Sunken Vessel or Blooming Flower? Lotus, Permissions and Restrictions within International Humanitarian Law

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A. Introduction

The permissive or restrictive 'nature' of IHL is currently receiving considerable attention, in particular in debates surrounding the legal basis for detention in NIACs.[1]

Unlike the law of IAC,[2] which provides for explicit legal bases on which to deprive both POWs and civilians of their liberty,[3] treaty law governing NIAC stipulates no such basis. CA 3 and AP II regulate the treatment of persons who have been placed *hors de combat* by detention, among other reasons, and hence seem to presume that persons may at least factually be detained in NIAC.[4] The awareness that 'deprivation of liberty is an ordinary

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1 See generally Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 301; Els Debuf, *Captured in War: Lawful Internment in Armed Conflict* (Editions Pedone/Hart 2013) or Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict* (OUP 2016).

2 See especially *Hassan v The United Kingdom*, App no. 29750/09, 16 September 2014; and commentary, such as Diane Webber, 'Hassan v United Kingdom: A New Approach to Security Detention in Armed Conflict?' (*ASIL Insight*, 2015) <https://www.asil.org/insights/volume/19/issue/7/hassan-v-united-kingdom-new-approach-security-detention-armed-conflict> accessed 30 October 2017.

3 See Art. 21 GC III, Art. 42 / Art. 78 GC IV and 68 GC IV. Note that while GC III is generally considered a sufficient legal basis for interning POWs, some controversy exists as to whether GC IV, on its own, suffices for the internment of civilians or whether an additional domestic legal basis must provide for it. The ICRC maintains that no distinction between GC III and GC IV should be made in this regard and that GC IV constitutes a sufficient legal basis without additional domestic law, see ICRC, 'Internment in Armed Conflict: Basic Rules and Challenges' (Opinion Paper, November 2014) 5 <https://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges> accessed 30 October 2017 (hereafter ICRC, 'Internment in Armed Conflict').

4 See CA 3, Art. 2 (1) AP II, Art. 4 AP II, Art. 5 AP II and Art. 6 AP II.

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and expected occurrence in armed conflict',[5] both international and non-international, is shared by many in the meantime.[6] However, it only assists in the quest for a legal basis for detention if its 'ordinariness' constitutes 'a general practice accepted as law'[7] to form an international customary legal rule. The ICRC has indeed concluded that both customary and treaty IHL contain an inherent power to detain in NIAC.[8] With respect to customary international law, it bases its position on the fact that 'internment is a form of deprivation of liberty which is a common occurrence in armed conflict'.[9]

This position has been challenged, most recently in the *Serdar Mohammed* case before British courts.[10] The case, which has been frequently commented on,[11] addresses the detention of an assumed Taliban

5 32nd International Conference of the Red Cross and Red Crescent, Resolution 1 'Strengthening International Humanitarian Law Protecting Persons Deprived of their Liberty' (December 2015) preamble, para 1.

6 See also The Copenhagen Process on the Handling of Detainees in International Military Operations (The Process): Principles and Guidelines (19 October 2012) preamble, para III, which formulates that '[participants] recognised that detention is a necessary, lawful and legitimate means of achieving the objectives of international military operations' while explaining that the Guidelines themselves cannot constitute a legal basis for such detention, Principle 16 and Chairman's Commentary 16.2.

7 Art. 38 (1) (b) ICJ-Statute.

8 Jean-Marie Henckaerts et al, 'Article 3: Conflicts not of an International Character' in ICRC (ed), *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* (2nd edn, CUP 2016) para 671.

9 ICRC, 'Internment in Armed Conflict' (n 3) 7. Rule 99 of the ICRC's Customary International Humanitarian Law Study merely states that 'arbitrary deprivation of liberty is prohibited' without positioning itself on the existence of any 'non-arbitrary' grounds of detention under IHL, see Jean-Marie Henckaerts and Luise Doswald-Beck, *Customary International Humanitarian Law*, vol. I: Rules (CUP 2005) (hereafter Henckaerts and Doswald-Beck, *Customary IHL*).

10 *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB); [2014] CN 1019 (hereafter *Serdar Mohammed v Ministry of Defence* [2014]); *Serdar Mohammed v Ministry of Defence* [2015] EWCA Civ 843; [2015] WLR (D) 354 [30] (hereafter *Serdar Mohammed v Ministry of Defence* [2015]), and *Serdar Mohammed v Ministry of Defence* [2017] UKSC 2 (hereafter *Serdar Mohammed v Ministry of Defence* [2017]).

11 See for each decision eg Marko Milanovic, 'High Court Rules that the UK Lacks IHL Detention Authority in Afghanistan' (*EJIL: Talk!*, 3 May 2014) <http://www.ejiltalk.org/high-court-rules-that-the-uk-lacks-ihl-detention-authority-in-afghanistan> accessed 30 October 2017; Sean Aughey and Aurel Sari, 'The Authority to Detain in NIACs Revisted: Serdar Mohammed in the Court of

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leader by British armed forces in Afghanistan in 2010 and raises various issues, such as the scope of application of the ECHR, its relationship with IHL, and, most relevantly, the power to detain under IHL, UN SC resolutions and domestic law.[12] The courts have denied the existence of a power to detain under customary IHL for lack of uniformity of State practice and evidence of *opinio juris*[13]; the lack thereof is explained, *inter alia*, by the difficulties and uncertainties in identifying the scope of such power, i.e. 'who may be detained, on what grounds, subject to what procedures and for how long'.[14] More importantly, the courts have engaged in the ongoing discussion about 'inherent'/'implied' IHL treaty powers.[15]

The position taken by the ICRC and others is that treaty IHL contains an inherent power to detain in NIAC, as internment is a form of deprivation of

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Appeal' (*EJIL: Talk!*, 5 August 2015) <http://www.ejiltalk.org/the-authority-to-detain-in-niacs-revisited-serdar-mohammed-in-the-court-of-appeal> accessed 30 October 2017; and Marko Milanovic, 'A Trio of Blockbuster Judgments from the UK Supreme Court' (*EJIL: Talk!*, 17 January 2017) <http://www.ejil-talk.org/a-trio-of-blockbuster-judgments-from-the-uk-supreme-court> accessed 30 October 2017.

12 The possibility of domestic law, IHRL or UN SC Resolutions to provide such authority (and their relationships) is disregarded for the purpose of this analysis. Note, however, that the debate regarding a legal basis to detain under IHL is prevalent mostly with respect to internationalised NIACS or NIACs with an extraterritorial element, in which the detaining power's ability to rely on own domestic law, informed by IHRL, cannot easily be assumed.

13 *Serdar Mohammed v Ministry of Defence* [2014] (n 10) [254]; *Serdar Mohammed v Ministry of Defence* [2015] (n 10) [241]. The Supreme Court majority deemed it unnecessary to express a concluding view while expressing a preference for rejecting the current existence of a customary legal basis, see: *Serdar Mohammed v Ministry of Defence* [2017] (n 10) [14]. For an analysis of customary IHL arguments to which the majority refers, see the dissenting opinion of Supreme Court Judge Lord Reed, *Serdar Mohammed v Ministry of Defence* [2014] (n 10) [271]. The Supreme Court's hesitance to contribute to emerging customary IHL has been described as a possible 'form of deliberate judicial conservatism', see Fionnuala Ní Aoláin, 'To Detain Lawfully or Not to Detain: Reflections on UK Supreme Court Decision in Serdar Mohammed' (*Just Security*, 2 February 2017) <https://www.justsecurity.org/37013/detain-law-fully-detain-question-reflection-uk-supreme-court-decision-serdar-moham-med> accessed 30 October 2017.

14 *Serdar Mohammed v Ministry of Defence* [2014] (n 10) [258].

15 For an in-depth analysis of the Mohammed-cases see Manuel Brunner, 'Detention for Security Reseons by Armed Forces of a State in Situations of Non-International Armed Conflict: the Quest for a Legal Basis' in this volume 89.

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liberty which is not prohibited, but regulated by CA 3 and referred to explicitly in AP II.[16] It is supported by authors who have commented on the *Serdar Mohammed* case specifically or on the legal basis for detention in NIAC more generally.[17] However, the arguments opposing this position are manifold and currently seem to cumulatively be considered more persuasive by most.[18] The extent of these arguments exceeds the scope of this analysis; nonetheless, they can be succinctly summarised as follows:[19] (1) if the drafters of the Geneva Conventions and Additional Protocols had intended to provide a power to detain in NIAC, they could have done so similar to IAC; (2) CA 3 and AP II should be understood as only referring to a factual reality; (3) their mere purpose is to provide minimum standards of treatment; (4) regulation and authorisation need to be legally distinguished; i.e. to argue that, as IHL requires the humane treatment of detainees, it authorises their detention, rests on a *non sequitur*;[20] (5) States which have been and continue to be unwilling to provide non-State armed groups, to which CA 3 and AP II apply reciprocally, authority and hence power to

16 See especially ICRC, 'Internment in Armed Conflict' (n 3) 7. For comment on the Internment Opinion Paper, see Kevin Jon Heller, 'What Exactly Is the ICRC's Position on Detention in NIAC' (*Opinio Juris*, 6 February 2015) <http://opiniojuris.org/2015/02/06/exactly-icrcs-position-detention-niac> accessed 30 October 2017.

17 See for example, Jann K. Kleffner, 'Operational Detention and the Treatment of Detainees' in Terry Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (OUP 2010) 465, 471; Ryan Goodman, 'The Detention of Civilians in Armed Conflict' (2009) 103 AJIL 48; Sean Aughey and Aurel Sari, 'IHL Does Authorise Detention in NIAC: What the Sceptics Get Wrong' (*EJIL: Talk!*, 11 February 2015) <http://www.ejiltalk.org/ihl-does-authorise-detention-in-niac-what-the-sceptics-get-wrong> accessed 30 October 2017.

18 See also *Serdar Mohammed v Ministry of Defence* [2017] (n 10) [274].

19 The following summary is based on the courts' analyses in the *Serdar Mohammed*-case, supplemented by additional considerations especially in the footnotes; see *Serdar Mohammed v Ministry of Defence* [2014] (n 10) [241], *Serdar Mohammed v Ministry of Defence* [2015] (n 10) [178], *Serdar Mohammed v Ministry of Defence* [2017] (n 10) [258].

20 Commentators have added that the distinction between regulation of conduct and authorisation of conduct is of particular importance to IHL, which regulates the use of force without providing legal grounds for it (*jus ad bellum*), Lawrence Hill-Cawthorne and Dapo Akande, 'Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?' (*EJIL: Talk!*, 7 May 2014) <http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts> accessed 30 October 2017.

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detain cannot rely on any implied powers of detention themselves; (6) a legal basis for detention cannot be implied without specification of the scope of the power; (7) the prohibition of 'arbitrary deprivation of liberty' requires that any legal basis authorising detention must define the circumstances to which it applies with sufficient precision;[21] (8) an authorisation, or absence of prohibition,[22] to use lethal force against certain individuals does not imply a power to detain, at least because the categories of people who may be lawfully killed or detained arguably differ.

Finally, and most relevantly to this analysis, (9) the ICRC's proposition that treaty law contains an inherent power to detain because internment is 'not prohibited by Common Article 3'[23] has been rejected as an obsolete application of the *Lotus* principle.[24] The UK Court of Appeals not only observes that 'in this statement, the ICRC derives a positive power to intern from an absence of prohibition',[25] but the court supports a view of the nature of modern international law according to which the 'absence of prohibition equals authority' approach is criticised and considered to be outdated.[26]

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21 To counter this specific (sub-)argument, the ICRC suggests that, in case of internationalised NIACs, either an international agreement between the international, detaining forces and the host State or the domestic law of the host State should address the scope of the detention power as 'additional authority', see ICRC, 'Internment in Armed Conflict' (n 3) 8. The ICRC has furthermore indicated that it considers 'imperative reasons of security' to be the minimum legal standard that should inform internment decisions in NIAC, see ICRC, 'Internment in Armed Conflict' (n 3) Annex I; Jelena Pejic, 'Procedural Principles and Safeguards for Internment / Administrative Detention in Armed Conflict and Other Situations of Violence' (2005) 87 IRRC 375.

22 On the similar, related debate regarding whether IHL provides a legal basis to use lethal force (including whether a lack of prohibition to kill combatants or 'fighters' implies a permission to do so), see for example Ryan Goodman, 'The Power to Kill or Capture Enemy Combatants' (2013) 24 EJIL 819 and Michael N. Schmitt, 'Wound, Capture, or Kill: A Reply to Ryan Goodman' (2013) 24 EJIL 855.

23 ICRC, 'Internment in Armed Conflict' (n 3) 7.

24 See generally Ryan Goodman, 'Authorization versus Regulation of Detention in Non-International Armed Conflicts' (2015) ILS 155; Matthias Lippold, 'Between Humanization and Humanitarization? Detention in Armed Conflicts and the European Convention on Human Rights' (2016) 76 ZaöRV 53.

25 *Serdar Mohammed v Ministry of Defence* [2015] (n 10) [202].

26 Ibid, [197]. For support of the Court's conclusion regarding this aspect, see Alex Conte, 'The UK Court of Appeal in Serdar Mohammed: Treaty and Customary IHL Provides No Authority for Detention in Non-International Armed Conflicts' (*EJIL: Talk!*, 6 August 2015) <http://www.ejiltalk.org/the-uk-court-of-appeal-

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On the contrary, the court considers and rejects the possibility of IHL having 'reached the stage' where it provides for a legal basis for detention in NIAC,[27] hence thereby requiring an explicit legal authority.

This contribution aims to both analyse the current relevance of the *Lotus* principle to IHL and expose the influence of the conception of public international law on IHL's 'implied' authorities in cases of missing explicit legal bases.[28]

B. Theoretical Background

In the first section, a brief overview of the most relevant theories of international law is given in order to embed the following discussion in the appropriate context.

Since the very beginning of international law, a broad range of theories of international law has existed, all of which seek to explain the nature of international legal rules.[29] Concepts such as realism, sociological theories or critical theories have offered insights into the political and sociological factors contributing to the development of international law.[30] However, the main debate in both public international law and IHL in particular remains between proponents of a positivist and a natural law approach, both advocating for the dominance of each theory in interpreting the

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in-serdar-mohammed-treaty-and-customary-ihl-provides-no-authority-for-detention-in-non-international-armed-conflicts> accessed 30 October 2017, who not only notes that the Court was correct in rejecting an 'absence of prohibition equals authority' approach, but who rather unapologetically remarks that '[n]o credible lawyer could genuinely assert that lack of an express prohibition constitutes authority to deprive persons of their liberty'.

27 *Serdar Mohammed v Ministry of Defence* [2015] (n 10) [9].

28 A recent *EJIL: Debate!* demonstrates the importance of a deeper reflection on the theories of international law. See (2017) 28 EJIL No. 1.

29 For an inspiring insight into the theories of international law, see Andrea Bianchi, *International Law Theories: An Inquiry into different Ways of Thinking* (OUP 2016).

30 See eg Ingo Venzke, 'Contemporary Theories and International Law-Making' (2013) 59 Amsterdam Law School Research Paper 12 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2342175#> accessed 30 October 2017; Steven Ratner, 'Legal Realism School' in MPEPIL (online edn, OUP July 2007); Anthony Carty, 'Sociological Theories of International Law' in MPEPIL (online edn, OUP March 2008); Günter Frankenberg, 'Critical Theory' in MPEPIL (online edn, OUP October 2010).

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international legal system. This appears to be the case despite the ostensible recognition that none of the theories can convincingly explain all aspects of the existing order.[31]

I. Positivism

Positivism is a generic term that describes a legal theory and covers a wide spectrum of partially competing positions which have been developed since the 19th century.[32] In a traditional positivist understanding, international law is defined as law laid down through the consent and agreement of sovereign States that are equally entitled to create norms.[33] Accordingly, law-making in international law requires two complementary elements: a 'voluntarist'- and a 'unity of sources'-element.[34] Whereas the former is needed to express that law originates from States' will,[35] the latter recognises as law only those norms that can be traced back to one ultimate source[36] and that are generated

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31 See generally: Martti Koskenniemi, 'International Legal Theory and Doctrine' in MPEPIL (online edn, OUP November 2007) para 17; and specifically, Andreas von Arnauld, *Völkerrecht* (3rd edn, C.F. Müller 2016) 6, who cites the *Münchhausen Trilemma* according to which each theory leads to a circular argument, a regressive argument, or an axiomatic argument.

32 For further reading on positivism, see Jörg Kammerhofer and Jean d'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014) or Robert Kolb, *Theories of International Law* (Bloomsbury Publishing 2016) 105-10 (hereafter Kolb, *Theories of International Law*).

33 James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 9 (hereafter Crawford, *Brownlie's Principles*). Note that some modern positivist approaches are open for the possibility of including non-State actors as 'law-makers', eg Bruno Simma and Andreas Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 AJIL 302, 306 (hereafter Simma and Paulus, 'Responsibility of Individuals'); Jörg Kammerhofer, 'Non-state actors from the perspective of the Pure Theory of Law' in Jean d'Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge 2011) 54, 59-60.

34 Frauke Lachenmann, 'Legal Positivism' in MPEPIL (online edn, OUP July 2011) para 3 (hereafter Lachenmann, 'Legal Positivism').

35 Ibid.

36 Depending on the branch of positivism, the ultimate source is to be found in State consent (consensualism) or notions such as *pacta sunt servanda* (neo-positivism) or a rule of recognition. See eg Hans Kelsen, *Reine Rechtslehre* (Deuticke, 1934) 129, who describes the ultimate source as 'Grundnorm'.

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by a pre-set legal procedure.[37] Consequently, international law is not described as law above States, but as law between States and can be differentiated from 'non-law' as well as national law by its sources, procedures, and doctrine.[38]

The *Lotus* principle has been considered to reflect a traditional positivist approach towards international law. According to the *Lotus* principle, States are free in their decisions unless acts or omissions are prohibited by international law.[39] Thus, international law is seen to possess a prohibitive character.[40] Positivism, as reflected in the *Lotus* principle, has been criticised especially with regard to the 'undesired' consequences which may result from the absence of prohibitive rules[41] and for its inability to provide adequate answers to contemporary challenges.[42] The adherence to State sovereignty and State will has raised questions concerning the sources of

37 Lachenmann, 'Legal Positivism' (n 34) para 3.

38 Crawford, *Brownlie's Principles* (n 33) 9; Jutta Brunnée, 'Consent' in MPEPIL (online edn, OUP October 2010) para 3; Lachenmann, 'Legal Positivism' (n 34) para 30.

39 The *Lotus* principle was developed from the so-called *Lotus* decision of the PCIJ, see The Case of the S.S. "Lotus" *(France v Turkey)* [1927] PCIJ Series A No 10, in particular the Court's statement at 8: 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.'

40 For an alternative interpretation of the *Lotus* decision, see eg Jörg Kammerhofer, 'Gaps, the Nuclear Weapons Advisory Opinion and the Structure of International Legal Argument between Theory and Practice' (2010) 80 BYIL 333, 341-43; Pia Hesse, 'Comment: neither Sunken Vessel nor Blooming Flower! The Lotus Principle and International Humanitarian Law' in this volume 80 (hereafter Hesse, 'Neither Sunken Vesserl nor Blooming Flower!').

41 With respect to domestic (German) law, see Gustav Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht' (1946) 1 SJZ 105 (hereafter Radbruch, 'Gesetzliches Unrecht'); regarding international law, see especially Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2nd edn, CUP 2006).

42 Jörg Kammerhofer and Jean d'Aspremont, 'Introduction: the future of international legal positivism' in Jörg Kammerhofer and Jean d'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014) 1, 4-7.

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international law[43] and the permissibility of analogies to fill perceived 'gaps' in international law.[44] Regardless of the criticism, positivism seems to currently remain the dominant theory of international law[45] since it, *inter alia*, offers coherence and predictability.[46] This continued reliance on positivism hence suggests a generally restrictive nature of international (humanitarian) law.

II. Natural Law

The concept of natural law refers to norms and principles deduced from god, nature, reason, the idea of justice, or some social or historical necessity, i.e. from something not laid down by any human authority.[47] According to natural law theory, international law is law above States and may not be superseded by law made by States or other actors.[48] While natural law does not exclude the possible creation of positive norms through State consent,[49] it foresees the prerogative to 'correct' positive law where needed.[50] Despite a resurgence of natural law theory in public international law,[51] one of natural law's most important challenges remains the lack of an acknowledged methodology for the identification and verification of natural

43 With regard to customary international law, the general principles of international law and *jus cogens*, see eg Lachenmann, 'Legal Positivism' (n 34) paras 35-37, 44, 47.

44 See Silja Vöneky, 'Analogy in International Law' in MPEPIL (online edn, OUP February 2008) paras 13-14, 24.

45 See generally Steven Ratner and Anne-Marie Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93 AJIL 291, 293; and specifically on human rights issues Simma and Paulus, 'Responsibility of Individuals' (n 33) 302, who note that 'in reflecting on our day-to-day legal work, we realized that, for better or for worse, we indeed employ the tools developed by the "positivist" tradition'.

46 Mary Ellen O'Connell, 'Legal Process School' in MPEPIL (online edn, OUP November 2006) para 22.

47 Alexander Orakhelashvili, 'Natural Law and Justice' in MPEPIL (online edn, OUP August 2007) para 1.

48 Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007) 11.

49 Kolb, *Theories of International Law* (n 32) 117.

50 See eg Radbruch, 'Gesetzliches Unrecht' (n 41).

51 Kolb, *Theories of International Law* (n 32) 116-18.

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law norms,[52] which would allow international legal actors to authoritatively rely on them.[53] Natural law theory neither follows a *Lotus* approach towards international law nor does it abstractly determine whether it is generally permissive or restrictive in nature. Instead, it follows a case-by-case approach and balances different norms and principles to reach a legal conclusion[54] which may be permissive or restrictive in character, e.g. allowing or prohibiting/limiting detention in armed conflict.

C. Existence of an International Humanitarian Law-Specific Approach?

IHL is a branch of public international law governing armed conflicts by protecting those who are not or no longer participating in hostilities and by restricting the means and methods of warfare. Whereas it must, as such, be interpreted in accordance with general public international law, it constitutes a distinct body of law with several specificities.[55] This section hence considers the possible existence of an IHL-specific approach towards permissiveness and restriction based on a positivist approach, also due to lack of accepted natural law methodology. It not only assesses the *Lotus* principle's perception within IHL, but also examines its norm structure, including the significance and meaning of the principle of military necessity and the Martens Clause.

I. Perception of the *Lotus* Principle within International Humanitarian Law

The extent to which the *Lotus* principle applies to IHL has been debated predominately in the context of the ICJ's *Nuclear Weapons* Advisory

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52 Martti Koskenniemi, 'Methodology of International Law' in MPEPIL (online edn, OUP November 2007) para 6. A prominent example which has been discussed as a possible natural law norm is the 'inherent right' to self-defence.

53 International courts as the ICJ and PCIJ have rarely based their judgments and opinions on norms or principles attributable to natural law, but reinforce their findings by invoking such notions by way of *obiter dicta*, see Lachenmann, 'Legal Positivism' (n 34) para 56.

54 See eg Gustav Radbruch, *Rechtsphilosophie: Studienausgabe* (2nd edn, C.F. Müller 2003). Radbruch describes a pyramid of natural law principles with the principle of justice on top.

55 Note for example the legally uncontested binding nature of IHL for non-State actors in NIAC.

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Opinion.[56] Given that the Court was asked if 'the threat or use of nuclear weapons [is] in any circumstances permitted under international law',[57] intervening States argued over the necessity of an authorisation under international law permitting the threat or use of nuclear weapons. Some States criticised that the formulation of the question was incompatible with international law, which protects States' sovereignty and freedom to act that is only restricted by prohibitive rules under international customary or treaty law. If the Court were to answer the question, the word 'permitted' should be replaced by 'prohibited'.[58] Other States asserted that the invocation of the *Lotus* principle was inappropriate under contemporary international law and in the circumstances of the present case.[59] The Court, however, simply noted that

> ... the nuclear-weapons States appearing before it either accepted, or did not dispute, that their independence to act was indeed restricted by the principles and rules of international law, more particularly humanitarian law …, as did the other States which took part in the proceedings.[60]

It hence concluded that 'the argument concerning the legal conclusions to be drawn from the use of the word "permitted" [is] without particular significance for the disposition of the issues before the Court'.[61] The Court thereby 'brushed aside'[62] any meaningful debate about the *Lotus* principle's application within IHL and diverted it to the judges' Separate and Dissenting Opinions.

The Opinions primarily reveal a dissent regarding the continued relevance of the *Lotus* principle for today's international legal order in general. Critics of a permissive approach to international law (1) stress the

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56 Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226 (hereafter *Nuclear Weapons*).

57 The question upon which the Advisory Opinion had been requested was set forth in UN GA Res UN Doc A/RES/49/75K (15 December 1994). The French text equally reads as follows: 'Est-il permis en droit international de recourir à la menace ou à l'emploi d'armes nucléaires en toute circonstance?'.

58 *Nuclear Weapons* (n 56) 238-39, paras 21 et seq.

59 Ibid, para 21.

60 Ibid, 239, para 22.

61 Ibid.

62 Christopher Greenwood, 'The Advisory Opinion on Nuclear Weapons and the Contribution of the International Court to International Humanitarian Law' (1997) IRRC 66, 67, who also demonstrates that the Court, in its subsequent analysis, considered if certain rules prohibit the use of nuclear weapons, and not whether they authorise such use.

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evolution of the international legal system from co-existence to community,[63] (2) emphasise the specific context of the *Lotus* decision, i.e. the delimitation of criminal jurisdiction,[64] and (3) support natural law approaches instead of, or in addition to, legal positivism.[65] In relation to a later Advisory Opinion, the continued endorsement of the *Lotus* principle was additionally criticised for ignoring 'the possible degrees of non-prohibition, ranging from "tolerated" to "permissible" to "desirable"'[66] and for failing to explore 'whether international law can be deliberately neutral or silent on a certain issue.'[67]

Regarding the application of the *Lotus* principle to IHL specifically, dissenting judges have distinguished the context of the *Lotus* decision (i.e. the collision of two vessels on the high seas in peacetime) from situations to which IHL applies (e.g. the use of nuclear weapons in armed conflict) in order to argue that IHL was already a well-established concept at the time of the decision, but simply not relevant to it. The PCIJ's decision should thus not be used to negate IHL and to override its basic principles, such as the Martens Clause.[68] In other, more drastic, words: a case dealing with the delimitation of criminal jurisdiction, being 'scarcely an earth-shaking issue',[69] should not be seen as governing 'any act which could bring civilization to an end and annihilate mankind'.[70] More fundamentally, it is contended that the *Lotus* principle does not apply to acts or omissions which 'by reason of their essential nature, cannot form the subject of a right', as these threaten the international community's very own existence and, thus, the international legal order protecting State sovereignty.[71]

Despite individual judges' doubts about the continued relevance of the *Lotus* principle in international law and concerns about the appropriateness of its application to IHL, the ICJ has so far not decided to abandon its mainly

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63 Declaration of President Bedjaoui in *Nuclear Weapons* (n 56) 48, para 12.
64 Ibid. On this aspect, see also Hesse, 'Neither Sunken Vessel nor Blooming Flower!' (n 40).
65 Dissenting Opinion of Judge Weeramantry in *Nuclear Weapons* (n 56) 494.
66 Declaration of Judge Simma in Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion) [2010] ICJ Rep 403, 480, para 8.
67 Ibid, 480-481, para 9.
68 Dissenting Opinion of Judge Weeramantry in *Nuclear Weapons* (n 56) 495.
69 Dissenting Opinion Judge Shahabuddeen in *Nuclear Weapons* (n 56) 395.
70 Ibid, 394.
71 Ibid, 392. For an analysis of the *Lotus* principle's compatibility with the UN Charter and the law of neutrality, see also 391.

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positivist view. An analysis of the norm structure of IHL might therefore complement the judges' considerations.

II. Norm Structure of International Humanitarian Law

As far as the first codifications of IHL – such as the Paris Declaration of 1856,[72] the Lieber Code of 1863,[73] the Saint Petersburg Declaration of 1868,[74] and the Oxford Manual of 1880[75] – are informative, IHL initially served to limit the belligerents' exercise of power and to generate restrictive effects by relying on certain overarching principles based on natural law.[76] As codification progressed, the formulation of and relationship between such principles was framed in positive legal rules,[77] making IHL one of the first branches of public international law to be comprehensively codified.

The norm structure of modern treaty IHL as well as its drafting history suggests that States primarily agreed on restrictive rules. The current rules of IHL treaties are generally prohibitory in wording and manner.[78] Only a few rules use permissive wording, e.g. Art. 21 GC III on the restriction of liberty of movement of prisoners of war and Art. 43 (2) AP I which grants '[m]embers of the armed forces of a Party to a conflict … the right to

72 Declaration Respecting Maritime Law (entered into force 16 April 1856) in British State Papers vol. LXI (1856), 155.

73 Instructions for the Government of Armies of the United States in the Field (24 April 1863) in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts* (3rd edn, Martinus Nijhoff Publisher 1988) 3 (hereafter Lieber Code).

74 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (entered into force 11 December 1868) in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts* (3rd edn, Martinus Nijhoff Publisher 1988) 102.

75 The Laws of War on Land (Oxford, 9 September 1880) in Dietrich Schindler and Jiri Toman (eds), *The Laws of Armed Conflicts* (3rd edn, Martinus Nijhoff Publisher 1988) 36.

76 Martti Koskenniemi, *The Gentle Civilizer of Nations* (CUP 2001) 70-88.

77 See Michael N. Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50 VJIL 796, 796 (hereafter Schmitt, 'Military Necessity'); Yoram Dinstein, 'Military Necessity' in MPEPIL (online edn, OUP September 2015) para 7 (hereafter Dinstein, 'Military Necessity').

78 This contribution perceives rules expressing obligations in IHL such as Art. 10 (2) GC I or Art. 12 (1) AP I as restrictive rules as they prohibit any behaviour which is not in compliance with the obligation.

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participate directly in hostilities'. Taking into account the *travaux préparatoires*, commentators argue that the permissive wording was chosen only for reasons of clarification.[79] According to them, the prerequisite of a permissive norm for belligerents' conduct was not intended.[80] As conventional IHL is expanding, in particular with respect to limitations and prohibitions of means of warfare,[81] it may well be argued that these treaties demonstrate a continued intention of States to regulate warfare by imposing restrictions, which is equally reflected in their practice contributing to the formation of customary IHL. An examination of the rules of customary IHL, as formulated in the ICRC's Customary International Humanitarian Law Study,[82] reveals that they too have been phrased in a mostly prohibitory way with only few rules formulated in permissive wording.[83] However, according to the context of and the commentaries to the rules, these permissions either constitute exceptions to general prohibitions or provide clarifications.[84]

For a more thorough analysis of the norm structure of IHL, the following subsections discuss the contemporary significance and meaning of the principle of military necessity and of the Martens Clause for the permission or restriction of conduct in IHL.

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79 Jean S. Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary*, vol. III (Geneva 1960) 178 (hereafter Pictet, *Commentary*); Yves Sandoz et al (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers 1987) 515-16 (hereafter Sandoz et al, *Commentary*).

80 Pictet, *Commentary* (n 79) 178; Sandoz et al, *Commentary* (n 79) 515-16.

81 See eg the recently adopted Treaty on the Prohibition of Nuclear Weapons (adopted 7 July 2017) UN GA A/RES/71/258 (Treaty on the Prohibition of Nuclear Weapons).

82 Henckaerts and Doswald-Beck, *Customary IHL* (n 9).

83 Ibid, Rules 1, 49, 51, 66, 68 and 128.

84 Ibid, Rule 1 which, in the first sentence, obliges parties to a conflict to distinguish between civilians and combatants. In the second and third sentence, the rule clarifies that thus, '[attacks] may only be directed against combatants', but 'must not be directed against civilians.'

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1. Principle of military necessity

When the principle of military necessity was first codified in the Lieber Code in 1863,[85] it drew in part upon morality and a responsibility 'to one another and to God' in conducting warfare.[86] However, it also established the weakening of enemy forces as the only legitimate purpose of the conduct of warfare and linked the necessity of measures 'indispensable for securing the ends of the war' to their legality according to 'the modern law and usages of war'. Whereas the principle has since been understood as only permitting measures 'in accordance with law', its permissive or restrictive nature remains controversial.[87]

Concerning the principle's relation to treaty and customary rules of positive law, States, academia and jurisprudence such as the Nuremberg Tribunal's *Hostage* case have rejected the German nineteenth century doctrine of *Kriegsraison geht vor Kriegsmanier* ('the necessities of war take

85 See Art. 14-16 Lieber Code (n 73): 'Art. 14: Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war'; 'Art. 15: Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war … Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.' and 'Art. 16: Military necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge … and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.'

86 The principle of military necessity and the Martens Clause are therefore often-cited examples of concepts containing notions of natural law; see Rupert Ticehorst, 'The Martens Clause and the Laws of Armed Conflict' (1997) 37 IRRC 125, 132-33 (hereafter Ticehorst, 'Martens Clause'); Michael Salter, 'Reinterpreting Competing Interpretations of the Scope and Potential of the Martens Clause' (2012) 17 JCSL 403, 433-34 (hereafter Salter, 'Reinterpreting Competing Interpretations'); David Turns, 'Military Necessity' (*Oxford Bibliographies*, 2012) <http://www.oxfordbibliographies.com/> accessed 30 October 2017; David Luban, 'Military Necessity and the Cultures of Military Law' (2013) 26 LJIL 315, 340 (hereafter Luban, 'Military Necessity'). This analysis considers them from a positivist perspective only.

87 See, among others, Burrus M. Carnahan, 'Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity' (1998) 92 AJIL 213; Schmitt, 'Military Necessity' (n 77); and Nils Melzer, 'Targeted Killing or Less Harmful Means? – Israel's High Court Judgment on Targeted Killing and the Restrictive Function of Military Necessity' (2006) 9 YbIHL 87.

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precedence over the rules of war'[88]). The Tribunal provided that '[m]ilitary necessity or expediency do not justify a violation of positive rules'[89] and that the prohibitions contained in the Hague Regulations 'control and are superior to military necessities of the most urgent nature except where the Regulations themselves specifically provide the contrary'.[90] Examples of contemporary rules providing for the possibility to invoke military necessity in exceptional circumstances include Art. 8 GC I and GC II, Art. 53 GC IV, Art. 52 (2) AP I, Art. 62 (1) AP I and Art. 71 (3) AP I as well as Rules 38 (B), 39, 43 (B), 50, 51, 56 and 156 of the ICRC's Customary International Humanitarian Law Study.[91] These articles support the conclusion that the principle of military necessity only permits departure from prohibitive rules if the rules foresee such a possibility.[92]

The role of the principle of military necessity in situations not explicitly covered by rules of positive IHL remains a subject of debate[93] and practical relevance, e.g. with respect to the legal basis for detention in NIAC, as illustrated above. Some argue that the principle is not limited to rules of positive law specifically foreseeing its application, but may serve as an independent rule – either as customary law or as a general principle of law within the meaning of Art. 38 (1) (c) ICJ-Statute – in the absence of explicit rules of positive law (i.e. providing a basis for detention).[94] Others maintain

88 Luban, 'Military Necessity' (n 86) 341.

89 *The United States of America v Wilhelm List, et al* (1948) Law Reports of Trials of War Criminals selected and prepared by the United Nations War Crimes Commission, vol. VIII, 66 (hereafter *US v Wilhelm List, et al*).

90 Ibid, 69.

91 Henckaerts and Doswald-Beck, *Customary IHL* (n 9). For an example of domestic regulation reflecting this position, see Office of General Counsel, Department of Defence, Law of War Manual, (Washington 2016) paras 1.3.3.2, 2.1.2.3 and 2.2. (hereafter DoD Manual), which defines military necessity as 'the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war'.

92 On the IHL-specific approach towards State responsibility (i.e. necessity as a possible circumstance precluding wrongfulness according to Art. 25 (2) (a) ASR), see eg Marco Sassòli, 'State Responsibility for Violations of International Humanitarian Law' (2002) 84 IRRC 401.

93 For an early discussion, see *US v Wilhelm List, et al* (n 89) 63-64, in which the Tribunal discussed under which circumstances violations of rules derived from fundamental concepts of justice, humanity and the rights of individuals may be justified (which were, however, not met in the case).

94 See eg DoD Manual (n 91) 2.2.1.

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that the principle may never be invoked as an independent rule, but only if a norm explicitly foresees its application.[95]

Ultimately, the existence or non-existence of the principle of military necessity as an independent rule of IHL seems to be of only limited significance for the purpose of this analysis. If the principle was an independent rule of IHL, its existence would only be relevant for the examination of an IHL-specific approach towards the *Lotus* principle if its nature was permissive. Such an independent permissive rule would imply that States are not free in their belligerent conduct, but are dependent on permission and are obliged to act at least within the limits of the principle of military necessity's scope of permission. Otherwise (i.e. if the principle of military necessity was restrictive in nature), it would in principle reinforce the application of the *Lotus* principle within IHL, but serve to restrict belligerents' freedom to conduct that is militarily necessary.

Currently, there seems yet to be insufficient support for the existence of an independent rule of the principle of military necessity, either permissive or restrictive in nature, within positive IHL. Therefore, it seems unjustified to, firstly, conclude that the principle of military necessity affirms or constrains the application of the *Lotus* principle within IHL or to, secondly, derive a humanitarian law-specific approach from it.

2. Martens Clause

Due to its uncommonly broad wording and drafting history, the Martens Clause has been subject to a variety of interpretations. In general, four main approaches for the interpretation of the Clause can be identified. These consider it as: (1) irrelevant/inapplicable, (2) a reminder that customary and conventional international law apply in parallel, (3) an affirmation of the existence of a separate source of international law to be distinguished from customary and conventional international law, and (4) a prevention of an *a contrario* argument based on the *Lotus* principle.[96]

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95 See eg Dinstein, 'Military Necessity' (n 77) paras 8-10, who refers to war crime trials after World War II; Nobuo Hayashi, 'Requirements of Military Necessity in International Humanitarian Law and International Criminal Law' (2010) 28 Boston University International Law Journal 39.

96 See generally Jochen von Bernstoff, 'Martens Clause' in MPEPIL (online edn, OUP December 2009); Ticehorst, 'Martens Clause' (n 86); Salter, 'Reinterpreting Competing Interpretations' (n 86).

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Whereas some have argued that the Martens Clause has lacked normative status since its inception, others have put forward that the Clause has lost legal significance over time. The former position is based on the Clause's (historical) context. It stresses that the inclusion of the Clause, proposed by Russian diplomat *Fyodor Fyodorovich Martens*, into the legally non-binding preamble of the 1899 Hague Convention II[97] was a compromise between the great powers and smaller States over a dispute on the inclusion of rules of the 1874 Brussels Declaration dealing with combatant status for resistance fighters during belligerent occupation, and therefore only constituted a 'diplomatic ploy'.[98] The latter position submits that the wording of the Martens Clause ('until a more complete code of the laws of war is issued') implied a temporary restriction to the Clause's scope of application which was triggered when 'a more complete code of the laws of war' was issued with the adoption of the 1949 Geneva Conventions and their Additional Protocols of 1977.[99] Both arguments, considered in isolation, ignore that the Martens Clause has not only been reaffirmed in subsequent conventions, but legally revalued when included in the substantive provisions of the Geneva Conventions and AP I.[100]

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97 Convention (II) with Respect to the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 04 September 1900) in Dietrich Schindler and Jiri Toman (eds), The Laws of Armed Conflicts (3rd edn, Martinus Nijhoff Publisher 1988) 69-93. The Preamble notes that '[until] a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience'.

98 Antonio Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' (2000) 11 EJIL 187, 193-94 and 197 (hereafter Cassese, 'The Martens Clause').

99 See especially the position of the Russian Federation in *Nuclear Weapons* (n 56), 'Written Statement and Comments of the Russian Federation on the Issue of the Legality of the Threat or Use of Nuclear Weapons' (19 June 1995) 13 <http://www.icj-cij.org/files/case-related/95/8796.pdf> accessed 30 October 2017.

100 See common Art. 63/62/142/158 GC, Art. 1 (2) AP I, the preamble to AP II and compare the wording of Art. 1 (2) AP I: 'In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.'

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The submissions of the UK and the US to the ICJ in the *Nuclear Weapons* Advisory Opinion reflect a second interpretative approach, according to which the Martens Clause only serves as a reminder that customary international law continues to apply after the adoption of a treaty norm, but has no normative content of its own.[101] Yet, it is not apparent why a reminder (legally binding or not) should be necessary, given that international law knows no hierarchy in the sources of legal obligations. Moreover, the Clause's wording is not limited to 'custom', but extends to the 'principles of humanity' and the 'dictates of public conscience', which can hardly be reduced to mean customary international law.

In a third interpretative approach, it has therefore been suggested that the Martens Clause affirms the existence of separate sources of international law that are to be distinguished from conventional and customary international law. Not only does the drafting history of the relevant treaties not support such a conclusion,[102] but it also remains unclear which rules would be deducible from the 'principles of humanity' and the 'dictates of public conscience' in the absence of conventional or customary international law. [103] It must thus be noted that in international and national

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101 See eg the position of the UK in *Nuclear Weapons* (n 56) 'Statement of the Government of the United Kingdom' (16 June 1995) 48, para 3.58 <http://www.icj-cij.org/files/case-related/95/8802.pdf> accessed 30 October 2017: 'The terms of the Martens Clause themselves make it necessary to point to a rule of customary international law which might outlaw the use of nuclear weapons. Since the existence of such a rule is in question, reference to the Martens Clause adds little.'

102 Compare the ICRC draft preamble to the Additional Protocols to the Geneva Conventions of August 12, 1949 and their Commentary (Geneva, October 1973), 5 ('Recalling that, in cases not covered by conventional or customary international law, civilian population and the combatants remain under the protection of the principles of humanity and the dictates of the public conscience') with the final wording of Art. 1 (2) AP I. The Drafting Committee did not follow the ICRC's proposal and located the principles of humanity and dictates of the public conscience within the Martens Clause-formulation requiring the existence of 'principles of international law derived from … the principles of humanity and from the dictates of public conscience', see Michael Bothe et al, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1977* (Martinus Nijhoff Publishers 1982) 44.

103 For a discussion about possible ways to identify the dictates of public conscience, see Dissenting Opinion of Judge Shahabuddeen in Nuclear Weapons (n 56) 410, who proposes to look to sources which speak 'with authority', like resolutions of the UN GA. See also the Treaty on the Prohibition

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jurisprudence, in State practice or academic writings, it has never been found that a rule has emerged only as a result of these notions, but that conventional or customary international law was required for a positive rule to exist.[104]

Based on these considerations, a fourth approach to interpreting the Martens Clause seems preferable. It supposes that the Martens Clause prevents an *a contrario* argument based on the *Lotus* principle and that it provides that something which is not explicitly prohibited by a treaty is not *ipso facto* permitted in IHL.[105] The notions referred to in the Clause at least prevent a strict application of the *Lotus* principle: States are not entirely free to do what is not expressly prohibited by treaty or custom. More specifically, they must consider the principles of humanity and the dictates of public conscience, which may or may not provide guidance restricting or

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of Nuclear Weapons (n 81) which in its preamble '[*reaffirms*] that any use of nuclear weapons would also be abhorrent to the principles of humanity and the dictates of public conscience' and hence takes a more affirmative stance than previous drafts which had reaffirmed 'that in cases not covered by this convention, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience'.

104 See generally *The Prosecutor v Kupreskic et al* (Judgment) ICTY-95-16-T-14 (14 January 2000) 525 and Cassese, 'The Martens Clause' (n 98) 202-8 and Mary Ellen O'Connell, 'Historical Development and Legal Basis' in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (3rd ed, OUP 2013) 1, para 131. See also Jean-Philippe Lavoyer and Louis Maresca, 'The Role of the ICRC in the Development of International Humanitarian Law' (1999) 4 International Negotiation 501, 511-17, who (partially dissenting) note with respect to the Ottawa process to ban anti-personnel landmines: 'This process affirmed for many what the ICRC and others had always known to be true: that humanitarian law has its roots in the public perception about the acceptable limits of warfare. It has long been a maxim of humanitarian law that even in the absence of positive or customary rules, the conduct of armed conflict is limited by the "laws of humanity and the dictates of public conscience". Public conscience was a vital element in creating the necessary political will for action against anti-personnel mines in government, military and international circles. As a result, it became a stigmatised weapon, and the norm against its use was established before the adoption of the ban treaty. This element was an important factor in the decision of countries to continue developing a ban in a new context, closely linked with civil society.'

105 Louise Doswald-Beck, 'International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons' (1997) 79 IRRC 37, 49.

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permitting certain conduct – such as detention – but which open up IHL to further development and other areas of international law.

D. Conclusion

The discussion about detention in NIAC illuminates the persistently diverse perceptions of international law and its treatment of situations which are not addressed by explicit legal rules. The issue whether and to what extent the *Lotus* principle applies to IHL is of fundamental importance in this context.[106] An analysis of the jurisprudence of the ICJ confirms a positivist approach which foresees the application of the *Lotus* principle within IHL. An examination of the norm structure of treaty and customary IHL also suggests that IHL is mainly restrictive in nature and compatible with a positivist vision of international law, meaning that belligerent conduct is permitted, if not prohibited by law. The principle of military necessity, if interpreted to constitute an independent legal rule of permissive nature and the Martens Clause, however, constrain the application of the *Lotus* principle within IHL. The Martens Clause especially serves to prevent *a contrario* arguments and to limit States' freedom in conducting armed conflict by introducing notions possibly inspired by natural law, such as the principles of humanity and dictates of public conscience. Forcedly vague, the notions require further legal interpretation to provide better guidance. However, it is foreseeable that a case-by-case approach to the application of a 'Martens Clause-restricted *Lotus* principle' (however well informed) does not produce pragmatic solutions to military and humanitarian needs which IHL seeks to balance with both resolve and caution. Thus, States are well advised to fill possible gaps in positive law and to work towards greater legal clarity.[107]

106 More generally, the operation of the *Lotus* principle within other branches of public international law seems worthy of more scholarly attention.

107 For scholarly contributions, see eg Brian Orend, 'The Next Geneva Convention: Filling a Law-of-War Gap with Human Rights Values' in Jens David Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (CUP 2016) 363.

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