



# Cut These Words: Passion and International Law of War Scholarship

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## Cut These Words: Passion and International Law of War Scholarship

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Naz K. Modirzadeh\*

[H]e is never dull, never insincere, and has the genius to make the reader care for all that he cares for. The sincerity and marrow of the man reaches to his sentences. I know not anywhere the book that seems less written. It is the language of conversation transferred to a book. Cut these words and they would bleed. . . .

—Ralph Waldo Emerson, on Montaigne

“You can’t just be a neutral witness to something like war. It crawls down your throat. It eats you alive from the inside and the out.”

—Quoted in Ken Burns, “The Vietnam War,” Episode 3

*In this paper, I explore how international legal scholarship about war, written at a time of war, ought to read. Can—and should—we demand doctrinal rigor and analytical clarity, while also expecting that scholarship makes us feel something, that it connects us to the author, that it captures the intimacy and emotion that human beings experience in relation to war?*

*I use two eras of international legal scholarship on war—namely, the Vietnam era and the War on Terror—to illustrate key moments in the field that were typified by very different kinds of writing and the corresponding differences in thinking and feeling. I argue, in part, that—in contradistinction to passion-filled Vietnam-era scholarship—a particularly influential strand of contemporary scholarship on the United States’ War on Terror adopts a view that is aridly technical, acontextual, and ahistorical. In short, it lacks passion. (I use “passion” as a composite term in an attempt to capture diverse facets of a problem that I am attempting to diagnose.)*

*The Introduction situates this project within broader writing on law and emotions. Part I provides a list of characteristics of what I consider passionate scholarship, using the Vietnam era as an example of*

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\* Professor of Practice, Harvard Law School. Founding Director, Harvard Law School Program on International Law and Armed Conflict. I benefited greatly from workshop presentations and feedback at the Melbourne Law School Laureate Program on International Law Conference on Humanitarianism and the Remaking of International Law: History, Ideology, Practice, Technology, the Fall 2018 Harvard Law School International Law Workshop, the Spring 2019 Harvard Law School Faculty Workshop, as well as from discussions with students in my Fall 2018 1L Reading Group. I wish to thank William Alford, Gabriella Blum, Tom Farer, Oren Bar-Gill, John C. P. Goldberg, Jack Goldsmith, Jonathan Horowitz, Ioannis X. Kalpouzos, David Kennedy, Dustin A. Lewis, Martha Minow, John Norton Moore, Samuel Moyn, Anne Orford, Sandesh Sivakumaran, and Sean Watts. I am grateful for the diligent work of Research Assistants Sonia Chakrabarty, Asma Jaber, Thejasa Jayachandran, Lisandra Novo, and Shira Shamir. I also wish to thank Jennifer Allison and the expert librarians of the Harvard Law School Library for their tremendous assistance and support. Finally, I am grateful to Matthew Farrell, Natasha Nicholson Gaviria, Sun Young Hwang, Eleftheria Papadaki, Parker White, and Jack Jaehyuk You of the *Harvard International Law Journal*. All errors and views are solely those of the author.

*that approach. Part II provides a mirrored list of the characteristics of abstract and bloodless scholarship, using the latter part of the War on Terror (2009 onward). The observations compare how scholars of each period contend with the sense of crisis and urgency of their time, and the understanding that they (we) were living—and writing—through moments that would be seen as history-changing and law-shifting in the future. Part III examines possible explanations for differences where we ought to see similarities, for absences of scholarly connection where they should be plentiful, and for a seismic shift in the general tone and mood of international legal scholarship on war in less than two generations. Part IV concludes by discussing why we—international lawyers, scholars who feel strongly about war and peace—ought to care about and seek to reverse this shift.*

## INTRODUCTION

It was the fourth hour of the conference, the sort of conference I imagined being someday invited to as young law-of-war scholar. We were in a vast, wood-paneled room at a military academy. I was surrounded by a mix of senior military personnel, medals shining in the early afternoon sun, and international-law-of-war scholars at the top of their game, many of them half-listening while busily typing away blog posts for influential websites. There were a handful of senior U.S. executive-branch officials. It was my sixth conference or workshop of the year, the third or fourth focusing on the worsening crisis in Syria and the increasing involvement of the United States in that brutal war. The meeting provided the particular kind of gratification that comes with expertise and maturity: we were throwing around acronyms such as “C-130,” “DPH-ing,” and “NIAC.” We all knew the law well enough to reference sub-paragraphs of the Geneva Conventions and their Additional Protocols, and we understood the various contemporary debates over the use of force enough to use the shorthand of “unable/unwilling” for different streams of argumentation. It was fun. Both in the sense that one was ensconced in one’s own discipline, shoulder to shoulder with those who understand the same terminology, argumentative moves, who read the same scholars, but also in the sense that the presence of the decision makers in the room lent an air of immediate relevance and influence to the discussion. As with most such conferences addressing the places where the United States has been involved in armed conflict over the past seventeen years (including Afghanistan, Yemen, Somalia, and Iraq), there were no Syrians, nor were there any lower-level military personnel who had been required to implement orders formulated by those in the room. We were not merely having an academic discussion. We were discussing the law of war, in a room dedicated to war planning, filled with people who were tasked with executing that war. This is what it felt like to *matter*.

But that day the pleasure of disciplinary specialization and proximity to power began to feel more like disgust. My reaction was as a member (however critical) of the field, and as someone who continued to believe that the discipline had something of value to contribute to the world. After so many years of similar discussions, beginning with Afghanistan, continuing with Iraq, then to the borderless version of the “war on terror” conflicts that

spread across the region, drone warfare, and targeted killing, this meeting, well into the second decade of the 21st century, felt like we had reached a low point. Like even we could not convince ourselves that we were actually discussing what we claimed to be discussing. As the afternoon progressed, I sensed a peculiar kind of malaise seeping through the room. We continued to engage the most salient, ripped-from-the-headlines issues, with people who had all kinds of insider knowledge of the war, but more and more it felt like ventriloquism. We were phoning it in. And we looked disappointed in ourselves.

That night, at the conference dinner, I sat next to a senior military professional who had served multiple tours in the region and had recently spent a great deal of time training Arab coalition lawyers and officers who were part of the campaign against ISIS. We were discussing the law applicable to nonstate armed groups in non-international armed conflict, and the fascinating doctrinal questions regarding the rules applicable to detention in such conflicts. He began to tell me about what it was like to be in the room with Jordanian officers when they saw the video of one of their fellow airmen, who had recently been shot down by ISIS and captured, being burned alive in a metal cage. He was describing what it was like to instruct these officers that despite the fact that they knew that the enemy would not follow international legal rules regarding treatment of detainees, they nonetheless were required to treat ISIS detainees in line with Common Article 3 of the Geneva Conventions. He began to cry. As our second course was placed in front of us, tears fell into his lap as he told me what it was like to actually use the law—our law, the law that had brought us to this place, that made us relevant to this discussion about Syria at this time—after all these years of war. It was the first time during the conference I felt like I was having a *real* conversation. I had the sense that this meant something was wrong.

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Back in my office, I found that I was having a hard time reading contemporary scholarship in my discipline. I would begin articles about the classification of conflict in Syria, or the legality of the use of force against particular armed groups there, or the question of the relationship between the United States Authorization for Use of Military Force and the U.N. Charter, and by halfway through, I felt I did not have the fortitude or interest to continue.

I started to wonder if other colleagues were experiencing what I was. I asked them why they had gone into the field of international law of war in the first place. Many had moving accounts of their motivations. For some, it was the idea of working on something that had to do with “life and death.” For others, it was the idea that war was about “big emotions.” Yet others shared that they had personal experiences, or stories from their families that had drawn them to the idea that there could be globally relevant rules appli-

cable in war. Many shared the sense that today's debate felt increasingly remote—that they felt alienated from their own discipline, or from what had brought them to the field. Several shared that they too could no longer bring themselves to engage with contemporary scholarship, or to participate in ongoing debates online or in workshops and conferences. There was a sense of fatigue but also a sense that something had gone awry in the way we were all talking about law and war.<sup>1</sup>

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Several months later, I was reading the 2010 Memorandum for the Attorney General discussing the legality of killing Anwar Al Aulqi,<sup>2</sup> a document that exemplifies the kind of legal writing and argumentation that has come to shape (and distort) U.S.-centered debates on international law relating to war. Drafted by two leading U.S. constitutional lawyers, it represents much of what traditional international lawyers find wrong with the way the United States has pursued the War on Terror.<sup>3</sup> I was looking for something that would restore my sense of urgency, my desire to engage and argue. Despite having read the document many times, I noticed a reference that I

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1. Many of the discussions within the field (at least for those of us of a certain age and experience) include lamentations regarding the style, tone, and heaviness of contemporary writing. Specifically, many have pointed out (largely, though not exclusively, in private conversation amongst colleagues) that the new United States Department of Defense Law of War Manual (an update to the 1956 text), which in its current form is 1,236 pages long with 297 footnotes, is arguably impossible to utilize as an actual manual in practice. U.S. DEP'T OF DEFENSE, LAW OF WAR MANUAL 1.1.1 (2016), at <https://perma.cc/AN2S-QZU7>. While the 1956 Manual appeared to have a real, imaginable, human audience in mind (the practitioner military lawyer or adviser: it was 236 pages long, and was meant to be able to fit in the pocket of a soldier or JAG officer's uniform), see U.S. DEP'T OF THE ARMY, DEPARTMENT OF THE ARMY FIELD MANUAL, FM27-10 (1956), at <https://perma.cc/W9LK-PVQB>, the 2015 manual seemed to strike people as not having imagined any audience that one could identify. It did not appear to take the reader into account at all. Similar observations have been made about the updated Commentary on the Geneva Conventions undertaken by the International Committee of the Red Cross. In particular, and in part in response to the many war-on-terror debates discussed in Part II, *infra*, the 2016 Commentary on Common Article 3 (currently available for the First and Second Geneva Conventions) is ninety-nine pages longer than the original, contains 908 footnotes, and incorporates numerous arguments in the alternative. While it is thorough, rigorous, and comprehensive, it is in some places exceptionally difficult to read, difficult to follow, and nearly impossible to imagine using in any practical manner. See, e.g., David Glazier et al., *Failing Our Troops: A Critical Assessment of the Department of Defense Law of War Manual*, 42 YALE J. INT'L L. 215, 216–17 (2017). Another way of approaching the analysis I engage in here might be to ask what happened in the move from the 1956 Revised U.S. Army Manual on the Law of Land Warfare (revision drafted by Richard Baxter, 246 pages, zero footnotes) to the 2015/2016 U.S. Department of Defense Law of War Manual (revision drafted by Karl Chang, 1,204 pages, 297 footnotes). For a major substantive critique of the 2015/16 Manual, see generally WILLIAM H. BOOTHBY & WOLFF HEINTSCHEL VON HEINEGG, THE LAW OF WAR: A DETAILED ASSESSMENT OF THE U.S. DEPARTMENT OF DEFENSE LAW OF WAR MANUAL (2018).

2. The memorandum provides the legal justifications for the killing of Anwar Al Aulqi, a U.S. citizen and alleged Al Qaeda operative, in a drone strike in Yemen. The U.S. Court of Appeals for the Second Circuit ordered the release of a redacted version of the memo on review of a FOIA request for the memorandum. N.Y. Times v. United States, 752 F.3d 123, 144 (2014).

3. Elsewhere, I have criticized the approach typified in this memorandum as “Folk International Law.” See Naz Modirzadeh, *Folk International Law*, 5 HARV. NAT'L SEC. J. 225, 228–29 (2014).

had failed to previously register. The discussion concerned the crucial question of the geographic scope of non-international armed conflict under international law on the use of force in situations where “the principal theater of operations is not within the territory of the nation that is a party to the conflict.” The Memorandum’s international law section is curiously framed around seeking authorities that would conclusively demonstrate that what the CIA wishes to do is clearly unlawful, rather than seeking to understand what actions would be seen as prudently lawful. In this mode, discussing whether it would be clearly unlawful to engage in a strike in a third state without there being an existing armed conflict in that state, the Memorandum says:

That does not appear to be the rule, or the historical practice, for instance, in a traditional international conflict. See John R. Stevenson, Legal Adviser, Department of State, *United States Military Action in Cambodia: Questions of International Law . . . in 3 The Vietnam War and International Law: The Widening Context* 23, 28–30 (Richard A. Falk, ed. 1972)<sup>4</sup> (arguing that in an international armed conflict, if a neutral state has been unable for any reason to prevent violations of its neutrality by the troops of one belligerent using its territory as a base of operations, the other belligerent has historically been justified in attacking those enemy forces in that state.)<sup>5</sup>

I suddenly realized that I had absolutely no idea what international legal arguments had been made regarding the U.S. invasion of Cambodia during the Vietnam War. Logically, I thought, it must have been similar to the questions now framing debates over the use of force in many countries across the Middle East and North Africa. But I had always assumed that the forms of legal argumentation and available legal doctrines prior to our present moment were not sophisticated enough to imagine questions like the notion of extraterritorial non-international armed conflict or the outer limits of the geographic scope of non-international armed conflict. This was, after all, I mistakenly assumed, why we did not tend to cite any debates or wars prior to our own time when discussing the legal crises brought about by the War on Terror. I did a quick search of leading contemporary scholarship on extraterritorial non-international armed conflict: no Vietnam. I thought about the many workshops and conferences I had attended on the issue: no discussion of Cambodia as a precedent. What was I missing?

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4. As will become clear later in our discussion, one could reasonably conclude on the basis of the substance and argumentation of the Memorandum that the authors did not bother to read, or at least rejected out of hand, the rest of that volume, particularly the work of its editor.

5. Memorandum for the Attorney General Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi, 25 (July 16, 2010), <https://perma.cc/8F8V-WA3S>.

I thought that, surely, there was something about the Vietnam and Cambodia question that distinguished it from the current debates, something that made our approach far more law-rich and technical. This had to be why we were not all discussing Cambodia. I went to the international legal scholarship of the Vietnam era to try to figure out why that might be. What I found astonished me.

There were remarkable doctrinal parallels, which I will discuss below. But what kept me there, what drew me deeper into piles of papers and stacks of books from the 1960s and 1970s, were not the parallels and the increasingly bizarre sense of lawyering *déjà vu* I had when reading about them. Nor was it the fact that I was reading highly sophisticated analyses of legal problems, many of which my generation have touted as novel or at least historically complex. It was the writing—and especially the *emotion* in and of the writing. It was the sense that I was being reminded why I had chosen this discipline, why I cared about international law relating to war in the first place. It was something of that feeling that I had when I spoke to that military official at dinner. And it was, finally, a sense that I was getting closer to what was wrong with what we are doing today.

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What is meaningful legal scholarship about war, especially during wartime? Should scholarship about international law of war be passionate? Should it make a reader *feel* something? Should a reader have some sense of the author, some sense that there is *soul* behind technical or complex legal analysis? Is it reasonable, or appropriate, to expect to be *moved* by international legal scholarship written during a seventeen-year (and counting) armed conflict, when that scholarship is published in the primary state pursuing this war?

Like listening to the same piece of music performed by different conductors and different soloists, the idea of closely reading similar texts, about similar issues, with similar vocabularies, set in two deeply fraught political eras, provides the opportunity to hear—over time, and with repetition—patterns, rhythms, meter, and dynamics. I focus generally on mainstream scholars writing within the U.S. debate (exclusively so in the case of Vietnam), but also those scholars outside the United States who appear to be seeking to influence and engage American debates. My sense is that there are at least three sets of projects that can be gained from a close, granular reading of international legal scholarship from these two eras of crisis.

First, and perhaps the most fascinating mystery, is the near-total erasure of the Vietnam era, and its vociferous doctrinal and policy debates, from the War on Terror international legal debate. The more one reads, the stranger it becomes—particularly once the invasion of Cambodia becomes publicly known in 1970, and the U.S. Department of State justifies the intervention

in international legal terms. The doctrinal debate is eerily similar to those underlying key controversies between 2009 and 2018. The underlying law is, in many respects, largely the same. The contours of the international legal questions and their purported implications for the future disclose remarkable similarities. And yet, with the exception of that single footnote in the Al Aulqi Memorandum, there is almost no reference to the raging scholarly discourse that occurred barely two generations earlier. This would perhaps be understandable if I had gone deep into the national archives of, say, Sweden, and had found obscure texts that had never been published in English, or had never been made available in libraries or on the internet. But we are talking more or less about similar substantive debates occurring in similar journals by scholars contending with the same government offices. And it all just disappeared. Why?<sup>6</sup>

Second, the under-appreciated richness of the Vietnam-era international legal debate invites a doctrinal comparison of the two wars, and a legal analysis of what exactly has changed as a matter of international law and practice since that time. In what ways have the *rules* and their interpretation changed, as opposed to our (often unsupported) assumption that things have just, well, changed? Are the rules on the use of force meaningfully distinct from the late 1960s and early 1970s? In what ways has the profound rise and expansion of international humanitarian law (“IHL”) impacted our assessment of the rules regulating the recourse to force? What is the appropriate timeframe we ought to apply in discussing whether the customary norms on the use of force have shifted, particularly when the stakes of such a shift are so high?

The third project is about something that initially struck me as purely about style<sup>7</sup> and that I will argue is about much more than aesthetics. Why does it feel so different, as an informed reader, to engage with the international legal scholarship written during the two wars? Why are the authorial voices so distinct? Why does writing during one war focus so much more on the rules on non-intervention while the other focuses so much on the rules applicable during armed conflict? And why, ultimately, are the Vietnam-era pieces so much more enjoyable and fulfilling to read?

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6. I plan to address this mystery in a follow-up piece to the present article. Madelaine Chaim notes in a review of a new volume gathering Richard Falk’s key writing from the Vietnam era: “The Vietnam War is remarkably absent from literature and debates on international law and the use of force. . . . [I]nternational lawyers have engaged in surprisingly little analysis of the international legal dimensions of the war in Vietnam.” Madelaine Chaim, *H-DIPLO* (Dec. 2018), at <https://perma.cc/XQ3U-PMMV> (reviewing *REVISITING THE VIETNAM WAR AND INTERNATIONAL LAW: VIEWS AND INTERPRETATIONS OF RICHARD FALK* (Stefan Andersson ed., 2017)). Samuel Moyn also observes, “Vietnam has been surprisingly absent from post-9/11 debate about American military conduct in an era of renewed global engagement, especially against asymmetrical enemies and in the heat of counterinsurgent warfare.” Samuel Moyn, *From Antiwar Politics to Antitorture Politics*, in *LAW AND WAR* 156, 157 (Austin Sarat, Lawrence Douglas & Martha M. Umphrey eds., 2014).

7. As Gerry Simpson notes in a piece I found incredibly useful to my thinking, “[S]tyle matters.” Gerry Simpson, *The Sentimental Life of International Law*, 3 *LONDON REV. INT’L L.* 3, 3 (2015).



It is difficult to discuss how scholarship makes one “feel” in a scholarly manner. It is further suspect to seek to characterize a massive range of academic output in archetypal form, or to make broad observations about a field or discipline over a decade-long stretch. Some readers will no doubt be highly skeptical of an effort to describe the work of many scholars at once. There is no way to “prove” that my observations are accurate, or that many readers “feel” the same way that I do when they read contemporary literature. There are no empirics here, no science of what we cognitively or physically experience when we read, and there are no efforts to use the number of citations as a demonstration of correctness. Rather, each reader will have to determine whether she or he intuitively shares my viewpoint, and whether she or he has a sense, somewhere deep in her or his gut, that something about our current scholarly environment is amiss.

What I found in comparing the two eras was the similarity of the doctrinal debates, but not only that. I also found a palpable difference in tone, approach, mood, force of feeling, and, ultimately, connection with the reader. The Vietnam-era scholarship was better, I would argue, as public international law scholarship, but it was also better for reasons that I think go beyond whatever we would consider to be an objective evaluation of what makes one law review article superior to another. Gerry Simpson describes contemporary international legal scholarship in this manner:

To be calm, reasoning, position-less is the liberal ideal. Whatever we experience as legal scholars, the inclination has been (with some exceptions) to express ourselves in a highly particular, contingent form. Generally speaking, the ideal is a deracinated, anti-biographical, depersonalized, formally circumscribed, view-from-nowhere prose style. It really is remarkable, given the variousness of our lives, how stylistically similar the majority of law review essays are.<sup>8</sup>

I want to suggest that there was a time when a group of scholars adopted a different model, and that the contemporary scholars in the field of the law of war are currently demonstrating an extreme version of what Simpson describes.

In a nutshell, today, the standard for the field has become a “view-from-nowhere” on steroids.

The overall feeling I was left with in reading the Vietnam-era scholars is that I could sense their relationship to the law—but also to the underlying events—unfolding as they wrote. Their work expresses angst, shame, anger, poignancy, a visceral sense of the stakes, and it creates an appreciation on the part of the reader for why this is all very *personal* for the author. It is clear

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8. *Id.*

that they have skin in the game.<sup>9</sup> I discern in their writing a sense that international law is a calling, and that it has an ethics, particularly for experts on the law-of-war writing during wartime. The overall feeling I am left with (and, my sense is, many of us are left with) in the contemporary era is that the stakes—at least as expressed by international law scholars—are very low. There is no sense of the magnitude of the very human dramas and violence. There is vanishingly little, if any, sense of Syria, or Afghanistan, or Yemen, or Somalia as real places with real people and real buildings and real cultures and real histories. There is no sense of military commanders as young people—often in their early twenties—faced with impossible decisions. The mood is arid, bloodless, boring, and clinical. There is no sense that they are fed up or triumphant or desperate or worried. There is no sense that after nineteen years of war, international law is worse off or better off.

In the Vietnam era, passion characterized both scholarship on the “left” and the “right”—that is, those international-law-of-war scholars who thought that the war was illegal, and increasingly associated themselves with the anti-war movement, as well as those scholars who supported the legality of U.S. action, even if they may have questioned the underlying strategy.<sup>10</sup> It will likely come as no surprise that every scholar I read from that era and that milieu was a white male, writing in what we would today consider very much the mainstream of international law. In the War on Terror era, the spectrum of legal dispute seems strangely narrow, politically as well as in terms of the range of opinions and perspectives on what is legal and what is not, and why that (il)legality matters. There is, today, an ideological homogeneity and consensus about a set of legal arguments and positions that ought to be wildly, outrageously contentious. It should strike us as deeply strange that so many international legal scholars seem to generally agree on international legal arguments that may drastically shift the rules regarding the use of force, and the interpretation of international humanitarian law’s applicability (read: the definition of war itself).

Ultimately, the big question I am left wondering is how international legal scholarship about war, written at a time of war, *ought* to read. Whether we can demand doctrinal rigor, and analytical clarity, while also expecting that scholarship makes us feel something, that it connects us to the author, that it captures the intimacy and emotion that human beings experience in relation to war. My immersion in the Vietnam-era scholarship made me

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9. This is in some ways connected to Martha Nussbaum’s description of eudaimonism, and specifically the notion of “differences of intensity,” which she argues are “explained by the importance with which I invest the object (or what befalls it) among my own goals and projects.” MARTHA NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* 55 (2003).

10. See, e.g., John N. Moore, *Legal Dimensions of the Decision to Intervene in Cambodia*, in 3 *THE VIETNAM WAR AND INTERNATIONAL LAW* 58, 75 (Richard A. Falk ed., 1972); Richard A. Falk, *The Cambodian Operation and International Law*, in 3 *THE VIETNAM WAR AND INTERNATIONAL LAW* 33, 42 (Richard A. Falk ed., 1972).

realize that it *is* possible, and it left me wondering why, today, as the human stakes of armed conflict are still so high, it feels so unimaginable.

A note on terminology and scope. First, with respect to the notion of passion underlying this article: I argue below, in part, that a particularly influential strand of contemporary scholarship on the United States' War on Terror adopts a view that is aridly technical, acontextual, and ahistorical. I use "passion" as a composite term in an attempt to capture these diverse facets of a problem that I am attempting to diagnose. I thus invoke a broad notion of passion, and, as I explain below, I think that passion better—if by no means fully—captures my concerns than other related concepts, such as sentimentality. Second, with respect to the scholarship that I am primarily addressing: I focus on a subset of contemporary writers who seem to have particularly influenced U.S. legal policy, and have contributed significantly to setting the terms of what should and should not be considered a mainstream perspective, on several controversial legal questions.

In this paper, I use two eras of international legal scholarship on war to illustrate key moments in the field that were typified by very different kinds of writing—and the corresponding differences in thinking and feeling. The Introduction situates this project within broader writing on law and emotions, almost all of which has focused on domestic law. Part I provides a list of characteristics of what I consider passionate scholarship, using the Vietnam era as an example of that approach. Part II provides a mirrored list of the characteristics of abstract and bloodless scholarship, using the latter part of the War on Terror (2009 onwards). The observations compare how scholars of each period contend with the sense of crisis and urgency of their time, the understanding that they (we) were living—and writing—through moments that would be seen as history-changing and law-shifting in the future. Part III examines possible explanations for differences where we ought to see similarities, for absences of scholarly connection where they should be plentiful, and for a seismic shift in the general tone and mood of international legal scholarship on war in less than two generations. Part IV concludes by discussing why we—international lawyers, scholars who feel strongly about war and peace—ought to care about and seek to reverse this shift.

## I. LAW AND EMOTIONS

There is a burgeoning literature on law and emotions, one that is just beginning to involve international lawyers and international legal questions.<sup>11</sup>

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11. Emily Kidd White is producing important work in this field. Moreover, a number of conferences and workshops suggest that we might expect a flourishing of near-term scholarship on emotions and international law. For instance, there was a conference in 2012 at the University of Melbourne School of Law on The Passions of International Law, (<https://perma.cc/T3AH-U9PQ>); a conference on Law and Emotion in a Comparative Perspective at Cardozo Law; a conference at the Graduate Institute of Geneva on Knowledge Production and International Law with a panel on Emotions and International Law; and a conference on Emotions in Legal Practices: Historical and Modern Attitudes Compared at the University

Here, I briefly locate the present piece in relation to this literature,<sup>12</sup> which I have found to be engaging and provocative. I also explain what I mean by “passion.”

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of Sydney. Vesselin Popovski, *Emotions and International Law*, in *EMOTIONS IN INTERNATIONAL POLITICS* 184 (Yohan Ariffin et al. eds., 2016), discusses the role of empathy for victims in the development of international humanitarian law, empathy for individuals in the development of human rights law, and the role of emotions and emotional language in the practice of international criminal tribunals. By far the piece most directly connected to the project herein is Gerry Simpson, *Sentimental Life*, *supra* note 7. Ultimately, I think Simpson and I are concerned with some of the same dilemmas, but are calling for slightly different things. Simpson notes:

[T]he best writing—the best theorising—resists the injunction to come to [a] point, to render the world transparent, to clarify the thesis, to achieve relevance, to simplify. These are the standard vices of the sentimentality of excess and simplicity, of operatic international law. This lecture has been a plea for something else: a different register combined with a wariness of that different register, a poetic international law of the ‘tingle’, an irony of the mind. This might involve an attentiveness to the unseen and unheard or, seemingly, insubstantial or a commitment to an international law of style and love and smallness, and an attentiveness to the everyday and to the informalities of power. A willingness to do what poets do: namely to notice the micro-political humiliations that might entirely undercut the grand humanitarian scheme.

*Id.* at 28 (citation omitted).

I agree. However (and cautiously), I think that there *are* moments that call for operatic international law, for grandness, and for a willingness to engage that part of ourselves (however critically minded, or ironic, or theoretically complex we might be) that is not necessarily “close to tears” but that is nonetheless moved and seeks to move others by the language and values of our own discipline (however problematic, colonial, blinded by power that discipline might be). I conclude that even international-law-of-war scholarship that *does* seek to answer a question, or to come to a point, or to otherwise be relevant (and I share Simpson’s concerns about this mode) *should* be passionate during wartime, perhaps even more passionate than theory. *See also* Mark Drumbl, *Distant Justice Symposium: Some Thoughts on Getting Close*, *OPINIO JURIS* (Mar. 10, 2019), <https://perma.cc/FN9U-L7UD>.

12. Key texts in the field, virtually all focused on the domestic United States legal context, include *THE PASSIONS OF LAW* (Susan A. Bandes ed., 2000) (Martha Minow’s piece on *Institutions and Emotions: Redressing Mass Violence* may be particularly instructive for those seeking to understand emotions in international criminal tribunal decisions); Kathryn Abrams & Hila Keren, *Who’s Afraid of Law and the Emotions?*, 94 *MINN. L. REV.* 1997 (2010) (which takes on a central theme in the field of law and emotions, namely the extent to which emotions are understood as contrary to reason or rationality, as well as providing an overview of existing scholarship and arguing for the pragmatic potential of law-and-emotions study and analysis); Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 *L. & HUM. BEHAV.* 119 (2006) (which provides a categorization of different approaches within the field such as the “emotion-centered approach,” the “emotion-phenomenon approach,” and the “legal doctrine approach” and illuminates the extent to which the key questions are focused on whether and how emotions can help create *better* legal outcomes or how emotions, descriptively, are already part of legal outcomes). Martha Nussbaum has written extensively on the topic, including *POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE* (2013) and *UPHEAVALS*, *supra* note 9 (2003), amongst many others. The work I found most salient and inspiring for purposes of my project, despite the completely different jurisdictional and substantive focus, was the speech of U.S. Supreme Court Associate Justice William Brennan on the occasion of the bicentennial of the United States Constitution, *Reason, Passion, and “The Progress of the Law”*, 10 *CARDOZO L. REV.* 3 (1988), and the collected responses and reflections to this address gathered in Volume 10 of the *Cardozo Law Review* in 1988. Finally, scholars who teach law should read Julius G. Getman, *Voices*, 66 *TEX. L. REV.* 577 (1988), which discusses the types of voices used in legal education, noting, “What disappoints me most about legal education is its undervaluing of ‘human voice,’ by which I mean language that uses ordinary concepts and familiar situations without professional ornamentation in order to analyze legal issues.” *Id.* at 582. Interestingly, and expressing a view I share as to the particular subset of texts I read closely for this project, Getman also notes, “Without having done a systematic study, I am strongly of the view that human voice was more common during the forties, fifties, and sixties than it is today.” *Id.* at 585, n.21.

The field of law and emotions is broadly concerned with a series of descriptive and normative projects, and it is unusually interdisciplinary insofar as it engages neuroscience, cognitive science, quantitative analysis, psychology, moral philosophy, and more. Much of the literature looks at how judges and lawyers express, hide, employ, or seek to suppress emotions in the courtroom and in judicial decisions (often with a focus on municipal criminal law, where so many powerful emotions are invoked or are pointedly missing from legal discourse). Some of the descriptive or analytical literature also observes the ways in which emotions might be involved in lawmaking and on how judges make decisions, excavating emotions where legal scholarship has previously looked only at rationality or doctrinal interpretation.<sup>13</sup> Much of this scholarship is framed as oppositional to or critical of mainstream accounts of lawmaking and judicial reasoning,<sup>14</sup> and seeks to center emotions in historical and contemporary understandings of how law works. Normatively, law-and-emotions scholarship engages how and which emotions ought to shape lawmaking; how this could be encouraged or contained; and how emotions might be marshaled to further justice in particular legal contexts.<sup>15</sup>

While my project benefits tremendously from the approaches and eclecticism of perspective of the field of law and emotions, it sits outside that field for several reasons. First, I am focused solely on academic scholarship, not other kinds of legal speech, performance, or judgement.<sup>16</sup> I am most interested in scholarship for two reasons. International law, a field that in general lacks a central authority to make, interpret, and enforce legal norms, treats scholarship as a potential *source* or at least as a key contribution to discerning

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13. In a wonderful subsection entitled “A New Analytic Method—Reading for Emotion,” Samuel H. Pillsbury discusses the idea of the “emotion-hunter”: “The reader becomes a hunter of feeling, looking for signs based on knowledge of the author and humanity generally. The search is based on a truism about human nature: that persons have feelings about anything of significance to them.” Samuel H. Pillsbury, *Harlan, Holmes, and the Passions of Justice*, in *THE PASSIONS OF LAW* 330, 340 (Susan A. Bandes ed., 2001). Pillsbury further suggests:

The emotion-hunter looks for literary qualities as well [in a legal opinion]. Particularly lively prose may signal the author’s personal engagement in the subject addressed. Where the prose takes on a recognizable, individual voice, breaking out of the dull legalese of judicial-speak, we may surmise that here the judge speaks personally, and perhaps emotionally.

*Id.*

14. Maroney notes, “A core presumption underlying modern legality is that reason and emotion are different beasts entirely: they belong in separate spheres of human existence; the sphere of law admits only of reason; and vigilant policing is required to keep emotion from creeping in where it does not belong.” Maroney, *supra* note 12, at 120.

15. Abrams and Keren note that there is significant pragmatic potential for law-and-emotions scholarship in “its capacity to *illuminate* the affective features of legal problems; its ability to *investigate* these features through interdisciplinary analysis; and its ability to *integrate* that understanding into practical, normative proposals.” Abrams & Keren, *supra* note 12, at 2002.

16. While some law-and-emotions work does mention legal scholarship, it is rarely the central focus of inquiry, for obvious reasons, particularly in the context of domestic law or moral philosophy.

international law.<sup>17</sup> This influence has historically been skewed toward western scholarship, particularly continental European and increasingly English-language work.<sup>18</sup> In this sense, international law scholarship may be doctrinally significant and may—particularly in times when the law is seen as in flux or under extreme pressure—influence the development and interpretation of international law in consequential ways. Alongside its potential doctrinal or positive-law significance, I am also deeply interested in the discipline and its professionals.<sup>19</sup> Many of those in the field of international law related to war spend the bulk of their time, energy, and effort producing scholarship. What they generate reflects the field at moments of tremendous anxiety or change.

Second, I am interested in the passion expressed by the authors themselves but also in the emotional response that scholarship has the capacity to evoke in a reader. In this sense, my reading of the texts is close but it is also punctuated by an entirely—and purposefully—non-empirical set of reflections. Third, and here my project draws happily from the law-and-emotions field but takes a less theoretically grounded approach to “emotion,” passion may serve as a *vehicle* for emotions more than a representation of an emotion in its own right. Law-and-emotions scholars identify a range of emotions that are relevant to legal discourse (particularly criminal law jurisprudence), including shame, anger, disgust, and fear.<sup>20</sup> Passion, in the sense that I use it and in the sense I read it throughout the texts discussed herein, is often a way of delivering or eliciting emotions.<sup>21</sup> Passionate writing is a style, a tone, and an approach to research and writing offering an opportunity for expression on the part of the author, and also the creation of a space for a reaction within the reader.<sup>22</sup> It may, in that latter sense, prompt a range of powerful emotions about and within international law relating to war. Passionate reasoning, as I found it in the Vietnam-era literature, and as I char-

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17. See, e.g., Statute of the International Court of Justice, art. 38 (1), June 26, 1945, 59 Stat. 1055, 3 Bevens 1179; William J. Aceves, *Symposium Introduction: Scholarship as Evidence of International Law*, 26 LOY. L.A. INT'L & COMP. L. REV. 1, 1 (2003).

18. See, e.g., ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? (2017); B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT'L COMMUNITY L. REV. 3, 3 (2006).

19. See, e.g., Frédéric Mégret, *Thinking about What International Humanitarian Lawyers 'Do': An Examination of the Laws of War as a Field of Professional Practice*, in THE LAW OF INTERNATIONAL LAWYERS: READING MARTTI KOSKENNIEMI 265 (Wouter Werner, Marieke de Hoon & Alexis Galán eds., 2017).

20. There is a rich discussion of what should count as an emotion, and which emotions should be seen as relevant to law in the field. See, e.g., Robert C. Solomon, *Justice v. Vengeance, On Law and the Satisfaction of Emotion*, in THE PASSIONS OF LAW 121, 124–31 (Susan A. Bandes ed., 1999); NUSSBAUM, *supra* note 9; Yohan Ariffin, *How Emotions Can Explain Outcomes in International Relations*, in EMOTIONS IN INTERNATIONAL POLITICS: BEYOND MAINSTREAM INTERNATIONAL RELATIONS (Yohan Ariffin, Jean-Marc Coicaud & Vesselin Popovski eds., 2016).

21. See, e.g., Emily Kidd White, *Till Human Voices Wake Us*, 3 J. L. RELIGION & ST. 201, 228 n.114 (2014) (“Passionate speech can inspire emotions that lead us toward right thinking, or at times to wrong thinking” (emphasis added)).

22. “Passion . . . is [a]ny kind of feeling by which the mind is powerfully affected or moved.” Stephen Wizner, *Passion in Legal Argument and Judicial Decisionmaking: A Comment on Goldberg v. Kelly*, 10 CARDOZO L. REV. 179, 179 (1988) (internal citations omitted).

acterize it below, is not about *emotional* writing, nor is it about writing that necessarily presents the interior life of the author. Rather, it reflects a kind of moral situatedness, a willingness to take seriously the professional ethics and moral agency of writing about international law and war to audiences that have power to make decisions about war.<sup>23</sup>

As I will argue, passion, in the realm of international law and war, may also have implications for substance.<sup>24</sup> Unlike some authors in the arena of “emotions and the law,” I do not argue that passionate reasoning will result in “better” doctrinal outcomes, or “correct” analysis, or even a preference for a particular ideological perspective.

While I do not employ the central methodologies or questions of the law-and-emotions discipline in this paper, the field of international law and war appears to be ripe for such analysis. In particular, there is a rich corpus of texts—including international judicial decisions, commentaries, Security Council resolutions, and military manuals—that both invoke and seek to exclude powerful emotions, and that we have thus far not sought to read or understand from the perspective of emotions.

My understanding of the term “passion,” my instinct to use this term over the other available alternatives that have similar (but I would argue slightly different) meanings and expectations,<sup>25</sup> is most informed by an analysis far outside my discipline. In a 1987 speech honoring Benjamin N. Cardozo delivered on the occasion of the bicentennial of the United States Constitution, Associate Justice William Brennan discussed “reason, passion,

23. While I take the unusual step of using the first person throughout the present piece (that is, beyond the introduction section, where it is commonplace in contemporary scholarship), this is in order to candidly convey my experience of working through a set of questions regarding my discipline, and to tell the story of encountering the Vietnam-era literature. This should not be understood as suggesting that passionate scholarship ought to utilize the first-person, or that authors ought to tell readers about their internal lives. Indeed, none of the authors I discuss from the Vietnam era write in the first person or reveal anything about their personal feelings regarding the war.

24. See Mégret, *supra* note 19, at 284 (“The reflexivity of critical sociology, its ability to turn the gaze on the subject (who is the ‘we’ in international humanitarian law?), is a crucial part of shaking the certainty of disciplinary practices.”).

25. I discuss in this section why I do not use the phrase “law and emotions” or seek to track specific emotions. I see passionate reasoning and writing as a way of expressing and eliciting emotion, but not necessarily as connected to a particular emotion or set of emotions, or to writing in an emotional manner. One could also imagine focusing on “sentiments” or “feelings.” The most instructive discussion on this issue, particularly for international lawyers, is a footnote in Gerry Simpson’s *The Sentimental Life of International Law*, where he indicates that he ultimately selects “sentiment” “because of the way in which the word makes explicit a relationship between intellect and feeling, and because—though this, too, has to be explored elsewhere—sentiment is both style and substance in ways that [he] find[s] intriguing. . . .” Simpson, *Sentimental Life*, *supra* note 7, at 5, n.10. He suggests that “[t]he word ‘passion’ is suggestive in different ways: some common derivations include the idea of physical agitation (perhaps, sexual), overwhelming emotion and the allusion to suffering, especially martyrdom, especially on the cross (The ‘Passion’ of the Christ).” *Id.* While a number of interlocutors suggested that “passion” had a biblical connotation, or insisted that it was related to pain and martyrdom in a way that was perhaps a bit unintentionally or distractedly loaded for the purposes of my argument, I ultimately found a debate from the late 1980s, far outside the realm of international law, to capture what I understood and felt the word to denote in my analysis.

and ‘the progress of the law.’”<sup>26</sup> Brennan’s attention is focused solely on judging in the American domestic legal context. But his analysis, which evoked significant reaction and scholarly response at the time, merits attention far beyond domestic law and U.S. constitutional scholarship. Brennan laments how “distance” and “disembodied” reasoning in precedent and legal treatises can serve to remove the judge from the outcome of the cases they hear.<sup>27</sup> He notes:

Cardozo drew our attention to a complex interplay of forces—rational and emotional, conscious and unconscious, by which no judge could remain unaffected. It is my thesis that this interplay of forces, this internal dialogue of reason and passion, does not taint the judicial process, but is in fact central to its vitality.<sup>28</sup>

Brennan refines his understanding of passion throughout the piece and presents in powerful language why it is essential for judges to be open to passion in their work. In the speech he also seems to see passion as having meaningful substantive and political force: passionate reasoning is not merely a better way of thinking or of writing a legal opinion, it is also a way of reasoning that forces one to be open to different ideas, to a broader range of experiences and critiques, and it centers the fundamental purpose of law<sup>29</sup> in the enterprise of legal interpretation and analysis, no matter how technical.<sup>30</sup> He argues:

By “passion” I mean the range of emotional and intuitive responses to a given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason. . . . The well-springs of imagination, of course, lie less in logic than in the realm of human experience—the realm in which law ultimately operates and has meaning. Sensitivity to one’s intuitive and passionate responses, and awareness of the range of human experience, is therefore not only an inevitable but a desirable part of the judicial process, an aspect more to be nurtured than feared.<sup>31</sup>

Justice Brennan was deeply concerned that judicial reasoning during a critical time for constitutional law was increasingly distanced from this well-spring and was utilizing “formal reason severed from the insights of

26. See generally Justice Brennan, *supra* note 12.

27. *Id.* at 8.

28. *Id.* at 3.

29. *Id.* at 11 (“Only by remaining open to the entreaties of reason and passion, of logic and of experience, can a judge come to understand the complex human meaning of a rich term such as ‘liberty.’”).

30. *Id.* at 9 (“In fact a far greater threat lay in the legal community’s failure to recognize the important role that qualities other than reason must play in the judicial process. In ignoring these qualities, the judiciary has deprived itself of the nourishment essential to a healthy and vital rationality.”).

31. *Id.* at 9–10.



passion” to elevate technical legal argumentation from the human beings and moral principles the law is meant to serve. He feared an “alien standard language” as associated with a particular kind of cold, disconnected governance.<sup>32</sup> “If due process values are to be preserved in the bureaucratic state of the late twentieth century, it may be essential that officials possess passion—the passion that puts them in touch with the dreams and disappointments of those with whom they deal.”<sup>33</sup> Justice Brennan was speaking to his own community of American judges in the 1980s, and into a particular debate that is distinct from those I engage here. There are dangers in relying too heavily on transposition across fields, states, and disciplines. However, I found myself repeatedly returning to his heartfelt words as I sought to better understand why one era of international-law-of-war scholarship read so differently, and resulted in such different reasoning, than that of my own era.

## II. PASSION

### *Context*

The United States’ full-scale participation in the war in Vietnam (roughly 1964–1975) created a deep sense of crisis for many U.S.-based international lawyers in the 1960s and 1970s.<sup>34</sup> Many were concerned about what the war meant for the future of humanity as well as about international law’s ability to regulate that future, however modestly. Both the 1945 United Nations Charter and the 1949 Geneva Conventions were relatively new at the time (the 1977 Additional Protocols to the Geneva Conventions were under discussion during much of the latter part of the conflict and were finalized after the war). There was a sense that Vietnam, and what it represented as a proxy war between the great powers, could undo the work of decades of revitaliza-

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32. In addition to the law-and-emotions literature, and the brief spate of “passion” literature that arose around Justice Brennan’s address, one might also look to scholarship on professional responsibility and scholarship, the debate over law and narrative, as well as medical studies on the distancing effects of language for doctors and their patients. (Interestingly, one article in this field, which observes that “[a] . . . source of distancing language in medicine, perhaps the most disturbing yet the most understandable, is the distancing language often used by physicians as a kind of defensive armor against the emotional demands of their position,” notes the problematic use of war metaphors in medical language (saying that “[t]his metaphor has many implications for medical treatment”). David Mintz, *What’s in a Word: The Distancing Function of Language in Medicine*, 13 J. MED. HUMAN. 223, 228–29 (1992). Thanks to Martha Minow for this suggestion.)

33. Justice Brennan, *supra* note 12, at 19. He continues, “[e]ach age must seek its own way to the unstable balance of those qualities that make us human, and must contend anew with the questions of power and accountability with which the Constitution is concerned.” *Id.* at 22.

34. There is a debate over the periodization of the war in Vietnam, as well as when one should mark the beginning of the United States’ role in the armed conflict as a matter of international law. U.S. military involvement in Vietnam began at least in the mid-1950s, with increasing numbers of military personnel and advisers based there under President Kennedy. For the purposes of this paper, I focus on the period after the Gulf of Tonkin Resolution in 1964 and the beginning of air strikes against North Vietnam in early 1965. This seems to mark a significant increase in international law scholarship concerning armed conflict.

tion of the international legal system, and could plunge the world into a third global armed confrontation. Worse yet, there was a palpable sense that the war in Vietnam could hasten a nuclear conflict.<sup>35</sup>

Within the scholarly discipline of international law of war,<sup>36</sup> the key debates focused on: whether the conflict should be understood as international or non-international in character (or perhaps a combination of both); the proper contours and limits of the notion of self-defense within the U.N. Charter system (including the definition of armed attack and the notion of threat); the proper legal construction of the notion of consent to intervene militarily in a foreign conflict; the legality (or not) of intervention in foreign civil wars; and the broader question of whether the Vietnam War was a “new kind of war.”<sup>37</sup> Sound familiar?

### *Characteristics of Passion*

This section presents my sense of the key characteristics of passionate international legal scholarship concerning war, as I read them through the increasingly anguished Vietnam-era writing. Some elements here are stylistic, some are about the analytical quality and rigor of scholarship; some may fall within the category of aesthetics and taste; and others are about what kinds of expertise and knowledge ought to underlie academic scholarship that seeks to influence contemporary policy-making during wartime.<sup>38</sup>

35. News reports published as this article was being completed suggest that, in 1968, General William Westmoreland, the top U.S. military commander in the Vietnam War, sought to move nuclear weapons within range to strike North Vietnamese forces should the battle of Khe Sanh have turned decisively against U.S. troops (a project he titled “Operation Fracture Jaw”). According to newly declassified documents, Westmoreland was on track to implement these plans until President Johnson was made aware of them and ordered an end to any such planning. See David E. Sanger, *U.S. General Considered Nuclear Response in Vietnam War, Cables Show*, N.Y. TIMES (Oct. 6, 2018), [HTTPS://PERMA.CC/RM6F-Z7WX](https://perma.cc/RM6F-Z7WX).

36. I am intentionally using this term to encompass both scholarly sub-disciplines of those who study intervention and the use of force (what we would today refer to as “*jus ad bellum*” or “*jus contra bellum*”), and those who focus on international humanitarian law/law of armed conflict and other international legal rules applicable within armed conflict (“*jus in bello*”). It appears to be a very new development that these are treated as almost two separate fields in contemporary international law and policy circles. In the Vietnam era, it would have been very peculiar indeed for scholars working on IHL not to deeply understand the law and legal debates relevant to intervention, and scholarship frequently addressed both areas of international law, often recognizing the rules of intervention to be far more consequential for world order than those applicable once armed conflict had been initiated.

37. See, e.g., Quentin L. Quade, *The U.S. and Wars of National Liberation*, in 1 THE VIETNAM WAR AND INTERNATIONAL LAW 102, 124 (Richard A. Falk ed., 1968) (“[T]o what extent [is] a war such as Vietnam . . . a new thing, demanding a new morality, i.e., a new relating of commitments and principles to new conditions which call for new moral judgments[?] Its most obvious distinctiveness is the dominant use of guerrilla tactics as the mode of combat . . . [and the] inter-mingling of combatant and non-combatant.”). See also Leonard C. Meeker, *Viet-Nam and the International Law of Self-Defense*, in 1 VIETNAM WAR AND INTERNATIONAL LAW 318, 318 (Richard A. Falk ed., 1968) (“As President Johnson has said, this is a new kind of war.”).

38. What follows is explicitly not intended to serve as a “checklist” for passionately reasoned scholarship. There is no passion “recipe” that, if followed, or followed in part, will produce “good” scholarship.

*Taking Facts Seriously*

Passionate scholarship manages to convey a rich sense of the actual war at issue, one that necessarily precedes the doctrinal analysis of the questions raised by the conflict.<sup>39</sup> In the realm of international law and armed conflict, this feature of passionate scholarship is particularly significant, insofar as the field has for much of its contemporary history claimed to be far more pragmatic and practical than its peer disciplines.<sup>40</sup> That is, the contemporary law of war has claimed that it is more bounded by and informed by reality and realism than other fields of international law, in part because its founders are claimed to have been men tested by battle, and in part because the field claims to be interested in directly influencing those who must utilize international law to make life-and-death decisions “on the ground.”

The writings of Vietnam-era scholars demonstrate the degree to which they took the facts of the Vietnam War seriously.<sup>41</sup> This is true across the political spectrum. Even those authors who supported the United States’ invasion of North Vietnam, and those who argued that the invasion of Cambodia was justified on international legal grounds, spend a number of pages at the outset of their pieces discussing these countries, often in great detail.<sup>42</sup> The four volumes of *THE VIETNAM WAR AND INTERNATIONAL LAW* produced by the American Society of International Law (“ASIL”) and edited by Richard Falk (heading an editorial board of the many scholars who were most engaged in the debates of the time) all begin with chapters about the factual situation. I was struck by how much it reframed my reading of the abstract law.<sup>43</sup> It made it impossible for me, as an informed reader, to sim-

39. There could be riveting scholarship that is only about purely abstract notions of international law of war: say, about the relationship of just war theory to the collective security system; or about the idea of proportionality as a conceptual frame for balancing lives. Such scholarship does not come within my analysis, both because it does not *claim* to be about the particular wars of our time (and the wars of the author’s nation) and because such scholarship should arguably be subject to different criteria regarding voice and verve.

40. See Mégret, *supra* note 19, at 285; Yoram Dinstein, *Concluding Remarks: LOAC and Attempts to Abuse or Subvert It*, 87 INT’L LEGAL STUD. 483, 489 (2012) (“Therefore, the genuine option that must be exercised is not between LOAC [the law of armed conflict] (characterized by pragmatism and common sense) and human rights law (untainted in its pristine purity).”).

41. My point here is not to argue whether international law scholars writing in the 1960s and 1970s were actually high-quality Vietnam experts (I myself am not qualified to assess this). The point is much simpler: that they actually spent many pages talking *about Vietnam the place* when writing about international law and the war *in Vietnam*. See, e.g., Rachel Hughes, *Left Justified: The Early Campaign for an International Law Response to Khmer Rouge Crimes*, 76 POL. GEO. 1, 1–10 (2020) (referencing John H.E. Fried’s visit to Vietnam and Cambodia in 1979); Tim Cahill, *Joan Baez in Hanoi: 12 Days Under the Bombs*, ROLLING STONE (Feb. 1, 1973), <https://perma.cc/T2YA-7TXX> (depicting Telford Taylor’s travels in Hanoi in 1972).

42. See Meeker, *supra* note 37; Moore, *Legal Dimensions*, *supra* note 10.

43. The point herein can be captured more simply. After reading twenty-five pieces published between 1965 and 1975 about the Vietnam War, I had learned something about the actual Vietnam War, and about Vietnam. After reading twenty-five pieces published between 2008 and 2018, I had learned nothing about the actual wars in Yemen, Somalia, or Syria, and nothing about any of those countries. The number of pieces of scholarship is arbitrary. This is not meant to represent a scientific approach to the data.

ply say after the first four paragraphs, “Well, I know what this piece is going to say, I may as well jump ahead to the conclusion.” It also made it far less easy for my eyes to glaze over the piece, or to start thinking about what I wanted to have for lunch. Nearly each piece forced me to remember, and to take seriously, that the author was discussing a real *war* in a real *place* that would affect thousands and thousands of actual *people*.

Yet the facts of the situation were not simply presented at the outset of the articles, as preludes to abstract analysis. They permeated the legal discussion and were constantly in dialogue with and informed the way international legal arguments were made. For instance, Wolfgang Friedmann, discussing the question of whether the invasion of Cambodia could be justified on the ground of Cambodian neutrality having been violated (under an international-armed-conflict theory) or on the ground of Cambodia having demonstrated that it was unable or unwilling to repel Viet Cong and North Vietnamese fighters, notes:

Of course, North Viet-Nam has violated Cambodian Neutrality. But the establishment of depots and units in sanctuaries near the South Vietnamese border did not interfere with the ordinary life of the people of Cambodia, who went about their business more or less in peace. It is the massive United States-Vietnamese invasion, with all the attendant aerial operations, that has set into motion a process—so painfully familiar from Viet-Nam—of destruction and devastation, the displacement of hundreds of thousands, and the probable ruin of a small country.<sup>44</sup>

Like most of the elements of passionate writing I found whilst reading the Vietnam-era work, taking facts seriously was not outcome-determinative. It was not a characteristic only of those who were against the war (though, as the war progressed, that group was, I believe, increasingly able to use the facts to their favor).<sup>45</sup> Nor was this a matter of writing sympathetically about faraway civilians, or seeking to use Vietnamese or Cambodian suffering to incite strong emotions in the reader. Those who defended the legality of the war also had to demonstrate why their approach made sense in light of the realities of the conflict, including those in the United States.

Context played a particularly compelling role in the discussions regarding international law and consent for the use of military force. As the U.S. government presented multiple justifications for the invasion of South Vietnam and later Cambodia, some rooted in the claim that these nations had consented (explicitly or tacitly) to U.S. strikes,<sup>46</sup> Vietnam-era scholars reminded

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44. George H. Aldrich, Wolfgang Friedmann & John Lawrence Hargrove, *Comments on the Articles on the Legality of the United State Action in Cambodia*, in 3 THE VIETNAM WAR AND INTERNATIONAL LAW 96, 98 (Richard A. Falk ed., 1972).

45. See discussion in note 39, *supra*.

46. See Moore, *Legal Dimensions*, *supra* note 10, at 75.

the reader that the abstract idea of “consent” needed to be understood in the context of real-world power.<sup>47</sup> The discussion sensibly cannot proceed, their writing suggests, without acknowledging that in the geopolitical context of the time, no one really believed that the United States was genuinely asking for permission, or that there was any actual option for a weak state such as Cambodia to say “no.” In their view, it would be impossible to have a meaningful and grounded conversation about international law without acknowledging this reality, and framing the legal questions and arguments with this basic recognition.<sup>48</sup> If this seems obvious, wait until we get to 2010.

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47. See, e.g., Falk, *The Cambodian Operation*, *supra* note 10, at 42. Falk states:

Under these circumstances it is difficult to accord any serious respect to the Lon Nol régime as a government of Cambodia. This régime does not seem able to represent the interests of its people. Its failure to protest the invasion, pillage, and occupation of its territory bears witness to its own illegitimacy, just as the willingness of the Saigon régime to enter into a friendship pact with a government group that had so recently initiated ruthless anti-Vietnamese policies, exhibits its illegitimacy in relation to the Vietnamese people.

These regimes are struggling at all costs to maintain power in the face of a highly unfavorable domestic balance of power. In this setting, their invitations to foreign governments to send in armies are of only slight legal consequence. The failure of the Cambodian Government to protest the invasion of its territory by foreign forces does not, under these circumstances, amount to a valid legal authorization.

*Id.*

John Norton Moore, Falk’s main scholarly opponent throughout the decade, comes out on the opposite side regarding the question of consent, but equally grounds his argument in the reality of the situation and a deep reading of international legal scholarship from the prior century (citing, amongst others, Greenspan, Hyde, Castrén, and Lauterpacht) and past conflicts (the bombing of Salonika, French attacks on the Tunisian village of Sakiet Sidi Youssef during the Algerian war, Israeli attacks in Jordan, Lebanon, and Syria). Thus, Moore’s argument is just as grounded in reality, but takes a different approach to the question of whether the relative weakness of Cambodia should matter in making the determination of legality. See Moore, *Legal Dimensions*, *supra* note 10, at 75. Moore states:

Although there were some Cambodian statements critical of the joint operation, on balance it seems to have received at least the tacit consent of the Cambodian Government. This tacit consent is another factor which makes the case stronger than that for Israeli action against guerrilla complexes in Jordan, Lebanon and Syria, or French action in the Algerian War against Tunisian frontier areas.

*Id.* See also JOHN N. MOORE, LAW AND THE INDO-CHINA WAR 403, 405–22 (chapter entitled “International Law and the United States Role in Vietnam: A Reply to Professor Falk,” section entitled “Real-World Vietnam: An Ambiguous Context”) (1972); Aldrich, Friedmann & Hargrove, *supra* note 44, at 99 (“It acquiesced after the event, and it is now quite clearly a client government of the United States. . .”).

48. It is worth noting that I am not engaging in an observation about “law and policy” as an approach to international law. While a number of the leading scholars at the time were students of Myres S. McDougal (most notably Falk and Moore), and influenced by the New Haven School of international law, the observations I make here are woven into the most positivist and rigorously legal analytical aspects of the scholarship. While there are other places where the Vietnam-era scholars clearly speak in the voice of “policy,” their constant reference to reality, to the actual things happening in the world, to basic notions of common sense, permeate even their most purely “legal” work.

*Taking the Past Seriously (Self Awareness About the Risks of Extreme Presentism)*

The Vietnam-era scholars believed that they were living through an historic time.<sup>49</sup> Scholarship from the early years of the war demonstrated an existing (pre-war) interest in the field in “internal” or “civil wars,”<sup>50</sup> and—as the war continued—began to focus on questions related to legitimate self-defense under the U.N. Charter, and later the question of attacks on states not directly involved in the conflict. Yet, despite their sense that they were living through a history-changing time, the Vietnam-era scholars displayed a remarkable facility with a broad array of scholarship that dates before their own time, in languages other than English, and with concrete examples of wars completely unrelated to their present moment.

Aside from my shock that the topics I thought were so *au courant* had already been thoroughly analyzed, in similar terms, with largely similar law—at least at its core—only 50 years earlier, I was struck by how much better their scholarship was as international legal scholarship.

As I read, their approach to scholarship slowly emerged: one grounded in deep familiarity with major treatises from multiple countries published over the past century, one rooted in historical examples connected to abstract legal claims, one that contextualized the present in the past. This approach served to keep them much more critical,<sup>51</sup> and much more comfortable with not having answers or at least not being able to identify consensus.<sup>52</sup> Across the political spectrum, Vietnam-era scholars were able to identify areas where the law was simply not developed enough to provide neat doctrinal answers to the difficult questions of the day.<sup>53</sup> They were willing to openly

49. I will return to their sense of the palpable threats facing humanity in the late 1960s, and how this may have impacted their scholarly voices, but to this point, a number of scholars reference the concepts underlying a quotation from Stanley Hoffman that John Norton Moore includes in the introduction to his book *LAW AND THE INDO-CHINA WAR*: “Professor Stanley Hoffman describes the present international system as a revolutionary system tempered principally by the potential for mutual nuclear annihilation.” MOORE, *INDO-CHINA*, *supra* note 47, at xviii. Manfred Halpren, writing at the beginning of the war, notes, “We are only now beginning to experience the pain of bafflement and frustration that comes from living in a world charging both hopefully and dangerously, and certainly quickly and seemingly beyond control.” Manfred Halpern, *The Morality and Politics of Intervention*, in 1 *THE VIETNAM WAR AND INTERNATIONAL LAW* 39, 52–53 (Richard A. Falk ed., 1968).

50. In a tragic connection to our present day, one edited volume on international law and internal war has chapters on the conflicts in Yemen and Congo. Interestingly, without any conscious reference to a “turn to history,” the volume also has chapters on the American Civil War, the Civil War in Spain (which many authors of the 1960s saw as inspiring much of the academic interest in civil war), and the Algerian Revolution. See *THE INTERNATIONAL LAW OF CIVIL WAR* (Richard A. Falk ed., 1971).

51. I am using the word “critical” in the dictionary sense, not in the legal-theoretical sense.

52. John N. Moore, *The Control of Foreign Intervention in Internal Conflict*, 9 *VA. J. INT’L L.* 205, 211 (1969) (“As a result, the armed attack-defense abstractions of the Charter provide little guidance as to the permissibility of assistance to either a widely recognized government or insurgents in a situation of internal war. Article 2(4) of the Charter prohibits the use of force in international relations but does not bar the use of force internal to a state.”).

53. Eliot D. Hawkins, *An Approach to Issues of International Law Raised by United States Actions in Vietnam*, in 1 *THE VIETNAM WAR AND INTERNATIONAL LAW* 163, 193 (Richard A. Falk ed., 1968) (concluding an entire section by saying, because there are disagreements “in the circumstances, the legality or illegality of the United States involvement as a whole cannot be decided”).

acknowledge that there were areas of legal disagreement that were genuine, for which only new law would provide clarity. Despite the fact that they arguably labored in a political environment far more openly hostile to international law and its role in shaping national policy, the Vietnam-era scholars did not seem to retreat into the trope of “all international law on war is utterly clear and well-articulated,” in order to protect the discipline from what they often called “anti-legalists” within the U.S. government and the academe.<sup>54</sup>

This aspect of passion, perhaps counterintuitively, gives the reader a sense of deep rigor and of analytical depth. What was most striking in reading, particularly, the debates over the invasion of Cambodia was the extent to which the scholars seemed to require themselves to go far beyond the war in Vietnam, or abstract legal argumentation, to support their perspectives. They referenced in detail a range of historical and ongoing conflicts (including the French and Algerian war, the Israeli-Palestinian conflict, and the Spanish Civil War), as well as the reactions of a range of states to strikes on third countries during internal armed conflicts and an array of international law scholarship. The latter component is notable to the contemporary reader not only in its temporal range (a number of the Vietnam-era scholars referenced works of international law academics from the 1800s), but also its breadth across sources written in multiple European languages (apparently with the expectation that readers could understand these references, as they were often quoted without translation). In some ways, this could be thought of simply as “good writing,” or “serious scholarship.” But as I read, with growing astonishment, that there was already in 1971 a debate over the complex and multi-layered history to what is today referred to as the “unable/unwilling argument” (more on that later), and read scholars who were able to speak about the issue in a manner leavened more often with curiosity than certainty, I increasingly felt that this embeddedness is part of what made their scholarship more engaging. Their writing read as though the authors were deeply invested in the project of international law: that they had committed themselves to contextual and historical analysis in order to bolster legal arguments about the U.N. Charter because they were passionate about their discipline and about the meaning and effects of their work.

Writing in the third Volume of *THE VIETNAM WAR AND INTERNATIONAL LAW*,<sup>55</sup> John H.E. Fried presents an article that follows many of the

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54. See, e.g., MOORE, *INDO-CHINA*, *supra* note 47, at 246 (“[F]or the past twenty years a debate has raged within the United States between the legalists and the anti-legalists. The anti-legalists have criticized an approach to American foreign policy which they allege has obscured the national interest in a cloud of legal rhetoric and mere precept. The legalists have in turn intensified their call for world peace through law and have for the most part dismissed the anti-legalists as latter day Machiavellis.”).

55. John H.E. Fried, *United States Military Intervention in Cambodia in the Light of International Law*, in 3 *THE VIETNAM WAR AND INTERNATIONAL LAW* 100 (Richard A. Falk ed., 1972).

patterns and forms I found in the scholarship of the Vietnam era.<sup>56</sup> The piece, in response to President Nixon's claim that the attack on Cambodia would be limited both geographically and temporally, and was not an attack on the Cambodian nation or its people (again, if this sounds strangely familiar, it should), first lays out the "basic facts" of the case, providing a detailed account of the Cambodian posture toward the war in neighboring Vietnam. Fried then provides the various U.S. justifications for the invasion:

- That Cambodian border areas have been used as a sanctuary for the enemy;
- That Cambodian neutrality has been violated by virtue of North Vietnamese/Viet Cong use of border areas, and that the United States is engaging in "hot pursuit" across the border; and,
- As part of several justifications that Fried sees as tacit in the U.S. approach: that the attack was necessary to "buy time"; that the attack prevented the first U.S. military defeat in its history; and that the war is a test of the U.S. role as the policeman of the global rule of law.<sup>57</sup>

Fried takes the sanctuary argument seriously, and concretely locates the abstract idea of "sanctuary" within the actual physical space of Cambodian border areas. He then takes on the U.S. arguments point-by-point, citing international legal scholars from the past 150 years, providing a detailed analysis of the French attack on the Tunisian village of Sakhiet Sidi Youssef,<sup>58</sup> as well as a number of other potentially relevant historical episodes. He also includes a detailed appendix of Cambodia's protests against violations of her neutrality. Fried points out that the United States has itself used the ports and territories of numerous neutral states to transfer war materiel. Finally, he argues that this "extreme form of self-help" (the invasion of a third state, not itself involved in the conflict, on the basis of the claim that it is unwilling or unable to stop fighters in an existing armed conflict from using its territory) could be used only "after nonviolent forms for the redress of grievances had been fully tried by the aggrieved belligerent."<sup>59</sup> As we will return to in Part II, Fried's rigorous analysis of what is today called the "unable/unwilling" argument, as well as those of his colleagues (both pro- and anti-invasion), are nearly completely absent from the mainstream scholarship of 2009 and beyond.<sup>60</sup>

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56. Fried's piece begins with the following epigraph: "You might say it's a case of the unwilling helping the ungrateful kill the unwanted," a quote attributed to an "American sergeant in Vietnam" in 1971. *Id.* at 100.

57. *Id.*, at 105–26.

58. Fried, *supra* note 55, at 118–22.

59. Fried, *supra* note 55, at 116–17.

60. See discussion, *infra* Part II.



*An Understanding of International Law Scholarship as a Conversation*

As I delved into the Vietnam-era literature, I increasingly felt like I was listening in on a debate about international law that had the contours of actual conversation. The communicative power of the scholarship and the sense that I was reading passionate reasoning arose at least in part because the authors appeared to be imagining concrete human beings in their audience. Much of the scholarship on law and emotions focuses on whether the judge ought to take individual human stories into account, or the extent to which the judge conveys in her opinion the stakes for individuals impacted by the application of the particular abstract legal principle at issue.<sup>61</sup> The Vietnam-era scholars write in a manner that suggests that they are not only writing for a handful of ultra-specialized fellow academicians but also for the broader public.

In reading, I was reminded that my discipline was not only—or primarily—about minute classifications of armed conflict nor about legal conundrums but rather, and much more fundamentally, about different communities of people making impossible decisions about life and death in faraway places.<sup>62</sup> The Vietnam-era scholarship was frequently rooted in a call for broad engagement and was often written in a remarkably comprehensible, clear, and succinct style. Moreover, it was almost always rooted in the facts of the place. Those writers thereby set themselves up to speak with a more human voice and to activate a feeling in readers that they are being engaged not only as specialists but also as members of a society at war.

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61. See, e.g., David Cole, *A Justice's Passion*, 10 CARDOZO L. REV. 221, 228 (1988) (“Justice Brennan’s dissent [in *McCleskey v. Kemp*] demonstrates that the Court must engage in passionate analysis of the concrete human realities presented if it is to ensure that some measure of rationality in the sentencing process is guaranteed.”).

62. See Mary J. Dudziak, *Death and the War Power*, 30 YALE J. L. & HUMAN. 25, 28 (2018) (arguing “that a crucial factor underlying the military-civilian divide and the lack of contemporary political engagement over the use of military force is the distance between American civilians and the carnage their wars have produced”).

Substantively, this often had the effect of bringing about a common-sense<sup>63</sup> test on abstract legal argumentation and fancy international legal concepts.<sup>64</sup>

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63. Professor Tom Farer, whose writing becomes increasingly passionate (but no less thorough) as the war stretches into the 1970s, responds thusly to the abstract concept of consent by the territorial government for intervention by a third state into its internal war:

The whole notion that you have the right to commit barbarous acts if you have the consent of the host government really goes back to the idealization of the scorched earth policies pursued by the Russians, both in the Napoleonic wars and in the Second World War. There's been an extraordinary amount of naïvete associated with the perception of these two conflicts. Many people talk about it as if every Russian peasant grabbed a torch, ran to his farmhouse, and set it aflame rather than have those French or German pigs move into it. My guess is that most peasants, whether they are Russians, or Vietnamese, or anything else, are not so committed to the national war effort that they want to see themselves, their family, their homes, and their villages destroyed. I think that until recently we've tended to assume there's something wonderfully valorous about the scorched earth policy. In fact, the scorched earth policy is normally an effort by a small elite that runs a government to preserve itself by sacrificing a significant proportion of its population.

...

One reason many people are opposed to the Vietnam War is the whole question of the perceived illegitimacy of the Saigon government. Why? Because so much turns on whether the Saigon Government is a genuinely autonomous entity. By virtually all the formal indices of international law, it is a legitimate government. It is, for instance, widely recognized. Of course, it is a fact that fifty, sixty, or seventy countries' governments will recognize just about *anything* if they are told to by their respective super-power patrons.

...

If, however, you look beneath the surface, this is really a colonial regime. It was created by the French, and we have maintained it since their departure.

Tom J. Farer, Robert G. Gard Jr. & Telford Taylor, *Vietnam and The Nuremberg Principles: A Colloquy on War Crimes*, in 4 *THE VIETNAM WAR AND INTERNATIONAL LAW* 363, 408 (Richard A. Falk ed., 1976). A number of scholars of the time, across the political spectrum, regularly refer to the notion of "client states," and question the extent to which the notion of "consent" could be relied upon when the United States was the one making the request of a weak third-world state.

64. Contemporary law-of-war lawyers will likely recognize the name of a young JAG officer writing in 1970:

Under the leading view, the Vietnamese conflict would not constitute a "non-international" conflict regardless of the validity of any arguments that the struggle between the NLF (Vietcong) and the government of South Vietnam is in the nature of a "civil war." The conflict cannot be divided up among the parties according to the nature of the involvement of one against the other; it is one armed conflict. The conflict is of one type as far as application of the Geneva Conventions is concerned even if it could be analyzed some other way for other legal purposes: in an examination of the question of intervention or the question of whether or not the NLF or anyone in South Vietnam is bound by the laws of Vietnam. The conflict has seen the direct involvement in armed hostilities of the United States, South Vietnam, North Vietnam, South Korea, Thailand. . . . This multiple involvement of two or more High Contracting Parties to the Convention is sufficient for the nonapplication of Article 3 under the leading view. The only other possibility of an application of Article 3 would concern an Alice-in-Wonderland conclusion that South Vietnam and the NLF are involved in a separate armed conflict in which the forces of the United States . . . do not participate at all.

Jordan J. Paust, *Legal Aspects of the My Lai Incident—A Response to Professor Rubin*, in 3 *THE VIETNAM WAR AND INTERNATIONAL LAW* 359, 361–62 (Richard A. Falk ed., 1972). This section has a footnote that reads:

The application of this [Alice-in-Wonderland] approach (or actually that of Humpty Dumpty since in his view words mean anything that he wants them to mean) would concern an argument that South Vietnam need only apply Article 3 protections to the NLF since some conflict

Another substance-shaping aspect of this mode of passionate writing—taking the general audience and one’s particular interlocutors as non-specialists while maintaining a voice that was accessible and comprehensible but also rigorous—drove scholars of the Vietnam era to take the enemy seriously and to do so on their terms. Numerous pieces from the time, as well as the four volumes from the ASIL Civil War Panel, include references to the arguments of the North Vietnamese, as well as appendices presenting full documents from the North Vietnamese side.<sup>65</sup>

About halfway through my reading, I realized that I had not encountered the phrase “*jus ad bellum*” in any of the Vietnam-era pieces (whether in favor of or against the legality of the U.S. involvement in the conflict). This seemed odd, given that we often tend to associate the use of Latin with old-fashioned international lawyering. Indeed, in piece after piece, the scholars of the time referred to the international law of “intervention,” “non-intervention,” and “aggression,” almost never employing the Latin.<sup>66</sup> On reflection, this makes sense. How often, in a regular conversation with another intelligent human being, does one use Latin phrases where vernacular would do?<sup>67</sup> I realized, many articles into my reading, that once I stopped transliterating “non-intervention” into “*jus ad bellum*” in my head, it actually made a difference to think about the concept of invading another state militarily as “intervention.” It made a difference to think about the rule as one of

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not of an international nature exists alongside and independent of the international conflict to which Article 2 applies.

*Id.* at 362 n.9.

One rarely audibly gasps whilst reading international law scholarship. This was an exception. I was struck by how the central argument accepted today as entirely sensible (if cumbersome, acrobatically challenging, and difficult to explain to anyone other than the 50 or so experts involved in the debate) was so readily dismissed as ridiculous forty years prior.

65. See, e.g., *Hanoi’s Four Points*, in 1 THE VIETNAM WAR AND INTERNATIONAL LAW 617 (Richard A. Falk ed., 1968); *Peace Proposals of the Provisional Revolutionary Government of South Vietnam: May 1969 Ten Point Program; September 1970 Eight Point Program*, in 3 THE VIETNAM WAR AND INTERNATIONAL LAW 897 (Richard A. Falk ed., 1972); *Special Supplement, Inaugural Address of Duong Van Minh as President of Republic of Vietnam (sic), April 28, 1975*, in 4 THE VIETNAM WAR AND INTERNATIONAL LAW 1001 (Richard A. Falk ed., 1976); ROGER H. HULL & JOHN C. NOVograd, LAW AND VIETNAM 9 (1968) (including a chapter on the view from Hanoi and quoting North Vietnamese primary sources in exploring different perspectives on the conflict). A number of scholars at the time visited Vietnam and engaged with North Vietnamese political actors. It is difficult to imagine most international law scholars today visiting war zones, much less engaging with members of jihadi groups or their supporters to better understand their perspective.

66. See, e.g., William T. Burke, *The Legal Regulation of Minor International Coercion: A Framework of Inquiry*, in 1 THE VIETNAM WAR AND INTERNATIONAL LAW 79; Wolfgang Friedmann, *Intervention, Civil War and the Role of International Law*, in 1 THE VIETNAM WAR AND INTERNATIONAL LAW 151; Dean Rusk, *The Control of Force in International Relations*, in 1 THE VIETNAM WAR AND INTERNATIONAL LAW 335; INTERNATIONAL ASPECTS OF CIVIL STRIFE (James N. Rosenau ed., 1964).

67. See Getman, *supra* note 12, at 578–79 (“Perhaps because professional voice derives from case law of varying ages, its rhetorical style tends to be formal, erudite, and old-fashioned. Its passages are often interspersed with terms of art and Latin phrases, as though its user were removed from and slightly above the general concerns of humanity. . . . Many of the problems just discussed apply equally to the use of professional voice in legal scholarship, which only rarely is as moving or interesting as the problems and human situations from which it derives.”).

“non-intervention” as opposed to the abstract Latinism, particularly insofar as “non-intervention” suggests that international law puts a finger on the scale *against* such intervention barring very specific circumstances (which it does).

Finally, the notion of writing scholarship in the mode of conversation appeared to allow the Vietnam-era scholars to be more honest about the indeterminacy of international law and about their own personal uncertainty regarding right answers. The scholars of the time frequently acknowledged that the law that they specialized in was distinct from domestic law<sup>68</sup> in how it afforded lawyers the opportunity to provide legal and other forms of counsel. Particularly as to international law on the use of force, Vietnam-era scholars seemed clear—with themselves and with their readers—that there were points where law ended and their own opinions or policy preferences began. Rather than shoehorn their views into purportedly abstract legal theories, they frequently expressed to the reader a sense that international law would get them only so far. In a sense, they were merely acknowledging what many international lawyers know and rarely like to admit: that the post-World War II international rules on the use of force boil down to two sets of provisions in the U.N. Charter and a handful of agreed-upon principles and rules in customary international law. They did not appear to be driven by a sense that it was the work of international lawyers to always provide confident, water-tight, neat answers to complex questions of law, politics, and warfighting.<sup>69</sup> This approach often had the effect of allowing

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68. See, e.g., Roger Fisher, *Intervention: Three Problems of Policy and Law*, in 1 THE VIETNAM WAR AND INTERNATIONAL LAW 135, 136 (Richard A. Falk ed., 1968). Fisher states:

In a domestic court, it is enough to persuade a judge of what the law is. Once he has been persuaded of the law he need not be given further reasons why he ought to follow it. The question, “Ought this court to follow the law?” simply does not arise. This is true of the lowest state court and of the Supreme Court of the United States. With rare exceptions, it is also true of non-judicial governmental officials. An assistant may be asked by the Postmaster General for a memorandum on his constitutional or statutory powers to seize a book. The Postmaster General does not ask for a memorandum on whether or not he should exceed his powers. If he thinks that sound policy requires that he have additional powers, he will seek to have the law changed.

In the domestic scene this is belaboring the obvious. . . . But if we shift our sights to the international arena it is not only not obvious, it is not true. Seldom is it enough to persuade the Secretary of State or a presidential assistant that a proposed course of action would violate international law. . . . He will often accept a statement as to the rules of international law but believe that it is wise or reasonable to break the rules. As the law looks to him, and as it looks to me there exists outside the law a policy question: “Should the law be respected?”

*Id.*

69. RICHARD BAXTER, HUMANIZING THE LAWS OF WAR: SELECTED WRITINGS OF RICHARD BAXTER 197 (Detlev F. Vagts et al. eds., 2013) (discussing international law and the Israeli/Palestinian conflict: “And so the hierarchy may be observed: at bottom, rules of international law to be applied to specific ships, specific people, specific buildings; in the intermediate rank, mixed legal and political questions about the recognition of the State of Israel, the extent of its territory, and the existence of war; and at the apex, like the grund-norm of Kelsen’s system, the question of the existence and preservation of Israel. Thus the answers to the majority of narrow legal questions have depended on the position taken on the paramount political question.”). See also Hawkins, *supra* note 53, at 193. Hawkins provides a deeply

me, the informed reader, to actually *think* about the dilemmas at hand, to be inspired by the scholarship to take up the questions that they left open.

I often wondered, as I read, if writing with a conversational interlocutor in mind, with a clear sense of the kinds of communities one is seeking to engage or persuade, guided by clarity and common sense, allowed authors to be more vulnerable in their scholarship. Was it possible that this mode of writing, and of relating to legal texts, eminent scholarship, and state behavior at a time of crisis—at a time of *war*—allowed scholars to be more honest about what kept them up at night? It seemed that many authors' relationship to the thinness of international law was troubled, that they worried about what was becoming of the project of international law. And that if this thinness were frankly acknowledged, then the role of influential scholars writing in the mainstream during wartime was particularly powerful. One scholar wrote, in the final months of the Vietnam War, reflecting that despite "this our first defeat in war," "[t]he question persists: Why the unease in watching the dénouement in Vietnam? Why do I feel uneasy observing a tragedy the last act of which can come as no surprise?" He then adds the following in a footnote:

It is perhaps well to emphasize that "unease" is used here in a sense to be distinguished from the unease that arises simply from witnessing death and destruction. . . . We all feel uneasy in the face of the suffering of others, quite apart from whether or not we have had any role in, or relationship to, that suffering. In the case of Vietnam, however, the particular unease experienced today stems in large part from the role we have played in the war and the nagging doubts almost all must feel about that role. Then, too, unease might in part stem from the self-deceptions that have been entertained almost to the very end.<sup>70</sup>

#### *A Theory or Position on What International Law Should Be About*

It is difficult to imagine raising one's hand at an international-law-of-war workshop, at least in the United States, and saying, "Yes, thank you very much for your points, Professor X, but given the hyper-technical nature of your scholarship, and its significant implications for how we understand the wars we are fighting today, I was wondering if you could say something about your views on the fundamental purpose of international law? I'm having a hard time understanding where you are coming from." Today, it seems unsophisticated for a law review article to include a basic statement about

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contextual analysis of the law on the use of force, discussing those issues which can and cannot be clearly resolved as a matter of law, noting, "in these circumstances, the legality or illegality of the United States involvement as a whole cannot be decided." *Id.* Many of his colleagues strongly disagreed with him, but rarely on the grounds that the answer is simple or obvious as a matter of law alone.

70. Robert Tucker, *Vietnam: The Final Reckoning*, in 4 THE VIETNAM WAR AND INTERNATIONAL LAW 1011, 1012 & n.\* (Richard A. Falk ed., 1976).

what the author thinks international law is as well as what work it should be doing in the world. While we may have conversations about what a scholar's "priors" are, we rarely write—and thus rarely read—scholarship that includes a statement as to our closely held values<sup>71</sup> regarding our own field. It seems like it would be a bit embarrassing. Or so I would have thought.

For the Vietnam-era scholars writing about law and war, passionate reasoning included saying something about the very purpose of public international law itself.<sup>72</sup> At a time when the law was under tremendous pressure, when it was not at all clear that the relatively young institutions of collective security would be able to survive, many scholars articulated a compelling and deeply earnest account of why international law mattered to the world.<sup>73</sup> These accounts vary widely. For some, international law's purpose was the achievement of world peace.<sup>74</sup> Others had a more modest view, and understood the fundamental purpose of international law to be about merely regulating the most aggressive impulses of states.<sup>75</sup> Across the political/outcome spectrum, or where they stood within existing schools of legal thought at the time, all seemed to share a sense that (a) there was something dangerous—at a time of seemingly endless war—*not* to talk about one's values

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71. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 849 (1935) ("Legal description is blind without the guiding light of a theory of values. It is through the union of objective legal science and a critical theory of social values that our understanding of the human significance of law will be enriched.")

72. In the simplest terms, reading serious and rigorous scholarship from the Vietnam era reminded me that it is perfectly acceptable to want to feel that one is part of something greater than oneself, to understand one's profession as more than service to technocracy, but as an effort to engage in a meaningful, and sustained, and politically-informed conversation about the norms and values that guide the relationships between states and among the people within those states. To be expansive, or to see the field in expansive terms—morally, ethically, critically, and academically—is not to be absurd or unscholarly.

73. John N. Moore, *Law and Politics in the Vietnamese War: A Response to Professor Friedman*, in 1 THE VIETNAM WAR AND INTERNATIONAL LAW 303, 316 (Richard A. Falk ed., 1968) ("But there are strong reasons for suggesting that the available range of complementary norms of international law makes a simplistic rule application a more dangerous exercise (dangerous in the sense of ease of manipulation of result) when dealing with complex major issues than the conscious application of norms in light of their function. . . . Legal scholarship must be concerned not only with rules and principles but also with purpose and values."). Falk (who comes to opposite conclusions from Moore) notes, in the introduction to a book about civil strife: "This introductory section serves to depict the political confrontation that alters the legal environment and to disclose my own bias about the desiderata of the world order." Richard A. Falk, *Janus Tormented: The International Law of Internal War*, in INTERNATIONAL ASPECTS OF CIVIL STRIFE 185, 186 (James N. Rosenau ed., 1964). He notes later in the same chapter, "[L]aw provides a medium for precise communication between international actors." *Id.* at 211.

74. See, e.g., Edwin B. Firmage, *Summary and Interpretation*, in THE INTERNATIONAL LAW OF CIVIL WAR 428 (Richard A. Falk ed., 1971); P.E. Corbett, *The Vietnam Struggle*, in THE INTERNATIONAL LAW OF CIVIL WAR 402 (Richard A. Falk ed., 1971); Falk, *The Cambodian Operation*, *supra* note 10, at 57.

75. See, e.g., Thomas M. Franck & Nigel S. Rodley, *Legitimacy and Legal Rights of Revolutionary Movements with Special Reference to the Peoples' Revolutionary Government of South Viet Nam*, in 3 THE VIETNAM WAR AND INTERNATIONAL LAW 723, 728 (Richard A. Falk ed., 1972) ("The role of law in the international community today is not to alter the patterns or behavior of states. . . . Rather, the function of international law is to stake out the minimal areas of mutually-perceived overlap in the self-interest of states and to try to minimize in specific cases idiosyncratic deviations from the mutually-established, normative patterns of conduct. Principal among the mutually-perceived overlaps of self-interest is the desire for survival in the nuclear era.")

when engaging in legal analysis<sup>76</sup>; and (b) an intuition that there was something untrustworthy or inauthentic about legal scholarship published in the United States written about Vietnam, during the Vietnam War, that did not include some articulation of the author's vision of international law, its purpose, and its limitations.

As a reader, even one outside the contemporaneous political context of Vietnam, this made the pieces not only more enjoyable to read but also more inspiring and more connected to the underlying human realities at hand. I had a sense that there was something exalted about the enterprise, even when it was in deep crisis (and arguably catastrophically failing to achieve any of its ostensible goals), and that the members of the international law community felt that they had a stake in and responsibility for the underlying purposes of the law they studied. Within their rigorous doctrinal analysis, they maintained an ethical voice, one that did not shy away from the more grandiose aspects of the international law project.<sup>77</sup>

#### *A Sense of Responsibility for Precedent-Setting*

Precedent is a peculiar thing in international law. Unlike in common-law jurisdictions such as the United States, precedent does not bind international courts. The role of state declarations and behavior, as well as—at least in some arenas—leading scholars, can be far more significant in terms of shaping understandings of law.<sup>78</sup>

The Vietnam-era scholarship was filled with a deep sense of worry and foreboding regarding what the legal theories being propounded might entail for the future.<sup>79</sup> I had the sense that this was not mere handwringing about what the internal disciplinary debate meant for the future of international legal argumentation. How they saw this future depended on their vision of international law and its purpose (for some, it was the blow to any hope for a peaceful world order; for others, it was a concern about specific precedents regarding the use of force or the invasion of “neutral” third countries in civil wars). Across the ideological spectrum,<sup>80</sup> the leading scholars of the day

76. John N. Moore, *The Lawfulness of Military Assistance to the Republic of Viet-Nam*, in 1 *THE VIETNAM WAR AND INTERNATIONAL LAW* 237, 256 (Richard A. Falk ed., 1968) (“In the welter of charges and countercharges growing out of the Viet-Nam conflict it is easy to lose sight of the fundamentals in a preoccupation with legalistic arguments or the ambiguities of the situation.”).

77. Such aspects could be absurd, or wrong, or blind to colonialism, imperialism, and power, of course, but reading the Vietnam-era literature did not give me the sense that the authors failed to understand that international law had been, was, and could be in the future deeply problematic. The exaltation was of the *work* of thinking through the big questions and purposes of international law, not necessarily a celebration of the law itself.

78. Usually those from the West. See, e.g., ROBERTS, *supra* note 18, at 51.

79. Fried, in analyzing the Army Field Manual's approach to intervention in third countries on grounds of violations of neutrality, concludes in the negative and notes: “The statement is very subtle. *It must be read with a magnifying glass; after all, the fate of entire countries may be at stake.*” Fried, *supra* note 55, at 116 (emphasis added).

80. Leonard Meeker, in a lecture delivered while he was at the State Department and supporting the legality of the Vietnam invasion, notes:

evinced a profound alarm at the kinds of arguments that were being made,<sup>81</sup> the possibility that scholars of the age would simply lay down and accept these arguments uncritically, and especially the important moral and professional responsibility of international law scholars to think through the applied implications of any abstract interpretations of the law not just for Mainland Southeast Asia but for the possible wars they could not yet imagine.

Vietnam-era authors were aware of the danger of abstract arguments for intervention that could theoretically be plausible (as a matter of international law arithmetic) but that took no account of their real-world implications.<sup>82</sup> As John Lawrence Hargrove notes, in assessing the purely legalistic merits of U.S. justifications for invading Cambodia:

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Throughout this land, the war in Viet-Nam weighs heavy on the minds of Americans. It is again and again the subject of our talk, under the pressing flow of news dispatches and under the thousand impacts this war has on our lives. It is never far from our thoughts. . . . It is my purpose . . . to locate the Viet-Nam war in the great river of time. . . . Let us remember, too, that the shape of things to come is in no small way determined by the actions of great powers.

Meeker, *supra* note 37, at 318, 324.

81. Fried, *supra* note 55, at 123 (“If, however, the U.S. interventions in Indochina are *not* considered illegal, then, under this doctrine, any other nation, e.g., the Soviet Union or China, is allowed to intervene in another country’s civil war (analogous to the US intervention in Vietnam), sow destruction there, for years, and then start destroying adjacent countries as a prerequisite for its conditional change of combat strategy in the first country.”).

82. Richard Falk notes, in a 1972 piece (in a sub-section entitled “Some Concluding World-Order Comments”):

The development of international law is very much a consequence of the effective assertion of claims by principal states. Such claims create legal precedents that can be relied upon on subsequent occasions by other states. The Cambodian operation, in this sense, represents both a violation of existing procedural and substantive rules of international law and a very unfortunate legislative claim for the future. It will now be possible for states to rely on the Cambodian operation in carrying out raids against external base areas or even when invading a foreign country allegedly being used as a sanctuary. It will no longer be possible for the United States Government to make credible objections to such claims. The consequences of such a precedent for the Middle East and southern Africa seem to be highly destabilizing.

. . .

In essence, then, the Cambodian operation represents a step backward in the struggle to impose restraints on the use of force in the conduct of foreign relations.

. . .

Within the present world setting, the United States is contributing to the deterioration of the quality of international order rather than to its improvement. Such a rôle is particularly tragic at this juncture of world history, a crossroads in human destiny at which the converging dangers of population pressure, ecological decay, and the possibility of nuclear war create the first crisis of world order that threatens the survival of man as a species and the habitability of the planet.

Falk, *The Cambodian Operation*, *supra* note 10, at 55–56.

Interestingly, his main intellectual opponent of the decade, John Norton Moore, agrees on the stakes: “In such a system, the dangers of confrontation, miscalculation, and escalation . . . pose a threat to the very future of man. . . . Unilateral resort to force for the purpose of extending national values . . . is much too destructive and dangerous in the present revolutionary international system.” MOORE, *INDO-CHINA*, *supra* note 47, at xviii–xix.



So far as international law is concerned, a President's duty is not just to be able to make a case for legality which is not patently absurd, but to be willing to forgo actions which are in their sum effect injurious to the international legal order. He must therefore be concerned in advance with the full panoply of practical consequences which his action may have for the viability of law as a guide to conduct. . . . [H]e must ask: Will it in fact be credited by other governments, and if so, with what deleterious effect on the evolution of the principles the United States has invoked? . . . [W]ill they in fact take our action as a means of justifying violence of their own in other circumstances even less defensible legally? Will our action further impair the ability of the United States to invoke legal restraints to reduce the level of violent conduct generally?<sup>83</sup>

They took seriously that as international legal scholars, as people within a professional community whose key legal texts were being used to legitimize extensive violence (violence that some saw as unlawful and others saw as at least technically lawful<sup>84</sup>), they had a duty to consider what these doctrinal moves would mean beyond present-day exigencies.<sup>85</sup> And they saw that responsibility as central to being international law scholars.<sup>86</sup>

### *Acknowledging the Potentially Conflicting Duties of Wartime*

Is the relationship of scholars to international law of war different when their own country (whether of nationality or where they live and work) is

83. Aldrich, Friedmann & Hargrove, *supra* note 44, at 99a.

84. *Id.* ("So far as international law is concerned, it is likely that most of the world's international policy-makers would accept the proposition that the United States invaded Cambodia on a grand scale on nothing more, at best, than a legal technicality.")

85. Daniel Partan noted in 1966:

Perhaps it is inevitable at this stage in history that governments of nation-states will formulate policy in areas perceived as vital to national interest with little or no attention to the existing conception of international law or to the impact that their action will have on the development of international law. This may be the present reality, but it is not the only reality.

[Discussing necessity and proportionality] Since clearly developed standards do not exist, and since each side in the Vietnam conflict attaches a high priority to avoiding defeat, not to achieving victory, there is no present possibility for affectively limiting allegedly defensive responses to a theoretical legal standard of necessity and proportionality. . . .

The double misfortune of the Vietnam conflict, however, is that the acts of force claimed to be taken in self-defense will not build standards of proportionality and necessity that might serve to limit future conflicts.

Daniel G. Partan, *Legal Aspects of the Vietnam Conflict*, in 1 THE VIETNAM WAR AND INTERNATIONAL LAW 202, 229 (Richard A. Falk ed., 1968).

86. Eliot Hawkins wrote early in the war: "In addition, little has been said about the impact of United States actions on the future state of international law." Hawkins, *supra* note 53, at 163. Later in the piece, he analyzed the United States' historically negative legal reaction to states intervening in civil wars, noting: "Unilateral actions of states, particularly if they are major powers, can serve as precedents and may eventually create rules." *Id.* at 194.

involved in an armed conflict? As I read, I had the sense that I was seeing in academic print—for the first time—thoughts and questions that all of us grapple with but that have somehow become unspeakable in contemporary law-of-war scholarship.

The authors of the 1960s and 1970s displayed some of their most poignant writing as they thought about what they owed their profession, one another, the public, and the world in their writing and their argumentation.<sup>87</sup> They understood that there were real risks in writing—even scholarly writing—about one’s own country as the war progressed. That there would be inevitable biases: rooted in patriotism, in the emotional impact of seeing body bags returning from the battlefield, in seeing families and villages destroyed in Vietnam. That there would be increasingly powerful incentives to pull back, to dull one’s critique, to temper one’s words in order to maintain influence or remain loyal to one’s home country.<sup>88</sup> As the war became more destructive, and as they began to realize that it could continue for many years, the scholars seemed increasingly willing to express their sense of shame (or, sometimes, pride, but by the early 1970s increasingly rarely even for those initially in favor of the war) both in the United States and in what the core concepts of international law were being used to legitimize.<sup>89</sup> They

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87. A group of scholars writing as the Lawyers Committee on American Policy Towards Vietnam writes in the preface to a 1967 book, *Vietnam and International Law*:

It is unusual for a group of international lawyers to go on the record to the effect that their own government is waging a war in violation of international law. Such an act expresses a belief that the national interest is better served by complying with relevant rules of international law than by the conduct of foreign policy free from the restraints of law. It is a belief that is heavily influenced by the experience of agonizing wars in the twentieth century and by the sense of concern that arises when we contemplate a third world war fought with nuclear weapons.

LAWYERS COMM. ON AM. POLICY TOWARDS VIETNAM, CONSULTATIVE COUNCIL, *VIETNAM AND INTERNATIONAL LAW: AN ANALYSIS OF THE LEGALITY OF THE U.S. MILITARY INVOLVEMENT* 11 (1967). They note later, “As students of international law we regard it to be a matter of civic and professional duty to point out that war actions of the United States in Vietnam violate international law.” *Id.*

88. Assessing various approaches in scholarship on the legality of intervention in Vietnam relatively early in the war, Wolfgang Friedmann observes that some scholars obscure their approach, in which “the norms of international law are professedly used as an objective and compelling standard, but in fact [are] interpreted so as to conform, in all cases, with national policy.” Wolfgang Friedmann, *Law and Politics in the Vietnamese Context: A Comment*, in 1 *THE VIETNAM WAR AND INTERNATIONAL LAW* 292, 294 (Richard A. Falk ed., 1968). Friedmann continues:

[T]he alternative approach is willing to regard international legal norms as controlling national behavior, even if it means the legal condemnation of the writer’s nation. . . . But it may also be predicted that, as the war goes on and escalates, and *more American soldiers are killed, the resources and prestige of the country are more deeply committed, any opposition to, or doubt in, the legality of the United States action in Viet-Nam will become increasingly regarded as an unpatriotic act.*

*Id.* (emphasis added).

89. It should be noted that many Vietnam-era scholars were *very* clear (across perspectives on the conflict) that there was a difference between legal experts writing as government lawyers and academicians, and that one must always keep this distinction in mind. In a key piece of scholarship responding to one of the first major State Department articulations of the U.S. legal position regarding international law and the Vietnam intervention, Richard Falk notes:

seemed to be willing to openly consider their own role—at times their own complicity—and to write scholarship *through* and *informed by* the awareness that allegiance<sup>90</sup> is a powerful and sometimes intoxicating emotion. They understood that as the war dragged on, it would become more and more difficult to hold onto a meaningful debate over whether it was lawful.

In these ways, the Vietnam-era authors allowed the reader to contemplate their own moral sense of how to talk and think about the doctrinal and policy questions at hand.<sup>91</sup> A scholar assessing the field from the outside (as a domestic law expert who had been tasked with teaching international law one semester), David W. Robertson wrote in 1968:

The arguments that United States officials have made in support of the legality of our position, the defenses of the same position that have been offered by independent legal scholars, and the attack upon that position mounted by other competent legal scholars are unsatisfactory in yet another respect: the enormous amounts of outright rhetoric that have been employed on both sides in the zeal of argumentation. “Principles” and “policies” and “over-riding goals” are invented, flourished, and dismissed with such apparent ease that it is difficult for the nonexpert to

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In assessing it [the Memorandum of the State Department Legal Adviser], we should keep in mind several considerations. First, the United States Government is the client of the Legal Adviser, and the Memorandum, as is entirely appropriate, is an adversary document. A legal adviser in Hanoi could prepare a comparable document. Adversary discourse in legal analysis should be sharply distinguished from an impartial determination of the merits of opposed positions.

Richard A. Falk, *International Law and the U.S. Role in Viet Nam*, 75 YALE L. J. 1122, 1135 (1966). (Again, if this seems so obvious and unremarkable as to not merit mentioning, keep reading.)

90. Whether expressed as patriotism or internationalism, duty to country, or fealty to the ideas and structures of international law.

91. In one of the leading academic international law journals of the time (and still today), Friedmann describes how he sees the dangers to come with evocative and powerful language:

Until there is an effective international organization, the only slender hope for peace lies in the balance of force, intervention and restraint used by the major antagonists in the interests of survival. The alternative attempt, which leads international lawyers to vindicate the actions of their own governments, whatever they are, can only lead down the slippery path of intellectual subservience. The self-immolation of an independent intellectual and professional class, characterized more than a generation ago by the French writer, Julien Benda, as “*la trahison des clercs*,” has been one of the principal grounds for the moral rot of totalitarian regimes of the right and of the left. The lawyer becomes the manipulator. Not the least of the values for which the United States and its allies have stood through two World Wars has been the right of independent criticism. The maintenance of this intellectual integrity is no less important a weapon in the fight against totalitarianism than armies and bombs.

Friedmann, *Intervention, Civil War and the Role of International Law*, *supra* note 66, at 159.

Scholars who at that stage, in the mid-to-late 1960s, supported the international legality of the intervention (or at least were not clearly in the “unlawful” camp) expressed themselves with a similarly direct style (also writing in major academic journals, as opposed to, say, lay periodicals or newspaper opinion pages).

sort the important from the trivial, the issues from the nonissues.<sup>92</sup>

Regardless of whether we would agree, an outsider describing the American War on Terror debate almost exactly fifty years later would certainly not complain of its overwhelming “zeal.” It is to that debate that we now turn.

### III. ARIDITY

The visual image I had in reading the Vietnam-era scholarship was one of war in technicolor, of loss, destruction, pain, and fear of more war to come. The main image I had in (re-)reading contemporary scholarship is that of a logic puzzle or a diagram<sup>93</sup>—an infographic of dilemmas. But before we get to the images evoked, let us set out the backdrop to this era of international legal crisis and the scholars who are writing through it.

#### *Context*

This section focuses on the second half (so far) of the U.S. War on Terror,<sup>94</sup> roughly that beginning with President Obama’s first term and ex-

92. David W. Robertson, *Debate among American International Lawyers about the Vietnam War*, 46 TEX. L. REV. 898, 908 (1968). Robertson states:

The simple truth is that our current role in the world demands that we strain for candor and credibility in an unprecedented fashion. It also demands that all of us—officials and independent scholars alike—apply to our own nation’s actions and utterances much more rigorous standards of criticism than we apply to the acts of other countries. . . . The point is rather that the United States position in Vietnam today *cries out* for the most critical and searching kind of scrutiny. If we are right, let us put our case in an effective way. If we are wrong, let us live up to our history by making an honest attempt to correct our position.

*Id.* at 910. Expressing his frustration with the tone and approach of much international legal scholarship and argumentation (from the perspective of a non-expert domestic law scholar), Robertson later states:

Undoubtedly the attitudes of all of us toward the Vietnam War are emotional. The unsettled question is whether our visceral predilections can be discounted to the extent necessary to test the relevance of international law to the question. It is essential that American officialdom and independent American legal scholars alike approach the weighty question of our position at international law with complete candor and realism.

*Id.* at 912. Robertson ultimately comes to the conclusion (from an admittedly—and, one gets the sense, proudly—outsider perspective) that international legal discourse about the war is not passionate *enough*. *Id.* at 913.

93. See, e.g., Jonathan Horowitz, *Untangling the Web of Actors in Syria and Additional Complexities of Classifying Armed Conflicts*, JUST SECURITY (Oct. 25, 2016). Horowitz describes that “considerable analysis is required to determine just what types of armed conflicts exist there and what laws apply,” which involves disaggregating the situation to map out the different actors’ relationships to the hostilities. He goes on to explain that, disaggregating the situation, one learns that “some of Syria’s attacks may be bound by the international humanitarian law (IHL) of IAC and others by the IHL of NIAC.”

94. As has been written about ad nauseum, the Obama administration announced early-on that it would no longer use the term “global war on terror,” but it continues to be the formal title of the armed conflict for purposes of veterans’ benefits and the distribution of military honors and recognition, and is the most comprehensive term for describing the various conflicts that make up the broader U.S. campaign. See, e.g., OPM Director James Issues Guidance to Agencies on New Eligibilities for Veterans’

tending through the tenure, to date, of the Trump administration (2009–2018). While this is an arbitrary delineation, it tracks what will soon be the second decade of this war, and begins with the dramatic geographic and operational expansion of the war, largely in the form of extensive targeting beyond the battlefields of Afghanistan and Iraq.<sup>95</sup> Throughout this period, there is a sense of unsettlement regarding international law and its core institutions, but with an exponentially greater focus on the laws applicable *within* armed conflict, as distinguished from the law on intervention and the use of force.<sup>96</sup> There is not so much a sense of physical insecurity, and much less (if at all) a sense that there is a serious possibility that humanity could be annihilated if the international system cannot be righted. Yet much like in the 1960s, there is a sense today that events may be shifting toward the worse, the more brutal, the more polarized, the more unequal.<sup>97</sup>

For purposes of understanding the style, approach, and tone of mainstream, U.S.-focused academic scholarship during the second half of the War on Terror, the shift that occurred at the start of the Obama administration is critical. First, there was a marked turn away from the Bush-era focus on detention, torture, and treatment of detainees. Experts shifted their attention toward targeted killing and other drone operations in Somalia, Yemen, and beyond. Also crucially, many prominent international law scholars (or friends and colleagues of such scholars) worked for the Obama administration in key government adviser positions over the course of its eight years, often rotating in and out of university positions. The administration's positive disposition toward international law and internationalism changed the posture of leading scholars toward official government legal argumentation,<sup>98</sup> and might have influenced the way many perceived the actions of the United States in the years where the War on Terror profoundly expanded in terms of intervention, killing, and destruction.<sup>99</sup>

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Preference, Press Release March 24, 2004, <https://perma.cc/W2PF-MR52> (discussing eligibility for Global War on Terrorism medals for veterans). I do not use the term in order to express any particular judgment about the conflict, or in a pejorative manner.

95. See Phyllis Bennis, *Why We Need to Remember the Iraq War—As Well as the Global Resistance to It*, THE NATION (Feb. 22, 2018) (noting that the War on Terror has “now expanded beyond Afghanistan and Iraq to envelop Yemen, Libya, Syria, and beyond”).

96. See Moyn, *supra* note 6.

97. For reasons that need not be explained, this feeling increases rather dramatically after the United States presidential election of 2016.

98. This may also explain the shift away from writing about the legality of war itself, as was far more prevalent during the invasion of Iraq in 2003. See Lori F. Damrosch, Bernard H. Oxman, *Editors' Introduction*, 97 AJIL 553, 553 (2003) (“The military action against Iraq . . . is one of the few events of the U.N. Charter period holding the potential for fundamental transformation, or possibly even destruction, of the system of law governing the use of force that had evolved during the twentieth century.”); see also Andreas Paulus, *The War against Iraq and the Future of International Law: Hegemony or Pluralism*, 25 MICH. J. INT'L L. 691, 692 (2004) (discussing a defeat of international law after the Iraq war and how international law is “unable effectively to implement its own decisions and thus useless”); Naz Modirzadeh, *Folk International Law*, 5 HARV. NAT'L SEC. J. 225, 228–29 (2014).

99. A number of colleagues suggested that I was failing to appreciate the passionately reasoned scholarship from this period, and the powerful and often deeply personal engagement of international law

By halfway through this phase, around 2013–2014, as the United States begins to militarily intervene in the conflict in Syria,<sup>100</sup> the international law debate on the law applicable to carefully planned “targeted killings” guided by law and policy—which was focused on the theoretical boundlessness of non-international armed conflict—was grafted onto a traditional civil war.

Within the discipline of international law of war, the key terms of the debate during this time were about:

- The scope of self-defense in the U.N. Charter and customary international law;
- The definition of “armed attack” and whether nonstate actors could, in addition to states, author such an attack;
- The question of whether a state deemed “unable or unwilling” to stop threats of terrorist attack could itself become the legitimate object of intervention;
- The notion of consent to the use of military force;<sup>101</sup>
- The geographic scope of international humanitarian law;
- The difference between international and non-international armed conflict;
- The depth and clarity of international law rules regarding lethal targeting (within armed conflict, or not); and

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scholars on the question of the legality and moral wisdom of the invasion of Iraq, particularly in 2003–2004. One important example (though outside my focus on U.S.-centric scholarship) is the so-called “We Are Teachers of International Law” letter signed by prominent UK international legal scholars in the lead-up to the U.S./UK invasion in March 2003. See *War Would Be Illegal*, THE GUARDIAN (Mar. 7, 2003), <https://perma.cc/TS5X-RAN9>. The letter, and its clear statement of the illegality of the intervention, led to extensive debate within the field, including about the appropriate roles and ethical responsibilities of international law scholars, captured in a searching article by the letter’s lead authors. See Matthew Craven, Susan Marks, Gerry Simpson & Ralph Wilde, *We Are Teachers of International Law*, LEIDEN J. INT’L L. 17 (2004), 363–74 (noting that the story of the letter is “about what happens when people who teach international law confront impending war, and about the questions that are brought into focus at such a time”). My inquiry here focuses on the latter part of the broader War on Terror (where Iraq would go on to become a key battleground), particularly the geographic expansion of a war that was legally framed as being a non-international armed conflict (where I see the most apt comparisons to Vietnam-era legal discourse). Future studies might look to other wars and their contemporaneous international law scholarship, and my narrow focus here is not meant to suggest that Vietnam and the War on Terror are the most significant exemplars of passion or dispassion. It might very well be the case that the 2003 invasion of Iraq is a prototypical example of passionate scholarship. But that, to my mind, would not negate the importance of also assessing the War on Terror more generally in the terms I identify in this paper.

100. Much like in Vietnam, marking the beginning of military intervention is in no way meant to suggest that the United States played no role in the origins of the conflict itself.

101. See Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. OF INT’L HUMANITARIAN L. 3, 5 (2011) (explaining that the need to make an argument that U.S. strikes in Yemen turn on a self-defense argument disappears if Yemen has effectively consented to the strike). See *id.* at 27 (“At least for the time being Yemen’s weak central government appears to lack the capacity to enforce its will reliably in Shabwa (the province where Al Aulqi and other AQAP members are thought to be) and other relatively remote provinces where AQAP members enjoy the protection of local tribes.”).

- Whether this whole debate was new,<sup>102</sup> whether the war was new, whether everything was new, or old, or somewhat new but also old.

What was *not* part of the key terms of the debate, and we should take a collective moment to be astonished about this, was the Vietnam War. At all—or at least in an all-but-passing way.<sup>103</sup>

At the very moment that the Al Aulqi Memorandum suggests that any killing *anywhere* of members of Al Qaeda, the Taliban, and associated forces is always already within the war between the United States and Al Qaeda, we should have seen citations to the Vietnam War everywhere. We should have seen debates that drew on those crafted in 1970–1975. We should have seen discussion of the precedential import, or not, of the Vietnam War; the

102. While the majority of international legal scholars conclude repeatedly and vociferously that most of the dilemmas faced in the War on Terror are not “new” as a matter of international law, they curiously fail to cite authorities or scholars or events before the International Criminal Tribunal for the Former Yugoslavia decisions of the mid-nineteen nineties. While many assert that key debates on issues of the use of force or IHL are not “new,” they almost never reference the debates in Vietnam, the literature on civil war and international law that immediately predated Vietnam, the literature on the Spanish Civil War, the French-Algerian War, and other examples that the Vietnam-era scholars saw as central to understanding international law on intervention, and particularly the question of intervention in third states which were not themselves the target of armed force. The only exception to this is the strange contemporary obsession with the *Caroline* precedent, which is frequently framed as having nearly mystical qualities. For several years from 2009 to about 2012, it seemed that among some international-law-of-war scholars in the United States, every discussion about the lawful use of force outside of an existing, territorial armed conflict was primarily about *Caroline*. In some debates one has the distinct sense that the *Caroline* incident has come to act as a proxy for a certain misreading of international legal rules on necessity and proportionality. See Marty Lederman, *The Egan Speech and the Bush Doctrine: Imminence, Necessity, and “First Use” in the Jus ad Bellum*, JUST SECURITY (Apr. 11, 2016), <https://perma.cc/MQR9-QUCF> (explaining that the “notion of ‘imminence,’ historically, has been used to flesh out what it means to determine whether the threatened state’s use of force in self-defense would be necessary,” thus satisfying one of the two fundamental conditions of the use of force in a nonconsenting state [the second being proportionality]). The *Caroline* incident was frequently discussed in the Vietnam-era literature, in light of similar questions (defining armed attack, the question of whether nonstate armed groups can be targeted when their actions are not attributable to a state, how to understand imminence). Yet, interestingly, they read *Caroline* quite differently (across the political spectrum). The trend of the late 1960s was to see *Caroline* not as a precedent for an expansive understanding of self-defense within customary international law, but rather as an articulation of stringent limits. See ROGER H. HULL & JOHN C. NOVOGRAD, LAW AND VIETNAM 113 (1968).

103. I am equally responsible as anyone I mention in this section. Until I happened to start reading the Vietnam-era literature, I had absolutely no idea that the international legal argumentation around the initial intervention, and then the invasion of Cambodia had been so doctrinally dense, so sophisticated, so well reasoned, and so similar in legal content to the present day. I had assumed that back then, the government just did what it wanted, and American international law scholars of the time simply did not have the intellectual and doctrinal resources we do to even discuss was what happening. Ashley Deeks is the one of the only contemporary scholars who connects the current debates to the invasion of Cambodia. See Ashley Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extra-Territorial Self-Defense, 52 VA. J. INT’L L. 483, 512–13 (2012). See also Kevin Jon Heller’s biography, OPINIO JURIS (2019), <https://perma.cc/CP6F-GJSH> (stating that Kevin Jon Heller and Sam Moyn are currently co-writing a book entitled THE VIETNAM WAR AND THE TRANSFORMATION OF INTERNATIONAL LAW); Jessica Whyte, *The “Dangerous Concept of the Just War”: Decolonization, Wars of National Liberation, and the Additional Protocols to the Geneva Convention*, 9 HUMANITY 313, 315 (2018) (arguing “that during the drafting of the Additional Protocols it was the anticolonial delegates who used the language of the just war to distinguish wars of national liberation from wars of ‘imperialist aggression’—particularly the U.S. war in Vietnam”).

legal arguments made by and against the positions taken by the U.S. government; and the positions of leading scholars such as Richard Falk, John Norton Moore, Wolfgang Friedmann, John H.E. Fried, Quincy Wright, and Leonard Meeker.<sup>104</sup> The Obama administration makes almost exactly the same doctrinal arguments in international law<sup>105</sup> to justify the boundary-less non-international armed conflict of 2009 onward as the Nixon administration had in supporting the invasion of Cambodia in 1970.<sup>106</sup> There was a veritable arsenal of arguments related to intervention (“*ius ad bellum*” in the contemporary parlance) available for legal experts to use—and, if one were opposed to the legality of the War on Terror’s scope, to use with powerful political effect, given the unpopularity of the Cambodia invasion in American eyes.<sup>107</sup> One can understand why the U.S. government (aside from the single footnote in the Al Aulqi Memorandum) did not wish to say, “Listen, Americans and the world, Nixon’s invasion of Cambodia is by far the best international legal precedent for why it is lawful for us to strike targets in Yemen,<sup>108</sup> Somalia, Niger, and beyond. These arguments have real depth!”

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104. The only exception that I found—an article that both closely reads some of the Vietnam-era scholarship and identifies questions regarding the shift in analytical and political focus from that period to the present—is Samuel Moyn, *supra* note 6. Moyn is focused on the broad shift (which he points out is not a cultural or legal necessity) from legal arguments around the use of force to those focused on regulations on the conduct of war itself, largely in the context of the invasion and occupation of Iraq. Moyn also provides a useful account of Richard Falk’s and Telford Taylor’s intellectual and political development, *supra* note 6, at 171–81.

105. There are also fascinating parallels regarding debates about executive power and domestic legal authorization for war (and its scope), but those are far beyond the discussions of this paper. See 3 THE VIETNAM WAR AND INTERNATIONAL LAW (Richard A. Falk ed., 1972), specifically chapters on “Constitutional Aspects” (163–90) and “The Constitutional Debate on the Vietnam War” (487–720) (each featuring numerous articles by leading scholars); see also 4 THE VIETNAM WAR AND INTERNATIONAL LAW (Richard A. Falk ed., 1976), specifically chapters on “Constitutional Structure and War-Making” (548–987).

106. Though, it should be noted, while the ultimate doctrinal *content* of these arguments is very similar, they were laid out much more succinctly, clearly, and simply in 1970 than in 2010 and beyond.

107. Nixon-era officials and scholars pronounced that the Cambodian people were not the target of the attacks. See John R. Stevenson, *Address by the State Department Legal Adviser*, DEPARTMENT OF STATE BULLETIN 765 (1970), reprinted in MOORE, INDO-CHINA, *supra* note 47, at App. C, 643, 653 (explaining that U.S. forces had a limited mandate in Cambodia: “The Cambodian government and the Cambodian people are not the targets of our operations.”). Some scholars explained, while acknowledging the political realities and the broader stakes at hand, that the U.S. operated with consent from Cambodian officials. See John Norton Moore, *Legal Dimensions*, *supra* note 10, at 75 (“Although there were some Cambodian statements critical of the joint operation, on balance it seems to have received at least the tacit consent of the Cambodian Government. This tacit consent is another factor which makes the case stronger than that for Israeli action against guerrilla complexes in Jordan, Lebanon and Syria, or French action in the Algerian War against Tunisian frontier areas.”). President Nixon’s State Department legal adviser appears to have relied on what we might today call an “unable/unwilling” argument. See Brian Cuddy, *Was It Legal for the U.S. to Bomb Cambodia?*, N.Y. TIMES (Dec. 12, 2017), <https://perma.cc/U3PF-NG5E> (explaining that the Nixon administration argued “that the incursion was justified because the Cambodian government could not or would not defend its neutral status and prevent Vietnamese communists from using its territory”).

108. See, e.g., John Odle, *Targeted Killings in Yemen and Somalia: Can the United States Target Low-Level Terrorists?*, 27 EMORY INT’L L. REV. 603, 620 (2013) (“The increased U.S. involvement in fighting AQAP in Yemen in 2012 and cooperation with the Hadi government is particularly important because it shows that [the] United States is operating inside Yemen with the consent of the Yemeni government



But for scholars, whether in favor of or against the expansiveness of the use-of-force justifications for the War on Terror, the Vietnam debates appear directly on point. For reasons that remain curious (at least to me), no one picks them up.<sup>109</sup>

### *Characteristics of Dispassion*

In an effort to understand why it feels like the field has moved away from passionate reasoning, this section is in some ways an attempt to paint a picture of negative space. I am trying to highlight what is *not* there in addition to what is written, and to think about why it matters. I try to examine why reading today feels so different from my experience with the Vietnam-era scholarship. My intuition is that this reaction, this sense of the experience of reading, or what one is left with while and after reading, is shared within the field and amongst my colleagues—but, here, there is less to point to by way of evidence. Because so much of this writing hides, or at least obscures, the author's voice, the intended audience, the sense of the fundamental purposes of international law of war, much of what I am doing here is to try to see what is opaque and hear what is unsaid. However, it is important to note at the outset that what I found in reading leading U.S.-centric scholarship produced in the period we are currently living through is not merely the lack of the characteristics I discuss above. Contemporary scholarship has certain attributes, model styles, and unspoken ground rules that make the writing more bloodless, more boring than what we would find if we simply took away the characteristics of Vietnam-era passion. But the absence of passion is not simply the absence of passion. It is not like the absence of decoration. It may, over time, pervert how we see, how we write, and how we think about war and the humans affected by it.

This section is not intended to be an attack from the outside. I am guilty of virtually every characteristic enumerated in the list that follows, as are

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and may indicate that it is becoming involved in the conflict between Yemen and AQAP.”). Assistant to the President for Homeland Sec. & Counterterrorism John Brennan provided an unable/unwilling argument and explained that the United States “reserve[s] the right to take unilateral action [against Al Qaeda and its associated forces] if or when other governments are unwilling or unable to take the necessary actions themselves.” John O. Brennan, Remarks at Harvard Law School Program on Law and Security: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), <https://perma.cc/HY47-N7F9>. Brennan summarized the points made when he stated that “[t]here is nothing in international law that . . . prohibits us from using lethal force against our enemies outside an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat.” John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks at the Wilson Center: The Ethics and Efficacy of the President’s Counterterrorism Strategy (Apr. 30, 2012), <https://perma.cc/HC9P-6A2B> (“[I]n full accordance with the law, and in order to prevent terrorist attacks on the United States and to save American lives, the United States Government conducts targeted strikes against specific al-Qaida terrorists, sometimes using remotely piloted aircraft, often referred to publicly as drones.”).

109. Moyn points out that influential journalistic coverage of abuses committed in the Iraq War also appeared to overlook relatively obvious comparisons to U.S. conduct in Vietnam, framing key events as unprecedented. See Moyn, *supra* note 6, at 158–59.

many people I admire. I am not ascribing any kind of intentionality or political/ideological bent in articulating the troubling (as I see it) turn of my own professional community. Rather, my sense is that for a variety of reasons (some of which are tentatively examined in Part III), the overall rules, style, and tone of academic scholarship in the arena of international law of war have shifted—in my view, for the worse. Citations in the sections that follow are meant to represent approaches, tones, and styles that virtually all of us have employed over the past ten years.<sup>110</sup>

The questions I raise here are worthy of moral, aesthetic, and scholarly attention regardless of one's methodological or political approach to international law. It is possible to write passionately and meaningfully or, conversely, in an arid and distanced manner, whether one engages in a critique of the colonial origins of the U.N. Charter or whether one engages in an entirely positivist analysis of the archival history of Article 118 of the Third Geneva Convention, with all the attendant sub-disciplinary vocabularies and audiences that such pieces might entail. Equally, and as I hope to convey herein, I do not think there is a particular attitude that is "passionate": passion, as I see it, is not about writing in the first person, nor about being personally revelatory, nor about being prescriptive.

While I focus here on what might be called mainstream international law scholarship (and scholarship that seeks to be influential on real-time law and policy development), those of us writing in a critical register are not immune to the aridity I discuss here. Despite critical legal studies' prioritization of context, history, and politics, many contemporary pieces in that genre employ irony, high theory, and a certain gadfly snarkiness in a manner that makes them as distanced as the liberal international legal scholarship I focus on here. An analysis of how international law of war itself constitutes and structures violence or references to Foucault do not necessarily connect any more than make-believe states and acronyms.

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110. With a few exceptions, I have made the decision not to provide examples and heavy citations in this section. My sense is that this would lead to focusing too much on specific authors, pieces, or perspectives. It might be easy to dismiss problematic approaches as being only those of a particular scholar or piece. Rather, I invite the reader to consider whether any of the observations herein resonate with them, whether they recognize any of these traits in contemporary scholarship, scholarly discourse, in how we talk professionally about law and war. The process of writing this article afforded me the opportunity to have a wide array of unusually candid discussions with colleagues, and to receive extensive and often strongly worded feedback. This section in particular invoked concerns about hasty generalization or overwhelming exception, wherein readers would identify a piece of U.S.-centric international-law-of-war scholarship that defied the qualities I describe here, or would point to a particular school of international law that was purportedly far less susceptible to the observations herein. Especially in the contemporary era, it is difficult to speak of the "field," to be comprehensive or representative in any sensible manner. Even if limited to a single language of scholarship, and even in a sub-sub-field, you will always miss something. There will always be more to read. There are always new or different journals, new specialized book series.

*Reasoning Through Abstraction and Unreality*

As I re-read the international-law-of-war scholarship of our time, I was most struck by what I had never before noticed. There are a number of analytical, rhetorical, and stylistic tools used to create distance. Distance between the author and the reader, distance between the legal analysis and any actual war, distance between international law and its effects, distance between international legal analysis and basic common sense. By far the most common distancing move, and the one I will discuss here first, was the use of hypotheticals in articles that claimed to be about an actual armed conflict in an actual place.

The use of hypothetical scenarios for pedagogical purposes is very common in law teaching. “Hypos,” as they are often called in American legal education, can aid in inviting students to think through how particular rules would apply to a range of possible (and often fantastical) situations, can urge students to test the limits of rules, or can even better allow students to see where rules blur into standards or background ethical assumptions. In legal scholarship, hypos can often be useful in exploring the abstract implications of law, or demonstrating various dilemmas that might face jurists in applying specific laws to a variety of plausible (but not actual) scenarios. Hypotheticals are, by definition, relatively context-free,<sup>111</sup> not about real people in real places, and do not require background knowledge or awareness of any particular situation in order to allow the reader to jump directly into thinking about law and legal institutions. That is their point. That is why, in the realm of public international law, hypotheticals are most frequently found in treatises.

So, what could possibly be wrong with using hypotheticals in legal scholarship on international law of war? What would the widespread use of hypos tell us about the style and approach of scholarship—and, perhaps, the relationship of scholars to the underlying human stories that make up the actual havoc wrought by war? First, let us set aside the use of hypotheticals in scholarship that explicitly claims either to be focused on the abstract or to examine interpretation of law-of-war rules in purely theoretical or philosophical terms. My sense of the best basis for comparison with the Vietnam-era scholarship was those academic pieces that indicated (whether in the title or the introductory paragraphs) that they were about international law of war as applied to particular sites of conflict (places where the United States is at war).

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111. There is a fascinating discussion of the role of context in critical legal theory and international legal history. See Alexandra Kemmerer, “*We do not need to always look to Westphalia . . .*”: A Conversation with Martti Koskenniemi and Anne Orford, 17 J. HIST. INT’L L. 1, 10 (2015) (Anne Orford stating that “[o]ften a legal concept or text will be invoked in multiple contexts, and our role is to try and grasp that movement of concepts across time and space.”). Here, I use the word “context” to refer to the rather simple idea of acknowledging where law is applied when we claim to be applying the law to particular places and events, as opposed to intervening in the broader debate on contextualization as a legal theoretical approach.

A model structure emerged across a range of pieces. First, there would be one or two paragraphs at the beginning of a piece introducing the key aspects of the conflict, or the particular aspect of the conflict being discussed in the article (e.g., dilemmas of consent specifically associated with Somalia, the question of self-defense and ISIS, the question of targeting war-sustaining objects in Iraq, the question of unable/unwilling and its application to various fronts of the War on Terror).<sup>112</sup> These were almost never of the depth, breadth, or span of temporal scope of the Vietnam-era literature. There was almost never a discussion of the colonial or imperial history of the place, an explanation for the reasons there was a conflict at all in that place, or any discussion of the longer-term relationship between the United States and that place.<sup>113</sup> In these early paragraphs, one often had the sense that the author did not feel it is particularly important, or central to their scholarship, to demonstrate knowledge about the places where the United States is fighting, only that it *is* fighting, and that thus a certain set of international legal rules are activated.<sup>114</sup> Some pieces discussed briefly the parties to the conflict (so, for example, in pieces about Syria, this section might be longer

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112. For purposes of giving a sense of approaches typical to contemporary texts, one such introductory expression of academic intent or purpose states, in a piece ostensibly about the conflict in Syria (in this piece, only the first paragraph discusses any facts about Syria, Syrian history, the context of the conflict, the political reasons the United States is involved):

On September 22, 2014, a U.S.-led coalition began airstrikes against the so-called Islamic State in Syria. At the same time, the United States started targeting the Khorasan group in Syria. These two operations raise (again) the question of when States may use defensive force against non-State actors in other States.

[The author articulates that the law on the use of force against non-state actors is in flux, and that secondary literature has sought to “resolve the uncertainty—to identify the interpretation that is or should be correct.”]

This article takes a different approach. Rather than try to distill the best or most accurate interpretation of the law, I map the positions that were plausibly available when the Syria operations began. I do so precisely because the law in this area has been unsettled. A broad range of legal positions might reasonably be invoked or applied in any given case. After mapping the legal terrain, I argue that the current operations in Syria accentuate three preexisting trends.

Monika Hakimi, *Defensive Force Against Non-State Actors: The State of Play*, 91 INT’L L. STUD. 2, 3–4 (2015).

113. *But see* P.E. Corbett, *The Vietnam Struggle and International Law*, in THE INTERNATIONAL LAW OF CIVIL WAR 348, 348–69 (Richard A. Falk & Quincy Wright eds., 1971); *see* Fried, *supra* note 55, at 118 (discussing what sanctuaries are in Cambodia, which helped explain why there was a conflict at all); *id.* at 101–03 (explaining the history of Cambodia’s protesting violations of its neutral territory by Saigon and U.S. forces, and the United States’ and Saigon’s insisting that their Vietnamese adversaries were using Cambodian border areas for military purposes); William Sprague Barnes, *US Recognition Policy and Cambodia*, in 3 THE VIETNAM WAR AND INTERNATIONAL LAW 148, 151–55 (Richard A. Falk ed., 1972) (detailing French colonial history of Vietnam, Laos, and Cambodia, as well as U.S.-Southeast Asian relations).

114. *But see* Richard A. Falk, *Introduction*, in 1 THE VIETNAM WAR AND INTERNATIONAL LAW 3 (Richard A. Falk ed., 1968); Richard A. Falk, *Introduction*, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 3 (Richard A. Falk ed., 1968); Richard A. Falk, *Introduction*, in 3 THE VIETNAM WAR AND INTERNATIONAL LAW 3 (Richard A. Falk ed., 1972); Richard A. Falk, *Introduction*, in 4 THE VIETNAM WAR AND INTERNATIONAL LAW 3 (Richard A. Falk ed., 1976).

because there are many parties), but again almost only as to their present-day interests or the extent of their involvement in the war—rarely anything about *why* they are involved in the conflict, or their relationship to the population.

In these early paragraphs, there would almost always be a mention of the terrorist group involved, be it the Taliban, ISIS, Al Qaeda, Boko Haram—take your pick. These would usually involve some basic description of those groups' military capacity, or whether they hold territory. This brief mention almost never involved any discussion of the perspective of the adversary. It would be nearly impossible to imagine an ASIL-published volume of articles called *The War on Terror and International Law* (a mirror of *The Vietnam War and International Law*) that would include full reproductions of the legal memoranda or positions of Al Qaeda.<sup>115</sup>

At this point in my reading, scholars often introduced the hypothetical that would animate the bulk of the piece and provide the grounds for most of the analysis. Sometimes the parties to the conflict were called “State A,” “State B,” and “Armed Group X”—other times, they had fictional names. One prominent piece (published as part of a volume about the conflict in Syria) notes:

To summarize, hostilities between a nonstate actor and a state are, in principle, meant to be viewed through the prism of NIAC. They are not an international armed conflict as they are not be-

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115. There are many readily available, at least in respect of Al Qaeda and ISIS. See OSAMA BIN LADEN, MESSAGES TO THE WORLD: THE STATEMENTS OF OSAMA BIN LADEN (2005). See also Mara Revkin, *The Legal Foundations of the Islamic State*, THE BROOKINGS INSTITUTION 21–22 (2016), <https://perma.cc/N9XT-JRCP>. Revkin states:

The Islamic State has developed elaborate rules governing its military operations. The organization claims to follow Islamic laws of armed conflict, although al-Qaeda, Jabhat al-Nusra, and other jihadist groups have disputed its compliance with these rules . . . [T]he Islamic State nonetheless claims that its combatants are acting lawfully according to the group's own rules. As one of its publications claims, the caliph is personally obligated to ensure combatants' adherence to rules that supposedly regulate their actions in combat: “The leader is required to ensure that he and his soldiers are held responsible for the rights that Allah has made obligatory and the limits that He has set.” The Islamic State has published guidelines, either as official fatwas or independent legal opinions authored by Islamic State-affiliated clerics, specifying the conditions under which enemy combatants may be targeted, tortured, mutilated, or killed, as well as rules governing the ransom of non-Muslim hostages. A 136-page manual containing guidelines on the treatment of prisoners of war explains that torture is permissible as a retributive punishment for enemies of the Islamic State that have engaged in equivalent acts of torture.

*Id.* It is hard, in other words, to imagine a present-day equivalent of the “view from Hanoi,” even though at the time Communism was arguably just as (or more) threatening and destabilizing and reviled as Islamist Jihadism. See Quade, *supra* note 37, at 123–24 (describing that the U.S. adversary is specified by “Communist ideology”; that, “[i]n other words, the enemy operates on the basis of a definition of morality sharply distinguished from our traditional codes, and, as part of this, a military ethic different from ours”). See also Richard Jackson, *The Epistemological Crisis of Counterterrorism*, 8 CRITICAL STUD. ON TERRORISM 33, 45 (2015) (“[L]ittle effort has been made by terrorism experts and officials to try and understand terrorist motivations by listening to their own words and messages, and seriously engaging with their subjectivity.”).

tween two (or more) states. . . . The remaining question is whether actions by Angosia against the armed group in the territory of Betazed without the latter's consent necessarily brings about an IAC between the two states.<sup>116</sup>

The analysis continues, in a section subtitled "Expanding Self-Defense into New States"<sup>117</sup>:

Let us assume for now that Angosia has already engaged in forcible operations against the Veridian group in the territory of Betazed, and that the justification given was one of self-defense following attacks against Angosia launched by the Veridian group from the territory of Betazed.<sup>118</sup>

The article goes on to introduce Cardassia, Davlos, and others. Another article notes:

Therefore, according to the consent position, hostilities on the territory of State A between Armed Group C (located in State B) and State A represent a single NIAC between A and C (without any additional IAC between A and B). Indeed, in this situation, the absence of consent of State A does not lead to the creation of an IAC between A and B as A is at the same time the State attacked and the State on which the violence is taking place.<sup>119</sup>

You get the point. If we were, perhaps, living through a profoundly peaceful decade, and international-law-of-war scholars were looking for something to talk about, and were searching out complicated scenarios in which to apply their fallow law, then perhaps we would need Cardassia and Angosia and Betazed (or C and A and B). We use pretend state names in international law final examinations in part precisely to *dissuade* students from seeking out additional facts, to *prevent* them from reading context into the problem. We want to focus their minds *only* on the law in the abstract. Why, in 2017, would we want to do that in scholarship concerning the conflicts in Syria, in Yemen, in Somalia, and beyond?

In addition to the frequent reliance on hypotheticals, three stylistic traits that I realized I had never noticed until I had spent time with the Vietnam literature emerged. First was the removal of the language of "invasion," "intervention," and "non-intervention," replaced with the use of the Latin

116. Noam Lubell, *Fragmented Wars: Multi-Territorial Military Operations Against Armed Groups*, 93 INT'L L. STUD. 215, 231 (2017).

117. Keep in mind how this debate unfolded in 1970.

118. Lubell, *supra* note 116, at 222.

119. Djemila Carron, *Transnational Armed Conflicts: An Argument for a Single Classification of Non-International Armed Conflicts*, 7 J. INT'L HUMANITARIAN LEGAL STUD. 5, 9, 12 n.33 (2016) (introducing hypotes by describing "intensive bombing by State A of a training camp of an Armed Group C on the territory of a State B").

“*jus ad bellum*.”<sup>120</sup> Second was the proliferation of acronyms as shorthand for war concepts. Lots of them. To the point that one no longer remembered that the acronyms represented words, words that themselves represented types of armed conflict between groups of people.<sup>121</sup> Third was what appeared to be a move towards creating typologies as a way of structuring arguments or creating new categories and labels for what seemed like new issues. Perhaps it is the case that the current situation is so unprecedentedly complex, so truly mindboggling, that the only way to speak about it sensibly is to create dense taxonomies of conflicts and sub-conflicts and types of intervention.<sup>122</sup> But it is difficult to see how anything that is occurring today is actually that much more intellectually taxing than what was occurring during the Vietnam War, as a matter of human and collective experience, or as a matter of the burdens on human judgment.<sup>123</sup>

Finally, the dominant structure and style tended to include brief and clinical concluding sections. Compared to the drama, politics, and sometimes beautiful writing that characterized the introductions and conclusions of the Vietnam-era pieces, it often seemed as though contemporary scholarship sought to emphasize and underline the technical and inward-looking purpose of their efforts. In some ways, the conclusions tell us more than the introductions about how the authors understand what they are addressing, and what they see as the issues at stake.<sup>124</sup>

The language and stylistic tools of abstraction and distancing served—intentionally or not—to allow the reader to forget about the actual wars going on, or the people fighting them, or the people being killed in them. Very rarely did I feel, as the reader, that I had any sense of what the author

120. See Raphaël van Steenberghe, *The Law Against War or Jus Contra Bellum: A New Terminology for a Conservative View on the Use of Force*, 24 LEIDEN J. INT'L L. 747, 756–61; Claus Kress, *The International Court of Justice and the 'Principle of Non-Use of Force'*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW, 565 (Marc Weller ed., 2015) (discussing the International Court of Justice's approach to the term “*jus ad bellum*” and recent discussions of terminology in scholarship).

121. Acronyms, used in this manner, were almost completely absent from the Vietnam-era scholarship I read. One presumes that acronyms were as freely available in 1968 as they are today.

122. Typologizing things, and coming up with new titles for relatively simple phenomena that exist in the world (and can already be explained through plain language) may also serve to distinguish scholars in today's much more crowded field of academic scholarship and influence-seeking. There may be advantages to being seen as coining a term that becomes popular within governments at war, or developing a way of abstracting existing wars that makes them easier to talk about in professional or logic-game terms.

123. It could be that this can be entirely explained by the tremendous rise of international jurisprudence concerning armed conflict since the mid-1990s. This is further discussed below. See discussion, *infra* Part III.

124. One article closes with remarkable confidence about the power of international law to figure out challenges posed by international law:

Multi-territorial conflicts against armed groups present a series of challenges across all relevant areas of international law. This article demonstrates that while emerging complexities require careful analysis, none of these obstacles is insurmountable and [all can] be addressed within existing legal frameworks.

Lubell, *supra* note 116, at 250. See also Hakimi, *supra* note 112, at 31.

felt, or thought, or was worried about in the various dilemmas and problem sets they presented. Perhaps most importantly, these stylistic and language choices served to enhance the sense that the worries facing international lawyers by 2014–2015 were about working out a conundrum, a puzzle.

The Vietnam-era authors knew they were dealing with a highly complex and interlocking or overlapping set of international law questions. Yet, somehow, they managed to speak of almost the exact same kinds of “conundrums” in an entirely different manner, one that never allowed the reader to forget what was at stake, one that articulated the role of the international legal scholar as primarily being about making the world a better place, not making international law more coherent.

### *Extreme Presentism*

If one characteristic of wartime passionate reasoning, and the respect that it demonstrates toward both the gravity of war and those caught up in war, is attention to facts, to scholarship of the past, to the context in which societies find themselves at the moment that armed conflict begins, then aridity experiences the time of war almost solely in the present.

Despite the fact that so many of the debates regarding the use of force and the classification of conflict informing the War on Terror discussions occurred in previous eras (not least in respect of the Vietnam War), if an outsider to the field picked up mainstream scholarship from the contemporary period, it would be exceptionally difficult for them to discern this. While during the Bush years, liberal international lawyers and scholars insisted that there was nothing “new” about the War on Terror, that it was not a “new kind of war” that required a new kind of law (or an eschewing of existing law),<sup>125</sup> the scholarship of the second phase of the War on Terror demonstrates a very different underlying attitude. Contemporary international legal scholarship on the War on Terror often reads like it is outside of time, or as though the dilemmas of international law and the use of force, self-defense, intervention in internal wars, and classification and application of appropriate IHL have only just arisen.

In much contemporary mainstream law-of-war scholarship, it is difficult to find any reference to past wars, or an indication of how the context and specific politics and legal dynamics of these wars might relate to the War on

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125. See, e.g., Jack M. Beard, *America's New War on Terror: The Case for Self-Defense under International Law and the War on Terrorism: Military Action against Terrorists Under International Law*, 25 HARV. J.L. & PUB. POL'Y 559, 559–60 (2002) (“It was in accordance with these long-established principles of customary international law and Article 51 that the United States . . . had ‘initiated actions in the exercise of its inherent right of individual and collective self-defense following the armed attacks that were carried out against the United States on 11 September 2001.’”); Mary Ellen O’Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 908 (2002) (after analyzing the legality of Operation Enduring Freedom under existing international law, O’Connell concludes that “[t]his was a lawful decision since the United States had initially been the victim of a significant armed attack and it had clear and convincing evidence of both planned future attacks and Afghanistan’s responsibility for both past and planned attacks.”).



Terror. The Cambodia example is particularly striking in its direct analogues to the current legal disputes, but contemporary debates also often fail to situate their arguments in any other historical contexts (such as the French/Algerian war, the Israeli/Arab conflicts, American engagements in Lebanon). This stands in stark contrast to the writing style and methodological approach of Vietnam-era scholars. Additionally, references to other international law scholarship are often exclusively focused on the post-*Tadić* era, as though these questions, or the issue of the line between international armed conflict and non-international armed conflict began—and in effect ended—with that decision. This creates a (as it turns out, wildly inaccurate) sense that the only relevant international legal analysis on the questions of the day are, well, of the day. The citation practices in contemporary scholarship focused on the United States are incredibly narrow, and tend to create a circular system of drawing conclusions that represent a “majority view” or the “state of play” based on the same contemporary references.<sup>126</sup>

In terms of the effect on the reader, this approach creates a sense that these questions and dilemmas really *are* new, and that the only available options are those that are being crafted, hastily and often in a reactive sense, during *this* war. This methodology (or absence of one) serves to normalize the kind of abstraction and argumentation through hypotheticals discussed above, because the failure to contextualize the War on Terror legal debates in history adds to a sense of disassociation, disconnect, and distance.

In contrast, Vietnam-era scholarship gives the reader a sense that these dilemmas are not as new as some suggest. It creates a sense of being grounded and located in time, but also a feeling that one ought to be cautious about becoming overly panicked about the notion that new, unforeseen threats require new, unforeseen approaches to international law.<sup>127</sup> Finally, the depth of their analysis, reaching back before the crisis of Vietnam, forced both the scholars and the reader to contend with the moral, political, and ethical context of those other moments in international law and war.

This deepening and enrichment allow both the reader and the author to think outside the present time, *and* to think about how the present war

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126. See Lianne J.M. Boer, ‘*The Greater Part of Jurisconsults*’: On Consensus Claims and Their Footnotes in Legal Scholarship, 29 LEIDEN J. INT’L L. 1021, 1023 (2016) (“What the analysis shows, is that footnotes following these claims most of the time consist of references to largely the same, limited set of scholars. Simply put, in order to support their consensus claims, scholars largely refer to the same publicists.”).

127. This is distinct from (though it could overlap with) the problems associated with formalism and positivism. Policy talk is frequently associated with American international legal scholarship, and the War on Terror is no exception. See Harlan Grant Cohen, *Are We (Americans) All International Legal Realists Now?*, in CONCEPTS ON INTERNATIONAL LAW IN EUROPE AND THE UNITED STATES 1 (Chiara Giorgetti & Guglielmo Verdirame eds., forthcoming) (“American jurisprudential legal realism, post-World War II international relations scholarship, utopian strands in American foreign policy thinking, and U.S.-specific foreign relations law—converged to bring a series of specific methods or attitudes to the forefront in American approaches [to] international law.”). But even the references to policy rationales are frequently rendered in abstract, distanced, and detached language. This is not a question of overreliance on doctrine, or an allegation that contemporary international law scholars think that law is a science. Rather, it is an entire approach that renders various methods similar in their tone, style, and effect on the reader.

might create implications for future generations. The Vietnam-era scholars, in thinking and writing in this way, moved naturally to questions of the underlying justice claims at work in debates from other times, and to speak forthrightly about how they were balancing present-day exigencies with longer-term implications. This gave the scholarship more texture, more humanity, and a sense of moral urgency that is missing from the contemporary atmosphere.

*From Conversation to Presentation*

In some ways, perhaps particularly in respect of wartime, international law acts as a meeting place, a “shared surface—the *only* such surface—on which political adversaries recognize each other as such and pursue their adversity in terms of something shared.”<sup>128</sup> The Vietnam-era scholars, on both sides of the debate over the legality and political wisdom of U.S. involvement in the war, deeply believed in this project, and in this sense, their scholarship often reads like a conversation about what is occurring and what ought to occur on this shared surface. Their writing allowed one to conjure the people involved, and to understand that the authors were writing both with skin in the game and with an understanding that there was a real audience considering their words.

The contemporary archetype creates a sense that rather than engaging in a meaningful discussion of the values and norms that ought to guide a society at war, one is sitting in a stuffy academic conference room, listening to a group of scholars talk only to one another. Much of the language of scholarship avoids any recognition of who the audience of the analysis might be, or why they ought to be affected, but rather focuses on other (typically like-minded) international law scholars. There does not seem to be an impulse to inform or persuade anyone outside of their own circle. This often manifests in a reference to international law as a “toolkit,” an “exercise,” or a series of “boxes,” which does evoke a certain kind of visual response in the reader (perhaps one recalling a visit to IKEA), but certainly not about the values that ought to guide in wartime.

The scholarship appears to assume the centrality of international law (it is not clear for whom) without asserting *why* international law relating to war should be of central importance at a time of crisis.<sup>129</sup> The goal becomes the creation of a coherent “analytical framework” (instead of, say, an international normative order)—one that can capture all U.S. action within the ambit of armed conflict such that IHL can be properly discussed and applied.<sup>130</sup>

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128. Martti Koskeniemi, *What is International Law For?*, in *INTERNATIONAL LAW* 29, 48 (Malcolm Evans ed., 4th ed. 2014).

129. There may be simple and reasonable explanations for this. See discussion, *infra* Part III.

130. See, e.g., Roy Schöndorf, *Extra-State Armed Conflicts: Is there A Need for a New Legal Regime?*, 37 *N.Y.U. J. INT'L L. & POL.* 1, 21–22 (2005). See *id.* at 21 (“The real question for those who object to the

Reading the Vietnam War scholarship, I often felt that the author was inviting me to take part in a conversation, or that I was sitting on the sidelines of a high-stakes, meaningful discussion between the scholar and other individuals. The writing often made me feel like I wanted to respond, whether to vigorously agree or disagree—but either way to jump into the fray. The moving elements of open despair or frustration made me sense that international law mattered not because of its doctrinal force, but because of its often-failed effort to tackle heady and dramatic questions of life and death, war and peace. Perusing contemporary scholarship on the War on Terror often felt like watching the delivery of a PowerPoint presentation in slow motion. One could almost see the slides emerging from the page.

#### IV. WHAT HAPPENED?

For those readers who agree that something feels like it has gone seriously awry with the way we write about international law and war today, or who find the comparisons between Vietnam-era writing and that of today conspicuous, a key question is: why? What changed? What follows in this section is by no means an effort to uncover empirical or sociological explanations for the shift, or to reflect on all the possible explanations for the change. This is also not a historical account of either the political realities of the Vietnam era or of our contemporary age. Rather, I attempt here merely to tentatively suggest some initial considerations—which may merit a separate and more comprehensive analysis of their own—on what might have contributed to this shift: the vastly different political environments, and certain changes to academic life and the field.

##### *Political Environment*

By far the most common explanation I heard for the transformation,<sup>131</sup> particularly from those who had lived through Vietnam, was that almost all the difference can be attributed to the profoundly different political environment in the United States and the West more broadly.

As one prominent scholar of the Vietnam era told me, “You have to have seen the mid-to-late 60s to understand the profound passions of the moment. . . . Your students felt strongly, everyone felt strongly. You felt you were involved.”<sup>132</sup> There is no question that the role of public opinion and

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legitimacy of such use of force is whether it is more worthwhile to insist on ideals that will not be respected by states in practice or to work towards a more pragmatic arrangement of the law.”).

131. In developing this piece, I had a rich range of conversations with scholars from around 35 years old to 95 years old, many of whom were generous with their time and incredibly open in sharing their memories and their perspectives.

132. This individual also traveled the country, holding town hall style meetings, and discussing law and the Vietnam War. This strikes me as incredibly indicative of the mood of the times. It is hard to imagine leading international law scholars from elite institutions today joining together with a leading U.S. military official to discuss law and the War on Terror in town halls around America. It is hard to

ultimately public outrage was dramatically different during the Vietnam War. It makes sense that scholars were affected. They woke up to read the newspaper with headlines discussing the stunning numbers of American soldiers killed as the war progressed. They experienced firsthand the bitter differences that emerged between colleagues, families, friends. They watched the nightly news, which often featured astonishingly raw footage of the war, including close-up portrayals of the suffering of Vietnamese civilians. Discussion of the war was constant, everywhere. Many professors had students who were protesting,<sup>133</sup> or were going off to war, or were dedicating themselves to anti-war activism. Another scholar noted that what struck him when I asked about why his and his colleagues' writing seemed so much more passionate at the time (an observation with which he agreed) was "the intensity. Nothing has come close to that."<sup>134</sup>

Many of the senior scholars writing and debating international law during Vietnam had lived through World War II. While it is frequently stated that those living in the United States have not experienced armed conflict on their territory since the Civil War, there are clues that World War II loomed large in the consciousness of politicians and scholars debating the U.S. role in Vietnam. There was a sense of the total, societally consuming, crushing weight of armed conflict, and perhaps a closer relationship to the physical, personal, terrifying reality of war. Regarding the Israeli/Palestinian conflict, Richard Baxter wrote in 1974:

Those of us who are Americans and who have recently gone through the ordeal of war ourselves—a chastening experience for all of us—should perhaps have a certain sense of sympathy and concern about the emotions to which the conflict between Israel and the Arab States has given rise. Our function should be to do our best to exercise any calming influence that we can in order to bring about a resolution of the conflict on the basis of justice and law.<sup>135</sup>

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imagine not because they would be unwilling, or because they are not interested in what people think, but because it is hard to imagine scholars being able to talk about international law and war in ways that would be compelling and accessible to lay audiences. (Interview on file with author.)

133. See, e.g., COLUM. UNIV. LIBRARIES, *CRISIS AT COLUMBIA: AN INSIDE REPORT ON THE REBELLION AT COLUMBIA FROM THE PAGES OF THE COLUMBIA DAILY SPECTATOR* (1968), <https://perma.cc/WB72-SUAJ>; *Harvard Students Protest U.S. Role in Vietnam War*, THE HARV. CRIMSON (Nov. 24, 1965), <https://perma.cc/HJ4H-NUGA>; *Michigan Faculty Created Teach-In*, N.Y. TIMES (May 9, 1965), <https://perma.cc/B3ZF-WY2F> (discussing the first teach-in protest against the United States' role in the Vietnam War in which approximately 2,000 students participated).

134. Interview on file.

135. Richard Baxter, *A Skeptical Look at the Concept of Terrorism*, in *HUMANIZING THE LAWS OF WAR: SELECTED WRITINGS OF RICHARD BAXTER* 211, 216 (Detlev F. Vagts, Theodor Meron, Stephen M. Schwebel & Charles Keever eds., 2013). See also, John F. Kennedy, 35th President of the United States, Inaugural Address (Jan. 20, 1961) ("Let the word go forth from this time and place, to friend and foe alike, that the torch has been passed to a new generation of Americans—born in this century, tempered by war, disciplined by a hard and bitter peace, proud of our ancient heritage—and unwilling to witness

Many felt that the draft was the single most important factor in explaining the difference. Beginning in 1964, the United States military drafted approximately two million men to serve.<sup>136</sup> While the majority of those conscripted came from poor and working-class families, “almost every American was either eligible to go to war or knew someone who was.”<sup>137</sup> The draft undoubtedly mobilized anti-war activism and fervent political debate within the United States. In this sense, it may also have personally affected international law scholars in ways that we would not know from reading their work, but could have seeped into their authorial voice and sense of the dramatic nature of the stakes of endless or expanding war. The war dead were not just individuals listed in the back of the newspaper; they were the children of friends, colleagues, they were family members. If you thought your own child could be called to fight, perhaps that would make you reason more passionately, write with greater commitment and risk-taking.<sup>138</sup>

Another element clearly expressed in the Vietnam-era scholarship was the palpable fear of nuclear confrontation.<sup>139</sup> The idea that proxy war in Indochina might bring the world closer to partial or total annihilation could certainly serve to clarify stakes, to force one to articulate one’s fundamental commitments, or to write and reason passionately. As one scholar noted in 1964, “At a time when the world trembles lest an inadvertent outburst of violence by one of the nuclear powers provide the spark igniting catastrophic destruction, the problem of the deliberate use of minor coercion assumes increasing importance.”<sup>140</sup> Perhaps the Vietnam-era scholars were writing at a time when the stakes actually *were* higher, in some measurable factual manner, and therefore we can understand why their writing reads with such urgency and connectedness.

It may be that the formative political and lived experiences of scholars writing, working, and teaching in the mid-1960s were much more alive to

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or permit the slow undoing of those human rights to which this nation has always been committed, and to which we are committed today at home and around the world.”)

136. 1,857,304 men were drafted between August 1964 and February 1973 to fight in Vietnam. *Induction Statistics*, Selective Service System, <https://perma.cc/AGE9-JH32> (last visited Sept. 22, 2018).

137. Amy J. Rutenberg, *How the Draft Reshaped America*, N.Y. TIMES (Oct. 6, 2017), <https://perma.cc/RV5C-PJMT> (discussing that the overwhelming majority of draftees came from working class families as opposed to more a more privileged class of Americans who were able to defer). Marc Leepson, *What It Was Like to Be Drafted*, N.Y. TIMES (July 21, 2017), <https://perma.cc/56KY-CD2T> (“During the Vietnam War every male of my generation—all 28 million of us—faced the vexing question of what to do about the draft. During my four years as a deferred college student, every guy I knew had countless conversations about it.”).

138. It is important to note that none of the scholarship I read from the Vietnam era expressly discussed this individually personal perspective on the war, but rather frequently expressed the *political* and *legal* stakes in personal voice.

139. I am not here expressing a view as to whether nuclear war was actually likely, or whether it was more likely then than now—only that the authors of the Vietnam era appear to be genuinely concerned about the imminent outbreak of nuclear confrontation between the two superpowers.

140. William T. Burke, *The Legal Regulation of Minor International Coercion: A Framework for Inquiry*, in *ESSAYS ON INTERVENTION* 60, 79 (Roland J. Stanger ed., 1964).

the reality of war, to the ways in which death and destruction could reshape human experience. For those who chose to study and dedicate their lives to international law on the use of force and regulation of armed conflict, it was perhaps more culturally or professionally acceptable to be animated by a sense of purpose, or calling. It might be that there was a shared understanding between those on both sides of the increasingly polarized Vietnam War debate, of what war itself meant, of the gravity of discussing the notion of intervention or invasion. It might be that underlying the profound disagreements over law—about international versus non-international armed conflict, about the meaning of self-defense, about intervention in third states—was a shared sense that those empowered with the ability to speak law, to advise the United States government, to influence policy, had a profound responsibility informed and shaped by the recent experience of “total” war.<sup>141</sup>

*And what of our times?*

Many of the scholars participating in the American international law debate on the War on Terror were raised after the Vietnam War, and, at least for those raised in the United States, grew up in a time of relative peace at home.<sup>142</sup> The first major armed conflict involving the United States that they experienced might have been the first Gulf War in 1990.<sup>143</sup> The formative debates and war politics of their early academic lives were likely to have been about peacekeeping, about the role of the United States as the world’s police, or about the appropriate limits of humanitarian intervention. It was a time when liberal internationalism turned its attention to how and whether military force could be used for good, to bring human rights, to stop atrocities, to spread democracy. The fear of nuclear annihilation had diminished. Debates over the use of force assumed that the American projection of military power would be limited, focused, and about getting involved in fixing other peoples’ problems. The United States built up an arsenal of weapons that would allow increasingly remote fighting,<sup>144</sup> and significantly expanded

141. It merits clarifying that the “experience of total war” was of course far more total, and far more “real” for those living in countries physically decimated by World War II. See Dudziak, *supra* note 62.

142. See Rick Hampson, *How the Overshadowed '90s Shaped Our World*, USA TODAY (June 29, 2014), [HTTPS://PERMA.CC/Q2G9-R6MB](https://perma.cc/Q2G9-R6MB); see also Jonathan Freedland, *The ‘Peaceful’ Decade That Set Up Our Current Turmoil*, THE GUARDIAN (Apr. 21, 2017), <https://perma.cc/68RZ-QY4L>.

143. Many scholars have pointed out that the United States has been at near constant “war” in one way or another since its founding; and during this period, the United States engaged in military interventions in Lebanon, Grenada, and Panama. However, for reasons that are undoubtedly problematic, the first Gulf War was seen and experienced by many as the first “major” war of the post-Vietnam age.

144. See Paul Robinson, *Ready to Kill but Not to Die: NATO Strategy in Kosovo*, 54 INT’L J. 671, 672–73 (1999) (“The pilot bombing a target from 15,000 feet never sees his enemy, never even has to fight him, and thus sees no need to honour him or behave in a restrained way towards him.”); but see Charles J. Dunlap Jr., *Kosovo, Casualty Aversion, and the American Military Ethos: A Perspective*, 10 J. LEGAL STUD., 95, 96–97 (1999) (“[T]he nature of modern precision munitions is such that they are often optimally targeted at the altitudes NATO employed. Among other things, higher altitude allows the pilots to concentrate on the targeting process; conversely, flying lower can be quite distracting.”).

its Special Forces, highly skilled and professionalized career warfighters who could quickly and quietly deal with security challenges with limited and precisely applied violence.<sup>145</sup> Increasingly, the notion of what it was like to be part of a society *at war* might have receded into historical distance.<sup>146</sup>

Nowadays, we regularly decry that “hardly anyone cares” about the wars we are fighting. Public awareness of the War on Terror is abysmally low.<sup>147</sup> A 2015 poll demonstrated that while 60% of millennials would support the United States intervening militarily to destroy ISIS, only 15% would themselves volunteer to serve in that campaign.<sup>148</sup> The United States Congress, across both parties, has been exceptionally weak in imposing any meaningful restraint on executive action in the arena of armed conflict, and the public is informed of only certain aspects of the War on Terror.<sup>149</sup> To the extent that any academics watch the nightly news, it is no longer singularly, or even frequently, focused on America’s wars. Particularly through the advent of social media, contemporary international law scholars have access to *more* images and stories and narratives about the War on Terror than their predecessors. They can see videos of bombings on Twitter, Apache helicopter feeds on YouTube, civilians sifting through rubble in the immediate aftermath of a strike on Facebook. Yet, it does not appear that this relatively unmediated access to reality has resulted either in a significant national po-

145. Michael Fitzsimmons, *The Importance of Being Special: Planning for the Future of US Special Operations Forces*, 19 DEF. AND SEC. ANALYSIS 203, 205–06 (2003).

146. MICHAEL BESCHLOSS, *PRESIDENTS OF WAR* 9 (2018) (citing Thomas Jefferson in 1805: “Considering that Congress alone is constitutionally invested with the power of changing our condition from peace to war, I have thought it my duty to await their authority for using force.”).

147. Stephanie Savell, *The War on Apathy over America’s Wars*, SALON (Feb. 25, 2018, 10:58 AM), [HTTPS://PERMA.CC/6QYP-3P9N](https://perma.cc/6QYP-3P9N); Tyler Bonin, *The Challenge of Teaching War to Today’s Students*, THE ATLANTIC (Nov. 8, 2017), [HTTPS://PERMA.CC/K7BR-CSEK](https://perma.cc/K7BR-CSEK); D’Vera Cohn & Cary Funk, *The Military-Civilian Gap: War and Sacrifice in the Post 9/11 Era*, 59, 59 (Pew Research Center, 2011), [HTTPS://PERMA.CC/453Z-DFT](https://perma.cc/453Z-DFT) (“[H]alf of the public says the wars in Afghanistan and Iraq have had little impact on their own lives.”).

148. *Harvard IOP Fall 2015 Poll*, HARVARD KENNEDY SCHOOL INSTITUTE OF POLITICS, [HTTPS://PERMA.CC/SUAZ-E6EC](https://perma.cc/SUAZ-E6EC). On the current makeup of the military, see George M. Reynolds & Amanad Shendruk, *Demographics of the U.S. Military*, COUNCIL ON FOREIGN RELATIONS (Apr. 24, 2018, 5:37 PM), [HTTPS://PERMA.CC/S9ST-DNFH](https://perma.cc/S9ST-DNFH).

149. THE WHITE HOUSE, *REPORT ON LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS* (2018), [HTTPS://PERMA.CC/5JJV-SZLNQ](https://perma.cc/5JJV-SZLNQ); Allison Murphy & Scott R. Anderson, *We Read the New War Powers Report So You Don’t Have To*, LAWFARE (Mar. 14, 2018), [HTTPS://PERMA.CC/V5Q8-YST5](https://perma.cc/V5Q8-YST5) (analyzing the contents of the war report, including what is missing and what might be included in the classified annex); S.J. Res. 59, 115th Cong. (2018), [HTTPS://PERMA.CC/L8BB-5XBB](https://perma.cc/L8BB-5XBB) (2018 AUMF proposal, including ISIS, with implications for associated forces); Robert Chesney, *A Primer on the Corker-Kaine Draft AUMF*, LAWFARE (Apr. 17, 2018 8:00AM), [HTTPS://PERMA.CC/EWE4-WGWS](https://perma.cc/EWE4-WGWS) (analysis of the resolution including list of associated forces, definition of associated forces, and implications for executive designation of new associated forces); COLUM. L. SCH. HUM. RIGHTS CLINIC AND SANA’A CTR. FOR STRATEGIC STUD., *OUT OF THE SHADOWS: RECOMMENDATIONS TO ADVANCE TRANSPARENCY IN THE USE OF LETHAL FORCE* 114 (2017) (“[T]here is insufficient clarity on how, and on what basis, a group is determined to be an ‘Associated Force’. In particular, it is not clear what factors the U.S. government uses to determine that a group has ‘entered the fight’ alongside al-Qaeda or the Taliban.”).

litical debate or the creation of political movements focused on U.S. military action.

Today, students of most international law scholars in the United States are not protesting in massive numbers. The streets are not filled with Americans chanting for peace, or decrying America's use of force in other countries (or celebrating America's military prowess<sup>150</sup>). As the War on Terror has dragged on, daily life in the United States is rarely affected by that war. Most international law scholars are not regularly faced with those who fight the wars that they study (or, more precisely, the wars regulated by the branch of law that they study).

It is hard to know how such life experiences, such formative encounters with war might affect not only individual scholars but might also affect what is understood to be the appropriate or expected tone of wartime international law scholarship. It is hard to isolate this possible factor from the overall shift in the culture: perhaps sincerity, conviction, or the earnest articulation of a moral center gave way to irony and cynicism in a way that permeated scholarship, shifted what could be said and how. But it may also be that the immediacy and proximity to war as a collective and nightmarish experience<sup>151</sup> compelled the Vietnam-era scholars to think contextually and personally about international law and war in a way that today's remote experience of war does not.<sup>152</sup>

Ultimately, while these all seem like relatively *true* observations (so far as they go), and while it is certainly the case that the political environment of America in the 1960s and early 1970s was vastly different than the 2009–2018 period, the explanation based solely on political culture is unsatisfying. It is possible that international law scholars write and speak in a more compelling and electrifying manner when they have the sense that their society and their communities are engaged and motivated by what is happening abroad. Maybe the sight of flag-draped coffins coming home on a weekly basis does actually change the way scholars think about their home

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150. At the time of this writing, President Donald Trump's plans for a large-scale military parade were still reportedly being viewed with some skepticism by both the Department of Defense and the city of Washington, D.C., and these plans are postponed indefinitely. Helene Cooper, *Trump's Military Parade Could Be Postponed Until 2019, Official Says*, N.Y. TIMES (Aug. 16, 2018), <https://perma.cc/D3LG-GC3H>.

151. Discussing Francis Lieber, Baxter writes, "Thus, by his twenty-sixth year, Lieber had engaged in two wars, had received his doctorate at Jena. . . . If, as seems not unreasonable, he who is to write of war must first experience it, this much of Lieber's qualifications as codifier of the law of war had been established." Richard Baxter, *The First Modern Codification of the Laws of War*, in *HUMANIZING THE LAWS OF WAR: SELECTED WRITINGS OF RICHARD BAXTER*, 122, 122 (Detlev F. Vagts, Theodor Meron, Stephen M. Schwebel & Charles Keever eds., 2013).

152. Scott Beauchamp writes, in discussing the remote and small-scale state of contemporary war fiction: "As war has become all-pervasive, it has also become a niche experience detached from mainstream American consciousness." Scott Beauchamp, *The Detached Literature of Remote Wars*, AMERICAN AFFAIRS (2017), <https://perma.cc/2M3F-U2UM>. Beauchamp's argument is that the style and character construction of many novels about our contemporary age of endless war fail to force the reader to connect to the larger social and political realities of U.S. actors abroad. He references "our collective apathy about conceptualizing the war itself." *Id.*



states' role in armed conflicts.<sup>153</sup> Perhaps it is as simple as suggesting that because the war in Yemen is not on the front page of the newspapers every day (or hardly any day), or the war in Somalia, or the war in Afghanistan, or the wars in Iraq, or in Syria, or in Libya, or in Niger, then international-law-of-war scholars, like other people, simply think less or differently about war. And care less about war. And therefore, write in a less passionate way about war.<sup>154</sup> Maybe. But this is a self-selected community that has chosen, as amongst many other possibly more enjoyable, less depressing, and more remuneratively satisfying options, to spend their time thinking and reading and talking about war. So why would law-of-war scholarship today be different based on the contemporary lack of broad political engagement, public debate, or even basic awareness of where the United States is at war?<sup>155</sup>

### *Changes in Academic Life and the Discipline*

In many respects, academic life in law has changed dramatically since the 1960s. For example, we frequently reference the rise of law-and-economics analysis,<sup>156</sup> the increasing status of empirical and quantitative methodologies, the brutal competitiveness of academic hiring, and the proliferation of law journals. It might in part be that the kind of scholarly community that existed in the mid 1960s (which was, it merits reiterating, nearly exclusively Anglo-European and male)—small, somewhat intimate, relatively unspecialized, publishing and debating one another in a small handful of journals

153. Dana Milbank, *Curtains Ordered for Media Coverage of Returning Coffins*, WASH. POST (Oct. 21, 2003), <https://perma.cc/KTG7-BMRF>.

154. See note 99, *supra*, for a discussion of how that scholarship may represent an example of more contemporary passionate reasoning. Some colleagues suggested that many international law scholars had been burned by their experience of observing and participating in the legal debates over the invasion of Iraq in 2003. That perhaps some had seen that being engaged (at a time when there *were* protests in the streets, all over the world, and when public debate about war was at a generational high point), putting one's all into one's scholarship, connecting to facts, had borne nothing: the invasion and occupation had gone ahead, to disastrous consequences. For these scholars, it had seemed to matter very little to anyone in power that the war was illegal. Perhaps that experience taught them a lesson, or even introduced a kind of detached, dejected acceptance of indefinite war as unavoidable, or at least, not addressable.

155. Rukmini Callimachi, Helene Cooper, Eric Schmitt, Alan Blinder & Thomas Gibbons-Neff, 'An Endless War': Why 4 U.S. Soldiers Died in a Remote African Desert, N.Y. TIMES (Feb. 20, 2018), <https://perma.cc/PGG2-J2DM> ("Are we protecting the United States? Who knows?" asked Ginger Russell, one of Sergeant Wright's aunts. "You don't think of your military in Africa. You're talking to people who didn't even know how to pronounce 'Niger.' We had to look it up on the map to see exactly where it happened."). See also *Meet the Press*, NBC NEWS (Oct. 22, 2017, 12:34 PM), <https://perma.cc/7Y4Y-FW3X> ("I didn't know there was a thousand troops in Niger," Senator Lindsey Graham, Republican of South Carolina, told NBC's 'Meet the Press' two weeks after the deadly attack. "This is an endless war without boundaries, no limitation on time or geography," Mr. Graham continued, adding, "We don't know exactly where we're at in the world militarily and what we're doing.").

156. A law and economics colleague, while disagreeing strongly with any notion that passionate reasoning belongs in legal scholarship, noted that it is expected in economics scholarship that articles begin with a clear statement of the objective of the piece, the motivation for the argument, and a sense of the intended audience. He emphasized that these sections are often written quite passionately, while the rest of the analysis is as "dry as possible." I would argue that these elements are currently missing from much international-law-of-war scholarship. See, e.g., Edward H. Stiglitz, *The Limits of Judicial Control and the Nondelegation Doctrine*, 34 J.L., ECON. & ORG. 27 (2018).

that were read by everyone in the field—simply no longer exists.<sup>157</sup> And it might in part be that such a community, writing before law review articles regularly ballooned to 80+ pages with hundreds of footnotes, or before the academic market became more competitive, was able to engage in a kind of conversation and to utilize a kind of tone and passionate reasoning that are no longer available or professionally encouraged.

Nor has the discipline itself remained static. It might be useful to also explore, for example, drawing on the work of such theorists as Pierre Bourdieu, whether the field today, perhaps as part of an effort to instantiate itself *as* a juridical field, places a higher value on scholarship meant to be more impersonal (in the sense of neutral, objective, and universal) and less personal (in the sense of partial, subjective, and parochial).<sup>158</sup> In that reading, perhaps, dispassionate scholarship might be considered preferable because it purports to uncover theories and practices relevant to *any* conflict, irrespective of political, social, and cultural distinctions. Such an approach might support, and itself be reinforced by, a modern turn toward emphasizing the universality, comprehensiveness, and imprescriptibility of the primary norms underlying the legal system.

In any event, during discussions of the present paper, a number of junior scholars approached me to share that they had submitted drafts of papers full of passion, only to have journals edit—perhaps bowdlerize—them into more dry, distanced, remote language and tone.<sup>159</sup> It may be that the leading law journals of the Vietnam era were open to a kind of writing<sup>160</sup> that would read today as overly strident or otherwise unscholarly. Or perhaps, with the rise of a more abstract, distanced, hyper-technical, emotionally remote scholarly voice, the expectations for both publication and promotion in international law have increasingly come to reflect broader trends in certain fields of legal academia.<sup>161</sup>

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157. Of course, as with all somewhat rose-colored summaries of what the past was like, it may be that it never actually existed, and only appears that way in retrospect.

158. See Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *HASTINGS L. J.* 814, 819–21 (1977).

159. Some readers have suggested that the contemporary blogosphere provides a more ready home for passionate reasoning, and that scholars have saved their more engaged and contextual writing for these forums, contributing to the aridity of academic publications.

160. The very first paragraph of a rigorous and doctrinal piece by Tom Farer, then an Associate Professor of Law at Columbia University, published in 1971 in the *Columbia Law Review* is one example that could be drawn from many: “The ravaged and purportedly pacified people of South Vietnam, as well as the architects of the tactics and strategies that are being employed there, may be surprised to learn that the choice of lawful means for the conduct of war is not entrusted exclusively to national whim.” Tom Farer, *Humanitarian Law and Armed Conflicts: Toward the Definition of “International Armed Conflict”*, 71 *COLUM. L. REV.* 37, 37 (1971).

161. See Getman, *supra* note 12, at 580:

If professional voice is slightly detached, scholarly voice tends to be far removed from the emotions, language, and understandings of the great majority of human beings. The emotional impact professional voice can sometimes achieve is rarely felt in such work. Indeed, one of its implicit messages is that legal issues are best analyzed in language that reduces their emotional content.

## V. WHY MIGHT PASSION MATTER?

Perhaps passionate reasoning is an “old-timey” relic of a past era, which might sound dignified or full of conviction by virtue of its anachronistic tone, or be made more significant because of some yearning for a simpler, less postmodern time.

Or, even if one agrees with the selective description I have provided here, one could argue that dispassion is a great advantage. That, as scholarship, the contemporary examples are *better* than those of the Vietnam era. Perhaps antiseptic writing is more objective, more clear-eyed, makes legal scholarship more like chemistry and less like literature. It could be that distanced and remote writing provides a better platform for doctrinal analysis, or clearer metrics for legal argumentation and dispute. It might be that aridity and intricate complexity indicate a maturation in the field, a sign that international law of war has come into its own.

I will first discuss some of the risks of passionate scholarship. I will then present two domains in which I argue that aridity, distancing, and abstraction are taking the field off course, possibly permanently.

My primary concern is those scholars working and writing in the United States or writing in a manner that is seeking to influence internal U.S. debates, *while the United States is prosecuting the War on Terror*. What does it mean to be an international-law-of-war scholar during wartime, writing in connection with the country spearheading conflict?

Fundamentally, we seek to shape new ideas or critiques on what it means to defend a nation lawfully, what it means to intervene in the lives of other people in other communities, and how law can serve to constrain and regulate humanity at its worst and most brutal (or how law has itself participated in or constructed that brutality). We think and write about the legal, ethical, and moral connections between politics and violence, and what law does say or should say about what kinds of bloodshed and destruction are—and are not—acceptable. Or how that bloodshed ought to be meted out. Or about how the lives of some people can be destroyed, but not the lives of others. What human collectives owe one another when they wish to destroy one another. That is what we do, and we are doing that at a time when the destructive potential of military technology is greater than ever. Without exaggerating the importance of international law itself, and certainly of international-law-of-war scholarship, how we write about these questions and how we engage with one another are central to who we are as scholars and who we are as a community of professionals.

Ours is ultimately not the most complex field of law. You can be rigorous. You have to learn the rules. But the rules were consciously built to be simple—to be easy to understand. In the case of IHL, to be teachable to teenagers. The hard part in our field is not the technical law math. The hard

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part is the morality, ethics, and the stakes of decision making. How to talk about those in a legal language, and how to actually say thoughtful or critical or constructive things about those questions. That is the hard part. The Vietnam-era scholars understood that. Rigor and passion were not in an inverse relationship, they were directly connected, because any serious analysis of self-defense, intervention, or the scope of armed conflict had to take into account the author's perspective on the potentially disastrous consequences of the war that was being conducted while the words were being written. To be rigorous was not simply to display a facility with the law or an ability to produce dense footnotes; it also meant the capacity to write with force and conviction about the way in which the fundamental purposes of international law were at risk, and to endeavor to connect one's international legal analysis with one's own conception of those purposes *during wartime* and for future generations.

Today, international-law-of-war scholars are distancing themselves from this approach to such an extent that we may be forgetting how to write with passion.

### *The Risks of Passion*

In his article titled *The Sentimental Life of International Law*, Gerry Simpson suggests that “what we seem to have is a concern about dryness (partly counteracted—but maybe also, at times, compounded—by the new international law of humanity and human beings) and an anxiety about melodrama (a nagging concern that all this focus on victims and individuals and narrative arc is sentimental and depoliticizing).”<sup>162</sup> We might be concerned that a turn to passion in law-of-war scholarship could involve a florid attention to broken bodies or a kind of victim pornography. Or that it would lead to a total personalization of analysis, where the individual scholar centers themselves as the main protagonist in international legal questions. Or perhaps more passion would lead to outright political advocacy thinly veiled as scholarship. Interpreted as being primarily about “emotion,” it could lead to a kind of writing that centers the author and their deeply personal opinions, inviting weak scholarship that is difficult to critique or assess on any objective or shared terms. Interpreted as being primarily about poetic or grandiose writing, it could encourage stylistic flourish that obscures problematic legal argumentation.<sup>163</sup> Finally, a passionate approach to scholarship

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162. Simpson, *Sentimental Life*, *supra* note 7, at 25. Simpson articulates four risks of a “sentimental” approach to international lawyering (which I see as distinct from, though related to, a passionate one): sentimental excess, moral simplicity, solipsism, and depoliticization. *Id.* at 17.

163. In an interview, historian Priya Satia reflects:

I’m realizing the work I most admire is defiant in its dogged empiricism rather than shrilly denunciatory—and work that is rigorously empirical but with a poetic quality too, and a kind of emotional intimacy . . . a hangover of the old idea that poetry offers a kind of transcendental truth—that feeling of existential relief when you read, say, Aimé Césaire’s *Discourse on Colonialism*.

may be far riskier (at least in the current academic environment) for women, scholars of color, and junior scholars, particularly in the rather traditional and stuffy field of international law of war. If these scholars were to take up a more passionate approach without the broader field shifting in this direction, they might be dismissed as either writing in too “emotional” of a manner, or of delving into the details of specific wars in order to make an identity-based point about the plight of the global south, to the detriment of their professional advancement.

My sense is that the most significant concern about passionate reasoning, even of the traditionally scholarly kind I have described from the Vietnam era, is that it will undermine the value and credibility of legal academic work. This may be a particularly serious risk in the realm of armed conflict, where emotions and political temperaments can run so high, and where emphasis on context can distract us from some of what makes legal analysis valuable. In this view, it may be the case that scholarship on international law and the use of force, or the law of armed conflict, ought to be dispassionate and distant exactly because war itself is so emotional. Or because it is powerful emotions and passionate commitment to ideology that often call for invasion and the continuation of war. That the role of lawyers and legal scholars is precisely to abstract out, to move governments and readers away from the heat of the battlefield toward cool reasoning. In this view, it is the work of legal scholars to identify patterns and connections, analogies and abstract models so that law can be brought to bear—can impose legal restraints—on human destructiveness *amid* the maelstrom. It may well be that the shift that I identify here is a salutary indication of the progress and institutionalization of international law concerning armed conflict. It is now a “real” body of law, one that can be discussed not as a proxy for ethics, but in the same manner as any other field of rules.

Indeed, in this sense, one might see real and important *benefits* to dispassionate international law scholarship. Dispassion might drive scholars to identify more concrete, objective, or empirically-sound research projects. A dispassionate approach might lead to formulating more questions that attempt to systematize international law, or create theories of law and war that are applicable across discrete conflicts and factual specificities. If mainstream and policy-influential scholarship is shaped by a dispassionate approach, it might mean that law is seen to develop outside of politics or particular wars, perhaps gaining more ground for law to regulate conflict. To the extent that the primary goal of international law scholarship should be the bolstering of international law as law, or to expand the capacity of law to shape and regulate the behavior of states in conflict, dispassion might be far more suited to this goal. The nationalism, bellicosity, and heated emotion of public dis-

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Interview by Chloe Bordewich with Priya Satia, Professor, Stanford Department of History, *Guns, Spies and Empire, Or, Why Good People Do Bad Things: Interview with Priya Satia* (Apr. 23, 2018), <https://perma.cc/92TG-VGU6>.

course during wartime might be usefully tempered by law that is seen (and presented) as neutral, objective, and distanced from real-time developments.

Mindful of these risks, my sense is that we can exercise good judgment while also insisting that the field overall could be more intellectually nourishing, and could be more connected to the world to which it seeks to be relevant. In some ways, my point is that it takes real hard work and dedication to take the blood *out* of law-of-war questions. Soulless scholarship is taking away what is innate to the topic, the stakes, and the central legal questions.

### *Disciplining the Discipline*

Rather than encouraging a diversity of approaches to scholarship about international law related to war, the dominant contemporary mode limits both the substantive scope of argumentation and the acceptable range of what may be brought to bear on these arguments. In terms of substance, the style and voice of contemporary liberal international legal scholarship related to war privilege technical IHL quibbling over powerful, risky scholarship about international law on the use of force. The obsession with typologies drives scholars to accept the premise that the big questions have already been answered. Substantively and doctrinally, this narrowing serves to make arguments about the use of force sound less and less like arguments about intervention and invasion (which is so often what they are actually about) and more like pit stops on the way to IHL. To the extent that argumentation about the international law on the use of force requires more context, more clarity, and more of the author's own voice and commitments in order to be sensible, dispassion and over-complexification may limit what we see as important legal questions meriting academic attention.

Dryness, distance, and bloodlessness have a corrosive and constraining effect over time. When abstraction and distancing from reality and the stakes of fundamental legal questions become accepted as the baseline of argumentation and scholarly discourse, it may have the effect of making more grounded, human, engaged, and passionate scholarship seem weak, unsophisticated, or overtly politicized. It may be far more difficult than one might think to go from talking about "Angosia" to talking about the United States at a particular time in history acting in a particular country against a particular adversary. It may be harder still to go from talking about Angosia and a slew of acronyms to clearly expressing concern about the stakes of the unable/unwilling doctrine, or the implications of U.S. arguments for future conflicts.<sup>164</sup> Over time, the reign of dispassion may serve to

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164. In discussing emotions and human rights law in judicial decision making, Emily Kidd White notes:

Legal philosophy is obsessed with bloodless questions. And yet, human rights cases are adjudicated in spaces full of beating hearts. . . . The thick emotions that relate to the concept [of

shift our perceptions of what counts as serious or objective scholarship, creating a sense that any mention of the realities in which abstract legal rules would be applied is somehow an example of “advocacy” or is “ideological.”<sup>165</sup> Global non-international armed conflict presents a fascinating legal puzzle, to be sure. But treating it like a puzzle diminishes the extent to which we can talk about it—also and much more importantly—as a *calamity*.

### *Abdicating Responsibility*

Passionate reasoning gives the reader a sense of why the author cares about the topic. In this sense, it also encourages a way of thinking and writing that is more open, vulnerable, and (in the case of war) filled with the agony of making judgements about life and death. This kind of thinking and writing, at a time when one’s own nation is at war, invites scholars to reflect on their own responsibilities, on the morality and ethics of their own engagement with international law during wartime, the burdens of speaking about war in one way and not another. Contextual, connected, passionate writing allows, and even demands of, the author to reflect upon the responsibilities that law, legal structures, and wartime legal scholars themselves may bear in seemingly endless war. The Vietnam-era scholars wrote about the decision to criticize their government during war, about what it meant to be a legal scholar at a time when the government was presenting a particular vision of legality to a divided public, about what it meant to continue to debate and engage law after the scope of the Cambodia invasion became known.

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human dignity] help judges see and understand human dignity violations in the evidence before the court. They draw blood from stone.

White, *supra* note 21, at 238.

165. It is noteworthy that the scholars who have been most comfortable to state in clear, simple language that instances of the use of force during the War on Terror violated international law are those traditionally associated with the “right,” and as somewhat hostile to international law (at least as applied to the United States). Indeed, often it is those who have written with more of a sense of connection to the stakes, to the realities at hand, who are writing from outside the field, or at least in the very small part of the field that is to the right of center. On this point, Jack Goldsmith notes:

Taken together, these precedents and rationales [justifying the use of force against terrorists outside of existing armed conflicts] have changed the U.S. position on the U.N. Charter to narrow its limits on the use of force. The administration has done something analogous with respect to the restraints of the *jus in bello* concerning global non-international armed conflict. Some but not all of the Obama administration’s practices found precedents in prior U.S. practice to some degree. . . . Obama came to office with an attitude and a team that signaled deep respect for international law related to war. When he embraced positions that narrowed those restraints to meet national security threats, he had more credibility to make these claims, and attracted fewer skeptics, than a hawkish president who disrespects international law would have.

Jack Goldsmith, *The Contributions of the Obama Administration to the Practice and Theory of International Law*, 57 HARV. INT’L L. J. 455, 463 (2016).

Distanced, remote, and abstract writing about the law of war, during wartime, allows the author to avoid bigger “so what” questions, but also allows them to avoid thinking through their own responsibilities, allegiances, and duties. It is easy to distance *oneself* when writing in a distanced manner about war.

The conflict(s) in Syria—and the U.S.’s involvement therein—ought to have been a moment of reckoning for the international-law-of-war field. After nearly fifteen years of the War on Terror, the U.S. government used self-defense arguments rooted in the notion of a global non-international armed conflict to intervene in a massive, profoundly destructive civil war. Any notion of consent was difficult to take seriously, particularly after the Syrian government indicated that they had *not* granted consent for the intervention. Regardless of one’s political leanings, it was exceptionally difficult to discern anything that looked like a long-term Syria policy on the part of the U.S. government. The government’s approach to domestic politics skirted the question of whether the nation should become involved in a new conflict by shoehorning the Syria intervention into the existing 9/11 Authorization for Use of Military Force. The very same use of force and IHL arguments that had been exhaustively discussed by law-of-war scholars regarding targeted killings were now suddenly the framework, not for a single strike against an individual named on the so-called “kill list,” but for engagement in a messy war involving multiple states. By the time of U.S. involvement, millions of Syrians had been displaced, tens of thousands had been killed in conventional (apparently indiscriminate) bombing by their own government, and ISIS controlled vast amounts of territory and upwards of eight million people.<sup>166</sup> Wherever one stood on the question of international law on the use of force, or the proper interpretation of the U.N. Charter or Common Article 3, as a country imploded, it should have been a watershed moment for what had led us there, and a moment to clarify and speak to the human stakes of this new front.

Instead, we continued to talk about extraterritorial NIACs and transnational NIACs, about unable/unwilling and about the “state of play,” about whether the concept of “co-belligerency” could be expanded to NIACs, about whether Betazed could hotly pursue an armed group into Cardassia. We did not question how our own treatment of international law had led us to this place. We did not question whether the legitimization of the war in Syria laid bare how the new approach to the use of force might allow for any military action to be justified in the language of the War on Terror. We were stuck in our own conundrums, trapped in intricate formulas of our own

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166. See Seth G. Jones et. al., *Rolling Back The Islamic State*, RAND (2017), <https://perma.cc/9VKP-FGBC>; *Islamic State and the Crisis in Syria in Maps*, BBC NEWS, (Mar. 28, 2018), <https://perma.cc/M3YG-VCDJ>; *Timeline: The Rise, Spread, and Fall of the Islamic State*, THE WILSON CENTER (Apr. 30, 2019), <https://perma.cc/HB54-PPTZ>.



making. Our debate would, I think, be deeply troubling to our predecessors from the Vietnam era.

Ultimately, what I felt in reading international-law-of-war scholarship and participating in professional academic workshops during the (ongoing) Syrian War was that we should be ashamed of ourselves. I felt that we would not have been comfortable presenting our arguments to a room full of Syrians. Or to a room full of young American soldiers. We would have been embarrassed to take our PowerPoints and our acronyms and tell a group of people affected by the war that what we were focused on began with an abstract and convoluted notion of self-defense, and ended with complex rules of targeting that we were not sure were actually being applied.<sup>167</sup> That it had no reference to those people, to their experience of war, to our political responsibility for the war they were living through, or to our fundamental and simple sense of how international law did and should see them. We had neither a story of failure, nor of justice. We had only desiccated concepts, devoid of connection.

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167. Michael P. Scharf, *How the War Against ISIS Changed International Law*, 48 CASE W. RES. J. INT'L L. 15, 35 (2016) ("As outlined in this communication, the United States has argued that it can attack ISIS targets in Syria without Syria's consent because (i) ISIS threatens Iraq, (ii) Iraq has requested the United States' assistance, (iii) ISIS has obtained safe havens in Syria, and (iv) the government of Syria has been unable to confront ISIS effectively."); Stephen W. Preston, *Policy Address: Legal Framework for the U.S. Use of Military Force Since 9/11*, 109 PROC. OF THE ANN. MEETING (ASIL) 331, 334–36 (2015) (arguing the legal basis for military operations against ISIS in Syria based on the 2001/2002 AUMF and "collective self-defense of Iraq and U.S. national self-defense" consistent with Article 51); Hakimi, *supra* note 112, at 4 (2015) ("When the Syria operations began, several positions on the use of defensive force against non-State actors were in play. Each of these positions had some support in the practice and secondary literature. But none was widely accepted as *the* correct interpretation of the law. As a result, States and other global actors could plausibly invoke or apply any of these positions in the Syria case."); THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 24–25 (2016) ("The determination as to whether a region constitutes an 'area of active hostilities' does not turn exclusively on whether there is an armed conflict under international law taking place in the country at issue, but also takes into account, among other things, the size and scope of the terrorist threat, the scope and intensity of U.S. counterterrorism operations, and the necessity of protecting any U.S. forces in the relevant location. Afghanistan, Iraq, Syria, and certain portions of Libya are currently designated as 'areas of active hostilities'"); COLUM. L. SCH. HUM. RIGHTS CLINIC AND SANA'A CTR. FOR STRATEGIC STUD., *supra* note 149, at 51, 113 ("The PPG has been in place since 2013, and yet it is not clear when the U.S. government designated Afghanistan, Iraq, and Syria as 'areas of active hostilities' or if for certain periods of time those or other countries were similarly designated.").