, but also that there were such indications as early as spring of 1944[208]. He was basing his arguments on the evidence he collected in the Japanese Foreign Office whilst editor of *Nippon Times* during the war years when censorship had prevented publication.

Asada argues that 'in all probability Japan could not have endured the winter of 1945-1946, that there was a possibility that Japan would not have surrendered before November 1' but that there was no support in Japanese sources of the US assertion that Japan would have surrendered before that date even if the bombs had not been dropped, if Russia had not entered the war and no invasion was planned[209].

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[203] Ibid.
[204] Miscamble, *The Most Controversial Decision: Truman, the Atomic Bombs, and the Defeat of Japan*.
[205] Robert Joseph Charles Butow, *Japan's decision to surrender* (Stanford University Press, 1954).
[206] Sadao Asada, "The Shock of the Atomic Bomb and Japan's Decision to Surrender: A Reconsideration," *Pacific Historical Review* 67, no. 4 (1998) p.507
[207] Kido Koichi, *Kido Koichi nikki: Tokyo saibanki* (Tokyo, 1966). p.443, quoted in Asada, "The Shock of the Atomic Bomb and Japan's Decision to Surrender: A Reconsideration." p.507
[208] Kazuo Kawai, "Mokusatsu, Japan's response to the Potsdam declaration," *Pacific Historical Review* 19, no. 4 (1950)
[209] Asada, "The Shock of the Atomic Bomb and Japan's Decision to Surrender: A Reconsideration."

Others argue that it was a fear of revolution amongst the elite that brought some to the conclusion that they needed to surrender[210]. There is some precedent for this too. Hiraizumi, who became a Tokyo Imperial University professor and someone involved with the educational materials for the military, was a particular critic of the French Revolution and the ideas of Rousseau, and considered revolution a dangerous idea for Japan, and one wholly alien to it[211].

The Japanese attitude to the surrender was informed by Japanese nationalism, which had increased due to a number of factors leading up to World War II: Japan's increasing isolation and resentment towards the West and China; the army's handling of the Great Kanto Earthquake in 1923; the Manchurian Incident of 1931; measures taken by the US against Japanese immigration; the failure of the Anglo-Japanese Alliance; the 1929 depression; the increased literacy rates and use of radio; the disenchantment with Western culture and modernity, and the contrasting popularity of samurai epics[212]. The army, failing to keep pace with the advancement of Western military forces and the difficulty in acquiring funding led some to turn to the relatively cheap option of spiritual education programmes and strengthening relations with local community education[213]. Popular culture between 1931 and 1945 heavily focused on idealised history of famous wars and warriors after the ongoing situation in China led to fatigue amongst the population for current affairs, and the Bureau of Information indicated that it would not give approval for plays whose authors did not exhibit the proper degree of *bushido*[214].

General Araki Sadao had removed terms such as 'surrender', 'retreat', and even 'defence' from the General Principles of Strategic Command in 1928[215]. He had been War Minister in the Inukai and Saitō cabinets between 1931 and 1934 had been one of the greatest promoters of bushido in the military and encouraged nationalistic concepts. Sheftall argues that, in the Pacific theatre of World War II, the Japanese military exhibited a no quarter approach and refused to surrender where western soldiers would have done so. Even civilians rejected the possibility of surrender; entire Japanese families leapt from cliffs or committed suicide using

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[210] Jeremy A. Yellen, "The Specter of Revolution: Reconsidering Japan's Decision to Surrender," *The International History Review* 35, no. 1 (2013)
[211] Oleg Benesch, *Inventing the way of the samurai: nationalism, internationalism, and bushidō in modern Japan* (Oxford: Oxford University Press, 2014). Referencing Hiraizumi Kiyoshi, *Bushidō no fukkatsu* (Tokyo: Shibundo, 1933).
[212] Benesch, *Inventing the way of the samurai: nationalism, internationalism, and bushidō in modern Japan*.
[213] Ibid.
[214] Ibid.
[215] Ibid.

grenades rather than fall into the hands of the United States[216]. Between 1941 and 1945, for each 40 Japanese soldier killed, one was captured[217]. Even on August 9, 1945, shortly before Emperor Hirohito accepted surrender terms, some in the Supreme War Leadership Council suggested that 'if the people of Japan went into the decisive battle in the homeland determined to display the full measure of patriotism and to fight to the very last, Japan would be able to avert the crisis facing her'[218].

In October 1944, Japan incorporated kamikaze tactics, the ultimate expression of this approach. It had already been strongly pushed by the Japanese media as a glorious act as well as a 'valiant tragedy'[219]. Benesch cautions against crediting bushido with the attitude of Japanese soldiers to surrender, noting that the state still thought it necessary to have capital penalties for retreat or surrender, and that the majority of Japanese prisoners of war questioned by the US believed that they would be tortured or executed by their Allied captors[220]. Furthermore, the vast majority of soldiers did not fight to the last or commit suicide; they surrendered in spite of this policy[221].

Nonetheless, a number of cultural works that praised the no-surrender approach experienced popularity and it speaks at least to the language which the leadership wished to use to cultivate this romanticisation of non-surrender. The Principles of the National Policy (*kokutai no hongi*), printed in 1937, stated that war was 'not a means intended for the destruction, overpowering, or subjugation of others; and it should be a thing for the bringing about of great harmony, that is peace, doing the work of creation by following the Way'[222]. However, they also emphasised the loyalty to the emperor and the importance of not distinguishing life and death: 'to fulfil the Way of loyalty, counting life and death as one, is Bushido'[223].

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[216] Mordecai G. Sheftall, "Kamikaze Warfare in Imperial Japan's Existential Crisis, 1944–5," in *How fighting ends: a history of surrender*, ed. Holger Afflerbach and Hew Strachan (Oxford Scholarship Online, 2012). Referencing Samuel Eliot Morison, *S. E. Morison, New Guinea and the Mariana, March 1944–August 1944*, History of United States Naval Operations in World War II, (Boston: Little, Brown and Company, Inc, 2002)., p.338

[217] Strachan, "Surrender in Modern Warfare Since the French Revolution."

[218] Butow, *Japan's decision to surrender*. p.170, quoted in Miscamble, *The Most Controversial Decision: Truman, the Atomic Bombs, and the Defeat of Japan*.

[219] Sheftall, "Kamikaze Warfare in Imperial Japan's Existential Crisis, 1944–5." p.384

[220] Benesch, *Inventing the way of the samurai: nationalism, internationalism, and bushidō in modern Japan*.

[221] Ibid.

[222] *Kokutai No Hongi: Cardinal Principles of the National Entity of Japan*, trans. John Owen Gauntlett, ed. Robert King Hall (Harvard University Press, 2013). p.95

[223] Ibid. p.145

Bushido is far from a monolithic idea and describes not only the orientalised image of a noble samurai bound by a brutal and uncompromising honour code. Instead it has changed much over the history of Japan[224]. According to Hirose, Japan was the only bushido country in the world and was therefore uniquely placed to understand the importance of sacred military expeditions. He argued that Japan's mission was to consider the worth of the use of force for the benefit of humanity; its task was to spread righteousness and ensure benevolence throughout the world in contrast to the West's desire to increase the wealth of the nation and hedonistic approach[225].

In World War II, Japan experienced the possibility of surrender for the first time, having never previously lost a major war[226]. The kamikaze tactics were intended to be an appeal to whatever force had previously guaranteed them this war record[227], adopted after the capture of Saipan, the media and public responses, and the coverage of the suicides of Japanese military and civilian population on Saipan[228]. 6,300 kamikaze pilots were killed, killing or wounding over 15,000[229]. Complimentarily, the adoption of the kamikaze strategy was in part a message to the Allies whom, Japan believed, had less of a stomach for casualties[230]. The seeds of the ideology were sown in the Meiji era, with the deification of the emperor; as Sheftall puts it 'the new imperial-era Japanese worldview embraced a hero system that exalted individual self-sacrifice for the collective Japanese good as the pinnacle of symbolic immortality to which any loyal subject of the emperor might aspire'[231].

The *Hagakure* had experienced a resurgence in the 1930s when the prospect of total war approached and the text's exaltation of death[232]. Furthermore, it was reinterpreted so as to give loyalty a cardinal place among the virtues discussed in the text[233]. In 1939, the *Bushidō hōten*, or *Bushido Treasury*, was published. It was comprised of a selection of writings on bushido, including parts of the *Hagakure.* It described the fourth element of Japan's bushido as the

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[224] Much use was made of: Benesch, *Inventing the way of the samurai: nationalism, internationalism, and bushidō in modern Japan*. The book describes well the variation in the application of the idea of bushido and this chapter, in giving an account of how the military leaders made use of the concept, is necessarily limited and does not do justice to the complexity of the idea.
[225] Ibid. Referencing Hirose Yutaka, *Gunjin shōkun* (Tokyo: Bushidō kenkyūkai, 1927).
[226] Sheftall, "Kamikaze Warfare in Imperial Japan's Existential Crisis, 1944–5."
[227] Ibid.
[228] Ibid.
[229] Mordecai G. Sheftall, *Blossoms in the Wind: Human Legacies of the Kamikaze* (New York: New American Library, 2005).
[230] Sheftall, "Kamikaze Warfare in Imperial Japan's Existential Crisis, 1944–5."
[231] Ibid. p.388
[232] Benesch, *Inventing the way of the samurai: nationalism, internationalism, and bushidō in modern Japan*.
[233] Ibid.

refusal to be taken prisoner, and the assertion that no Japanese soldier had ever surrendered, in contrast to Russian and Chinese soldiers which had fought the Japanese shortly before. Indeed, the editor of the work related bushido to Japan's expansionist policies[234].

The point of these remarks is not to justify the atrocity that the United States inflicted upon the two Japanese cities and the extraordinary carnage inflicted on its citizens. Indeed, the Japanese expectations about how they would be treated as prisoners of war were not dreamt from nothing[235]. It may yet lend some weight to the force a codified surrender could have in similar situations. There is not the space to fully explore this idea, but it may be that a codified form of surrender would release heads of state from this kind of inertia.

2.9 Conclusion and typology

This chapter has attempted to provide an account of the practice and consequence of surrender through history. It has necessarily eschewed a comprehensive approach due to space constraints, but has tried to explore an mix of examples that nonetheless facilitate comparisons. Generally speaking, it has opted for depth rather than breadth and, as such, has neglected many regions and belief systems that would have contributed to the cursory examination.

Nonetheless, what the examination reveals is a multi-faceted conception of surrender that highlights the ways control has been exercised such that it would be difficult to define surrender that reflects this control in a one-dimensional way. While absolute surrenders have taken place, even the Roman practice of *deditio* had some exceptions to its totality. More subtle forms of control, such as the tributes of the Byzantines and the Arabs in the post-classical period need to be reflected as well. As Holmes notes, the gradual steps that Byzantium took to advance governance on its eastern frontier means that it is difficult to pinpoint the moment when a territory becomes part of Byzantium[236]. One possibility is to suggest it occurs at the point that the Byzantines stationed a garrison at the city[237]. But this would mean that the Truce of Safar would not be considered a surrender. Indeed, Byzantine practice seemed to be to station a

[234] Ibid.
[235] John W. Dower, *War without mercy: race and power in the pacific war*, ed. Societies American Council of Learned (New York: Pantheon Books, 1993). In: Benesch, *Inventing the way of the samurai: nationalism, internationalism, and bushidō in modern Japan*.
[236] Holmes, "Treaties between Byzantium and the Islamic world."
[237] Ibid.

presence at major towns and leave junior warlords in place in surrounding castles[238]. Similarly, full demilitarisation has not always taken place. Austria was only required to confine the size of its army to 150,000 after the Austrian defeat at Wagram and it was not enforced[239]. This is despite some arguing that Wagram was one of the few emphatic military triumphs of the Napoleonic Wars[240].

In most of these cases, surrender has been used as an instrument of overt imperialism and in some cases, such as that of Egypt, it was used by multiple imperialist powers fighting over the same territory. Several of these cultures have expressed their superiority of their cause in appealing to 'greater peace' of some sort, as well as superiority based on the more benevolent treatment of prisoners, but they have done this even where it is not reflected in practice. But they did at least in some sense regard restraint as humanitarian and morally right. With very broad brush strokes, one can track the development of restrictions on actions towards prisoners of war as well as what is permissible after surrender away from total *deditio*.

Another key theme demonstrated by the attitudes to surrender (regardless of whether they were expressed in practice) was that surrender was something shameful, a feeling felt by several of the above cultures. The policy of "no surrender" has also been glorified in a number of the above cases. Even where the uncertainty of treatment after surrender was reduced (though there still certainly was some – and the expected treatment as prisoners of war impacted the Japanese reluctance to surrender) states still sought to prevent as much as possible surrender taking place.

The modern peace treaty exhibits a form of hybrid self-determination: state redefinition, disaggregated power and dislocated power[241]. Any transhistorical, transcultural definition of surrender must be sensitive to this in the actual content of the definition, and any duty of surrender must exhibit the same sensitivity. Thus, the definition must include a broad understanding of the qualifying concessions. It must include economic and political concessions, rather than only military or territorial. The more expansive definition of control is not entirely without precedent in the legal world. The ICJ noted in the *Chagos Archipelago* case, that Mauritius was still under the authority of the United Kingdom precisely because the

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[238] Ibid.
[239] Jarrett, *The Congress of Vienna and Its Legacy: War and Great Power Diplomacy after Napoleon*, 80.
[240] Broers, "'Civilized, Rational Behaviour'? The Concept and Practice of Surrender in the Revolutionary and Napoleonic Wars, 1792–1815."
[241] Christine Bell, *On the law of peace: peace agreements and the Lex Pacificatoria*, Oxford scholarship online, (Oxford: Oxford University Press, 2008).

Committee of Twenty-Four had noted that the Mauritian constitution did 'not allow the representatives of the people to exercise real legislative or executive powers, and that authority is nearly all concentrated in the hands of the United Kingdom' and that it was this that signified Mauritius as a colony of the United Kingdom[242].

From these themes, the definition for a state surrender will be termed "terminative concession agreement" or "terminative concession".

A *terminative concession* is an agreement:

a) Which (temporarily or permanently) terminates hostilities;
b) In which a first party makes a material concession (economic, political or military) to a second party which gives the second party some degree of control over the first which did not exist in the *status quo ante bellum*.

There is also a possibility of adding a third part of the definition, which depends on how one-sided the surrender agreement is:

c) In which the second party does not make an equivalent material concession such that the first party also would have a degree of control over the second.

Individual surrender will still be referred to as "surrender". Generally, a duty to surrender will be used to refer to the overall arching theory, with either "state-level" or "state", or "individual-level" or "individual" preceding it, to denote the two subtypes. "State-level surrender" is therefore equivalent to "terminative concession".

Note that this definition necessarily includes withdrawals. In a withdrawal, a state might invade a territory and then surrender, and give back the territory it originally took. This would meet the definition of surrender, provided that it puts the invading state which gives the invaded state some degree of control over it that did not previously exist. If it were otherwise, Napoleon's surrender, the Treaty of Fontainebleau and the 1814 Treaty of Paris, shrinking France back to its 1792 borders, would not have been a surrender.

Some agency is assumed on the part of the first party, which might seem antithetical to the idea of surrender. However, with closer examination, the "voluntariness" of such a decision is not

[242] United Nations General Assembly. 4th Committee, *Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples* (1965).

binary, and is a vital part of the definition. Given that the definition requires a giving over of control, it seems unlikely that such an action would be entirely voluntary, but surrender is also different from the acceptance of defeat; it is a positive action. What this definition does, then, is exclude the two extremes. In doing so, it avoids the reductivism that would equate surrender with the recognition of defeat. There may be a duty to recognise defeat, but this thesis, motivated by the humanitarian aims elucidated in the introductory chapter, is suggesting that there is a duty to surrender not only because not doing so would be to not recognise the reality of a defeat, but because not doing so results in avoidable harm.

Surrender would not always be required to be brought about by *military* deficiencies, and this is also reflected in this definition; it should be acknowledged that the appetite to continue a war may be lost through various factors not limited to the belief that one is militarily outmatched. Brest-Litovsk came about not only by the failures of the Kelensky offensive, but also by the rise of the Bolsheviks and the strain on Russia's economy. Military factors might not always fully explain the push for a surrender, and factors such as morale cannot always be reduced to a function of military capability (see, for example, the morale of France in WWII, discussed in Chapter Five). In both of these cases, then, the strength of the definition is its flexibility, reflecting the gravity of such a decision while retaining the nuance of the "voluntariness" of the action.

A significant number of modern peace treaties are those that settle intra-state conflicts and those that settle wars of liberation. There is tension between the very idea of surrender (giving another control) and the self-determination that justifies these wars. Reference was made to 'the ultimate form of government of Japan…in accordance with the Potsdam Declaration, [being] established by the freely expressed will of the Japanese people'[243]. However, it was also the "will of the Japanese people" that was brought about by US nuclear weapons, not Japan itself. It is interesting to note that FDR also partly supported the policy of unconditional surrender to appease US Republicans who had contested Wilson's demands for an armistice with Germany based on his Fourteen Points, an important part of which was self-determination, rather than unconditional surrender[244].

[243] Miscamble, *The Most Controversial Decision: Truman, the Atomic Bombs, and the Defeat of Japan*.
[244] Marc Gallicchio, *Unconditional: The Japanese Surrender in World War II*, Pivotal Moments in American History, (New York: Oxford University Press, 2020).

The practice of individual surrender seems to have developed, perhaps unsurprisingly, in parallel with the treatment of prisoners of war. Particularly during the Napoleonic wars, soldiers surrendering could expect certain rights in captivity. However, it is also notable that the Ottoman expansion, and the conquests by Muslims in general, sought to indicate victory by collecting a tax rather than forced conversion. Likewise, the Code of Manu and Sun Tsu's *Art of War* describe the humanitarian treatment of prisoners of war, though there has not been the space to discuss them[245].

After the Hague Conventions, it became more possible and safer for the soldier to surrender. In the First World War, between seven and eight million prisoners were taken. However, this did not connect to defeat. Around 25% of Italy's casualties were prisoners and only 9% of Germany's casualties were prisoners. In World War II, around 35 million of the 96 million soldiers became prisoners of war[246].

This fact may also provide insight into one of the ways a state may discharge its duty to surrender. If it can be done so by facilitating the surrender of the soldiery, more robust guarantees on prisoner safety would contribute to this. However, this is no panacea, as the cases of Abu Ghraib and Guantanamo Bay demonstrate that the existence of a Third Geneva Convention does not protect against the committing of actual abuses and war crimes against prisoners of war. This is even in a country, like some of the cases discussed above, which expressed ideals of peace and humanitarianism while denying it to those under its control. Having discussed the history of surrender up until (almost) the contemporary period, the following chapter shall discuss the current international law on surrender.

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[245] Sun Tsu, *The Art of War*, trans. John Minford, Penguin Classics, (New York: Penguin Group, 2009). Manu, *Manu's code of law: a critical edition and translation of the Manava-Dharmasastra*, ed. Patrick Olivelle and Suman Olivelle, South Asia research (New York, N.Y.), (Oxford: Oxford University Press, 2005).
[246] Strachan, "Surrender in Modern Warfare Since the French Revolution."

Chapter 3: Doctrinal International Law: Humanitarianism in armed conflict

3.1 Introduction

Chapter Two finished with examining the treatment of the Japanese surrender at the close of the Second World War. This leads us into the contemporary context of post-1945 international law, which is the topic of this chapter. Where before we were concerned with trying to arrive at common themes in obligations of surrender by examining its practice and treatment before 1945, the entry into the post-1945 allows access to the rich landscape of international law after the advent of the United Nations. More than this, it introduces the *lex lata*, the important first of four stepping stones (one per chapter) before we arrive at the *lex ferenda* of Chapter Six. In order to reach this point, we must first examine what the perceived obligations around surrender are and glean what we can from international law as a whole, then gradually reducing the emphasis on the doctrinal over the following chapters. But this doctrinal examination must be the first step in order to begin answering the first research question and bring to the fore those principles which the future stepping stones must aspire for coherence with.

Surrender is one of the most important rules of international humanitarian law because it is the central 'device for containing destruction and death in our culture of war'[247]. In the earliest human societies, honour codes forbade surrender and the "law of the jungle" prevailed[248]. Gradually, international law has developed in multifarious ways to limit the use of violence. However, it largely focuses on preventing war at the outset (*jus ad bellum* or the law on the use of force) and on limiting the methods and tactics of war (*jus in bello* or international humanitarian law) rather than war termination itself.

This chapter aims to serve two purposes. Firstly, by examining the bodies of law that are most pertinent to compelled war termination, it will seek to specify the extent to which such

[247] Buchan, "The Rule of Surrender in International Humanitarian Law."; Holger Afflerbach and Hew Strachan, *How fighting ends: a history of surrender* (2012).
[248] Jean Pictet, *Development and Principles of International Humanitarian Law* (Leiden, The Netherlands: Brill | Nijhoff, 01 Sep. 1985, 1985). in Buchan, "The Rule of Surrender in International Humanitarian Law."

compelled war termination already exists in international law, thereby seeking to answer the first research question. Secondly, while a law of surrender in the sense meant in this dissertation is certainly not explicit, exploration of the concept's potential legal "cousins" will nonetheless assist with defining its parameters, thereby answering the second; these parameters are those with which coherence is ultimately sought. This chapter will proceed with a doctrinal analysis of the "cousins". These cousins are, in order, legal instruments of war termination and peace treaties, international law on the use of force (of which the international crime of aggression is an important component), international humanitarian law and human rights law. Each of these has something to say about a law of surrender, and will help to anticipate some of the moral questions that will arise over the following chapters. Any legal instantiation of a surrender is likely to take the form of a peace agreement of some sort; the law on the use of force is principal body of law which pertains to the transition from peace to war, and hence is the complement to a law concerned with the transition from war to peace; international humanitarian law is directly concerned with restraining violence once a conflict has started and helps illuminate the principle of humanity; and human rights law is the body of law most directly concerned with states' responsibilities towards their populations and thus emblematic of the reconceptualising sovereignty as responsibility. This exploration will mean the chapter can serve ably as a general reference chapter for questions of international law, but specific themes will be drawn out as it progresses, and at each stage a conclusion will summarise the points most pertinent to keep in mind when constructing a duty to surrender over the following, less doctrinal chapters.

This chapter is distinguished from later legal chapters in that its purpose is largely descriptive. It is concerned with what the law is now, or the *lex lata*. The law in Chapter Six operates on the assumption that international law is dynamic and thus balance the state of the law with the aims of the various bodies of international law and the changing nature of conflict. Where later chapters are more adventurous and prospective, this chapter is tentative. Relatedly, this chapter is primarily concerned with the first research question, though arriving at the main themes and underlying logic of these various bodies of international law will nonetheless greatly assist in making progress on the second.

3.2 *Jus ex bello*: War Termination and Suspension of Hostilities

The first area of international law to examine is that pertaining to war termination or *jus ex bello*. Obliging states to surrender is, after all, a form of *jus ex bello*. As will be shown, there are various legal ways in which a war might end, but these do not approach a legal duty to surrender. Various legal documents have aligned themselves with the principle of preventing and limiting war and replacing it with a quasi-legal process, notably the Pact of Paris (Kellogg-Briand Pact) of 1928 and the Protocol for the Pacific Settlement of International Disputes of 1924[249]. The preambles to such treaties reference motivations such as 'the desire to serve, even in this extreme case [of war], the interests of humanity and the ever progressive needs of civilization…' as well as 'the desire to diminish the evils of war, as far as military requirements permit'[250] and 'to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to [humankind]'[251]. Though these documents rightly belong in *jus ad bellum*, we can safely say that the purpose of *jus ex bello* is reflected in these statements. The purpose of *jus ex bello*, then, which would be the purpose of a duty to surrender, is for the settlement of 'international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'[252].

Wars do not always end in a formal peace treaty[253]. As a result, some legal measures, such as the Geneva Conventions, determine that prisoners of war (POWs) ought to be returned to their nations at the cessation of hostilities but that the Convention's nonetheless continue to apply until the transfer has actually taken place[254]. Elsewhere, the scope of the Geneva Conventions simply reference the 'general close of general military operations' in non-occupied territory and one year after this point in occupied territory[255]. Accordingly, the discussion of the current

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[249] *Kellogg-Briand Pact. Protocol for the Pacific Settlement of International Disputes*.
[250] *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*. Preamble. It is also worth noting that the use of "civilization" in international law documents betrays the oppression and inequalities that exist in international law and, as such, this thesis will focus on the principle of humanity. See, for example, Ntina Tzouvala, *Capitalism As Civilisation: A History of International Law*, Cambridge Studies in International and Comparative Law, (Cambridge: Cambridge University Press, 2020).
[251] *Charter of the United Nations*, 1 UNTS XVI UN Charter (1945). Preamble
[252] Ibid. Art 2(3)
[253] Carsten Stahn, "Jus post bellum: Mapping the discipline(s)," *Am. U. Int'l L. Rev.* 23 (2007)
[254] The Geneva Conventions have now been ratified by 194 states, and are held to be universally applicable as treaty law.
[255] Geneva Convention IV, Article 6. POWs continue to be protected under the terms of the Geneva Conventions even after this point and until their return.

means of war termination will commence with peace agreements but will include other measures.

3.2.a Peace Treaties

Peace treaties are the classic method of terminating wars. They may not necessarily coincide with the actual peace, however; it may be that a treaty reiterates a pre-existing peace or anticipates and defines one. They are not only a negative document in the sense that they defined by their removal of the state of war but are also positive in the sense that they declare the restoration of amicable relations between the parties to the conflict[256]. They also imply recognition of a Contracting Party as a state[257]. The majority of modern conflict is now intrastate in nature[258] and approximately half of civil wars since 1990 have ended via peace agreement[259]. Due to various aspects of their nature and the parties signing them, they lack solid legal status in either domestic or international law[260].

Peace agreements with at least one non-state actor as a party cannot be a treaty in the way that the 1969 Vienna Convention on the Law of Treaties (hereafter "the VCLT") defines them[261]. The VCLT defines a treaty as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'[262]. The VCLT itself concluded that while an agreement may not strictly be a treaty, this does not affect the 'legal force of such agreements' nor 'the application of the Convention as between themselves under international agreements to which other subjects of international law are also parties'[263]. Peace agreements signed between two state parties do not have this issue. Under the terms of the

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[256] Yoram Dinstein, *War, Aggression and Self-Defence*, Fifth ed. (Cambridge: Cambridge University Press, 2011). p.36
[257] Ibid. p.36
[258] Lotta Themnér and Peter Wallensteen, "Armed conflict, 1946-2010," *Journal of Peace Research* 48, no. 4 (2011)
[259] Christine Bell, "Peace Agreements: Their Nature and Legal Status," *The American Journal of International Law* 100, no. 2 (2006)
[260] Laura Edwards and Jonathan Worboys, "The Interpretation and Implementation of Peace Agreements," in *International Law and Peace Settlements*, ed. Andrea Varga, Marc Weller, and Mark Retter (Cambridge: Cambridge University Press, 2021).
[261] Philipp Kastner, "Interactions between Peace Agreements and International Law," in *International Law and Peace Settlements*, ed. Andrea Varga, Marc Weller, and Mark Retter (Cambridge: Cambridge University Press, 2021).
[262] United Nations, *Vienna Convention on the Law of Treaties*, United Nations, Treaty Series, vol. 1155, p. 331 (1969).
[263] Ibid. Article 3

VCLT they are considered treaties[264]. Regardless, the VCLT is customary international law, and provides a useful guide even where it does not strictly apply, and so would also for surrender agreements[265].

There is a typology of the different types of peace agreements. Cease-fires are generally considered to be temporary, in contrast[266]. Under the 1907 Hague Conventions armistices were suspensions of hostilities but are understood more recently to terminate the war[267]. Peace agreements can be further sub-divided into three types of agreement depending on their nature: pre-negotiation agreements, frameworks/substantive agreements and implementation/renegotiation agreements. Talks at the prenegotiation stage are the "talks about talks" which lay the groundwork for the negotiations and describe how they will progress, and which provide the required assurances that the talks will not be used to gain advantage, building up to a formal ceasefire[268]. They typically lack legal formality and therefore parties can avoid the appearance of commitment to compromise[269]. In some cases, there may be "interim settlements" which postpone controversial issues to "final status" negotiations[270].

Substantive agreements are what are generally considered peace agreements. They are designed to address the root cause of the conflict and halt the violence more permanently[271]. While the wording and structure of such peace treaties imply they are legal documents, they cannot easily be categorised as a treaty, international agreement or constitution because they deal with both external legitimacy of the state and the state's internal constitutional order[272].

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[264] Ibid.
[265] Anthony Aust, "Vienna Convention on the Law of Treaties," in *Max Planck Encyclopedia of Public International Law* (Oxford Public International Law, 2006).
[266] Dinstein, *War, Aggression and Self-Defence*.
[267] Wolff Heintschel von Heinegg, "Factors in War to Peace Transitions Symposium: The Rule of Law in Conflict and Post-Conflict Situations," *Harvard Journal of Law & Public Policy* 27, no. 3 (2003-2004 2003)
[268] Bell, "Peace Agreements: Their Nature and Legal Status."
[269] Ibid.
[270] For scholars of "ungovernance", the impossibility of reconciliation over some issues means that law ought to leave room for peace-making to be a process, involving institutions that generate discussion over the issue and, as such, are iterative or transitional. See: Christine Bell, "'It's law Jim, but not as we know it': the public law techniques of ungovernance," *Transnational Legal Theory* 11, no. 3 (2020/07/02 2020); See also: Jan Pospisil, "The ungovernance of peace: transitional processes in contemporary conflictscapes," *Transnational legal theory* 11, no. 3 (2020); Christine Bell and Jan Pospisil, "Navigating Inclusion in Transitions from Conflict: The Formalised Political Unsettlement," https://doi.org/10.1002/jid.3283, *Journal of International Development* 29, no. 5 (2017/07/01 2017);Oliver Ramsbotham, *Transforming Violent Conflict: Radical Disagreement, Dialogue and Survival*, Routledge studies in peace and conflict resolution, (London: Routledge, 2010).
[271] Bell, "Peace Agreements: Their Nature and Legal Status."
[272] Ibid.

Implementation agreements develop aspects of the framework and in domestic cases often take the form of a constitution.

The general consensus is that peace treaties are part-legal and part-political documents (more reason for research in them to be interdisciplinary). Article 3 of the VCLT does state that agreements between parties at least one of which is a non-state subjects of international law can enter into legally binding international agreements to which the VCLT would still apply[273]. The VCLT is accepted as illustrative of customary international law for conflicts not only between state actors[274]. Furthermore, this does not necessarily mean they are not legally binding, or that surrender agreements would not also not be legally binding. The International Commission of Inquiry on Darfur stated that non-state actors have the capacity to conclude binding international agreements[275]. Under the VCLT, the legal force of agreements is not necessarily affected if the agreement is not strictly a treaty according to its provisions.

One route out of defining peace agreements, particularly those resulting from intrastate conflicts, as documents with reduced legal weight is to argue that peace agreements are constitutional agreements. Such agreements are often transitional rather than permanent and tend to make use of third-party enforcement and other enforcement mechanisms[276]. Treating peace agreements as constitutional would mean that it was a question of national and constitutional law[277]. This could lead to further issues, particularly if the document recognises another party as a state, such as was the case with the Comprehensive Peace Agreement for the Sudan[278].

Another is to make use of Common Article 3 of the Geneva Conventions and declare an agreement a Special Agreement. The ICRC Commentary confirmed peace agreements could

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[273] VCLT on the Law of Treaties (1969)
[274] Colin R. G. Murray, Aoife O'Donoghue, and B. T. C. Warwick, "The implications of the Good Friday Agreement for UK human rights reform," ed. Fiona De Londras and Siobhán Mullally (Hart Publishing, 2018). See also Ian Sinclair, *The Vienna Convention on the Law of treaties*, 2nd ed. ed., Melland Schill monographs in international law, (Manchester: Manchester University Press, 1984). pp.5-10 and Anthony Aust, *Modern treaty law and practice*, 2nd ed. ed. (Cambridge: Cambridge University Press, 2007). pp.11-13.
[275] Kastner, "Interactions between Peace Agreements and International Law." See International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004* (Geneva, 25 January 2005), https://www.un.org/ruleoflaw/files/com_inq_darfur.pdf.
[276] Bell, "Peace Agreements: Their Nature and Legal Status."
[277] Scott P. Sheeran, "International law, peace agreements and self-determination: The case of Sudan," *The International and Comparative Law Quarterly* 60, no. 2 (2011)
[278] Ibid.

be considered Special Agreements[279]. While this does imply recognition in international law, such agreements do not by the fact of this declaration come within the scope of the VCLT[280]. While this seems to produce some international effects, it is not straightforward what those are. The Havana Agreement between the FARC-EN and Colombian Government, dealt with more fully in Chapter Six, used this approach and even explicitly stated that it was declared as such for the purpose of international validity[281]. While the primary purpose of Special Agreements is to allow NIACs to access greater levels of humanitarian protection usually reserved for IACs, some authors have suggested that there could be more flexibility in either altering the distinction between hard law and soft law, in the creation of new regimes or else in providing normative guidelines of a legal character[282]. Indeed, intrastate groups may be reluctant to appeal to Common Article 3, as it could imply that the conflict is internal and that they do not therefore represent a separate people[283].

Another route out is to make use of Security Council Resolutions. Christine Bell notes that the themes can be drawn from the processes in Kosovo, Afghanistan and East Timor, namely that a Security Council resolution first provides the basis for an interim administration before a transitional government is established, followed by elections and then the drafting of a constitution[284]. The UN Security Council has increasingly referred to the non-implementation and violation of peace agreements when assessing the existence of a threat to international security and actions under Chapter VII of the UN Charter[285]. However, UN Security Council endorsement does not necessarily transform the legal status of such an agreement. Firstly,

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[279] Knut Dörmann, Jean-Marie Henckaerts, and sponsoring body International Committee of the Red Cross, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Commentaries on the 1949 Geneva Conventions, (Cambridge: Cambridge University Press, 2016). p.285 §850

[280] Laura Betancur Restrepo, "The Legal Status of the Colombian Peace Agreement," *AJIL Unbound* 110 (2016)

[281] *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (National Government of Colombia - FARC-EP)*, (24 November 2016).

[282] See Restrepo, "The Legal Status of the Colombian Peace Agreement.". For greater flexibility, see, respectively: Andrej Lang, ""Modus operandi" and the ICJ's appraisal of the Lusaka ceasefire agreement in the Armed Activities case: the role of peace agreements in international conflict resolution," *International Law and Politics* 40, no. 107 (2008), Marco Sassòli, "Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law," *Journal of International Humanitarian Legal Studies* 1, no. 1 (01 Jan. 2010 2010), Ezequiel Heffes and Marcos D. Kotlik, "Special agreements as a means of enhancing compliance with IHL in non-international armed conflicts: An inquiry into the governing legal regime," *International Review of the Red Cross* 96, no. 895-896 (2014)

[283] Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge Studies in International and Comparative Law, (Cambridge: Cambridge University Press, 2002). pp.65-67

[284] Bell, "Peace Agreements: Their Nature and Legal Status."

[285] Cindy Wittke, *Law in the Twilight: International Courts and Tribunals, the Security Council and the Internationalisation of Peace Agreements between State and Non-State Parties* (Cambridge: Cambridge University Press, 2018). p.171

careful attention must be paid to the language used. Secondly, any obligations contained in the resolution flow from the resolution itself and do not affect the agreement[286]. The Special Court for Sierra Leone's Appeals Chamber, also in the *Kallon* case, noted that the UN as a mediator of peace could not 'add up to a source of obligation to the international community to perform an agreement to which the UN is not a party'[287].

Thirdly, a peace agreement might compensate for lack of legal formality is via precision, (Fortna's research on the adherence to these commitments emphasises precision)[288]. A discussion of the legality of treaties is important not only to find peace agreements their legal place, but it influences adherence to them and therefore any adherence to a compelled surrender; the reputation costs for a party to a peace agreement increases the more formal and legal the agreement[289]. This is not the place to provide a full analysis of why peace treaties fail, but the success of them is not based wholly on their legal standing. Factors the literature considers to be important include the "ripeness" of the treaty, the political will and spoiler issues[290]. For example, while the Arusha Accords were supported by the UNAMIR under Chapter VI authorisation[291], they were, of course, ultimately unsuccessful in that they failed to prevent the recurrence of the Rwandan civil war and the genocide in the coming years[292]. The point here is that they are also comprised of a significant political element:

> Peace agreements resemble internationalized contracts in the use of international law as a basis for a legal order that is "neutral" as between the parties. However, in the peace agreement context, the use of international law is driven less by the need for an autonomous denationalized legal order, and more by the need to take processes of domestic legal reform outside their

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[286] Edwards and Worboys, "The Interpretation and Implementation of Peace Agreements."
[287] *Prosecutor v Kallon, Kamara (Appeals Chamber Judgment)*, (Special Court for Sierra Leone 13 March 2004) SCSL-2004-15-AR72(E). §39
[288] Bell, "Peace Agreements: Their Nature and Legal Status." referencing Virginia Page Fortna, *Peace Time: Cease-Fire Agreements and the Durability of Peace* (Princeton: Princeton University Press, 2018).
[289] Fortna, *Peace Time: Cease-Fire Agreements and the Durability of Peace*.
[290] See, for example, William Zartman, "Ripeness: The hurting stalemate and beyond," *International conflict resolution after the Cold War* 2 (2000); Stephen John Stedman, "Spoiler problems in peace processes," *International security* 22, no. 2 (1997); Michael J Gilligan and Ernest J Sergenti, "Do UN interventions cause peace? Using matching to improve causal inference," *Quarterly Journal of Political Science* 3, no. 2 (2008)
[291] Although The Force Commander Romeo Dallaire considered it to be a "Chapter 6.5" mission.
[292] The law itself may shape the treatment of a conflict, reaction to it, or negotiation. The narrative around the Rwandan civil war was shaped by the genocide and legal framework around it. See: Aoife O'Donoghue, "How Does International Law Condition Responses to Conflict and Negotiation?," *Global Policy* 7, no. 2 (2016)Similarly, when the Commission of Inquiry in the DPRK said that there was not enough evidence for genocide, they felt it necessary to emphasise that this did not reduce the gravity of the situation.

> normal channels so as to address the illegitimacy of the preagreement legal and political order[293]

While there remain problems that would transfer to any legally compelled surrender, a framework is developing. This framework is one that a compelled surrender may be able to tap into. Christine Bell argues that the practices employed in peace processes now amount to a *lex pacificatoria* whose themes consist of:

> - a distinctive self-determination role: peace agreements address both external and internal challenges to a state's legitimacy through new permutations of government and human rights protections;
>
> - a distinctive mix of state and nonstate signatories: peace agreements are "hybrid" agreements straddling international and domestic legal categories; - distinctive types of obligation: peace agreements consist of both treaty-like/contractual and value-driven/constitutional provisions; and
>
> - distinctive types of third-party delegation: peace agreements rely on hybrid legal pluralism, involving multiple intertwined and overlapping legal and political mechanisms, for their implementation.[294]

Other patterns have emerged. For example, as reflected in the UN Charter, peace is now considered to entail positive commitments to prevent further outbreak of violence[295]. Peace-making has become international, in that international authorities' participation in reconstruction or enforcement in accordance with such treaties is not considered to be an unlawful intervention in domestic affairs[296]. This accords with the general trend of strengthening human rights obligations and limitations on state sovereignty. Of the 1,500 peace agreements included in the University of Edinburgh's Peace Agreements Database, 1,061 reference human rights and equality[297].

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[293] Bell, "Peace Agreements: Their Nature and Legal Status." p.406
[294] Ibid. p.407
[295] Stahn, "Jus post bellum: Mapping the discipline(s)."
[296] Simon Chesterman, *You, the people: the United Nations, transitional administration, and state-building* (Oxford: Oxford University Press, 2004). And Theodor Meron, "Agora: The 1994 U.S. Action in Haiti--Extraterritoriality of human rights treaties," *The American journal of international law* 89, no. 1 (1995)in Stahn, "Jus post bellum: Mapping the discipline(s)."
[297] Kastner, "Interactions between Peace Agreements and International Law." Referencing: Christine Bell et al., "PA-X Codebook, Version 1. Political Settlements Research Programme," ed. University of Edinburgh (Edinburgh, 2019). www.peaceagreements.org.

Such emerging patterns in the treatment of peace agreements and treaties in international law directly impact the status of obligated surrender in international law. The role of self-determination in particular will feature heavily in Chapter Six. Before moving on, however, the legal status of agreements forced onto a party deserves further discussion, as it is an issue that will likely arise in relation to surrender agreements.

While before the advent of the UN Charter and the VCLT, it was not considered important that a treaty was brought about by the threat or use of force[298], Article 52 of the VCLT declares a treaty void if it is made under threat or use of force 'in violation of the principles of international law embodied in the Charter of the United Nations'. This is also customary international law[299]. The prior position was considered to be reflective of international law during the era before the Covenant of the League of Nations and the Pact of Paris towards the legality of the use of force itself[300].

The invalidating potential of coercion applies to many peace treaties anyway[301]. The International Law Commission in its commentary on the VCLT stated that 'As long as a war was regarded as a lawful course of action…a treaty of peace was considered perfectly valid, even when imposed on the defeated Party by the victor as an outcome of the use of force'[302]. The International Law Commission added that it was only aggressors who could not benefit from such protection; it is only the *unlawful* use of force that invalidates a treaty[303]. In such a case, the entirety of the treaty is void. Reference is made by the Commission to use of force that is in conflict with the principles of the UN Charter. In two cases, that of the Military Technical Agreement of 9 June 1999 and the Lusaka Agreement, the parties involved did not claim that their respective agreements were void, despite it being clear that they would not have

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[298]Report of the International Law Commission, 18th Session (ILC Yearbook 172 1966); *Report of the International Law Commission, 18th Session*, Yearbook of the International Law Commission, 1966, vol. II (1966). Article 49

[299]*Dubai-Sharjah Border Arbitration*, (1993) 91 International Law Reports 543-701, Cambridge University Press. P.569. See also *Partial Award No 310-56-3*, (Iran-United States Claims Tribunal 14 July 1987). §91. See also Serena Forlati, "Coercion as a Ground Affecting the Validity of Peace Treaties," in *The Law of Treaties Beyond the Vienna Convention*, ed. Enzo Cannizzaro (Oxford University Press, 2011).

[300]*Report of the International Law Commission, 18th Session*. Article 49. *Covenant of the League of Nations*; *Kellogg-Briand Pact*.

[301] For peace treaties, claims of invalidity on such grounds of coercion are rare. Other practical reasons apply. For example, 'formal recognition of the illegal coercion could take place only after overcoming the political and military scenario that brought it about'. See: Forlati, "Coercion as a Ground Affecting the Validity of Peace Treaties." p.324

[302] Dinstein, *War, Aggression and Self-Defence*. p.39 Referring to: *Report of the International Law Commission, 18th Session*.

[303]Report of the International Law Commission, 18th Session Short; *Report of the International Law Commission, 18th Session*., 247. Emphasis added.

been agreed but for the use of force, and the ICJ endorsed them as applicable law in relevant cases[304].

A related issue, worth pre-empting before it arises in later chapters, is the legal status of actions after the breakdown of a peace agreement. By the doctrine of *pacta sunt servanda*, parties are bound to act in good faith during the making and execution of a treaty[305]. Yet breakdown still of course occurs, whether due to absence of good faith or not. Under the terms of the VCLT, a material breach of a cease-fire by one party can be grounds for the other party to resume hostilities. Article 60 of the VCLT defined "material breach" as either: 'A repudiation of the treaty not sanctioned by the present Convention' or 'the violation of a provision essential to the accomplishment of the object or purpose of the treaty. "Material breach" is deliberately distinguished from "all breaches" – only particularly serious ones will allow the resumption of hostilities – and from "fundamental breaches" which would have been considered to be more central to the purpose of the treaty[306]. However, even in the absence of a material breach, resumption of hostilities would not automatically amount to an act of aggression; it does not affect the legal relationship between the belligerent parties[307].

Crucially, Bell does not argue for the creation of a new soft law; she proposes that peace agreements be understood as hybrid documents, neither domestic nor international[308]. They are, as Scott Sheeran puts it, 'ill-suited to the prevailing positivism of international law'[309]. Nonetheless, the framework is useful in shaping a prospective obligated to surrender.

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[304] The DRC did use arguments around the invalidity of the treaty, but only to push for a restrictive interpretation of it rather than the to void it entirely. The ICJ noted, in the *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo,* that 'none of the participants' questioned the validity of Resolution 1244(1999). See: *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Advisory Opinion),* (International Court of Justice 22 July 2010). §85. In the same case, Serbia called the resolution 'the cornerstone of the international legal regime of Kosovo' *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Written statement of Serbia),* (International Court of Justice 17 April 2009).§1040(iv)

[305] Murray, O'Donoghue, and Warwick, "The implications of the Good Friday Agreement for UK human rights reform." See also J. Klabbers, The Concept of Treaty in International Law (Kluwer Law International, 1996) p.39. See also Oscar Schachter, *International law in theory and practice*, Developments in international law, (London: Nijhoff, 1991).

[306] Report of the International Law Commission, 18th Session, [1966] II I.L.C. Ybk 172, 247.

[307] Dinstein, *War, Aggression and Self-Defence*. p.61

[308] Aoife O'Donoghue, "Good offices: grasping the place of law in conflict," *Legal Studies* 34, no. 3 (2014)

[309] Sheeran, "International law, peace agreements and self-determination: The case of Sudan." p.425

3.2.b Cessation of hostilities without a peace treaty

Conflict may also be terminated without a peace treaty. The Geneva Conventions recognise the 'general close of military operations' as the point at which their provisions cease to apply. We can infer from this that it was at least anticipated that conflict could end without a formal peace treaty and simply by the non-continuation of active hostilities. For example, a war may be terminated by what Dinstein calls 'implied mutual consent'[310]. This is when the consent to end the war is inferred from the actions of the belligerent parties. Such inference must be cautious and the actions of the parties must demonstrate their intention, either through the resumption of diplomatic relations or other such evidence, to terminate rather than merely cease hostilities[311]. It is unlikely that a legally compelled surrender and implied mutual consent would be applicable to the same case.

3.2.b (i) Debellatio

Debellatio describes a situation in which the occupying state is able to decide the fate of the occupied territory[312]. It involves the complete defeat of a state, defined by the following criteria:

> (i) The entire territory has been occupied, no remnant being left for the exercise of sovereignty.
>
> (ii) The armed forces of the State in question are no longer in the field (usually there is an unconditional surrender), and no allied forces carry on fighting by proxy.
>
> (iii) The Government of the State has passed out of existence, and no other Government (not even a Government in exile) continues to offer effective opposition[313].

Debellatio is illegal because it conflicts with the right of self-determination, a point supported by the International Court of Justice in both the *East Timor* case and its Advisory Opinion in

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[310] Dinstein, *War, Aggression and Self-Defence*.
[311] Ibid.
[312] von Heinegg, "Factors in War to Peace Transitions Symposium: The Rule of Law in Conflict and Post-Conflict Situations."
[313] Dinstein, *War, Aggression and Self-Defence*.

the *Wall* case[314]. The right of self determination, it declares, is irreproachable[315]. Belligerent occupation does not produce a transfer of sovereignty or claim over the territory in question by itself. This is confirmed by Article 4 of Protocol I, Additional to the Geneva Conventions. Although Israel and the United States have not ratified the Protocols Additional they do not object to this specific provision[316].

The topic of unconditional surrender was a particular focus in the aftermath of World War Two. While traditionally unconditional surrender is a type of capitulation made by the military, it is easily transferable to the political sphere[317]. However, it is necessary to distinguish between the standing down of military forces and the juristic-political act formalised in a treaty and conducted between states[318]. The crucial aspect of this treaty is the transfer of *imperium*[319]. Authors at the time noted, however, that the continued maintenance of the treaty rests largely on the military superiority of the victor, who would be wise not to rely too heavily on the illusion of the power of the law to force compliance in such circumstances[320]. What this demonstrates, then, is the need for the duty to surrender to reflect these concerns about the transfer of *imperium* and the importance of self-determination.

3.2.b (ii) Compelled and Facilitated War Termination

What is missing from the discussion so far is whether there are situations in which war termination is *obligatory* through the application of the law, as would be the case in the proposed theory of surrender. The UN Security Council, via Chapter VII of the UN Charter, may order parties to engage in a cease-fire, as it did after Israel's war of independence[321]. As above, a cease-fire differs from a peace treaty in that the former is considered a (temporary)

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[314] Ibid. See *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (International Court of Justice (ICJ) 2004) General List No. 131; *Case Concerning East Timor (Portugal v. Australia)*, (International Court of Justice (ICJ) 1995) I.C.J. Reports 1995, p. 90; General List No. 84.
[315] Dinstein, *War, Aggression and Self-Defence*.
[316] N. Schmitt Michael, "Debellatio," (Oxford University Press). 174, 169 and 79 states are state signatories to Additional Protocol I, II and III respectively. Some states, such as the US, Iran, India, Pakistan and Israel are not state signatories to the Protocols Additional. The Ethopia Claims Commission considered that 'most of the provisions of Protocol I were expressions of customary international humanitarian law'. See *Partial Award: Central Front - Ethiopia's Claim 2*, (28 April 2004). §17
[317] Francis C. Balling, "Unconditional Surrender and a Unilateral Declaration of Peace," *American Political Science Review* 39, no. 3 (1945)
[318] Ibid.
[319] Ibid.
[320] Ibid.
[321] Dinstein, *War, Aggression and Self-Defence*. p.54

suspension of hostilities rather than a (permanent) termination of them. The key difference here between a request and an order is the language used. It is not uncommon for the Security Council to 'call on', parties to cease military operations, signifying a recommendation. In the case of the Israeli war of independence the Security Council used unequivocal language, which members are bound, via Article 25 of the UN Charter, to follow[322]. It *demanded* a cease-fire, signifying a binding decision.

The UN Security Council may also impose the terms of the cease-fire, as it did in 1991 on Iraq in Resolution 687[323]. Here the Security Council also imposed strict disarmament obligations on Iraq[324]. More recently, the UN has increased its involvement in peace negotiations, especially when contrasted with pre-1945 settlements, which has resulted in increased complexity and decreased consent from the belligerent parties, though not to the point of disregard in the case of the latter[325]. The General Assembly may also call upon states to engage in a cease-fire, but may not order it[326].

This speaks to the importance of good offices as, if not a obliger, at least a facilitator. It is an approach that emphasises the peacemaker rather than the structure of the peace itself; good offices can refer to states such as Switzerland in the Franco-Prussian War (1870-1871),

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[322] Ibid.

[323] Ibid. p.55 United Nations Security Council, *Security Council Reolution 687*, S/RES/687 (3 April 1991). The Security Council has more generally been less restrained since September 11 2001. 'Notably, prior to 9/11 no Chapter VII resolutions imposed a legal duty on states to introduce specific kinds of domestic counterterrorism legislation' Fionnuala Ní Aoláin, "The Ever-Expanding Legislative Supremacy of the Security Council in Counterterrorism," in *9/11 and the Rise of Global Anti-Terrorism Law: How the UN Security Council Rules the World*, ed. Arianna Vedaschi and Kim Lane Scheppele, Global Law Series (Cambridge: Cambridge University Press, 2021). p.34

[324] Dinstein, *War, Aggression and Self-Defence*.

[325] David M. Morriss, "From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations," *Virginia Journal of International Law* 36, no. 4 (1995)

[326] Dinstein, *War, Aggression and Self-Defence*. The "Uniting for Peace" Resolution, Resolution, seems to offer a potential avenue for the General Assembly to take measures for peace and security, provided that an SC resolution has failed to be adopted in the face of a threat to the peace, breach of the peace or act of aggression, if requested by a majority of the SC. Nonetheless, it could still only issue recommendations rather than binding decisions. See: Larry D. Johnson, ""Uniting for Peace": Does it Still Serve Any Useful Purpose?," *American Journal of International Law* 108 (2014) The GA has been reluctant to challenge the primacy of the SC in matters of peace and security. Though arguments supporting the increased use of the Uniting for Peace Resolution are put forward, others have claimed that it is no longer necessary as the UNSC sits year-round and that the UNGA is not barred from taking up an issue that the UNSC is already considering. See: Andrew J. Carswell, "Unblocking the UN Security Council: The Uniting for Peace Resolution," *Journal of Conflict and Security Law* 18, no. 3 (2013) Notably, the UN GA made use of the Resolution in response to Russia's invasion of Ukraine in 2022, first time in three decades it had been used. It called Russia's actions aggression and demanded that Russia cease its use of force. SeeMichael P. Scharf, "Power Shift: The Return of the Uniting for Peace Resolution," *Case Western Reserve Journal of International Law: Faculty Publications* 55 (2023). See also United Nations General Assembly, Resolution 277 [Uniting for Peace], (3 November 1950)., For the response to the invasion of Ukraine, see: United Nations General Assembly, Resolution ES-11/1, (18 March 2022).

international organisations such as bodies of the United Nations, or individuals such as Tony Blair in his role as Peace Envoy to the Middle East[327]. One of the earliest and most significant descriptions is contained within the 1899/1907 Convention for the Pacific Settlement of International Disputes, whose Article 2 reads: '[i]n case of disagreement or dispute, before an appeal to arms, the Contracting Parties agree to have recourse as far as circumstances allow to the good offices or mediation of one or more friendly powers'. However, both the Convention for the Pacific Settlement of Disputes and the American Treaty on Pacific Settlement (1948) implies a distinction between mediation and the use of good offices[328]. Although Chapter VI of the UN Charter does not mention good offices, later GA and SC resolutions have noted it as a method of dispute resolution[329]. Furthermore, the adjustment of a mandate of the Secretary General via the "Peking formula" – a simultaneous authorisation by and disassociation from a mandate given by a body of the United Nations to the Secretary General – has meant that the Secretary General is accepted as an impartial political and diplomatic entity and representative within the United Nations[330].

Good offices demonstrate that there is a gap in the conflict resolution landscape and the lack of full development means the role of third parties in managing and enforcing peace processes faces questions of legalisation and legitimisation[331]. It also lends weight to the possibility of a surrender process being subsumed under an external authority.

To conclude this section, there are hints at a framework that might lend itself to compelling, via the law, war termination. The practice and law around peace treaties helps to delineate what form a surrender would have to take to be considered legal. It is worth emphasising that the illegality of *debellatio* means the conclusion of war must be less extreme. If there is now limits on what the defeated must endure, there is greater room for surrender to be conditional. Furthermore, though there is sparse evidence for an explicit law by which the UN could compel parties to a conflict to *terminatively concede,* there are many principles throughout international law on war that would seem to inspire the existence of one. It is to these principles, within the various "cousins" to which this chapter now turns.

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[327] O'Donoghue, "Good offices: grasping the place of law in conflict."
[328] Ibid.
[329] Ibid.
[330] See Leon Gordenker, *The UN Secretary-General and the Maintenance of Peace*, Columbia University Studies in International Organization, (New York: Columbia University Press, 1967). O'Donoghue, "Good offices: grasping the place of law in conflict."
[331] O'Donoghue, "Good offices: grasping the place of law in conflict."

3.3 *Jus ad bellum*: International Law on the Use of Force

The law on the use of force is the body of international law specifying those conditions under which a state may enter into armed conflict. As the body of law concerned with the transition from peace to war, it can be considered to be the complement of the proposed *jus ex bello*, those principles governing the transition from war back to peace. Aside from describing the *jus ad bellum*, this section is relevant because it describes those actions which international law has deemed grave enough to prohibit. As will be seen in later chapters, some revisionist just war theorists have sought to derive a *jus ex bello* from *jus ad bellum* principles. Some orthodox/regular just war theorists also equivocate the rejection of fair peace terms with aggression[332].

3.3.a The UN Charter

An outline of the law on the use of force in international law must begin with the UN Charter, and specifically Article 2(4), containing the general prohibition of the use of force:

> All Members shall refrain in their international relations from the threat or use of 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 International Law Commission considers this an example of *jus cogens*[333]. There are exceptions to this prohibition, however. Article 51 of the UN Charter permits the use of force in self-defence. Such use of force can be collective in nature, covering the actions laid out in Article 5 of the NATO Charter, for example, and it can be pre-emptive, provided very restrictive criteria are met. Article 51 reads:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the

[332] See: Emer de Vattel, *The Law of Nations*, ed. Knud Haakonssen (Carmel: Liberty Fund Inc, 2008).
[333] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits*, (International Court of Justice (ICJ) 1986) I.C.J. Reports 1986, p. 14; General List No. 70. 190. Also: *Report of the International Law Commission, 18th Session*. 172, 247.

> United Nations, until the Security Council has taken measures necessary to maintain international peace and security…

The second notable exception is Chapter VII authorisation. The exceptions are notable because they also shed light on which conditions prevail over a duty to surrender; if the prohibition on aggressive war is overcome by certain conditions, these might also be conditions in which there would be no requirement for the war to terminate and therefore for states to surrender. Chapter VII gives the United Nations Security Council the sole authority to make a determination of the 'existence of any threat to the peace, breach of the peace, or act of aggression'[334] and to thereby permit its members to use force in response and to restore international peace and security. The reference in Article 39 to a 'threat to the peace' has been interpreted broadly by the UN Security Council[335]. Chapter VII does not only cover the use of force; the Security Council has taken economic measures under it. The Security Council may then take actions not involving the use of force under Article 41, or actions involving the use of force under Article 42. Attempts by the Security Council to authorise action under Chapter VII was largely met with a veto response during the Cold War and although there was some optimism that the end of the Cold War and the UN response to the Iraqi invasion of Kuwait would produce a "new world order", this has not materialised[336]. The UN has shown itself to be 'flexible and non-formalistic in the exercise of its powers' and the distinction between peacekeeping and enforcement action has at times been blurred[337].

Although there is some discussion of the right of humanitarian intervention, it is largely restricted to writers, rather than states. The UK's Foreign and Commonwealth Office in a 1984 policy document stated that 'the best case that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal'[338]. Despite this fact, the UK has argued that there is such a right in the absence of Security Council authorisation, but this

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[334] UN Charter, Article 39. Again, Article 103 of the UN Charter states that when the Charter conflicts with another legal instrument it is the Charter that prevails. Also, the ICJ held that the UN Security Council was the principal organ for maintaining international peace and security in the Nicaragua Case. See *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Judgment*, (International Court of Justice (ICJ) 1984) I.C.J. Reports 1986, p. 14; General List No. 70. 94-6

[335] Christine Gray, *International Law and the Use of Force*, Third ed. (Oxford: Oxford University Press, 2008).

[336] Ibid.

[337] Ibid. p.326

[338] UK Foreign and Commonwealth Office, Is Intervention Ever Justified?, (The National Archives, Kew 1984). p.618. From Colin R. G. Murray and Aoife O'Donoghue, "Towards unilateralism? House of Commons oversight of the use of force," *International and Comparative Law Quarterly* 65, no. 2 (2016) p.315

is a minority view[339]. Indeed, the UK's officials used language appealing to legitimacy and morals rather than the law in relation to NATO airstrikes in 1999[340]. Similarly, in relation to action against Syria, the UK Parliament demonstrated the possibility that they may be swayed by legalised, rather than legal, argument[341]. Proponents of this view look to the International Commission on Intervention and State Sovereignty (ICISS) whose ideas were unanimously endorsed by the United Nations General Assembly in its 2005 World Summit Outcome Document. Although watered down, it nonetheless confirmed that states have a "responsibility to protect" (R2P) their citizens from genocide, ethnic cleansing, war crimes and crimes against humanity. Again, one might expect that a duty to surrender would *not* apply in such cases, if they were exceptions to the prohibition on the use of force.

Aggression is notably not included as one of the major international crimes that the World Summit Outcome Document linked to R2P, which is notable as reference to it is made elsewhere in the document[342]. The "responsibility to protect" of the World Summit Outcome document only permits humanitarian intervention insofar as it accords with the UN Charter anyway, even if Article 103 of the UN Charter did not emphasise this point on its own[343].

Contrarily, opponents of humanitarian intervention argue that humanitarian intervention is little more than a double standards doctrine aggression under the guise of beneficence not unlike civilising missions. The definition of aggression states that 'no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression' and this would seem to support the criticism[344]. If humanitarian intervention is aggression under another name, then the pursuit of humanitarianism would lend greater support to the requirement to terminate conflict than to allow it to continue. Indeed, pending a

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[339] For example, where Article 1 of the Convention on the Prevention and Punishment of Genocide commits the signatories to preventing and punishing genocide, and Article 8 of the same Convention permits its signatories to call upon the UN to consider an appropriate response. However, when considering the potential of the Article, two things ought to be borne in mind. Firstly, that that preparatory work of the Genocide Convention shows that the word "may" was chosen deliberately. It was argued that it was important that States ought to be obligated to take action but this was ultimately dismissed (See E/AC.25/W.5 in Hirad Abtahi, *The Genocide Convention: the Travaux Préparatoires*, ed. Philippa Webb, The travaux préparatoires of multilateral treaties, (Leiden: Martinus Nijhoff, 2009). p.1083. Secondly, that the Article clearly refers to "action under the Charter of the United Nations" and that Article 2(4) of the UN Charter imposes the general prohibition on the use of force. More relevantly for the purposes here, Article 103 of the UN Charter states that in the event of any conflict between the UN Charter and any other legal document, it is the UN Charter which prevails.
[340] Murray and O'Donoghue, "Towards unilateralism? House of Commons oversight of the use of force."
[341] Ibid.
[342] *2005 World Summit Outcome: Resolution/adopted by the General Assembly*.
[343] Article 103 states that where another treaty or legal document may conflict with the UN Charter, it is the provisions in the latter which prevail. See *Vienna Convention on the Law of Treaties*.
[344] United Nations General Assembly, *Definition of Aggression*, A/RES/3314 (14 December 1974).

discussion on the crime of aggression, it seems that a law that requires states to surrender would be more coherent with international law's limits on the use of force than would a right to continue fighting indefinitely. It also necessitates an in-depth analysis on the law of aggression, for two reasons. Firstly, aggression is on the other side of the duty to surrender coin; they describe the war-peace transition in different directions. Secondly, one could draw parallels between continuing war past a certain point (as some just war theorists do, detailed in the following chapters) and committing the crime of aggression.

3.3.b Aggression

3.3.b (i) Legal instruments on the crime of aggression before the Rome Statute

The decades before the Second World War and the creation of the United Nations featured several efforts to limit the waging of war. The 1919 Covenant of the League of Nations charged states with respecting territorial integrity and political dependence and with submitting to arbitration by the League matters that might lead to rupture[345]. The 1924 Protocol for the Pacific Settlement of International Disputes also sought to replace war with an arbitrative process[346]. And the 1928 Kellogg-Briand Pact (or Pact of Paris) had its signatories renounce war as an instrument of national policy[347]. It is notable that Justice Pal, in his dissentient opinion in the International Military Tribunal for the Far East, argued that Kellogg's position – that it was legitimate for Britain itself to judge the limits of its right of self-defence in its colonies – meant that the Pact, in lacking the 'final ascertainment by agencies other than the parties to the dispute can the law be rendered certain' also lacked legal quality[348].

References to aggression as an offence to the international community were made at the close of the Second World War and the Nuremberg Charter (though there was also an attempt to put Kaiser Wilhelm on trial for aggression[349]). Indeed, the majority of scholars at the time of the Nuremberg Military Tribunal argued that Article 6(a) of the 1945 London Charter was innovative as opposed to declaratory and that punishment for crimes against peace was

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[345] *Covenant of the League of Nations*. Articles 10 and 13
[346] *Protocol for the Pacific Settlement of International Disputes*.
[347] *Kellogg-Briand Pact*.
[348] Radhabinod Pal, *Dissentient Judgment of Justice Pal*, International Military Tribunal for the Far East, (Tokyo, Japan: Kokusho-Kankokai, Inc, 1999). pp.45-6
[349] William A. Schabas, *The Trial of the Kaiser* (Oxford University Press, 2018).

retroactive[350]. Criticism of it centred around the position that prosecuting German military leaders for the "crime" violated the principle of *nullum crimen sine lege*. The dissenting opinion of Justice Pal in the Tokyo War Crimes trials also adopted this view, as well as noting the conspicuous absence of Allied crimes, namely the bombing of civilian targets and colonialism[351]. Nonetheless, all defendants were found guilty on at least one charge.

The General Assembly confirmed the Nuremberg Principles[352]. However, the actual task of defining aggression took several more decades. In 1974, The General Assembly adopted Resolution 3314, the "Definition of Aggression" unanimously[353] to 'contribute to the strengthening of international peace and security'[354]. Article 1 defined aggression as 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations'. (Part of) Article 3 added that instances of aggression included:

> a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof…[355]

Particularly relevant to the treatment of non-state actors is that where the ICJ relies on Article 3(g) of the 1974 GA Resolution 3314, the article does not establish any given act as one of aggression and merely reflects the customary rule that non-state actors' actions are attributed to their respective states[356].

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[350] Florian Jeßberger, "The Modern Doctrinal Debate on the Crime of Aggression," in *The Crime of Aggression: A Commentary*, ed. Claus Kreß and Stefan Barriga (Cambridge: Cambridge University Press, 2016).
[351] Pal, *Dissentient Judgment of Justice Pal*.
[352] Claus Kreß, "Introduction: The Crime of Aggression and the International Legal Order," in *The Crime of Aggression: A Commentary*, ed. Claus Kreß and Stefan Barriga (Cambridge: Cambridge University Press, 2016). United Nations General Assembly, *Affirmation of the Principles of Law Recognized by the Charter of the Nuremberg Tribunal*, A/RES/95 (11 December 1946).
[353] Kreß, "Introduction: The Crime of Aggression and the International Legal Order." *Definition of Aggression*.
[354] *Definition of Aggression*.
[355] Ibid. Art 3
[356] Dapo Akande and Antonios Tzanakopoulos, "The International Court of Justice and the Concept of Aggression," in *The Crime of Aggression: A Commentary*, ed. Claus Kreß and Stefan Barriga (Cambridge: Cambridge University Press, 2016). This rule was codified in Article 8 of the ILC Articles on the Responsibilities of States for Internationally Wrongful Acts.

3.3.b (ii) Case law and the International Court of Justice

Although the Rome Statute is the current central instrument for the crime of aggression, significant case law developed before this. The most prominent cases are the *Nicaragua, Oil Platforms* and the *Armed Activities* cases alongside other cases including the *Nuclear Weapons*, *Wall Opinion* and the *Corfu Channel* cases[357]. The *Nicaragua Case* of 1986 relied on the 1974 General Assembly definition as customary international law[358].

There is some debate about whether aggression is the complement to self-defence[359]. The ICJ has never determined that an unlawful use of force automatically constitutes an act of aggression. However, this is because making such a determination is unnecessary; the unlawful use of force refers mainly to the UN Charter articles (as above) and it has made use of the themes of the concept of aggression when referencing the concept of armed attack in Article 51 of the UN Charter[360].

While it might be supposed that only those attacks which compromise the sovereignty, territorial integrity or political independence of another state, or are otherwise contrary to the purposes of the UN Charter are illegal, an argument premised on this position is unlikely to be convincing. The British claims in the *Corfu Channel* case that they did not violate the territorial integrity of political independence of Albania in entering Albanian waters to recover evidence were rejected by the International Court of Justice[361]. The Israeli attacks on bases in Syria, justified on the basis that they were not attacking Syria but targets in Syria met with similar criticism[362] as did a possible justification of the wall in Palestine in the *Wall Opinion*[363].

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[357] Ibid. *Nicaragua Case (Merits)*, (International Court of Justice (ICJ) 1986) I.C.J. Reports 1986, p. 14; General List No. 70 *Case concerning Oil Platforms (Islamic Republic of Iran v United States of America) (Judgment)*, (International Court of Justice 6 November 2003); *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v Uganda); Merits*, (International Court of Justice (ICJ) 19 December 2005); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, (International Court of Justice (ICJ) 8 July 1996) I.C.J. Reports 1996, p. 226 *Wall Opinion*, (International Court of Justice (ICJ) 2004) General List No. 131 *Corfu Channel Case (United Kingdom v. Albania); Merits*.

[358] *Nicaragua Case (Merits)*, (International Court of Justice (ICJ) 1986) I.C.J. Reports 1986, p. 14; General List No. 70

[359] Others, such as D.W. Bowett argues that the definition of the crime of aggression relates to the collective security system and part of broader "threats to peace". See Akande and Tzanakopoulos, "The International Court of Justice and the Concept of Aggression."

[360] Ibid.

[361] Gray, *International Law and the Use of Force*. p.32

[362] Amos N Guiora, "Anticipatory self-defence and international law—a re-evaluation," *Journal of Conflict and Security Law* 13, no. 1 (2008)

[363] *Wall Opinion*, (International Court of Justice (ICJ) 2004) General List No. 131 §139

There is some debate about whether the "crime of aggression" is synonymous with "illegal use of force". Dapo Akande and Antonios Tzanaopoulos hold that there are two spectra of gravity on the use of force. The first progresses from the use of force, reliant on Article 2(4) of the UN Charter, to armed attack (Article 51 of the UN Charter) to a 'serious breach of a peremptory norm of general international law (article 40 of the Articles on State Responsibility)'[364]. The second moves from use of force to an act of aggression and then the crime of aggression. The former relates to state responsibility only and the second relates to both state and individual criminal responsibility. This assessment is based on ICJ interpretation of the various legal instruments pertaining to the use of force[365].

The *Nicaragua case* distinguished between uses of force that fall below the threshold of an armed attack and one that activates the self-defence of Article 51 of the UN Charter and in so doing determined there to be a "gap" between Article 51 and Article 2(4)[366]. The ICJ has not set out a clear set of criteria for determining where the threshold is although it has determined that frontier incidents do not meet the threshold where mining a single military vessel, as in the *Corfu Channel* case, might; the latter is a violation of Article 2(4) and might also breach the threshold for determining armed attacks[367].

The ICJ considered the definition of an armed attack in *Nicaragua*, with limited reliance on the *Definition of Aggression*. Armed attacks can be committed by the irregular forces, although there is disagreement about the extent of state involvement, and it does not include financial and logistical support[368]. While the Court's definition has been criticised, it is consistent with state practice; the Security Council has not classed the supply of arms to opposition forces as armed attacks[369]. In the *Iranian Oil Platforms* case, the ICJ did not classify two specific attacks on US-owned vessels (not showing the US flag) as an armed attack nor was minelaying, and therefore an attack must be specifically targeted at a state to be considered an armed attack[370].

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[364] Akande and Tzanakopoulos, "The International Court of Justice and the Concept of Aggression." pp.228-9
[365] Particularly, *Nicaragua Case (Merits)*, (International Court of Justice (ICJ) 1986) I.C.J. Reports 1986, p. 14; General List No. 70; *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v Uganda); Merits*, (International Court of Justice (ICJ) 19 December 2005). In *Nicaragua*, the ICJ distinguished aggression as a 'more grave' use of force (§191). In *Armed Activities*, the ICJ found that regardless of whether several attacks could reach the threshold of an armed attack, they did not amount to GA Res 3314(XXIX)'s definition of aggression because they could not be attributed with sufficient directness to the DRC (§146). It considered the Ugandan intervention into the DRC as a grave violation and contrary to Article 2(4) of the UN Charter (§165).
[366] Akande and Tzanakopoulos, "The International Court of Justice and the Concept of Aggression."
[367] Ibid.
[368] Gray, *International Law and the Use of Force*.
[369] Ibid.
[370] Ibid.

Lastly, the Commission in found that limited clashes between Eritrean and Ethiopian border patrols did not satisfy the gravity requirement of an armed attack[371].

There are at least two strong reasons for positing that the ICJ considers the concept of an armed attack to be analogous to that of aggression. The aforementioned gravity threshold is one and the other is that the ICJ appeared to favour referring to the 1974 GA Resolution 3314 on the definition of aggression to determine whether a use of force constitutes an armed attack[372]. The 2010 Rome Statute of the International Criminal Court constitutes the first point of reference for a definition of aggression, to which the thesis will now turn, but takes much from the GA's Resolution 3314.

3.3.b (iii) The Rome Statute

Article 8 *bis* from the 2010 Rome Statute defines acts of aggression as 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations'[373]. The debate around the definition of the crime focussed on, among other things, whether to adopt what was called a "monistic" or "differentiated" approach[374]. It was the differentiated approach that eventually prevailed, as drafters considered that the crime was perpetrated by states before individuals. Therefore, the *crime* of aggression, according to the same Article 8 *bis* (1) of the Kampala Conference review, and later Article 8 *bis* (1) of the Rome Statute is:

> the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations[375]

The crime of aggression differs from the act of aggression in that the former relates to the actions of an individual and the latter relates to the actions of a state. This is notable as it speaks to how the duty to surrender might impose obligations on individuals and states

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[371] Ibid. *Final Award - Eritrea's Damages Claims between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, (17 August 2009) Eritrea-Ethiopia Claims Commission.
[372] Akande and Tzanakopoulos, "The International Court of Justice and the Concept of Aggression."
[373] United Nations General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, ISBN No. 92-9227-227-6 (17 July 1998).
[374] Barriga and Kress, *The Travaux Préparatoires of the Crime of Aggression*.
[375] *Rome Statute of the International Criminal Court (last amended 2010)*.

analogously. Aggression is distinguished from the other international crimes in that it requires a state conduct element before an individual may be found to have committed the crime of aggression[376]. Note that an act of aggression is not sufficient for a finding of a crime of aggression; it must be above a threshold of gravity, although this is because of the judgments of the International Court of Justice and not the UN Charter itself[377].

In keeping with the other international crimes, aggression has a criminal act (*actus reus*) and a criminal intent (*mens rea*). The latter component is a requirement by Article 30 of the Rome Statute[378]. Article 32(1) of the Rome Statute also excludes criminal responsibility for aggression (and other international crimes) in cases of mistake of fact, thereby demonstrating that both components of the crime are necessary[379]. The same applies, in principle, if the decision-maker was under duress or insane[380]. The *actus reus* of the crime of aggression if fulfilled in Article 8 *bis* (2) of the Rome Statute, taken from the Article 3 of General Assembly Resolution 3314, above.

The majority of the 34 UN Security Council resolutions determining aggression targeted the South African administration under apartheid and Southern Rhodesia (now Zimbabwe). Others condemned Israel and Iraq and three did not attribute the actions to a state. It is noteworthy that the Security Council considered these latter three as instances of aggression in spite of the fact that Article 8 *bis* considers that such acts perpetrated by non-state actors to be aggression only when they are sent by a state or act on its behalf[381]. Those pertaining to Southern Rhodesia were made at the time that it was still a colony of the United Kingdom. Based on Strapatsas' analysis of the 34 Security Council resolutions determining aggression, he considers it likely that it would, if faced with an inter-state conflict, make a referral to the prosecutor via Article

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[376] Kreß, "The State Conduct Element."
[377] Akande and Tzanakopoulos, "The International Court of Justice and the Concept of Aggression." The proposed crime of ecocide, hoped to be added to the Rome Statute as Article 8 *ter*, also includes a gravity requirement, particularly with the use of 'wanton', something which its critics consider to undermine the project. See: Stop Ecocide Foundation, *Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text* (2021). For criticism, see: Kevin Jon Heller, "The Crime of Ecocide in Action," *Opinio Juris*, 2021, http://opiniojuris.org/2021/06/28/the-crime-of-ecocide-in-action/.
[378] Dinstein, *War, Aggression and Self-Defence*.
[379] Ibid.
[380] Ibid.
[381] Nicolaos Strapatsas, "The Practice of the Security Council Regarding the Concept of Aggression," in *The Crime of Aggression: A Commentary*, ed. Claus Kreß and Stefan Barriga (Cambridge: Cambridge University Press, 2016).

13(b) of the Rome Statute without invoking Article 15 *ter* (on the exercise of jurisdiction over the crime of aggression and Security Council referral)[382].

The fact that acts of aggression are so classified because of their character, gravity and scale means that there are actions "short of war" which do not constitute a crime of aggression. The Kampala amendments specified that actions were considered to be *manifest* violations of the UN Charter where they exceeded the thresholds of character, gravity and scale.

Just as with other international crimes, the Rome Statute has potentially prioritised ratification over a sound description of a moral offence[383]. Two notable moral difficulties with the definition are that it can only be applied to non-state actors indirectly and with great difficulty, and that cyber warfare is not included as an *actus reus*[384]. The former of these is particularly relevant to a duty of surrender. The Prosecutor for the ICC had been exploring pursuing state nationals in response to crimes committed by IS[385]. She was not able to bring aggression charges against them in 2014. The difficulty here is that it is the foot soldiers who are nationals of state parties and the crime of aggression is a leadership crime. At the moment, any determination of the applicability to nationals of a non-state party would require a pronouncement by the ICC[386].

The crime of aggression on the prohibition on the use of force demonstrates a number of things. Firstly, and most importantly, it demonstrates the strength of the condemnation of the use of force to achieve political aims. Secondly, the rationale is in keeping with that justifying inclusion of a duty to terminatively concede in law. The condemnation of aggressive war is condemnation of states exerting control over others. It condemns a range of actions contrary to the principles of the UN Charter, including self-determination. Importantly, this condemnation persists in the face of justifications about ostensibly just aims. The principles of a duty to surrender must also be coherent with the purpose of the criminalisation of aggression. Insofar as it is possible to determine the purpose of a body of international law, the purpose of the law on the use of force is to 'promote the welfare of [humankind]' and the

[382] Ibid.
[383] For an example, see: UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, United Nations, Treaty Series, vol. 78, p. 277 (9 December 1948).
[384] David Scheffer, "Amending the Crime of Aggression under the Rome Statute," in *The Crime of Aggression: A Commentary*, ed. Claus Kreß and Stefan Barriga (Cambridge: Cambridge University Press, 2016).
[385] Ibid.
[386] Ibid.

'renunciation of war', to ensure that 'peaceful and friendly relations…may be perpetuated'[387] and 'ensure the maintenance of general peace'[388]. To put it more succinctly, the purpose of *jus ad bellum* is to outlaw war and promote peace, as it is the aim of the proposed duty to surrender.

3.4 *Jus in bello*: International Humanitarian Law

3.4.a Necessity and Humanity

International humanitarian law, as *jus in bello*, is the body of law which regulates conflict. It is independent of *jus ad bellum*, or law on the use of force, in that it is symmetric regardless of degree of adherence to *jus ad bellum*; simply, it applies equally to the side that entered the war justly as it does to the unjust side. It aims to reconcile two principles – necessity and humanity – and all of its rules are a careful balance between these two principles[389]. This underlying logic of IHL is exhibited in the St Petersburg Declaration espousing its goal as 'alleviating as much as possible the calamities of war'[390]. The Lieber Code of 1863, the famous code written for Union forces in the American Civil War, defined necessity as 'those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war'[391]. It adds that 'in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult'[392]. As has already been noted, 'no argument of military necessity may be invoked to refuse an unconditional surrender'[393].

The St Petersburg Declaration of 1868 aspired to '[fix] the technical limits at which the necessities of war ought to yield to the requirements of humanity'[394]. Specific weapons are

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[387] *Kellogg-Briand Pact*. Preamble.
[388] *Protocol for the Pacific Settlement of International Disputes*.
[389] Schmitt, "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance." See also *Corfu Channel Case (United Kingdom v. Albania); Merits*., p.22 in which the ICJ acknowledged that "elementary considerations of humanity" run through international law.
[390] *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (Declaration of Saint Petersburg)*, (1868).
[391] United States Army, *Instructions for the Government of Armies of the United States in the Field (Lieber Code)*, General Orders 100 (24 April 1863)., Art 14.
[392] Ibid., Art 16.
[393] Sandoz, Swinarski, and Zimmermann, *Commentary to Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. p.487
[394] *Lieber Code*., Preamble

prohibited because they are considered to cause unnecessary suffering[395]. The Saint Petersburg Declaration was the first formal treaty in international law that prohibited the use of certain weapons, such as asphyxiating gas[396]. Dum-dum bullets, designed to expand on impact, are also prohibited because they 'will invariably cause injury and suffering greater than that required to achieve the legitimate military objective of placing enemy combatants *hors de combat*[397]. It was also the St Petersburg Declarations that distinguished between combatants whose weakening was 'the only legitimate object which States should endeavour to accomplish during war'[398].

Later, the Hague Conventions of 1899 and 1907 noted that the right of belligerents to 'adopt means of injuring the enemy is not unlimited'[399]. Under their Articles 23(a), the Hague Conventions prohibit the use of poison or poisoned weapons[400]. Article 25 also prohibits, 'the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended', drawn from the principle of distinction and Article 22 declares 'he right of belligerents to adopt means of injuring the enemy is not unlimited'[401]. Proportionality is also evident in Article 27: 'all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes'[402]. The "Martens Clause" of Hague Convention IV states that the principle of humanity was intended to be a counterbalance permeating through the laws of war to the principle of necessity[403]. The Hague Conventions have progressed into customary

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[395] Andrew Clapham et al., *The Oxford handbook of international law in armed conflict*, Handbook of international law in armed conflict, (Oxford: Oxford University Press, 2014).
[396] Dill and Shue, "Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption."
[397] Clapham et al., *The Oxford handbook of international law in armed conflict*. p.106
[398] *St Petersburg Declaration*.
[399] *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*. See Schmitt, "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance."
[400] *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*.
[401] Ibid.
[402] Ibid.
[403] Schmitt, "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance." Interpretations of the Martens Clause differ, ranging from considering it an extra-legal and superfluous reference to the authority of customary international law to an anti-positivist view of the laws of war. For the former, see Yoram Dinstein, "The principle of proportionality," in *Searching for a 'Principle of Humanity' in International Humanitarian Law*, ed. Camilla Guldahl Cooper, Gro Nystuen, and Kjetil Mujezinović Larsen (Cambridge: Cambridge University Press, 2012).

international law, confirmed by the ICJ[404] but an analogous principle is also found in Additional Protocol I[405]. However, the Martens Clause only applies where international law is silent.

Compromises between the two principles of necessity and humanity are present in the Geneva Conventions too. On the one hand, Additional Protocol I permits derogation from the ban on "scorched earth" tactics in the presence of 'imperative military necessity'[406]. Article 52 acknowledges that civilian objects may be legitimate targets when they confer a 'definite military advantage'[407]. On the other, the principle of distinction requires parties at all times to distinguish between civilians and combatants[408]. Under Article 51(5)(b) of Additional Protocol I, considered also to be customary international law, attacks that cause excessive collateral damage are prohibited.

Operations in wartime are also subject to restrictions designed to prevent unnecessary suffering, such as by the proportionality requirement described in Additional Protocol I of the 1949 Geneva Conventions[409]. The proportionality principle similarly functions to provide a balance between the 'achievement of a particular military goal and the cost in terms of civilian lives'[410]. However, this was a late development; it was not until the growth of humanism in the 18th century that the needless suffering of combatants and civilians were thought to be unacceptable[411]. *Jus in bello* proportionality does not depend on previous assessment as to the necessity of the attack[412]. Other than the examples given by API itself, neither international practice nor case law provides definitive answers as to what distinguishes a proportionate attack from a disproportionate attack, and thus the emphasis must be placed on the procedure that leaders are required to follow, rather than an assessment of the attack itself[413]. This emphasis on procedure is something that will be revisited in Chapter Six. While at least some the

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[404] *Wall Opinion*, (International Court of Justice (ICJ) 2004) General List No. 131, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, (International Court of Justice (ICJ) 8 July 1996) I.C.J. Reports 1996, p. 226 They were also found to be customary by the Nuremberg Tribunal: *Judgment*, (International Military Tribunal (Nuremberg) 1 October 1946).
[405] *Additional Protocol I*.
[406] Ibid. Article 54(5)
[407] Ibid. Article 52.
[408] Ibid. Article 48
[409] Ibid.
[410] Gardam, *Necessity, proportionality, and the use of force by states*. p.3
[411] Ibid.
[412] Enzo Cannizzaro, "Proportionality in the Law of Armed Conflict," in *The Oxford Handbook of International Law in Armed Conflict*, ed. Andrew Clapham and Paola Gaeta (Oxford: Oxford University Press, 2014).
[413] Ibid.

Protocols Additional have not been signed by some key states, such as the United States and India, such principles are considered to be customary international law.

In bello proportionality (not to be confused with *ad bellum* proportionality) is determined by an assessment of '(A) the expectation of excessive incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, compared to (B) the anticipation of the concrete and direct military advantage to be gained'[414]. Emphatically, it is not just a tally of the casualties on both sides[415].

3.4.b International Armed Conflicts and Non-International Armed Conflicts

The Protocols Additional themselves were adopted after calls from many in the international community that the 1949 Geneva Conventions needed updating in order to keep up with, in particular, two trends in conflict: the growing prevalence of intranational hostilities and intra-state warfare[416]. As both of these trends continue to characterise modern conflict, the question of whether a theory of *terminative concessions* which appeals to the principle of humanity might also apply to NIACs. The principles of international humanitarian law that apply to international armed conflict are much more developed than those that apply to non-international armed conflicts (NIACs). So far, the protections discussed are taken from international humanitarian law in general and so were made for state-on-state conflict.

NIACs are distinguished from international armed conflicts in several ways. Firstly, NIACs must be waged inside the territory of a single state, though there may be some spillover into other territories[417]. Note that in cases where the upheaval is so great as to spark an actual division, such as in the Korean War, what matters for determination of a NIAC is that the parties have attained the international legal criteria for statehood[418]. For our purposes, it is also

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[414] Dinstein, "The principle of proportionality." See *Additional Protocol I*. Article 51(5)(b)
[415] Dinstein, "The principle of proportionality."
[416] Schmitt, "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance."
[417] Article 8(2)f of the *Rome Statute of the International Criminal Court (last amended 2010)*. refers to 'armed conflicts that take place in the territory of a state'. This interpretation was confirmed in *The Prosecutor v. Alfred Musema (Judgement and Sentence)*, (International Criminal Tribunal for Rwanda (ICTR) 27 January 2000) ICTR-96-13-T.. See Yoram Dinstein, *Non-International Armed Conflicts in International Law* (2014). p.25
[418] Dinstein, *Non-International Armed Conflicts in International Law*.

important to distinguish NIACs from revolutions; a NIAC, says Yorem Dinstein 'takes a while to brew', although, of course, this is relatively difficult to pin down[419]. The judgment in the *Tadic case* observed that the UN had been focussed on the war in the former Yugoslavia since 1992 and therefore the several years that had passed meant the conflict did reach this threshold[420].

Inroads have been made more recently into developing the law for NIACs, but it is still lagging behind. Until the advent of Additional Protocol II, the protections from the Geneva Conventions consisted of Common Article 3[421]:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;

[419] Ibid. p.33
[420] *Prosecutor v. Dusko Tadic aka "Dule" (Opinion and Judgment)*, (International Tribunal for the former Yugoslavia (ICTY); Trial Chamber 7 May 1997) IT-94-1-T. §§ 561-568
[421] International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 1125 UNTS 609 (8 June 1977).

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Additional Protocol II included much more expansive protections and was exclusively targeted at regulating non-international armed conflict. The US and the UK expressed concern about putting non-state fighters on equivalent legal standing to its armed forces and giving what they saw as undue weight to the principle of humanity over the principle of necessity, and while the UK eventually did ratify the Protocols Additional, it took two decades to do so[422].

The current regime governing non-international armed conflicts consists essentially of the following: Article 3 common to the 1949 GCs; Article 19 of the 1954 Hague Convention for the Protection of Cultural Property (1954 Hague Convention); the 1977 AP II to the 1949 GCs; Article 2, paragraph 2 (c–f), of the Statute of the International Criminal Court adopted in Rome on 17 July 1998; Article 22 of the Hague Protocol of 26 March 1999; the 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects as amended on 21 December 2001; the majority of customary IHL rules defined and published by the ICRC Study[423].

While Common Article 3 requires humane treatment, specifically for persons not taking an active part in hostilities and those rendered *hors de combat* (such as those who surrender), it

[422] Schmitt, "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance." Common Article 3 of the 1949 Geneva Conventions applied to their actions before this point, however.
[423] Eric David, "Internal (Non-International) Armed Conflict," in *The Oxford handbook of international law in armed conflict*, ed. Andrew Clapham et al. (Oxford: Oxford University Press, 2014). pp.354-5

suffers both from glaring omissions and abstract generalities[424]. There are some notable gaps in APII compared to API, such as the lack of prohibition of indiscriminate attacks, the requirement of proportionality in damage to civilians and the need to take feasible precautions in attack, but these have been filled by more recent customary international law[425]. Article 4(2) of APII specifically prohibits 'at any time and in any place' against persons not taking part in hostilities:

> (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
>
> (b) collective punishments;
>
> (c) taking of hostages;
>
> (d) acts of terrorism;
>
> (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
>
> (f) slavery and the slave trade in all their forms;
>
> (g) pillage;
>
> (h) threats to commit any of the foregoing acts[426]

Importantly for the purpose of this thesis, (h) forbids ordering that there be no survivors, echoing Hague Regulation 23(d) and in essence 'the idea is that fighters must be given an opportunity to surrender'[427].

The Trial Chamber for the International Criminal Tribunal for the former Yugoslavia noted in the *Tadić* case that the relevant bodies of law apply to non-international armed conflicts as distinguished from 'banditry, unorganised and short-lived insurrections, or terrorist activities' by the level of intensity (defined with reference to gravity and duration) of the hostilities and

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[424] Dinstein, *Non-International Armed Conflicts in International Law*. Concerning glaring omissions, Dinstein references: Anton Schlögel, "Civil War," *International Review of the Red Cross (1961-1997)* 10, no. 108 (1970)
[425] Dinstein, *Non-International Armed Conflicts in International Law*.
[426] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*. Article 4(2)
[427] Dinstein, *Non-International Armed Conflicts in International Law*. p.140 *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land.*

the nature of the actors involved[428]. Specifically, the hostilities must reach a gravity 'almost similar to those between regular armies'[429]. The ICC Pre-Trial Chamber found that there was a conflict in the Central African Republic after Bozize led dissident forces towards the city of Bangui to overthrow President Patassé and after JP Bemba sent between 1,000 and 1,500 soldiers to assist Patassé and the two forces engaged in combat and established 'strategic bases'[430]. The ICTY found that the conflict between the Kosovan Liberation Army (or Ushtria Çlirimtare e Kosovës) and Serb forces in Kosovo amounted to an armed conflict after the number of attacks increased from nine in 1995 to 1486 in 1998, that they were directed against civilians and Serbian police/security and that buildings had been bombed[431].

In essence, while IHL relating to NIACs is less extensive than that governing IACs, it is clear that it is still motivated by the same humanitarian impulse. Whatismore, this is a developing area and, far from it being appropriate to neglect NIACs in a theory of *terminative concessions* as a less developed area, it would be remiss to not take this area of IHL into consideration, not least because it explicitly references surrender.

3.4.c Combatants and non-combatants: the principle of distinction and surrender in IHL

This final section on surrender in IHL will cover the remaining points: the importance of the principle of distinction in IHL, *levées en masse* (which will be discussed in greater depth in Chapter Six) and the explicit laws around surrender. The principle of distinction, that combatants possess a different legal status to non-combatants, is a key principle in IHL, as required by considerations of humanity[432]. However, there are other groups, such as medical personnel and "civilians directly participating in hostilities" that warrant separate legal status. It is worth noting because it explains the link between combatant status and rights therein on

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[428] *Prosecutor v. Dusko Tadic aka "Dule" (Opinion and Judgment)*, (International Tribunal for the former Yugoslavia (ICTY); Trial Chamber 7 May 1997) IT-94-1-TTadic case. §562

[429] David, "Internal (Non-International) Armed Conflict." p.356

[430] *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (Pre-Trial Chamber)*, (International Criminal Court 15 June 2009) ICC-01/05-01/08-424., §240. §§340–4. §243.

[431] Haradinaj et al, Trial Judgment, 3 April 2008 *Prosecutor v. Haradinaj et al. (Trial Judgment)*, (International Criminal Tribunal for the former Yugoslavia (ICTY); Trial Chamber 3 April 2008) IT-04-84-T. §§90–9. See: David, "Internal (Non-International) Armed Conflict."

[432] Nils Melzer, "The Principle of Distinction Between Civilians and Combatants," in *The Oxford handbook of international law in armed conflict*, ed. Andrew Clapham et al. (Oxford: Oxford University Press, 2014).

the one hand, and their status as representatives of the state, which in turn takes responsibility for them, on the other hand, as well as the interesting case of the *levée en masse*. Article 43(1) of API provides a definition of armed forces during *international armed conflict* which is now part of customary international law:

> The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict[433]

Combatants are defined, also by API:

> Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities[434]

Civilians are defined negatively[435]. A civilian is a person who is not a member of the armed forces, nor a participant in a *levée en masse*; all people are either a member of the armed forces, as defined above, or a civilian[436]. Article 2 of the 1907 Hague Convention recognises the belligerent status of participants in a *levée en masse*[437]. Although a strict reading of the Geneva Conventions and the Protocols Additional would seem to confirm that a person must be either a member of the armed forces or a civilian, the addition of participants in a *levée en masse* is confirmed by the ICRC's editors of *Customary International Humanitarian Law* as a principle of customary international law[438]. Participants of a *levée en masse* are afforded "privileged combatant" status when they carry their arms openly and respect the laws and customs of

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[433] *Additional Protocol I*. Article 43(1)
[434]Ibid. Article 43(2)
[435] Melzer, "The Principle of Distinction Between Civilians and Combatants."
[436] Ibid.
[437] *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*. Article 2
[438]Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*. p.18. See Melzer, "The Principle of Distinction Between Civilians and Combatants."

war[439]. Under Article 2 of the Hague Convention of 1907, participants in a *levée en masse* are 'inhabitants of a territory which has not been occupied, who, on approach of the enemy spontaneously take up arms'[440]. Likewise, although a mercenary are defined by Article 47(2) of the API as a person who is not a member of the armed forces, the qualifying criteria contained within the definition of a member of the armed forces would seem to apply to them. Melzer argues that the only reasonable interpretation in light of these facts is that Article 47(2) refers to membership of the armed forces as defined in national law and that mercenaries are members of the armed forces within the meaning of Article 43 of API, less the entitlement to prisoner-of-war status and combatant privilege[441]. This "combatant privilege" refers to immunity to prosecution from lawful acts of war; it allows killing which otherwise would be crimes under municipal law. It does not provide any protection against actions that violate the laws of war.

Still, not all combatants can be considered legitimate military targets. Combatants that are *hors de combat* (outside combat) are not. This is noteworthy given that soldiers who have surrendered are placed *hors de combat*. Civilians, if they are directly participating in hostilities, defined by may also lose their protection and become a legitimate military target. A legitimate military target is defined by Article 52 of API:

> Military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage[442]

In non-international armed conflicts, the principles described above are considered to have attained customary status with respect to non-international armed conflict[443]. In both situations, peaceful civilians, religious and medical personnel and persons *hors de combat* are

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[439] Article 2, *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*. Also customary law dating to the *Lieber Code*. And the Brussels Declaration Brussels Conference, *Project of an International Declaration concerning the Laws and Customs of War*, (27 August 1874). This definition is taken from Article 4(A)(6) of International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 75 UNTS 135 (12 August 1949).. Finally, see Melzer, "The Principle of Distinction Between Civilians and Combatants."

[440] *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*. Article 2

[441] Melzer, "The Principle of Distinction Between Civilians and Combatants."

[442] *Additional Protocol I*. Article 52

[443] Melzer, "The Principle of Distinction Between Civilians and Combatants."

protected against direct attack[444]. Persons not entitled to such protection from direct attack include armed forces of all types – state armed forces and other armed groups – as well as medical and religious personnel, civilians and persons *hors de combat* who commit hostile acts[445].

In light of mentioning persons *hors de combat*, there a few further points to mention specifically insofar as they relate to the issue of surrender. In relation to unconditional surrender, there are two particularly important points from customary IHL. Firstly, the ICRC states that 'the general tenet…is that a clear indication of unconditional surrender renders a person *hors de combat*'[446]. API prohibits attacks against persons recognised as *hors de combat* and the principle has been upheld in case-law following WWI and WWII. Concerning NIACs, common Article 3 of the Geneva Conventions prohibits violence to life and person against persons placed *hors de combat*.

Improper use of the white flag[447] – that is, use to secure a military advantage or otherwise use the white flag not as part of an intention to surrender – is prohibited. In terms of international armed conflicts, it is recognised in the Lieber Code the Brussels Declaration and the Oxford Manual, codified in the Hague Conventions and is contained in Additional Protocol I. The draft of APII included a prohibition on improper use of the white flag in NIACs, but was removed to simplify the text. The ICRC found no official contrary practice and emphasises that 'any violation of the rule would undermine the protection to which persons advancing in good faith under a white flag are entitled'[448].

Orders to give no quarter are also prohibited in customary IHL and by the Rome Statute[449]. It is a long standing rule in customary IHL recognised in the Lieber Code, the Brussels Declaration and the Oxford Manual, and is codified in the Hague Regulations. Article 4 of Additional Protocol II prohibits orders that there shall be no survivors, covering NIACs, and is supported by official statements. It would also violate common Article 3 as it would result in killing of persons *hors de combat* and would be murder. Note that Article 60 of the 1863 Lieber

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[444] Such attacks are still subject to the additional prohibitions, such as the principle of proportionality and the restrictions on certain methods of warfare. Efforts must also be made to limit collateral damage.
[445] Melzer, "The Principle of Distinction Between Civilians and Combatants."
[446] Customary IHL Database ICRC, "https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule47." *Rome Statute of the International Criminal Court (last amended 2010)*.Article 8, paragraph 2, (b)(xii)
[447] Customary IHL Database ICRC, "https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule58."
[448] Ibid.
[449] Customary IHL Database ICRC, "https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule46."

Code, whilst noting that it is 'against the modern usage of war' to give no quarter, such an order is permitted to be given by a commander 'when his own salvation makes it impossible to cumber himself with prisoners'[450]. As stated, such an order is now prohibited.

There is one particularly important link here. Firstly, it is the military objective of placing someone *hors de combat* which the Oxford Handbook of the International Law in Armed Conflict refers to when citing the reason for the prohibition of dum-dum bullets[451]. And secondly, unconditional surrender renders a combatant *hors de combat*. Therefore, the law does consider (unconditional) surrender to facilitate the ultimate military objective that defines the limits of necessity in war, which in turn gives rise to other laws. IHL does confer on combatants and non-combatants certain rights and protections. These are important because one possible foundation for a law on compelled surrender might be grounded in the protection of such rights. In order to explore such rights and protections more comprehensively, and to complete the discussion of the extent of surrender in law, human rights law in conflict must now be considered.

3.5 Human Rights

International Human Rights Law is a relatively new body of international law, having emerged only in the 1940s[452]. Its structure imposes obligations on states to the benefit of individuals[453]. In this sense, it represents sovereignty as responsibility as well as the human-centricity of war law – key motivators for an assessment of the duty to surrender within contemporary just war theory and war law in the first place. As such, it might be a fitting candidate for the foundation of a duty to surrender, since the duty would seek to protect individuals from actions of states that perpetuate war. Most human rights instruments take their inspiration from the Universal Declaration of Human Rights, adopted by the General Assembly on 10 December 1948[454]. The failure of the League of Nations had produced an environment of scepticism towards the ability of international law to be useful and lawyers sought to revisit the case of "peace through law"

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[450] *Lieber Code*. Article 60
[451] Clapham et al., *The Oxford handbook of international law in armed conflict*.
[452] Dinah Shelton, "Introduction," in *The Oxford handbook of international human rights law*, ed. Dinah Shelton (Oxford: Oxford University Press, 2013).
[453] P. J. Rowe, *The impact of human rights law on armed forces* (Cambridge: Cambridge University Press, 2006).
[454] Shelton, "Introduction." United Nations General Assembly, *Universal Declaration of Human Rights*, 217 A (III) (10 December 1948).

from first principles[455]. A number of commentators revisited state sovereignty as the central premise of international law and suggested instead turning to the individual as the subject and addressee[456]. The UN, however, gave renewed weight to the role of state sovereignty in international law and viewed askance appeals to natural law[457].

Hans Lauterpacht is credited with persistent advocacy of the role of human rights. His book, *International Law and Human Rights* presents the case for human rights, situating it within the broader Western tradition[458]. It is notable, however, that the basic value of the inherent dignity of human beings are discussed in important historical texts, including the Code of Hammurabi, the Charter of Cyrus, the Hungarian Golden Bull and the Magna Carta[459]. The language of rights is also present in a number of constitutions leading up to WWII, including the constitutions of the US in 1788, France in 1791, Haiti in 1801, Colombia in 1912[460], Japan in 1889[461], Latvia in 1922[462], and Mexico of 1917, and of the Irish of 1937.

Following the UDHR, regional human rights conventions were created under regional bodies who also set up a regime for the protection of those rights: in 1950 the Council of Europe concluded and the European Convention on Human Rights was set up; the American Convention on Human Rights came into force in 1969 and established the Inter-American Court of Human Rights; and in 1981 the African Charter on Human and Peoples' Rights concluded and what is now the African Union set up the African Commission on Human and Peoples' Rights[463]. All of the conventions are recognised as being of constitutional nature[464].

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[455] Samuel Moyn, *The last utopia: human rights in history* (Cambridge, MA: Belknap Press of Harvard University Press, 2010). "Peace through law" is borrowed from Hans Kelsen.
[456] Ibid.
[457] Ibid.
[458] Ibid.
[459] Michael O'Boyle and Michelle Lafferty, "General Principles and Constitutions as Sources of Human Rights Law," in *The Oxford handbook of international human rights law*, ed. Dinah Shelton (Oxford: Oxford University Press, 2013).
[460] Peter N. Stearns, *Human rights in world history*, Themes in world history, (Abingdon, Oxon ;: Routledge, 2012).
[461] Ibid.
[462] Colin J. Beck, Gili S. Drori, and John W. Meyer, "World influences on human rights language in constitutions: A cross-national study," *International Sociology* 27, no. 4 (2012/07/01 2012)
[463] Malgosia Fitzmaurice, "Interpretation of Human Rights Treaties," in *The Oxford handbook of international human rights law*, ed. Dinah Shelton (Oxford: Oxford University Press, 2013). Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (27 June 1981); Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, ETS 5 (4 November 1950). Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, (22 November 1969).
[464] Fitzmaurice, "Interpretation of Human Rights Treaties."

Members of the armed forces do benefit from a range of human rights protections: the right to life; the right not to be subjected to torture, degrading or inhuman treatment; the right to privacy; the right to liberty; and freedom of thought, conscience and religion[465]. The right to life is what the Human Rights Committee referred to as 'the supreme right'[466]. Article 3 of the UDHR reads, 'Everyone has the right to life, liberty and security of person'[467]. The International Covenant of Civil and Political Rights, the American Convention on Human Rights, the African Charter on Human and Peoples' Rights and the European Convention on Human Rights all contain protections of life[468]. It is a rule of customary international law and while the Human Rights Committee's draft General Comment characterises Article 6 of the International Covenant on Civil and Political Rights as *jus cogens*, declaring it as such would be controversial in light of the lack of case law declarations in support of this[469].

The right encompasses prohibitions against the unlawful taking of life; in *Guerrero vs Colombia*, the Human Rights Committee found that the state of Colombia had violated its obligations under Article 6 of the ICCPR when police shot suspected terrorists without making an attempt to arrest them and without warning, thereby violating the principle of necessity[470]. But it also positively obligates states to take certain measures to protect against it; in *McCann and Others vs UK* the European Court of Human Rights found that the UK had violated the ECHR's Article 2 by failing to take measures at the planning stage that could have avoided the fatal outcome after British security personnel killed members of the IRA erroneously claimed to have been armed and with a car bomb that could be remotely detonated[471]. The various human rights instruments mentioned also state that the right ought to be guaranteed by law, substantively requiring effective investigation processes and violations of the right to life have been found where effective investigation was lacking even where it was not found that the death was attributable to the state[472]. Lastly, there is also an evident obligation to protect people

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[465] Rowe, *The impact of human rights law on armed forces*.
[466] Rhona K. M. Smith, *International human rights law*, Ninth edition ed., Law trove, (Oxford: Oxford University Press, 2020).
[467] *Universal Declaration of Human Rights*.
[468] With the exception of the ECHR, which protects against intentional deprivation of life in cases other than those excepted, the others all prohibit 'arbitrary' deprivation of life.
[469] Nigel S. Rodley, "Integrity of the person," in *International human rights law*, ed. Daniel Moeckli et al. (Oxford: Oxford University Press, 2018).
[470] *Guerrero v. Colombia*, (Human Rights Committee 31 March 1982) Communication No. 45/1979: Colombia. 31/03/82.
[471] *McCann and Others v the United Kingdom*, (European Court of Human Rights 27 September 1995) 18984/91.
[472] For example, *Abukabar Amirov and Aizan Amirova v Russian Federation*, (Human Rights Committee 2 April 2009).

from death from third parties'[473]. This is crucial for a duty to surrender as it would also involve protecting one's soldiers from enemy soldiers. The scope of the right in armed conflict will be explored in the next section.

Under Article 18 of the UDHR, 'Everyone has the right to freedom of thought, conscience and religion'[474]. The full scope of the protections shall not be discussed here for the sake of brevity. Freedom of thought has direct relevance because it is the right under which conscientious objection operates[475]. Indeed, the Human Rights Committee's position has moved from interpreting the right to freedom of thought and religion as not protecting conscientious objection at all to considering it an 'absolute element of freedom of conscience under Article 18(1) which is not capable of limitation under Article 18(3) ICCPR'[476]. It is common for states with a form of compulsory military service to provide a non-military alternative for conscientious objectors, but far less common that states which do not have compulsory military service to permit such objections to particular military operations[477]. This service must not be punitive in nature; it must be genuinely of service to the community[478]. In *Bayatyan v Armenia*, the European Court of Human Rights held that 'opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9'[479]. The Inter-American Commission on Human Rights has not accepted that freedom of conscience protects against obligatory military service[480]. Chapter Six will engage with this topic in *lex ferenda* terms.

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[473] Rodley, "Integrity of the person." p.182
[474] *Universal Declaration of Human Rights*. Article 18
[475] Quaker Council for European Affairs, *The Right to Conscientious Objection in Europe: A Review of the Current Situation* (Brussels, 2005), http://www.quaker.org/qcea/coreport.
[476] Dominic McGoldrick, "Thought, expression, association, and assembly," in *International human rights law*, ed. Daniel Moeckli et al. (Oxford: Oxford University Press, 2018). p.216 See also Office of the High Commissioner for Human Rights, *General Comment 22: The right to freedom of thought, conscience and religion (Art. 18)*, CCPR/C/21/Rev.1/Add.4 (30 July 1993).; *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*, (United Nations Human Rights Committee 23 January 2007) CCPR/C/88/D/1321-1322/2004.; *Atasoy and Sarkut v. Turkey*, (United Nations Human Rights Committee 19 June 2012).
[477] O'Boyle and Lafferty, "General Principles and Constitutions as Sources of Human Rights Law."
[478] McGoldrick, "Thought, expression, association, and assembly."
[479] *Bayatyan v. Armenia*, (European Court of Human Rights 7 July 2011) 23459/03. §110
[480] McGoldrick, "Thought, expression, association, and assembly." See *Cristián Daniel Sahli Vera et al. v. Chile*, (Inter-American Commission on Human Rights (IACHR) 10 March 2005) Case 12.219, Report No. 43/05, Inter-Am. C.H.R., OEA/Ser.L/V/II.124 Doc. 5 (2005).

3.5.a International Human Rights Law in Armed Conflict

Human rights obligations specifically pertaining to armed conflict warrant special analysis. (Non-human rights) international law creates human rights, in that it has conferred rights directly on individual human beings[481]. Notable examples include the Second Geneva Convention, which is concerned with the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea. Parties to peace agreements also owe obligations not only to each other but also to individuals within their jurisdiction[482]. It is also worth noting that some argue that wartime human rights preceded peacetime human rights, with the Geneva Conventions marking the *end* of the process creating wartime human rights in 1949 and the adoption of the UDHR marking the *beginning* of the process for peacetime human rights[483].

Some rights emerge in wartime. For example, whereas the freedom from forced labour recognised in the European Convention and others do not extend to compulsory military service (or the alternatives for conscientious objectors), the Fourth Geneva Convention does prohibit compelling civilians to serve in the armed forces of an occupying power[484]. Some are reduced, such as the freedom of assembly[485]. Others are strengthened. Whereas there is only a general provision against medical and scientific experimentation, Article 11 of API is much more detailed, prohibiting the removal of tissue or organs for transplantation even with the donor's consent, unless it is for blood transfusion or skin grafting[486]. Humanitarian interventions, controversial as they are, to say the least, are also premised on the idea of restoration of human rights and built into the proportionality criterion[487].

There are several ways in which human rights law applies in wartime. Although it might be expected that states would issue derogation notices in the advent of conflict, such notice was

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[481] Yoram Dinstein, "Human Rights in Armed Conflict: International Humanitarian Law," in *Human Rights in International Law*, ed. Theodor Meron (Oxford: Oxford University Press, 1986).
[482] Murray, O'Donoghue, and Warwick, "The implications of the Good Friday Agreement for UK human rights reform." See also V. Crnic-Grotic, "Object and purpose of treaties in the Vienna Convention on the law of treaties," (Leiden, The Netherlands: Brill | Nijhoff, 1997)., 145 and Henry J. Steiner, "International Protection of Human Rights," in *International Law*, ed. Malcolm Evans (Oxford: Oxford University Press, 2010)., pp.800-801.
[483] Dinstein, "Human Rights in Armed Conflict: International Humanitarian Law."
[484] Ibid.
[485] Ibid.
[486] Ibid.
[487] Carsten Stahn, "'Jus ad bellum', 'jus in bello' . . . 'jus post bellum'? - Rethinking the Conception of the Law of Armed Force," *European Journal of International Law* 17, no. 5 (2006)

not issued in the Falklands/Malvinas conflict in 1982, the Gulf war of 1990, the NATO operations in the Balkans in the 1990s or the war in Iraq in 2003[488]. Furthermore, Dinstein notes that while states may derogate from the duties conferred on them by human rights law, such derogation does not mean that no human rights law provisions apply[489]. The European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Social Charter, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights all contain derogation clauses[490]. Each of these, however, also outline exceptions to such derogation. In three of the four (the European Social Charter does not explicitly reference the articles from which states may not derogate, only that they may derogate 'provided that such measures are not inconsistent with its other obligations under international law'[491]), the right to life is explicitly referenced as a right from which states are not allowed to derogate. It is worth noting that states cannot derogate from their obligations arising from international humanitarian law[492]. Deaths of non-combatants during civil war may violate the right to life under the African Charter[493].

3.5.b International Human Rights Law and International Humanitarian Law

One last issue to resolve is where human rights law and international humanitarian law overlap and so whether human rights law can be appealed to as a justification for a duty to surrender at all. Although human rights law does apply in wartime, so does international humanitarian law. Potentially, this is an instance of the types of conflict that is described in the International Law Commission's report on fragmentation[494]. The report defines a conflict, widely, as 'a situation where two rules or principles suggest different ways of dealing with a problem'[495].

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[488] Rowe, *The impact of human rights law on armed forces*.
[489] Dinstein, "Human Rights in Armed Conflict: International Humanitarian Law."
[490] Notably, the African Charter On Human And Peoples Rights does not contain a derogation clause.
[491] Article 30, European Social Charter
[492] Rowe, *The impact of human rights law on armed forces*.
[493] Smith, *International human rights law*. See *Commission Nationale des Droits de l'Homme et des Libertés v Chad, Merits*, (African Commission on Human and Peoples' Rights (ACommHPR) October 1995) Communication 74/92.
[494] International Law Commission, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*, United Nations General Assembly (2006).
[495] Ibid. §25

The first question, then, is whether human rights law and international humanitarian law do indeed suggest different ways of dealing with the problem which in this case is war. To some extent, human rights law is incorporated into other bodies of international law anyway. Article 21(3) of the Rome Statute holds that the laws contained must be applied and interpreted in a manner consistent with international human rights protections[496]. Grover does observe, however, that Articles 31-33 of the VCLT make clear that it is the principle of legality and not consistency with international human rights obligations which has primacy. The UN Charter references the motivation 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'[497].

Firstly, in the *Wall Opinion*, the ICJ stated that it 'considers that the protection offered by human rights conventions does not cease in case of armed conflict save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political rights'[498]. The ICJ based this on its opinion given in the *Nuclear Weapons* case that Article 6, paragraph 1 of the ICCPR, namely the right to life and the protection against being 'arbitrarily deprived of it', applied during hostilities[499]. Though some provisions may be derogated from, the right to life is not one of them. The question is whether the deprivation of life is arbitrary, and this is determined by the *lex specialis*, which in this case is the law 'designed to regulate the conduct of hostilities', namely IHL[500].

An Advisory Committee submitted a draft declaration on the right to peace to the Human Rights Council in 2012 that included the statement that 'the prohibition of the use of force is the primary international prerequisite…for and the full implementation of the human rights and fundamental freedoms proclaimed by the United Nations'[501]. The Inter-American Commission on Human Rights stated that:

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[496] Leena Grover, "Interpreting the Crime of Aggression," in *The Crime of Aggression: A Commentary*, ed. Claus Kreß and Stefan Barriga (Cambridge: Cambridge University Press, 2016).
[497] *Charter of the United Nations*. Preamble
[498] *Wall Opinion*, (International Court of Justice (ICJ) 2004) General List No. 131 §106. See William A. Schabas, "Aggression and International Human Rights Law," in *The Crime of Aggression: A Commentary*, ed. Claus Kreß and Stefan Barriga (Cambridge: Cambridge University Press, 2016). p.362
[499] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, (International Court of Justice (ICJ) 8 July 1996) I.C.J. Reports 1996, p. 226 §24
[500] Ibid. §25
[501] Schabas, "Aggression and International Human Rights Law." p.356

> 'it is precisely in situations of internal armed conflict that human rights and humanitarian law converge most precisely and reinforce one another…both common Article 3 of the Geneva Conventions [1949] and the American Convention on Human Rights [1969] guarantee these rights [the right to life and physical integrity] and prohibit extra-judicial executions, and the Commission should apply both bodies of law'[502]

Indeed, 'there is no good reason why human rights principles do not extend to the combatants themselves'[503]. Even during an international armed conflict, both bodies of law apply. This is supported by the *Nuclear Weapons* case[504].

Secondly, it might be possible to go further than this. The definitions of some international crimes are drawn from human rights[505]. Likewise, the UDHR preamble states that human rights ought to be protected so that people did not need to resort to 'rebellion against tyranny and oppression', 'but there has been a growing willingness to contemplate military interventions as the ultimate solution to serious human rights violations'[506]. Article I of API exempts armed conflicts against colonial domination, alien occupation and against racist regimes in the exercise of their right self-determination[507] and the ICJ has held that IHL relating to the prohibition of some weapons causing unnecessary suffering does not apply strictly in the case of a country placed in an extreme situation of self-defence[508]. Larry May argues for the threat against human rights to occupy the centre of considerations in condemning acts of aggression, in contrast to the traditional notions of territorial integrity and political sovereignty, although it is these two traditional notions that the law favours[509]. Indeed, the recommendations of the ILC's report on the fragmentation of international law emphasises that, where possible, conflicts should be resolved 'in accordance with the principle of

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[502] Rowe, *The impact of human rights law on armed forces*. Quoting *Arturo Ribón Avila v. Colombia*, (Inter-American Commission on Human Rights 30 September 1997) Report No. 26/97; Case 11.142. §174. The Commission found there to be an 'internal armed conflict' to be in existence and therefore common Art. 3 to the Geneva Conventions 1949 applied, §202. See also *Juan Carlos Abella v. Argentina Report No. 55/97*, (Inter-American Commission on Human Rights 18 November 1997) OEA/Ser.L/V/II.95.
[503] Schabas, "Aggression and International Human Rights Law." p.360
[504] §25. Also see note 23 Rowe, *The impact of human rights law on armed forces*.
[505] Schabas, "Aggression and International Human Rights Law." p.357
[506] Ibid. p.358
[507] Ibid. p.362
[508] Ibid. p.362
[509] Jeßberger, "The Modern Doctrinal Debate on the Crime of Aggression." Territorial integrity and political sovereignty appear in the UN Charter and are uncontroversial principles of international law.

harmonization'[510], namely that where two or more norms bear on one issue, they should be interpreted such that they 'give rise to a single set of compatible obligations'[511].

However, there is also conflict between the two bodies of international humanitarian law and human rights law. The latter arguably offers a more modern framework for peacebuilding in particular: 'International human rights law regulates public authority directly from the perspective of individual and group rights (human rights, minority rights, self-determination), whereas international humanitarian law continues to view public authority, at least partly, through the lens of competing state interests'[512]. William Schabas argues that a fundamental disagreement between the two bodies of law is that human rights law, having developed in the aftermath of the Second World War, takes the prohibition of the use of force for the settlement of disputes as a premise where international humanitarian law, having developed when the use of force was not prohibited, did not[513]. The role of the state is also different in both bodies of law. Human rights law 'is essentially born out of the abuses of the state over its citizens and out of the need to protect the latter from state-organised or state-sponsored violence' whereas humanitarian law places restrictions on the conduct of hostilities[514].

Deciding applicability of human rights obligations to an occupying power by the 'effective control over an area' creates problems in that it resembles an all or nothing approach that fails to take into account the particular circumstances as well as limitations applied by occupation law itself[515]. As such, it has been recommended by the ICJ in the *Wall Opinion* that the whole suite of obligations apply in virtue of an occupying power being an occupying power, though the substantive obligations might ake into account the circumstances, in this case the presence of the Palestinian Authority and the role it plays[516].

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[510] *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, International Law Commission (2006). §42
[511] Ibid. §4
[512] Stahn, "'Jus ad bellum', 'jus in bello' . . . 'jus post bellum'? - Rethinking the Conception of the Law of Armed Force." Citing Frédéric Mégret and Florian Hoffmann, "The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities," *Human Rights Quarterly* 25 (12/01 2008)
[513] William A. Schabas, "Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus ad Bellum," *Israel Law Review* 40, no. 2 (2007)1
[514] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment)*, (International Criminal Tribunal for the former Yugoslavia (ICTY) 22 February 2001) IT-96-23-T & IT-96-23/1-T. §470
[515] Noam Lubell, "Human rights obligations in military occupation," *International Review of the Red Cross* 94, no. 885 (2012)
[516] *Wall Opinion*, (International Court of Justice (ICJ) 2004) General List No. 131 §112. See also Lubell, "Human rights obligations in military occupation."

Therefore, while there is some overlap and the two bodies share some of the same (particularly humanitarian) motivations, their relationship may also be an example of fragmentation. Fragmentation theory is concerned with the relationships between general international law and the growing specialised areas of international law[517]. The maxim of *lex specialis* states that the more specialised body of law derogates from general law (*lex generalis*)[518]. It may not always be easy to tell which is the *lex specialis*, however and international case law appears to endorse the maxim without elaborating on it in great detail[519].

A notable case in this regard is that brought to the UK courts by the families of members of the UK armed forces after they were killed by an incident of friendly fire involving British Challenger tanks ("the Challenger claims") and by the detonation of IEDs with Snatch Land Rovers ("the Snatch Land Rover claims"), alleging negligence on the part of the UK Ministry of Defence (MOD). The UK Supreme Court concluded in the case of *Smith and others v the Ministry of Defence* that human rights law did require the UK state to put systems in place to protect the right to life of its nationals under Article 2 of the European Convention on Human Rights even extra-territorially and even to members of the armed forces[520]. However, it did not hold, contrarily to the decisions taken by the High and Appeals Court, that such protections extended to soldiers *whilst in the theatre of operations*[521]. It is this fact, then, that demonstrates that a doctrine of obligated surrender, based on human rights obligations, overreaches; it is here that the doctrine must be extrapolated, guided, rather than merely be unearthed. It was for this reason that the Ellis negligence claim was not upheld as it was considered that it was less clear that the doctrine of non-combatant immunity did not apply[522]. The judgment by the UK Supreme Court in this case has not fully illuminated the responsibilities of the state to its armed forces under human rights law, but there is reason to suppose that states will owe right to life obligations to military personnel, but not when they are killed by the enemy during armed

[517] Colin R. G. Murray and Aoife O'Donoghue, "A path already travelled in domestic orders? From fragmentation to constitutionalisation in the global legal order," *International Journal of Law in Context* 13, no. 3 (2017)
[518] Law Commission, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*.
[519] Ibid.
[520] *Smith and others v The Ministry of Defence, Ellis v The Ministry of Defence, Allbutt and others v The Ministry of Defence*, (United Kingdom Supreme Court 19 Jun 2013) UKSC 41.
[521] Ibid. §89-96
[522] Ibid. §89-96.

conflict[523]. The Supreme Court was wary about placing undue burden on the state in the chaos of war.

In the *Nuclear Weapons* case, the ICJ interpreted the landscape as giving priority to international humanitarian law over human rights law in cases of the deprivation of life[524]. However, as we have seen, international human rights law does not cease to apply and may provide guidance. For example, the Trial Chamber in the *Furundžija Case* noted that while international humanitarian law prohibits torture during armed conflict, it does not provide a definition and the Chamber therefore turned to human rights law[525]. Furthermore, although the ICJ did indicate preference to international humanitarian law in the *Nuclear Weapons*, as the *lex specialis*, it also did not rule out the use of nuclear weapons in extreme cases of self-defence. This speaks to the *jus ad bellum*, something that international humanitarian law is deliberately agnostic towards[526].

There is perhaps not so great a divergence between human rights law and the law of non-international armed conflict and hence, perhaps more scope here to make use of human rights law. The ICTY Trial Chamber in the *Kunarac Case* observed that the two share 'goals, valued and terminology'[527]. However, several differences still remain. The role of the state changes, as above, and whereas international humanitarian law is binding on all parties, human rights law generally only applies to one party[528]. Perhaps most relevantly for the purposes of this thesis, humanitarian law allows killing on a large scale and human rights law has a much more (though not absolute) attitude towards such killing[529]. Human rights law might then be better placed to protect those individuals whose right to life is at risk when the state continues to engage in a conflict against the wishes of its population, a key moral argument in support of including a duty to surrender.

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[523] Ian Park, "The Right to Life of Armed Forces Personnel during Armed Conflict," in *The Right to Life in Armed Conflict* (Oxford: Oxford University Press, 2018).
[524] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, (International Court of Justice (ICJ) 8 July 1996) I.C.J. Reports 1996, p. 226 §25
[525] *Prosecutor v. Anto Furundzija (Trial Judgement)*, (International Tribunal for the former Yugoslavia (ICTY); Trial Chamber 10 December 1998) IT-95-17/1-T. §159-164
[526] Schabas, "Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus ad Bellum."
[527] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment)*, (International Criminal Tribunal for the former Yugoslavia (ICTY) 22 February 2001) IT-96-23-T & IT-96-23/1-T §467
[528] Ibid. §470. See also Dinstein, *Non-International Armed Conflicts in International Law*.
[529] Dinstein, *Non-International Armed Conflicts in International Law*.

3.6 Conclusion

This chapter has aimed to describe what bodies of international law currently say about surrender and their related concepts. There is no explicit positive requirement that states or individuals consider surrender. This is despite international law advocating the principle of humanity and the limitation of war, by the principles of necessity and proportionality in both *jus ad bellum* and *jus in bello* and the responsibility of states to prevent threats to international security. It has progressed in answering the first research question by describing the distance between the current state of international law, or *lex lata,* and a duty to surrender. It has progressed in answering the second by excavating the motivating principles of international law, coherence with which this duty to surrender must ultimately achieve.

While the body of law most closely concerned with protecting individuals from the actions of their own states as well as other states does apply in time of conflict and states may not derogate from the right to life protections, it is also clear that courts are unwilling to place undue burden on states to protect their soldiers once they step onto the battlefield. In such a case, there is reason to consider international humanitarian law the *lex specialis*, although this also does not seem entirely definitive. The protections afforded by this body of law are numerous but this body of law also does not contain a law mandating surrender; its comments on surrender are brief. Civilians are particularly well protected by international humanitarian law and combatants also benefit from protections such as the prohibition of weapons considered to be unnecessarily cruel, but there are still notable gaps in the coverage of NIACs. There are also gaps in the coverage of non-state actors in the law on war termination and peace treaties. While patterns in quasi-legal forms of war termination are emerging, there are still questions about the legal status of peace treaties. In total, therefore, while the aims of the various bodies of international law – the limitation of war and the protection of rights of individuals – are at least congruent with a law requiring war termination and compelled surrender, there is still a sizeable gap between it and the current legal architecture, which this thesis aims to bridge.

As we will see in the following chapters, this is surprising. The Just War Tradition is the philosophical parent of the law on the use of force and international humanitarian law in particular, and did consider questions of justice in the ending of war and it is to this Tradition which this thesis will turn in bridging this gap. The immediately following chapter will explore the orthodox Just War Tradition as that part of it most closely aligned with international law.

It will discuss Vattel and Walzer in particular as representatives of the orthodoxy of the Just War Tradition, but others such as Grotius, Suarez and even St Augustine raised such questions.

Chapter 4: The Orthodox Just War Tradition – Emer de Vattel and Michael Walzer

4.1 Introduction

In considering the coherence of a duty to surrender with ideas on the legitimate use of force, and having found current international law to not explicitly include a duty to surrender, this thesis will now turn to its philosophical architecture. Recall that this thesis is attempting to answer two sub-questions under the general "coherence" umbrella: (1) to what extent can a duty to surrender be considered to be "emergent" from international law and just war theory? (2) what would a maximally coherent duty to surrender look like?

The various bodies of international law that have been discussed do present some crucial ideals with which a duty to surrender must conform, namely the principles of humanity, individual human rights, self-determination and the limiting of war, but they do not amount to an explicit duty of surrender. These ideals give us, at least *prima facie,* a reason to expect that some mechanism that compels surrender/the cessation of hostilities would be welcome, and they help to define its parameters. However, further flesh must be added to the bone.

Just war theory as a discipline allows this thesis, at this point, to go beyond the *lex lata*, and provides the tools for a discussion of *lex ferenda*. As outlined the introduction, the use of this second discipline provides external criteria by which to judge the law, but without introducing a discipline that is alien from the law to the point of incompatibility. By remaining with Walzer and Vattel, there is still the "canonical" aspect to the study that facilitates a discussion of an *emergent* duty to surrender rather than an *extrapolated* one, a discussion which will proceed with earnest in Chapter Five but will also be dealt with here from Section 4.4. Turning to the orthodox just war tradition next makes sense for a number of reasons. Firstly, as the philosophical "parent" of the laws of war, the orthodox just war tradition allows us to consider the principles behind the law in context. In contrast to the revisionist family (discussed in the following chapter), examining the orthodox family gives us access to more material with which to judge coherence whilst still being able to draw on the depth of a tradition which has existed in parallel with the laws of war. Secondly, the orthodox just war tradition is the school of just

war tradition that observes the key tenets of international law, notably the doctrine of non-combatant immunity and what is variably called the moral equality of combatants, the independence thesis or the separation of *jus in bello* from *jus ad bellum*[530]. The orthodox just war tradition is represented here by the works of Michael Walzer and Emer de Vattel, and there are also reasons why it makes sense to turn to these two individuals in particular. Michael Walzer's 1977 work, *Just and Unjust Wars*[531], reprinted with updates several times, contributed to a revival of just war theory and is one of, if not the most, widely cited modern work in the field. He draws on arguments from earlier just war thinkers and a range of historical illustrations to present a moral defence of the laws of war. His inclusion is based on precisely this final point; aside from his prominence he seeks to give the law a moral foundation.

The inclusion of Swiss political philosopher and international law, Emer de Vattel (1714-1767), might be more controversial. Carl Schmitt (and others) suggest that Vattel is actually a regular war theorist rather than a just war theorist[532]. Schmitt argues that it is precisely his concept of the sovereignty of the state that prevented questions of justice, reducing questions of the legitimacy of war to mere form[533].

The inclusion of Vattel in this chapter is based on three reasons. Firstly, *The Law of Nations* is meant partially as a philosophical treatise but also as a practical guide for lawyers and states[534]. Secondly, his work was written at a number of key crossroads. He exhibits elements of the shift towards positivist law at a time when international law remained relatively underdeveloped; he is perched precariously between the secularisation of theories of government and the waning authority of the church, and is also situated in the beginning of the revolutionary period in Europe[535]. Vattel's conception presages the positivistic understanding

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[530] Seth Lazar, "Just War Theory: Revisionists Versus Traditionalists," *Annual Review of Political Science* 20, no. 1 (2017) The "independence thesis" amounts to the belief that all sides in a conflict are bound by the same duties and obligations regardless of whether they were the aggressor or defender, or whether they have a just cause or not; they are bound by the same duties and obligations regardless of the extent to which they adhered to the *jus ad bellum* criteria. Not to be confused with the independence thesis of Moellendorf, which references the independence of the justice of continuing war from the justice of resorting to war. See Moellendorf, "Two Doctrines of *Jus ex Bello*."

[531] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, Fourth ed. (New York: Basic Books, 2006).

[532] Gregory Reichberg also emphasises the formal requirements of Vattel's theory rather than its normativity.

[533] Carl Schmitt, *The Nomos of the Earth*, trans. G.L. Ulmen (New York: Telos Press Publishing, 2003). p.167

[534] Stephen Neff, "A Short History of International Law," in *International Law*, ed. Malcolm D. Evans (Oxford: Oxford University Press, 2003).

[535] Others have marked the shift as later, see Nicholas Rengger, "The Jus in Bello in Historical and Philosophical Perspective," in *War: Essays in Political Philosophy*, ed. Larry May and Emily Crookston (Cambridge: Cambridge University Press, 2008).

of international law in a vacuum of such law[536]. Furthermore, his adherence to the independence thesis is credited as his main innovation and departure from the ideas of his predecessors[537]. This adherence is an important aspect of Vattel's work and qualifies him to become an ambassador of both the orthodox just war tradition, so defined by the advocacy of the independence theses, and international law.

Thirdly, this innovation does not mean that Vattel can be considered an anomaly and should be excluded for that reason. He is heavily influenced by Wolff and Grotius. Others, such as James Turner Johnson, credit him with originality, but originality within the just war tradition, arguing that Vattel's overall continuity with absolutist moral and religious constraints is self-evident[538]. While being innovative in his treatment of *jus in bello* in particular, Vattel nonetheless in large part inherited the concepts from earlier just war theorists and use them for the same end, that of accepting as pragmatic the reality of war and seeking to limit it as far as possible[539].

4.2 War Termination in the Orthodox Family

This chapter now asks the orthodox family the first question, namely: to what extent can a duty to surrender be considered to be "emergent" from orthodox just war theory? To answer this question, we must turn to what the orthodoxy says about surrender specifically, but also what they say about the termination of war more generally. The latter ought to be analysed because where a duty to surrender is lacking, the extrapolation of one can be guided by exploring the more general themes and concerns of the tradition.

Both Vattel and Walzer do state that there is a correct point at which war should end after which continuation is unjust. For them both, the legitimate end of war is tied intimately with its beginnings, in the sense that the latter helps to define the former and in the sense that the former has to be considered at the beginning of war. For Vattel, the proper end of war is the

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[536] James Turner Johnson, "Ethics, Law, and Humanitarian Intervention: Biggar's Argument for the Precedence of Moral Order in the Dialectic with Positive Law " *Soundings: An Interdisciplinary Journal* 97, no. 2 (2014)
[537] Gregory M. Reichberg, Henrik Syse, and Endre Begby, *The Ethics of War: Classic and Contemporary Readings*, ed. Gregory M. Reichberg, Henrik Syse, and Endre Begby (Oxford: Blackwell Publishing, 2006).
[538] James Turner Johnson, *Just War Tradition and the Restraint of War* (Princeton: Princeton University Press, 1981).
[539] James Turner Johnson, *The Quest for Peace: Three Moral Traditions in Western Cultural History* (Princeton: Princeton University Press, 1987).

pursuance of justice: war is 'that state in which we prosecute our right by force[540]. Similarly, the single legitimate *jus ad bellum* principle for Vattel is response to an injury, either suffered or imminent, which pertains to the *perfect rights* of the state. This does not have to be aggression, and includes violation of any such rights. There are therefore three valid justifications for conflict based on this injury:

> 1. To recover what belongs or is due to us. 2. To provide for our future safety by punishing the aggressor or offender. 3. To defend ourselves, or to protect ourselves from injury, by repelling unjust violence[541]

Vattelian considerations about the end of war differ depending on the *jus ad bellum* status of the state. For example, in the case of the justly warring party:

> When a sovereign has been compelled to take up arms for just and important reasons, he may carry on the operations of war till he has attained its lawful end, which is, to procure justice and safety[542]

In the case of the (potentially) unjustly warring party:

> If the cause be dubious, the just end of war can only be to bring the enemy to an equitable compromise (*Book* III. S 38); and consequently the war must not be continued beyond that point. The moment our enemy proposes or consents to such compromise, it is our duty to desist from hostilities[543]

Walzer, too, argues that there is a point at which war must end:

> We need to seek the legitimate ends of war, the goals that can rightly be aimed at. These will also be the limits of a just war. Once they are won, or once they are within political reach, the fighting should stop. Soldiers killed beyond that point die needlessly, and to force them to fight and possibly to die is a crime akin to that of aggression itself[544]

By referencing aggression, Walzer is making a direct comparison between the legitimate ends of war and the crime of *starting* a war illegitimately (though, recall, this was also discussed in

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[540] Vattel, *The Law of Nations*. p.469
[541] Theodore Christov, "Emer de Vattel," in *Just War Thinkers: From Cicero to the 21st Century*, ed. Daniel R. Brunstetter and Cian O'Driscoll (New York: Routledge, 2018). p.484
[542] Vattel, *The Law of Nations*. p.654
[543] Ibid. p.654
[544] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. p.110

Chapter Three). Likewise, Vattel's ideas about the right end of war is linked with what legitimised it in the first place. The end of war, for Vattel, is to secure the justice which one was deprived of by the suffering of an injury. The natural end of war occurs at the redemption of such an injury. This may also go some way towards explaining why a theory of compelled surrender is not fully developed; it was considered contained within the limits of war entry. Certainly, "chance of success" is a fairly uncontroversial criterion of the just war tradition as a whole, and it would mirror international law's focus on war entry: 'classic just war thought had included in its *jus ad bellum* the requisite that war not be fought except for the end of peace'[545].

If the natural end point of war occurs when the injury is redeemed or when the original goals have been achieved, it might be expected that the duty to surrender occurs at this point too. However, for both Vattel and Walzer, the question of when a duty to surrender would arise, just as the question of when war termination more generally should occur, cannot fully be answered with reference to the *jus ad bellum.* One concern that they both have is what Cian O'Driscoll calls the 'disease of victory', namely that giving victory too much moral value encourages one to disregard the costs of achieving it[546]. Walzer criticises a 'group of writers' who argued that the pursuit of justice was heavily implicated in carrying war to its extreme and ultimate end[547]. This points to the moral requirement of separating *jus ex bello* from *jus ad bellum* in order to avoid justifying all kinds of brutality on the basis of the perfect victory. Crucially, for Walzer pursuing such an absolute policy in relation to victory was permissible against Nazi Germany, provided the effects of the imposed treaty were limited to the Nazi government and not the German people. Some loss of rights of the German people after the war was also permissible because they failed to overthrow the Nazi Government themselves and therefore the Allies were entitled to interpret this, in a limited way, as responsibility and so occupy Germany[548]. However, no further loss of rights was necessary. This might suggest that the costs of Walzerian surrender should not leak into the general population, as was suggested with the Japanese 1945 surrender.

Vattel's sentiments about war exit are surprisingly similar. Indeed, Vattel jettisoned the centrality of *jus ad bellum* of the classic just war tradition in favour of a broader *jus in bello*[549]. Crucially, although his *ad bellum* must be in response to an injury, this need not be reflected in

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[545] Johnson, *The Quest for Peace: Three Moral Traditions in Western Cultural History*.
[546] Cian O'Driscoll, *Victory: The Triumph and Tragedy of Just War* (Oxford: Oxford University Press, 2019).
[547] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. p.110
[548] Ibid. pp.111-116. Walzer adds that the methods of the Nazi state do not make this conclusion clear-cut.
[549] Johnson, *The Quest for Peace: Three Moral Traditions in Western Cultural History*. p.206

the peace treaty terminating a conflict, so would not need to be reflected in surrender. Not only does he consider that if acknowledgement of injustice were a prerequisite for any peace treaty to be successful peace would never be concluded, he considered peace agreements to be a political arrangement arriving at a compromise deemed fair for the purposes of the cessation of hostilities[550]. Peace treaties reflect the weariness of both parties to the conflict and not restoration of the *status quo ante bellum*.

Importantly, the separation of *jus ex bello* (and surrender within it) from *jus ad bellum* extends to symmetry. In other words, the duties about ending war are equally on parties who entered the war justly and those who entered the war unjustly. As noted above, for Vattel, the goal of the end of war is to bring the enemy to an equitable compromise, again something that might have to be reflected in surrender. Although Vattel does make a distinction between ends of war for a justly warring party and the ends of war for an unjustly warring party, this does not actually result in different sets of obligations for the two sides. This is partly because individual soldiers are not expected to have knowledge of the *casus belli.*

But it is also because Vattel is talking about natural law here and not positive law. Positive law, in the sense of law that derives its authority from the consent of the states, is further sub-divided three ways into the voluntary law of nations, which proceeds from the *presumed* consent of nations, 'the conventional from an express consent, and the customary from tacit consent'[551]. However, the voluntary law of nations is also a modified form of the necessary, or natural, law[552]. Necessary law is natural law in its purest form and is universally and constantly binding on the *conscience* of individuals and sovereigns, whereas the voluntary law describes what demands may be placed on others. Natural law has to be adapted on the basis of necessity. Vattel distinguishes his position from Grotius in that his voluntary law rests on presumed consent; if it was resting on actual consent it would be part of conventional law[553]. The consent can be safely assumed to be given by all states because the withholding of such consent would be 'an infringement of the common rights of nations'[554]. Paradoxically, they have consented to it because they have to consent to it. In essence, once the distinction between justly and unjustly warring parties is removed, Vattelian peace is not peace that reflects the

[550] Ian Hunter, "Law, War, and Casuistry in Vattel's *Jus Gentium*," *Parergon* 28, no. 2 (2011) p.102
[551] Vattel, *The Law of Nations*. p.78
[552] Ibid. p.78
[553] Ibid. p.592
[554] Ibid. p.592

original injury. So while the natural law element does require different codes from justly warring parties and unjustly warring parties, the positive law element does not.

The duty to surrender, therefore, for Vattel, would not be the sole responsibility of the injuring state in virtue of that injury. Indeed, Reichberg considers departing from the view shared by all classical just war theorists that the justly warring state was unilaterally granted all rights to the means of war to be Vattel's main innovation[555], something also reflective of international law. For the reasons outlined above, the neglect of a duty to surrender in orthodox just war theory cannot be attributed to the tradition believing it to be contained entirely within, and reducible to, the *jus ad bellum*.

If this is not the reason, it might also be proposed that surrender is the point at which where OJWT draws the line between the principle of humanity and the principle of necessity, international law likewise being balanced between these two principles. In other words, it might be supposed that war termination was considered entirely the purview of states; they may decide when to end war and could not be compelled to do so. Aside from seeming fatalistic, it also does not seem accurate. This would seem to suggest that they would be prioritising military necessity over humanity, or the rights of the state over individuals. Neither Vattel nor Walzer emphasise the principle of military necessity over the principle of humanity. Vattel's own position hints at accepting this view where he references 'moderation' as 'commendable' but not 'obligatory' and states that famine was a useful tactic to break sieges[556].

However, he ultimately rejects what we might call the von Moltke position of arguing that the greatest kindness in war is to use whatever methods one has access to in order to ensure that it is ended in the quickest way possible. Indeed, Lieber, the author of the famous Lieber Code[557], criticised Vattel as ineffectual as a result of the latter's condemnation of new weapons whose destructiveness and potential for thereby shortening war fascinated Lieber[558]. Vattel at several points both acknowledges the utility of certain measures in achieving the ultimate war aim whilst condemning them. Assassination is not permissible because it involves deception[559]. Furthermore: 'All this [wasting a country, destroying the provisions and sinking ships] tends

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[555] Reichberg, Syse, and Begby, *The Ethics of War: Classic and Contemporary Readings*; Gregory M. Reichberg, "Catholic Christianity," in *Religion, War, and Ethics: A Sourcebook of Textual Traditions*, ed. Gregory M. Reichberg and Henrik Syse (Cambridge: Cambridge University Press, 2014). p.504
[556] Vattel, *The Law of Nations*. p.551
[557] *Lieber Code*.
[558] Johnson, *The Quest for Peace: Three Moral Traditions in Western Cultural History*. p.208
[559] Vattel, *The Law of Nations*. pp.557-563

to promote the main object of the war: but certain measures are only to be pursued with moderation, and according to the exigency of the case'[560]. He considered the use of red-hot cannon balls extreme because they were indiscriminate and he argued against the uprooting of vines and the cutting down of fruit trees because only enmity could motivate such actions[561].

This suggests that Vattel would not have been against the humanitarian purpose of obligated surrender. A crucial passage for our purposes here takes place in Vattel's discussion of the restoration of peace, which he argues is one of the duties of a state to its citizens, as well as to people from other nations. Vattel argues, contrary to Hobbes, that the needs of humans can be met best in times of peace, and thus the 'law of nature every way obliges them to seek and cultivate peace'[562]. The passage is as follows:

> This obligation of cultivating peace binds the sovereign by a double tie. He owes this attention to his people, on whom war would pour a torrent of evils; and he owes it in the most strict and indispensable manner, since it is solely for the advantage and welfare of the nation that he is intrusted with the government (Book I S 39). He owes the same attention to foreign nations, whose happiness likewise is disturbed by war[563]

Walzer likewise explicitly rejects the realist position of Clausewitz and von Moltke that *in bello* restrictions should be jettisoned in favour of ending war as quickly as possible[564]. A just war, says Walzer, is a limited war[565]. Therefore, while the inclusions of considerations of *jus ex bello* are referenced in the *jus ad bellum* principles of Walzer and Vattel, they do not completely answer the question of whether there is a duty rather than merely a right to surrender. Furthermore, their arguments about the ends of war demonstrates that it is not out of agnosticism to the ends of war that such a duty to surrender is not fully articulated; it is not that they are leaving the decision of when to end a war to states, or that they think it exists outside the sphere of justice. They *do* think there is a right end to war. The analysis above demonstrates both the incompleteness of a just war theory that does not deal with justice in surrender and the

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[560] Ibid. p.570
[561] James Turner Johnson, *Ideology, Reason and the Limitation of War: Religious and Secular Concepts, 1200-1740* (Princeton: Princeton University Press, 1975). p.251
[562] Vattel, *The Law of Nations*. p.652
[563] Ibid. pp.652-3
[564] Not to be confused with those that Walzer names as realists, who argue that it is the "crusader" attitude that logically permits total war.
[565] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. p.122

imperative for dealing with it. The following sections will therefore try and extrapolate one from orthodox principles as far as possible while maintaining coherence, and this thesis is thereby turning its attention to the second research question for the moment.

4.3 On the basis of the state's obligations in war

The duty to surrender would presumably arise from the same source as the other duties of war. This section is therefore concerned with analysing the various obligations the state has, either to its population, or others. If a specific duty is found to be the "bottommost" one, then the duty to surrender must also arise from this duty. Although Vattel's work largely focuses on the state level, state legitimacy shares similar groundings in social contract traditions and an idea of sovereignty rooted in individual rights. Vattelian sovereignty is arguably exactly what has been incorrectly termed "Westphalian" sovereignty[566]. It exhibits the same tension between the right to be free from external interference and the individual rights to life and freedom from tyranny that exists throughout historical understandings of sovereignty[567]. For Vattel, the sovereignty of the sovereign to be ultimately derived from the sovereignty of the nation. Indeed, the state has a right to wage war because its individual members have this right, the right in individuals to restore natural justice when it has been impaired[568]. Obligations of the sovereign are derived either from the rights of their subjects or from the rights of other states.

While he refers to the prince as the sovereign, Vattel is careful to distinguish between the original possessors of sovereignty, meaning the people, and the princes who exercise it[569]. Vattel considers that civil society requires its members to yield certain rights to the state and imbue it with powers of compliance over the citizens[570]. Such a characterisation puts him in line with the social contract theorists from the sixteenth century and onwards and with the ideas that produced the American and French Revolutions in which Vattel was still referenced as

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[566] Jennifer Pitts, Stefano Recchia, and Jennifer M. Welsh, "Intervention and sovereign equality: legacies of Vattel," in *Just and Unjust Military Intervention* (2013).
[567] Luke Glanville, "The antecedents of 'sovereignty as responsibility'," *European Journal of International Relations* 17, no. 2 (2010) p.235
[568] Johnson, *Ideology, Reason and the Limitation of War: Religious and Secular Concepts, 1200-1740*. p.242
[569] Simone Zurbuchen, "Vattel's law of nations and just war theory," *History of European Ideas* 35, no. 4 (2012) p.412
[570] Richard Tuck, *The rights of war and peace: political thought and the international order from Grotius to Kant* (Oxford: Oxford University Press, 1999). p.192

authoritative source[571]. ("The sovereign" here will be used to denote what Vattel would call the prince rather than the people.)

However, his conception of the social contract differs notably from that of Hobbes and Rousseau. He criticises Rousseau for thinking humankind is isolated in the state of nature[572]. More noteworthy is how it differs from the Hobbesian social contract. Hobbesian sovereignty was aimed, more modestly, at survival rather than the duty of the perfection of oneself and others[573]. Vattel also considered Hobbes to have incorrectly characterised humankind's natural state as one of war, suggesting openness or optimism to further pacific measures.

His sovereignty is also more qualified, however, in that it is not exclusively popular. All states, for Vattel must comply with 'certain basic economic rules if they are to be properly sovereign'[574]. Perhaps most problematic of these is his approval of Locke's arguments about productivity and ownership, particularly in relation to agriculture (something to be wary of if the outlined obligation to surrender is to be non-imperialist): 'The law of nations will therefore not acknowledge the property and sovereignty of a nation over any uninhabited countries, except those of which it has really taken actual possession, in which it has formed settlements, or of which it makes actual use'[575]. In the same passage he argues that a nation only has a right to territory if it makes use of it, and it also not allowed to hinder others from 'deriving advantage from it'[576]. In accordance with this approach, he considers that the settler colonialism in North America could be lawful[577]. As Anthony Anghie notes, these are not unique to Vattel, but 'it is Vattel who is cited, both in cases and scholarship, for the proposition…that non-agricultural people may be deprived of their lands'[578].

Vattel has also made some anti-imperialist remarks: 'though a nation be obliged to promote, as far as lies in its power, the perfection of others, it is not entitled forcibly to obtrude these good offices on them. Such an attempt would be a violation of their natural liberty'[579]. In the same

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[571] Christov, "Emer de Vattel." p.156
[572] Tuck, *The rights of war and peace: political thought and the international order from Grotius to Kant*. p.192
[573] Hunter, "Law, War, and Casuistry in Vattel's *Jus Gentium*." p.90
[574] Antony Anghie, "Chapter IX. Vattel and Colonialism: Some Preliminary Observations," Graduate Institute of International and Development Studies (2011). p.251
[575] Vattel, *The Law of Nations*. p.215
[576] Ibid. pp.214-15
[577] Georg Cavallar, "Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?," *Journal of the history of international law = Revue d'histoire du droit international* 10, no. 2 (2008)
[578] Anghie, "Chapter IX. Vattel and Colonialism: Some Preliminary Observations." p.253
[579] Vattel, *The Law of Nations*. p.265

section he calls the justifications of the European attacks on American nations on the grounds of civilising them 'unjust and ridiculous'[580]. He also supported states in restricting trade where they thought it was harmful, explicitly supporting Chinese restriction of European goods[581].

The response is to attempt to emphasise the consent-based parts of Vattel, or the appeals to self-determination. This argument in relation to territory is particularly problematic and any proposal of a duty to surrender has to be acutely aware of sanctioning conquest or imperialism. As such, the analysis will proceed by emphasising the popular sovereignty element of Vattel, noting that the humanitarian cause of a duty to surrender is reflected, while taking care to avoid facilitating imperialism.

Walzer explicitly supports the idea that it is from property rights of individuals that the state's right to war arises[582]. Walzer also emphasises that the state does not have value greater than the sum of the value of the lives of the individuals to whom it provides safety[583]. Indeed, Walzer's *jus ex bello* and *jus ad bellum* are both products of this same principle, that the rights of nations are derived from the rights of individuals[584]: 'the theory of ends in war is shaped by the same rights that justify the fighting in the first place – most importantly, by the right of nations, even of enemy nations, to continued national existence and, except in extreme circumstances, to the political prerogatives of nationality'[585]. This must also then be the source of the obligatory quality of the duty of surrender.

All obligations for Walzer, arise from membership of some group[586] and the obligation to surrender would arise from the same place. Even obligations to which people are bound by their conscience are just linguistic place-holders for obligations towards unspecified others[587]. Walzer does state that such membership must be wilful in order to produce obligations, but societies interpret assent in different ways, and this may be simply indicated by continued membership after a particular age, as would be the case for most sovereign states[588]. To some extent, the weight assigned to these obligations are dependent on the weight of the consent[589].

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[580] Ibid. p.265
[581] Anghie, "Chapter IX. Vattel and Colonialism: Some Preliminary Observations."
[582] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. p.55
[583] Michael Walzer, "The Obligation to Die for the State," in *Obligations: Essays on Disobedience, War, and Citizenship* (Cambridge: Harvard University Press, 1970). p.83
[584] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. p.123
[585] Ibid. p.123
[586] Walzer, "The Obligation to Disobey." p.7
[587] Ibid. p.5
[588] Ibid. p.7
[589] Ibid. p.10

The weight of the consent is not assigned on the basis of the alternative group membership available, as one issue is that there is often no practical alternative to membership of a state-group, or at least, no way to signal non-membership than reverting to crime, as Walzer observes[590]. Instead it is action that is the 'language of moral commitment': the way individuals behave provides the legitimacy of requiring the performance of duties[591].

What results from Vattel's conception is a theory of sovereignty that is highly permissive for the sovereign but, crucially, not unlimited. States are protected from interference by other parties unless they have violated certain types of pre-existing right. Indeed, it was the strength of Vattel's concept of the sovereignty of nations that prevented his natural law from being subject to external enforcement. Not only did Vattel reject Wolff's idea of using a fictional supreme state, enjoying at least some sovereignty over all states (*civitas maxima*) as the enforcement mechanism of natural law, opting instead for the conscience of sovereigns to restrain their behaviour, he derived the force of voluntary law from the same principle of strong state sovereignty[592]. This conception also means that it is the sovereign that must pay all the costs of war and bear the guilt; the citizens and military are exempt from both[593]. It also, however, provided a strong basis for the doctrine of sovereign equality in international society, no matter the extent of their relative power[594].

Furthermore, sovereignty is also subject to limits from below, as nations can withdraw their obedience to the sovereign under certain circumstances. The fundamental laws of the state may limit the sovereign, who is also obliged to respect and preserve such laws. The sovereign is also required to embody the nation's duties towards itself, generally, to preserve and perfect itself[595]. Sovereigns are therefore not only representatives of their societies on the international stage but also guarantors of their citizens' rights.

Like Vattel, Walzer conceives international society as made up of independent states which are the protectors of the rights of their citizens; even the UN Charter of Human Rights cannot be enforced without reference to the society[596]. Also like Vattel, Walzer's position is that the state

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[590] Ibid. p.18
[591] Walzer, "The Obligation to Die for the State." p.98
[592] Luke Glanville, "Responsibility to Perfect: Vattel's Conception of Duties beyond Borders," *International Studies Quarterly* 61, no. 2 (2017) p.388
[593] Johnson, *Ideology, Reason and the Limitation of War: Religious and Secular Concepts, 1200-1740*. pp.243-4
[594] Jennifer Pitts, "International relations and the critical history of International Law," *International Relations* 31, no. 3 (2017)
[595] Vattel, *The Law of Nations*. pp.96-109
[596] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. p.61

derives its sovereignty from its citizens. Both conceptions of sovereignty, therefore, are premised on the rights of their constituent members and such sovereignty exists to promote these rights. Both describe theoretical rather than actual social contracts. Vattel's conception of sovereignty is more permissive for the sovereign, whose authority is reflected in the lack – but not complete lack – of restraints imposed on the sovereign in the international sphere.

The centrality of sovereignty to this question lies in its ability to describe the relationship between the sovereign and the subjects. This suggests that if a duty to surrender is framed as a humanitarian and popular duty, in the sense that it seeks to protect the lives and rights of individuals within the state's responsibility, it would be largely coherent with orthodox just war theory so far. Indeed, framing it this way would suggest that the state, in not ensuring that the seeking of consent to surrender or continue to engage in hostilities tracks the wishes of the population unjustly violates their rights. While it might appear that the "modern" conception of sovereignty as responsibility would lend itself more easily to a moral duty which would require prioritising the rights of individuals over that of the sovereign, these important elements are present in the more historical just war orthodoxy. Both Vattel's and Walzer's understandings of sovereignty are the foundations of their respective moral theories and so a *jus ex bello* that includes a duty to surrender must first be consistent with their conceptions of sovereignty.

4.3.a Vattelian sovereignty as ahistorical

In seeking some form of coherence, it is worth discussing whether Vattelian sovereignty represents such a radical departure from the historical idea of sovereignty as to render any examination of Vattel pointless, especially now that sovereignty is established as a central theme. Even "Westphalian" sovereignty, and specifically its principles of absolute non-interference and the complete authority of the sovereign, was never actual[597]. The characterisation of the Treaties of Westphalia as the origin of international society itself began with the counter-revolutionary movement[598]. A reading of the Treaties themselves demonstrates that sovereignty over territory was qualified, sovereign equality was not

[597] See, among others Andreas Osiander, "Sovereignty, International Relations, and the Westphalian Myth," *International Organization* 5, no. 2 (2001); Derek Croxton, "The Peace of Westphalia of 1648 and the Origins of Sovereignty," *The International History Review* 21, no. 3 (1999) or Peter M. R. Stirk, "The Westphalian model and sovereign equality," *Review of International Studies* 38, no. 3 (2012)
[598] Pitts, "International relations and the critical history of International Law."

recognised by the signatories, states maintained a right to interference, and authority from the state was challenged both from above by the Holy Roman Empire and from below by – albeit minimal – religious rights for the individual[599].

What the Peace of Westphalia did begin to establish, however, was religious plurality and secular international law, were supported in the later Treaty of Utrecht which was in turn supported by all the major treaties of the eighteenth century[600]. In this sense, the Peace pre-empted some of the themes in Vattel. These themes were also reflected in the works and treaties of Vattel's own time. In the "long eighteenth century" ideas, of legitimacy grounded in the nation, rights for the individual, as well as the creation of explicit contracts between the sovereign and the governed, manifested.

The Congress of Vienna in many ways also embodies Vattel's conception of sovereignty. Vattel both emphasised the difference between lawful and unlawful increases in power, and did not grant states full immunity from interference[601]. It attempted to combine legitimacy with the balance of power. Balance of power was written explicitly into the 1814 Treaty of Paris (immediately before the Congress)[602]. More recently, some have argued that it was also implicit but no less central to the Vienna Congress[603].

It is neither the case that Vattel's conception of sovereignty is inconsistent with historical understandings of sovereignty from the time of Westphalia to the French Revolution, nor that it is inconsistent with a duty to surrender. This section has been far too brief to decisively make the point, but ought to provide a reasonable comparison between Vattel on the one hand, and the unlimited "Westphalian" sovereignty as well as contemporaneous notions of sovereignty on the other. Indeed, it was not until Vattel specifically that the right of non-intervention was fully articulated[604]. However, while this is innovative on Vattel's part, it is not so innovative as to place Vattel on an island disconnected from history and the just war tradition.

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[599] Croxton, "The Peace of Westphalia of 1648 and the Origins of Sovereignty."
[600] Marc Bélissa, "Peace treaties, *bonne foi* and European civility in the Enlightenment," in *Peace Treaties and International Law in European History*, ed. Randall Lesaffer (Cambridge: Cambridge University Press, 2004). p.242
[601] Isaac Nakhimovsky, "Vattel's theory of the international order: Commerce and the balance of power in the Law of Nations," *History of European Ideas* 33, no. 2 (2012)
[602] Clark, "Revolutionary and Legitimate Orders: Revolution, War, and the Vienna Settlement."
[603] Paul W. Schroeder, "Did the Vienna Settlement Rest on a Balance of Power?," *The American Historical Review*, 97, no. 3 (1992)
[604] Glanville, "The antecedents of 'sovereignty as responsibility'."

Furthermore, as has been and will be further shown, this right is not absolute enough to preclude a duty to surrender.

4.4 On the state's duty to surrender

Thus far, this chapter has argued that while Walzer and Vattel do not espouse a fully developed theory of obligated surrender, there is reason to expect that they would seek one. It has also started to outline the central themes to which the duty must appeal. The remainder of the chapter will consider what a maximally coherent duty to surrender would look like. Vattel's *Law of Nations* is indeed largely concerned with affairs of state, and his discussion of the individual is rather starved as a result. What is notable is that the individual is largely (but certainly not completely) bound to obey the state for Vattel. Vattel's soldiers defer the responsibility to judge the correctness of participation in war to the state. We must therefore determine, in order to answer the question of when the individual must surrender, when the state must surrender.

4.4.a Interstate wars

The duty of the state to surrender in interstate wars speaks to several potential duties: the duty to pursue peace, the duty to other states, the duty to the lives of its population, the duty to pursue justice and the duty to protect its interests. The question is which of these prevails, which duty has primacy. Vattel conceived of states as bound by an obligation firstly to themselves, for self-preservation[605]. States, he believed, are societies united for the purpose of cultivating their mutual security and advantage. The nation, by virtue of a social compact, owes the duty of self-preservation to itself, and also is bound by the duty to protect each of its members. The primacy of such a duty might suggest that the state is never required to surrender but, importantly, Vattel considers that this duty must give way to the demands of peace:

> What idea should we entertain of a prince or a nation who would refuse to give up the smallest advantage for the sake of procuring to the world the inestimable blessings of peace? Every power therefore owes this respect to the happiness of human society, to shew himself open to every mode of conciliation, in

[605] Reichberg, Syse, and Begby, *The Ethics of War: Classic and Contemporary Readings*. p.505

> questions relating to interests which are neither essential nor of great importance. If he exposes himself to the loss of something by an accommodation, by a compromise, or by an arbitration, he ought to be sensible what are the dangers, the evils, the calamities of war, and to consider that peace is well worth a small sacrifice[606]

This is not to say that he supports peace for the sake of it. Vattel's remarks suggests a more nuanced definition of peace than the mere absence of conflict: 'if an unjust and rapacious conqueror subdues a nation, and forces her to accept of hard, ignominious, and insupportable conditions, necessity obliges her to submit…this apparent tranquillity is not a peace'[607]. Vattel's *jus ex bello* is in some sense dependent on *post bellum* conditions; treaties that are overtly unfair are void[608]. We can assume, based on his previous discussion of *jus ad bellum,* that it is legitimate to consider a state's track record when considering whether a state is duty-bound to surrender. Based on these two passages, the state would be under a duty to surrender because it achieves peace, provided that that peace is not subjugation.

Justice, for Vattel, would also limit what the surrendering state can be expected to endure as a result of the defeat. Recalling that the right of conquest originated from the right of self-defence, this conquest can be turned to the conqueror's advantage only to the extent that this right allows. For Vattel, the conqueror may reimburse the losses incurred as a result of engaging in the defensive war, and may disable the conquered state, but may go no further, and may do the latter by the gentlest means possible[609]. Vattel would expect that a duty to surrender should not require a state to accept any and all terms.

On this point, Walzer has been keen to place limits on post-war treatment of a defeated state. Indeed, Walzer goes as far as to say that the track record of Nazi Germany, and the anticipated rights abuses in the event of a Nazi victory justifies not only non-surrender, but a bombing campaign that would have been impermissible under circumstances which would not have been such a "supreme emergency" if it was the only way to ensure victory[610]. In such cases, Walzer contends, the laws of war might be suspended in order to prevent a greater moral catastrophe[611].

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[606] Vattel, *The Law of Nations*. p.454
[607] Ibid. p.672
[608] Bélissa, "Peace treaties, *bonne foi* and European civility in the Enlightenment."
[609] Vattel, *The Law of Nations*. pp.598-599
[610] Chris Brown, "Michael Walzer," in *Just War Thinkers: From Cicero to the 21st Century*, ed. Daniel R. Brunstetter and Cian O'Driscoll (New York: Routledge, 2018). p.209
[611] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. pp.258-261

A duty to surrender would have to Walzer is therefore wary about a state so flagrantly abusing rights being victorious and Walzerian justice in surrender would have to maximise *post bellum* rights protection.

Vattel agrees that a state's historical conduct insofar as it speaks to potential future conduct can factor into treatment of it, particularly when this applies to justifying anticipatory self-defence. The right to life, for example, is a right that is clearly at risk if a sovereign is to continue a conflict that is ultimately futile. However, the difficulty is when one is forced to choose between at least two fundamental rights. A duty to surrender in some sense involves the weighing of the rights to life with the rights of property of the individuals or self-determination: do they concede the loss of territory or risk their lives by continuing to fight over it? Recall that the definition of *terminative concessions* does indeed terminate the conflict, but this benefit is exchanged with something else, such as territory or political power that gives the victor a degree of control over them that the to-be-victor did not previously have.

A nation, according to Vattel, cannot be required to sacrifice essential rights. Such rights, Vattel believes are those 'without which she could not hope to support her national existence'[612]. A Vattelian nation also has a duty to perfect itself, which transfers to the sovereign, which means that it should be aimed at achieving the end of civil society. This is 'to procure for the citizens whatever they stand in need of, for the necessities, the conveniences, the accommodation of life, and, in general, whatever constitutes happiness, – with the peaceful possession of property, a method of obtaining justice with security, and, finally a mutual defence against all external violence'[613]. Elsewhere: 'the safety of the people is the supreme law'[614]. The duty to the population is therefore primary. On an individual level, Vattel argues that 'he who no longer exists can have no duties to perform: and a moral being is charged with obligations to himself'[615]. This is notably different to Walzer's position, which denies the existence of rights to oneself as previously mentioned.

There is also reason to suppose that the right to life is not always the most important right; in some cases it is eclipsed by freedom, or self-determination. Vattel posits that where an injury presents a legitimate justification for war and arbitration a nation should not even attempt to engage in a conference but must, on the contrary, 'gloriously lavish her blood to the last drop

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[612] Vattel, *The Law of Nations*. p.454
[613] Ibid. p.86
[614] Ibid. p.114
[615] Ibid. p.86

if necessary'; 'a free people will prefer death to servitude'[616]. As mentioned earlier, it is not only that this *ought* to be the choice made by free people, but a sovereign has the right to demand this of their nation. In summary, the Vattelian duty to surrender would appear to arise out of the duty to cultivate peace and bring about civil society provided that it would not also lead to subjugation of the people. Walzer, in turn, considers the rights to life and liberty to be the most important. While property is fundamental, it is secondary to life, as Walzer makes clear in his assessment of the validity of the competing claims over Alsace-Lorraine. Territorial integrity does not derive its force from property; it is instead derived from the rights of the inhabitants.

A deeper conception of a Walzerian duty to surrender emerges from his treatment of groups. For Walzer, rights can be ranked by the value that the group aims for[617]. Individuals can join groups that claim primacy over the state and, as previously noted, it is their actions that rank the importance of the groups, which thereby ranks the weight of the rights. Since these groups can be real or imaginary, one has to consider the principles of individuals before ranking the rights, and again this is signified by action. Therefore, in contrast to, Vattelian surrender, Walzerian surrender requires some understanding of the value the relevant groups place on different rights.

While not having a definitive answer on the precise rights that determine the justness of a surrender might appear unsatisfactory, it is absolutely necessary. To decide which rights have primacy here would be paternalism, and risks compounding the issues inherent in exploring the answers in a Western, as opposed to truly international tradition. Not having this principle and deciding that life has primacy could easily lead to a state refusing to surrender, and perpetuating a brutal conflict in order to "save the lives" of others, and would run headlong into a chief criticism of humanitarian intervention. So at this point the duty to surrender, to maximise coherence with orthodox just war theory, must be aimed at furthering rights, but those rights considered to be most important by those affected by the surrender, and self-determination.

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[616] Ibid. p.454
[617] Walzer, "The Obligation to Disobey." p.19

4.4.b State legitimacy and consent: intrastate wars and humanitarian intervention

What the above analysis suggests is that states would be under a duty to surrender if, for Vattel, it does not undermine the existence of the state and if it is to protect the rights of the population, and for Walzer, if it furthers those rights that the nation cares about. This popular sovereignty amounts to the beginnings of what will become one of, if not the most, central themes of this project: self-determination. Taking this to its natural next step, intrastate wars must be considered, not only because intrastate conflict is the dominant form of modern conflict[618] but because it goes to the heart of when the state's actions are legitimate and self-determination are on the table.

As we have seen, Vattelian sovereignty is multifaceted. Though the Vattelian sovereign is afforded many privileges, their power is not unlimited. The sovereign is internally limited by whatever laws pertain to the powers of the sovereign in each state. Regardless of the specific nature of the national laws, the sovereign is required not only to respect them but also support them[619]. He goes further in arguing that intervention in civil wars is only permissible in extreme circumstances; it is explicitly not the same as aid to tyrannised subjects and indeed is closer conceptually to interstate wars in which the rebellious party has attained the rights of states in virtue of the extent of their departure from the parent state[620].

Ultimately, Vattel considers that 'it is a settled point with writers on the natural law, that all [individuals] inherit from nature a perfect liberty and independence, of which they cannot be deprived without their own consent'[621]. For Vattel, the state 'is then established only for the common good of all citizens'[622]. The sovereign is invested with understanding and will' and is the 'depositary of the obligations and rights relative to government'[623]. The state is explicitly representative. It stands to reason, therefore, that a duty to surrender which is grounded in a consent-based understanding of state rights would be largely coherent with Vattelian obligations. Resistance is justified on the basis of the illegitimacy of the state, which is when

[618] Themnér and Wallensteen, "Armed conflict, 1946-2010."
[619] Vattel, *The Law of Nations*. p.103
[620] Pitts, Recchia, and Welsh, "Intervention and sovereign equality: legacies of Vattel." p.147
[621] Vattel, *The Law of Nations*. p.68
[622] Ibid. p.97
[623] Ibid. p.99

it is not representative. Concerns about the continued existence of the nation are not an issue in civil wars. Surrender then arises out of the similar pacific urges of interstate war.

Vattel does not deal in detail with civil war, choosing to focus on what he terms "public war": war between states. Where he does discuss it, he distinguishes civil wars from rebellions, in that rebellions are against a legitimate sovereign, and hence illegitimate themselves. In civil wars, the parties are legitimate and since they do not possess a common superior they 'stand therefore in precisely the same predicament as two nations, who engage in a contest and, being unable to come to an agreement, have recourse to arms'[624].

Walzer does consider resistance in more detail. He observes that those that continue resistance after a military defeat (which presumably includes surrender) are obligated by their previous membership to the state before it was betrayed to resist the new regime[625]. He adds, however, that it is the kind of duty that does not provide a legal basis for punishing collaborators in the event of a successful resistance; they have a right to decline to take part in the resistance[626]. More broadly, 'the duty to disobey', says Walzer, 'arises when obligations incurred in some small group come into conflict with obligations incurred in a larger, more inclusive group, generally the state'[627].

Walzer's general theory that would pertain to surrender is one of groups and contracts. Individuals can form, by way of engaging in through their actions, (theoretical) contracts. Civil wars arise when individuals belong to a secondary association with claims to primacy[628]. Individuals, by their actions, are signalling their membership of groups constantly, and the point at which civil disobedience is justified is where a group may claim primacy on behalf of its membership which can provide greater goods to its membership than the state. Surrender, then would also turn on this. If the state can be expected to provide greater levels of good, which is presumably the rights that Walzer talks about elsewhere, then the non-state group has a duty to surrender. If the second group breaks away from the first to such an extent that the conflict is interstate in all but name, then other considerations must apply. In this way, there would be safeguards against a second group which better protected the rights of those it

[624] Ibid. p.645
[625] Walzer, "The Obligation to Disobey." p.9
[626] Ibid. p.9
[627] Ibid. p.19
[628] Ibid.

represented, say a particular religious group, but not the rights of another group. It might claim high legitimacy from the former, but this would not be enough to ignore the rights of the latter.

More guidance on the importance Walzer gives to consent in this context, and its relationship with rights, is provided by his treatment of humanitarian intervention. For Walzer, intervention in a civil war is only permitted if it is to counter a pre-existing intervention to achieve balance and thereby to render the situation as close to non-intervention as possible[629]. It must be done in response to actions that "shock the moral conscience of mankind"[630]. The intervening party must align itself with the interests of the oppressed party and thereby to enter into the purposes of the party. Perpetrators of crimes against humanity 'lose their right to participate in the normal…process of domestic self-determination'[631]. Purity of intention is neither required nor expected. A crucial line point is that Walzer considers that the intervening party must align themselves with not just the interests but the *wishes* of the oppressed party. Likewise, Vattel considers humanitarian intervention justifiable only in the limited case when a legitimate revolution is underway; he commended the intervention of William of Orange during the Glorious Revolution on such grounds[632].

For Vattel, surrender in civil wars is essentially a question of legitimate representation, albeit with the benefit of the doubt given to the sovereign. A sovereign is legitimate when the majority of the population supports their leadership. Since the sovereign is imbued with powers of compulsion, they are not required to surrender provided they are representing their subjects. Once the conflict has started, a duty of surrender would seem to arise in a civil war in the same set of circumstances as an international conflict. There are some additional *in bello* restrictions that apply, particularly in relation to the person of the sovereign but, broadly speaking, a duty of surrender is required when doing so would better protect rights. If a nation breaks off from their sovereign and forms a new nation, the war becomes what Vattel would call a public war and then the situation is exactly the same.

In summary, while Walzer waives self-determination in very extreme circumstances (not circumstances which would be coherent with international law), generally speaking orthodox just war theory takes rights and self-determination as the starting point and, in the majority of cases, self-determination has primacy over rights, otherwise states would be permitted to

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[629] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. p.104
[630] Ibid. p.107
[631] Ibid. p.106
[632] Zurbuchen, "Vattel's law of nations and just war theory." p.412

intervene in cases of human rights abuse regardless of the wishes of the population. The obligation to surrender, then, also arises from self-determination.

4.5 On the individual's duty to surrender

In discussing the popular sovereignty approach, the individual's duty to surrender has already been discussed implicitly. However, the thesis would also merit from an explicit discussion. While the orthodox just war tradition, and Vattel in particular, focuses on the level of the state, there are also important considerations for the soldier, ones which would develop the role of self-determination or governance by consent in Vattel and Walzer.

4.5.a On the duty to obey the state

Given the focus on the state in orthodox just war theory, and having discussed the state's duty to surrender, it makes sense to discuss whether the individual is automatically required to obey the state and therefore whether the individual's duty to surrender ultimately turns on the state's. The treatment of disobedience in Walzer and Vattel then speaks to a duty to surrender in a number of ways. It describes the individual's right to continue in the face of the state's surrender. Perhaps more importantly, it describes the individual's right to surrender in the face of state continuation in the war. It is perhaps more important because the central question of this thesis emerged by considering the duty of the state to protect its population from harm, particularly in light of the limits on statehood.

Vattel's own *Law of Nations* is, as the title suggests, largely focused on the rights and duties of states themselves rather than individuals. Nonetheless, he does deal with the issue. For Vattel, the duty of the individual to fight on behalf of the state, and presumably therefore the duty to not surrender, is on all individuals in theory[633]. Indeed, 'every citizen is bound to serve and defend the state as far as he is capable'[634]. All soldiers (mercenaries included) take an oath to serve (even if they do so involuntarily) and as such are not permitted to desert. Desertion merits 'severe and exemplary punishment; and the sovereign may, if he thinks it necessary, annex the

[633] Johnson, *Ideology, Reason and the Limitation of War: Religious and Secular Concepts, 1200-1740*. pp.243-4
[634] Vattel, *The Law of Nations*. p.473

penalty of death to desertion'[635]. Vattel is of course aware that individual surrender occurs in practice given that he discusses the treatment of prisoners of war, but the state nonetheless possesses strong powers of compulsion and the right to use them. The state has the right to enlist soldiers and mercenaries, though the latter must voluntarily enlist.

Importantly, however, Vattel describes the right of a nation to 'withdraw itself from [a sovereign's] obedience' as 'indisputable'[636]. He argues that the position that a people may not resist a ruler under any circumstances is built on the supposition that the sovereign is not accountable, which is not correct. Vattel objects to this directly when recalling that the citizens gave up rights for the common happiness of all, and discussing the contradiction in this power being used against the "all": 'could the society make such use of its authority, as irrevocably to surrender itself and all its members to the discretion of a cruel tyrant? No, certainly, since it would no longer possess any right itself, if it were disposed to oppress a part of its citizens'[637].

Walzer argues that the individual has an obligation to live for the state, or more accurately: an obligation to stay alive for the state[638].

> Throughout history, and even into the modern age, the state has vigorously opposed self-slaughter of every other sort, and the laws of the state have visited upon the corpse of the successful suicide the most strange and horrifying mutilations…hence the taking of his own life with his own hands can only be described as an insurrection against divine authority[639].

Concerning termination past a certain point, Walzer goes as far as to say:

> If people have a right not to be forced to fight, they also have a right not to be forced to continue fighting beyond the point when the war might justly be concluded. Beyond that point, there can be no supreme emergencies, no arguments about military necessity, no cost-accounting in human lives. To press the war further than that is to re-commit the crime of aggression[640].

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[635] Ibid. p.479
[636] Ibid. p.104
[637] Ibid. p.105
[638] Walzer, "The Obligation to Live for the State." p.170
[639] Ibid. p.169
[640] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. p.268

For Walzer, there is also the just and right end of war after which the soldier may not be forced to continue. Presumably, the individual soldier would at least have a right to surrender here, or at least desist in contributing to the war effort. He recalls the stoic philosopher Euphrates seeking permission of the emperor Hadrian before committing suicide, arguing that the force of a commitment to the state to such an extent likely has a personal quality[641]. He considers the right to preserve one's life to be a right that can be legitimately surrendered by the individual to the state (or another group), but that the state must 'do more than protect ones privacy' if it is to demand the duty to stay alive for the state[642]. The state, therefore, cannot legitimately demand the duty without offering something of meaning in return. The political obligation to die arises from at least one of three sources: 'as a function of the state's foundation or of the individual's act of adherence, or as a deduction from the collectively affirmed or (it is said) universally recognised ends of the state, or, finally, as a necessary consequence of the citizens relations with the political community as a whole'[643] .

Walzer references Hobbes' account of the right of someone to save themselves from death – pertinent to this discussion – recalling that Hobbes posited that such a right could not be transferred or given up[644]. Walzer notes that the Hobbesian account would have found Socrates' behaviour – assenting to the state's request for him to commit suicide – to be indicative of madness. Walzer observes that this arises from the assertion that the end of the state is the promotion of individual life[645], a point of notable difference from Vattel. Hobbes goes on to say that individuals who flee do not commit an unjust act but merely a dishonourable one[646]. Interestingly, the original consent of the soldier (enlistment) does not, for Hobbes, bind the individual to the duty to continue fighting. Instead, it is the wages and, for the mercenary, plunder[647].

Walzer notes a contradiction in Hobbes' account of the state and the permissibility of soldiers running away from a battle: 'The very existence of the state seems to require some limit upon the right of self-preservation, and yet the state is nothing more than an instrument designed to fulfil that right'[648]. He then notes the position of Rousseau – 'he who wills the end wills the

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[641] Walzer, "The Obligation to Live for the State." p.175
[642] Ibid. p.188-189
[643] Walzer, "The Obligation to Die for the State." p.77
[644] Ibid. p.81
[645] Ibid. p.82
[646] Ibid. p.84
[647] Ibid. p.85
[648] Ibid. p.87

means also, and the means must involve some risks, and even some losses'[649]. Perhaps, then, the state cannot compel via justice its young men and women to enlist and must instead rely on persuasion[650].

Vattel's own position is that the state must also provide services to expect obedience, even if it does have strong powers of compulsion: 'No engagement can oblige or even authorise a man to violate the law of nature'[651]. In determining the extent of a right of resistance, Vattel argues for a balance aimed at the tranquillity of the state:

> [Unless] the injuries are manifest and atrocious…the nature of sovereignty, and the welfare of the state, will not permit citizens to oppose a prince whenever his commands appear to them unjust or prejudicial. This would…[render] government impossible. A subject ought patiently to suffer from the prince, doubtful wrongs, and wrongs that are supportable[652]

The role that individual surrender might play in a grander duty of surrender should not be overlooked. It is not unheard of that individual rights require not guarantees by the state but some sort of duty to conduct its due diligence. If consent to the various social contracts that permit the various sorts of state action discussed is the important factor, then the opportunity for individuals to surrender would alleviate the difficulties in compelling a state to surrender. More accurately, if soldiers acting in such a way that, for Walzer, signals their assent to the contract, then the sovereign need not be concerned about the violation of rights.

This does, however, have limitations. If we are discussing the protection of civilians, it is quite conceivable to be in a situation in which soldiers do not surrender and endanger the unwilling civilian population in doing so. Furthermore, recall that it is precisely that soldiers cannot be expected to fully understand the reasons for conflict that they are morally exempt from any wrongdoing, and it is this that justified the independence between *jus ad bellum* and *jus in bello* for Vattel; it is the role of the sovereign to make these decisions. The brief response would likely be that there is no individual duty to surrender but there is a duty for the state to surrender, provided some threshold of unwilling citizens is reached.

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[649] Jean-Jacques Rousseau, *Of the Social Contract and Other Political Writings*, ed. Christopher Bertram, trans. Quintin Hoare (London: Penguin Classics, 2012). BkII Ch5 in: Walzer, "The Obligation to Die for the State." p.90
[650] Walzer, "The Obligation to Die for the State."p.93
[651] Vattel, *The Law of Nations*. p.110
[652] Ibid. p.110-11

4.5.b Back to rights

The soldier, in deciding the justice of their surrender, also has to consider the harm that might be caused. From their discussion of rights, we can infer that justice in surrender turns not on the state's decisions *per se*, but on the extent of rights protection filtered through popular sovereignty. An analysis of Vattel's and Walzer's work reveals the kinds of harms they are concerned about and demonstrates that the duty of *individuals* to surrender would also turn on rights. Whereas *jus ad bellum* is primarily a matter for the government of states and the head of states in particular, it is the armed forces of a state and individuals within that that are responsible for conduct *in bello*[653]. Generally speaking, Vattel adopts humanitarian principles that prohibit unnecessary harm. He considered the use of red-hot cannon balls extreme because they were indiscriminate and he argued against the uprooting of vines and the cutting down of fruit trees because only enmity could motivate such actions[654]. Destruction of edifices is also condemned on the grounds that humanity is honoured by them[655]. The responsibilities towards humanity more widely are manifold. Beyond the negative restrictions against destruction of buildings and cities, there are also several positive obligations on states. They generally were required to consider non-coercive means to discharge their duties – echoing the last resort norm of the just war tradition – as well as more specific duties to engage in commerce and provide safe passage, hospitality and refuge[656]. These place limits on war that would suggest there are points when surrendering is just and non-surrender is unjust.

In contrast to the Geneva Conventions and even the earlier St Petersburg Declaration and Hague Conventions, Vattel did consider the use of poisonous weapons permissible because of the relatively low level of deception involved[657]. Walzer, in contrast, goes into less detail on the specific prohibitions in war. What they have in common, however, is that they are prohibited because they entail disproportionate or unnecessary violations of rights, or because they threaten civilians. Nuclear war, for example, is condemned on this basis. It is problematic

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[653] Brian Orend, "Just and Lawful Conduct in War: Reflections on Michael Walzer," *Law and Philosophy* 20, no. 1 (2001)
[654] Johnson, *Ideology, Reason and the Limitation of War: Religious and Secular Concepts, 1200-1740*. p.251
[655] Ibid. p.251
[656] Cavallar in: Glanville, "Responsibility to Perfect: Vattel's Conception of Duties beyond Borders." p.387
[657] Vattel, *The Law of Nations*. pp.562-563

due to the dangers of escalation and the impossibility of distinguishing between combatant and non-combatant targets[658].

What is important, therefore, again, is the rights of the individual. Although the rights manifest in different principles of what is right and wrong in war, it is this "bottommost principle" that does the work. Both Walzer and Vattel consider the protection of rights to be foundation of duties and obligations in wartime. For Vattel it is explicitly the harm done to human society that renders an action illegitimate[659]. Walzer also explicitly asserts that it is 'the rights of the people of the enemy country that rule out further fighting, whatever its added value'[660]. Emphatically: 'The defence of rights is a reason for fighting. I want now to stress again, and finally, that it is the only reason'[661].

In summary, therefore, it is still the rights of individuals which the individual must consider in deciding whether to surrender, not the loyalty to the state. They must consider whether their continued participation in a war is more likely to lead to the kinds of harms and unnecessary suffering that Walzer and Vattel are concerned with. Individuals are bound by many duties to humanity and its members which a duty to surrender could be considered to be an expression of. Both accept that there is a right to disobey the state in some cases, and that justice in surrender is determined not by the will of states but the protection and furtherance of certain types of rights.

4.6 Conclusion

Both Vattel and Walzer ground their network of duties and rights of the state in the rights of individuals and the relationship between the sovereign and the citizen. It is this protection of rights that permeate through the entirety of the theories. Even the extra-legal measures that Walzer considers are justified in extreme circumstances are justified because of the protection of rights. These rights, in the orthodox just war tradition, are primarily owed to the citizens of one's own nation, but also to the citizens of other nations, or citizens of humanity. If the

[658] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. pp.274-278
[659] Vattel in: Reichberg, Syse, and Begby, *The Ethics of War: Classic and Contemporary Readings*. p.510
[660] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. p.120
[661] Ibid. p.72

protection of rights of individuals is truly the priority, more so than the justification for war, there are situations in which a state must surely be said to have a duty to surrender.

Even where, in Vattel, a state cannot be forced to surrender its essential rights, peace treaties are valid and are valid even where they do not reflect the *status quo ante bellum*, or the circumstances before the injury was received. There are further positive reasons to expect a duty to surrender to emerge from the above theories. Vattel considers peace to be the natural state of humankind. While he diverges from some of his contemporaries and predecessors on this front, orthodox just war theory at the time of Walzer would likely support this view.

The role that consent plays in both theories might satisfy the requirements of a duty to surrender provided soldiers and civilians are given the opportunity to surrender themselves. There is some inelegance here in that questions would remain about responsibility, particular in the tension between *jus ad bellum* involving state-level decision-making and *jus in bello* involving individual-level decision-making. What is evident, though, is that in order for the rights to be fully protected, both the individual and the state do have a duty to surrender; in some sense, their theories are not complete without this.

What is more, this chapter has started to outline what the duty must look like in order to be maximally coherent. Although one might be tempted to believe that the question is satisfactorily dealt with by reference to the role the ends of war plays in the *jus ad bellum*, this is not correct. Neither believe that the *ad bellum* status of a state is enough to outweigh the potential justice in ending a war. A duty of surrender, namely the duty of the individual to lay down their arms and not continue fighting, and the duty of the state to not continue fighting (which may mean withdrawing from a country if invaded, or capitulating whilst invaded) must therefore depend on the post-war protection of rights. Analysing sovereignty and civil wars demonstrates that the duty of the state to continue fighting flows from the protection of rights and the consent of those involved. Vattel is less concerned about the consent of the individuals, but the themes are there, and this aspect must also be emphasised in order to correct the western and Christian centricity of the just war tradition and international law and to ensure that it does not lead to adopting a principle of 'might makes right', particularly in light of flawed humanitarian justifications for civilizing missions.

This chapter has sought to demonstrate that the inclusion of a duty to surrender would not entail a radical overhaul of the structure of what Walzer calls the war convention. After having considered the war theories of Vattel and Walzer in detail, it is worth reiterating a point made

earlier. What is surprising is not that a duty to surrender seems both consistent with and an expression of the principles Vattel and Walzer present, it is that *jus ex bello*, and such a duty to surrender in particular, has not been considered in detail. Themes around self-determination, consent and popular sovereignty are presented in such a way that that grounding a duty of surrender on them would not be such a grave affront to the just war orthodoxy. These themes will be developed less doctrinally in the following chapter.

Chapter 5: Revisionist Just War Theory: Deep Morality, Consent, and Resistance

5.1 Introduction

Having established the extent to which a duty to surrender can be considered to be emergent from orthodox JWT, this chapter is concerned with answering this, the first research question, in relation to the revisionist school. The revisionist family is defined in contrast to the orthodox school and international law by rejecting the moral equality of combatants, the independence of *jus ad bellum* and *jus in bello*, and not accepting the principle of discrimination between combatants and non-combatants. For these reasons, the revisionist school is able to make a uniquely valuable contribution to the thesis.

Thus, although its core, namely its rejection of the independence thesis and the principle of discrimination, does not fully cohere with the norms of international law, if we take law as flexible and dynamic, as this chapter and the next will do, the treatment of individuals and their relationship with the state, and civil war in RJWT become more useful. The analysis of RJWT allows for the consideration of the central questions of this thesis without being constrained by the assumptions of OJWT. It also affords the possibility of examining developing thought that might anticipate where legal and moral norms are heading. In this way, this chapter is the natural next step after an analysis of OJWT in the path to presenting a *lex ferenda*. By the end of this chapter, both chief schools of JWT will have spoken, and what will remain is to consider what international law says about the framework that has been produced by them.

This chapter will begin with an interpretive account of revisionist *jus ex bello* by reconsidering one of the conclusions of the previous chapter, namely the extent to which the *jus ex bello*, of which the duty to surrender is a part, is reducible to the *jus ad bellum*. This examination of what RJWT already says about *jus ex bello* speaks to the first research question. Having argued that the duty to surrender still does not turn on *jus ad bellum* status, this chapter turns to the more foundational parts of revisionist just war theory: the protection and furtherance of rights, and the procedures by which they are given over and taken.

The chapter provides an in-depth analysis of the expected revisionist treatment of justice in the surrender of individuals. To address the second research question, the duty to surrender will be positioned in dialogue once again, this time with RJWT. In doing so, an equilibrium is sought between the spirit of RJWT and justice in surrender. This section will argue that it is right that the duty to surrender ought to be individual-centric, from a moral point of view as well as for the benefit of greater coherence, and that the duty must arise on the basis of self-determination because of the important role consent plays in the school. It will also analyse how rights promotion produces the duty of the individual to surrender. The next section will be concerned with the state and how the individual surrender speaks to the state's duty.

This chapter also develops a hierarchy of consent which helps to make sense of the solutions proposed, building from the establishment of the theme in the previous chapter that consent and self-determination are central to evaluating the justice of surrenders. This hierarchy, in descending order will be: true consent, acquiescence and non-dissent. Specifically, it is used to establish the necessity of referenda on surrenders, conscientious objection, and the safeguarding of some form of resistance. Further explanation will be provided in the discussion of individual surrender (5.3.b). The first research question having been fully answered in relation to doctrinal international law, OJWT and shortly RJWT, this consent framework, part emergent from the principles unearthed from the discussion of just war theory so far, part extrapolation, will form the most foundational layer of the theory, whose coherence with its closest legal parallel will be ultimately sought in the following chapter. Therefore, while some of the extrapolation started in the previous chapter, it is in this chapter where the restraints of doctrine and canon are most noticeably loosened – it is the revisionist school, after all – and therefore it is here where the bulk of the creating of the theory of *terminative concessions* can be done, limited only by the demand of coherence.

5.2 A duty to surrender, and *jus ex bello* in revisionist just war theory

5.2.a Jus ex bello *from* jus ad bellum*?*

As noted, the revisionist camp is characterised (in part) by its rejection of the independence thesis. The revisionists argue that the independence of *jus in bello* from *jus ad bellum* does not

represent either "deep morality" or our intuitions about whether an individual is liable to harm or not. Prominent revisionist just war theorists such as Jeff McMahan and Cecile Fabre endorse the link between *jus in bello* and *jus ad bellum* and, as such, it might be expected that they would link *jus ex bello* with *jus ad bellum,* and that they would therefore consider a duty to surrender to be ultimately derived from *jus ad bellum*. Indeed, McMahan argues that *jus in bello* and *jus ad bellum* are two sides of the same coin. One's involvement in an injustice makes one liable to harm and, as such, there is (potentially) no reason that a soldier fighting on the side of the conflict that entered the war with a just cause and having met all of the *jus ad bellum* criteria would be liable to harm, and every reason to expect their opponent would be liable to harm. Why, then, would they have to surrender?

Fabre, likewise, argues for the inclusion of the *jus ad bellum* criteria in the calculation. She particularly supports the existence of a just cause as a legitimising influence, one that allows a party to a conflict to continue the war. In some cases, the just cause criterion can justify the continuation of a war for belligerents who do not have a strong chance of success – one of the traditional *ad bellum* requirements – provided they begin a war to improve their bargaining position[662]. She also notes that there is a *prima facie* reason to believe that a justly warring party is permitted to continue and that an unjustly warring party is required to end its war, in virtue of the injustice of its warring[663]. If the *ad bellum* just cause criterion is given this weight, might it also decide *jus ex bello*?

Similarly, Darrell Moellendorf posits:

> Take the case of a war of unjust conquest pure and simple, and assume that in the course of events no additional injustices arise that the war would remedy. The fundamental moral requirements in this case are that the party pursuing conquest cease and desist. The reason for this is basic to just war theory itself: war is an evil that is justified only if it meets several conditions that serve to make it likely that sufficient good will derive from its prosecution and that limit the evil that can be done in its prosecution[664]

This statement is not only an appeal to the central tenet of just war theory – that while war is extremely harmful, it may nonetheless be justified in certain circumstances – it is also a

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[662] Cécile Fabre, *Cosmopolitan Peace*, First edition. ed. (Oxford: Oxford University Press, 2016). p.13
[663] Ibid.
[664] Darrel Moellendorf, "Jus ex Bello," *Journal of Political Philosophy* 16, no. 2 (2008) p.134

revisionist argument that conflict termination is an important duty *the justice of which draws from* the *jus ad bellum*.

5.2.b That justice in surrender is not derived wholly from jus ad bellum

However, the duty to surrender would not derive entirely on the *jus ad bellum* and a quick interpretation of revisionist just war theorists supports this convincingly. Darrel Moellendorf explicitly argues that the *jus ex bello*, and surrender as a species of war termination, is not wholly determined by the *jus ad bellum*: 'the moral status of a war at its commencement does not determine its moral status once the fighting begins. War changes things; it can even change the moral status of the war itself'[665].

Fabre also notes that the duty of the unjust party to surrender and the right of the just party to not surrender are *prima facie*, but only *prima facie*. Her contention that *jus ex bello* must be separated from *jus ad bellum* can be demonstrated by specific arguments: 'it does not follow from the fact that one's war is just at t1 that one has the right to carry on with it at t2— any more than it follows from the fact that it is unjust at t1 that one must sue for peace at t2'[666]. Fabre also explicitly argues that the *jus ex bello* is not entirely reducible to *jus ad bellum*: we 'should reject the view…that whether belligerents are competent to sue for peace…is entirely dependent on the moral status of those parties' war *ad bellum* and/or *in bello*'[667]. And it can also be demonstrated with reference to specific features of war which are appealed to by revisionists and demonstrate the absolute necessity of separating *jus ex bello*, and by extension, surrender, from the *jus ad bellum*. These features are that war is generative, that *in bello* actions affect liability to harm, and the likelihood of injustice.

The closest Moellendorf comes to outlining the sort of duty to surrender that is described in this thesis is via his appeal to factor a "proportionality budget" into calculations of war termination[668]. Under this appeal, Moellendorf argues that even where the just cause criterion – which holds a certain primacy amongst the *jus ad bellum* criteria – is met, it does not justify

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[665] Darrel Moellendorf, "Ending Wars," in *The Oxford handbook of ethics of war*, ed. Seth Lazar and Helen Frowe (New York: Oxford University Press, 2018). p.500
[666] Fabre, *Cosmopolitan Peace*. p.309
[667] Ibid. p.32
[668] Moellendorf, "Two Doctrines of *Jus ex Bello*."

all manner of actions; they must still be proportionate. A party to a conflict, permitted to fight by the virtue of its cause, might be furnished with such a proportionality budget and, once it is exhausted, they must consider war termination.

However, just as it argues that this proportionality principle assumes and depends on some support from *jus ad bellum* status, so it suggests that justice in war termination does not turn entirely on the *jus ad bellum* because it is amended by this proportionality principle. The distance between Moellendorf's conclusions and this thesis' aims is also increased when one considers the point made by Moellendorf himself that what logically follows from this proportionality budget being exhausted is not, in fact, necessarily a surrender *en masse*. When presenting it in terms of a variation on the classic trolley problem, an entity A may, in virtue of their *ad bellum* status only be permitted by their "proportionality budget" to kill three people rather than let five die. If an accident happens before the fork, and three people die, A has reached their proportionality budget without have saved the five, and still have the choice ahead of them. But Moellendorf asks whether this "proportionality quota" would carry over to a second person, B, if A steps down. This demonstrates not only that the duty to surrender, and justice in war termination is implicit in what just war theory has already said about other areas, but also that it does not turn entirely on the *jus in bello* and *jus ad bellum* criteria.

Furthermore, Moellendorf's argument includes the assumption that, 'in the course of events no additional injustices arise that the war would remedy'[669]. He adds that, 'War changes things; it can even change the moral status of the war itself'[670]. Violence, says Hannah Arendt '[interrupts] what otherwise would have proceeded automatically and therefore predictably' and, 'necessarily destroys the whole pattern in whose frame the prediction moves and where it finds its evidence'[671]. To use Arendt's interpretation, carried from Clausewitz, it is *generative*[672]. Additional injustices do arise that can drastically alter the justice of the war. The concern that just war theorists have with placing too much emphasis on *jus ad bellum* and

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[669] Moellendorf, "Jus ex Bello." p.134
[670] Moellendorf, "Ending Wars." p.500
[671] Hannah Arendt, *On violence* (New York: Harcourt, Brace, Jovanovich, 1970). p.31 and p.7 respectively. Following Hannah Arendt strictly might require that we abandon any attempt to predict events: 'only in a world in which nothing of importance ever happens could the futurologists' dream come true' p.7. However, international law and the concept of proportionality in law and just war theory expects some prediction to be made. Perhaps the framework is less reliant on futurology because it is filtered through consent of individuals.
[672] Ibid.; Patricia Owens, *Between war and politics: international relations and the thought of Hannah Arendt* (Oxford: Oxford University Press, 2007); Carl von Clausewitz, *On War* (Princeton University Press, 1976); Christopher J. Finlay, "Legitimacy and Non-State Political Violence," https://doi.org/10.1111/j.1467-9760.2009.00345.x, *Journal of Political Philosophy* 18, no. 3 (2010/09/01 2010)

allowing, as a result, the continuance of the war until this just cause has been achieved extends to revisionists as well. He also explicitly argues elsewhere for the complete independence of *jus ex bello*[673].

For McMahan, further injustices may easily arise that make one liable for harm. Just combatants may still become legitimate targets if their means violate norms. He gives the example of the crew of the Enola Gay bound for Hiroshima being a legitimate target for Japanese pilots[674]. He adds that where both parties (in a two-party conflict) are unjustly warring, combatants on neither side are able to legitimately attack those on the other[675]. David Rodin argues that war has the characteristics of a trap in that it is easy to get into and hard to get out of[676]. This is precisely because there are new risks that arise during the course of the war (namely, the risk of one's opponent committing an atrocity in retribution). These risks must be factored into the decision to go to war but they also demonstrate that war's termination is not entirely due to the *jus ad bellum* status for him either.

Beyond demonstrating the pedigree for not deriving a duty to surrender from *jus ad bellum* (and therefore the need to derive it from something else), a discussion of revisionist *jus ex bello* also yields insights which would apply to the duty to surrender, namely consent, potential duties to fallen soldiers, whether to restore the *status quo ante bellum*, and the costs of terminating war.

The fact that war is generative also means that unjustly warring parties are not necessarily required to surrender, or cease fighting, in virtue of the injustice of their participation, according to revisionists. A sunk cost dilemma, for Rodin, relates to the moral permissibility of continuing with an unjust action because the unjustness of it is in the past. Rodin argues that continuing to dangle someone from a window is morally permissible if the dangler (obviously originally in the wrong) cannot pull the dangled through the window by themselves. Therefore, the dangler causes greater moral harm in persisting in dangling but it is morally necessary[677]. Rodin directly compares the case of the dangling victim to that of Iraq; while

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[673] Moellendorf, "Two Doctrines of *Jus ex Bello*."
[674] Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2011).
[675] Ibid. p.17
[676] David Rodin, "The War Trap: Dilemmas of *jus terminatio*," *Ethics* 125, no. 3 (2015)
[677] Ibid. Moellendorf also argues that there are situations in which war termination would be unjust, even if the war was unjust as well, because withdrawal, say, could lead to a civil war. See: Moellendorf, "Jus ex Bello."

intervention in Iraq was wrong in 2003, so would have been a quick withdrawal, he says[678]. An important response, which this thesis will take up later, attributes the wrongness to the dangled's lack of consent. Indeed, this something considered by Rodin and his thoughts include many of the themes this thesis engages with[679].

However, it certainly indicates the acceptance in revisionist just war theory of the separation between *jus ad bellum* and war termination even for states that started a war unjustly. There is one cautionary point to make, however, on this independence. O'Driscoll notes that victory, the pursuit of which is contrary to the moderation championed by just war theory and IHL, is often 'invoked as the debt that the living owe to the fallen'[680]. In essence, accepting the "debt to the fallen" would mean that an unjustly warring party can be furnished with a reason to continue the war, and given the commonplace nature of the "debt to the fallen", the continuation of all too many wars would be justified. Both Cecile Fabre and Victor Tadros dismiss the "debt to the fallen" idea because it would mean arguing that the life of one soldier is tantamount to the original just cause (in cases where a just caused is valued at a certain number of lives and this value is reached, thereby requiring either the quota of lives is exceeded or the just cause value respected)[681].

A key question is whether a war should end in a way that does not restore the *status quo ante bellum.* Vattel, as we have seen, does not consider this necessary. Fabre emphasises the "all-things-considered justified peace": 'a just peace is one in which the wronged party obtains redress for the rights violations and (justified) rights infringements to which it was subject. Sometimes, however, the pursuit of a just peace will lead to an escalation in violence and render any kind of peace increasingly difficult to achieve… At the same time, [an all-things-considered justified] peace is not the same as the mere cessation of violence, for there are

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[678] One caveat should be made. If we were to assume that the continued dangling is not wrong, it would be problematic to analogise this to the occupation of, say, Iraq. Even if we remove the crimes committed by the US and other coalition forces in Iraq, the perpetuation of a war is almost certainly likely to lead to greater harm, in both the narrow and wide sense, than peace, or indeed the US-led forces terminatively conceding.

[679] See footnote 14 in Rodin, "The War Trap: Dilemmas of *jus terminatio*.": 'It is important to be clear about what consent amounts to in these cases. The victims give their consent to the defenders to undertake acts that will result in their suffering harm they would not otherwise suffer. They do not consent to the aggressors inflicting the harm on them. If aggressors impermissibly harm the victims as a result of the defender's action, they will still wrong them. In all of these cases there are complex questions about what is required for consent to be effective'

[680] O'Driscoll, *Victory: The Triumph and Tragedy of Just War*. p.129

[681] Victor Tadros, "Past Killings and Proportionality in War," *Philosophy & Public Affairs* 46, no. 1 (2018)

burdens which a wronged party cannot be held under a duty to incur even for the sake of peace narrowly understood as the absence of war'[682].

Fabre adds that if the costs of terminating a war endangers the possibility of flourishing lives for one's citizens, and the enemy's combatants are liable to be killed to avoid this, then that former side need not surrender[683], assuming they are fighting a just war. This raises a curious point for a project aspiring to outline a legal principle of surrender, namely that if this argument is to be honoured, such a principle must be responsive to the type of enemy and its aims; it must be responsive to the anticipated post-war situation. It would have to acknowledge the legitimacy, for example, of the decision taken by some German military leaders, even after recognising the war was lost, to continue to fight the Red Army to facilitate as many of their civilians as possible could surrender to British and American troops, rather than the Red army, on the grounds that conditions would likely be better[684].

To summarise this section, while the relationship between *jus ad bellum* and *jus ex bello*, and therefore a duty to surrender, is nuanced, it is clear that revisionists do not think the latter turns entirely on the former. Even if the revisionists do not align themselves to the independence of *jus ad bellum* and *jus in bello*, this dependence does not transfer to *jus ex bello*. If a duty to surrender cannot be found amongst revisionist *jus ad bellum*, it makes sense to seek elsewhere for a foundation.

5.2.c Individual rights as the foundation of justice in war

In keeping with the trend towards human-centricity, this thesis argues that the duty to surrender must turn on the protection of individual rights. Fabre's explicit statements on the duty to surrender provide insight into what this foundation would be: 'if the costs of terminating the war are such as to impair citizens$_A$' prospects for a flourishing life, and if under the circumstances combatants$_B$ either are liable to be killed as a means for A not to incur those costs or may be killed as the lesser of two evils, then A is not under a duty to surrender to B. Failing those two conditions, however, A must do so'[685]. Fabre emphasises that the duty of a

[682] Cécile Fabre, "War Exit," *Ethics* 125, no. 3 (2015) p.638
[683] Fabre, *Cosmopolitan Peace*. p.21
[684] Ibid. p.26
[685] Ibid. p.43

party to the conflict is not only owed to the enemy; it is also owed to the citizens themselves[686]. It is important to note that when she describes this viewpoint she is assuming that A is fighting a just war though, as has already been noted, this fact does not mean A would never be under a duty to surrender. Indeed, digging further reveals that rights underpin her cosmopolitan approach, which begins with the assertion that 'all human beings wherever they reside have rights to the resources and freedoms which they need to lead a flourishing life…[and national and political borders] are irrelevant to the conferral of those rights'[687]:

> General rights are rights which we have in virtue of (depending on one's account of rights) being human, or being a person. Special rights, by contrast, are standardly bestowed on their holders either as a result of some past event or deed, or through transactions such as contracts, agreement, and promises[688]

Note that there are three "arms" to Fabre's articulation of a duty to surrender, above: (1) *post-bellum* rights, (2) liability to harm, and (3) "lesser evil" justifications. Fabre is clear that a state is under a duty to surrender when the material concession proposed does not impair their citizens' prospects for a flourishing life (1) or when the enemy combatants are either not liable to harm (2) or continuing the war cannot be justified on "lesser evil" grounds (3). McMahan's views are very similar. Liability to harm may also be overridden (3). A significant part of his contribution to this chapter is his discussion of liability to harm (2) and how this shapes his duty to surrender. McMahan's treatment of (1) is less direct than Fabre's, but it is there. The language of rights are used throughout his theory and if the ending of war is based on liability to harm, then it must necessarily be based on rights. The liability to harm, for McMahan, turns not only on *jus ad bellum* status. The pilots of the Enola Gay are a legitimate target for Japanese pilots because their *in bello* actions make them liable to harm[689]. Though this is strictly *in bello*, their actions make them liable to harm because of the damage that they *will* cause. In fact, appeals to the principle of proportionality, another significant part of McMahanian just war theory, is based on expected future outcomes. It stands to reason, therefore, that he would expect the justice of a decision to continue warring or surrender to turn on the expected outcomes from such a decision. In such a case, it would be *post bellum* rights. Curiously, then, this is something revisionist and orthodox just war theorists would agree on.

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[686] Ibid. p.44
[687] Ibid. p.314
[688] Ibid. p.92
[689] McMahan, *Killing in War*.

But a state put in a position where it must consider whether to surrender or to continue with a war is not choosing between rights and something else, it is choosing between two different kinds of rights, to remake a point made in the previous chapter. What type of rights depends on the material concession that is offered as part of a *terminative concession*. It might be a part of territory, in which case they will be trading the right to life for property or territorial rights (or indeed, any number of other rights that go with it). If they are making some sort of trade-off of sovereignty, such as agreeing to the installation of officials that was done in the Byzantine-Arab wars, it would be trading the right to life (at least) for political rights. These are crude depictions of the exchange. Certainly, the right to life could very plausibly be on both sides of the scales, and so could political rights. Nonetheless, if the question of justice for surrender turns on the protection of post bellum rights, this begs the question: how do we adjudicate between rights (if we have to)? This suggests that rights are not the most basic foundation of a duty to surrender – the judging principle is.

5.2.d Do some rights have primacy over others?

Fabre draws a distinction between those rights that are important for a human to live a life worthy of a human being and those without which one can still live such a life, just not a flourishing one[690]. While Walzer in particular purports to be seeking justice from the premise of the protection of rights of individuals, this is much more the case with Fabre's "cosmopolitan sufficientism", which begins with the statement that individuals are the primary loci of moral concern[691]. Her theory prioritises the following: 'life, body, and health; bodily integrity; basic health and average longevity; emotional and intellectual flourishing…; control over material resources as well control over one's social and political environment'[692]; the political right to have a formal say over the way political, economic and social institutions are arranged[693].

For Christopher Finlay, it is primarily 'Life and Limb' rights whose violation provides justification for *violent* resistance[694]. This set of rights that includes loss of life, maiming, kidnapping and political oppression so extensive that it amounts to *de facto* enslavement[695].

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[690] Fabre, *Cosmopolitan Peace*. p.4
[691] Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, Incorporated, 2012).
[692] Ibid. p.19
[693] Fabre, *Cosmopolitan Peace*. p.3
[694] Christopher J. Finlay, *Terrorism and the right to resist: a theory of just Revolutionary War*, Terrorism & the Right to Resist, (Cambridge: Cambridge University Press, 2015).
[695] Ibid.

However, he specifically cautions against the conclusion that violent rebellion is justified only on a particular conception of justice and not others: 'it…seems unduly partisan to reject…the possibility that…a democratically mandated *socialist* revolution could be justified or a national one'[696]. Some, such as David Rodin and Richard Norman, consider that there are other, lesser, rights but that their infringement does not permit armed resistance[697]. However, there may be other rights whose violation justifies armed resistance, including less extensive oppression, but require a more detailed calculation of probable costs and gains of rights. Sometimes, Life and Limb rights might be stacked against political rights. The proposed solution, to feature in the coming sections, is to appeal to consent and republican theories of liberty, namely that there must always be at least one way to express dissent to a position.

As already noted in several places, consent plays an important role in revisionist just war theory thinking, both in the sense that individuals can legitimately change their duties in response to individuals consenting to their change of rights, and in the sense that the duties of the state reflect directly what the individuals they are responsible for have consented to. Before this is dealt with fully however, as it will occupy a central point of a duty to surrender, the duty of an individual surrender will be analysed in depth.

5.3 Individual surrender

This thesis now seeks to argue that what is needed is a theory of justice in surrender which is more human-centric rather than state-centric. It will do this by accepting the same starting point that has been outlined above and then considering the individual duty to surrender. It would also describe some examples which, it argues, demonstrate that the individual duty to surrender is not derived from the state and that it cannot be. There is already some evidence for this within orthodox just war thinking, but there is reason to think that revisionist just war theory is better able to reflect some features of modern conflict: human rights, non-international armed conflicts and the difficulty in distinguishing combatants from non-combatants. Whilst the remainder of the chapter seeks to engage primarily with revisionist just war theory, it is no longer merely interpreting; it is an active discussant where before it was passive.

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[696] Ibid. p.25. Emphasis in original.
[697] See David Rodin, "War and Self-Defense," *Ethics & International Affairs* 18, no. 1 (2004). And Richard Norman, *Ethics, killing, and war*, Ethics, Killing & War, (Cambridge: Cambridge University Press, 1995). Taken from Finlay, *Terrorism and the right to resist: a theory of just Revolutionary War*.

Recall that this thesis firmly situated the demand for asking the question of a duty to surrender in the current context. This context is one of human rights, which protect individuals against the actions of *their own* government. In this context, although on the face of it the chief concern might be to protect the people of one state from the carnage of war by another, it is also concerned with protecting the individuals of one nation against the warmongering of their state. To be sure, there are plenty of cases where the state or figures of authority have shown sensitivity to the suffering of their subordinates. The mayor of Liège, one case that will be examined later, surrendered the town in order to avoid further destruction[698]. A more extreme example is that of Edward King, a major general of the US army who defied Douglas McArthur's orders and surrendered Bataan Peninsula in 1942 to the invading Japanese army. He expected to be court martialled for disobeying the order, but was not. But it is the position of this thesis that, given the stakes, such decisions should not be dependent on leaders of good character and sensitivity.

This section will approach the relationship between state surrender and individual surrender in much the same way as it approached the relationship between *jus ad bellum* and *jus ex bello*. It will separate the two, and thereby demonstrate that the justice of one does not turn on the justice of the other, and then demonstrate that it is the one and not the other that is more fundamental.

5.3.a The right to disobey the state

The state's duty to surrender and the individual's duty to surrender can be separated by fixing one and varying the other. This produces two combinations. In the first, the state wants to continue a war and we then consider whether the individual is permitted to surrender. Note this is a right to disobey, rather than a duty at this point. Analogously, the revisionist duty to surrender is fleshed out in the first instance as a right rather than a duty. But principles on which the justice of it turns are brought into the fore that permit the forming of surrender as a duty. In the second, the state surrenders, and I consider whether the individual is then required to surrender. Analogously, the first concerns resistance to invasion and the second concerns resistance to occupation.

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[698] Jay Lockenour, *Dragonslayer: The Legend of Erich Ludendorff in the Weimar Republic and Third Reich* (Cornell University Press, 2021).

However, as will be shown, the question of the justice of these cases turns on the evergreen quality of the right to resist in certain circumstances, and the duty of the state to respect this right. The argument is that individuals, as the original possessors of rights who must retain avenues to guarantee them, must always be allowed to express dissent in one form. This in turn ensures that it must be consent to which a duty to surrender appeals most frequently and most urgently. It may seem paradoxical to suggest that appealing to consent as the arbiter of justice in such cases may sometimes require surrender, but it would also not be just to deny individuals the right to choose to continue the war while at the same time asking them to bear the cost of it. The legal dimension of this paradox will be discussed in the following chapter. For now, this chapter will begin with individual duties in the face of state continuation, namely the first of two combinations.

5.3.a (i) When the state orders continuation

There are several cases that might help to illuminate the first type, such as the Russian invasion of Ukraine. Arguments are being made that Ukraine ought to give up part of its territory for the sake of peace, and the response that doing so would be appeasement. Palestine is a notable example in light of its influence on international law and the Finnish resistance to the invasion of the Soviet Union is one taken up by Michael Walzer to discuss the "Munich Principle"[699], but there are many others. In the Battle of Liège, WWI, Belgium refused a German ultimatum, insisting on its neutrality, putting up a valiant defence and inflicting heavy casualties against the larger German army, falling on 7th August 1914. A German verb, *lüttichieren*, "to liègify," was coined to refer to the taking of fortresses with overwhelming force[700]. One might also question whether the individual Iraqi soldier is required to surrender in the face of the U.S. military, given its enormous military spending and military culture. On the other hand, the question of whether the individual soldier of the US or West more broadly is required to surrender upon learning that the justifications of the invasion were false, or that the war was illegal, is a natural one to ask.

There are presumably several reasons why the soldier would be required to stand their ground or continue the conflict. (1) The state has ordered it. Arguments of this start might be appeals

[699] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*.
[700] Sophie De Schaepdrijver, "Belgium," in *A companion to World War I*, ed. John Horne (Chichester, West Sussex, UK: Wiley-Blackwell, 2010).

to social cohesion – that it is better to obey a bad order than to have disobedience – or might be an appeal to the greater amount of information the state has (2) The state, in ordering the continuation, has appealed to a valid justification. In the second case, the fact that the state ordered them to defend Liège is not the part that did the moral work. In actuality, there is a principle "behind" the state's order that: (2a) Surrender here would reduce the rights of other individuals, either one's compatriots or one's non-compatriots. In such a case, it might still be right for the individual to obey the state, given the greater amount of information the state has access to. Alternatively, (2b) is that the harm done by assisting in the continuation of the war is not morally important.

5.3.a (ii) The duty to obey the state simpliciter in revisionist just war theory

(1) Speaks directly to the right to disobey the state. Revisionists firmly reject the idea that the individual is under a duty to obey the state simply in virtue of it being the state. In keeping with the primacy of rights protection in their theories, obedience to the state is much more conditional on whether the state protects rights. In many cases, they go further; there is not only a right to disobey the state, but a duty to actively resist it in cases where it is negligent in the face of human rights violations, or the cause of them. Analogously, the duty to surrender would turn on rights, not state orders.

Christopher Finlay argues that if human rights are to mean anything, there must always be actions available to an oppressed group to protect themselves against human rights violations[701]. This right arises from the failure of the state to discharge its principal duty, to be a bulwark against oppression[702]. This is substantially coherent with both the orthodox just war theory conception of the state and the doctrine of responsibility to protect[703]. It is not a new idea that the state has a responsibility to guarantee the rights of its citizenry. It is in Locke, Rousseau and Milton, and now the Responsibility to Protect[704]. And, crucially, it is also what

[701] Finlay, *Terrorism and the right to resist: a theory of just Revolutionary War*.
[702] Ibid.
[703] See, for example, International Commission on Intervention and State Sovereignty, *The Responsibility To Protect: Report of the International Commission on Intervention and State Sovereignty* (2001).
[704] See John Locke, *Two treatises of government* (London: London printed MDCLXXXVIIII reprinted the seventh time by J. Whiston, W. Strahan, J. and F. Rivington, L. Davis, W. Owen and 18 others in London, 1772). Rousseau, *Of the Social Contract and Other Political Writings*. John Milton, *The tenure of kings and magistrates*, Early English books online, (London: Matthew Simmons, 1649).
International Commission on Intervention and State Sovereignty, *The Responsibility To Protect: Report of the International Commission on Intervention and State Sovereignty*.

the cosmopolitan and revisionist traditions seem to stress about the state. Finlay's right to resist oppression is in this sense a right that is owned by individuals in virtue of them having other human rights that they should always be able to protect, and derogated from the state in the event that the state cannot discharge the duty or, further, if the state itself is the cause of the human rights violations.

This is one of the situations that speak to the perhaps greater explanatory power of revisionist just war theory. Although Vattel does adopt a social contractual approach and considers that the protection of the nation is the responsibility of the state, he expresses discomfort about the right of the individual to position itself against the state. But Vattel's conception of the state is more unitary and homogenous, with less acceptance of a population unwilling to obey their head of state. More contemporary orthodox just war theory does accept the right to dissent, or resist, as does international law, but revisionist just war theory is more comfortable with civil unrest that some parts of orthodox just war theory.

Cecile Fabre explicitly considers the justice of surrender when not sanctioned by the state. She states that an army's 'act of surrender is not rendered unjust simply because it lacks *de jure* authority'[705]. She argues that the individual has a duty to obey the state 'if and only if its institutions and officials, through the laws which they vote and enforce and the executive decisions which they make on the basis of those laws, respect and promote the fundamental rights of both the state's members and outsiders'[706]. Even if a state does not meet this criterion, it does not follow that the duty to obey is ever entirely removed as it may still be beneficial for them to act in accordance with a specific good policy: 'the claim that in a given case state officials have forfeited their right to govern is entirely compatible with the two-pronged view that the state's members are under a duty to one another to obey those laws which enable them better to fulfil their moral duties'[707]. Likewise, Finlay considers injustice to be a required feature of oppressive social relationships, noting that the presence of domination, harm and discrimination to be insufficient without it[708]. So certainly there is no need to continue fighting for the state just because the state orders it.

Fabre's position is that a person is under a positive duty to support just institutions and policies which benefit distant strangers, and is under a negative duty to not support unjust ones.

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[705] Fabre, *Cosmopolitan Peace*. p.30
[706] Fabre, *Cosmopolitan War*. p.46
[707] Ibid. p.48
[708] Finlay, *Terrorism and the right to resist: a theory of just Revolutionary War*. p.22

However, they are not under a positive duty to engage in practices seeking to remedy unjust effects, such as wealth redistribution by giving money to charity, nor are they under a negative duty to not participate in informal structures that produce unjust effects[709].

The revisionist position that the individual only has a duty to obey the state under certain conditions would seem to resonate. The state, by ordering a particular action, cannot transform an unjust method into a just one. The action must be just independently of the state ordering it. We presumably would not argue that a soldier ordered to commit a war crime has to continue. We would also, presumably, not argue that the injustice of Russian expansionism in the present day or of German expansionism before World War I can be overridden by the endorsement of the Russian or German states *simpliciter*.

Nor can it be said that while the individual bears moral responsibility in theory, the extent of the persuasive power of the state means that this responsibility is not reflected in practice. It may be accurate that '[m]any recruits have felt that they were not made sufficiently aware of their obligations and the nature of their career before enlisting. The independent advice service *At Ease* reports that many of its callers are not aware of their terms of service or their right of conscientious objection, for example'[710]. Further, the 'terms are extremely confusing, unnecessarily complicated and highly restrictive. Recruitment literature normally omits the terms, refers to them ambiguously or inaccurately, or misleads recruits in the view that it is easy to leave the forces once enlisted'[711].

The speed of the victory of the U.S. and U.K. over Iraqi forces is at least in part attributed to their ability to 'deploy...motivated fighting forces', in part thanks to the practice of embedding reporters[712]. McMahan's own position is that the individual is also duty-bound to educate themselves in such matters of state. As soon as the war started, the devastation of Shock and Awe, causing an estimated 6,000 civilian casualties two days into the invasion, ought to have removed any doubt[713]. McMahan argues that soldiers have a responsibility to gather moral and

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[709] Fabre, *Cosmopolitan War*.
[710] David Gee, *Informed Choice? Armed forces recruitment practice in the United Kingdom* (London, 2007). p.69
[711] Ibid. p.139
[712] Stephen T. Hosmer, Why the Iraqi Resistance to the Coalition Invasion was so Weak, (RAND Corporation, 2007). See also: Justin Lewis, "Television, Public Opinion and the War in Iraq: The Case of Britain," *International Journal of Public Opinion Research* 16, no. 3 (2004)
[713] John Hagan, Joshua Kaiser, and Anna Hanson, *Iraq and the Crimes of Aggressive War: The Legal Cynicism of Criminal Militarism*, Cambridge Studies in Law and Society, (Cambridge: Cambridge University Press, 2015).

political knowledge, and emphasises that their job is one of moral, and not just physical peril: 'we must cease to regard them as mere instruments or automata and recognize that they are morally autonomous and therefore morally responsible agents'[714].

5.3.a (iii) The duty to obey the state appealing to a principle

It is much easier to say that (2a) – namely that the state has appealed to a right principle – would be the case, but this requires an analysis of the potential rights impact. If a part of the territory was held by a certain number of soldiers, half of these surrendering would mean the remaining half would be in greater danger than they were before the surrender. It stands to reason that a single deserter would increase the harm faced by those remaining as it would likely reduce their fighting capability. To be sure, this might not universally be the case. Perhaps an individual was particularly inept or clumsy, and so their desertion or surrender might actually be beneficial to those remaining. Nonetheless, we will put this case aside and work on generalities.

If we imagine a face-off on either side of a bridge, involving forty soldiers of Country A and forty soldiers of Country B, it seems plausible that Country B's soldiers will not want to risk rushing the bridge when Country A matches them for numbers but would readily do so if they knew twenty soldiers (the *first half)* of Country A surrendered. Suppose that behind Country A's soldiers is a village. The twenty soldiers of Country A that surrender risk greater harm being done to the remaining soldiers of Country A (the *second half*) as well as the villagers behind.

It might then be possible that the second half might reason that their continuation would be futile, and also surrender and thereby risk the villagers' rights. The first matter concerns the degree of responsibility the first half have for the second half of the soldiers of Country A. If we assume that the second half would surrender, but would have not surrendered if the first half had remained with them, they would likely be operating under a principle of remaining if they can feasibly resist, and not remaining if they cannot. In terms of rights, they will be attributing value to Life and Limb rights and the probability that they will be compromised. In such a case, surrendering immediately would guarantee (let's suppose), that one stays alive, where remaining does not guarantee it. They might calculate that the chance of Country B's

[714] McMahan, *Killing in War*. p.95

soldiers attacking are low, and the chance of the soldiers of Country A being harmed in the attack are also low, even if they do attack, but they are not zero. In considering the balance in such a way, and restricting it to only the probability of physical harm, there must be another duty that is enough to not surrender and to outweigh the probability, however small, of harm of the "bodily integrity" sort. For Fabre, this is likely to be control over one's social and political environment.

The importance of this social and political environment can be considered in light of the republican idea of liberty as non-domination, which focusses on whether interference is *able* to occur rather than whether it actually does. The fact that historically states have sought to exercise control by various means, rather than simple interferences, suggests this is the right way of thinking about it. In the Byzantine-Arab wars, the replacement of officials in conquered territory with officials of the conqueror would only be a restriction of freedom for non-republicans if they changed laws. If they remained in place, always able to change the laws at their discretion, but not actually doing so, the republican would still consider the conquered state less free. Republican political thought has strong links with anti-monarchism, though more recent proponents, notably Phillip Pettit, have applied it more generally[715]. If republican liberty is accepted as a guide here, then the second half of the soldiers of Country A would be stacking the probability of their Life and Limb rights being compromised against the loss of actual political rights. Country A may suffer immediate harms by surrendering, and it may, by prostrating itself, place itself in a compromised position and would therefore be less able to resist further harms[716]. For Finlay, such republican justifications can help squeeze political rights into the category of rights which justify the use of force.

In any case, if we say that the first half have a duty towards the second half to remain fighting (or at least stationed at the bridge) then we would be saying that the second half have the right to demand that the first half face a risk of harm because it reduces their own risk of harm. The assumption is also that the principles doing the work on the question of whether to surrender or continue are different. The second half are more willing to accept a risk of harm where the first half were not.

We have been assuming up until this case that surrender means that the soldiers are able to remain alive (or at least the risk to their Life and Limb rights is greatly reduced). If this is the

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[715] Pettit, *Republicanism: a theory of freedom and government*.
[716] Rodin, "The War Trap: Dilemmas of *jus terminatio*."

case, then the second half surrendering would also remain alive. Therefore, we would be valuing the choices of the second half to value political liberty over Life and Limb rights over the preferences of the first half. It also cannot be purely quantitative, because if there were 100 soldiers of Country A and 20 surrendered, we would be in the same situation.

In this way, a full-scale rout would be sanctioned by taking it piecemeal. If each combatant on Country A's side were denoted as A_2, A_3, and so on, imagine A_2 was content to stand their ground next to the bridge provided that they were fighting a numerically matched force but no worse, and A_3 would remain provided they were only numerically outmatched by one person, but no more, and A_4 would remain provided A were only numerically outmatched by two, and so on. If A_1 was only happy to remain provided that their odds of avoiding harm were very great, and surrenders accordingly, then this would cause a cascade to all forty soldiers.

Prima facie, this seems like a bad thing. A_{40}, who had been prepared to face overwhelming odds, might resent $A_{1\text{-}39}$. But although the decision taken would not match a vote of the forty soldiers (which would presumably be 39-1), forty soldiers on A's side have not been harmed or killed, not continued to war, and not risked themselves, and all have obeyed their consciences. The calculations about harms to rights only work if the 40 soldiers of A are not harmed as POWs. If it is wrong, then, the harm can be attributed to two factors.

The first is that the harm is done to the village behind. In such a case, the question then is put to the inhabitants of the village. If they have seen that Country B's soldiers have previously taken several villages and in this case have not harmed the inhabitants, they might reasonably decide that the cost is worth paying for the guaranteed survival. Perhaps B will take 10% of the food stores each period to feed their occupying army. In such a case, this would be weighed against the odds of survival. If B had previously engaged in much more brutal human rights abuses, A could reason that surrendering would be unjust. Perhaps being placed under the control of an alien force is too much. In such a case there would be no duty to surrender provided these costs are generally paid by those consenting to it. The second is that by not reflecting the vote outcome, the decision taken on a dissent level does not reflect the overall wishes of those involved. Therefore, the decision-making made should be de-prioritised relative to such a vote.

Deterrence deserves mention here. Some have argued that Ukraine ought to give up land in order to satisfy Russian demands for the purpose of peace. If we were to treat justice in surrender as entirely a matter of quantifying the total rights protection and weighing one against

the other and choosing whichever was the lesser, the justification on the basis of continuance presents a classic challenge. A state resisting an invasion would have to choose between two options, continuing to fight or to surrender, which stacks the value of an immediate outcome against a less immediate outcome. Basing it exclusively on a quantification of rights protection would mean that the state would have to consider whether the rights compromised in the near future by surrendering – namely, the potential loss of political rights, economic rights, territorial rights and so on, by the terms of an occupation – would balance against the rights compromised by continuing to fight – the loss of life and the other harms that war brings. But in taking the case of deterrence, it would also have to balance the loss of rights in the future farther away. In such a case, therefore, the soldiers of Country A might wish to inflict a token cost on B to ensure that they would not be seen as an easy target in the future. But again, the justice of this turns on the consent of A. The question becomes whether it is just for the inhabitants of the village to bear the cost of resistance for the sake of deterrence. It still turns on the predicted rights and consent but it is clear that a duty of surrender must provide an avenue to inflict a deterrent cost.

We have already dismissed the idea that the soldiers would have a duty to obey the state *simpliciter*, but, to just briefly return to it, the justice of the mayor of the village ordering the soldiers to remain would depend on the principle as well. In light of the dangers of a full-scale rout, one might think that it is the job of the leaders to maintain discipline, to observe the bigger picture and prevent such a cascade.

But the mayor of the village would only be able to justly demand of the soldiers that they do not surrender if they were indeed appealing to the right principle. If they were persuading the army to remain because a shipment of weapons would arrive shortly that would help them win, but they could not inform the soldiers directly of this for fear of spies, then this could be a legitimate use. In contrast, if they were ordering the soldiers to remain because they wanted their house to be protected, this would not. The difference is that the former justification appeals to the protection of the harms of those they represent, and the latter does not.

The mention of a vote also points to a superior method of gauging consent than what shall be called *acquiescence thresholds*. Though the 40 soldiers of A might surrender wrongly given that the collective vote would be for all 40 to remain, they might not if it were put to a vote before, and each agreed to accept the results. This suggests that such explicit consent ought to take priority over acquiescence. A decision based on *thresholds* might lead to a decision which

does not fully reflect the collective consent, and should take the position of a second preference. But it also suggests that the state does still have an important role to play.

In all likelihood, this thought experiment is too sanitised with the harms too cleanly distributed. The harms are not restricted to deaths, there will be much trauma and other harms brought about by the continuation of the war. As such, it is highly likely that narrow and wide proportionality would be breached all over the place. As McMahan has it: 'Except in cases in which the war is clearly defensive and clearly not responsive to a justified instance of humanitarian intervention, soldiers can know that on a purely statistical basis their war is more likely to be unjust than just'[717]. But this is all the more reason that the framework should therefore favour a just surrender, as a method of war termination, wherever possible.

Up until this point, we have been considering whether A's soldiers have a right to surrender, whether they must remain fighting rather than surrender. But this thesis is concerned with a *duty* to surrender. Much of the groundwork, however, has already been laid. We have also generally concerned ourselves with the more difficult theoretical case of A's surrender. If B is the invading force on A's territory, it is much easier to see that B is under a duty to surrender. Unless A has held a referendum in a state of complete peace and security, and in receipt of no threats, nor with the perception that a war is at all likely, and decided that it would prefer to be placed under B's statehood, A has absolutely not consented to the invasion. This is what is meant by *true consent*. In light of this, B is under a duty to surrender in virtue of the clear impact of self-determination/consent and harm to rights caused by it.

If B's soldiers had a valid claim on A of their surrender on the grounds that their non-surrender would mean they were put in harm's way, A would also have this claim-right in relation to B. Each individual soldier of B could also just surrender themselves to remove this danger. Moreover, if we assume that B is the aggressor, then B represents the greater threat of harms to all those involved. So far, we have been basing the decision on a mixture of consent to harm, liability to harm via moral culpability and the likely distribution of harms. Much of the intricacies of the question of whether A's soldiers ought to surrender or not are unnecessary if B's soldiers surrender. In the case of Liège, if German soldiers surrendered, Belgium would obviously not have to fight. German civilians and Belgian civilians alike would not be put in

[717] McMahan, *Killing in War*. p.150

harm's way. Likewise, if US and UK soldiers surrendered, Iraqi soldiers would not have to fight. This is a point that needs to be made emphatically clear.

Appealing to (2b) – one does not have to consider the harm done by continuing the war because it is not morally important – would be arguing that the Germans would not have to surrender because they need not concern themselves with the *post bellum* rights of Belgians. The chief response to this, from the revisionist point of view, is surely that the individual's responsibility to minimise harm is not only owed to compatriots, but to non-compatriots as well. When determining whether the surrender of a single Belgian soldier, say, was just, it is not only the harm done to Belgians that must be added into the calculations, but the harm to the Germans as well. Likewise, surrendering Germans must take into account the harm potentially done to Belgians. Indeed, what distinguishes cosmopolitanism from its orthodox counterpart is that it, while emphasising the role of institutions in justice, also emphasises the moral arbitrariness of borders:

> (1) all individuals, irrespective of political borders, have the aforementioned civil, political, and welfare rights, that (2) all individuals are under the relevant correlative duties to rights-bearers, irrespective of political borders, and (3) that there is no principled reason …for duty-bearers to confer priority on compatriots or fellow residents when faced with conflicts between rights[718]

It is the moral arbitrariness of borders that allows Fabre's cosmopolitanism to move from the universality of rights to the universality of duties. In other words, the duty to protect the rights in the first position is on everyone equally regardless of political borders. This will certainly put B's soldiers in a difficult position, between prosecuting an injustice and increasing the risks of harm to their friends. But these friends are also continuing to prosecute an injustice. In the McMahanian sense, their non-exercising of their right to surrender means that they are morally culpable. The existence of an alternative also means that they are liable to harm from A's soldiers.

5.3.a (iv) Acquiescence, pragmatism and the perfect being the enemy of the good

What has emerged from this analysis is that decisions are likely to be based on whether certain thresholds are met, particularly on what costs each individual would acquiesce to, begrudgingly

[718] Fabre, *Cosmopolitan War*. p.31

and under duress. The remaining soldiers of Country A may be resolved to continue fighting provided that they have a reasonable chance that they will succeed, or survive. Or it might be that they aim to continue fighting provided that those in the village behind them stand a reasonable chance of surviving, or escaping. The farmer might privately think that they will acquiesce to the demands provided that only 10% of the produce is taken away, perhaps on the expectation that this situation is temporary. These thresholds may not be entirely well defined or exact, but at the very least it seems unlikely that people will insist on a right *though the heavens fall* when insisting would perpetuate war. It is posited here that while the farmer would not be expressing true consent, and therefore the result could not be just, appealing to acquiescence might limit injustice even when it involves losing ground to an unjustly warring party.

While there should be mechanisms that strive to mirror full justice as much as possible (and there will be outlined below some ways by which the state may do this), there may also be challenges in mirroring this exactly. Revisionists have dealt with the impractical demands of deep morality in relation to a number of aspects.

The revisionism of McMahan is, after all, moral revisionism rather than legal revisionism. At the close of his book he emphasises 'the foregoing discussion of civilian liability has been concerned solely with *moral* immunity and *moral* liability…The law of war cannot aspire to congruence with the morality of war…and pragmatic considerations argue decisively for an absolute, exceptionless legal prohibition of intentional military attacks against civilians'[719]. (Of course, the position of this thesis is that the law of war and the morality of war can be congruent, at least on the issue of a duty to surrender).

Adil Haque also acknowledges the difficulty of making such decisions in times of war. He advocates what he calls the 'service approach', namely that the law of war does not seek to represent the 'deep morality' of McMahan, but rather aims to outline the principles that draw a balance between minimising injustice as far as possible and accessibility in wartime, a time which lends itself extremely poorly to careful reflection.

This is similar to what Finlay suggests in justifying the "second best" principle of non-combatant immunity over one that maps better to the demands of justice if it can be realised

[719] McMahan, *Killing in War*. p.234. Emphasis in original. I would argue that the pragmatism of the law here is of moral value for the reasons given by Finlay.

ideally but is less practicable[720]. The former overall reduces injustice to the greatest degree possible[721]. This also bears some resemblance to Fabre's justification of 'all-things-justified' peace, which has already been described.

In summary, therefore, where consent is the ideal that must be strived towards wherever possible, where problems occur, acquiescence may be a more useful yardstick. This reflects the underlying premise of just war theory and war law, the compromise between the reality of war and humanitarian aims. This is problematic, and there are important mechanisms that will be outlined below that will attempt to ensure that justice of surrender tracks as closely to true consent as possible, which will be described in the section on procedures of consent.

5.3.a (v) On unjust conquests

It is important to note that the reaching of a threshold on a collective level, thereby legitimising a state decision as to conflict continuation or surrender does not mean that the result is legitimate in a wider sense. The validity of an *acquiescence threshold* in making such decisions is based on an appeal to the validity of consent but it is obviously different to *true consent* ideal.

Cian O'Driscoll notes that Hugo Grotius was forced to concede that unjust conquests must be accepted as a legitimate outcome for a war because it ensured wars were thereby made easier to end and harder to restart[722]. However, this thesis argues the opposite. In Rodin's example of the dangler and dangled, the consent of the dangled to continue to be dangled does not mean that the original defenestration was acceptable. Republican theory can aid interpretation. If the inclusion of a duty to surrender by basing it on the consent of individuals is an attempt to avoid them being dominated by an invading state or by their own state which seeks to drag them into a war, then the idea then it runs into one criticism of positive liberty, namely what Isaiah Berlin calls the "retreat to the inner citadel". Accepting freedom as not being hindered from that which you have a will to do would lead to the possibility that one can be free even

[720] Finlay, *Terrorism and the right to resist: a theory of just Revolutionary War*.
[721] Ibid. p.118
[722] O'Driscoll, *Victory: The Triumph and Tragedy of Just War*.

when imprisoned if one removes the desire to be outside prison[723]. It does not make sense, therefore, to suggest that a right is fully waived by "retreating to the inner citadel".

So if the village behind the bridge requests that the leaders of the village offer terms to the invading soldiers which includes giving up a percentage of profits or land or resources to them, this would only create a just situation if they had truly waived the right. But, as we have seen, they have accepted the loss of land or resources rather than consented to it. O'Driscoll considers the 'proclamation of the right of all nations to self-determination [to have] created a new reality that was not conducive to the right of conquest'[724]. Appealing to self-determination, therefore, necessitates that there is a method by which the injustice inherent in unjust conquests can be remedied.

It is the goal of both international humanitarian law and just war theory that injustice is minimised as far as practically possible. It is the contention of this thesis that the framework for a duty to surrender must accord with this aim, without falsely sanctioning and unjust action as just. Therefore, I am not arguing that unjust conquests are just or that a surrender agreement done on the basis of self-determination is a fully consensual act. Importantly, the proposal here will still provide avenues to condemn unjust conquests. The goal is more modest, and that is to minimise injustice as far as possible. Far too many innocent people will be harmed. Narrow and wide proportionality is frequently breached. At the very least, these decisions ought to be taken by those who are primarily affected.

To conclude this section, an individual is only under a duty to obey the state where the state appeals to the right principles. This principle has to be representative. It has to be based on consent and self-determination. In summary, the individual's duty to surrender turns on the expected harms to Life and Limb (and some political) rights unless these rights are transformed by waiving or being overridden. An individual is under a duty to surrender in virtue of the harms to rights that will be caused by their continuation, unless those harmed have truly consented to those rights being infringed, or are participating in an injustice.

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[723] Pettit, *Republicanism: a theory of freedom and government*. See also Isaiah Berlin, "Two Concepts of Liberty," in *Liberty* (Oxford: Oxford University Press, 2002).
[724] O'Driscoll, *Victory: The Triumph and Tragedy of Just War*. p.92

5.3.a (vi) When the state surrenders

The second case that demonstrates the importance of having individuals as the moral locus is that of post-surrender resistance. Consider the case, for example, of the French national resistance, which persisted after the orders from the French government. One is presented with a dilemma: if the soldier is not compelled to surrender then what force does state surrender have? On the one hand, if the nation does not surrender after the state-entity surrenders, then the force of state surrender is substantially reduced. On the other hand, if we are to go with Francis Lieber, who argues that there was no right to resistance if the state surrenders, then we are requiring an oppressed group to bear whatever costs the occupation force throws at them, regardless of whether the terms of the occupation (if there are any) change.

The Franco-German Armistice of 25 June 1940 was signed with the expectation that a fuller peace treaty would follow. It did not guarantee the rights of French people. It left the French government in place, at least nominally, though, as we have seen, this is still one of the ways that conquerors choose to exert control. Asserting that French individuals have to respect the decision of the French state to surrender is to assert three things: that the decision of the French state is representative, that the resultant occupation is not generative, and that military superiority over France produces a right to France. The latter is particularly odious and something this thesis has consistently argued against. The former will be dealt with in relation to state legitimacy.

The middling must also not be the case because the fact of war being generative is one of the central reasons why revisionists consider the justice of surrender does not turn entirely on *jus ad bellum*. The French occupation was also generative. During the occupation, Jewish property was confiscated. And when the MBF started to assassinate German soldiers in 1941, Hitler ordered at least 50 hostages to be executed for every lethal attack, carried out by the SS after the MBF expressed reluctance[725].

Hitler's campaign of "Final Solution" to the "Jewish Question" started with defamation and discrimination, including the boycott of Jewish businesses, the confiscation of property and then escalated. This began in Germany but after the signing of the armistice agreement of 1940, it took place in occupied France as well. French leaders made use of anti-Semitic measures to satisfy German authorities and local anti-Semites and to assist in keeping control

[725] Thomas J. Laub, *After the Fall: German Policy in Occupied France, 1940-1944* (Oxford: Oxford University Press, 2009).

over French assets. Hitler also introduced measures of labour deportation to prop up the German economy.

One presumably would not argue the French were required to put up with this on the grounds that the French state had accepted the armistice, which may have been agreed out of lack of military capability. Indeed, Finlay's account of the right to resist includes just this sort of case – the use of reprisals[726]. The difficulty is that resistance might be unjustified on the ground that it would incur (though of course, this is not to say the resistance should be blamed) reprisals. One possibility is to bring the chances of success as a criterion into the discussion. Another, similar one, is to consider the representativeness of the state-like entity.

Regardless of which method to choose, the point is that the individuals or non-state actor representing the individuals is not required to surrender because the state has surrendered. The same is true for the Six-Day war. The 1967 Six-Day war ended in a UN-brokered ceasefire and Jordanian forces withdrew from the West Bank, which does not neatly fit into the category of state surrender when it comes to Palestinian resistance after the Israeli occupation. Nonetheless, it demonstrates the generative nature of the *post bellum* situation.

Israel has made use of various mechanisms to engage in land-grabbing after the end of the Six-Day War. Between 1968 and 1979, Israel seized 47,000 dunam (a dunam being 900 square metres) of private land on the West Bank largely for the establishment of further settlements[727]. After the *Elon Moreh* case, in which the High Court nullified a land acquisition order on the basis of military purposes, on the grounds that the settlement established could not reasonably be considered temporary or instrumental to security, Israel made use of other justifications[728]. This included declaring land as state land making use of Ottoman land law, expropriating it for public needs by abolishing the procedural requirements of Jordanian law that would facilitate appeals, and buying land on the free market by restricting land transactions on the West Bank without authorisation from the commander in the region[729].

To reiterate, a surrender as an act of popular will does not by itself legitimise the consequential occupation. In other words, the surrender of Belgium in World War I, of France in World War II, of Iraq in the 2003 invasion does not mean that their occupiers are entitled to the land. The

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[726] Finlay, *Terrorism and the right to resist: a theory of just Revolutionary War*.
[727] Yehezkel Lein, *B'Tselem-Land Grab: Israel's Settlement Policy in the West Bank, Comprehensive Report, May 2002* (Israeli Information Center for Human Rights in the Occupied Territories, 2003).
[728] *Dweikat et al. v. State*, (High Court of Justice of Israel 1979), No. HCJ 390/79.
[729] Lein, *B'Tselem-Land Grab: Israel's Settlement Policy in the West Bank, Comprehensive Report, May 2002*.

legal concept of duress has been discussed in Chapter Three and it has been demonstrated that, in such a case, the fact of a treaty being concluded under conditions of duress does not invalidate the treaty by itself. Nonetheless, that France formally surrendered to Hitler's Germany via an armistice does not mean that Germany has a moral claim to three fifths of France. The right of the French to engage in resistance is not removed by the fact of that armistice.

The problem with accepting unjust conquest is that 'it violates the principle that crime should never pay and smuggles in the might is right doctrine by the back-door'[730]. Surrender is particularly vulnerable to smuggling "might is right" by the back door. It would not seem intuitively correct that the imposition of any terms on Iraq is legitimate in virtue of the military strength of the US and UK. Furthermore, a theme running through this piece is that there must always be at least one avenue for dissent open. Both of these points demonstrate the necessity of permitting post-surrender resistance.

5.4 The centrality of consent

The above analysis appeals in several cases to consent as a foundation. The state derives its rights and privileges from the rights of people rather than being the original possessor of such rights and duties. The revisionist theorists – Fabre, McMahan, Finlay and Rodin – that have been discussed so far all discuss the importance of consent as the basis of authority for the state. For the purpose of ensuring coherence, I will now turn to the discussion of consent and self-determination in revisionist just war theory.

Fabre's treatment of self-determination is complicated. On the one hand, Fabre does reference the importance of consent in other areas, such as with the case of Hong Kong. Great Britain had signed a treaty that would grant it a ninety-nine year-long lease of Hong Kong from 1898 at which point it would transfer to China. She notes that the people of Hong Kong were not consulted about Britain's sovereignty over it, nor about the transfer to China. Fabre argues that in spite of orthodox interpretations which emphasise Britain's legal duty to honour the treaty describing the transfer, her own individualist understanding of international relations was not morally binding without consultation of its inhabitants[731]. This is in spite of her not accepting

[730] O'Driscoll, *Victory: The Triumph and Tragedy of Just War*. p.106
[731] Fabre, *Cosmopolitan Peace*. p.102

the legitimacy of first occupancy claims, nor claims that rely on historical relationship with the territory. This is because exercising the right of self-determination to some extent depends on security which is facilitated by the consistency and networks of relationship which long-term use of a territory and resources provides. What matters here for Fabre is that the population is consulted.

On the other hand, in relation to humanitarian intervention, she argues that explicit consent does not need to be gathered to justify intervention, though interveners need to be careful that widespread human rights violations do not in themselves merit intervention nor do they guarantee support for such an intervention[732]. More importantly for the purposes of this thesis, she does not give self-determination a central role in the making of peace agreements. She does indeed acknowledge this, and notes that it will mean 'much to worry about'[733].

Humanitarian intervention and civil war do indeed share some common themes, but they differ in this most crucial regard: 'rebellion is waged by the oppressed subjects themselves, while humanitarian intervention is carried out by foreigners on their behalf'[734]. And operating on behalf of someone who has not explicitly consented to that aid is dangerous. It would be inconsistent with international law, with which the theories presented here aspire to coherence. Similarly, as noted by Bellamy, the liberal cosmopolitan approach is problematic because of the lack of validity to the proposition that all individuals have intrinsic rights and because liberalism is rejected in much of the world[735]. It would therefore not be correct to adopt the liberal rights-centric view without this universal adoption.

The response, which exists both in Mill and Walzer, is that self-determination ought to be emphasised, and therefore revolution cannot be imposed from outside; humanitarian interventions are much more justified if they have the explicit consent of the avowed beneficiaries. Finlay notes that Mikhail Tukhachevksy's "Revolution from Without" also shares this belief[736]. It further observes that there is, however, an imbalance in the military prowess and technology of the regular forces of the state and the new forces of the masses.

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[732] Fabre, *Cosmopolitan War*. pp.166-207
[733] Fabre, *Cosmopolitan Peace*. "Conclusion" p.315
[734] Ned Dobos, "Rebellion, Humanitarian Intervention, and the Prudential Constraints on War," *Journal of Military Ethics* 7, no. 2 (2008) p.102 in Christopher J. Finlay, "Assisting Rebels Abroad: The Ethics of Violence at the Limits of the Defensive Paradigm," *Journal of Applied Philosophy* (2020)
[735] Alex J. Bellamy, *Just Wars: From Cicero to Iraq* (Cambridge: Polity Press, 2006). p.202
[736] Mikhail Tukhachevsky, "Revolution from without," *New Left Review*, 1969. [Translated by Lynette Gill] in Finlay, "Assisting Rebels Abroad: The Ethics of Violence at the Limits of the Defensive Paradigm."

Tukhachevsky argues that intervention is acceptable if it is to counter the *military* superiority only[737]; the state may not shore up deficiencies in rights-guaranteeing with use of military force.

Jeff McMahan also discusses the importance of consent. One of the ways an individual might lose such a right is by waiving it: 'A right is waived when the possessor of the right consents to [it]'[738]. McMahan observes that some consider the liability for harm of the combatant is based on their consenting to waive the right not to be harmed; in some sense, all combatants consent to the risks of war that makes them legitimate targets[739]. However, he further observes that accepting risk is very different from offering consent such that it would amount to a waiving of their right to not be attacked. He gives the example of someone walking through a dangerous neighbourhood at night or a police officer: they might accept or assume some risk of being mugged or attacked, but in no way consent to it[740].

Nonetheless, it implies that McMahan considers the consent of an individual as a morally important way that rights can be waived or transformed into a different set of rights and duties. Alternatively, the right of the victim might be overridden by another overpowering moral consideration. This does not affect the right itself, however, it only justly infringes on it. The rules of proportionality and necessity emerge because the forfeiture of rights is not entire; rights are forfeited *in the circumstances*, perhaps suggestive of a hierarchical approach to self-determination. Therefore, it does not follow that someone forfeiting their right to life means that anyone can kill them at any time[741]. For McMahan, liability to harm and desert of harm reflect a distinction between the instrumentality of the former and non-instrumentality of the latter. The former is instrumental because a person is liable to be harmed only if it serves another purpose whereas if that same person deserves harm there does not need to be this other purpose; it is an end in itself[742]. This liability, for McMahan, 'corresponds to the loss of a right, not to other ways in which an attacker's action might be unconstrained by rights'[743].

The ways in which rights are waived speaks not only to why individuals can be harmed, but also on what grounds the state can compel its citizens to do something it would not ordinarily

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[737] Finlay, "Assisting Rebels Abroad: The Ethics of Violence at the Limits of the Defensive Paradigm."
[738] McMahan, *Killing in War*. p.9
[739] Ibid.
[740] Ibid.
[741] Ibid.
[742] Ibid.
[743] Ibid. p.9

have a right to do, which would include the nationwide surrender (or cessation of hostilities). It also speaks to whether the state may compel its citizens to continue to engage in hostilities if they have not consented to it. Fabre's discussion of the validity of consent in forming contracts goes further than McMahan's. She argues that if the citizenry of one state can signal that they no longer consider themselves bound by a treaty they can withdraw, provided they do so 'in a procedurally fair manner [and which] compensates other parties to the agreement for the burdens attendant on its withdrawal'[744]. There are potentially problems with *pacta sunt servanda* here, but the purpose here is to demonstrate the importance placed on consent.

To conclude this section, the individual duty to surrender turns on consent and rights. Consent can be broken down and ordered into *true consent*, *acquiescence* and *non-dissent*. Justice turns ultimately on true consent, but it is hard to realise. The fact that justice turns on true consent is one of the reasons that the right to resist or dissent is not waived when a state surrenders. Unjust occupations may come about by acts of acquiescence, such as a referendum, but the deviation from true consent also evidences the necessity that there is some avenue to recover the just situation. Including non-dissent returns to the idea that the state (for example) ought to provide a means by which those under its care can object to a position. It provides an avenue for resistance but it means that individuals are not forced to endure the harms incurred by the choices of others, to some extent. However, the term "non-dissent" needs to be treated with utmost delicacy. It should not be assumed that what is suggested by its use is that someone has consented to something because they have not dissented to it. That would have all kinds of problematic conclusions. Indeed, the hierarchy here is meant to demonstrate that acquiescence and non-dissent are not true consent and that therefore they do not amount to it. The farmer has not in any meaningful way consented to 10% of his or her produce being taken away. Given a true choice, they would surely choose to retain more of it. But they might accept it *under the circumstances*. The distinction speaks to the duty to surrender when selected by the procedures by which this consent might be measured, covered in a later section, namely referenda (acquiescence and acquiescence thresholds) and the facilitation of conscientious objection (dissent). It suggests that the truest form of consent is the thing appealed to, while recognising that it is not realised in these situations; peace is not perfectly just, but it is more just than war.

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[744] Fabre, *Cosmopolitan Peace*. p.100

To emphasise a point made in transforming the right to surrender to a duty, it is not that states may have permission from their populations to surrender, it is that they require permission to perpetuate the devastation of war, and have a duty to surrender otherwise. This duty arises because the rights of others are put at risk by the continuation of war, and only in very limited circumstances is this risk justified. This duty may only be discharged if the population are provided with as great an opportunity as possible to consent to such perpetuation as possible, and do not exercise it.

In all likelihood, the non-dissent and acquiescence versions of this formula will arise most often, but it is important that consent is given primacy for the reasons already outlined. Not doing so would legitimise unjust conquests. The justice of individual surrender turns on expected future rights and, as such, is not necessarily settled by state decisions. The next section is concerned with state surrender. The first part of this will discuss the procedures of consent. These not only legitimise state decisions but help alleviate the epistemic problem of individual surrender.

5.5 State Surrender

5.5.a State legitimacy in revisionist just war theory

Having dealt with individuals, we must ask about the conditions under which this duty is transferred from the individuals to the state. When is it just that the state surrender? The answer to the dilemma is likely to be complex: it depends. The state may wrongly issue orders for a general surrender and it may rightly issue orders for a general surrender. Such an answer is likely to find favour with revisionists who emphasise the symbiotic relationship between *jus ad bellum* and *jus in bello* and who require individuals to make their own moral judgements. The proposed answer is that state surrender is just when it is a legitimate expression of the popular will; consent has to be reflected at the state-level.

Some insights may be drawn by again re-adopting an interpretive approach to revisionist just war theory. Recall that Fabre considers that the state has a moral right to govern ‘if and only if its institutions and officials respect and promote the fundamental rights of both the state's

members and outsiders'[745]. While it may be true, as Fabre observes, that it is rare for states to meet such a high bar for legitimacy, this does not necessarily entail that it is right to remove them, nor does it mean a particular state's law ought not to be obeyed. The question of legitimacy for a state and non-state actor is crucial in particular due to its historical association with the right to wage war. In Europe, at least, only those able to enforce laws over a given territory and benefitting from recognition as such by other states were permitted to wage war. The just war tradition and the law of war confers legitimacy on a *levée en masse* as well as national liberation movements and states[746]. This is also emphasised by Finlay, who notes that Yasar Arafat's speech to the United Nations was partly aimed to convince his audience that the Palestine Liberation Organisation possessed a just cause and that it was a legitimate representative of the 'Palestinian masses'[747].

Fabre considers that the requirement of competent authority should be jettisoned because, just as it is a human right to have certain things, it is also a human right to use violence if they are threatened[748]. Fabre notes that widening the scope of the "legitimate authority" principle does not represent a departure from the just war tradition's precepts when applied to colonial wars; those wars, in being fought by communities wrongfully denied the status of state sovereignty, ought therefore be regarded as interstate wars[749].

Traditionally, a competent authority, i.e. one whose leadership is such that it is able to confer combatancy rights on those whom they represent, is limited to states, coalitions, liberation movements or leaders of a *levee en masse* against a tyrant[750]. For Vattel, this latter category is limited: rebellions are illegitimate up until the point where the rebels *de facto* become their own separate nation.

Christopher Finlay notes that in addition to the two types of relationship between the victim of aggression and the individual (or body) bound by the duty to assist, there is a third: authorisation. Authorisation differs from the other two in that it requires the victim to be consulted. With the first two relationships, the duty to assist arises in virtue of the relationship itself and does not require consultation. The first involves a relationship that entails a specific

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[745] Fabre, *Cosmopolitan War*. p.46
[746] Cécile Fabre, "Cosmopolitanism, just war theory and legitimate authority," *International Affairs* 84, no. 5 (2008)
[747] Finlay, "Legitimacy and Non-State Political Violence."
[748] Fabre, *Cosmopolitan Peace*.
[749] Fabre, "Cosmopolitanism, just war theory and legitimate authority."
[750] Fabre, *Cosmopolitan Peace*.

duty of care such as the bond between parent and child. It is, Finlay notes, not a relationship that ordinarily occurs between two adults with full moral competence'[751]. The second is that of a rescue; someone sees another in need of rescue and assists. This case, Finlay argues, ought to be restricted to cases in which the victim is not capable of self-defence of communicating to the assistor.

A more expansive doctrine of legitimacy is therefore outlined by Finlay. In this theory, bodies aspiring to "representiveness" are required to exhibit strategic intelligence, coercive ability, moral probity, consent, input legitimacy and orientation[752]. Such requirements provide grounds for expanding the methods of measuring consent beyond what are mentioned here. In this schema, satisfaction of the latter three conditions represents an autonomy-based claim to political recognition. Finlay notes that while the Provisional IRA may justify their armed responses – and did – by seeking to protect Catholics, they would need to provide a larger justificatory claim to the level of a just war claim[753]. While it would not be acceptable for a paramilitary organisation to mount a sustainable campaign of defensive violence on the basis of being part of the 'rescue' relationship, they would be justified in doing so if they presented the relationship as one characterised by authorisation.

Finlay discussed a principle of 'Lesser Moral Authority', essentially the non-state version of the moral authority of states. While he observes that it would be difficult and potentially impossible to justify the principle on the basis of the "deep morality" of Rodin and McMahan, it might be possible to justify it on the basis of convention[754]. For example, 'first and second Protocols to the Geneva Conventions provide a basis for recognising the belligerent status of non-state groups once they have achieved continuous control over territory'[755]. Noting that war is generative in that it generates a new political situation rather than simply act as a faithful servant of politics and that it is unpredictable, Finlay notes that there would in fact be very few cases where choosing to engage in violent action becomes justified, and therefore that seeking wide endorsement from the community the non-state actor claims to represent is all the more

[751] Finlay, "Legitimacy and Non-State Political Violence." p.292
[752] Finlay, "Assisting Rebels Abroad: The Ethics of Violence at the Limits of the Defensive Paradigm."
[753] Finlay, "Legitimacy and Non-State Political Violence."
[754] Ibid.; McMahan, *Killing in War*; ibid.
[755] Finlay, "Legitimacy and Non-State Political Violence." p.303

important[756]. Changing the culture of the nation is likely to produce truer change where violence and coercion produces only superficial change[757].

5.5.b The procedures of consent: representatives, referenda and conscientious objection

Now that the principles on which the individual duty to surrender have been established and the treatment of the state's legitimacy in revisionist just war theory has been discussed, the task now is to consider how this duty can be reflected by the state maintaining fidelity to these principles. If consent is the fundamental moral principle, what remains is to consider how this consent might be exercised. There are several possibilities. One is via a referendum or plebiscite on the particular question, another is by electing representatives and entrusting them to make a decision in the national interest, and another is via what might be termed contestation in the form of conscientious objection. These will be referred to as the referendum method, the representative method, and the contestation method, respectively. Ultimately, it will be argued that the representative method is not sufficient and that the referendum method and contestation method need to be retained.

In the representative method the consent is more removed. Representatives are elected to represent and, faced with a decision to continue the war or not would be permitted to decide which course to take by their own judgement as they would with other decisions. But this would give too much license to these representatives. When the Iraq War was started, the UK's Prime Minister Tony Blair had been the recipient of wide public support. He had already won two terms as Prime Minister, and would go on to win a third. However, the election of 2001, which gave Tony Blair his second term in office and resulted in him being in office when the 2003 invasion of Iraq was commenced, happened before certain significant events, namely the September 11 terror attacks, UN Security Council Resolution 1441 and the presentation of claims of Saddam Hussein's weapons of mass destruction (WMDs), upon which the invasion was erroneously justified. Likewise, U.S. President George W. Bush's first term started before

[756] Ibid.
[757] Finlay, "Assisting Rebels Abroad: The Ethics of Violence at the Limits of the Defensive Paradigm."

these events. To support the representative method is to argue that these significant events would not affect the legitimacy calculations.

To be sure, there may be cases in which the candidates run for elections with their intentions included in their manifestos. But there might also be incentives to over-promise. Indeed, the eventual agreement made between the Government of Colombia and the FARC-EP is long, at around 300 pages and the referendum on the agreement signalled that its non-acceptance. But while Juan Manuel Santos' campaign for the 2010 election in Colombia included his plans for the approach to the civil war, it was certainly not as detailed as the ultimate agreement. War is not the only condition that is generative; negotiations also change. They may also win elections *in spite* of their position on war, not because of it.

It makes sense, then, to turn to the second method. There are therefore two reasons presented for why referenda are far more desirable a method of settling the matter than are representative-made decisions. The first is a negative reason, namely that, as noted, the degree to which the situation may change between the time these representatives become representatives and the time that the decision on the conflict needs to be made is significant. The second is related but positive (i.e. pro-referenda rather than anti-representation), namely that only a referendum can fully reflect the threshold-based decisions without making assumptions. These acquiescence thresholds are highly individualistic. If this is the correct interpretation, then the best way to respect them is to produce an agreement which comes down on the correct side of every one of those acquiescence thresholds. The most practical way of doing this is by having a detailed agreement ready and then asking each person whose rights would be reduced whether it is within their acquiescence threshold or not. This is a referendum or plebiscite.

The third method again recalls republican ideas and the role of dissent and contestation that has arisen in several places already. The question of whether one can truly consent to something under duress is a valid one, but the laws of war aim to minimise injustice. Grounding a theory in this form of consent, flawed though it is, means that the injustice is minimised as far as possible. Importantly, if land is given up to an aggressor on the basis of a referendum, this does not necessarily mean that the aggressor has a rightful claim to it but it might mean the greater of two injustices can be avoided.

Finlay grants one very important exception to violation of Life and Limb rights justifying violent resistance which gives weight to the role of republican ideas of contestation in the context of RJWT. He argues that "Non-Life-and-Limb-Rights-violating oppressive regimes"

may still be violently resisted using republican justifications. Examples of these kinds of regimes are those that use entirely legal methods of oppression, such as arresting protesters and holding them long enough for a non-violent resistance to be prevented from gaining momentum, but not at a point where their Life and Limb rights are threatened.

Essentially, this is a situation which, to use Rawls' phrase, forces a population to choose between 'submission or forceful resistance'[758]. The republican conception of freedom is that a people must always have a choice; there must be at least one avenue of resistance open to them. Finlay's account, in general, is that the violent resistance is only the avenue when there is no other avenue.

Fabre observes that explicit consent will not always be able to be fully given. In recognition of this, she favours permitting presumed consent. It is the position of this thesis that presumed consent should not be relied upon. For *terminative concession agreements*, a vital part of the legitimacy of them is that they are conducted on the basis of agreement of the population. Permitting presumed consent would mean that individuals would not be satisfactorily protected from actions of the state and imperialism has been too easily facilitated by it. One possible solution, however, is to permit a presumed consent in limited cases by appealing to republican emphasis on contestation. If individuals are given a proper opportunity for dissent and do not exercise it, they can be presumed to have accepted the consequences of an action.

The republican tradition as a whole is generally favourably disposed to the prospect of violent revolution and particularly based on the illegitimacy of the state. Rousseau, Milton and Pettit all argue that the power of the state is derived from the sovereignty of the people, that they have the right to retract this authorisation of the state, and that they must always have the means to do so[759]. Incidentally, Walzer also suggests that 'membership [of a group] is established as a moral option by the existence of alternatives. Thus, the possibility of becoming a conscientious objector establishes the *possibility* of incurring an obligation to fight in the army'[760]. Pettit in particular focusses on contestation as the principle which legitimises the state and argues that it must always be possible for society to contest the state. The frequent appeals to republican political philosophy and consent, and the link between state and

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[758] John Rawls, *The law of peoples: with "The idea of public reason revisited"*, ed. John Rawls (Cambridge, Mass.: Harvard University Press, 1999). p.181-2
[759] See: Rousseau, *Of the Social Contract and Other Political Writings*. Milton, *The tenure of kings and magistrates*. Pettit, *Republicanism: a theory of freedom and government*.
[760] Walzer, "The Obligation to Disobey." p.19. Emphasis in original.

individual surrender suggests an elegant solution: conscientious objection. Here, permitting conscientious objection would not only provide individuals to respect the individual duty to surrender as outlined in this thesis, it would also legitimise any state decisions on surrender.

The following examples not only speak to the legitimacy of the state's actions in the face of collective decisions, but also the latter's power to influence the former and the impact individual-level surrender may have on the wider war. In the months leading up to the invasion of Iraq there were reports of a high desertion rate within the Iraqi army[761]. This was no doubt due to the perceived futility of resistance to American military superiority, rather than the justice of the humanitarian intervention itself. It was complex, based partly on this as well as lack of loyalty to Saddam. As shown in Chapter Two, the perceived likelihood of good treatment contributed to higher desertion rates or rates of individual surrender (the former was the preferred option as it involved Iraqis returning to their own homes). The RAND Corporation considers the expectation of to be a factor, though the reports of human rights abuses by the US and UK were not yet widely circulated, and it also notes that the soldiers did not expect the dissolution of the Iraqi military and banning of officers from the new army[762]. The propensity to desertion was so great that Iraqi troops would carry civilian clothing in anticipation of desertion[763]. One important factor was the breakdown in barriers to desertion: the lack of credibility of threats to eventual punishment and the breakdown of military discipline[764].

In contrast, when Germany invaded Belgium, 'even political cultures in opposition to the bourgeois and Francophone Belgian state…rallied' and contributed to the 20,000 strong volunteer movement, amounting to 50% of a conscription levy[765]. It was in the face of the general public support that the Belgian state announced its continuation of the war. In June 1940, Lieutenant Friedmann recalled that 'a whole country seems suddenly to have given itself up'[766]. It is estimated that around half of the 1.5 million French prisoners of war taken were taken between Petain's 17 June speech about the armistice and the finalising of the armistice itself[767]. To be sure, mistakes were made by the French leadership and its allies and this is

[761] Hosmer, Short Why the Iraqi Resistance to the Coalition Invasion was so Weak.
[762] Ibid.
[763] Ibid.
[764] Ibid.
[765] Schaepdrijver, "Belgium." p.387 Referencing: Jean Stengers and Eliane Gubin, *Le grand siècle de la nationalité belge: de 1830 à 1918* (Bruxelles: Racine, 2002).
[766] Julian Jackson, *The fall of France: the Nazi invasion of 1940* (Oxford: Oxford University Press, 2003). p.186
[767] Ibid.

certainly not the only cause of the defeat of France. But the vast majority of the population was directly affected by World War I. Soldiers marched through the sites of battles and destroyed cities and villages. France emerged from the war with a 'pacifism rooted in exhaustion'[768]. Léon Emery coined the phrase, 'rather servitude than war' to describe the French attitude to war in 1937[769].

So too with the Wehrmacht. After German generals had opposed conscription and the occupation of the Rhineland and other disagreements between Adolf Hitler and his generals, Hitler replaced some generals with less questioning ones, though some opposition to the invasion of France remained amongst the ranks of the military[770]. State surrenders in such cases have not always been just. The US-UK invasion of Iraq was unjust, as was Hitler's invasion of France and Germany's invasion of Belgium. The connection between the legitimacy of state surrender has already been discussed at length but these cases also point to the *practical* use of conscientious objection in terminating war.

5.6 Conclusion

In summary, despite the fact that revisionist just war theorists, as defined here by non-acceptance of the independence of *jus ad bellum* and *jus in bello* (and the principle of discrimination), still arrive at a similar point with regard to the duty to surrender. That is, that it is based on consent and the protection of rights after the war rather than *jus ad bellum* status.

An individual is under a duty to surrender because those whose rights would be reduced by that individual's continued warring have not accepted the rights reduction. Having determined that consent must play the crucial role, this chapter explored how this consent must be recorded and arrived at two possible ways: the facilitation of conscientious objection and the holding of referenda on surrender agreements.

It is worth emphasising that there are multiple ways a war can be unjust and this proposal is not supposed to be a panacea. Proportionality represents an additional requirement, an additional way in which an action of war is unjust. For example, when considering whether the bombing of a munitions factory is permissible, it must adhere to proportionality. But the

[768] Ibid. p.192
[769] Ibid. p.191
[770] Laub, *After the Fall: German Policy in Occupied France, 1940-1944*.

determination of its proportionality does not mean that it is just, because actions of a military in violation on the law on the use of force are still unjust because they have violated the *jus ad bellum*; as Adil Haque puts it, international law is not symmetrically permissive, but symmetrically prohibitive[771]. In the same way, though an army or members of it may not be required to surrender by the schema outlined here, it does not mean that their cause is just. A state which invades and occupies its neighbour is not a just action in virtue of possessing the consent and approval of its population. On the revisionist account, the population of the neighbouring state had not consented to incur harm and, as such, were not liable to attack.

Even if the neighbouring state holds a referendum and considers that it does wish to trade part of its territory for peace, this does not mean that the land grab is automatically just, it is just an additional hurdle. In this case, (assuming that the members of this traded territory did not wish to trade state before the war) the state still violated its *jus ad bellum* duties. In such a case, what the duty to surrender, as outlined here, does ensure is that the costs of the continuation of war are not borne by an unwilling population. It therefore represents a further safeguard aimed at minimising the injustice of war. What remains is to assess the degree of compatibility this framework has with international law.

[771] Adil Ahmad Haque, *Law and morality at war*, First edition. ed., Oxford legal philosophy, (Oxford: Oxford University Press, 2017).

Chapter 6: A proposal for a theory of *terminative concessions* and individual duty to surrender as a solution to tensions in international law

6.1 Introduction

This thesis opened with a problem: that, even in the face of sovereignty being conceived as including a duty to ones citizens[772], the humanisation of war, efforts to replace war with judicial procedures[773], and the various measures by which the international legal system has aimed to strike a balance between necessity and humanity, demanding a framework that obligates war termination, there is no such framework. This chapter will therefore aim to tie the remaining conceptual pieces together, under a theory of obligated surrender, and present it as a solution to the tensions in international law and the natural, coherent next step in the humanitarianisation of international law.

While the first research question, namely the extent to which a duty of surrender is emergent from the principles of just war theory and international law, has been answered, this chapter is much more focused on the second research question, namely what a maximally coherent duty to surrender would look like. It is the *lex ferenda* to Chapter Three's *lex lata* – where Chapter Three was concerned with outlining the law as it currently is, this chapter aims to determine what the law *could be* and how it could better fulfil its humanitarian aims without a radical departure from its structure. This thesis puts just war theory and international law in close dialogue here, and therefore this chapter's purpose is best served by distilling the themes from the just war theory chapters – particularly the focus on consent and popular sovereignty – and using them to discuss the coherence of it with international law. Where chapters four and five

[772] The growth of human rights law is the most obvious example.
[773] Christine Bell speaks of peace agreements aiming to 'translate the conflict from violent to non-violent forms' Bell, *On the law of peace: peace agreements and the Lex Pacificatoria*. p.201. However, formal legal peace treaties, such as the Kellogg-Briand Pact, have also sought to provide quasi-judicial procedures by which states can attempt to settle their incompatibilities without resorting to war.

were responding to the points raised in Chapter Three, now Chapter Six can respond to chapters four and five.

Both orthodox and revisionist just war theory would seem to operate from the premise that rights are the fundamental moral currency, and the discussion of the latter demonstrated the central role that consent and contestation must play, as well as the necessity of resistance. This suggests that a coherent solution to the problem that prompted this thesis (that a duty to surrender seems to be required in order for the promise of IL and JWT to be fulfilled but is not explicitly extant) would be rights-based.

The idea of sovereignty has also featured heavily in this piece, and one substantive remaining objection is that a prescribed surrender would be facilitating occupation, legitimising it, and disregarding self-determination[774]. The next section will therefore attempt to reconcile self-determination as it appears in international law with the idea of prescribed surrender, given the role that consent has played in the discussions of just war theory. It involves the final step in examining the coherence of a duty to surrender based on consent with other norms of war. This is also the place to discuss the so-called Third World Approaches to International Law (TWAIL) to ensure that, given the more nuanced expressions of control included in the definition of surrender described in Chapter Two, the framework of a duty to surrender does not facilitate empire. The chapter will then move on to the issues that have arisen out of the study of individual surrender in the preceding chapters. The conclusion of the thesis will follow immediately after.

6.2 Surrender as an expression, and as an instrument, of the right of self-determination

The right of self-determination is a principle of international law that emerges from a number of treaties as well as customary international law. It is a right *erga omnes* and considered to

[774] Sovereignty as the dominant feature of traditional international law is also the foundation for Bell's argument for including a *lex pacificatoria*, or law of the peacemakers. She contends that traditional accounts do not accurately represent the impact peace agreements have had on both sovereignty and law while accepting the importance of human rights, self-determination and peacekeeping in the development of the law of peacemakers. See O'Donoghue, "Good offices: grasping the place of law in conflict." Referencing: Kal Raustiala, "Rethinking the Sovereignty Debate in International Economic Law," *Journal of International Economic Law* 6, no. 4 (2003). Referring to: Bell, *On the law of peace: peace agreements and the Lex Pacificatoria*.

have attained *jus cogens* status[775]. It is protected by Article 1 of the UN Charter and defined further by Article 1 of the ICCPR, which declares it a right of 'peoples' – to 'freely determine their political status and freely pursue their economic, social and cultural development'[776]. However, the precise requirements of the right of self-determination are unclear, and therefore a fuller discussion of the relevance of the right, particularly in virtue of the central role it plays as the legal parallel to consent, and how it developed are warranted.

6.2.a The relevance of the right of self-determination to a duty to surrender

The right of self-determination here is relevant to the overall aim of the thesis for two primary reasons. Firstly, a legal obligation to surrender will naturally have to confront the question of whether it facilitates imperialism. Requiring a state to surrender on the basis of military inferiority, for example, would lead quickly to "might makes right". Indeed, any basis for an obligation to surrender that does not orbit around the right of self-determination runs this risk.

Secondly, and relatedly, previous chapters have noted that there are different combinations of the hierarchy of rights and, once again, a duty to surrender should not dictate which is the right hierarchy; some may prefer the right to life over self-governance and others the reverse (to say nothing of the ways rights have been claimed to have been given but in reality withheld from colonial peoples[777]). The decision to surrender rather than continue fighting is enormously consequential and leaving the decision to one (or several) people at the top would be counter to one of the trends that, this thesis argues, produces the need for an obligation to surrender: that the state owes this responsibility *to the people*. Explorations of just war theory in the preceding chapters have also demonstrated the central role played by the nature of popular sovereignty, the legitimacy of the government as rooted in the degree to which is represents the population, and consent. Chapter Five on revisionist just war theory particularly emphasised the nature of consent – Finlay, McMahan and Fabre all discuss the role consent plays – but even Vattel argues that the sovereign owes a duty to the citizens. In law, Christine Bell also convincingly argues that while the relationship between the bodies of international law that make up the 'law of the peacemakers' is not straightforward, and, as a result, the legal

[775] *Report of the International Law Commission, 73rd Session*, A/77/10 (2022); *Report of the International Law Commission, 71st Session*, A/74/10 (2019).
[776] UN General Assembly, *International Covenant on Civil and Political Rights*, United Nations, Treaty Series, vol. 999 p.171, (16 December 1966). Art 1.
[777] James Thuo Gathii, "Imperialism, colonialism, and international law," *Buffalo law review* 54, no. 4 (2007)

status of peace agreements is dubious, peace agreement practice is heavily influenced by the demands of the law on self-determination[778].

The discussion of self-determination here may also pre-empt criticism about legitimising conquest even where a duty to make terminative concessions is otherwise coherent with international law. The TWAIL scholarship has explored imperialism *by* law. Antony Anghie, for example, argues convincingly that the legacy of international law is imperialist, created not for sovereign states (and certainly not between states equally sovereign) but out of a dispute between two European colonial companies over the spoils of pillage[779].

B.S. Chimni suggests a number of ways to overcome this, including conceptualising permanent sovereignty as right of peoples and not states and using the language of rights properly[780]. This includes the respect of economic sovereignty, and indeed the definition of *terminative concessions* is sympathetic to such forms of potential control. Likewise, the concept of self-determination owes something to the inclusion of these less overt forms of control. Vladimir Lenin considered economic imperialism as the 'monopoly stage of capitalism' and his work is part of the history of the right of self-determination[781]. All the more reason to place self-determination at the centre of *terminative concessions*: Anghie considers the right of self-determination to have facilitated decolonisation in international law, or at least symptomatic of the drive in that direction (in spite of the fact that he was a critic of the trusteeship system, itself is underpinned by the principle of self-determination of peoples)[782]. J.T. Gathii follows Grovogui in her study of Namibia's anti-colonial struggle in arguing that international law

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[778] Bell, *On the law of peace: peace agreements and the Lex Pacificatoria*. Bell discusses the law of self-determination, human rights law and the law on the use of force as three areas of law which peace agreements are not *of* but which they draw from.
[779] Anghie, *Imperialism, sovereignty, and the making of international law*. p.224. This episode is also recounted in: Scott Shapiro and Oona Hathaway, *The Internationalists and Their Plan to Outlaw War* (Penguin Random House, 2017).
[780] B.S. Chimni, "Third World Approaches to International Law: A Manifesto," *International Community Law Review* 8, no. 1 (01 Jan. 2006 2006)
[781] Vladimir Lenin, "Imperialism, the Highest Stage of Capitalism," in *Selected Works* (Moscow: Progress Publishers, 1963). Much more recently the economic dimension of imperialism has been discussed in: Tzouvala, *Capitalism As Civilisation: A History of International Law*.
[782] Anghie, *Imperialism, sovereignty, and the making of international law*; Steven Wheatley, "The self-determination of peoples," in *Democracy, Minorities and International Law*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2005).

conspired to prevent the decolonisation of colonised countries *by* not implying complete self-determination, rather than a flaw in the concept itself[783].

In accordance with all this, the duty to surrender must be both an instrument of, and an expression of, the right of self-determination. Respectively, it must not lead to an outcome that entails oppression, and it must be born from the wishes of the population. As such, this chapter examines the right of self-determination, when it applies, what its purpose is, and whether it would be inconsistent with an obligation of *terminative concessions*.

The right of self-determination can be split into two related concepts, both of which are important for this thesis: internal and external self-determination. There are differences in where the distinction is drawn[784] but, broadly, internal self-determination, or self-determination on the national level, is the right of a 'nation, already constituted as a state, to choose its form of government and to determine the policy it meant to pursue' and external self-determination, or self-determination on the international-level, is the right 'of a group which considered itself a nation to form a State of its own'[785]. The former concerns the requirement that the state reflects the nation, while the latter is more associated with anticolonialism. The relevant distinction for this thesis is as follows. Internal self-determination is the right which most directly speaks to how peoples (broadly defined) should be consulted before a state makes such a serious decision to surrender or not (*surrender as an expression of self-determination*). External self-determination is the right that most directly defines the limit of what international law considers it acceptable for a population that has lost a war to bear (*surrender as an instrument of self-determination, or surrender as an instrument of imperialism/conquest/non-self-determination*).

In some places, the distinction between the external right and the internal right is controversial itself. For example, Spain does not recognise Gibraltar as having the right to external self-determination insofar as it does not include a decision to be absorbed under Spanish sovereignty and reject British colonial rule[786]. The tension stems from the waning of the view

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[783] James Thuo Gathii, "International law and eurocentricity," *Eur. J. Int'l L.* 9 (1998). Reviewing: Siba N'Zatioula Grovogui, *Sovereigns, quasi sovereigns, and Africans: Race and self-determination in international law*, vol. 3 (University of Minnesota Press, 1996).
[784] James Summers, "The internal and external aspects of self-determination reconsidered," (2013).
[785] As expressed by the Netherlands in United Nations General Assembly, Human Rights: Recommendations concerning international respect for the self-determination of peoples, (18 November 1952). §4 Taken from Paul M. Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge: Cambridge University Press, 2020). p.42
[786] Michael Waibel, "Gibraltar," *Max Planck Encyclopedia of Public International Law* (2009)

that territory is property[787]. This is encapsulated by Judge Dillard's comments in the *Western Sahara Advisory Opinion*, that it was 'for the people to determine the destiny of the territory' and not the other way around[788]. Much of the question of conceding territory ought to turn on self-determination, therefore, and it is to an in-depth analysis of the right to which this chapter now turns.

6.2.b The development of the right of self-determination

The principle of self-determination has roots in the French Revolution (though France did not recognise the right of Haiti to self-determination) but it is in the context of anti-colonialism that the right of self-determination has developed. It originated with a joint declaration by US President Franklin D. Roosevelt and British Prime Minister Winston Churchill with the 1941 Atlantic Charter of 1941[789]. As a legal principle, it developed with the UN Charter in 1945, the Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960, and the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights in 1966[790]. Noteworthy other formulations of it predate the Atlantic Charter, such as US President Woodrow Wilson's Fourteen Points and the *Åland Islands (Aaland Islands)* case (as well as Lenin's work just mentioned) but these are the primary documents[791].

Article 1(2) of the UN Charter developed the principle of self-determination of peoples and Article 73 of the Charter envisaged the eventual self-government of inhabitants of non-self-governing territories. However, the idea is not defined within the Charter itself and reviewing the *travaux préparatoires* reveals that the reference to 'self-determination of peoples' followed a proposal from the Soviet Union, and Soviet Foreign Minister Molotov explained that it was

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[787] Michael Waibel, "Falkland Islands/Islas Malvinas," *Max Planck Encyclopedia of Public International Law* (2012)
[788] *Western Sahara Advisory Opinion, Separate Opinion of Judge Dillard*, (1975). §122
[789] Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights*.
[790] *Charter of the United Nations*. United Nations General Assembly, Resolution 1514 (XV) Declaration on the Granting of Independence to Colonial Countries and Peoples, (14 December 1960). *International Covenant on Civil and Political Rights*; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, United Nations, Treaty Series, vol. 993, p. 3, (16 December 1966).
[791] Bell, *On the law of peace: peace agreements and the Lex Pacificatoria*.

put forward to enable dependent countries 'as soon as possible to take the path of national independence'[792].

Despite the lack of clarity in the concept at the time, it was clear that it did not mean the (a) the right of a minority, ethnic or national group to secede (b) the right of a colonial people to achieve independence, (c) the right to regular, free and democratic elections, or (d) the right of two nations to merge[793]. At this point, therefore, it meant very little, and was structured in order to minimise the threat to state interests; UK Prime Minister Winston Churchill, for example, quickly restricted the principle to *not* include colonial peoples after the formation of the Atlantic Charter in 1941[794].

It was UN GA Resolution 1514 (XV) that transformed the principle of equal rights and self-determination into a legal right[795]. Crucially, under Resolution 2625, the populations of non-self-governing territories were recognised as having the right to determine the status of their territory regardless of the position of the colonial power[796].

Finally, it was Article 1 of both the International Covenant on Economic, Social and Cultural Rights, and the Covenant on Civil and Political Rights that provided the central definition:

> All peoples have the right of self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

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[792] Thomas Musgrave, *Self-determination and national minorities* (Oxford: Clarendon Press, 1997). p.64. See also "The self-determination of peoples," in *Democracy, Minorities and International Law*, ed. Steven Wheatley, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2005).

[793] Cassese, *Self-determination of peoples: a legal reappraisal*. p.42

[794] Ibid. p.37

[795] Wheatley, "The self-determination of peoples." Although prominent works – notably those of Antonio Cassese and Karen Knop – observe that self-determination is a principle and a right, and it would be a mistake to attempt to consider self-determination as having only one norm-type. James Crawford argues that there is a political principle (too vague), a legal principle (general) and a legal rule (precise). The difference, argues Knop, between a legal principle and a legal right (apart from the generality of the former) is that the latter has a fully determined subject, in this case the peoples, as the possessor of the right. See: Cassese, *Self-determination of peoples: a legal reappraisal*. Karen Knop, *Diversity and Self-Determination in International Law*, Cambridge Studies in International and Comparative Law, (Cambridge: Cambridge University Press, 2002). James Crawford, "Self-Determination of Peoples. A Legal Reappraisal. By Antonio Cassese. Cambridge, New York: Cambridge University Press, 1995. Pp. xviii, 365. Index," *American Journal of International Law* 90, no. 2 (1996)

[796] Wheatley, "The self-determination of peoples.". Anne F. Bayefsky, "Report by Alain Pellet "Legal Opinion on Certain Questions of International Law Raised by the Reference"," (Leiden, The Netherlands: Brill | Nijhoff, 1999).

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.[797]

There is a notable lack of clarity in the definition of 'peoples' and hence a difficulty of determining whether a population that have surrendered would be protected by the principle of self-determination. Notably, the UN has recognised the territorial dispute in the Falkland/Malvinas Islands but referred to the inhabitants of the islands as a 'population' rather than a 'people' and has called on the two states – UK and Argentina – to resolve the issue bilaterally[798]. Though, whatever it does mean, it certainly does extend to the colonial trust territories and non-self-governing territories established by the UN Charter[799]. It also does include the populations of sovereign states[800]. The argument in general terms is that the right is intimately defined by the decolonisation context it originated in. The *Wall Opinion, East Timor case* and the *Chagos Archipaeligo case* found that the right of self-determination was a right *erga omnes*[801] and the ILC has also stated it has achieved *jus cogens* status[802].

The 1970 UN Declaration on Friendly Relations clarifies that alien subjugation and domination is distinct from colonial systems, despite a proposal suggesting that colonialism was an

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[797] *International Covenant on Civil and Political Rights*.
[798] See Resolution 2065(XX), 1965 and Resolution 3160(XXVIII), 1973. Waibel, "Falkland Islands/Islas Malvinas."
[799] Knop, *Diversity and Self-Determination in International Law*.
[800] See Wheatley, "The self-determination of peoples." See also Scientific and Cultural Oganization United Nations Educational, *International meeting of experts on further study of the concept of the rights of peoples: Final Report and Recommendations* (Unesco, Paris, 1989).
[801] *Wall Opinion*, (International Court of Justice (ICJ) 2004) General List No. 131 §155 *Cace Concerning East Timor (Portugal v Australia) (Judgment)*, (International Court of Justice 30 June 1995) I.C.J. Reports 1995, p. 90. §29 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)*, (International Court of Justice (ICJ) 25 February 2019). §180
[802] *Report of the International Law Commission, 73rd Session*. *Report of the International Law Commission, 71st Session*.

umbrella term for all instances of the denial of self-determination[803]. Although there were some calls for the adoption of an expansive definition of 'alien domination' to include the economic exploitation that characterises neo-colonialism, it is the more limited doctrine of intervention by use of force and military occupation that has been adopted[804]. In the 1977 Geneva Protocol, it was the Latin American States that instigated the change of the phrase 'alien domination' to 'alien occupation'. However, in the *Wall Opinion,* the ICJ found that Israel had breached the Palestinian people's right of self-determination and made no mention of colonialism or the right pertaining only to indigenous peoples[805]. This was after the UN GA had declared that the Palestinian people were entitled to self-determination and that the PLO was the 'sole legitimate representative of the Palestinian people'[806]. Cassese also considers that 'state practice and United Nations resolutions make it clear that extending self-determination is a right belonging not only to colonial peoples but to peoples subject to foreign occupation', citing the UN Declaration on the Independence of Colonial Peoples and the UN Declaration on Friendly Relations, as well as comments made by the US and Brazil[807]. There would not be any incoherence, then, in extending the duty to surrender to any such groups.

Self-determination seems to be the most natural legal parallel to the concept of consent and popular will that has found to play such a pivotal role in the discussion of a duty to surrender within just war theory. The arguments for restriction and expansion have in common the recognition that the right is designed to prevent oppression and the kinds of situations we are worried about post-surrender. This thesis will proceed on the basis of this, and also noting Chimni's argument that the rights should be of peoples and not states.

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[803] The proposal was submitted by Algeria, Burma, the Cameroons, Ghana, India, Kenya, Nigeria, Syria, United Arab Republic, and Yugoslavia. Cassese, *Self-determination of peoples: a legal reappraisal*.
[804] Ibid.
[805] *Wall Opinion,* (International Court of Justice (ICJ) 2004) General List No. 131
[806] United Nations General Assembly, 2672 C (XXV) United Nations Relief and Works Agency for Palestine Refugees in the Near East, (8 December 1970).
[807] Cassese, *Self-determination of peoples: a legal reappraisal*. pp.90-1

6.2.c Does the right of self-determination automatically outlaw the types of control mentioned in terminative concession agreements?

Cassese notes that military occupation amounts to a grave breach of Article 1(1) (on self-determination) of the ICCPR[808]. The question, then, is whether an act of self-determination which leads to occupation (surrender) may then not itself be a breach of self-determination. Despite the resistance of states to be termed "Occupying Powers", attributed to the pejorative connotation to the concept of occupation, the law of occupation applies equally to all forms of occupation[809]. It applies to both lawful and unlawful occupation, in the sense that it applies to occupation by belligerent powers which did not satisfy the law on the use of force, further testament to the separation of bodies the law of war[810]. However, it only applies in IACs[811].

There is not the requirement to discuss all facets of the law of occupation in full here. Specifically, it is not necessary to discuss when a state of occupation arises and when it ends, beyond saying that it is a temporary state, limited by GCIV to a period of one year and it exists when the Occupying Power is able to exert effective control over the territory or another State[812]. What is useful here is that the law of occupation does contribute to the discussion of what is considered to be legitimate by the international legal regime in periods following conflict where a compromise needs to be reached between the self-determination of one state and the military superiority of the other. The law of occupation itself can be grouped around four general principles in addition to its temporary nature[813]:

1. The Occupying Power does not acquire sovereignty over the occupied territory and thus is not permitted to change the intrinsic characteristics of the occupied territory.
2. The rights exerted by the Occupying Power are transitory and the Occupying Power must also respect the laws in the occupied territory and maintain as

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[808] Ibid. It is worth pointing out, as indeed Cassese does, that if an occupation is justified by Article 51 of the UN Charter it is not in conflict with Article 1(1) of the ICCPR

[809] Philip Spoerri, "The Law of Occupation," in *The Oxford handbook of international law in armed conflict*, ed. Andrew Clapham et al. (Oxford: Oxford University Press, 2014).

[810] Ibid.

[811] Ibid.

[812] International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 75 UNTS 287 (12 August 1949).

[813] Spoerri, "The Law of Occupation." See also Yoram Dinstein, *The International Law of Belligerent Occupation*, 2 ed. (Cambridge: Cambridge University Press, 2019).

normal a life as possible, including providing a minimum level of protection to the civilian population.

3. In keeping with IHL more broadly, the law of occupation requires that a balance must be struck by the Occupying Power between military necessity and respect for the interest of the occupied population.
4. The Occupying Power cannot exercise its authority to further it's own (non-military) interests.

Several points need to be made in relation to the Israeli occupation of Palestine and their influence on these principles. Insofar as the situation and the jurisprudence of the Israeli High Court of Justice (HCJ) has developed the underlying law of occupation, it has increased the license given to the Occupying Power due to wide interpretations of what is necessary for the safety of the occupiers[814]. As Alice Panepinto notes, however, and as shall be seen, the occupying power is still able to exercise influence in a way that would normally be associated with a sovereign state[815]. In particular, Israel has enacted laws that apply extraterritorially to Israelis on the West Bank relating to taxation and human rights. And in disputes over possession, Palestinians may not have access to the Palestinian justice system nor even Israeli courts[816]. Lastly, in *Beth El*, Justice Landau argued that anything required to ensure public order and safety was justified by Article 43 of the Hague Regulations, including establishing civilian settlements to facilitate military defence in the area[817]. In relation to the fourth principle, Israeli occupation in Palestine has facilitated the construction of *de facto* Israeli sovereignty and the furtherance of its ends.

The ICJ considers many aspects of the Israeli occupation to be illegal. It stated that Israel flouted Articles in the Hague Regulations relating to confiscation of property[818]. Importantly,

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[814] Although the HCJ has not absolutely confirmed that it considers the Geneva Conventions apply in the Occupied Territories, referring to its provisions are standard practice. Israel has ratified the four Geneva Conventions but not incorporated them into domestic law. It has also stated in the *Beth El case*, that GCIV is also not part of customary law, or at least not entirely. See David Kretzmer, "The law of belligerent occupation in the Supreme Court of Israel," *International Review of the Red Cross* 94, no. 885 (2012); *Israel, Ayub et al. v. Ministry of Defence et al. (The Beth El case)*, (High Court of Justice 1978) H.C. 606/78.
[815] Alice M. Panepinto, "From Extraterritorial Jurisdiction to Sovereignty: The Annexation of Palestine," in *The Extraterritoriality of Law: History, Theory, Politics*, ed. Daniel S. Margolies et al. (Routledge, 2019).
[816] Panepinto refers to the dispute between Michael Lessens and Ahmad Abed-el-Kader. See *Abed-el-Kader v Military Board of Appeals*, (High Court of Justice 2011) HCJ 5439/09. Repoted in: Ronit Levine-Schnur, "Private Property and Public Power in the Occupied West Bank," *European Property Law Journal* (2017) Taken from: Panepinto, "From Extraterritorial Jurisdiction to Sovereignty: The Annexation of Palestine."
[817] See Kretzmer, "The law of belligerent occupation in the Supreme Court of Israel." See *Israel, Ayub et al. v. Ministry of Defence et al. (The Beth El case)*, (High Court of Justice 1978) H.C. 606/78
[818] *Wall Opinion*, (International Court of Justice (ICJ) 2004) General List No. 131 §132

relating to destruction and requisition of property contemplated by Article 53 of GCIV (as well as by Articles 46 and 52 of the Hague Regulations), it added that 'the Court is not convinced that the destructions carried out…were rendered absolutely necessary by military operations'[819]. Furthermore, particularly importantly when considering that the duty of surrender is positioned against the abuse of state power, Kretzmer notes that the interpretive principle outlined by Justice Shamgar in *Afu*, that the Court should interpret Article 49(1) in the way least restrictive of state sovereignty, is 'totally out of tune with the fundamental principles in interpretation of international conventions that deal with human rights or humanitarian law'[820].

While Arai-Takahashi makes a distinction between different types of occupation, variable on whether it takes place after surrender, after *debellatio*, for pacific reasons, or whether it is belligerent occupation, it is the existence of an element of domination or authority that determines the applicability of the law of occupation, not the actions which brought about the situation, surrender or not[821].

Modern occupation law has been developed by the Fourth Geneva Convention. Indeed, up until the Anglo-American occupation of Iraq in 2003, occupation was considered analogous to colonialism and apartheid[822]. The principle of self-determination has changed the traditional law of occupation from armed conflict based on colonialism, racist regimes or apartheid to international armed conflict under Art 1(4) of AP1[823]. Furthermore, while for Benvenisti the Allies would have had the legal right to acquire sovereignty over Germany in virtue of the *debellatio* in 1945[824], *debellatio* is no longer considered legal, having been based on the anachronistic idea that sovereignty rested with a political elite[825]. Benvenisti further notes that while there were objections to the Allied legal claim to sovereignty at the time, these were

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[819] Ibid. §135
[820] Kretzmer, "The law of belligerent occupation in the Supreme Court of Israel." p.215
[821] Yutaka Arai-Takahashi, *The law of occupation: continuity and change of international humanitarian law, and its interaction with international human rights law* (Leiden: Koninklijke Brill NV, 2009).
[822] Ibid.
[823] Ibid. Eyal Benvenisti, *The International Law of Occupation*, vol. 2nd ed (Oxford: Oxford University Press, 2012), Book. p.187
[824] Eyal Benvenisti, "The Law of Occupation in the Wake of World War II," in *The International Law of Occupation* (Oxford: OUP Oxford, 2012).
[825] Common Article 2 of the 1949 Geneva Conventions makes no exception for *debellatio*. This fact is noted and endorsed by: ibid.

based on the conception that international law was concerned with states, but in modern times human rights law places individual human beings at the centre[826].

Articles 7, 8 and 47 of GCIV are those which stipulate the rights of protected persons in occupied territory, and this holds even where instruments of surrender or armistice agreements modify the law of occupation as *lex specialis*[827]. Similar to an armistice agreement, an instrument of surrender would serve as a *lex specialis* but does not overrule the applicability of the law of occupation, particularly in light of Common Article 2 of the Geneva Conventions[828]. Likewise, under Articles 8 and 47 of GCIV, even where an instrument of surrender can modify the law of occupation as *lex specialis*, human rights guarantees are still inviolable[829].

Thus the license given to the Occupying Power has shrunk. At once the law covers more situations and permits fewer privileges, both of which a duty of surrender must observe. The development of human rights law and its influence on IHL suggests that subjugation of the conquered population is no longer justifiable[830]. Therefore, even though an agreement ending a conflict may become a *lex specialis* and hence override some responsibilities of the law of occupation, the fundamental guarantees of human rights are inviolable, as is the principle of self-determination[831]. Furthermore, in keeping with the themes of this thesis, borne out by both the discussions of international law and the just war tradition, certain rights must be placed at the centre of a duty to surrender.

On the face of it, the very concept of self-determination is inconsistent with the possibility of a legitimate form of foreign occupation, and therefore one might expect that the latter would also entail this conflict and present a fatal challenge to a duty to surrender insofar as it results in occupation. But the occupier is, by definition, not a sovereign. As early as 1934, Siegmund Cybichowski objected to the wording of the 1919 "Minorities Treaty" between the Allied Powers and Poland, and specifically the reference to the Allies having 'restored to the Polish

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[826] Ibid. Max Huber, president of the ICRC expressed concern to US Secretary of State Byrnes in a letter which built on the conception that states and not individuals were the subjects of international law.
[827] Arai-Takahashi, *The law of occupation: continuity and change of international humanitarian law, and its interaction with international human rights law*. Arai-Takahashi references: Robert Kolb, "Etude Sur L'occupation Et Sur L'article 47 De La Iveme Convention De Geneve Du 12 Aout 1949 Relative A La Protection Des Personnes Civiles En Temps De Guerre: Le Degre D'intangibilite Des Droits En Territoire Occupe," *African Yearbook of International Law* (2003)
[828] Arai-Takahashi, *The law of occupation: continuity and change of international humanitarian law, and its interaction with international human rights law*.
[829] Ibid.
[830] Ibid.
[831] Ibid.

nation the independence of which it had been unjustly deprived'[832]. This criticism was directed to the idea that sovereignty, rooted in the people, could be assigned sovereignty by a foreign power which itself never possessed it.

It is also, by definition, an aggressor: General Assembly Resolution 3314 on the Definition of Aggression makes clear that the crime of aggression itself also refers to 'invasion or attack…or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof'[833]. If this were also not enough to demonstrate the legitimacy of use of force in self-defence against occupation, UNGA Resolution 37/43 reaffirmed the 'legitimacy of the struggle of peoples for independence, territorial integrity, national unity and liberation from colonial and foreign domination and foreign occupation by all available means, including armed struggle'[834]. This also maps well onto the need for the right of resistance to be preserved, discussed in Chapter Five.

But self-determination does not outlaw occupation *qua* occupation in that there are measures an Occupying Power can introduce that are accepted either by international law generally, or the right of self-determination specifically, For example, the General Assembly noted that the right of integration is part of the right of self-determination when it is 'the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage'[835]. Likewise, a surrender which

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[832] *Minorities Treaty between the principal Allied and Associated Powers (the British Empire, France, Italy, Japan and the United States) and Poland*, (18 June 1919). Siegmund Cybichowski, "Die völkerrechtliche Okkupationsrecht," *Zeitschrift für Völkerrecht* 18 (1934) Quoted in Peter M. R. Stirk, *The Politics of Military Occupation* (Edinburgh University Press, 2009).

[833] *Definition of Aggression*. Article 3. Dapo Akande and Antonios Tzanakopoulos make the argument that the fact of an occupation being aggression means that states have the right of self-defence provided it is necessary, because the immediacy requirement is automatically met in virtue of occupation being a continuing attack. The argument appears in: Dapo Akande and Antonios Tzanakopoulos, "Legal: Use of Force in Self-Defence to Recover Occupied Territory," *European Journal of International Law* 32, no. 4 (2021) On the relationship between armed attack and aggression in this regard, see: Akande and Tzanakopoulos, "The International Court of Justice and the Concept of Aggression." For the counter-argument, see Tom Ruys and Felipe Rodríguez Silvestre, "Illegal: The Recourse to Force to Recover Occupied Territory and the Second Nagorno-Karabakh War," *European Journal of International Law* 32, no. 4 (2021)

[834] UN General Assembly, *Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights*, A/RES/37/43 (3 December 1982). §2

[835] GA Res 1541, principle IX(b)

is conducted as an expression of self-determination that results in a kind of occupation may not be immediately illegal (assuming it is an expression of self-determination).

6.2.d Surrender in IACs: occupation, legislative changes and material concessions

But even if the right of self-determination does not outlaw occupation *qua* occupation, it still might limit the possible material concessions made in surrenders. The next question is then whether occupation law outlaws the kind of expressions of control outlined in Chapter Two – is the definition of a surrender agreement workable, or does it demand illegal actions? 'Occupation law does not authorize a foreign power to introduce wholesale changes in the legal, political, institutional, and economic structures of the territory under effective control'[836]. Indeed, this is one of the reasons that some commentators argue that occupation law is ill-suited to the challenges of modern conflict.

The applicability is hampered by inconsistent state practice on recognising the status of occupied territory. The United States has previously considered occupied territory as territory of the United States. The port of Tampico was held to be a foreign port for revenue purposes despite the US exercising 'sovereignty and dominion'[837] even where other nations were required to treat the territory as US territory precisely because of this sovereignty[838]. The same is true for Cuba; a Joint Resolution of Congress in 1898 explicitly stated that it did not claim sovereignty or jurisdiction, other than for the purposes of pacification[839]. And it treated occupied US territory as enemy territory, prohibiting trade to the areas[840].

Article 43 of the Hague Regulations forbids the Occupying Power from extending its legislation or from acting as a sovereign legislator[841]. Article 64 of GCIV provides more detail,

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[836] Spoerri, "The Law of Occupation." p.192
[837] George Melling, "The War Power and the Government of Military Forces," *Journal of the American Institute of Criminal Law and Criminology* 7, no. 4 (1916) p.254
[838] Stirk, *The Politics of Military Occupation*. George Melling, 'The war power and the government of military forces', Journal of the Institute of Criminal Law and Criminology, 7 (1916), p. 254 And see 'Sanchez v. United States', US Reports, 216 (1909), p. 170, which drew on the judgment of American courts.
[839] Ibid. See Carman F. Randolph, "Some Observations on the Status of Cuba," *The Yale law journal* 9, no. 8 (1900) p.356.
[840] William E. Birkhimer, *Military government and martial law* (Washington, D.C.: Washington, D.C., J. J. Chapman, 1892). p. 296 Also in Stirk, *The Politics of Military Occupation*.
[841] Marco Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers," *European Journal of International Law* 16, no. 4 (2005)

and the ICRC Commentary observes that although it is only penal law that is mentioned, this was because it had not been satisfactorily observed in previous conflicts rather than to stipulate the continuance of only penal law. Indeed, 'there is no reason to infer *a contrario* that the occupation authorities are not also bound to respect the civil law of the country, or even its constitution'[842].

In the occupations of both Germany and Japan, the United States did not attempt to pretend the previous state sovereignty remained and in fact even wrote the Japanese Constitution. In Japan, when there was resistance to the desire of the United States that Japan disband its missions in neutral states on the basis that it had not been included in the Potsdam Declaration, which therefore formed the terms of the Japanese surrender, the US rebutted this attempt; General MacArthur stated that the surrender was not contractual and was, instead, unconditional on the part of Japan[843]. The fact that there was no resistance from Germany against the equivalent disbanding of its missions lent force to the claim that Germany sovereignty was even weaker at the time[844].

It is Article 43 of the Hague Regulations that is the arbiter of the admissibility of the Occupying Power altering local legislation (excepting courts, judges and public officials). Most importantly, an Occupying Power may not transform a democratic republic into a monarchy, or a liberal economy into a communist one[845]. A crucial exception to this "Fauchille doctrine" is 'where a political system constitutes a permanent threat to the maintenance and safety of the military forces of the occupant so that there is "absolute necessity" to abolish it'[846].

Sassòli emphasises, though, that while this would distinguish the American involvement in the German and Japanese regimes after their surrender World War II from the German attempts to

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[842] Oscar M. Uhler et al., *The Geneva Conventions of 12 August 1949: Commentary IV Geneva Convention relative to the Protection of Civilians in Time of War*, ed. Jean Pictet, trans. Major Ronald Griggin and C. W. Dumbleton (Geneva: International Committee of the Red Cross, 1958). p.335

[843] Stirk, *The Politics of Military Occupation*.

[844] Ibid.

[845] Ernst H. Feilchenfeld, *The international economic law of belligerent occupation*, ed. Law Carnegie Endowment for International Peace. Division of International, Monograph series of the Carnegie Endowment for International Peace, Division of International Law, (Buffalo, N.Y.: W.S. Hein & Co., 2000). p. 89 Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers."

[846] Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers." p. 671 Citing Edmund H. Schwenk, "Legislative power of the military occupant under Article 43, Hague Regulations," *Yale Law Journal* 54, no. 393 (1944-1945) p. 403 This is a reformulation of "unless absolutely necessary" though the meaning of this is controversial. Some argue that it does refer to military necessity, while others only require a level of justification to make legislative changes. However, the preparatory works of the Brussels Declaration demonstrate that the "necessity" mentioned in Article 3 was not meant to be equivalent to "military necessity". Instead it referred to the "necessity" of Article 3 of the Brussels Declaration. See Sassòli.

change the Belgian regime during World War I, the two former involvements should not be seen as precedent-setting. This is for three reasons. Firstly, he argues – while emphasising the right of self-determination and its role in preventing the Occupying Power from making such changes – that the particular odiousness of the Japanese and German regimes during the period, and the extent of their violations of international law, mark them as extraordinary. The second reason is that *debellatio* was considered at the time to end the law of occupation, which is no longer thought to be the case after GC IV. Indeed, the Allies exempted themselves from the Hague Regulations' prescriptions by insisting on, and ultimately being given, the unconditional surrender of Japan and Germany[847]. But the law has moved since then. Thirdly, the events, of course, predate GCIV.

Article 47 itself states that protected persons 'shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the . . . territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory'[848].

At first glance it might look as though this prohibits all institutional changes introduced by the Occupying Power, but the ICRC's Commentary emphasises that it is 'of an essentially humanitarian character; its object is to safeguard human beings and not to protect the political institutions and government machinery of the State as such'[849], suggesting that surrender for humanitarian reasons might also be acceptable. Sassòli, in making the same observations, argues that the sweeping changes made Anglo-American coalition in Iraq, in light of this interpretation given by the ICRC's Commentary, did not automatically breach international law in virtue of them being changes made by an occupying force[850]. Instead, each change ought to be evaluated against the stipulations.

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[848] *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*.
[849] Uhler et al., *The Geneva Conventions of 12 August 1949: Commentary IV Geneva Convention relative to the Protection of Civilians in Time of War*. p.274
[850] Sassòli is referencing, among others, the establishing of the Interim Governing Council in Iraq, abolished the Ba'ath Party and its system of government, the move towards a federalist constitutional system and the attempt

The UN SC Resolutions give some idea of the status of sovereignty during the occupation of Iraq. SC. Res 1483 affirmed the sovereignty of Iraq while recognising the US and UK as occupying powers. Even in the face of the illegality of the invasion of Iraq, SC. Res 1511 stated that the Iraqi Governing Council embodies the sovereignty of Iraq until 'an internationally recognised, representative government is established and assumes the responsibility of the Authority'. And SC. Res 1546 welcomed the formation of a sovereign Interim Government[851].

There are other cases where the Coalition did breach international law in relation to its governance during occupation (aside from the numerous human rights abuses). One example is the creation of a new Iraqi court before which to bring international crimes committed by the previous regime; existing Iraqi courts or the Coalition's own military courts would have been better alternatives[852]. As an aside, but an important aside, the US-led coalition also violated customary international law in the inconsistent application of property rights after conquest and in the large privatisation of Iraqi public assets, compounded by the inability of Iraqis to remedy the situation through legal avenues[853]. Certainly, more types of rights ought to be protected. It is certainly not suggested that the occupation was legitimate. Indeed, the argument is that *in spite* of the illegality of the war, some changes were legal.

In light of practice, Article 64 of GCIV and Article 43 of the Hague Regulations should, some argue, be reinterpreted broadly to allow a more interventionist approach on the part of Occupying Power, provided that its other responsibilities to the local population are observed[854]. Indeed, the *travaux préparatoires* reveals that the twin obligations – to respect local laws and maintain public order and security – are in fact two separate obligations. Spoerri notes that the French text – equally as authoritative as the English – refers to the restoration of 'l'ordre et la vie publics', *vie publics* being much more broad than the public order to which the English text refers[855]. However, one could also argue that what it requires is still less than

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to introduce a free-market economy. For full references for Coalition Provisional Authority documents, see Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers."

[851] United Nations Security Council, Resolution 1546 (2004), (8 June 2004).

[852] Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers."

[853] James Thuo Gathii, "Foreign and other economic rights upon conquest and under occupation: Iraq in comparative and historical context," *University of Pennsylvania journal of international economic law* 25, no. 2 (2004). Gathii argues that the solution is improved recognition of human rights of non-Western peoples by Western states.

[854] Spoerri, "The Law of Occupation."

[855] Ibid. See also Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers.". Sassòli notes that there is reason to interpret the original French in line with the "Brussels Declaration" on the

what is required by human rights law because the Occupying Power's legislative power is limited[856].

The defeat of a Mexican proposal which would have given Occupying Powers a right to repeal local legislation contrary to international human rights law in the drafting of the fourth Geneva Convention[857]. can be attributed to the 'embryonic character of human rights law at the time of the negotiations'[858]. In contrast, there is now reason to expect that the Occupying Power has not just a right but a duty to not respect institutions that are contrary to human rights law[859]. Importantly, this includes the right of self-determination[860].

There are other exceptions to the prohibition on an Occupying Power to legislate in occupied territories, generally for the purpose of humanitarian concerns of the occupied, for the security of the occupying force, to ensure respect for IHL and IHRL, provided the changes are essential, and where explicitly authorised to do so by a UN SC Resolution[861].

The possibility of an occupying state overhauling the political system of the occupied state is particularly dangerous territory. While 19th century positivist jurisprudence insisted on the

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grounds that it was proposed in 1874 by Baron Lambermont at the Brussels Convention, and given that Article 43 of the Hague Regulations combine Arts. 2 and 3 of the Brussels Declaration. This would equate the requirement to respect social functions and ordinary transactions which constitute daily life: *des fonctions sociales, des transactions ordinaires, qui constituent la vie de tous les jours.* See Ministère des Affaires Etrangères de Belgique, Actes de la Conférence de Bruxelles de 1874, at 23, reproduced in Schwenk, "Legislative power of the military occupant under Article 43, Hague Regulations.", p.393

[856] Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers."

[857] Spoerri, "The Law of Occupation."

[858] Ibid. p.195

[859] *Wall Opinion*, (International Court of Justice (ICJ) 2004) General List No. 131. The ICJ in the Wall Opinion is emphatic, but it is controversial. It did state that the ICCPR was applicable to 'acts done by a State in the exercise of its jurisdiction outside its own territory' §136. However, it has also come under criticism for, A, relying too much on the preparatory work of the ICCPR, B, not considering the extent to which the Palestinian Authority was responsible for human rights implementation and, C, assuming that the law of armed conflict had limited applicability to the situation due to rigorous adherence to the one-year cut-off point of IHL. See Michael J. Dennis, "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation," *American Journal of International Law* 99, no. 1 (2005) and Adam Roberts, "Transformative Military Occupation: Applying the Laws of War and Human Rights," *American Journal of International Law* 100, no. 3 (2006). Less controversial, but also less emphatic support, can be found in the fact that Additional Protocol I overlaps more with human rights law. Chapter Three (3.5.b) contains fuller information on the applicability of human rights law in cases where international humanitarian law would be the *lex specialis*. See also Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers."

[860] Roberts, "Transformative Military Occupation: Applying the Laws of War and Human Rights." Roberts argues that while the custom of "transformative occupation" has changed significantly since 1945, it does not amount to a full recognition that such transformative policies are valid, and thus he recommends either *ad hoc* UN Security Council Resolutions in such cases, or a formal modification of international humanitarian law. In the absence of this, it would seem, given the general applicability of human rights law in occupation, and the right of self-determination in both human right law and international humanitarian law, and notably the duty to promote it, such measures would only be able to be conducted in pursuit of the right of self-determination.

[861] Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers."

formal equality of states, European states considered the legal systems of non-European states to be inadequate to govern their citizens in those countries, and they therefore forced the non-European states to sign treaties of capitulation[862]. As Anghie notes, this is in direct conflict with the principle of territorial sovereignty[863]. Indeed, Anghie argues that the distinction between internal and external sovereignty was itself created by the protectorate system, in which 'uncivilized' states were placed under the 'protection' of European states which would control completely the external affairs of the 'protected' states. In theory, at least, the protected states would be allowed to have control over their internal affairs, thus marking the distinction between internal and external self-determination (though this pre-dated the expressions of the concept discussed above)[864].

Likewise, in a similar vein, Christine 'Bell's proposition could be used as a neo-imperialist tool to allow for third party involvement to reconfigure states in a mode which is judged more suitable to democratic ends…The participation of third parties in this process is an integral facet of this new order.'[865]

Again, similarly, neoliberalism was deeply embedded in the changes made by the Coalition Provisional Authority in Iraq. The aim was to turn Iraq into a free-market, neoliberal economy with a restricted public sector[866]. Specifically, the changes included the introduction of a 15% tax rate as the maximum for individuals and corporations[867]. Furthermore, the logic of improvement was present. This meant that while in theory the law of occupation did not allow occupying powers to make wholesale changes to the structure of governments, in practice, equating improvement with neoliberalism, conjoined with the presentation of Iraqis as unable to govern themselves[868], in practice it did was possible. Most crucially for the purpose of this thesis, the CPA delayed provincial elections, supported by the UN Security Council, despite ostensibly supporting democracy and over protests of Iraqi voices[869].

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[862] Anghie, *Imperialism, sovereignty, and the making of international law*.
[863] Ibid. p.86
[864] Ibid.
[865] O'Donoghue, "Good offices: grasping the place of law in conflict." p 24-5 Illan Rua Wall, "On the Threshold of Law: A Review of 'On the Law of Peace' by Christine Bell," *Irish Yearbook of International Law* (2010)
[866] Tzouvala, *Capitalism As Civilisation: A History of International Law*.
[867] Coalition Provisional Authority, Tax Strategy for 2003 (Order 37, 19 September 2003) CPA/ORD/19 (2003). Noted in: Tzouvala, *Capitalism As Civilisation: A History of International Law*.
[868] Tzouvala, *Capitalism As Civilisation: A History of International Law*.
[869] United Nations Security Council, Short Resolution 1546 (2004).

But this is all the more reason to put a robust right of self-determination at the centre, as a solution to neo-colonialism. The Brahimi report considered it dangerous to rely too much on the consent of local population for the legitimacy of the presence of peacekeepers and was criticised along neo-colonialist lines[870]. Although there is some reason to believe the UN SC looks more favourably on the authorisation of the use of force to restore a democratic government – after a coup in 1991 overthrew the democratically elected government in Haiti, and after the coup of 1997 that overthrew the Sierra Leonean democratic government – there is little evidence to support the right of states to *unilaterally* use force to reinstate a democratic government[871]. And even where some commentators have considered that the US-led coalition (in spite of the violations of international law elsewhere) to be in keeping with occupation law, it is the imposed transition to democracy, even in the face of later Iraqi endorsement and even with UN SC demands, that raises the most questions[872].

Theoretically, an occupation would end when a democratically elected government was introduced as it could not truly be considered a legislative change, even if initiated by the Occupying Power. However, the legitimacy of such governments is controversial, and if the armed forces of the Occupying Power remain in place, it is also not clear how they can be determined as remaining with the permission of the new government[873]. The ICCPR gives some limited guidance on what self-determination would look like: political rights and the rights of minorities[874].

To take stock, firstly, although one might have expected to find an immovable obstacle to resolving the *prima facie* inconsistency between self-determination and surrender, this is the same *prima facie* inconsistency as between self-determination and occupation, and this obstacle turns out to be one that can indeed be overcome. However, it has to be done with a great deal of care and though the injustice of occupation is not a complete inconsistency with a duty to surrender, it is always better to err on the side of self-determination.

Secondly, a framework has developed upon which a duty to surrender is based. The discussion of occupation law has illuminated how *terminative concession agreements* are situated in a framework of rights protection and self-determination. If an Occupying Power is not able to

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[870] Lakhdar Brahimi, Comprehensive review of the whole question of peacekeeping operations in all their aspect, (21 August 2000). Also Tzouvala, *Capitalism As Civilisation: A History of International Law*.
[871] Gray, *International Law and the Use of Force*.
[872] Benvenisti, "The Occupation of Iraq 2003-05."
[873] Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers."
[874] *International Covenant on Civil and Political Rights*.

make certain changes to the Occupied State, it stands to reason that this should also inform the limits of what are acceptable material concessions. They suggest that self-determination and the protection of human rights are areas that international law values more than constraints on legislative change. However, at all times self-determination must be respected. This is the crucial point and, without it, the arguments could be interpreted to look favourably on a foreign power introducing paternalistic changes to the political system. While other lines can be set aside, at no point is it implied that self-determination may be set aside; self-determination remains the constant. Lastly, one point does need to be emphatically emphasised and remembered: that '[t]he best way to respect [self-determination] for an occupying power is not to legislate, but to withdraw'[875].

6.2.e Secession: territorial concessions, NIACs, and peace

Internal self-determination refers to the right of peoples to choose their leaders free from domestic hindrance. In this sense, it can be thought of as a 'manifestation of the totality of rights embodied in the Covenant' that 'permit the expression of the popular will', notably freedom of expression, the right of peaceful assembly, the right to freedom of association, the right to vote, and the right to take part in the conduct of public affairs, either directly or through representatives[876].

The right of self-determination is often spoken of in conjunction with secession but it 'should be distinguished from any supposed general right of peoples to declare unilaterally secession from a state'[877]. Considering secession within the right of self-determination allows us to consider any problems with territorial concessions (in particular the coherence with territorial integrity), surrender in NIACs insofar as it illuminates state legitimacy, and the relationship between self-determination and peace, thereby providing a final reason for using self-determination in war termination.

Generally, the international order places high value on territorial integrity. In the *Aaland Islands* case, the League of Nations found that the Swedish-speaking population of the Aaland

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[875] Dinstein, *The International Law of Belligerent Occupation*. p.677
[876] Cassese, *Self-determination of peoples: a legal reappraisal*. p.53
[877] Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights*.

Islands could not leave Finland and join Sweden[878]. The Commission of Rapporteurs for the League of Nations stated that the separation and reattachment could only be considered on an exceptional basis, when the state lacks the will or ability to apply the right guarantees, and it is this statement that is given as support for a right of secession in what James Crawford calls *carence de souveraineté*[879]. As Finland was in a position to grant the inhabitants of the Aaland Islands satisfactory guarantees, the Commission did not consider separation necessary. These guarantees were of territorial property, education and political representation[880]. This suggests that these might be what the state is required to provide to hold up its side of the legitimacy bargain.

The Commission found that the state discharges its duty to respect the right of self-determination (in the form it was then) if it preserved, protected and promoted the ethnic characteristics of those minorities, and allowed them to be expressed; the right to secession was not required[881]. In such cases, the doctrine of territorial integrity was given primacy. The Friendly Relations Declaration 2625 (XXV) confirmed the need to preserve territorial integrity[882]. This is supported by the Badinter Arbitration Commission attached to the peace conference for the former Yugoslavia. It stated that 'whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris)* except where the states concerned agree otherwise'[883]. These present strong qualifiers to the general preference of the international community that referenda and plebiscites settle these issues and that 'in complex cases where self-determination and "anti-colonial" claims collide, the former should always prevail'[884]. As noted in relation to the case of Quebec, international law does not accept the right of a region to secede from a federal state,

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[878] "Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with Task of Giving an Advisory Opinion under the Legal Aspets of teh Aaland Islands Question," *Official Journal of the League of Nations*, Special Supplement No. 3, no. 5 (October 1920) 28.
[879] James Crawford, *The creation of states in international law*, 2nd ed. (Oxford: Clarendon, 2007). p.86. Taken from Knop, *Diversity and Self-Determination in International Law*.
[880] Knop, *Diversity and Self-Determination in International Law*.
[881] See also "Aaland Islands Question." It questions: But what reasons would there be for allowing a minority to separate itself from the state to this it is united? , p.4
[882] United Nations General Assembly, Resolution 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, (24 October 1970).
[883] Conference on Yugoslavia Arbitration Commission, Opinions on Questions Arising from the Dissolution of Yugoslavia, (11 January and 4 July 1922). Opinion No.2, §1 The Good Friday Agreement is an example of the latter.
[884] Cassese, *Self-determination of peoples: a legal reappraisal*. p.212

even if they represent a distinct cultural group (in this case one defined by language with an indigenous population)[885].

The self-determination of colonies does not conflict with the principle of territorial integrity only because international law 'gives colonies a status separate and distinct from the state'[886]. 'The Declaration on Friendly Relations reaffirms that the right of all peoples to self-determination cannot violate the principle of territorial integrity, but that a colony or other non-self-governing territory has a separate and distinct territorial status. The principle of territorial integrity thus prohibits secession, but not decolonisation'[887]. The other side of the coin is that the 'principle of territorial integrity prohibits secession, but only if the state complies with the principle of self-determination'[888]. All the more reason for giving such primacy to self-determination. In essence, the penultimate paragraph of the Declaration of Friendly Relations establishes secession as an exception. Secession speaks to how a state actor may discharge its duty to respect the right of self-determination in NIACs, whether it therefore has the right to not surrender, whether it must allow secession or provide further rights, or what material concessions it is required to make to satisfy the demands of self-determination.

Under General Assembly Resolution 2625, the principle of equal rights and self-determination principles grants all peoples 'the right to freely determine, without external interference, their *political status* and to pursue their economic, social and cultural development'[889]. This does not mean they are required to secede; they may also integrate with an existing state. As GA Res. 2625 states, 'The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people'[890].

In *Loizidou v Turkey,* 1996, from the ECtHR, Judge Wildhaber observed that the association between the right of self determination and the right to decolonisation was an association that existed 'until recently' and that there was an emerging consensus that the right to self-

[885] Ibid. *Reference re Secession of Quebec, [1998] 2 S.C.R. 217,* (Supreme Court of Canada 20 August 1998).
[886] Knop, *Diversity and Self-Determination in International Law*. p.75
[887] Ibid. p.75
[888] Ibid. p.76
[889] United Nations General Assembly, Short Resolution 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. Emphasis added.
[890] Ibid., Principle of equal rights and self-determination of peoples

determination was remedial in cases of flagrant and consistent human rights violations or a lack of representation[891].

In the case of a NIAC, then, if we are prioritising the protection of *post-bellum* rights, as prioritised by self-determination, it would: A, give the non-state actor, provided it represented the interests of its people, a right to secession in cases where the rights were not fully respected by the state and, B, the types of concessions that are referenced in *terminative concession agreements.* NIACs actually present less of a challenge to a theory of *terminative concessions* than do IACs.

One final point speaks to the reasoning behind the right of self-determination. The commentary on the right of self-determination in relation to Article 1(2) of the UN Charter is crucial to the development of a law of surrender. Knop, who assumes for the purposes of argument that self-determination means something other than the non-interference in the internal affairs of states, discusses two interpretations of this Article: 'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace'.

On one view, the purpose of the UN is to 'develop friendly relations…based on…self-determination' *and* 'to strengthen universal peace'. This reading would imply that self-determination is of absolute value; it is an end in itself, not a means to an end. On the alternative view, the purpose of the UN is to 'develop friendly relations based on…self-determination, and…*other* appropriate measures to strengthen universal peace' (emphasis added). Such a reading would imply that self-determination is of instrumental value insofar as it cultivates peace. The idea that self-determination can be disregarded if compliance with it would exacerbate conflict is backed up by Cassese's view[892].

Article 55 of the UN Charter could also support this view, as could the Declaration on Friendly Relations: self-determination is to be furthered 'to promote friendly relations' and 'the subjection of peoples to alien subjugation…constitutes a major obstacle to…peace and security'. Knop notes that some authors writing during and after the Cold War argued variations of Frederic Kirgis' assertion that a claim of secession must be a balance between the

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[891] *Loizidou v Turkey*, (European Court of Human Rights 28 November 1996) 40/1993/435/514.(concurring opinion of Judge Wildhaber, joined by Judge Ryssdal)

[892] Antonio Cassese, "Article 1, Paragraphe 2," in *La charte des Nations Unies*, ed. Jean-Pierre Cot and Alain Pellet (Paris: Economica, 1985). p.43

degree of representative government to be achieved, and the extent of destabilisation of the international community[893].

It is also noteworthy that the League of Nations Commission of Rapporteurs, in examining the *Aaland Islands* case, considered the impact of their determination on the security of Sweden and Finland, the two states involved, and *peace and stability* in the region[894]. The islands were considered key to the security of Finland because in the winter the islands were joined to Finland by ice as the water froze over[895]. It described the Aaland Islands as 'a dagger…always raised…against the heard of Sweden'[896] because of its proximity to Stockholm. It concluded, therefore, that the Aaland Islands did not pass to Finland *because the demands of peace and security, and self-determination* could be achieved without secession.

The obligation to surrender is situated at the overlap between the right of self-determination (both in terms of a surrender leading to a situation which might compromise the right, and in terms of being an expression of self-determination), the law of occupation and peace. While self-determination is of instrumental value – that is, it aimed to promote peace – it would be dangerous to adopt an approach that disregards the right of self-determination fully. It would certainly be hasty to assert that the requirements of peace always takes primacy over self-determination without the approach being itself an expression of self-determination.

However, if *terminative concessions* are themselves expressions of self-determination, it seems that they are fully coherent with international law. That being established, the next stage, therefore, is to consider how this (internal) self-determination may be accommodated. This chapter will return to the "procedures of consent" discussed in the previous chapter: how must self-determination be recorded or expressed in *terminative concessions*?

6.2.f Returning to the procedures of consent

General Assembly Resolution 2625 notes that the principle of equal rights and self-determination principles grants all peoples 'the right to freely determine, without external

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[893] Knop, *Diversity and Self-Determination in International Law*. p.89 See Frederic L. Kirgis, "The Degrees of Self-Determination in the United Nations Era," *The American Journal of International Law* 88, no. 2 (1994) p.308.
[894] Knop, *Diversity and Self-Determination in International Law*.
[895] Ibid. See also: "Aaland Islands Question."
[896] "Aaland Islands Question."

interference, their *political status* and to pursue their economic, social and cultural development'[897]. As GA Res. 2625 states, 'the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people'[898].

The ICCPR is also the source of the right to democratic participation[899]. It reflects the expectation that the state ought to reflect the will of the people. Although there is consensus that elections should be periodic, genuine, free and fair, there is less agreement about the specific form and the UN General Assembly has observed that every state has the right to determine its own political system, suggesting that direct democracy is not necessarily favoured[900]. Furthermore, the 'dream of representative governments for all was not contemplated' by the framers of the UN Charter and the democratic requirements in the ICCPR are loose[901].

That being said, plebiscites or referenda have been used in several cases to terminate conflict – Spain in 1978, Bosnia in 1994, Northern Ireland and the Republic of Ireland in 1998 and Iraq in 2005 are some examples[902]. The Treaty of Versailles had also provided for a number of plebiscites to be held, albeit on contentious territories[903]. Relatedly, the use of war manifestos – manifestos drawn up by the state designed to increase public support for a war – have been used for centuries, though more out of pragmatic concerns and the inconvenience that a lack of such support would bring rather than recognition that the public had a right to make such a decision[904].

The efficacy of referenda in termination of conflicts is an ongoing subject of research. While in some cases, such as the Colombia-FARC peace agreement in 2016, below, it has been argued

[897] United Nations General Assembly, Short Resolution 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. Emphasis added.
[898] Ibid., Principle of equal rights and self-determination of peoples
[899] Marc Weller, "Self-Determination and Peace-Making," in *International Law and Peace Settlements*, ed. Andrea Varga, Marc Weller, and Mark Retter (Cambridge: Cambridge University Press, 2021).
[900] Ibid.
[901] Cassese, *Self-determination of peoples: a legal reappraisal*. p.4
[902] Neophytos G. Loizides, "Referendums in Peace Processes Dataset," (Queen's University Belfast).
[903] Wheatley, "The self-determination of peoples."
[904] Oona A. Hathaway et al., "War Manifestos," *University of Chicago Law Review* 85, no. 5 (2018)

that referenda have a negative effect by can amplify divisions and polarisation[905] they also have the capacity to promote legitimacy[906].

Some points on referenda for war termination are worth making insofar as they speak to self-determination and imperialism in law. The referendum on the status of the Falkland Islands was described by Argentine President Cristina Fernández de Kirchner 'as if a consortium of squatters had voted whether to continue illegally occupying a building'[907]. It is also straight out of the colonial playbook. The plantations in the 16th and 17th century in Ireland by British settlers, and British colonisation of the Americas are a couple of other examples. These situations are not identical, but they are all cases in which the holding of a referendum on the status of the territory would not necessarily provide a solution.

The best response to this is surely that self-determination is not fully realised with the conducting of a plebiscite, it is not *true consent*; it is more faceted, and needs to include the protection of rights of minorities. An alternative possibility is that proposed by GA. Res. 2983 relating to the *Question of Western Sahara*, that of ensuring that '*only* the indigenous inhabitants exercise their right to self-determination and independence'[908]. This does not necessarily entirely resolve the issue, as sorting the population into indigenous and non-indigenous also presents problems. The Belfast Agreement, in 1(ii) states that 'it is for the people of the island of Ireland…to exercise their right of self-determination on the basis of consent, freely and concurrently given…accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland'[909]. Bell and Cavanaugh note that, contrarily, the need for majority support in the South is not specifically reinforced as it is with the North[910]. This is an example of constructive ambiguity. In essence, therefore, while the question of whose consent to seek for surrender is not entirely nailed down, this is not necessarily a problem. A similar approach might be

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[905] Aila Matanock and Miguel García-Sánchez, "The Colombian Paradox: Peace Processes, Elite Divisions, and Popular Plebiscites," *Daedalus* 146 (04/07 2017)
[906] Katherine Collin, "Peacemaking referendums: the use of direct democracy in peace processes," *Democratization* 27, no. 5 (2020)
[907] Mario Diaz-Balart, Recognizing the Falkland Islands referendum in favor of retaining their status as a British Overseas Territory, (U.S. Congress, 2013).
[908] United Nations General Assembly, Resolution 2983 (XXVII) Question of Spanish Sahara, (14 December 1972). §5(b), emphasis added.
[909] *The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland*, (10 April 1998).
[910] Christine Bell and Kathleen Cavanaugh, "'Constructive Ambiguity' or Internal Self-Determinatinon? Self-Determination, Group Accommodation, and the Belfast Agreement," *Fordham International Law Journal* 22, no. 4 (1998)

adopted here, namely that the referendum would have to achieve a majority overall in the country whose territory is in dispute, additionally contingent on the support of a majority of residents within the territory. Some flexibility must be maintained and there will always need to be *ad hoc* arrangements.

Another issue that arises is the need to promote the rights of marginalised groups without endorsing the types of liberalism that has damaged these communities. As encountered in Chapter Four, it is not possible to definitively rank rights on their importance. Indeed, Pahuja agues that international law's claim to universality is 'the source of [its] imperial quality'[911]. What is needed is an open universality[912]. Specifically in relation to rights, B.S. Chimni notes that while civil and political rights are helpful for advancing the cause of the poor and marginalised communities, neo-liberalism presupposes a cultural superiority that is ultimately highly damaging and 'wars and interventions are unleashed' in the name of civil and political rights, and the solution presented is to avoid a narrow conception of rights[913].

Likewise, while the inclusion of human rights standards in peace processes is necessary, it is not sufficient to guarantee women the same level of rights as men. In particular, the 'guarantee of economic and social rights is essential', rights that are not given the same attention as, say, the right to life and liberty[914]. The same concerns have also been expressed toward the brokerage of the voice of women by liberal NGOs[915]. In essence, therefore, far from being an incomplete theory, a theory of obligated surrender which remains agnostic to the relative

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[911] Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality*, Cambridge Studies in International and Comparative Law, (Cambridge: Cambridge University Press, 2011). p.256

[912] Ibid. Pahuja recalls Linda Zerilli speaking of Laclau. Zerilli explains that Laclau 'reinterprets universality as a site of multiple significations which concern not the singular truths of classical philosophy but the irreducibly plural standpoints of democratic politics' See: M. G. Zerilli Linda, "This Universalism Which Is Not One," review of Emancipation(s), Ernesto Laclau, *Diacritics* 28, no. 2 (1998) p.8

[913] Chimni, "Third World Approaches to International Law: A Manifesto." p.17

[914] Christine Chinkin, Peace Agreements as a Means for Promoting Gender Equality and Ensuring Participation for Women (Background Paper), EGM/PEACE/2003/BP.1 (31 October 2003). p.17

[915] María Galindo, "Political, Feminist Constitution of the State: The Impossible Country We Build as Women," *No se puede descolonizar sin despatriarcalizar* (Hemispheric Institute2013), https://hemisphericinstitute.org/en/emisferica-11-1-decolonial-gesture/11-1-dossier/constitucion-politica-feminista-del-estado-el-pais-imposible-que-construimos-las-mujeres.html#_edn1. It is worth noting that this constitution is also against mandatory military service. It is also explicitly signals against being put to a universal vote: 'We do not claim the status of law because the contents of this document are greater than the law…this constitution exists as an expression of the impossible country that thousands of women create each day'. However, the terminative concession proposed here must aspire to the sorts of quasi-legal legitimacy of peace agreements.

weighing up of rights remains open, and necessarily so, a point already made in the JWT chapters.

The right of self-determination, as expressed in the *Western Sahara* case, requires the paying of regard 'to the freely expressed will of peoples'[916]. The case observes that GA Resolution 1541 listed the modes of self-government as independence, free-association or integration, and that such self-government 'should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes'[917].

The ICJ's advisory opinion in the *Western Sahara case* provides further guidance on what procedural form this would take. General Assembly Resolutions between 1966 and 1973 considered the holding of a referendum to be the preferable option. However, the referendum was postponed by GA Res. 3292 until the General Assembly decided on the appropriate policy and until the ICJ issued its opinion 'in order to accelerate the decolonisation process'[918]. Cassese states that the Western Sahara case represents a departure of the UN 'from its fairly consistent policy of ascertaining the will of the population concerned by means of an internationally supervised referendum'[919]. However, it is notable that the ICJ had 'not found legal ties of such nature as might affect the application of resolution 1514(XV) in the decolonisation of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the territory'[920]. This is more notable in light of the fact that, just before the advisory opinion was issued, the Special Committee on Decolonization found that the 'overwhelming consensus among Saharans within the Territory in favour of independence and opposing integration with any neighbouring country' and that any 'differences of opinion…were concerned not with the objective but with the means by which it should be achieved and the support given to rival political movements'[921]. The Mission visited the territory and conducted interviews with leaders of Mauritania, Algeria, Morocco, Spain and Saharan delegations[922]. The fact that the ICJ

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[916] *Question of Western Sahara*, (International Court of Justice (ICJ) 16 October 1975, 1975) General List No. 61. §59
[917] Ibid. §57
[918] United Nations General Assembly, Resolution 3929 (XXIX) Question of Spanish Sahara, (13 December 1974). §3
[919] Cassese, *Self-determination of peoples: a legal reappraisal*. p.218
[920] *Question of Western Sahara*, (International Court of Justice (ICJ) 16 October 1975, 1975) General List No. 61 §162
[921] Special Committee on Decolonization (C-24), *Report of the United Nations Visiting Mission to Spanish Sahara* (1975). §202
[922] Ibid. §§17-66

considered the matter not settled and that the UN General Assembly continued to push for the holding of a referendum demonstrates the UN's alignment behind the holding of a referendum to settle the issue. In the *Quebec* case, the Supreme Court of Canada noted that even though a referendum 'has no direct legal effect', the 'democratic principle…would demand that considerable weight be given to a clear expression of the people of Quebec of their will'[923]. More strongly, the ICJ in its 2010 Advisory Opinion on Kosovo noted that the declaration of independence was *not* in breach of international law though it did not discuss the legal validity of it[924]. The declaration of independence was supported by a referendum in favour of independence by 99.87% with a turnout of 87.01%[925]. Kosovo's statehood has since been recognised by over 100 countries, albeit the recognition is divisive[926].

There are some notable cases that did not draw on a plebiscite or referendum. The Indian invasion of Goa, Damao and Din on 1961 after the Portuguese dawdled on decolonisation was only briefly challenged by the UN Security Council and a UNSC resolution referring to the principle of self-determination, was vetoed by the USSR[927]. Another case is the UN General Assembly's position on Gibraltar, in recognition of the "squatters" issue, it chose to emphasise a solution based on negotiations between Spain and the UK, though negotiations that took into account the interests of the people in the territory[928].

To take stock at this point, although self-determination is taken to be of instrumental value, in that it is important because it facilitates peace, this does not give other states license to act in such a way that would compromise self-determination even if avowedly motivated by peace. Not only is the duty to surrender based on self-determination coherent with just war theory and international law, it is a natural extension of them such that they are not complete without the duty. Continuation of conflict in some cases will compromise the rights of the population to a greater degree than peace, and the moral force of the various bodies of international law – indeed, not only human rights law – demands the inclusion of some instrument which remedies

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[923] *Reference re Secession of Quebec, [1998] 2 S.C.R. 217*, (Supreme Court of Canada 20 August 1998) §87
[924] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Advisory Opinion)*, (International Court of Justice 22 July 2010)
[925] 'Central Board of Kosovo for the Conduct of the Referendum, Result, 7 October 1991' in James Summers, "Kosovo," in *Self-Determination and Secession in International Law* (Oxford University Press, 2014); Marc (ed.) Weller, *The Crisis in Kosovo 1989-1999* (Documents and Analysis Publishing, 1999).
[926] With reference to the Montevideo convention, the main challenge to the statehood of Kosovo is the authority of its government, chiefly because it is not in control over its entire territory and because international institutions are present. Stefan Wolff and Annemarie Peen Rodt, "Self-Determination After Kosovo," *Europe-Asia studies* 65, no. 5 (2013).
[927] Cassese, *Self-determination of peoples: a legal reappraisal*.
[928] United Nations General Assembly, Question of Gibraltar, (1967).

this, provided it does not also come into conflict with these priorities. The caveats are that the *terminative concession agreement* may not include such a large transfer of control to amount to a shift in sovereignty, but may include legislative changes within certain parameters, and must completely accord with self-determination as expressed through a referendum unless under very exceptional circumstances.

6.3 An illustration: the Havana Agreement between Colombia and the FARC

The *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (National Government of Colombia - FARC-EP)*[929], or the "Final Agreement" or "Havana Agreement", in 2016 ending the civil war between the Colombian government and FARC is suitable example for an illustration of how *terminative concessions* might look like in practice, and how the issues discussed manifest. It is notable not only in light of it being representative of Bell's "law of the peacemakers", but also because it was a treaty decided by a referendum. It is not unique in this regard. Referenda had been used in the Democratic Republic of Congo, Indonesia/East Timor, Iraq, Northern Ireland and Somalia[930]. But it is an important case. In Colombia, a national committee was also set up to consult with Colombian citizens and be informed of their priorities for the peace process, another potential best practice route for manifesting self-determination in peace-making[931]. However, in many ways it is not typical and cannot be considered to be representative of broader practice. Colombia is particularly legalistic in that the Constitution contains IHL and IHRL obligations, and therefore they hold internally, and the Constitutional Court has found that humanitarian, human rights and constitutional norms constitute a "constitutional block"[932].

The role of IHL and IHRL obligations is particularly interesting in light of the Havana Agreement. Not only has Colombia ratified the Geneva instruments of IHL, but under the 1991 Constitution of Colombia, human rights and humanitarian obligations apply *internally*,

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[929] *Havana Agreement*.
[930] Christine Bell, "Lex Pacificatoria Colombiana: Colombia's Peace Accord in Comparative Perspective," *AJIL Unbound* 110 (2016)
[931] Christine Bell and Catherine O'Rourke, "The People's Peace? Peace Agreements, Civil Society, and Participatory Democracy," *International Political Science Review* 28, no. 3 (2016).
[932] Pablo Kalmanovitz, "Ius Post Bellum and the Imperative to Supersede IHL," *AJIL Unbound* 110 (2016)

meaning that citizens can appeal to *national* courts on potential breaches[933]. Article 214.2 of the Constitution states that IHL 'in all cases…shall be observed'[934]. The Constitutional Court also stated that it understood that the core of human rights, humanitarian and constitutional norms constituted a single 'constitutional block' whose primary purpose was to protect human dignity and basic rights[935]. More explicitly, in *Arturo Ribon Avilan v Colombia*, the Inter-American Commission found that IHL and IHRL 'converge' and mutually reinforce one another[936].

To offer a necessarily short, and consequently crude, summary, Colombia has a long history of intrastate violence, which can be separated into three periods, broadly between liberals and conservatives, since its independence in 1819. The Thousand Days War (1899-1902) ended with an agreed peace, but the assassination of the Liberal Party presidential candidate precipitated the period known as *La Violencia* from 1948 to 1958. Another settlement terminated this conflict in which the Liberal and Conservative Party agreed to alternate power for 16 years[937]. Demands by some sectors of society, notably the peasantry, for better representation were met with repression from a government concerned about the spread of communism, and the *Armadas Revolucionarias de Colombia* (FARC) in 1964, and later the *Ejército de Liberación Nacional* (ELC) were formed in 1964. Landowners organised themselves against the guerrillas, who had relied on extortion for income, in the 1980s. Drug production and trafficking grew substantially and when in 1991 a new Constitution was created, although it provided better rights protection, the inertia of the illegal drug trafficking was not reversed, and the violence continued.

There have been various efforts to fashion peace. In 1998 a peace process with FARC started but failed. In 2003, a scheme to trade demobilisation of the paramilitary groups for socioeconomic benefits reduced the intensity of the conflict, but the FARC continued to fight. The first peace agreement, in Havana, was completed in 2016, between the Colombian

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[933] Ibid. See also César Rojas-Orozco, *International Law and Transition to Peace in Colombia: Assessing Jus Post Bellum in Practice* (Leiden, The Netherlands: Brill | Nijhoff, 24 Jun. 2021, 2021).. Both referencing Article 93

[934] *Colombia's Constitution of 1991 with Amendments through 2015*, trans. Max Planck Institute (Comparative Constitutions Project: Oxford University Press Inc., 2015).

[935] Kalmanovitz, "Ius Post Bellum and the Imperative to Supersede IHL."

[936] Ibid. See *Arturo Ribón Avila v. Colombia*, (Inter-American Commission on Human Rights 30 September 1997) Report No. 26/97; Case 11.142

[937] Rojas-Orozco, *International Law and Transition to Peace in Colombia: Assessing Jus Post Bellum in Practice*. Here citing: Daniel Pécaut, *Crónica de cuatro décadas de política colombiana* (Bogotá: Norma, 2006).

government and the FARC. The ELN remains active, albeit with low military capacity[938]. Some FARC dissidents also continue to operate in the country and the conflict continues to meet the Uppsala Conflict Data Program's threshold for battle-related deaths per year[939].

This agreement was put to a referendum, and achieved 49.8% of the vote, to 50.2%. Afterwards, the agreement was revised and ratified by the Congress. The new Final Agreement, or Havana Agreement was reached on 24 November 2016 after deliberation. The Agreement itself is lengthy at around 300 pages, and highly detailed. This is because it took a "nothing is agreed until everything is agreed" approach, and amounted to a consolidation of previous agreements on various issues[940]. It specifically contained measures to transition FARC-EP to a legal entity[941]. Indeed, it contains many provisions that lend strength to the idea of the peace agreement as a constitutional document.

The Havana Agreement would be a *terminative concession* by the definition provided above, derived from the definition of surrender in Chapter Two. It was an agreement and it did terminate the conflict (even if it did not end violence completely). The FARC did not achieve their main stated aim, but it certainly did not completely fail. On 27 May 1963, key figures of the FARC held a meeting in which they stated their aims to be the seizure of power from the capitalist government and fostering anthropology-based Marxist theories[942]. This main goal was not achieved but the FARC were guaranteed five seats in the House of Representatives and there are broad measures to facilitate wider participation in Colombian politics by the FARC. The Government achieve their aim of peace and the (broad) demobilisation of the FARC, though they also had to make some concessions, just stated, towards the FARC.

However, it is not the picture of subjugation and humiliation that the word "surrender" is sometimes associated with. In fact, some argue that it was a positive-sum outcome[943]. The peace deal acted as a mechanism to promote greater political participation. The language of *terminative concessions* is perhaps therefore better suited to describe agreements of this kind than the pejorative, baggage-laden of "surrender".

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[938] Rojas-Orozco, *International Law and Transition to Peace in Colombia: Assessing Jus Post Bellum in Practice*.
[939] "Uppsala Conflict Data Program," in *UCDP Conflict Encycolpedia* (Uppsala University, 2020). www.ucdp.uu.se. [Accessed 24 February 2022]
[940] Bell, "Lex Pacificatoria Colombiana: Colombia's Peace Accord in Comparative Perspective."
[941] *Havana Agreement*. 3.2.1.2(a)
[942] "Uppsala Conflict Data Program."
[943] Alexandra Phelan, "Engaging Insurgency: The Impact of the 2016 Colombian Peace Agreement on FARC's Political Participation," *Studies in Conflict & Terrorism* 42, no. 9 (2019/09/02 2019)

The agreement sought to provide for its own legal status, the referendum being one of the mechanisms by which it sought to achieve this. As noted in Chapter Three, agreements that involve a non-state actor do not, strictly speaking, attain the status of a treaty. The legal status of the Havana Agreement was of concern both to the Colombian government and to FARC, keen to avoid the possibility of subsequent governments making revisions. The formula they arrived at including declaring the document a special agreement under Common Article 3 of the Geneva Conventions, and unilateral declaration by the Colombian State before the UN requesting that the Final Agreement be annexed to UN Security Council Resolution 2261 (2016)[944]. It also was made part of the "Constitutional Block" in the Colombian Constitution, together with IHL and IHRL[945].

After some criticism that the delineation of special agreements under Common Article 3 of the Geneva Conventions was reserved for humanitarian purposes only, the new Agreement stated that this was for 'the effects of its international validity'[946]. The original purpose of the special agreements under Common Article 3 was to extend the regulations covering IACs to NIACs by the means of bilateral agreements, in recognition of the limited protection given in NIACs by the Geneva Conventions[947].

Though this thesis has sought to place the most weight on self-determination and democracy, there is room for other groups, and indeed this should be considered to be a model aspect of such agreements. As O'Rourke and Bell note, there are problems with the vagueness of the term "civil society", particularly in its potential opposition to democracy, but groups such as churches and women's organisations may assist with providing popular purchase[948]. But such groups would likely benefit the expression of human rights which are central to a duty to surrender as it has so far been set out. Gender issues generally feature heavily in the Final Agreement, although it was not part of the negotiations until two years into the process[949]. Gender mainstreaming is a feature of the Agreement and one of the main concerns hoped for 'ensuring attention to the position of women'[950]. Though the agreement that was rejected has

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[944] Rojas-Orozco, *International Law and Transition to Peace in Colombia: Assessing Jus Post Bellum in Practice*.
[945] "Acto Legislativo 01 de 2016," ed. Congreso de la República de Colombia (2016).
[946] *Havana Agreement*. Preamble
[947] Rojas-Orozco, *International Law and Transition to Peace in Colombia: Assessing Jus Post Bellum in Practice*. Also: Bell, *On the law of peace: peace agreements and the Lex Pacificatoria*.
[948] Bell and O'Rourke, "The People's Peace? Peace Agreements, Civil Society, and Participatory Democracy."
[949] Lina M. Céspedes-Báez, "Gender Panic and the Failure of a Peace Agreement," *AJIL Unbound* 110 (2016)
[950] Chinkin, Short Peace Agreements as a Means for Promoting Gender Equality and Ensuring Participation for Women (Background Paper).

also been criticised for framing gender along heterosexual and cisgender lines, to the exclusion of the LGBTI community, and the concern was that the rejection of the Final Agreement in the referendum would lead to a toning down of gender issues[951], the inclusion is positive. Likewise, the inclusion of Afro-Colombians in the process was encouraging and the commitment to dialogue with the community is promising, though it is probably still too early to entirely judge the success of the Agreement[952].

It is also not claimed that a theory of terminative concessions offers a panacea. Instead, the rather more modest claim is that the inclusion of mandated terminative concessions in international legal and normative canon would bring its reality more into line with its aspirations. In other words, the claim is that a international legal and moral framework *with* a duty to make terminative concessions is a better expression of the principles and aims of international law and just war theory than an international legal and moral framework *without* one. The terminative concessions would still need to accommodate suitable transitional justice measures and, as we have seen, a broad understanding of rights. The Agreement includes measures related to the Special Jurisdiction for Peace (JEP), a set of bodies to investigate and levy penalties for crimes that do not rise to the level of war crimes or crimes against humanity, and gross human rights violations[953]. Like many peace treaties, the Final Agreement does, 'on termination of the hostilities, in accordance with IHL…grant "the broadest possible" amnesty'[954]. The Inter-American Court of Human Rights jurisprudence establishes the requirement to investigate and punish serious violations of human rights law and IHL and so not all cases could be granted amnesty[955]. It does, however, give some further support to the idea that *jus ex bello* is not wholly dependent on *jus ad bellum* or *jus in bello*.

One concern expressed is around the requirement of the military to reduce. The transition between war and peace also marks the transition, if not from IHL to IHRL, at least away from IHL generally and towards the law of occupation, insofar as they are two separate bodies of law, and then on to IHRL. It is not always straightforward. In Colombia, the government

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[951] Céspedes-Báez, "Gender Panic and the Failure of a Peace Agreement."
[952] Xiomara Cecilia Balanta-Moreno and Yuri Alexander Romaña-Rivas, "The rights of Afro-Colombian communities in the Final Agreement and its mechanisms of implementation," *AJIL Unbound* 110 (2016)
[953] Colleen Murphy, "Judging the justice of the Colombian Final Agreement," in *The Colombian Peace Agreement: a multidisciplinary assessment*, ed. Jorge Luis Fabra Zamora, Andrés Molina-Ochoa, and Nancy Doubleday, Routledge studies in peace and conflict resolution (Milton Park, Abingdon, Oxon: Routledge, 2021).
[954] *Havana Agreement*. p.157
[955] Juana Inés Acosta-López, "The Inter-American Human Rights System and the Colombian Peace: Redefining the Fight Against Impunity," *AJIL Unbound* 110 (2016)

avoided the question of military downsizing in the wake of the Havana Agreement, and so while may be less explicitly permissive than IHRL, there is a subset of actions that are not prohibited in IHL which are prohibited in IHRL[956]. Though Chapter Two demonstrated that surrenders do not actually have to involve the demilitarisation, and it is not necessary in this regard, it does speak to the potential success of the agreement and the conception of peace as something fuller than just the absence of war.

A full duty of surrender would likely also have to include some mention of third party involvement: the Final Agreement did acknowledge the good offices role played by Venezuela and Chile. Likewise, a full consideration of terminative concessions, to be considered complete, would also have to consider third-party involvement which is beyond the scope of this thesis. However, it would have clear benefits. It would facilitate negotiations and assist with defining the form the justice would take; what concessions should be made? The participation of third parties is also an important part of the new order that is the *lex pacificatoria: '*Arguably Bell's description of the re-emergence of a non-Westphalian view of treaty law since the Cold War is both undermined and reinforced by the practice of good offices. Certainly state-led good offices come within the traditional account of international law; however, the roles played by the heads of organisations herald a move away from the state'[957].

This brief analysis outlines the form of what a duty to surrender could require, and that it is possible. The Havana Agreement is coherent in form with the hybrid self-determination described by Christine Bell, the tension in international law between IHRL and IHL, and the features of *terminative concessions agreements* discussed in this thesis.

6.4 The right, and duty, of an individual to surrender

A legal framework that mandates surrender in certain circumstances has in many places had to grapple with the relationship between the individual and the state. This thesis is firmly situated in the human rights context (the law which protects individuals from actions "from above"), issues of self-determination and the legitimacy of governance. An analysis of the just war

[956] Kalmanovitz, "Ius Post Bellum and the Imperative to Supersede IHL."
[957] O'Donoghue, "Good offices: grasping the place of law in conflict." p.25

theory thinking on the war termination and the duty to surrender, in Chapters Four and Five, have also raised the possibility of a more grassroots influence.

McMahanian just war theory in particular has considered individuals more morally culpable as perhaps the just war theory orthodoxy. Finlay's just war theory also provides a more expansive outline of representation, and indeed contestation. Given the role of resistance played in his theory, it is also necessary to consider cases in which the individual is more directly pitted against the state. In other words, where the state either wishes for continuance of a conflict, or does not explicitly move for its termination, what would the legal manifestation of this take? The next section of this chapter will therefore consider two further possible manifestations, based on the individual's role in surrender: a kind of reverse *levée en masse,* and conscientious objection.

6.4.a Levée en masse

One might appeal to the status of participants in a *levée en masse,* observing that individuals are permitted (in that the law guards against the ill treatment of such participants) to respond to occupation without the authority of the state. One might then question why such individuals are afforded special privilege in coming to a different conclusion than the state on the balance between obeying the state and military participation in one direction and not the other. In other words, one might question why a group of individuals are given the authority to enter armed conflict but not to end it. In this sense, if a duty to surrender would need to be more decentralised and bottom-up, the *levée* can be seen as a reverse surrender. To find its applicability to a duty to surrender, it would be worthwhile to discuss the purpose of the idea.

Recall from Chapter Three that Art. 4(A)(6) of the Third Geneva Convention describes this category of persons who, upon being captured by the enemy, are entitled to prisoner of war status: 'Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war'.

The Commentary to the Convention notes that this relates to the idea of *levée en masse*[958]. It is the only group of persons with full autonomy from the state[959]. They are also not considered civilians for the purposes of rules governing the conduct of hostilities. Likewise, Article 9 of the Articles of State Responsibility owes something to the idea of *levee en masse*:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

The wording of the text itself is taken from the Hague Conventions, but the concept goes back to the Lieber Code, and is quickly associated with the French Revolution. The Lieber Code states that:

> If the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the approach of a hostile army, rise, under a duly authorized levy 'en masse' to resist the invader, they are now treated as public enemies, and, if captured, are prisoners of war[960]

The more recent ICRC Commentary of the Third Geneva Convention of 1949 makes a number of important observations. Firstly, again, the *levée* is the only group of persons recognised under Article 4A of the Third Geneva Convention that has full autonomy from the state[961]. They also do not require a command structure or a fixed distinctive sign. Though this is limited by the temporal element: they must shortly be replaced by regular forces which ought to be in compliance with the law of war[962]. They can be formed in non-occupied areas or areas in which the 'Occupying Power has lost control over the territory and is attempting to regain it'[963]. But they must carry arms openly and respect the laws and customs of war and it must be

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[958] International Committee of the Red Cross, "Prisoners of war," in *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, Commentaries on the 1949 Geneva Conventions (Cambridge: Cambridge University Press, 2021).
[959] Ibid.
[960] *Lieber Code.* Article 51
[961] Cross, "Prisoners of war." Nils Melzer, ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, (2009).
[962] Article 4, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*.
[963] Cross, "Prisoners of war." p.390

spontaneous (in that they have not had time to organise into regular armed units or by the State)[964].

In one sense, the *levée* is the reverse of one aspect of the duty to surrender that is suggested here. Independently of state authority, a group of civilians have decided to become part of the armed resistance and this decision is considered legitimate in international law only because of the demands of the situation. There are several differences between a *levée* and a sort of surrender *en masse*. The obvious difference is the direction: a *levée* is a transition from "peace" to war, and the surrender is the reverse. It would seem strange to sanction the legitimacy of such a group decision only towards war and not peace, though.

A second is that the *levée* is only recognised in territory not yet occupied. Debate about whether those who resisted invasion should be legitimised or not continued into the Hague Peace Conference of 1899, again with the divide being along power lines[965]. Indeed, it was this stalemate eventually led to what Adams calls the 'most famous and majestic fudge words in international legal history': the Martens Clause, which featured in this thesis' introduction[966]. The 1949 GCs adopted a similar position as that outlined in the 1906 Hague Regulations. The Commentary to the 1949 Geneva Conventions explained that the idea of a *levée en masse* was not compatible with a full occupation, and the reason is telling. It observed that the lawmakers could not, out of respect for humanitarian principles, permit or encourage levies[967]. It must therefore be either replaced by, or incorporated into, the regular forces of the authority the *levée* purports to represent[968].

It was another French resistance which developed the idea, as the experience of World War II, in which the French resistance was considered largely legitimate, caused the first three 1949 Geneva Conventions to enlarge those entitled to prisoner of war status to 'those of organized movements' provided they met certain criteria[969].

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[964] Ibid.
[965] Emily Crawford, "Tracing the Historical and Legal Development of the Levée en Masse in the Law of Armed Conflict," *Journal of the History of International Law / Revue d'histoire du droit international* 19, no. 3 (14 Aug. 2017 2017)
[966] Adam Roberts, "Resistance to Military Occupation: An Enduring Problem in International Law," *AJIL Unbound* 111 (2017) p.46
[967] Jean de Preux, *The Geneva Conventions of 12 August 1949. III: Geneva Convention III relative to the treatment of prisoners of war: commentary*, ed. ICRC, ed. Jean S. Pictet (ICRC, 1960).
[968] Ibid. p.68
[969] Roberts, "Resistance to Military Occupation: An Enduring Problem in International Law." See *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*. Art 4A(2)

Indeed, the idea of a *levée en masse* arose in the years following the French Revolution, when the French National Assembly needed to rapidly increase the size of its army, without reinstating the conscription associated with the *ancien regime*, and decided to make use of the revolutionary ideology to cultivate the idea of a soldier-citizen volunteering for the army from a sense of civic duty and community, and an expression of national identity[970]. It is in this sense a symbol of the state's persuasive power toward militarism. In this sense, a reverse *levée en masse* would be quite a symbolically fitting measure that combats state militarism.

The existence of a *levée en masse* in law is a compromise between the need to protect regular armed forces and the demands of national resistance[971]. It is a trade-off, dispensing with the requirements of a hierarchy and the wearing of a distinctive sign in recognition that the defence is a 'last-ditch defence of a country'[972].

On the second point, international law's position has shifted. The Russian draft declaration for the Brussels Declaration of 1874 proved contentious in explicitly denying POW status to participants in a *levée* in occupied territory, and particularly draw criticism from the smaller European nations who generally did not have standing armies[973]. In the final version, Article 10 stipulated that the *levée* must be initiated by the people and not the authorities, in contrast to the conception of the French Revolution, and must start spontaneously in response to invasion[974]. This restriction of temporal scope directly reflected the concern that the concept could legitimise rebellion[975].

Francis Lieber also did not consider resistance to occupation legitimate, but the position of international law is now different. What mattered for Lieber was that the *levée* was open and in 'respectable numbers' and were in the unconquered part of the country[976]. Francis Lieber envisaged occupation as an exchange: the occupied would not cause trouble for the occupiers

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[970] Crawford, "Tracing the Historical and Legal Development of the Levée en Masse in the Law of Armed Conflict."
[971] Gary D. Solis, *The law of armed conflict: international humanitarian law in war*, Third edition. ed. (Cambridge: Cambridge University Press, 2022).
[972] Ibid. p.183
[973] Crawford, "Tracing the Historical and Legal Development of the Levée en Masse in the Law of Armed Conflict."
[974] Ibid.
[975] Jean De Breucker, "La declaration de Bruxelles de 1874 concernant les lois et coutumes de la guerre," *Chronique de politique étrangère* 27, no. 1 (1974) cited in: Crawford, "Tracing the Historical and Legal Development of the Levée en Masse in the Law of Armed Conflict."
[976] Francis Lieber, *Guerrilla Parties Considered with Reference to the Laws and Usages of War, Written at the Request of Major-General Henry W. Halleck, General-in-Chief of the Army of the United States* (New York: D. Van Nostrand, 1862).

in return for their safety. As we have seen, armed resistance to occupation is considered legitimate and has been confirmed in several places[977].

Although some consider the *levée* an historic concept not relevant to modern conflict, there are recent examples. The *Oric* Trial judgment of the ICTY noted that the situation in Srebrenica would be characterised as a *levée en masse* in the period between April and May 1992[978]. This was in reference to 'local groups of fighters acting independent of one another and lacking the essential features of an army, including an organised structure with a proper command, uniforms, weapons and headquarters'[979]. Two Georgian men donned military clothing and sought to join the defence of their city after the Russian army had overcome the resistance of the Georgian army and invaded Georgia in 2008[980] and in 2014 Ukrainian volunteer battalions joined in the resistance against Russian-backed separatists[981]. Likewise, in 2022, as this thesis is being written, Ukrainian civilians are engaged in resisting Russian President Vladimir Putin's invasion of Ukraine. Although the Ukrainian civilians were later given direction on their resistance by the Ukrainian government there seems to have been at least some point when the resistance would have constituted a *levée*[982]. Regardless, the legal concept is still employed. The Court considered, though ultimately dismissed, the nature of the conflict being a *levée en masse* in the *Delalic* case[983].

If the concept of *levée* is still relevant to modern conflict, but also in the face of the adjustment of some of its components, why is a sort of reverse *levée* not also legitimate? Attitude to the more anachronistic concerns about encouraging resistance do not apply and the idea does seem to fit well in the rubric of popular measures against the continuation of war. The scope of the giving of participants in a *levée* privileged status was limited to spontaneous acts and only during the point of invasion, before occupation. Complementarily, limiting the validity of *terminative concessions* to periods of invasion would be acceptable. The limitation to spontaneous acts was largely due to the perceived need to protect regular armed forces, and

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[977] *Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights*.
[978] *Prosecutor v. Naser Oric (Trial Judgment)*, (International Criminal Tribunal for the former Yugoslavia (ICTY); Trial Chamber II 30 June 2006) IT-03-68-T.
[979] Ibid.
[980] Solis, *The law of armed conflict: international humanitarian law in war*.
[981] Ibid.
[982] Emily Crawford, "Armed Ukrainian Citizens: Direct Participation in Hostilities, Levée en Masse, or Something Else?," *EJIL: Talk!* , 2022.
[983] *Prosecutor v Delalic and Delic (Judgment)*, (International Criminal Tribunal of Yugoslavia 16 November 1998). §268-70

was for humanitarian reasons. Since that time, different categories of combatants have arisen with respective levels of protection. Certainly, regular armed forces are not now the only protected group. The unease with the legitimacy of resistance is now greatly reduced since the Lieber Code, and part of the reason for limiting the scope of a *levée* was out of concern for humanitarian principles. If *terminative concessions* are in pursuit of the same humanitarian principles, it stands to reason that, if the idea of permitting a group of individuals the right to make decisions about escalating armed conflict is not in itself so uncomfortable, then including *terminative concessions* in international law ought to be more welcome. It gives more reason to expect that international law would be coherent with a sort of reverse *levée en masse*; it would be coherent with bestowing a "privileged status" on those who surrender even in the absence of a state order, and possibly contrary to that state order.

However, there is also no need for the parallel privileged status. As seen in Chapter Three, combatants who surrender are considered *hors de combat* and entitled to privileged war status. Greater protection is needed, however, from one's own state. Therefore, we should turn to the treatment of conscientious objectors in international law.

6.4.b Conscientious Objection

Conscientious objection by combatants is not a right *per se* but a derivative right, related to the right to freedom of thought, conscience and religion. The right of freedom of thought anticipates the kind of counter-arguments that have already been encountered in discussing the just war tradition and the balance between requiring those to fight to protect their co-nationals who cannot fight and their own rights. For example, Article 9 of the European Convention on Human Rights states that:

> 1. Everyone has the right…to manifest his [or her] religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others[984]

[984] *European Convention for the Protection of Human Rights and Fundamental Freedoms*. Emphasis added

Article 12 American Convention on Human Rights contains very similar wording[985]. Likewise, the African Charter on Human and Peoples' Rights states that freedom of conscience may be guaranteed and that 'No one may, *subject to law and order*, be submitted to measures restricting the exercise of these freedoms'[986]. Lastly, the Ibero-American Convention on Young People's Rights requires signatories 'to promote the pertinent legal measures to guarantee the exercise of this right and advance in the progressive elimination of the obligatory military service'[987]. Though this last one has not been widely ratified, it both urges further development and specifically mentions measures as being in response to *obligatory* military service.

In general, conscientious objection has been in response to conscription rather than a selective measure against particular wars. Amir Paz-Fuchs and Michael Sfard discuss in detail seven reasons to maintain the distinction between selective and universal conscientious objection, ultimately concluding that there is no good moral reason to permit the latter and not the former[988]. One of the counter-arguments described in response to the claim that it might weaken the ability of the state to rule is that conscientious objection would 'enhance the moral seriousness of [a] process' which rests on the idea of consent, and enhances dialogue[989].

One view is that a position of universal conscientious objection is more sincere than a selective one, though there does not seem to be any justification for this. There may equally be a principle that is universally applied to requests to participate in a conflict but still only result in selective conscientious objection. Indeed, the previous chapters on just war theory have described formulae that require different things of the individual but are nonetheless based on fixed moral principles. Bertrand Russell was staunchly against WWI, leading to fines, the cancellation of his fellowship at Trinity College, Cambridge and ultimately a prison sentence, yet then advocated for a 'relative political pacifism' that necessitated the defeat of Hitler and therefore military resistance[990].

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[985] *American Convention on Human Rights, "Pact of San Jose", Costa Rica*.
[986] *African Charter on Human and Peoples' Rights ("Banjul Charter")*. Article 8, emphasis added.
[987] Regional Treaties, Agreements, Declarations and Related, *Ibero-American Convention on Young People's Rights*, (1 March 2008 2005).
[988] Amir Paz-Fuchs and Michael Sfard, "The Fallacies of Objections to Selective Conscientious Objection," *Israel Law Review* 36, no. 3 (2002)
[989] Ibid. p.123 The argument is an adapted form of Walzer's. See: Walzer, "Conscientious Objection."
[990] Russell did also previously express liberal imperial views reminiscent of Locke and the idea that conquest could be justified if the land could be put to better use by the conquering civilization, but he later converted to anti-imperialism. He was also consistently against the use of nuclear weapons, though it has been suggested that he appeared to advocate for a pre-emptive strike on the USSR.

The Israeli Supreme Court in *Zonshein v Judge-Advocate Gene* decided that selective conscientious objection could not be recognised by a democratic state[991]. However, there are mechanisms by which soldiers can conscientiously object to particular wars. Implicit, therefore, in the contract between soon-to-be-soldier and State, is the recognition that the duty to fight does not extend to absolutely every case. Furthermore, UNHCR Commission Resolution 1998/77 observed that those performing military service could develop conscientious objections and thus conscientious objection should be equally permitted after enlistment[992].

It is in this sense that the greatest leap would have to be made for conscientious objection to be adapted for a duty to surrender. In *Cristián Daniel Sahli Vera et al v Chile*, the Inter-American Commission on Human Rights found that the 'failure of the Chilean State to recognise "conscientious objector" status in its domestic law…*does not constitute an interference with their rights to freedom of conscience*'[993]. As such, one cannot reasonably argue that there is a recognised right of conscientious objection, at least on the grounds of freedom of conscience. Essentially, the Commission argued that international human rights jurisprudence recognised the status of conscientious objections in a county only insofar as such status was provided for in that country's national laws and that the ACHR specifically considered military service in countries where conscientious objectors were not recognised. In *Bayatyan v Armenia*, the ECtHR held that, in light of European documents beyond than the ECHR, such as the 2000 Charter of Fundamental Rights of the European Union, amounting to 'unanimous recognition of the right of conscientious objection', the conviction of the applicant did constitute a violation of Article 9 of the ECHR, relating to freedom of conscience[994]. It also noted that this is not a belief that needs to be held only by the religious, it can also be 'a precious asset for atheists, agnostics, sceptics and the unconcerned'[995]. In 2005, 18 of the 29 European countries with

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[991] *Zonstien v. Judge-Advocate General*, (Supreme Court of Israel 30 December 2002) HCJ 7622/02. See also Paz-Fuchs and Sfard, "The Fallacies of Objections to Selective Conscientious Objection."
[992] Office Of The High Commissioner For Human Rights, Resolution 1998/77 Conscientious objection to military service, (1998).
[993] *Cristián Daniel Sahli Vera et al. v. Chile*, (Inter-American Commission on Human Rights (IACHR) 10 March 2005) Case 12.219, Report No. 43/05, Inter-Am. C.H.R., OEA/Ser.L/V/II.124 Doc. 5 (2005) §100, emphasis added.
[994] *Bayatyan v. Armenia*, (European Court of Human Rights 7 July 2011) 23459/03 §106
[995] Ibid. §118

active conscription programmes permitted applications for conscientious objector status only before military service was started[996].

Insofar as this project has been attempting to describe an *emerging* duty of surrender and outline the principles coherent with the various codes that regulate armed conflict, the question of conscientious objection poses a unique problem. On the one hand, shifting power away from the state and towards the individual would find favour particularly with McMahanian revisionism which already places moral responsibility with the individual, and the similarly individualistic approach of cosmopolitanism. It could also be situated in the conceptualisation of the state as entailing responsibility and decentralised, reflecting the philosophy of human rights law. The state would be discharging its duty of care to its population merely by providing the individual with an alternative to continuing to engage in hostilities, to express dissent. It would thereby encapsulate the shift away from the Vattelian position that the state makes such decisions but also takes on the moral burden, and towards the more recent trends in just war theory that considers the individual a being capable of making such moral decisions. Indeed, it would also reflect the trend from Chapter Two, that increasing the rights of soldiers leads to more instances of state surrender, and that of the army becoming less of an instrument of the state to use as it saw fit.

It would be an elegant solution to the difficulty of conceiving of a duty of surrender which took self-determination into account without aligning itself to a position of absolute state authority. It would also be situated within human rights law, the body of law aimed at curbing state license in favour of individual protection. Self-determination, or consent, would also feature in the sense that it would permit the individual soldier to either consent to participating in a particular military action or not. Therefore, if the right of conscientious objection were universally recognised it would be the duty to surrender emerged, and very much suited to the contemporary context.

On the other hand, the legal patterns seem to reject the possibility that such a right is generally recognised, meaning that a duty to surrender in this form has not yet emerged. A number of countries do recognise this right of conscientious objection, but there is a broad range of positions taken on it. For example, several countries only permit conscientious objection

[996] United Nations Office of the High Commissioner of Human Rights, Conscientious Objection to Military Service, HR/PUB/12/1 (2012). See also Affairs, *The Right to Conscientious Objection in Europe: A Review of the Current Situation*.

before individuals are called for service. Armenia and Austria both have this form, but the former requires a personal interview and was estimated to have around 20 conscientious objectors per year, and the latter did not and was estimated to have 6,000-10,000[997]. Some States – the UNHCR note Canada, Croatia, Germany, the Netherlands, the United Kingdom and the United States – recognise conscientious objection to voluntary military service[998]. In any case, some States might have other means by which a soldier might leave the armed forces without having to assert a right of conscientious objection. Slovenia, for example, merely terminates the contract of soldiers who assert this right. Australia also has mechanisms for soldiers who oppose military service to apply for discharge or transfer to another unit[999].

Improving the protections around conscientious objection would likely satisfy revisionist just war theory as well as the general claim of this thesis that certain duties ought to be owed by the state to the individual. Individual conscientious objection would have to be motivated by the principles set out in Chapter Five, but accepting broad protections over conscientious objection would have the advantage of great coherence with a rights-based approach that ensures that the popular will is respected and that individuals are protected against state decisions to continue war. It would also accord with Walzer's ideas on the duty to obey the state, particularly in that the state needs to provide good reason to wield the power of compulsion over its people, which in turn raises the question of the superior orders defence and state cohesion.

6.4.c Military discipline, state cohesion, respondeat superior *and desertion*

During the drafting process of the Genocide Convention, the question of whether superior orders was a defence, mitigation of punishment, neither, or both, repeatedly arose. Concerns about the stability of state institutions was expressed, such as by the Venezuelan representative (in opposition to the proposal of the USSR, backed up by Poland who argued that it accorded with the IMT at Nuremberg), in response to the inclusion of allowances for soldiers following

[997] Affairs, *The Right to Conscientious Objection in Europe: A Review of the Current Situation*.
[998] Rights, Short Conscientious Objection to Military Service.
[999] *Analytical report of the Office of the High Commissioner for Human Rights on best practices in relation to conscientious objection to military service*, E/CN.4/2006/51 (2006)., §27 See Rights, Short Conscientious Objection to Military Service.

superior orders[1000]. For Dinstein, these responses and others indicate the influence the doctrine of *respondeat superior*[1001]. For various reasons, the Genocide Convention does not contain a provision on superior orders. The issue re-arose in the drafting of the Geneva Conventions, with the same result[1002].

However, after the UN General Assembly '[affirmed] the principles of international law recognized by the Charter of the Nurnberg Tribunal and the judgment of the Tribunal', it also tasked the newly established International Law Commission to formulate these principles[1003]. Negotiations on the issue of the necessity of moral freedom for moral responsibility, resolved by the "Brierly amendment", based on the Nuremberg judgment, which advocated adding the final ten words to Principle IV: 'provided a moral choice was in fact possible to him'[1004]

The General Assembly did not affirm this formulation, instead asking for submissions after which it went through several changes[1005]. Notably, the Sixth Committee took particular issue with the reference to moral choice and it was removed, only to resurface in the 1951 with Article 4 of the Draft Code of Offences against the Peace and Security of Mankind[1006]. Article 4 reads:

> The fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order[1007]

[1000] See Ad Hoc Committee on Genocide – Report (May 1948), (ECOSOC, O.R., 3rd year, 7th Session, Supp. 6) (E/794) in Abtahi, *The Genocide Convention: the Travaux Préparatoires*. Also in Yoram Dinstein, *The defence of 'obedience to superior orders' in international law* (Oxford, U.K.: Oxford University Press, 2012; repr., Repr., with a new postscript preface.).
[1001] Dinstein, *The defence of 'obedience to superior orders' in international law*.
[1002] Ibid.
[1003] See United Nations General Assembly, Resolution 95(I) Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, (11 December 1946).Resolution No. 95. (I) and United Nations General Assembly, Resolution 174 (II) Establishment of an International Law Commission, (21 November 1947).
[1004] International Law Commission, Report of the International Law Commission on its Second Session, Official Records of the General Assembly, Fifth session, Supplement No.12 (A/1316), (Yearbook of the International Law Commission, 1950).
[1005] Dinstein, *The defence of 'obedience to superior orders' in international law*.
[1006] Ibid.
[1007] International Law Commission, Draft Code of Offences against the Peace and Security of Mankind (Yearbook of the International Law Commission 1954).

Both the statutes of the ICTR and ICTY denied superior orders as a defence[1008]. Article 33 of the Rome Statute provides that the existence of an order from a superior does not relieve one of criminal responsibility unless they were legally required to obey the order, they did not know the order was unlawful or the order was not 'manifestly unlawful'[1009].

The rationale for including superior orders as a legitimate legal defence is not for the purposes of state cohesion, however. As Robert Cryer notes, the very essence of international criminal law is that certain individual duties transcend their national boundaries[1010]. Likewise, he argues that the *respondeat superior* rule no longer holds sway thanks to the manifest illegality test and, as stated in the *Einsatzgruppen* case, a soldier following orders is not 'the obedience of an automaton'[1011].

As Dinstein notes, the issue here is that it is always *possible* to not comply with an order, though the price may be death. As very briefly noted in Chapter Three, Article 32(1) of the Rome Statute excludes criminal responsibility for individuals under duress. The issue is what rights a deserter might have: could they seek refuge with the enemy? Desertion is defined broadly as 'the unauthorised individual or collective abandonment of a given military duty or post'[1012]. Other definitions add additional elements, such as distinct from a defection, but this serves as a general definition.

Tom Dannenbaum argues that to deny refugee status to deserters is to ignore the rationale for recognising refugee status in the first place, namely that the 1951 Refugee Convention recognises refugees who have a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion [and are] unwilling to avail [themselves] of the protection of that country'[1013]. The ambiguity arises from the fact that aggression is a crime committed by leaders, not low-level soldiers. However, aggression's wrongfulness inheres in the suffering it causes to individuals at all levels, and the

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[1008] Cryer, "Superior orders and the International Criminal Court." United Nations Security Council, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), (8 November 1994). United Nations Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), (25 May 1993).
[1009] *Rome Statute of the International Criminal Court (last amended 2010)*.
[1010] Cryer, "Superior orders and the International Criminal Court."
[1011] Ibid. p.54 *United States v. Ohlendorf and others ('Einsatzgruppen') IV*, (1948) TWC 411. p.470.
[1012] Afsah, Ebrahim, Deserters, in: R. Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law, p.50. Cited in Heike Niebergall-Lackner, *Status and treatment of deserters in international armed conflicts*, International humanitarian law series, (Boston, Massachusette: Brill, 2016).
[1013] Article 1.A(2), United Nations General Assembly, *Convention Relating to the Status of Refugees*, United Nations, Treaty Series, vol. 189, p. 137 (28 July 1951).

violation of the human right to life[1014]. Therefore, he argues, refugee protection should extend to these low-level troops and that states granting this protection would fulfil the duty to protect lives and attacks on the right to life.

In purely legal terms, desertion is not extensively covered by international law beyond the remarks made in light of surrender rendering a combatant *hors de combat.* Instead it is left up to domestic law and soldiers cannot unilaterally end their military service except by the protocols of conscientious objection described above[1015]. It has been suggested that, although enemy deserters *may* be treated as prisoners of war under customary international law, there is no requirement[1016]. Chapter Two noted the relationship between how soldiers could expect to be treated as prisoners of war and how willing they were to surrender. This would be because the combatant places themselves in the hands of the enemy rather than fall into it, the latter of which is the requirement for Article 4 of GCIII and Article 44(1) of AP1[1017].

However, this seems incorrect. The Commentary on the Third Geneva Convention states that 'fallen' was specifically to include 'not only "captured" prisoners of war, but also those who have fallen into the power of the enemy by other means, such as surrender or mass capitulation', being a new addition to the 1949 Conventions and designed to expand the protection beyond those who had been captured, who had been the sole beneficiaries of the protection in the Hague Regulations and the 1929 Geneva Convention on Prisoners of War[1018]. To avoid further doubt, 'to have fallen into the power of the enemy in the sense of Article 4 of the Third Convention implies…that the person is no longer *willing* or able to participate in hostilities'[1019]. In any case, if they were not protected by GCIII they would be protected by GCIV. International law may still benefit from explicit reference to deserters and the insistence that states grant particular protections to them; the *travaux préparatoires* of GCIII does not include any specific explicit reference to deserters[1020].

[1014] Tom Dannenbaum, "The Legal Obligation to Recognize Russian Deserters as Refugees," *Just Security*, 2022.
[1015] Niebergall-Lackner, *Status and treatment of deserters in international armed conflicts*.
[1016] Ibid.
[1017] *Additional Protocol I*; *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*.
[1018] *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, Commentaries on the 1949 Geneva Conventions, (Cambridge: Cambridge University Press, 2021). p.356 In contrast to 'captured' in the Hague Regulations of 1899 and 1907 and the Geneva Convention of 1929.
[1019] Ibid. p.356 Emphasis added.
[1020] Marco Sassòli, "The Status, Treatment and Repatriation of Deserters under International Humanitarian Law," *Yearbook / International Institute of Humanitarian Law* (1985)

In conclusion, this chapter has sought to provide an in-depth analysis of what this thesis has argued must be the foundation to which *terminative concessions* appeals. The danger of facilitating conquest and empire means that self-determination must be the right which surrender is done in the name of. This chapter has argued that the right of self-determination is not immediately contradictory with a duty of surrender, but it also determines when such a duty would arise and when it would not. Referenda must play a role, and the right of self-determination also limits what the surrenderee can be expected to endure. Moreover, there are already legal tools to deal with some of the problems that a duty to surrender would expect to encounter, such as the validity of the concessions required. This chapter has also provided an analysis of legal tools that speak to the ways an individual may discharge their duty to surrender. It comprises the final stage in analysing the coherence of the duty across two disciplines. All that remains is to fully articulate the duty, draw all the pieces together and state the full conclusions, and look to future research.

Chapter 7: Concluding Remarks

In conclusion, a duty of surrender that is coherent with, and emerges from, the principles of just war theory and international law is not only desirable, it is demanded. In keeping with the recommendatory nature of the research, this thesis has conducted an in-depth analysis of the subject and has proposed a specific duty, marking an original contribution to the study of *jus ex bello*. This specific duty balances the omnipresent need to promote humanitarianism in armed conflict and to protect the rights of humans, without facilitating the imperialism, domination and appeasement of the illegitimate-mighty that feature in questions of surrender. To achieve this, the duty must arise from the right of self-determination and must include extra protections for individuals. As such, this thesis has established the following: that surrender has humanitarian value; that the lack of analysis in just war theory and international legal thought is an oversight; that a duty to surrender is an expression of the animating principles of the two disciplines; that it must arise from the right to self-determination in order to be coherent and avoid pitfalls; that it therefore must entail the holding of referenda and protection for conscientious objection. It is laid out more systematically as follows:

States,

> Paying due regard to the freely expressed will of peoples and individuals;
>
> For the purpose of promoting all human rights, including but not limited to social, economic and political rights;
>
> In accordance with the UN Charter, and particularly for the humanitarian cause of promoting international peace and security;
>
> Knowing that this control does not amount to the assumption of sovereignty by an alien power;
>
> Knowing that any economic, political or military concessions made cannot overrule the self-determination of the people;

1. Must seek to terminate conflict via agreements which include material concessions (economic, political or military) to a second party which gives the second party some degree of control over the first which did not exist in the *status quo ante bellum*;

a) Pursuant to the freely expressed will of peoples as expressed in a plebiscite, referendum (which must be free and regular) or, in exceptional circumstances, other means, in the first instance,

b) Or for the greater protection of human rights of individuals within their territory whose importance is of greatest importance to those individuals, provided it is not contrary to the right of self-determination,

2. Must also regularly hold referenda on the continuation in conflict, pursuant to 1(a).

3. Must protect conscientious objectors by putting in place measures to safeguard conscientious objectors from undue prosecution,

4. Must grant at least the protections included in the Third Geneva Convention and Additional Protocol I to deserters.

Individuals,

To facilitate greater respect for human rights;

And in particular, respecting the right of self-determination;

Recognising the intense level of human suffering caused by conflict;

Knowing the limits of the existence of superior orders as a defence;

5. Are under an obligation to surrender,

a) In the face of manifest human rights violations or if continuation would be contrary to self-determination,

b) If demanded by a plebiscite.

6. And are under an equivalent duty to dissent, desert, resist or conscientiously object.

7.1 Return to the themes and research questions

Several themes have emerged throughout the analysis undertaken by this thesis. Far from being a departure of these themes – of humanitarianism, human rights, self-determination and an individual-centric approach – they would be better reflected with the recognition of a duty to surrender than they would with its non-recognition. These themes are widespread in the normative architecture of human rights, international criminal law (particularly aggression), international humanitarian law, the law on the use of force, orthodox just war theory and revisionist just war theory. Indeed, these themes are so widely supported by the two disciplines, not merely as incidental undercurrents, but as animating and guiding principles, that the surprising fact is not that the recognition of a duty to surrender is coherent with just war theory and international law, it is that the duty has not been subject to an in-depth study of this kind, and that such a duty is not incorporated within the canon of *jus ex bello*. This thesis provides an articulation of this duty, grounded in the right of self-determination, and supporting arguments from two disciplines. Importantly, it has also avoided raising the spectres of appeasement, conquest and empire.

It is not controversial to argue that international law is animated by a humanitarian impulse. While at the same time recognising military necessity, international law has sought to prevent unnecessary suffering. These limitations on warfare, by law and JWT equally, are multifarious. Firstly, some types of armed conflict are illegal. Secondly, even amongst those legal forms, some methods (use of particular weapons or tactics) are illegal. Thirdly, even where these obstacles are overcome, only certain targets are permissible. It does not permit the destruction of war, but where it is not prohibited, it seeks to limit it as much as possible. This thesis opened by questioning why there is not one more obstacle put in place to limit war. Its central focus has been to demonstrate that the absence of this additional obstacle is noteworthy and warrants remediation. Indeed, this thesis has aimed to demonstrate that the core principles which animate the law of war are better realised with the inclusion of a duty to surrender than they are without it.

The theme of balancing international law's recognition of necessity with humanitarianism was explicitly discussed in Chapter Three, though it is worth noting that the discussion of peoples in Chapter Two exhibits this theme. Many of them sought to demonstrate that they were more civilised or superior to their enemies *because* they were magnanimous, even if this was not reflected in their actual practice.

In Chapter Three it was noted that international humanitarian law in particular is animated by the balance between the principles of humanity and necessity. In the chapter on the orthodox just war theory, this thesis discussed the basis of more theoretical conceptions of justice in war. It observed that in orthodox just war theory, even though it seeks to provide support for the morality of international law and has historically advocated for strong state sovereignty, state sovereignty gives way to the humanitarian demands of peace, and *jus ex bello* is not contained within the *jus ad bellum*. The demands of this *jus ex bello,* of which the duty to surrender is a part, are not satisfactorily advanced by the framework. The chapter on revisionist just war theory observed that inroads were already being made into *jus ex bello*. Much of the basis of this was the humanitarian aim of reducing harm as far as possible.

A second theme is the level of responsibility the state has to its population. This most clearly emerged in Chapter Three and the discussion of human rights, notably including the duty of states to proactively take positive measures to protect human rights. However, the chapter also demonstrated the centrality of rights of individuals in the other bodies of international law. Both orthodox and revisionist just war theory observed that states have duties to the individuals and, furthermore, in some cases, that individuals have a duty to states only insofar as the states fulfil their duties to their populations. In particular, the chapter on revisionist just war theory extended the idea of a state that is governed by consent. Chapter Six grounded the duty to surrender explicitly in terms of the duties the state owed to its citizens, both by discussing the legitimacy of states and by the necessity of an appeal via plebiscites to public mood. If these two themes were extended, they would seem to justify a duty to surrender on the grounds described.

Two other themes are also the chief objections against this project. Whilst these words are being written, Ukraine is involved in a struggle against Putin's invasion. Arguments against Ukrainian resistance have been made that have been made before in similar situations and they represent the chief dangers of advocating a duty to surrender. These dangers are that doing so would facilitate conquest, or empire, and that it would amount to appeasement.

This thesis has attempted to mitigate this problem by limiting the duty to surrender at the outset, namely by arguing that the duty only arises on the back of self-determination, and by not closing the door to further resistance. At first glance, this looks like the opposite position to Hugo Grotius, in that it is arguing that international agreements are not binding because they could in such a case legitimise the spoils of conquest. However, in seeking to provide avenues

for continued resistance, it ensures coherence with revisionist just war theory, and retains the possibility of decisions made by states with justice but not strength on their side being remedied. Furthermore, agreements are still binding, and the possibility of resistance does not change this, just as the fact of resistance by a non-state actor does not necessarily change the legitimacy of the state. If there is any safeguard to facilitating actual empire, it is surely the right of self-determination. Using the right of self-determination in this way makes it clear that the occupying force's surrender would achieve the greater rights protection, a point worth emphasising. Though the duty to surrender is symmetrical, one cannot distract from the fact that the invading army is causing the greater loss of rights or threat to self-determination.

Related to this, is the theme of ideological imperialism, namely, the fact that the just war tradition is largely Christian, and international law has faced criticism for its roots in imperial projects. This thesis has attempted to find a balance between coherence with current ideas and progression where it is necessary. As such, it has recognised the role that people like Emer de Vattel have played in the history of international law, in spite of some positions of his that facilitate imperialism, particularly European settler colonialism. However, it has sought to leave some of his arguments that might do this facilitation by the wayside, and emphasise parts of international law which counter the European, Christian and Western centricity. Grounding the entire project in self-determination has played a vital role in buttressing the duty from empire. It has also sought coherence with the Third World Approaches to International Law. Most importantly, by grounding the moral force of *terminative concessions* in self-determination and consent, it has remained necessarily agnostic to the relative value of rights.

Another concern that one might have in arguing that states are required to surrender under certain circumstances is that it would make appeasement more likely. It is notable that when Michael Walzer discusses this issue he refers to it as the Munich principle, referencing the Munich Agreement which ceded the Sudetenland to Germany in the hope that it would prevent the expansion of Nazi Germany[1021]. Similarly, arguments about Ukraine make references to 'poking the Russian bear'. But this objection is not intrinsic to advocating a duty to surrender in itself; it depends on the grounds. If one were to argue that states were only under a duty to surrender when the population desired it this would not likely lead to appeasement. It would

[1021] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*.

be hoped that the population themselves would continue to be a judge of when a policy of appeasement would be likely to work.

The references to poking the Russian bear also exemplify the danger of basing a duty to surrender on likelihood of success. Although chance of success is a principle with strong just war pedigree, and this thesis is not advocating its removal, there is a better foundational principle and one which appeals to justice. This is that such decisions must reflect self-determination.

To respond to the first of the two research questions presented at the opening of the thesis, in some ways a duty to surrender can be considered to be emergent from international law and just war theory. The principles of both support the inclusion of a duty to surrender and all but produce one. A duty to surrender is not formally, explicitly extant in the two disciplines, but the humanitarian reasons for supporting a duty to surrender are interwoven in them. The appeals to rights protection, and indeed the ultimate grounding of the theory in the right of self-determination has strong pedigree in orthodox, revisionist and just war theory. All that is lacking is the final step. Furthermore, the absence of this final step is remiss; the duty to surrender *should* be there in order for the aspirations of these disciplines to be more fully realised It is this final step that this thesis has taken. To respond to the second question, a maximally coherent duty to surrender (fully presented above) should be grounded in the right of self-determination. It is the best way to avoid facilitating conquest, which remains a dangerous risk in advocating surrender. But it also accords with the human-centricity of international law and revisionist just war theory. In practice, this means that a state may only fully discharge a duty to surrender when it provides opportunities for referenda on war continuation, and facilitates conscientious objection. Individuals are under a duty to surrender when it matches the desire expressed by these acts of self-determination, and to protect the rights of others.

7.2 Limitations and opportunities for further research

While grounding a theory of justice in surrender in anything other than the right of self-determination ought to be greeted warily, a significant practical difficulty remains, namely whom to include in the referendum, and whom to not include. There are two axes to this question. One is territorial and the other relates to the indigeneity of the population. For the

first axis, the question is whether an entire country or the part of the population on the territory which might be conceded should be the ones to determine the fate of the territory. The second axis relates to the relationship between the land and the people in the referendum.

For example, Vladimir Putin did seek to legitimise his invasion of Crimea in 2014 by referenda. If the duty to surrender as described in this project were to be exercised at the point of his invasion, one could ask whether it is only the residents of Crimea or Ukrainians more generally who would have to vote. On the one hand, it would make sense to have only those most directly affected.

One possible response to this is again to take refuge in the definition of peoples that is given in relation to the right of self-determination. One could draw the boundary along ethnic lines. Doing so would mean that the population of Kurdistan or Palestine might be more readily able to get a vote without having their fate decided by Israel or Iraq, and therefore provide an avenue for a change in self-determination if they needed to. However, this would have its own problems.

In all likelihood, this would need to be somewhat *ad hoc*. It would likely need to appeal to the authority of a body, such as the UN General Assembly, to decide where the appropriate division should be drawn in each case as to the validity of the referendum. This would need to be a feature anyway; good offices already play an important role in conflict termination. It could also by multi-level, as discussed when mentioning Bell's work on ungovernance and particularly the Belfast Agreement[1022].

The second opportunity for further research would involve an appeal to political science as to the efficacy of peace treaties created under such conditions. For example, there is a body of political science research which is concerned with the ripeness thesis, namely that in order for a peace treaty to be successful, the time for it must be "ripe"[1023]. In reality, providing a long-lasting solution to a conflict is going to be a function of many variables relating to questions of rights and transitional justice. This thesis has sought to accommodate some of this with a closer analysis of the peace agreement between the FARC-EN and the Colombian Government as a "best practice" case.

[1022] Bell, "'It's law Jim, but not as we know it': the public law techniques of ungovernance."
[1023] Zartman, "Ripeness: The hurting stalemate and beyond."

But there are further variables that would need to be factored in. Political science research on the effectiveness of peace treaties in securing lasting peace include the presence of spoilers[1024], the presence of peacekeepers[1025], per capita income[1026], the presence of refugees[1027], the credibility of the commitment[1028], and the decisiveness of the victory[1029] to pick a few. Virginia Page Fortna's comprehensive study on the independent variables most directly causally related to successful implementation of peace treaties discusses: physical constraints (presence or withdrawal of troops, the existence of demilitarised zones, arms control measures and arms control), external guarantees (third party involvement, the presence of peacekeepers), and communication (confidence-building measures, dispute resolution, the specificity of agreements, the formality of the agreement, and audience costs)[1030]. Some of these variables will speak to peace agreements created by the duty to surrender and research on whether such an agreement created in such a way would be successful.

Relatedly, one needs to be careful not to only consider the issue of an absence of measures to terminate war with legal force only in theory. While the scope of this thesis has primarily been concerned with the theory of the question, focusing mainly on international law and just war theory, it has also been careful to deal with *de facto* equivalents. For example, though it observed in the previous chapter that the laws of occupation state that sovereignty is not transferred to the Occupying Power, in practice there are ways this can be done without violating occupation law. This is one of the several, but one of the key, reasons why it has sought to place much emphasis on the right of self-determination as the only foundation that would balance the benefits of war termination with the harm of conquest and empire.

No doubt these are promising and exciting lines of enquiry, made all the more urgent by contemporary challenges which, it is hoped, scholarship is now better equipped to meet. For now, it is further hoped that this thesis is a useful contribution to this very necessary area of

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[1024] Stedman, "Spoiler problems in peace processes."
[1025] Gilligan and Sergenti, "Do UN interventions cause peace? Using matching to improve causal inference." Fortna, *Peace Time: Cease-Fire Agreements and the Durability of Peace*.
[1026] Paul Collier, Anke Hoeffler, and Måns Söderbom, "Post-Conflict Risks," *Journal of Peace Research* 45, no. 4 (2008/07/01 2008) Also, the "war economy" has been suggested as a reason for the continuation of conflict. See: Mary Kaldor, *New and old wars*, Third edition. ed., New and old wars: organized violence in a global era, (Cambridge: Polity Press, 2012).
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