



Contemporary Buddhism

An Interdisciplinary Journal

ISSN: (Print) (Online) Journal homepage: <https://www.tandfonline.com/loi/rcbh20>

LIMITING THE RISK TO COMBATANT LIVES: CONFLUENCES BETWEEN INTERNATIONAL HUMANITARIAN LAW AND BUDDHISM

Vishakha Wijenayake

To cite this article: Vishakha Wijenayake (2021) LIMITING THE RISK TO COMBATANT LIVES: CONFLUENCES BETWEEN INTERNATIONAL HUMANITARIAN LAW AND BUDDHISM, Contemporary Buddhism, 22:1-2, 208-222, DOI: [10.1080/14639947.2021.2088959](https://doi.org/10.1080/14639947.2021.2088959)

To link to this article: <https://doi.org/10.1080/14639947.2021.2088959>



Published online: 08 Sep 2022.



Submit your article to this journal [↗](#)



Article views: 525



View related articles [↗](#)



View Crossmark data [↗](#)



Citing articles: 1 View citing articles [↗](#)



ICRC



LIMITING THE RISK TO COMBATANT LIVES: CONFLUENCES BETWEEN INTERNATIONAL HUMANITARIAN LAW AND BUDDHISM

Vishakha Wijenayake

Faculty of Law, Centre for Human Rights and Legal Pluralism, McGill University, Montreal,
Quebec, Canada

ABSTRACT

This article places international humanitarian law (IHL) side by side with Buddhist narratives as seen through the *Jātakas*, to investigate how they view the expectation placed on soldiers to risk their lives in battle. To this end, I delve into the notion of reciprocity of risk in battle from an IHL perspective, which I argue is crucial to infusing warfare with restraint. Similarly, Buddhism acknowledges the importance of reciprocity as an ethical principle that leads to non-violence. I demonstrate how IHL tries to ensure that the risk combatants undertake in combat is limited through its rule of surrender. I compare this argument with the *Seyyamsa* or *Seyya Jātaka* (no. 282), which illustrates the need to cease violence in cases of surrender. The way militaries treat their own combatants is crucial to the meaningful practice of surrender and thereby the limits and restraints of warfare. Buddhism too encourages rulers to value the lives of their soldiers and not to put their lives at unnecessary risk. I conclude that to maximise the combatant's choice to limit the risk he takes in battle, IHL should pay more attention to the orders that militaries and armed groups issue to their combatants. Buddhism, for its part, can facilitate the constructive use of military orders because it projects positive images of rulers who are reluctant to order their soldiers to take unnecessary risks in war.

KEYWORDS *Jātakas* (*Seyyamsa* or *Seyya* (no.282), *Vaddhakisūkara* (no.283), *Supatta* (no.292), and *Culla Kālīṅga* (no.301)); law; international humanitarian law; reciprocity of risk; restraint; combatants; surrender

Introduction

War is a way of framing political violence around which various narratives are constructed (Kahn 2013, 202). One such narrative is that pertaining to death. Death in wartime is not viewed with the same lens as it is viewed in peacetime. This is even more applicable to how combatants' deaths are seen in comparison to civilian deaths. While in peacetime it is illegal to kill another, in war it is legal to kill an enemy combatant (Additional Protocol I, Article 42). There is an acceptance that those who join the military have a high probability of dying. Likewise, morality in times of war and as applied within the

CONTACT Vishakha Wijenayake  vwijenayake@gmail.com

© 2022 Informa UK Limited, trading as Taylor & Francis Group

military is different to that of civilian society (Durkheim 1951, 198; McMahan 2009, 36).¹ Militaries and armed groups seem to 'lay down their own precepts and presume to establish their own hierarchies of norms' (Cover 1983, 33). However, the boundaries of even sectarian communities such as the military can be porous. The principles that establish the worldview of a community, including the military, tend to mirror the cultural constructs of the community within which it resides (Cover 1983, 33). A combatant does not exclusively reflect his attitudes *qua* military man but is also influenced by social, economic, political or religious affiliations (Huntington 1957, 60). Therefore, societal and religious norms and expectations continue to play a role in defining the value of a soldier's life, actions and eventual death.

Buddhism does not encourage violence and is pacifist in terms of its outlook towards war.² However, this is not to say that Buddhist narratives are entirely silent on this issue. For example, the circumstances that resulted in the Buddha narrating the *Vaddhakisūkara Jātaka* (no. 283) involved a monk by the name of Dhanuggaha Tissa who is described as a clever military strategist. During the time when the Buddha narrated this *Jātaka*, the King of Kosala had sent spies to hang around the monasteries to overhear military strategies communicated by monk Dhauggaha Tissa to monk Upatissa, for example:

In warfare there are three strategies such as Paduma Bruha, Cakra Bruha and Sataka Bruha. In the Sataka Bruha, positioning the army on either side, fighting for some time and retreating suddenly, then rushing into the middle of the enemy camp like the army of Mara, is one strategy of capture. If one fights using this strategy beside that mountain, one could defeat the enemy easily. (Jat. II.404) (Obeyesekere 2016, 251)

The spies duly informed their king of this strategy. The king in turn carried out wartime preparations accordingly and captured King Ajātasattu (Obeyesekere 2016, 252).³ While this story is clear on the fact that the monk did not engage in giving direct advice to the king on how to fight war, it is an apt example to show that Buddhist lore contains narratives that speak of war and view it from the perspective of a non-participating observer. In this article, I choose to focus primarily on such narratives as seen through the *Jātakas*. The *Jātakas*, or stories of the past lives of the Buddha during which he was mastering the qualities that would enable him to become a Buddha, form an integral part of Buddhist lore. Even if *Jātakas* may not be strictly Buddhist in origin and may have been taken from the wider Indian context, one cannot dismiss these stories given that they have been a popular part of Buddhism for over 2000 years (Appleton 2010, 10). Likewise, they are the stories with which Buddhist communities grow up, and they shape their cultural sensibilities (Schober 1997, 1). Appleton (2010, 2) states that especially in Theravāda Buddhist countries, *Jātakas* are infused into people's daily lives through 'illustrations in temples, their presence in sermons, children's story books, plays, television programmes, theatre, dance

and poetry'. These tales influence not only the cultural sensibilities of Buddhist societies but also their ethical principles. Therefore, the pursuit of identifying messages that the *Jātakas* project about war, and the image of the soldier that they paint, is an important one, given that they have the capacity to influence how militaries make decisions about how their combatants engage in battle.

This article places international humanitarian law (IHL) side by side with Buddhist narratives as seen through the *Jātakas*, to investigate how they view the expectation placed on soldiers to risk their lives in battle. To this end, firstly, I delve into the notion of reciprocity of risk in battle from an IHL perspective, which I argue is crucial to infusing warfare with restraint. It must be noted, however, that the notion of reciprocity of risk is not one that finds expression in the black letter of IHL. My argument, through an exploration of warfare as an interactional practice, is that reciprocity of risk in warfare acts as an undercurrent to IHL's objective of increasing restraint in warfare. Similarly, Buddhism acknowledges the importance of reciprocity as an ethical principle which leads to non-violence. Secondly, I demonstrate how IHL tries to ensure that the risk combatants undertake in combat is limited through its rule of surrender. I compare this argument with the *Seyyam̐sa* or *Seyya Jātaka* (no. 282), which illustrates the need to cease violence in cases of surrender. Thirdly, I establish that the manner in which militaries treat their own combatants is crucial to the meaningful practice of surrender and thereby the limits and restraints of warfare. I argue that Buddhism too encourages rulers to value the lives of their soldiers and not to put their lives at unnecessary risk. I conclude that in order to maximise the combatant's choice to limit the risk he takes in battle, IHL should pay more attention to the orders that militaries and armed groups issue to their combatants. Buddhism, for its part, can facilitate this by projecting positive images of rulers who are reluctant to order their soldiers to take unnecessary risks in war.

Reciprocity and restraint in war

War, since pre-historic times, has been a reciprocal enterprise (Keely 2012, 11). René Provost (2012) argues that the notion of reciprocity undergirds IHL. The chivalric codes of mediaeval Europe supported reciprocal trust between knights, including with those on the opposing side. These codes have been assimilated into modern wartime practices (Pilloud et al. 1987, 434). However, with the universal ratification of the Geneva Conventions of 1949, all states now have an obligation to respect IHL regardless of whether it is being respected by the opposing parties to a conflict (International Committee of the Red Cross 2016, 119; Provost 2012, 19; Dörmann and Serralvo 2014; Mégret 2013).⁴ Common Article 1 to the Geneva Conventions provides that '[t]he High Contracting Parties undertake to respect and ensure respect for the present Convention *in all circumstances*' [emphasis added], emphasising

the automatic application of the Conventions.⁵ Therefore, it may be argued that reciprocity is now less important in order for IHL rules to apply to warring parties. In spite of this shift, I argue that reciprocity remains relevant to how combatants risk their lives in combat. The ‘reciprocity of risk in combat’ speaks to the mutual danger and vulnerability experienced between adversaries (Kahn 2013, 218). This ‘bond of mutual risk’ brings human interaction into war, where ordinary social relations otherwise experience a breakdown (Mégret 2013, 1310). Accordingly, when combatants confront each other on the battlefield they engage in a reciprocal interaction (Provost 2012, 36). Reciprocity of risk, therefore, marks an ‘internal morality of combat’ (Kahn 2013, 201) and can be seen as reinforcing IHL given that it acts as a pragmatic *raison d’être* for restraint in warfare (Evangelidi 2018, 100).

The mutually reinforcing relationship between reciprocity and restraint can also be seen in Buddhist ethics (Scheible 2009, 212). The *Dhammapada* contains verses considered to be delivered by the Buddha preserved in the form of an anthology in the Pali language in Sri Lanka and Southeast Asia. Parallel versions of this text are found in many languages from throughout the Buddhist world, and it is the most translated Buddhist text into non-Asian languages because of its succinct and accessible presentation of Buddhist teachings. The Pali version (Carter and Paliawadana 1987, 202–203) states thus:

All are frightened of the rod.
Of death all are afraid.
Having made oneself the example,
One should neither slay nor cause to slay.

All are frightened of the rod.
For all, life is dear.
Having made oneself example,
One should neither slay nor cause to slay.

Charles Hallisey states that using the terms ‘Having made oneself the example’ to mean ‘As I am, so are other beings’, and that to prevent oneself from harming another indicates ‘an awareness of an underlying ‘kinship, or sameness in a defining experience, that can be used as a guide for actions’ (Hallisey 2009, 136). Norman (1997, 20) offers an alternative translation to the third line, rendering ‘Having made oneself the example’ as ‘Comparing (others) with oneself’. This makes even more clear the point about how one can better relate to the experience of others by looking inward. Moreover, the fifth-century Pali treatise the *Visuddhimagga* contains a meditation that mirrors the verses from the *Dhammapada*:

On traversing all directions with the mind
One finds no one anywhere dearer than oneself.
Likewise everyone holds himself most dear,
Hence one who loves himself should not harm another.

(Ireland 1997, 62)

Both the *Visuddhimagga* and the *Dhammapada* present an ethical argument that appeals to the ability to empathise with others, putting oneself in their place. According to Kristin Scheible (2009, 122), this requires determining how one wants or would want to be treated, and then projecting the quality of one's own self-interest onto others.

Similarly, in war, the notion of reciprocity 'reflects the fact that most agents will agree to be bound by a norm on the basis that they thereby obtain a benefit' (Provost 2012, 18). Likewise, IHL provides combatants with a combatant's privilege, a right to legally kill other combatants on the grounds that these combatants would have an equal right to target them.⁶ While IHL itself does not expressly expand on this idea in the following manner, as just war scholar Michael Walzer puts it: 'You can't kill unless you are prepared to die' (Walzer 2004, 101). This speaks to an ethos that undergirds the interactional nature of warfare. Likewise, Bryan Peeler argues that reciprocal behaviour by parties to a conflict, when repeated over time, can create a possibility for mutual restraint in warfare (Peeler 2019, 23). Without such a norm, there is a risk of losing restraint imposed through law in times of conflict, leading to warfare that is excessive (Greenspan 1959, 319). The understanding that to cause harm to an adversary, a combatant has to assume a similar risk of harm to himself, prevents unbridled violence from taking place (Robinson 1999, 682). In other words, my argument is that while a reciprocity of risk in combat is not a rule that is expressly featured in IHL, it is in fact a rationale underlying how restraint in war is maintained. The corollary of this equation is that where the adversary does not pose a threat, the legitimacy of targeting one's opponent founded on reciprocal threat would also fail. The manner in which this practice of reciprocity leads to restraint is best demonstrated in how surrender operates on the battlefield.

Limiting the risk to life of combatants through surrender

Obligations are reciprocal if they depend on 'the existence of connected obligations on others' (Provost 2002, 121). Surrender, therefore, is a practice that depends on a shared understanding of how one party will be treated by the other in the case of a combatant ceasing to fight. Surrendering communicates a limit to the risk that a combatant is willing to take in battle: If you will not surrender or be taken prisoner, and torture or kill those who surrender to you, your enemies will not allow you to be taken or to surrender' (Keely 2012, 10).

A look at Buddhist *Jātaka* tales further demonstrates this need to grant mercy to those who refuse to fight in battle through acts of surrender. In the *Seyyamaṃsa Jātaka* (no. 282), the Bodhisattva, being born as the King of Benares, overcomes his enemy by meditating on compassion. When a foreign army

invades his kingdom, the soldiers in his city go to the king to inform him about the arrival of the King of Kosala, thereby requesting to fight him. The King of Benares commands them not to fight, and then gives the order for the palace gates to be opened. The King of Kosala, confident, captures and imprisons the King and Queen. While in prison, the King of Benares, who is in this case the Bodhisattva, meditates on compassion, the power of which causes the King of Kosala to feel his body burn unbearably. This is due to the fact that he captured the kingdom of a king who practises meditation based on compassion. The King of Kosala releases both the King of Benares and the other prisoners. The Bodhisattva, surrounded by his ministers, tells them that by the power of the thoughts of compassion and loving kindness he was able to save his life as well as theirs (Obeyesekere 2016, 249–250).

Through the acts of the Bodhisattva King of Benares, Buddhist lore accepts surrender as a legitimate option to take in war. The *Seyyamsa Jātaka* demonstrates the need for violence in war to be reciprocal, and therefore when one party refuses to engage in combat, violence must cease. Not only does the *Jātaka* approve of the practice of surrender, it demands that such practice be respected by the victor. Likewise, the obligation to not harm the surrendering party is prompted by the King of Kosala feeling burning sensations in his body. This is an indication that if a party to a conflict were not to grant mercy to those who surrender, it would bear adverse repercussions. While the *Jātaka* presents the repercussions as an immediate adverse physical reaction, at a more universally practical level, an adverse repercussion might, for example, result in the party not being shown respect in the future. Therefore, the refusal to grant mercy to those who surrender would make the foundations of reciprocal restraint crumble. Another facet of the story speaks of how the Bodhisattva King was conscious of the need to limit harm to his own soldiers. The king states that by avoiding going into battle and by meditating on compassion, he was able to save the lives of his officials, including those of his soldiers. This is a recognition that the Bodhisattva valued the lives of his own troops and realised that surrendering would limit the risk they would have to take if they were to engage in battle. This demonstrates that the notion of limited warfare is contingent not only on how a party treats its opponents but also on how a military decides to treat the lives of its own troops.

In its development, IHL created obligations on the party receiving a surrender to accept it. Article 41 of Additional Protocol I to the Geneva Conventions speaks of safeguarding an enemy who has been rendered *hors de combat*. The obligation on the adverse party is to cease fire immediately upon being communicated a clear intention of surrender. Accordingly, surrender as per Additional Protocol I to the Geneva Conventions is unconditional. It is prohibited to refuse an offer of surrender and ‘no argument of military necessity may be invoked’ to do so (Pilloud et al. 1987, 488). In IHL, a belligerent can no longer choose whether or not to accept a surrender by a warring party based on how its own combatants’

offers of surrender were received by the adversary. In other words, belligerents are obliged to accept surrender whether this practice is reciprocated by the adversary or not. Even while IHL attempts to make the practice of surrender less reciprocal, however, reciprocity still continues to play a role in how surrender takes place in battle. Hersch Lauterpacht (1953) claims that 'it is impossible to visualise the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from rules of warfare without being bound by them'. In this case he views benefits and obligations as deriving from the conduct of the adversary. The next section of the article notes that, in the case of surrender, a party to the conflict may deny the acceptance of surrender due to combatants of such party themselves being prevented from being able to surrender through the internal rules of their own military. That is, for meaningful reciprocity and restraint to be practised in war, it is important to look into how and to what extent militaries demand their own soldiers to risk their lives in combat.

Importance of how a military treats its own troops to limited risk in warfare

Historically, armed groups have often determined the degree of risk their own combatants are expected to take in battle, by making it difficult for combatants to practise surrender. For example, 'in Aztec combat in which soldiers fought in units and sought to maintain cohesion, it was difficult for an individual to separate himself physically in order to surrender to the enemy' (Hassig 2012, 116–117). Any Roman who surrendered chose disgrace for himself and his family (de Libero 2012, 33). Accordingly, a soldier was expected to sacrifice his life rather than surrender (Kortüm 2012, 43). Today's legislation governing military discipline does not contain stringent prohibitions against surrender. However, remnants of historical practice that frowns upon surrender remain. This is seen in the fact that current laws in some countries try to ensure that surrender is only used as a last resort. Command and leadership play a significant role in establishing whether soldiers can engage in surrender or not. Therefore, internal military rules on when one is able to give up fighting are directly applicable to commanders.⁷ Surrender is only permitted if exercised in situations where successful defence is not possible. Such laws indicate to commanders that a decision to surrender can only be exercised as a last resort and cannot be made lightly, even when one's forces are at great risk.

Furthermore, certain provisions in national legislation make it an offence to engage in acts that could be indicative of surrender. For example, the Army Act 1949 of Sri Lanka (as amended) makes it an offence for any military person to send a flag of truce to the enemy. The law does not expressly refer to the intent of the combatant who uses a white flag or the circumstances in which the flag is

used. Law in Ireland penalises combatants who treacherously or without due authority send a flag of truce to the enemy.⁸ This provision, however, envisages a situation where a white flag can be used to surrender when this is done as per due authority. During international armed conflicts, the main right those who are surrendering can claim is to be treated as prisoners of war (Pilloud et al. 1987, 488).⁹ Certain legislation limits the capacity of a military's own soldiers to stop fighting through rules that prohibit being captured by the enemy.¹⁰ With the effect of such provisions, individual soldiers are barred from taking measures warranted under IHL for them to exercise a legal surrender. Therefore, while IHL may dictate that once an intention to surrender is expressed the adversary is obligated to respect it, the aforementioned provisions penalise a combatant for making an offer of surrender in the first place.

Such prohibitions against surrendering or being taken prisoner shatter the equation of reciprocity as it relates to the practice of surrender, which is based on a risk of death which is limited. To a combatant who has been ordered to fight to the death or who has no or limited option of surrender, what incentives are there to empathise with someone who would want to give up fighting in order to preserve his or her own life? The restraint embedded in the idea of reciprocal risk in combat rests on both parties understanding that, at the point a combatant ceases to be a threat, there will no longer be a risk of being targeted by him or her. However, where there is certainty of death, a combatant cannot envisage a point at which the other side ceases to be a threat. Accordingly, the manner in which the internal structures and ethos of militaries and armed groups minimise or magnify the risk to their own troops must be of concern to IHL.

The notion of reciprocity of risk must be assessed in the context of how different cultures decide to draw the limits to risk in battle. According to Walzer (2006, 23) restraints that are observed in war are determined by each society. Each cultural context tends to determine 'who can fight, what tactics are acceptable, when battle has to be broken off, and what prerogatives go with victory into the idea of war itself'. Walzer (2006, 24–25) argues that while war tends to be limited, how it is limited and the extent of its limits are specific to each time and place. It is pertinent, therefore, to examine how the cultural context created through Buddhist narratives approaches the issue of how a military should treat its own troops.

Buddhism speaks strongly of the manner in which one's own troops are to be treated. For example, a '*cakkavartin*' or universal monarch¹¹ is meant to keep his armed forces in good health and condition. The Buddhist approach to such treatment would not be limited to a mere utilitarian need to ensure the good health of one's forces but would also demonstrate compassion and give dignity to all. The Buddha, according to the *Jātakas*, urged warrior nobles to see value in the lives of their soldiers, by encouraging them to recognise how much was lost if they were sacrificed. For example, in the *Culla Kālīṅga*

Jātaka (no. 301) minister Nandisena takes a thousand of the king's personal guards up a cliff. He then asks them whether they are prepared to risk their lives by jumping off the cliff in order to save their king's life. To this the warriors unhesitatingly answer yes (Obeyesekere 2016, 305). The minister, however, states 'What use is there in falling off this cliff? Go ahead and fight without retreating and help our king' (Obeyesekere 2016, 306). While the story discourages retreating from battle, it also indicates that Buddhism does not approve of the kind of extreme altruism that requires disregard for the value of one's own life.¹² This *Jātaka* mirrors IHL principles where the duty of utmost exertion cannot be interpreted as extending to an obligation to recklessly fight to death. In modern legislation, the term 'utmost exertion' speaks to the degree of risk a soldier is supposed to take prior to being legitimately capable of giving up fighting. The National Defence Act of Canada at section 74 makes it an offence for any military person, when ordered to carry out an operation of war, to fail to use his utmost exertion to carry out the orders. These legal provisions should be interpreted in a manner consistent with IHL. To this end, the utmost exertion clause must be read in light of, and so as not to contravene, the rule on surrender and foundational notions of restraint in IHL.

In the *Supatta Jātaka* (no. 292), the virtue of a king as well as the virtue of the soldier is measured by the willingness of the soldier to sacrifice his life in the name of the king (Obeyesekere 2016, 280–281). In this story, the Bodhisattva was born as a crow known by the name Supatta, the king of 80,000 other crows. The Bodhisattva's chief queen developed a pregnancy craving for royal human food. His general, Sumukha, planned to fly down and topple the lids when the cook in the royal kitchen came out carrying the food for the human king. Four of the other crows would then swoop down and scoop out some rice. He knew he would get caught. But he asked the other crows not to tell the King and Queen that he was caught (Obeyesekere 2016, 280). It is important to note that the general, Sumukha, did not want his king to find out that he was sacrificing his life in order to get his queen royal food. He states that if they were to find out, they would refuse to eat the food. This shows that the king did not take pleasure in soldiers sacrificing their lives for him and would not give an order to that effect.

Similarly, I argue that IHL should be updated to the effect that military leaders are prevented from leading their own forces to needlessly give up their lives. Such a development would not be wholly alien to the existing provisions and developing trends in IHL. Common Article 1 to the Geneva Conventions enshrines the duty to ensure respect for IHL, which applies first and foremost to the High Contracting Parties themselves, including their armed forces and other persons and groups acting on their behalf (International Committee of the Red Cross 2016, 118). Moreover, in the case of *The Prosecutor v. Bosco Ntaganda* (2014), the International Criminal Court's Pre-Trial Chamber

addressed allegations that Ntaganda committed the war crimes of rape and sexual slavery – involving children forcibly recruited into his armed group, the Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo (UPC/FPLC). The court determined that these war crimes would extend to the acts of armed groups in relation to their own troops.¹³ While in this case, such protection applied in the context of child soldiers, the ICRC Updated Commentary to Common Article 3 to the Geneva Conventions (International Committee of the Red Cross 2016, 547–549) argues that ‘all parties to the conflict should, as a minimum, grant humane treatment to their own armed forces based on Common Article 3’. Furthermore, Article 40 of Additional Protocol I to the Geneva Conventions prohibits taking or threatening the adversary to take no survivors. Making this a separate article from Article 41 (which requires belligerents to accept surrenders) was one way of underlining the fundamental importance of the idea that ‘combatants who went on defending themselves to the limit of their strength and finally surrendered and laid down their arms, should not be exterminated’ (Pilloud et al. 1987, 476). Article 40 speaks to those who are in the power of the enemy, anyone who is rendered *hors de combat*, or is surrendering. When reading the rule prohibiting no quarter in conjunction with the principle of surrender, I propose that for these provisions to be meaningful in practice, it must be implicit in IHL that the risks that combatants undertake in warfare are limited not only through the acts of the adversary but also through the internal military culture to which they belong.

Conclusion

While the image of warfare painted by IHL accepts a risk to combatants as an occupational hazard of engaging in hostilities, it does not expect a combatant to necessarily die in battle simply as a precondition of war. However, in the military context, sometimes norms of obedience are so strong that they can create a presumption of obedience to authority even when the actions ordered would otherwise be perceived as immoral or illegal (Osiel 2001, 55).¹⁴ Historical experiences of mass atrocities have enlightened international law to the fact that there needs to be a balance between the need to maintain discipline on the field and deterring soldiers from engaging in war crimes (Ziv 2014, 20; Posner and Sykes 2007, 129). Today, the duty to disobey a manifestly unlawful order is a rule of customary international law that is intrinsic to combatants respecting the principles of IHL, regardless of their superior orders. Likewise, customary law as set out in ICRC Customary IHL study’s Rule 154 tends to suggest that acts which, if committed, would amount to war crimes would necessarily have to be disobeyed. This rule still leaves it unclear whether due obedience pertaining to anything but the most egregious offences such as war crimes would be a violation of the duty to disobey manifestly unlawful orders

(Osiel 2001). Therefore, combatants have to decide which orders are manifestly unlawful, in which case they would have a duty to disobey such orders under general international law. If an order is 'lawful', on the other hand, they have a duty to obey such an order under domestic legislation governing military discipline. While it is debatable whether an order that requires a combatant to fight to the death or expose themselves to extreme risk is manifestly unlawful, as argued in this article, such an order can render the principle of surrender in IHL redundant. However, some scholars argue that, given that combatants are liable to be killed in any case, while 'any rule that limits the intensity and duration of combat or the suffering of soldiers is to be welcomed', the violation of such a norm would not result in universal disapprobation (Walzer 2006, 42). Therefore, it would seem that an order to fight to the death is not one that is so manifestly unlawful that a combatant has a duty to disobey it. This highlights a need for IHL to take steps to ensure clarity through express rules on how armed forces treat their own combatants, in particular with regard to the use of orders to fight to the death or laws prohibiting surrender.

However, where IHL rules may not provide clarity, other cultural influences, such as religious narratives, can come into play and discourage combatants from engaging in practices that challenge restraint in warfare. This appeal to something other than merely the 'law' to preserve humanity in war can be seen in the adoption of the Martens Clause. The Martens Clause has formed a part of the laws of armed conflict since its first appearance in the preamble to the 1899 Hague Convention (II) with respect to the laws and customs of war on land, and appeals to 'public conscience' as a safety net where principles of international law provide no cover. The notion of public conscience is not a monolith, and a combatant's choice to act is influenced by how good or bad is understood by the public to which he or she is most related. This is particularly the case where the law's requirements are not obvious (such as where the illegality of a superior's order is not fully manifest). Therefore, religious narratives can help combatants 'exercise practical judgment in the circumstances where bright-line rules do not provide clear guidance' (Walzer 2006, 37).

As this article has highlighted, Buddhism responds to such existential and ethical questions that may preoccupy the soldier. It emphasises that there is a duty of care on the part of those in command to conduct hostilities in a manner that preserves the lives of their own troops where at all possible. Accordingly, in the *Jātaka* stories, the justness and virtue of a king is measured by his reluctance to sacrifice the lives of his soldiers. The article has argued that recent developments in IHL point in the direction of generating a norm that binds parties to a conflict to look into treating their own forces with humanity and dignity. However, given that the choice exercised by individual combatants is limited, normative frameworks in war need to be strengthened so that militaries cannot prevent combatants from exercising their choice to surrender, thereby leading such combatants to unduly risk their lives. Buddhism lends

cultural credibility to the efforts of the international lawyer who cares for the humanity of the combatant. This confluence between Buddhism and IHL is particularly important as narratives that influence those who engage in war can hardly be compartmentalised into separate boxes. They intermingle and create webs of meaning. IHL and Buddhism are two such narratives based on which soldiers and the forces to which they belong can generate their own meaning regarding how soldiers are to be treated in war. Therefore, a commingling of IHL and Buddhism would result in better treatment by the armed forces of their own soldiers.

Notes

1. McMahan (2009, 36) acknowledges the argument that 'war is fundamentally different morally, from other forms of conflict and all other types of activity'.
2. The first of the Five Precepts of Buddhism is to abstain from killing and there are no exceptions to this principle for times of war. However, this idea is debated by Buddhist and international humanitarian law scholars. More elaborate discussions on this debate can be found in other articles of this volume.
3. In referring to this work in the remainder of this article, proper names have been changed to the Pali version.
4. This shift away from the principle of reciprocity in IHL can be seen in rules regulating reprisals in attack. 'Customary IHL – Rule 145. Reprisals'. https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule145.
5. International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31 at Art 1; International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, 12 August 1949, 75 UNTS 85 at Art 1; International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, 12 August 1949, 75 UNTS 85 at Art 1; International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287 at Art. 1.
6. Combatant privilege does not expressly apply in the context of non-international armed conflicts. Scholars debate the impact of this asymmetry in the recognition of combatants on the reciprocal foundations of IHL.
7. Surrender is only permitted if exercised in situations where successful defence is not possible. Such laws indicate to commanders that a decision to surrender can only be exercised as a last resort and cannot be made lightly, even when one's forces are at great risk: National Defence Act, 1985 of Canada last amended in 2019, at 73; Defence Act No. 18 of 1954 of Ireland, at 124(b); The Gambia Armed Forces Act, 1985 of Gambia, at 37(c); Military Penal Code, No. 13 of 1940 of Iraq, at 55; Armed Forces Act, 1968 of Kenya, at 15(d).
8. Defence Act of Ireland, note 9 at 125 (b) and (c). Also see The Army Act, 1950 of India at 34(f).

9. During non-international armed conflicts, detainees are not entitled to prisoner of war status, but according to Common Article 3 to the 1949 Geneva Conventions, they must be treated humanely.
10. Armed Forces Act, 1970 of Malta at 41(1); Armed Forces Act of Malaysia, note 16 at 43(1); Armed Forces Act, 1972 of Singapore; Defence Force Act of Botswana, note 22 at 31(1); Armed Forces Act, 1968 of Kenya at 21(1).
11. A universal monarch is considered an ideal universal king, who reigns ethically and compassionately over the entire world.
12. See also the 'story of the present' from the *Kuṇāla Jātaka* (no. 536, Jat V.412–414), where the Buddha confronted the Sākiyans and Koliyas who were about to attack each other over rights to the water of a shared river at a time of drought. He did so by asking them whether they should sacrifice something of great value – the lives of the warrior-nobles – for something of lesser value – water.
13. ICC, Ntaganda Decision on the Confirmation of Charges, 2014: 76–82, https://www.icc-cpi.int/CourtRecords/CR2014_04750.PDF
14. *US v. von Leeb*, 11 Nuremberg Military Tribunals 511 (1948) (the High Command Trial): 'within certain limitations, [a soldier] has the right to assume that the orders of his superiors . . . are in conformity to international law'.

Acknowledgements

For their helpful input on earlier drafts, I thank Professor René Provost, Dr Noel Trew, Dr Elizabeth Harris, Professor Kate Crosby and Andrew Bartles-Smith.

Disclosure statement

This article has been supported by the International Committee of the Red Cross (ICRC).

Notes on contributor

Vishakha Wijenayake is a doctoral candidate at McGill University, Faculty of Law, specialising in international humanitarian law. At McGill, she is also an O'Brien Fellow attached to the Center for Human Rights and Pluralism and a recipient of a grant by Fonds de recherche du Québec. She holds a master's degree in law from the University of Michigan Ann Arbor, where she was a Fulbright Scholar and a Hugo Grotius Fellow. She holds a bachelor's degree in law from the Faculty of Law, University of Colombo. Previously, she worked as a consultant and legal advisor at the International Committee of the Red Cross and as a lecturer at the Department of Law, University of Jaffna. Her publications include peer-reviewed articles in journals such as the *International Review of the Red Cross*. She has also contributed to research for the ICRC updated commentaries to the Four Geneva Conventions and the Customary IHL study of the ICRC. Her research interests include international humanitarian law, international human rights law, gender studies and legal pluralism.

This article comprises work that forms part of the author's DCL thesis at McGill University's Faculty of Law.

References

- Appleton, N. 2010. *Jātaka Stories in Theravāda Buddhism: Narrating the Bodhisatta Path*. Farnham: Ashgate.
- Carter, J. R., and M. Palihawadana. 1987. *The Dhammapada*. New York: Oxford University Press.
- Cover, R. 1983. "Nomos and Narrative." *Harvard Law Review* 97 (1): 4–68.
- de Libero, L. 2012. "Surrender in Ancient Rome." In *How Fighting Ends: A History of Surrender*, edited by H. Afflerbach and H. Strachan, 8–14. Oxford: Oxford University Press.
- Dörmann, K., and J. Serralvo. 2014. "Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations." *International Review of the Red Cross* 96 (895/896): 707–736. doi:10.1017/S181638311400037X.
- Durkheim, E. 1951. *Suicide: A Study in Sociology*. 2nd ed. London: Routledge.
- Evangelidi, E. 2018. "Restraint in Bello: Some Thoughts on Reciprocity and Humanity." In *International Humanitarian Law and Justice: Historical and Sociological Perspectives*, edited by M. Deland, M. Klamberg, and P. Wrangé, 100–113. Oxfordshire: Routledge.
- Greenspan, M. 1959. *The Modern Law of Land Warfare*. Berkeley: University of California Press.
- Hallisey, C. 2009. "The Golden Rule in Buddhism [II]." In *The Golden Rule: The Ethics of Reciprocity in World Religions*, edited by J. Neusner and B. D. Chilton, 129–145. London: Bloomsbury.
- Hassig, R. 2012. "How Fighting Ended in the Aztec Empire and Its Surrender to the Europeans." In *How Fighting Ends: A History of Surrender*, edited by H. Afflerbach and H. Strachan, 113–123. Oxford: Oxford University Press.
- Huntington, S. P. 1957. *The Soldier and the State: The Theory and Politics of Civil–Military Relations*. Cambridge: Harvard University Press.
- International Committee of the Red Cross. 2016. *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*. Cambridge: Cambridge University Press.
- Ireland, J., trans. 1997. *The Udāna: Inspired Utterances of the Buddha*. Kandy: Buddhist Publication Society.
- Kahn, P. W. 2013. "Imagining Warfare." *European Journal of International Law* 24 (1): 199–226. doi:10.1093/ejil/chs086.
- Keely, L. H. 2012. "Surrender and Prisoners in Prehistoric and Tribal Societies." In *How Fighting Ends: A History of Surrender*, edited by H. Afflerbach and H. Strachan, 7–13. Oxford: Oxford University Press.
- Kortüm, H. 2012. "Surrender in Medieval Times." In *How Fighting Ends: A History of Surrender*, edited by H. Afflerbach and H. Strachan, 41–54. Oxford: Oxford University Press.
- Lauterpacht, H. 1953. "The Limits of the Operation of the Law of War." *British Year Book of International Law* 30: 206–243.
- McMahan, J. 2009. *Killing in War*. Oxford: Clarendon.
- Mégret, F. 2013. "The Humanitarian Problem with Drones." *Utah Law Review* 5: 1283–1319.
- Norman, K. R. 1997. *The Word of the Doctrine Dhammapada*. London: Pali Text Society.
- Obeyesekere, R. 2016. *The Revered Book of Five Hundred and Fifty Jataka Stories: Volume II. Translated from the 14th Century Sinhala Version*. Colombo: Gunasena.

- Osiel, M. J. 2001. *Obeying Orders: Atrocity, Military Discipline and the Law of War*. Somerset: Routledge.
- Peeler, P. 2019. *The Persistence of Reciprocity in International Humanitarian Law*. Cambridge: Cambridge University Press.
- Pilloud, C., Y. Sandoz, C. Swinarski, and B. Zimmermann. 1987. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Geneva: International Committee of the Red Cross.
- Posner, E., and A. Sykes. 2007. "An Economic Analysis of State and Individual Responsibility under International Law." *American Law and Economics Review* 9 (1): 72–134. doi:10.1093/aler/ahm001.
- Provost, R. 2002. *International Human Rights and Humanitarian Law*. Cambridge: Cambridge University Press.
- Provost, R. 2012. "Asymmetrical Reciprocity and Compliance with the Laws of War." In *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law*, edited by B. Perrin, 17–42. Vancouver: UBC Press.
- Robinson, P. 1999. "'Ready to Kill but Not to Die': NATO Strategy in Kosovo." *International Journal: Canada's Journal of Global Policy Analysis* 54 (4): 671–682.
- Scheible, K. 2009. "The Formulation and Significance of the Golden Rule in Buddhism [I]." In *The Golden Rule: The Ethics of Reciprocity in World Religions*, edited by J. Neusner and B. D. Chilton, 116–128. London: Bloomsbury.
- Schober, J. 1997. *Sacred Biography in the Buddhist Traditions of South and Southeast Asia*. Honolulu: University of Hawaii Press.
- Walzer, M. 2004. *Arguing About War*. New Haven: Yale University Press.
- Walzer, M. 2006. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. 4th ed. New York: Basic Books.
- Ziv, B. 2014. "The Superior Orders Defense: A Principal-Agent Analysis." *Georgia Journal of International and Comparative Law* 41: 1–74.