Leiden Journal of International Law (2014), 27, pp. 331–352
 doi:10.1017/S0922156514000065

Rules, Lawyering, and the Politics of Legality: Critical Sociology and International Law's Rule

NIKOLAS M. RAJKOVIC*

Abstract

After decades of rule-of-law promotion in world affairs, international law and legality have regained scholarly imperative. Yet this has not dissolved disciplinarity between international law (IL) and relations (IR), but furthered a priori theorizing and the unilateral extension of disciplinary research agendas. A prime example is the influential 'legalization agenda' of IR scholarship, where an institutionalist doctrine has renarrated the 'L word' through a fetishizing of rules and a managerial focus on rule compliance. However, this approach confronts a problem of relevance as international struggles increasingly involve contests over how to legally characterize issues, actions, and events, and this engages juridical and normative dimensions of rule application which are beyond the managerialism of compliance. This article argues for greater sociological and critical engagement with the way in which the concept of law operates through juridico-political practices of legality, and the aim is to provide a theoretical and empirical discussion that revives the significance of the juridico-political world for scholarships which have habitually underplayed the constitutive significance of lawyering for rule application. To do so, this article, first, addresses the profundity of Kant's work and concern over law's application by a rule-applier and, second, claims this has long invited a more critical sociology. To initiate that social exploration, the paper draws on both Pierre Bourdieu's concept of the 'juridical effect' and the Foucauldian notion of 'normative law' to theorize the significance of juridical and normative practices in the making of international law's rule. In the final section, I introduce the empirical benefit of these critical sociologies by turning to the law of armed conflict (LOAC), and the ways juridical and normative power have enabled sophisticated militaries of the developed world to constrain the application of the LOAC in contemporary wars of asymmetric combat.

Key words

juridical; Kant; legality; practice; warfare

1. Introduction

What is the relationship between international law and politics? The response to this perennial question has been filtered by two institutionally separate communities of

* Lecturer in International Law, University of Kent Law School [n.rajkovic@kent.ac.uk]. Research for this article was supported by a Jean Monnet Fellowship from the Global Governance Programme of the Robert Schuman Centre for Advanced Studies, European University Institute. Earlier drafts were presented at the 'Law as Practice' panel of the European Society of International Law Annual Convention held in Amsterdam and the Institute for Global Law and Policy Workshop held at Harvard Law School. I am indebted to the helpful feedback of Tanja Aalberts, Hilary Charlesworth, Cyra Choudhury, Thomas Gammeltoft-Hansen, Stefano Guzzini, David Kennedy, Friedrich Kratochwil, Anna Leander, Miguel Poiares Maduro, Frederic Megret, Nicholas Onuf, Surabhi Ranganathan, Akbar Rasulov, Christian Reus-Smit, Alvaro Santos, Bas Schotel, Ole Jacob Sending, Ingo Venzke, and the two anonymous reviewers.

scholarship dealing with the international world: international law (IL) and international relations (IR). Each of these disciplines has represented the international in terms of *sui generis* questions which have promoted distinct representations of what the legal versus political world look like.[1] What has stood behind these communal divisions, however, is more than just different disciplinary conferences or journals. Rather, the divide has roots in an epistemic tradition which has theorized rule through a presumed opposition between law and politics.[2] This zero-sum binary has, to a large extent, influenced knowledge production on the international world, and its pivotal enactment came into view when, breaking with international law, E. H. Carr[3] and Hans Morgenthau[4] constituted an IR discipline centred on the ultimate reality of international power.

Yet, the passage of time has seen a disruption of this disciplinary and scholarly ordering. After recent decades of rule-of-law promotion in world governance, it seems that international law and legality have regained scholarly imperative; with the need to legally harm, profit, or pollute influencing how international actors now perform and contest political moves.[5] This move to law, however, has not meant the end of disciplinarity between international law and politics.[6] Instead, while IL and IR scholars now largely acknowledge the association between law and politics in global affairs, the institutional separation of these scholarly communities has nonetheless fed a mode of a priori theorizing on law and politics concerned with the unilateral extension of disciplinary research agendas.[7] As such, many IL scholars have made semantic forays into notions of politics and power; while, at the other end, some IR counterparts have recast legal norms into variables for behavioural testing. A pattern of interdisciplinarity has ensued, producing either convenient methodological alliances à la 'dual research'[8] or proclamations of incompatibility between what political scientists and lawyers do à la 'counter-disciplinarity'.[9]

What makes these developments remarkable is less the interdisciplinary food fights and more what fuels this controversy over knowledge production on the international world. The resurgence of law within IR research, and the parallel interest of IL in politics, reveal an epistemic shift in how international power is

1 F. Kratochwil, 'International Law and International Sociology', (2010) 4 *International Political Sociology* 311.
2 See D. Kennedy, *The Rise and Fall of Classical Legal Thought* (2006); M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989).
3 E. H. Carr, *The Twenty Years' Crisis, 1919–1939: An Introduction to the Study of International Relations* (1939).
4 H. J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (1948).
5 M. Koskenniemi, 'The Politics of International Law – 20 Years Later', (2009) 20 *European Journal of International Law* 7; D. Kennedy, 'Three Globalizations of Law and Legal Thought', in D. Kennedy (ed.) *The New Law and Economic Development* (2006); D. Kennedy, 'The Mystery of Global Governance', in J. L. Dunoff and J. P. Trachtman (eds.) *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009); R. D. Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (2011); R. Kleinfeld and K. Nicolaidis, 'Can a Post-Colonial Power Export the Rule of Law?', in G. Palombella and N. Walker *Relocating the Rule of Law* (2009).
6 O. Kessler, 'So Close Yet So Far Away? International Law in International Political Sociology', (2010) 4 *International Political Sociology* 303.
7 J. Klabbers, 'Counter-Disciplinarity', (2010) 4 *International Political Sociology* 308.
8 A.-M. Slaughter, 'International law in a World of Liberal States', (1995) 6 EJIL 503; A.-M. Slaughter, A. S. Tulumello, and S. Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship', (1998) 92 AJIL 367, at 370.
9 M. Koskenniemi, 'Law, Teleology, and International Relations: An Essay in Counterdisciplinarity', (2012) 26 *International Relations* 3.

studied today relative to IR's disciplinary inauguration and storied break from IL. There has been an informal collapse of the law/politics binary which has led to informal – and sometimes formal – agreement between IR and IL that law can substantially influence processes and outcomes of power politics, and the same can apply vice versa. The problem, however, is that a disciplinary mindset still reigns promoting a priori engagement with law and politics through essentialized definitions, e.g. what power is or what law is; which subsequently bracket out canonical perspectives and cleavages integral to understanding the scope and depth of both fields.[10]

Thus, the reassociation of law with the study of international politics places significance on the way in which we conceptualize law and, crucially, laws' relationship to power. This becomes a key point, I argue, when one distinguishes between semantics and ontology to question whether the proliferation of legalistic terminology within IR's scholarly syllabus actually tells us something grounded about the meaning of law in-use.[11] Put differently, what is at stake here is the appreciation that uses of legalistic forms are not in and of themselves a resolution of the crucial and contentious issue of law's substance and, ultimately, its application in practice. Rather, it is the beginning of what this article will elaborate on as the juridical and normative politics of legality.

This issue has been largely neglected by the legalization agenda which has profoundly influenced IR's re-engagement with international law since the launch of the year 2000 special issue of International Organization.[12] Legalization scholars have been successful in convincing IR scholarship of law's importance through the use of what in conceptual terms has been a Trojan horse: the notion of institutions. IR scholars were asked to readmit law into the church of power politics, not for the purpose of a genuine rethink of the politics/law schism, but because legalization, as a discursive technique, offered a way to flatten law into a managerial and consequential property via a behaviouralist vernacular.[13] To refer to Anne-Marie Slaughter, a pivotal contributor to legalization theory, the so-called 'L word'[14] could then be renarrated and fetishized as 'formal and informal bundles of rules, roles and relationships',[15] and scholars could validate that characterization by looking out of their tinted glass to appreciate the institutional skyline of world affairs:

> IR and IL scholars seem increasingly to see the same world outside their office windows. One of the things they see is a proliferation of formal institutions for international cooperation. Governments conduct a large and growing proportion of their foreign affairs … through a wide variety of formal agreements and organizations. In response, IR theorists are much more interested in the form of international institutions, or

10 W. Werner, 'The Use of Law in International Political Sociology', (2010) 4 *International Political Sociology* 304; J. Klabbers, 'The Bridge Crack'd: A Critical Look at Interdisciplinary Relations', (2009) 23 *International Relations* 119.

11 See I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (2012).

12 J. Goldstein et al., 'Introduction: Legalization and World Politics', (2000) 54 *International Organization* 1; K. W. Abbott et al., 'The Concept of Legalization', (2000) 54 *International Organization* 17.

13 M. Koskenniemi, 'Miserable Comforters: International Relations as New Natural Law', (2009) 15 *European Journal of International Relations* 395, at 405–11.

14 Slaughter et al., 'International Law and International Relations Theory', *supra* note 8, at 367.

15 Ibid., at 371.

https://doi.org/10.1017/S0922156514000065 Published online by Cambridge University Press

> rather, the difference that form makes. Further, much institutional cooperation has taken an increasingly "legalized", "judicialized" or constitutional form.[16]

This turn to form thus enabled an institutional narrative which steered away from the fuzziness of internal questions over law's conceptualization and meaning. Yet, it left the legalization agenda having underexplored the concept of law beyond a quite general Kantian idea that law's purpose and effect involved promoting rule-oriented conduct. Indeed, that ontological shortcut resonated with those in the IR academy who identified the 'L word' with the symbolism of omnipotent courts and the presumed effectiveness of transposing that kind of institutional governance at the global level.[17]

However, the growth of international courts and tribunals, as well as the expansion of issue-specific legal regimes, has produced a curious effect. The global legal order is indeed legalizing and 'judicializing',[18] but with the intensity of becoming fragmented between competing conceptions of rule-orientation and hence law.[19] Returning to Slaughter's earlier metaphor: IR and IL scholars now look out of 'their office windows' and see not one but many institutional skylines each competing to advance their own takes and stakes on the meaning(s) of legality in the global political economy. Thus, the attempt to renarrate the 'L word' by fetishizing the omnipotence of rules has run into a problem of relevance. International actors increasingly understand that the appearance of legality has become a powerful linguistic and juridical artefact, and the frontline of international politics is now engaged in contestation over how to legally characterize issues, actions, and events.[20] However, the institutionalist framework has limits when engaging those contests, because the juridical and normative politics of international law has been reduced to the managerialism of rule compliance.

What emerges, therefore, is a need for greater sociological and critical engagement on how the concept of law operates through juridico-political practices, and the aim of this article is to provoke precisely that more social take on the concept of law for both IR and IL scholars. To do so, I question whether the a priori mindset and court-centric focus of most interdisciplinary debates have distracted theorizing from a more social approach that examines the various ways politics and law come together through juridico-political practices of legality. In other words, a way of moving past the disciplinized dichotomy of law versus rule compliance is to ask: where are practices of legality in our theories of international law and politics? How could it be possible to theorize – no less debate – the role of law or legal rules in world affairs without scrutinizing legal practices that are entwined with and constitute

16 Ibid., at 370.
17 R. O. Keohane, 'Twenty Years of Institutional Liberalism', (2012) 26 *International Relations* 125.
18 See G. Guillaume, 'The Future of International Judicial Institutions', (1995) 44 ICLQ 848; A.-M. Slaughter, 'A Global Community of Courts', (2003) 44 *Harvard International Law Journal* 191; R. Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench', (2006) 55 ICLQ 791.
19 See Koskenniemi, *supra* note 9, at 21; N. M. Rajkovic, 'On Fragments and Geometry: The International Legal Order as Metaphor and How its Matters', (2013) 6 *Erasmus Law Review* 6; M. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (2012); G. Teubner, *Constitutional Fragments* (2012).
20 See Koskenniemi, *supra* note 5, at 7–19.

the practical meaning of law's rule? What is more, how is it possible to understand law's application without engaging the strategic world and practices of lawyering?

I claim that the law/politics binary can be collapsed further when scholars engage less in reifying ideal types and focus instead on how legal and policy practitioners work with or around rules on behalf of specific actors and/or agendas (i.e. clients) in particular contexts. However, in order to grasp the empirical significance of what practices of legality mean for the concept of law, the juridico-political world must be revived ontologically and theoretically for scholarships that have habitually underplayed the constitutive significance of lawyering for law's application. A number of cross-disciplinary sources have pushed the profundity of legal practices and lawyering to the margins of theoretical significance, ranging from the bureaucratic rationality of Weberian sociology, the reification of legal rules by Legal Classicism, to the American constitutional ideal that law's rule entails the 'rule of no one'.[21] Yet, it is Kant's work, and its subsequent alignment with the aspiration for a global rule of law, which is often presumed to provide foundation for a view of law which is rule fetishizing and consequently diminishing of the constitutive role of practices in legal application.

This article proposes to redress that theoretical deficiency in the following steps. First, I emphasize the need to consider more profoundly Kant's conceptualization of law, and, in particular, how Kant himself, through concern over law's application by a ruler-applier, contemplated the indeterminacy of rules, and how law was ultimately dependent upon human judgment. This Kantian dilemma has long invited a more critical sociology, and to initiate that engagement I draw on Pierre Bourdieu's concept of the juridical effect and the Foucauldian notion of normative law to theorize the significance of juridical and normative practices in the making of international law's rule. In this way, Bourdieu and Foucault are not discussed for the purpose of formulating a homogenous theory, but rather to highlight alternative avenues that critical social theorizing provides us for re-examining the concept of law via the social constitution of legality. To introduce the empirical benefit of this critical social approach for our construal of rules and rule-oriented conduct, I later turn to the example of the law of armed conflict (LOAC) and the ways juridical and normative power have enabled potent militaries of the developed world to increasingly constrain the application of the LOAC in contemporary wars often characterized by asymmetric combat.

2. Kantian indeterminacy through the lenses of juridical and normative power

Should there be a Kantian ambition behind the emphasis of IR institutionalists on the rule of 'rules',[22] a closer look seems appropriate into Kant's actual reflection on

21 N. M. Rajkovic, '"Global Law" and Governmentality: Reconceptualizing the "Rule of Law" as Rule "Through" Law', (2012) 18 *European Journal of International Relations* 29.

22 A. Hurrell, 'Kant and the Kantian Paradigm in International Relations', (1990) 16 *Review of International Studies* 183; J. G. Ikenberry and A.-M. Slaughter (eds.), *Forging a World of Liberty under Law: US National Security in the 21st Century, Final Report of the Princeton Project on National Security* (2006).

https://doi.org/10.1017/S0922156514000065 Published online by Cambridge University Press

the application and determinacy of law. Such a revisit is timely, owing to how a spectrum of scholars has asserted that the rise of post-national legal regimes marks a departure from the backward politics of national sovereignty.[23] This professed shift has a notable Kantian texture and quaintness in terms of how such global governance is presented as fulfilling the emancipating potential of rule-directed conduct. In other words, since regimes (e.g. human rights, environmental, or trade) are predicated on legal forms and facilitate variants of rule-oriented behaviour, we have extended the suggestion that growing legalization of world affairs brings us progressively closer to a Kantian Kingdom of Ends.

Yet, one might and should spot a problem with this preposition on how mere rule-following and uses of legal idiom lead to a purported Kantian scheme of 'Perpetual Peace'. The issue touches upon a cleavage which informs common complaints about the difference between a legal versus a justice system, and stands at the root of every lawyer joke we encounter: the distinction between formal legal trappings versus upholding the normative substance of law.[24] This timeworn controversy occupied Kant's considerations with measureable consternation. Established opinion suggests that Kant cleared a way through this problem via faith in law's enlightened rationality and its correct deduction. However, in this part, we turn back to Kant's concern over law's human application, and I attempt to expand his critique on the *auctoritatis interpositio* by broadening our apprehension of the juridico-political world through Bourdieu's theorizing of the juridical field and Foucauldian attention to the socialized logic of legal judgment. I argue that each of these critical insights expands upon Kant's problem of legal indeterminacy in different social ways, and that they inject respectively, for both IR and IL scholars, the significance of juridical and normative power into the production of legal norms of conduct and policy.

2.1. Kant and his enigmatic rule-applier

One of the greatest challenges when referring to Kant is the theoretical and ideological encompassment of his work. Kantian ideas have been used to service a missionary impulse that asserts law's international rule to be an inherent teleology which fulfills a transition from power politics to international law.[25] Kant is inserted and cast within a discursive strategy to reify and naturalize the extension of law's universal jurisdiction, as an autonomous and necessary end in itself.[26] Kant is not alone, however, as he is joined by other eminent figures represented as exemplars of this timeless and universal idea. For instance, the genealogical effort extends back to

23 R. G. Teitel, *Humanity's Law* (2011); J. Rawls, 'The Law of the Peoples', in S. Freeman (ed.), *John Rawls: Collected Papers* (1999); J. Habermas, *The Divided West* (2006); P. Capps, 'The Kantian Project in Modern International Legal Theory', (2001) 12 EJIL 1003.

24 See Koskenniemi, *supra* note 13, at 411–16.

25 R. Collins, 'Constitutionalism as Liberal-Juridical Consciousness: Echoes from International Law's Past', (2009) 22 *LJIL* 253; O. Korhonen, 'Liberalism and International Law: A Centre Projecting a Periphery', (1996) 65 *Nordic Journal of International Law* 481.

26 D. Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', (1997) 17 *Quinnipac Law Review* 101; M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law* (2002), at 11–97.

ancient times where Aristotle is similarly aligned to this said eternal conversation on law's enduring and inevitable progression.[27]

Yet, the interesting part, which appears reflected in both the specific cases of Kant (modern) and Aristotle (ancient), is the selectivity and essentialism of how alleged theoretical 'ancestors'[28] are recalled to forge a transhistorical narrative on law's eventual and desirable rule. In the case of Aristotle, the omission involves the lifting of choice phrases, as most are familiar with the statement, 'it is preferable that law should rule rather than any single one of the citizens',[29] while fewer are acquainted with Aristotle's subsequent admonition that the rule of (good) law was dependent upon the rule of (good) men.[30] Kant endures a similar treatment, but, I argue, the relevant omission is perhaps more sizeable because it negates Kant's specific questioning of law's self-evident application, which has broader implication for any rule-of-law project for which he could be credited.

The crux of what is at issue with Kant relates, in fact, to a problem many lawyers are familiar with in their vocational existence: how should an authoritative text be read? Singularly? Or, in relation to other pertinent texts? In this case, how Kant is read goes beyond a narrow vocational remit and applies more broadly to the extent to which Kant is properly situated within a canon that alleges the indisputable trajectory of the rule of law. The interpretive problem is compounded by how Kant's works are popularly read, and thus conditioned via ahistorical essentialism, such that Kant's name is conflated with a transcendental discourse on the autonomous progression of law as the basis for a cosmopolitan future.[31] This effect results from years of scholarly and cultural emphasis[32] placed upon Kant's essays 'Perpetual Peace'[33] and 'The Idea for University History with a Cosmopolitan Purpose'[34] along with supporting passages in the *Critique of the Power of Judgment*[35] and the *Metaphysics of Morals*[36], making these texts the naturalized centre of Kant's writings and inscribing him into a cosmopolitan project that embraces a rational, legal, and institutional future[37] impermeable to the regressive past of politics and national interest.

However, should Kant's discussion on law's character be limited to popularized texts and passages? The matter becomes pertinent to the fundamental problem Kant himself identified over the character of law in his earlier *Critique of Pure Reason*.[38] In

27 F. Kratochwil, 'Has the Rule of Law Become a Rule of Lawyers?'. in G. Palombello and N. Walker (eds.), *Relocating the Rule of Law* (2009), 171.
28 D. Vigneswaran and J. Quirk, 'Past Masters and Modern Inventions: Intellectual History as Critical Theory', (2010) 24 *International Relations* 115, at 118.
29 Aristotle, *Politics* (1972), at 1287a.
30 J. Frank, 'Aristotle on Constitutionalism and the Rule of Law', (2007) 8 *Theoretical Inquiries in Law* 38.
31 See M. Wight, 'An Anatomy of International Thought', (1987) 13 *Review of International Studies* 224; H. Bull, 'Society and Anarchy in International Relations', in H. Butterfield and M. Wight (eds.), *Diplomatic Investigations: Essays in the Theory of International Politics* (1966).
32 E. Keene, 'Human Nature, Civilization, and Culture', in E. Keene, *International Political Thought* (2005), at 135.
33 I. Kant, 'Perpetual Peace: A Philosophical Sketch', in P. Kleingold (ed.), *Toward Perpetual Peace and other Writings on Politics, Peace, and History* (2006), at 67–109.
34 I. Kant, 'The Idea of Universal History with a Cosmopolitan Purpose', in Kleingold, *supra* note 33, at 3–16.
35 I. Kant, *Critique of the Power of Judgment* (2000), at 302–3.
36 I. Kant, 'Metaphysics of Morals' in M. J. Gregor (ed.) *Kant: Practical Philosophy* (1997).
37 R. A. Miller and R. M. Bratspies, 'Progress in International Law: An Explanation of the Project', in R. A. Miller and R. M. Bratspies (eds.) *Progress in International Law* (2008), 21–2.
38 I. Kant, 'Of the Transcendental Faculty of Judgement in General', in I. Kant, *Kant's Critiques* (2008).

https://doi.org/10.1017/S0922156514000065 Published online by Cambridge University Press

the *Critique*, Kant asserted that, since rules could not supply criteria for their auto application, law cannot be applied independent of judgment, and thus rules were reliant upon their human user:

> A physician therefore, a judge or a statesman, may have in his head many admirable pathological, juridical or political rules, in a degree that may enable him to be a profound teacher in his particular science, and yet in the application of these rules he may very possibly blunder – either because he is wanting in natural judgment (though not in understanding), and whilst he can comprehend the general *in abstracto*, cannot distinguish whether a particular case *in concreto* ought to rank under the former; or because his faculty of judgment has not been sufficiently exercised by examples and real practice.[39]

Koskenniemi has subsequently engaged this Kantian dilemma with the use of Carl Schmitt's[40] term of *auctoritatis interpositio*,[41] the condition of law's dependence on an intervening authority; which raises the question of how we should construe and weigh Kant's problem of authoritative interpretation? Kant suggests answers through his further works: he asserted the need for a transcendental morality (lawfulness)[42] and the fulfillment of republican federation.[43] The former is expressed in *The Metaphysics of Morals*, where Kant emphasized the state of lawfulness as a moral obligation which provided 'conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom'.[44] While the latter goal, federation, which Kant grappled with extensively through his different writings, represented the extension of lawful morality into international behaviour via an objective and inherent duty understood and acted upon by the republican statesman. In this way, one could argue, Kant addressed his doubt over law's practical application through these normative aspirations.

Yet, I argue, the depth of Kant's doubt expressed in the *Critique* provokes consideration as to whether Kant could have fully addressed the dilemma over law's human application without probing further into the social; on how rules are applied not by an abstract *auctoritatis interpositio* but by real persons that are socially constituted and politically driven. Kant, for instance, referred to the 'judge' and the 'statesman' to illustrate the dilemma of law's application. However, in the *Critique*, he did not pursue those identities more fully into the social and political world which they inhabited. Rather, Kant reduced the issue of law's application to the box of individual judgment and knowing the 'code'.[45] It seems intrinsic to Kant's inquiry that the *auctoritatis interpositio* had to be situated in and animated by social and political agency, to arrive at a fuller understanding of law's human application; but Kant, while touching upon the social, did not elaborate in depth.

---

39 I. Kant, ibid., at 95.
40 C. Schmitt, *Politische Theologie: Vier Capital zur Lehre von der Souveranitat* (1979), at 41.
41 M. Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization', (2007) 8 *Theoretical Inquiries in Law* 9.
42 I. Kant, *Critique of the Power of Judgment* (2000), at 302–3.
43 I. Kant, 'Perpetual Peace: A Philosophical Sketch', in Kleingold, *supra* note 33, at 67–109
44 I. Kant, 'Metaphysics of Morals', in M. J. Gregor (ed.) *Kant: Practical Philosophy* (1997), at 24.
45 See Koskenniemi, *supra* note 41, at 11.

https://doi.org/10.1017/S0922156514000065 Published online by Cambridge University Press

A key reason, I claim, Kant was limited in his pursuit of social agency relates to the nascent institutional development of law generally during his time. Indeed, it is contested philosophical ground to suggest that historical insight becomes pertinent in our reading of Kant and law; since the analytic tradition claims philosophy to express a timeless *logos* which permeates beyond context.[46] However, I find motive to probe – albeit carefully – due to the difference between the aspiring institution Kant seized upon during the late Enlightenment versus the complex juridico-political practices we now encounter in the (post)modern context. Simply put, there is a lot to be discerned and reflected upon in the 200-plus years since Kant's reflection on rule application, most importantly of which is increasingly legalized and hybridized social fields constituted by professional jurists and juridico-political regimes.

2.2. Bourdieu: the rule-applier as juridical professional

This is where, I argue, Pierre Bourdieu gives us a theoretical entry to expand upon Kant's problem of rule application. Bourdieu sought to socialize the *auctoritatis interpositio* by exploring the juridical world where Kant's enigmatic rule-applier is, in fact, the professional jurist. Bourdieu came to focus upon the jurist in his study of law as a 'juridical field'; which was a continuation of his work on different social 'fields', inclusive of the academic, intellectual, religious, and scientific.[47] For Bourdieu, a 'field' was an area of structured activity[48] which exerted an unconscious, 'magnetic-like', force upon all those who engaged in a disciplinarily defined practice.[49] In his essay, 'The Force of Law: Toward a Sociology of the Juridical Field', Bourdieu set out the juridical field as 'organized around a body of internal protocols and assumptions, characteristic behaviours and self-sustaining values',[50] which formed the cultural politics of the legal profession.

The interface between Kant's *auctoritatis interpositio* and Bourdieu's juridical field is visible in the latter's emphasis that legal professionals are central to understanding law's explicit function. In particular, Bourdieu asserts, lawyers, judges, and legal scholars struggle in a distinct linguistic, symbolic, and hermeneutic world to impose authorized interpretations of rules, both within and beyond the legal field:

> The juridical field is the site of competition for monopoly of the right to determine the law. Within this field there occurs a confrontation among actors possessing a technical competence which is inevitably social and which consists essentially in the socially recognized capacity to interpret a corpus of texts sanctifying a correct or legitimized vision of the social world.[51]

Within the scheme of Bourdieu's juridical field, analysis is directed at the techniques and practices employed by jurists to claim the mantle of Kant's *auctoritatis*

46 H. Putnam, *The Many Faces of Realism* (1987), at 227–8.
47 P. Bourdieu, 'The Field of Cultural Production, or the Economic World Reversed', (1983) 12 *Poetics* 311.
48 P. Bourdieu and L. Wacquant, *An Invitation to Reflexive Sociology* (1992), at 97; D. Swartz, *Culture and Power: The Sociology of Pierre Bourdieu* (1997), at 117.
49 R. Terdiman. 'Translator's Introduction: The Force of Law; Toward a Sociology of the Juridical Field', (1987) 38 *Hastings Law Journal* 805, at 806.
50 P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field', (1987) 38 *Hastings Law Journal* 805, 806.
51 Ibid., at 817

https://doi.org/10.1017/S0922156514000065 Published online by Cambridge University Press

interpositio; with the noted distinction that Bourdieu theorized authoritative interpretation as something more than individual decision-making, because the outcome of rule-application involved interaction between juridical language and the professional division of juridical labour. The former, encompassed linguistic procedures intended to frame the interpreter as the universal subject (e.g. impartial and neutral) possessed with the capacity to ascertain and normalize the 'factual'.[52] While the latter, a division of labour, signified that law's practical meaning was shaped by confrontation between different categories of jurists (e.g. judges, lawyers, and scholars), each moved by divergent interests informed by professional hierarchy and the social position of respective clients.[53]

From this Bourdieuian perspective, Kant's dilemma over rule application reveals a more complex and social dynamic. The rule-applier is no longer set in contemplative isolation, merely wrestling with his or her judgement to correctly apply the stated rule. Rather, the rule-applier is embedded within a social context where he or she is answerable to the client and the application of law involves 'highly rationalized struggles' between jurists, each competing to construct an 'official representation of the social world'.[54] In this context, as Bourdieu explains, what the rule means moves beyond enlightened essentialism, and is defined by social and power relations that animate operative interpretations. Further, what constitutes the correct application of the rule becomes less clear as the juridical world must reconcile both the social motives of legal professionals and the objectives of unequal parties that seek juridical remedy through law.[55]

In this way, Bourdieu highlights, rule-oriented conducted is hyphenated by a 'juridical effect'; and the meanings of rules are outcomes of social and professional struggles which see force in the juridical construction of applicable meaning. Such struggles are moved not in the absence of power relations but, rather, by distinct social and professional inequalities where jurists possess both 'unequal technical skills' and unequal access to juridical resources that can exploit 'possible rules'.[56] This latter notion of possible rules, Bourdieu asserts, has profound implications for our understanding of rules and their practical performance. First, it underlines how written rules evolve through ongoing representational strategies e.g. formalization, codification, and ratification, where the symbolic autonomy of law is used to normalize and even naturalize desired social arrangements.[57] Second, there is the crucial aspect of professional hermeneutics, where, owing to the elasticity in interpreting legal texts, legal professionals become possessed with techniques of reading the law. As Bourdieu notes:

> To varying degrees, jurists and judges have at their disposal the power to exploit the polysemy or the ambiguity of legal formulas by appealing to such rhetorical devices as *restrictio* (narrowing), a procedure necessary to avoid applying a law which,

52 Ibid., at 819–20.
53 Ibid., at 821–2.
54 Ibid., 805, at 847–9.
55 Ibid., at 850.
56 Ibid., at 827.
57 Ibid., at 839–41.

https://doi.org/10.1017/S0922156514000065 Published online by Cambridge University Press

> literally understood, ought to be applied; *extensio* (broadening), a procedure which allows application of a law which, taken literally, ought not to be applied; and a whole series of techniques like analogy and the distinction of letter and spirit, which tend to maximize the law's elasticity, and even its contradictions, ambiguities, and lacunae.[58]

Thus, should we speak of law's preferable rule, Bourdieu's perspective asks whether Kant's problem of rule application has assumed juridical proportions beyond its initial formulation; where the enigmatic rule-applier is consumed by a modern profession which must interpret 'the rules' as it navigates the rigours of juridical competition and the existential imperatives of answering to the client. From this perspective, the *auctoritatis interpositio* can be viewed neither as an object or an enlightened subject, rather as a juridical player constituted by power relations which work between the juridical and broader social world; where it is difficult to speak of a correct or faithful application of 'the rule' when the exercise of juridical construction is influenced by social agency. In this manner, rule application cannot be understood as the solitary act to apply the pure rule; as modern professionalization and juridical encompassment have now tied rule application more closely to juridical appearances. Perversely, Kant's initial concern about rule application heightens the political significance of the lawyer's expertise with the vernacular of legality, and a corresponding capacity to transform moral hazard into legal opportunity.

2.3. Foucault: The rule-applier and the legal 'norm'

Yet the significance of legal appearances invites a potentially broader panorama on Kant's problem of rule application, stretching beyond Bourdieu's juridical effect into epistemic theorizing on legality as not simply a game of lawyers but, crucially, as integrated within a deeper linguistic enterprise to discipline human thought, judgment and, ultimately, conduct.[59] As such, while Bourdieu's attention to the juridical economy touches this normative dimension of legality, his focus on juridical practices in 'The Force of Law' limits the extent of engagement with a wider epistemic disciplining of social, and even juridical, norms of judgment and conduct. In other words, should a thin distinction exist between these juridical versus normative dimensions of rule application, it resides in how the latter notion sees a more diffuse encoding and extension of power through epistemic processes that normalize, or objectify, specific norms of thought and, crucially, an asymmetric ordering of subjects and categories of legal relations.[60]

This is where Michel Foucault enters the fray on Kant's dilemma with his focus on discursive and, specifically, normative 'regimes of truth'. Bourdieu's juridification of the concept of law brings the significance of lawyers into needed theoretical view, but the Foucauldian lens gives a broader perspective of how lawyering is connected to knowledge production and, specifically, productive processes which ultimately direct all formal and informal modes of social ordering.[61] Translated

58 Ibid., at 827.
59 B. Golder and P. Fitzpatrick, *Foucault's Law* (2009), at 35–7.
60 Ibid., at 36.
61 V. Tadros, 'Between Governance and Discipline: The Law and Michel Foucault', (1998) 18 *Oxford J. Legal Stud.* 75, at 78.

https://doi.org/10.1017/S0922156514000065 Published online by Cambridge University Press

into the problem of rule application, Foucauldian thought reminds us that the construction and determination of legality is as much tied to the juridical world as it is to normative and productive processes that constitute what is deemed to be both 'known' and, correspondingly, 'normal' by a given group at a given time.[62] We turn briefly to this Foucauldian perception of knowledge, and then translate that into an appreciation of how lawyering, as a social and strategic practice, is integrated within wider processes of normative and epistemic ordering.

For Foucault, knowledge did not reflect an accessible external reality, but was something wholly intra-linguistic.[63] In other words, knowledge claims were not understood to depict how things are but instead constructed by historical developments and discursive practices taken to be current.[64] This did not mean that Foucault denied the existence of an external world, rather his inquiry was directed at histories of discourses and the content of linguistic practices which set out the epistemic boundaries of what was deemed to be 'true' and constituted knowledge.[65] Power relations played a decisive role within this framework via the determination of currency in discourse, e.g. what may and may not be stated or what was held to be current and correct language.[66] Further, power helped form 'regimes of truth', where society established discourses, e.g. expert or scientific, which were held to foster 'true' statements; and engaging in such discourses enabled one to 'speak the truth' by virtue of making the right linguistic move.[67]

Initially, Foucault's treatment of law was construed as outside this knowledge/power nexus, owing to particular passages in his *History of Sexuality*[68] where law is characterized in a crude juridical form: 'the institution of law as the expression of a sovereign power'.[69] However, interpretive work begun by Francois Ewald, Foucault's colleague and one-time assistant at the Collège de France, has endeavoured to reveal that Foucault's writings also manifest another normative and epistemic conceptualization of law; where the jurist becomes understood as both the object and asset of disciplining practices owing to the law's formal and informal expression of 'the norm' and hence social normality. As Ewald explains:

> Foucault's ideas have a dual consequence for the philosophy of law. They encourage us to distinguish law and its formal expression from the juridical. The juridical served as a "code" that enabled monarchical power to constitute itself, formalize its structure. ... However, such a code is not the only possible form the law can take ... We can and must imagine a history of law that would give meaning and function to the law's varying modes of formal expression. Foucault also compels us to reconsider what we mean by norm, which he places among the arts of judgment. Undoubtedly the norm is related to power, but it is characterized less by the use of force or violence than

62 F. Ewald, 'Norms, Discipline, and the Law', (1990) 30 *Representations* 138, at 139–41.
63 M. Foucault, *The Order of Things* (1973), at 43.
64 M. Foucault, 'Nietzsche, Genealogy, and History', in P. Rabinow (ed.) *The Foucault Reader* (1971), at 78–83.
65 C. G. Prado, *Searle and Foucault on Truth* (2006), at 81.
66 M. Foucault, *Power/Knowledge: Selected Interviews and Other Writings*, (ed.) C. Gordon (1980), at 125–31.
67 See Prado, *supra* note 65, at 86.
68 M. Foucault, *The Will to Knowledge: The History of Sexuality, Vol. 1* (1979), at 87.
69 See Ewald, *supra* note 62, at 138.

https://doi.org/10.1017/S0922156514000065 Published online by Cambridge University Press

> by an implicit logic that allows power to reflect upon its own strategies and clearly define its objects. [. . .] The norm relates the disciplinary institutions of production – knowledge, wealth, and finance – to one another in such a way that they become truly interdisciplinary; it provides a common language for these various disciplines and makes it possible to translate from one disciplinary idiom into another.[70]

This alternative picture frames a distinction between a formal and codified system of coercive rule and the 'legal' as being tied to normative practices concerned with the production and subtle disciplining of how we represent and consequently think about social life. It situates the lawyer directly in Foucault's claim that modernity marks the arrival of the normative age; where the importance of the norm is tied to social processes of normalization which are then channelled into a socialized logic of legal judgment: 'Judging in terms . . . of the value of an action or a practice in its relationship to social normality, in terms of the customs and habits which at a certain moment are those of a given group'.[71]

This Foucauldian emphasis on the significance of the norm, and the way it objectifies a particular mode of thought and, consequently, legal judgment, provides insight into how Kant's rule-applier, whether juridical professional or not, is an agent that operates within normative and epistemic practices which constitute accepted knowledge and, consequently, discipline social thought and judgment. As a result, the *auctoritatis interpositio* departs from the romance of enlightened 'judgement' to encounter a world where law's application becomes expressed through social performances of the norm; and the concept of law is valued for its epistemic value to extend normalizations of the world. With this Foucauldian optic, therefore, the problem of rule application is resituated within a broader framework of normalization, which leads to a shift in analytical perspective where the rule-applier or juridical professional works within processes that discipline perceived 'normality' and thus influence the social logic of legal judgment. In this way, our understanding of juridical agency expands its scope to incorporate how the work of lawyering is connected to larger practices concerned with the epistemic ordering of social meaning. To refer in summary to the words of James Boyle, it is to appreciate how law's capacity to seemingly engender 'the way things are' is often less about the law's internal attributes and more the linguistic consolidation of particular social meanings through which legality is extended:

> [O]ne would have to ignore the central insight that "social constructs", such as law, do not have some pre-existing shape prior to human intervention. The idea of finding the essence or the real sources of law distracts us from the reality that, in a very important sense, it is being created by our categories and definitions rather than being described by them.[72]

70 Ibid., at 138–41.
71 F. Ewald, 'A Concept of Social Law', in G. Teubner (ed.) *Dilemmas of Law in the Welfare State* (1988), at 68.
72 J. Boyle, 'Ideals and Things: International Legal Scholarship and the Prison-House of Language', (1985) 26 *Harvard International Law Journal* 327, at 331–2.

https://doi.org/10.1017/S0922156514000065 Published online by Cambridge University Press

3. Legality of warfare through the lenses of juridical and normative power

Thus far our discussion has been overtly theoretical by engaging the concept of law with critical social theory, and some could even argue it has been unorthodox in approach vis-à-vis the conversation I have attempted between Kant, Bourdieu, and Foucault on the question of rule application and its legal possibilities. Yet, it is precisely the critical sociologies of Bourdieu and Foucault which, I argue, become valuable for exploring the concept of law beyond a fetishized understanding of rules and rule-oriented conduct. Bourdieu's focus on the juridical effect and the attention of Foucauldian thought to the epistemic sources of legal judgment push theorizing and research on the concept of law past the legal classicism of late nineteenth century sociology; where law is posited as an ordering rationality which is both internally coherent and institutionally effective in practice. Bourdieu and Foucault apply different lenses of critical social insight that become helpful to socialize the application of rules and provoke greater scrutiny into the politics of legal judgment and, consequently, legality.

This is where a shift now becomes useful from the theoretical to the empirical, so as to better animate the social ways in which power permeates into the juncture of Kant's consternation. The intention here is to revisit the appearance of rule-oriented conduct by employing a critical narrative which seeks to empirically underscore the juridical and normative dynamics that our discussions of Bourdieu and Foucault set forth in merely theoretical and ontological terms. To do so, we will revisit the institutional rise of the LOAC and, subsequently, discuss three contemporary concepts that have profound epistemic and juridical implications for the current (re)constitution of warfare: asymmetric combat, lawfare, and shadow warfare. The aim is to critically engage the perception of the LOAC as an institution which constrains warfare by bringing into view how – in recent times – the most advanced militaries of the developed world are turning the table on that relationship by engaging in practices and performances which juridically and epistemically constrain the possibilities of applying the LOAC. This strategic engagement with the LOAC, I argue, provides opportunity to illuminate juridical and normative dimensions that become salient as these potent militaries attempt to (legally) manoeuvre through or around the norms of liability which govern the formal rules on sanctified human destruction.

Perhaps the best way to begin such an examination is with reference to what seems an odd noun relative to the grand narrative of the LOAC: exculpation. The term lives a curious banishment, far removed from the assumed constraining impulse of international law, to the distant *techne* and specializations of domestic criminal and tort law. Even more foreign is the term when one appreciates that the constitutive narrative of the LOAC is tied to the stated purpose of advancing rules of accountability and responsibility in international conduct. This premise has its origin in a legal classicism which defined the era from which the LOAC emerged, where law was understood to be a structural constraint on power, its practice

involved a refereeing of politics, and jurists were schooled to police that imagined dichotomy.[73]

This is why the notion of exculpation is raised to disrupt that classical and foundational narrative; to cast law not as the antonym of power but rather as related to juridical and normative practices with the potential to as much encode as constrain the exercise of power. The anti-power image commonly attributed to law, I argue, has worked to obscure how law does rule in its own right, but rather through people, and specifically legal discourses and meanings, that characterize whether someone or something is legally just. As David Kennedy has explained, the current proliferation of legal discourses across a number of political fields has empowered not merely lawyers but, crucially, a legal vocabulary and syntax which then influence the expression of norms that direct judgment and policy:

> [International lawyers] speak the same language as those who plan and fight wars ... our legal and professional terminology has seeped into popular parlance – collateral damage, rules of engagement, humanitarian intervention, self-defense, collective security – has become the vocabulary of governance. ... [B]illions once allocated to dams and roadways [are now spent] on court reform, judicial training and "rule of law" injection.[74]

Yet, it would be misleading to suggest that this more hybrid relationship with power is contemporary rather than historical in character. Notably, the corpus of the LOAC has traditionally and even habitually escaped scrutiny owing to the progressive and humane identity fused with its name. The grand narrative of the LOAC as constraint and protector is rooted in its celebrated origin, and specifically the storied tale of Henri Dunant's encounter with the wounded and dying at Solferino in 1859. The shock of that experience is said to have led Dunant to lobby[75] for the 1864 Geneva Convention as 'the first attempt to bind states to distinguish between lawful and unlawful conduct in war'.[76]

This reverent turning point becomes a legal genesis of international proportions, where the late nineteenth and early twentieth centuries are then cast into a teleological progression of international legal institutions attempting to perpetuate 'rule and reason' upon warfare. What ensues is a historic parade of coded rules and regulations which are sequential, accumulating, and exude the ambition of Kantian-like progress: i.e. the Hague Conferences of 1899 and 1907, the League of Nations and the Permanent Court of Justice in 1919, the United Nations in 1945, the 1948 Universal Declaration of Human Rights and, finally, the 1948 Genocide Convention. This formal legislating of the LOAC is further complemented by an informal project which infuses a series of tropes that affirm the enlightened and emancipatory credentials of what is deemed to be a looming transformation, such

73 D. Kennedy and W. W. Fisher III, 'Introduction', in D. Kennedy and W. W. Fisher III (eds.), *The Canon of American Legal Thought* (2006), at 8–9; See Kennedy, *supra* note 5, at 27.

74 D. Kennedy, 'Reassessing International Humanitarianism", in A. Orford (ed.), *International Law and its Others* (2006), at 132.

75 F. Megret, 'From Savages to Unlawful Combatants: A Postcolonial Look at International Humanitarian Law's Other', in Orford, ibid., 273.

76 R. Belloni, 'The Trouble with Humanitarianism', (2007) 33 *Review of International Studies* 451, at 452.

https://doi.org/10.1017/S0922156514000065 Published online by Cambridge University Press

as: 'placing humane limits on war'; being derived from a 'feeling for humanity'; and having a dedication to 'protect the individual'.[77] Put together, this grand narrative tied the LOAC, as well as international law, to the enlightenment project and its *topos* of emancipation, enabling it to be normalized as a body of norms and lawful rules directed at the mitigation of suffering and the rescue of 'life from the savagery of battle and passion'.[78]

A more critical eye on the making of the LOAC cautions on the incomplete epistemic and juridical picture which that iconic narrative displays. In particular, what is omitted from view is how the symbolic benevolence and 'civility' of international legal rules, and by implication the LOAC, have been a historical asset for the transcultural disciplining of non-European worlds into the homogenizing unity of an imperial international.[79] In other words, a further epistemic and juridical legacy needs telling on the making of international law as a rule-oriented framework that has extended the normative imperatives of colonial conquest and absolute rule. The Salamanca School, and notably Francisco de Vitoria, become a useful historical reference on how the epistemic relevance and bounds of early modern Christian theology became involved and manoeuvred in the forging of a juridical rationality which authorized seafaring European powers to forcibly occupy, exploit, and exterminate across the so-called new world.[80] As Antony Anghie has noted, this historical counter-narrative becomes important to underscore how European extensions of law on an international plane became implicated discursively in 'the characterization of non-European societies as backward and primitive [which] legitimized European conquest of these societies and justified measures colonial powers used to control and transform them'.[81] This imperial view has intimate significance for the LOAC as the historical record also reveals that the celebratory Hague and Geneva Conventions were made and negotiated by familiar European powers concerned with establishing norms and rules of legal warfare conducive to their military preferences[82] and, no less, the oppressive tactics of imperial administration and colonial subjugation.[83]

However, what is of specific interest for this current analysis is less the dark testimonials of that imperial legacy and more the ways in which this heritage finds extension in an acclaimed post-colonial present. The ambit of our investigation thus shifts from the orchestral politics of institutional design to the incipient but no less domineering politics of the norm, and the way juridical and epistemic practices interweave to reproduce systemic inequalities of power and welfare. Put concretely, what does the strategic engagement of the LOAC, by the most coercive

77 Y. Beigbeder, *Judging War Criminals* (1999), 1.
78 H. Lauterpacht, 'The Problem of the Revision of the Law of War', (1953) *1952 British Yearbook of International Law*, at 363–4.
79 T. Ruskola, 'Legal Orientalism', (2002) 101 *Michigan Law Review* 179, at 192–9.
80 M. Koskenniemi, 'Empire and International Law: The Real Spanish Contribution', (2011) 61 *University of Toronto Law Journal* 1, 5–13.
81 A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2005), at 3–4.
82 See C. P. Phillips, 'Air Warfare and Law: An Analysis of the Legal Discourses, Practices and Policies', (1952–53) 21 *George Washington Law Review* 311.
83 See Megret, *supra* note 75, at 286–94.

organs of informal empire, tell us about the extent to which rule application is influenced by normative and juridical power? How does the LOAC, as a body of now canonized norms and rules, become affected by embrace of the most lethal military forces in human history? Here, I claim, the sequential exploration of the notions of asymmetric combat, lawfare, and shadow warfare become useful social windows onto the juridical and normative politics of legality, and how a particular economy of justice seeks fulfillment through various appearances of formal compliance with the norm.

First, the notion of asymmetric combat challenges the most fundamental protection of the LOAC, which is considered the normative achievement of The Hague and Geneva Conventions: civilians and civilian objects shall not be the target of attacks.[84] This principle of civilian protection becomes the basis for a formal rationality which requires that 'definite military advantage' must be balanced with the sanctity of civilian life.[85] At first blush, that rule seems both intuitive and self-evident; until one appreciates that the rule-appliers in this field are – more often than not – the warring parties and likely transgressors themselves.[86] This interpretive mix becomes thickened further by two concepts that are attached to the obligation for balancing between military and civilian reality: distinction and proportionality. The former concept obligates belligerents to distinguish between military and civilian targets,[87] while the latter stipulates that belligerents must refrain from causing damage excessive to the military advantage to be gained.[88]

It is important to appreciate the significance which military practices make in the application of these protective concepts; and the need to factor in how highly organized and wealthy militaries apply vast human, juridical, and technological resources into the service of normalizing exercises of lethal force. Put another way, the probability of legal constraint interacts with the will of political economy and its resultant potential for ordering the process of rule application. As such, while the LOAC provides the ontological framework for distinguishing warfare between innocence and culpability, the practical basis of that distinction is moved by a broader web of – legal and extra-legal – juridical and normative practices engaged in the characterization of events and persons on the ground.[89] This means the LOAC is more than just a legal code, but in fact a powerful normative asset: where the symbolic immobility of legal codification obscures the role of normative practices and language in the constitution of rule-oriented conduct. In this way, while the LOAC formally constrains the destruction of innocents, it can also facilitate the appearance of innocence in the shadow of impugned destruction. The conceptual dividing line between the former and latter amounts to what is no more than a turn

84 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977*, Art. 52(1).
85 Ibid., Art. 52(2).
86 See C. Jochnik and R. Normand, 'The Legitimation of Violence: A Critical History of the Laws of War', (1994) 35 *Harvard International Law Journal* 48.
87 See *supra*, note 84, Art. 48.
88 Ibid., Art. 51.
89 See M. Halbertal, 'The Goldstone Illusion', *The New Republic*, 6 November 2009.

https://doi.org/10.1017/S0922156514000065 Published online by Cambridge University Press

of phrase: civilian suffering and death is legal when an object of attack is labelled as having a military status.[90]

This conceptual game comes into contact with a profoundly changing 'battle' space, characterized by how predominantly North Atlantic militaries have become concerned about the appearance of combat to domestic and international audiences.[91] In large measure, this sensitivity has arisen through a conjunction of social and technological factors, such as the growth of 24-hour media coverage, the proliferation of internet and smartphone technologies into daily life, and the spectre of public shaming campaigns by non-governmental human rights organizations like Human Rights Watch and Amnesty International.[92] Yet, the concern is also rooted in the markedly 'asymmetrical' nature of most contemporary wars, where overwhelming destructive capacities are directed against foes which – by intention and circumstances – lack the form of a modern army and where combat is set – by strategy or objective – among civilians.[93]

What emerges then from asymmetrical combat is a dual certainty: civilian life and property will be destroyed in dramatic scope, and this becomes accessible at the click of a mouse on YouTube.[94] Courtesy of virtual reality, the graphic local consequences of asymmetrical combat lose remoteness by having the potential to extend into a global audience of cyber-folk. In this way, a cybernetic and strategic leverage can be used to cramp the ability of the wealthiest and most advanced military forces to use their superior destructive capacities at will. Yet, as noted earlier, this potential penetration by the LOAC engages military actors which, since the 1960s, have openly embraced 'information management' as an integral and strategic principle in all aspects of war fighting.[95] In other words, militaries with the most coercive and destructive capabilities have, for decades now, not merely understood the importance of information technology (IT) systems for the ordering of combat but, crucially, that the social construal of what is allegedly happening in combat can involve a similar ordering through juridical and, ultimately, normative appearances.[96] The asymmetric 'battlefield' remains a canvass of meaning(s), where the socialized perspective of legal judgment becomes manoeuvrable through the colouring provided by juridical and normative tactics of representation.

This brings us to the recent popularity of the notion of lawfare which – broadly stated – addresses the perceived rectitude of military actions via the role lawyers play in finding the law, facts, and interpretations necessary to manoeuvre the LOAC in

90 See *supra*, note 84, Art. 52.
91 R. R. Krebs and P. T. Jackson, 'Twisting Tongues and Twisting Arms: The Power of Political Rhetoric', (2007) 13 *European Journal of International Relations* 35, at 35–6.
92 See P. Vennesson and N. M. Rajkovic, 'The Transnational Politics of Warfare Accountability: Human Rights Watch Versus the Israel Defense Forces', (2012) 26 *International Relations* 409.
93 J. G. Stein, 'The Shard in a Fragmenting Legal Order', in E. Adler (ed.) *Israel in the World* (2013).
94 See, e.g., 'Syria Chemical Weapons – Sarin Gas Attack near Damascus?' <https://www.youtube.com/watch?v=n2GPTqxf8rE&bpctr=1383147835> (Accessed 30 October 2013).
95 See A. Bousquet, 'Chaoplexic Warfare or the Future of Military Organization', (2008) 84 *International Affairs* 915.
96 See Y. Winter, 'Asymmetric Discourse and its Moral Economies: A Critique', (2011) 3 *International Theory* 488.

service of military objectives and imperatives.[97] The strategic significance of 'lawyering up' was one of the hallmark features of the 1991 Gulf War, where US commanders expanded the numbers and role of the Judge Advocate General (JAG) and advertised that intervention as 'per capita – the largest-ever wartime deployment of lawyers'.[98] This model became extended into and beyond the 1999 NATO bombing of Serbia, where 'lawyers based at the Combined Allied Operations Center in Vicenza, Italy, and at NATO headquarters in Brussels approved every single targeting decision'.[99]

Yet, the move into juridico-military warfare brought normative and epistemic mutations for the application of the LOAC, and two developments in particular emerged as the most profound. First, the social blending of lawyers with generals gave impetus to a juridico-military vocabulary, which recharacterized civilian causalities through an exculpating idiom that supplanted the linguistic and epistemic basis of the LOAC. This renormalizing process was the most notable with such initial terms as 'collateral damage' and 'incidental accompaniment'.[100] Second, as recounted by JAG reservists in the 1991 Gulf War, the military's bureaucratic expansion into lawyering took operational cues not from human rights activism, but from the client culture of corporate law which was more in tune with the hierarchy of military organization:

> Commanding officers ... come to realize that, as in the relationship of corporate counsel to CEO, the JAG's role is not to create obstacles, but to find the legal ways to achieve his client's goals – even when those goals are to blow things up and kill people.[101]

In this way, the perceived penetration of the LOAC into the bowels of military operations[102] could not overlook the likelihood that the LOAC would be mutated by hybridization of juridical and military practices, as Major General Charles J. Dunlap Jr. illustrates:

> Clausewitz's famous dictum that war is a "continuation of political intercourse, carried on with other means" relates directly to the theoretical basis of lawfare. ... Specifically, in modern democracies especially, maintaining the balance that "political intercourse" requires depends largely upon adherence to law in fact and, importantly, perception. [...] In short, by anchoring lawfare in Clausewitzean logic, military personnel – and especially commanders of the militaries of democracies – are able to recognize and internalize the importance of adherence to the rule of law as a practical and necessary element of mission accomplishment. They need not particularly embrace its philosophical, ethical, or moral foundations; they can be Machiavellian in their attitude toward law because adherence to it serves wholly pragmatic needs.[103]

---

97 See W. G. Werner, 'The Curious Career of Lawfare', (2011) 43 *Case Western Reserve Journal of International Law* 61; D. Kennedy, 'Lawfare and Warfare', in J. Crawford and M. Koskenniemi (eds.), *The Cambridge Companion to International Law* (2012), 158–84; D. Kennedy, *Of War and Law* (2006); G. Eckhardt, 'Lawyering for Uncle Sam When He Draws his Sword', (2003) 4 *Chicago Journal of International Law* 431.

98 S. Keeva, 'Lawyers in the War Room', (1991) 77 *American Bar Association Journal* 52, at 59.

99 T. Smith, 'The New Law of War: Legitimizing Hi-Tech and Infrastructural Violence', (2002) 46 *International Studies Quarterly* 355, at 368.

100 See H. M. Kinsella, 'Discourse of Difference: Civilians, Combatants, and Compliance with the Laws of War', (2005) 31 *Review of International*Studies, at 163–85.

101 See Keeva, *supra* note 98, at 59.

102 See L. A. Dickinson, 'Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance', (2010) 104 *AJIL* 1.

103 C. Dunlap, 'Lawfare: A Decisive Element in 21st Century Conflicts?', (2009) 54 *Joint Forces Quarterly* 34, at 35.

Yet, in contrast to lawfare, the notion and rise of shadow warfare speaks to newer developments in contemporary military strategy with the potential for greater implications in the continued application – and even relevance – of the LOAC in future war-fighting. Put differently, it relates to how the United States military, among a number of coercive powers in the developed world, represent the vanguard of a paradigmatic[104] shift to network[105] and 'liquefy'[106] military capacities; with the twin aim of having capacity to apply 'precision' attacks anywhere on the globe and, concurrently, evade the informative eye of a networked international society and 'enemy', i.e. Al-Qaeda.[107] What this involves concretely is the making of a juridico-military complex which specializes in remote killing and thus constrains the potential application of the LOAC through an integrated organizational, juridical, and epistemic strategy of dispersing and hybridizing personnel (e.g. human-robot)[108] and organizational identities (intelligence-military). The cloak-and-dagger essence of this new form of lethal non-warfare is buttressed both by a transnational network of clandestine military bases[109] and the expansion of juridico-military idioms devised to simultaneously name but no less obscure the specific military attributes of lethal or coercive entities involved: Black Ops, White Ops, JSOC, SOCOM, Drones, Reapers and Cyberware.[110]

Thus, shadow warfare relates to a grander normative transformation which looks to reconstitute and re-encode the way lethal or coercive attacks are performed, with the objective of cloaking their conventional military form and legal visibility[111] which then constrains the possibilities of rule application under the LOAC or even domestic law.[112] This implies that shadow warfare marks a more epistemic turn where military command does more than employ greater numbers of lawyers as juridico-military advisers, it sees strategic significance in knowledge production as the means by which to manoeuvre and lawyer the norm of recognizable warfare and hence influence the legal application of the LOAC. In this way, military strategy becomes concerned with new and more diffuse modes of non-military organization and description, which serve to renormalize lethal actions beyond the Clausewitzian paradigm into 'counter-terrorism' techniques more akin to the communitarian quaintness of policing or the benign trope of the constant gardener; as Steve Niva explains with his narrative of epistemic consequence:

104 See Bousquet, *supra* note 95, at 925–7.
105 S. A. McChrystal, 'It Takes a Network: The New Front Line of Modern Warfare", (2011) (March/April) *Foreign Policy* 1.
106 N. Denes, 'From Tanks to Wheelchairs: Unmanned Aerial Vehicles, Zionist Battlefield Experiments, and the Transparence of the Civilian", in E. Zureik, D. Lyon and Y. Abu-Laban (eds.), *Surveillance and Control in Israel/Palestine: Population, Territory and Power* (2010).
107 K. De Young and G. Jaffe, 'US "Secret War" Expands Globally as Special Operations Forces Take Larger Role', *Washington Post*, 4 June 2010.
108 See P. Singer, *Wired for War: The Robotics Revolution and Conflict in the Twenty-First Century* (2009), at 191–5.
109 N. Turse, *The Changing Face of Empire: Special Ops, Drones, Spies, Proxy Fighters, Secret Bases, and Cyberwarfare* (2012), at 21–7.
110 Ibid., at 12–19.
111 J. Scahill, *Dirty Wars: The World is a Battlefield* (2013) at 180–3.
112 See D. Sanger, *Confront and Conceal: Obama's Secret Wars and Surprising Use of American Power* (2012).

https://doi.org/10.1017/S0922156514000065 Published online by Cambridge University Press

> Although the targeted killings of Osama bin Laden in Pakistan and the US-born Al-Qaeda cleric Anwar al-Awlaki in Yemen briefly thrust this shadow war into the public spotlight, these operations are merely the visible trace of a dense matrix of highly secretive operations that occur on a daily basis across the globe. The special operations forces raid against Bin Laden undertaken by SEAL Team 6, for example, was only one of nearly two thousand similar strike missions undertaken in both Afghanistan and Pakistan in the several years prior to that raid. Such kill-or-capture strikes were becoming so casual and common in terms of frequency that one US military official commented it was like "mowing the lawn" [. . .] The sheer scale of these operations in Afghanistan, where hundreds of suspected insurgents were being killed or captured on a monthly basis, led retired Colonel John Nagl to tell PBS's *Frontline* (2011) that the capabilities of this shadow war amount to "an almost industrial-scale counterterrorism killing machine".[113]

4. Conclusion: Rules, lawyering, and rule-oriented domination

What our above discussion of the LOAC intended to do was prompt critical reflection into the ways juridical and normative power enter into the Kantian space of rule application, and transform it into a social prism of growing political complexity. To make visible how the rules which formally distinguish between innocence and culpability under the LOAC increasingly involve a legal game of expanding juridical and normative strategy. Further, the empirical case of the LOAC became useful to animate how confidence in rule-oriented conduct, and its acclaimed legality, can become symbolic currency which dulls scrutiny into the legal representation of detrimental consequences. This brings us back to our respective discussions of Bourdieu and Foucault regarding juridical and normative law, and the way lawyerly and epistemic practices become integral to the normalizing of an asymmetric order of social, political, and, correspondingly, legal relations; which raises some profound questions: To what extent are contemporary practices of legality actually empowering versus constraining the wealthiest and most organizationally capable powers on the planet? To what extent has the fetishizing of rules and rule-oriented conduct come to the service of powers with financial and organizational means to juridically and/or normatively influence international law's rule? For instance, the LOAC has been historically and conventionally understood to constrain military force, but a focus on legal practices reveals how that same set of rules can function as a code that instructs perpetrators how 'to kill in the right way'.[114]

Quickly, through these seemingly empirical questions, we find ourselves staring back into the abyss which Kant identified on the problem of rule application. Further, the theoretical insights of both Bourdieu and Foucault reveal that the nature of this dilemma has social, juridical, and epistemic depths the extent of which Kant possibly could not have imagined. As such, how should one respond to a cross-disciplinary

113 S. Niva, 'Disappearing Violence: JSOC and the Pentagon's New Cartography of Networked Warfare', (2013) 44 *Security Dialogue* 185, at 186.

114 G. Noll, 'Sacrificial Violence and Targeting in International Humanitarian Law', in O. Engdahl and P. Wrange (eds.), *Law at War: The Law as it Was and the Law as it Should Be* (2008).

https://doi.org/10.1017/S0922156514000065 Published online by Cambridge University Press

academy and broader policy world grasped by the perceived equity of law's rule? How should one engage the legalization agenda of IR scholarship, with its faith in the equitable power of rule-oriented conduct? There are two ways, I suggest, we can reconcile the confluence of rule-bound ordering and power, where either the former or latter drives our orientation.

The first option is to expand the fetishism of rules to encompass the iconology of the international lawyer, and therefore claim that rules are indispensable signs in a symbolic order which has been intended to restrain power but where lawyers cannot ultimately ensure equity and eliminate 'incidental' infractions. The alternative is a critical and more sociological perspective less comfortable with notions of altruistic intent, exceptionalism, or privileged knowledge, preferring more systematic scrutiny into an economy of legal justice which questions the epistemic and juridical means by which rule-oriented domination is normalized and extended globally. Notably, this second course of analysis requires profound reflection on the extent to which disciplinary division, i.e. between international law and politics, represents a mode of thought and knowledge production which moves us farther away – rather than closer – to understanding the hybridity of the politics of international legality. What is more, this critical approach to the study of international law's rule brings the issue of guiding teleology into view, where IL and IR scholars gain appreciation of how epistemic and disciplinary barriers are increasingly becoming a hindrance to our ability to grab complex systems of juridico-political rule which further the pathological destruction of our planet and shocking imbalances of global welfare. In sum, by pursuing a more critical sociology of international law's rule we push our analyses in the direction of what Foucault might have replied to Kant on the problem of rule application, to suggest to IL and IR scholars the depths of rule the fetishism of rules and legal misery propagates via the mantra of global governance:

> Humanity does not gradually progress from combat to combat until it arrives at universal reciprocity, where the rule of law finally replaces warfare; humanity installs each of its violences in a system of rules and thus proceeds from domination to domination.[115]

115 See Foucault, *supra* note 64, at 85.

https://doi.org/10.1017/S0922156514000065 Published online by Cambridge University Press