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ARTICLE

In Search of Humanity: The Moral and Legal Discrepancy in the Redress of Violations in International Humanitarian Law

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Abstract

Both international humanitarian law (IHL) and international human rights law (IHRL) make extensive references to humanity. Yet the role attributed to humanity differs between the two. Humanity is seen in IHRL as the source of the rights, whereas in IHL it is interpreted as a moral obligation to avoid harm. This article challenges this perspective. Relying upon contemporary interpretations of IHL, it will be argued that, in a moral sense, IHL matches up closely with IHRL. Crucial here is that humanity, rather than reflect a utilitarian perspective to avoid harm, is worded in stronger terms. To reflect this accurately, it is argued that IHL is best seen as a reflection of TM Scanlon's contractualism as opposed to utilitarian reasoning. Relying upon the similarities in moral reasoning visible in both bodies of law, the article argues that this should also be reflected when it comes to redress for violations. In a concrete sense, the argument here is that this also presents a moral requirement to recognise individual claims within IHL. To give legal effect to this moral demand, it is suggested that IHRL might play a role in bridging the gap between the moral and legal considerations in IHL.

Keywords: international humanitarian law (IHL); redress; international human rights law (IHRL); moral philosophy; contractualism

1. Introduction

The dual application of international humanitarian law (IHL)[1] and international human rights law (IHRL) has highlighted the need for lawyers

[1] Some quotes within this article make reference to the law of armed conflict (LOAC) or the law of war. For the purpose of this article, these are considered synonyms. In a similar way, reference will be made to notions of redress and reparations, mainly for stylistic reasons. For content, these can also be considered synonyms.

involved with armed conflict to become bilingual and versed in both bodies of law.[2] Yet these bodies of law have very different cultural bases. Whereas IHL is portrayed as dominated by ex-military personnel or government representatives,[3] IHRL scholars are often portrayed as activists.[4] Similarly, whereas IHL is often described as 'remarkably positivist',[5] IHRL is often seen more as a reflection of activism, as 'human rights scholars often know which conclusions they want to arrive at before they begin their research, the temptation to engage in wishful thinking may be great'.[6]

In practice, this leads to situations which 'at times make it seem like speaking Dutch to the Chinese or vice versa'.[7] A prime example of this is the concept of humanity. Both IHRL and IHL make extensive references to the concept of humanity. Yet, it has been argued, they do so in different contexts as[8]

> [t]he adjective 'human' in the phrase 'human rights' points at the subject in whom the rights are vested: human rights are conferred on human beings as such (without the interposition of States). In contrast, the adjective 'humanitarian' in the term 'International Humanitarian Law' merely indicates the considerations that may have steered those responsible for the formation and formulation of the legal norms.

This difference is not only rhetorical. Whereas IHRL has emphasised the individual's position, leading to the possibility of individual claims whenever violations take place, IHL lacks such a system. IHL has instead emphasised the role of states and limiting their actions, and does not seem to recognise an individual right to claim redress for violations.[9]

[2] Françoise Hampson, 'Relevance for the Prosecution of Violations of International Humanitarian Law' in Larry Maybee and Benarji Chakka (eds), *Custom as a Source of International Humanitarian Law* (International Committee of the Red Cross (ICRC) 2006) 103, 103.

[3] Naz K Modirzadeh, 'The Dark Side of Convergence: A Pro-civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict' (2010) 86 *International Law Studies* 349, 380.

[4] Fons Coomans, Fred Grünfeld and Menno T Kamminga, 'Methods of Human Rights Research: A Primer' (2010) 32 *Human Rights Quarterly* 179, 182.

[5] Naz K Modirzadeh, 'Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance' (2014) 5 *Harvard National Security Journal* 225, 235.

[6] Coomans, Grünfeld and Kamminga (n 4) 183.

[7] Noam Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict' (2005) 87 *International Review of the Red Cross* 737, 744.

[8] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd edn, Cambridge University Press 2016) 27.

[9] Cátia Lopes and Noëlle Quénivet, 'Individuals as Subjects of International Humanitarian Law and Human Rights Law' in Roberta Arnold and Noëlle Quénivet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Brill 2008) 199, 216. One exception to this could be the treatment of prisoners of war, where Article 78 of Geneva Convention III allows for standing to complain about the conditions in which they are being held: Geneva Convention (III) relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135 (GC III).

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This article aims to explore further this difference in conceptions of humanity. Relying upon the moral foundations visible within both bodies of law, it seeks to provide a slightly more nuanced viewpoint towards the 'humanitarian' in international humanitarian law. Instead of being concerned only with minimising harm, it is argued here that IHL matches more closely with notions visible in the ethical reasoning surrounding contractualism. The logic here would match more closely with how IHL is currently employed and highlights the role that principles play. These principles are subsequently used to argue that there is a similarity between the philosophical approaches in IHL and IHRL. Such a relationship also results in a moral demand of allowing for similar recognition of individual claims. To give effect to this, the suggestion is made that reliance could be had upon IHRL as an intermediary.

In this way the article aims to broaden the discussion surrounding redress within IHL. The discussion surrounding redress has been based mainly on legal positivist arguments. Likewise, there is an active engagement from the philosophical community surrounding the nature of the law of war. Building upon both of these fields, this article aims to offer a more philosophical account of the moral demands within the notions of IHL. Ultimately, this also leads to a moral argument towards a new foundation for considering redress for violations of IHL.

To start this analysis, the article will briefly describe the *lex lata* surrounding redress within IHL. The following section will then reverse engineer an argument to defend the current notions of redress within IHL. Here it will be argued that this is morally defensible, provided we accept that IHL is a purely utilitarian body of law. This would signify that its primary goal would be to reduce harm. Relying upon the contemporary practice of IHL, this can be seen to provide an ill fit. Instead, this work would argue that the notion of IHL is built mainly upon the two fundamental principles of humanity and military necessity. Relying upon the contractualist framework, it is argued here that these represent principles which cannot be reasonably rejected.[10] In the philosophical notions underlying IHL, this nuance is used to defend the view that IHL would contain a moral demand to facilitate the recognition of individual claims.

This article sets up this argument in four sections. The next section (2) will establish the initial claim that IHL does not directly recognise the standing of individuals to claim compensation. This is done by analysing the *lex lata* and how this has been interpreted within domestic courts. Using the case law of domestic courts highlights that IHL is not seen to contain a direct right to reparations. Instead, victims are often dependent on domestic legal systems. This contrasts with IHRL, in which victims can rely directly upon IHRL to claim a right to reparation.

After setting out the initial legal consideration, emphasis shifts towards moral concerns (Section 3). This work starts from the perspective of defending the current practice. It will be argued that there can be a validation for the

[10] Dinstein (n 8) 9–10.

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current form. It will be discussed here that such a practice can be defended based upon an annulment thesis, a particular perception of corrective justice. However, this proposal works only if we frame IHL as a mainly utilitarian project.

Whereas there is some historical basis for framing IHL as such a utilitarian project, the article demonstrates that this provides an awkward fit with contemporary IHL. It fails to account for the foundations upon which this body of law is based and their role within this, such as the absolute nature of many of the rules within IHL.[11] Examples of this are plentiful and are explored within this section. This leads ultimately to the conclusion that the utilitarian basis of IHL would need to be rejected.

This critique will lead into Section 4, in which an alternative argument is presented. Based upon the core values of humanity and military necessity, it will be argued that IHL represents a form of moral contractualism, as portrayed by TM Scanlon. This, in this author's eyes, reflects that IHL represents a 'system of rules for the general regulation of behaviour which no one could reasonably reject as a basis for informed, unforced general agreement'.[12] The role of these principles leads to a philosophical similarity with IHRL. The role of humanity within these principles is then used to argue against the current approach to redress.

Ultimately, this different moral perception creates a strong argument for recognising individuals within IHL. Crucial here is the deontological conception that this is based upon a principle of humanity. It is then argued that there is a discrepancy between what morality demands in the forms of redress and current practice. To overcome this difference, the article proposes to bring in human rights as an intermediary. The last section (5) will consider how this legal reasoning would work. This leads to a *lex ferenda* discussion, in which it is argued that IHL should also adopt increased recognition of individuals when considering redress for violations of IHL.

2. Individual redress within IHL

An individual right to compensation within IHL has attracted much legal debate. Some have argued that specific provisions contain a personal right to reparation. An example of this is in Kalshoven stating that the 1907 Hague Regulations 'undeniably accords such a capacity (to claim reparations) to individual injured parties, be they enemy or neutral persons'.[13] Others have argued that such an interpretation would push the definition: 'since Article 3 of Hague IV was adopted at a time when it was unthinkable that

[11] In general, see David Lyons, 'Utility as a Possible Ground of Rights' (1980) 14 *Noûs* 17, 27.

[12] TM Scanlon, 'Contractualism and Utilitarianism' in Amartya Sen and Bernard Williams (eds), *Utilitarianism and Beyond* (Cambridge University Press 1982) 103, 110.

[13] Frits Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces' (1991) 40 *International and Comparative Law Quarterly* 827, 843. Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (entered into force 26 January 1910) *Martens Nouveau Recueil* (ser 3) 461.

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individuals might enjoy rights under international law, this provision cannot but reflect the inter-state structure of the international legal order'.[14]

Courts, in general, have supported such a conservative interpretation, whereas the International Committee for the Red Cross (ICRC) has stated that '[t]here is an increasing trend in favour of enabling individual victims of violations of international humanitarian law to seek reparation directly from the responsible State'.[15] Case law and practice seem to point in different directions. Starting with the practice of bodies established to redress harm following armed conflicts, it is often unclear in these cases if reparations are based upon violations of IHL or general damage.[16] Taking as an example the claims originating out of the Iraqi invasion of Kuwait, compensation here was to address 'losses arising as a direct result of Iraq's invasion and occupation of Kuwait, regardless of whether or not they were caused by a violation of this law'.[17] As a further issue, compensation programmes also have not generally recognised the direct standing of individuals. Programmes such as the United Nations (UN) Compensation Commission and the Eritrea-Ethiopia Claims Commission did not recognise the individual's standing, representing situations in which 'the State is acting on behalf of the individual'.[18] As such, it is difficult to argue that these programmes represent an individual right to reparations.

Case law also points towards a restrictive notion of redress. Whereas some judgments argue that a right to individual compensation can be seen to exist for natural persons,[19] practice demonstrates that courts have been reluctant to award individual compensation. The European Court of Human Rights (ECtHR) stated that the broader IHL treaties do not contain a right for individuals to claim reparations.[20] This has been confirmed by domestic courts, which have held that the earlier referenced Hague IV Convention 'do[es] not justify any individual claims for damages or compensation'.[21] US courts have also held that 'the Conventions are best regarded as addressed to the interests and honour of belligerent nations, not as raising the threat of judicially awarded

[14] Paola Gaeta, 'Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (Oxford University Press 2011) 305, 308.

[15] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Vol I: Rules* (ICRC and Cambridge University Press 2005, revised 2009) (ICRC Study) rule 150: Reparation.

[16] Marten Zwanenburg, 'The Van Boven/Bassiouni Principles: An Appraisal' (2006) 24 *Netherlands Quarterly of Human Rights* 641, 660.

[17] Emanuela-Chiara Gillard, 'Reparation for Violations of International Humanitarian Law' (2003) 85 *International Review of the Red Cross* 529, 541.

[18] Elke Schwager, 'The Right to Compensation for Victims of an Armed Conflict' (2005) 4 *Chinese Journal of International Law* 417, 425.

[19] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, [152].

[20] ECtHR, *Markovic and Others v Italy*, App No 1398/03, 14 December 2006, para 111.

[21] Bundesgerichtshof III, ZR 140/15, 6 October 2016, para 17 (translated by Google Translate).

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damages at war's end'.[22] All of this points towards a right of reparation not being available for individuals relying purely upon IHL. This contrasts with IHRL, in which a direct right of individuals is often available through domestic implementation, regional courts or international bodies.[23] Instead, within IHL, individuals are forced to rely on either the state claiming redress for them or a broad domestic implementation that allows redress.

Many domestic jurisdictions, however, have not implemented or restricted such a right. Courts in the United States are not allowed to judge '[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war'.[24] In the Netherlands, courts have stated that judges must employ 'a high degree of restraint' when considering violations of IHL.[25] It was held in Italy that 'means and methods of warfare falls among the "acts of government" ... hence, by their very nature, they are non-justiciable'.[26] Considering the *Distomo* massacre, the German court equally held that 'acts of the German military are to be qualified as sovereign acts (*acta iure imperii*), [and] that there is not yet a customary rule of international law excepting *ius cogens* violations from immunity'.[27]

A combination of these judgments and lack of practice has led to individual compensation for IHL being mainly theoretical. Only in limited cases have courts recognised the possibility of individual claims based on violations of IHL. An example of this would be the Dutch courts holding that the award of reparations 'comes down to whether each of the appellants has personally been the victim of an event that must be reported as a violation of humanitarian (war) law'.[28] This, however, seems to be based upon a broad domestic view of what constitutes a wrongful act and would be liable for compensation under tort law; it thus appears to reflect more of a specific Dutch domestic law rather

[22] *Tel-Oren v Libyan Arab Republic*, 726 F.2d 774, 806–807 (1984), para 111. See also *Goldstar (Panama) SA and Others v United States*, 967 F.2d 965 968 (4th Cir 1992); *Princz v Federal Republic of Germany*, 307 US App DC 102, 26 F.3d 1166 (1994).

[23] The prime example of this is the redress available through the regional human rights systems in respectively Europe, America and Africa. The right to compensation, however, has already been recognised since the Universal Declaration of Human Rights (n 151), in which its Article 8 recognised a right to a remedy. This right has since made a broad appearance in human rights treaties, visible in UN General Assembly Res 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (16 December 2005), UN Doc A/RES/60/147, Preamble.

[24] 28 USC § 2680 (2006) Exceptions to the Federal Tort Claims Act.

[25] District Court of The Hague, *Danikovic et al. v The Netherlands*, ECLI:NL:GHSGR:2004:AU4443, 25 March 2003, para 3.2 (translated by Google Translate).

[26] Micaela Frulli, 'When are States Liable for Serious Violations of Humanitarian Law? The Marković Case' (2003) 1 *Journal of International Criminal Justice* 406, 409.

[27] Elisabeth Handl, 'Introductory Note to the German Supreme Court: Judgment in the Distomo Massacre Case' (2003) 42 *International Legal Materials* 1027, 1028.

[28] Appeals Court of Amsterdam, *Dedovic v Kok et al.,* ECLI:NL:GHAMS:2000:AO007, 6 July 2000, para 5.3.23.

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than international law-based practice.[29] Yet, even in these cases the courts have still employed the mentioned high degree of restraint.

All in all, this has led to very patchy enforcement of the ability of individuals to claim reparations. As this is mainly up to states, individuals have often been on the outside looking in. Instead of being able to rely upon legal obligations, claims have often been more dependent on goodwill than anything else. This is compounded by many of the issues surrounding enforcement in general within international law.[30] Even when a victim has a right to reparation, it is not guaranteed that this is paid because of a lack of a central body to enforce these judgments.

In general, it must be concluded that IHL does not currently provide for a direct right of reparation for individuals. Crucial here is a lack of legal reasoning to support an individual right of reparation contained within IHL. Other practice also does not seem to support the notion that an individual has the right to claim redress for a violation directly. Reparations are usually made at the states' discretion rather than arising from a legal obligation. Taking this as the current *lex lata*, the next section will explore these issues from a moral perspective.

3. A utilitarian approach and IHL

As noted in the previous section, the current practice of IHL does not directly recognise any claims put forward by individuals. In a moral sense, there are no fundamental arguments against this; given certain conditions, such a practice could be ethically defended. However, it would depend on an interpretation that is consistent with the annulment thesis. The annulment thesis represents a simple form of corrective justice, based upon the classic notion put forward by Aristotle where 'just in rectification will be the intermediate between loss and gain'.[31] The annulment thesis simply states that 'justice requires a certain state of the world be brought about, but no one in particular has a special reason in justice for bringing it about'.[32]

The most notable conclusion from the annulment thesis is that the actor bringing this compensation is irrelevant. In a moral sense, it does not propose a special responsibility on those that have caused the harm. Instead, it argues that the only relevant consideration is if the loss caused (or negative utility) is adequately compensated in utilitarian terms. Taking this as a starting point, the justice perception here is very much a utilitarian perspective. Taking this reasoning further, it makes moral sense to accept this only if the body of law can be framed in similar, purely utilitarian terms.

[29] Article 6:162 Burgerlijk Wetboek (BW) [Dutch Civil Code], http://www.dutchcivillaw.com/civilcodebook066.htm.

[30] Gerald Fitzmaurice, 'The Foundations of the Authority of International Law and the Problem of Enforcement' (1956) 19 *The Modern Law Review* 1, 4.

[31] Aristotle, *Nicomachean Ethics* (tr David Ross, Oxford University Press 2020) 87.

[32] Coleman contrasts the annulment thesis in his work with the relational view, ultimately leading to a hybrid conception: Jules L Coleman, 'The Mixed Conception of Corrective Justice' (1992) 77 *Iowa Law Review* 427, 432.

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This section will consider the attempts to phrase IHL in utilitarian terms. It will be argued that whereas there is a historical basis for these considerations, the Geneva Conventions and Additional Protocols abandon this perspective to a large extent. Contemporary IHL can be seen to provide a poor fit with both act-based utilitarianism and rule-based utilitarianism. This ultimately also rejects the notion that the annulment thesis would be a morally acceptable way of considering redress.

3.1. Historical consideration: IHL as a utilitarian project

IHL has a long historical reference to utility. This is already visible in the St Petersburg Declaration, in which it was stated that 'the progress of civilization should have the effect of alleviating as much as possible the calamities of war'.[33] From a philosophical viewpoint, this argument was made by Sidgwick, who in 1891 argued that a moral combatant should avoid '(1) any mischief which does not tend materially to this end, nor (2) any mischief of which the conduciveness to the end is slight in comparison with the amount of the mischief'.[34]

Luban argues that this points toward the origins of IHL as a form of negative Benthamism.[35] It reflects the perspective that the goal of IHL is based upon the consideration that the 'moral justification of these rules lies in the fact that their acceptance and enforcement will make an important contribution to long-range utility'.[36] As a result of this utilitarian-based reasoning based on minimising harm, the individual is only a secondary concern. A reflection of this viewpoint is found in the work of Hart, who stated that this is a result of the notion that 'since not persons for the utilitarian but the experiences of pleasure or satisfaction or happiness which persons have are the sole items of worth'.[37] The Hague Conventions would support such a viewpoint, making only a brief reference to civilians and thus not differentiating between specific categories of protected individuals.[38]

However, the utilitarian reasoning within IHL has not only been used to argue for the avoidance of harm on a micro-level. Historically, it has also been used to defend IHL as an overly facilitative body of law and representing

[33] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight (entered into force 11 December 1868) 138 CTS 297 (St Petersburg Declaration).

[34] Henry Sidgwick, *The Elements of Politics* (Cambridge University Press 2012) 254.

[35] David Luban, 'Human Rights Thinking and the Laws of War' in Jens David Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (Cambridge University Press 2016) 45, 49–54.

[36] Richard B Brandt, 'Utilitarianism and the Rules of War' (1972) 1 *Philosophy and Public Affairs* 145, 147.

[37] HLA Hart, 'Between Utility and Rights' (1979) 79 *Columbia Law Review* 828, 830.

[38] Only in Article 46 is reference made to civilians under occupation, referencing 'Family honours and rights, individual lives and private property, as well as religious convictions and liberty, must be respected': Hague Convention (II) with respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (entered into force 4 September 1900) Annex, art 46.

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a military viewpoint of utility, in which the goal is to be able to conduct warfare in a permissive way. An example is found in the Lieber Code, its Article 29 concluding that '[t]he more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief'.[39] Whereas Lieber himself did not intend this provision to be unlimited,[40] in practice it had been used to argue for the rejection of rules based upon the principle of military necessity and a quick end to wars:[41]

> The claim that often the direct killing of civilians will minimise human death and suffering overall because it is more efficient than allowing combatants to kill each other and thus means that a war ends sooner has been made from time immemorial.

This points towards IHL as a facilitating regime, in which the conduct is regulated in a way that leads to a quick conclusion of the war.

Such an interpretation, however, does not seem justified. An example of this would be the consideration that leads to a form of *Kraigsraison* or the argument that all militarily necessary conduct is permissible under IHL. However, such an argument overtly reduces the content of IHL. It is 'unacceptable because it purports to justify all military conduct necessary even where it is already unqualifiedly outlawed in positive LOAC [law of armed conflict]'.[42] The claim that obligations would be trumped by military necessity is valid in only a limited number of cases as 'international humanitarian law has developed in such a way that it already accounts for the special circumstances in which claims of necessity or military necessity would be made'.[43] This leads to the first rejection of a macro-utilitarian-based 'military necessity' perspective.

Similarly, Sidgwick's claim that any action that does not further a military advantage must be rejected is also not visible within IHL. As noted by Hampson, such an interpretation would represent an 'extension of the existing rule' based upon the consideration that only necessary attacks are allowed to be executed.[44] As long as the target and means of warfare are legal within IHL, the military necessity plea is not needed for an act to be legal; or, in other terms, parties are left at liberty to fight badly and attack unnecessary targets,

[39] Instructions for the Government of Armies of the United States in the Field, General Orders No 100, 24 April 1863 (Lieber Code), art 29.

[40] ibid arts 14, 16, 60.

[41] Janina Dill and Henry Shue, 'Limiting the Killing in War: Military Necessity and the St Petersburg Assumption' in Henry Shue (ed), *Fighting Hurt: Rule and Exception in Torture and War* (Oxford University Press 2016) 447, 463.

[42] Nobuo Hayashi, 'Basic Principles' in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016) 89, 101.

[43] Nobuo Hayashi, 'Requirements of Military Necessity in International Humanitarian Law and International Criminal Law' (2010) 28 *Boston University International Law Journal* 39, 58.

[44] Hampson makes this observation with regard to the use of force on a moving column of forces during the Gulf War and the capture or kill debate: Françoise J Hampson, 'Means and Methods of Warfare in the Conflict in the Gulf' in Peter Rowe (ed), *The Gulf War 1990-91 in International and English Law* (Routledge 1993) 89, 107.

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as long as they do so within the rules of IHL.[45] This provides a rejection of the notion that IHL seems to facilitate a form of act-based utilitarianism.

As an alternative to act-based utilitarianism, rule-based utilitarianism could also be considered. Within rule-based utilitarianism, rules are morally justified on the grounds that they maximise utility. This negative Benthamite assumption has not yet been addressed.[46] Relying on developments within IHL, the next section represents the argument that this consideration would need to be rejected. It does so because the historical development of IHL seems to have moved towards what Luban describes as human rights thinking, the 'heightened solicitude toward the civilians caught in a battle space whose basic rights are affected by the war'.[47] This rejects the notion that IHL is based on utilitarian terms.

3.2. Contemporary adaptations: Moving away from the utilitarian basis

Examining the more contemporary notions of IHL, it can be seen that it has moved away from the historical utilitarian basis. Throughout the body of law, it can be seen that IHL here is no longer concerned only with the aggregate utility gained or lost. Instead, emphasis is also laid upon the specific status of individuals. For example, IHL now recognises that '[t]he wrongness of killing civilians is established independently of the goal of mitigating the horrors of warfare'.[48] As a result, a comprehensive reference to civilians or persons who no longer participate in the armed conflict appears. Examples of this are visible in Common Article 3 of the Geneva Conventions,[49] the fourth Geneva Convention dedicated to the protection of civilians,[50] and the vast amount of protection built in for these groups within Additional Protocol I (AP I).[51] This points towards an initial different validation for this body of law.

Crucial here is that IHL does not see all harm as equal. Reflecting on Hart's previous statement, IHL seems to be very concerned with who experiences the

[45] Nobuo Hayashi, *Military Necessity: The Art, Morality and Law of War* (Cambridge University Press 2020) 233–36.

[46] Bentham rejected, in general, the existence of something such as a right but argued that the only valid use of laws was to maximise social utility in the long term; see Philip Schofield, 'Jeremy Bentham's "Nonsense upon Stilts"' (2003) 15 *Utilitas* 1.

[47] Luban (n 35) 70.

[48] Jeremy Waldron, 'Civilians, Terrorism, and Deadly Serious Conventions', *Public Law & Legal Theory Research Paper Series*, Working Paper No 09-09, 19 February 2009, 27, https://papers.ssrn.com/abstract=1346360.

[49] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (entered into force 21 October 1950) 75 UNTS 31 (GC I); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (entered into force 21 October 1950) 75 UNTS 85 (GC II); GC III (n 9); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV), art 3.

[50] GC IV (n 49).

[51] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1979) 1125 UNTS 3 (AP I).

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harm. It would simply be false to state that combatants cannot experience harm. Yet, IHL does not seem to emphasise minimising harm to them, instead choosing to emphasise prevention of injury to civilians. Only in a limited way is it concerned with the harm inflicted on (active) combatants, in the sense of prohibiting inhumane means and methods of warfare.[52]

However, many harmful practices are not prohibited when considering the position of combatants. Examples include suicide attacks, conduct attacks that have no chance of succeeding,[53] and the earlier referenced attacks against combatants which are not strictly necessary or provide a definite military advantage.[54] In such a way IHL seems less concerned with preventing harm to combatants; rather, it seems more concerned with the allocation of damage, emphasising the protection of civilians and those no longer able to participate in the conflict. This contrasts with the claim that the goal of IHL is to work towards a minimum amount of harm.

Instead, we can see that contemporary IHL differentiates between the various forms of harm. An example of this would be the various subjects of the Geneva Conventions. GC I and II address those who are no longer able to participate as they are wounded, sick or shipwrecked. GC III emphasises the protection of prisoners of war, who are no longer actively participating in the conflict. Lastly, GC IV addresses the protection of civilians in international armed conflicts. A similar approach can be seen within the relevant parts of AP I. This again highlights that the concerns of these conventions are not the reduction of all harm; instead, the aim is to prevent harm to specific groups.

This departure from utilitarian grounds becomes more visible when examining how this body of law is currently employed. Three main arguments are presented here. Firstly, it is emphasised that the separation between *jus ad bellum* and *jus in bello* signifies the first rejection of utilitarian-based reasoning. Secondly, the nature of the absolute rules within IHL presents a strong argument against a utilitarian interpretation. Lastly, this work will reject the view that IHL is a facultative body of law. A combination of these arguments ultimately rejects the notion that IHL has a utilitarian basis.

3.2.1. *The separation of* jus ad bellum *and* jus in bello

An initial consideration that fails to accommodate a utilitarian perspective is the current split between *jus ad bellum* and *jus in bello*. Within IHL, it is currently the case that[55]

[52] ICRC Study (n 15) rule 70: Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering.

[53] Reference here can be made to the attacks on trenches in the First World War. Currently, there is no rule within IHL that would prohibit such attacks which have little to no chance of succeeding or have the potential to inflict great harm on the individual/unit conducting them. In the words of Hayashi, IHL allows armies to fight 'badly' in this sense: Nobuo Hayashi, 'Military Necessity and the Law of Armed Conflict', Lecture at the Asser Institute, The Hague (The Netherlands), 13 October 2020, https://www.youtube.com/watch?v=Jl59jmO2oWI.

[54] Hampson (n 44) 107.

[55] ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (2015) para 76.

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> the parties to an armed conflict have the same rights and obligations under IHL (even if this is not the case under domestic law). This principle reflects the fact that IHL does not aim to determine the legitimacy of the cause pursued by the belligerents.

A utilitarian perspective would reject this distinction between the bodies of law. It would do so by holding that 'the independence of its two branches cannot be maintained. Whether an act in war is *in bello* proportionate depends on the relevant good it does, which in turn depends on its *ad bellum* just causes'.[56]

Accepting a utilitarian-based perspective on this notion would lead to outcomes different from those currently visible within IHL. An example of this is given by Kamm, who argues that 'the doctor who saved these lives (if not the lives of clearly malicious aggressors) may not have reduced immunity just because of making possible the unjust threat'.[57] The protection within IHL for medical personnel, however, is not based upon the result of their actions but on their status as medical personnel. They are protected if they do not abandon this status by participating directly in hostilities.[58]

Similarly, IHL does not currently accept the notion that proportionality should be judged 'as a proxy for the contribution the act makes to the achievement of the just cause'.[59] It is not widely accepted that proportionality functions in this way, as in both *in bello* and *ad bellum* proportionality is to be judged independently.[60] Even those who base their conflict upon unlawful or immoral terms would have the same rights within the armed conflict and could rely upon a notion of proportionality.

In maintaining this separation, IHL thus does not seem concerned with the contribution to aggregate utility. Instead, it highlights that it is concerned mainly with protecting individuals on different grounds, seemingly implicitly rejecting an appeal to a utilitarian-based form of moral reasoning. This points towards an additional motivation, which is also visible when considering the absolute nature of IHL.

3.2.2. The absolute nature of IHL

Secondly, it is worth highlighting that a utilitarian perspective would have difficulty in accommodating the absolute nature of many of the provisions found within IHL. An example of this is found in Koskenniemi's considerations of the work of Grotius, in which he held that 'law cannot be reduced to prudential or utilitarian maxims; it points to an autonomous "reason" that, he believed,

[56] Thomas Hurka, 'Proportionality in the Morality of War' (2005) 33 *Philosophy & Public Affairs* 34, 45.

[57] This seemingly indicates a belief that doctors who do contribute to 'malicious aggression' would suffer reduced immunity: FM Kamm, 'Failures of Just War Theory: Terror, Harm and Justice' (2004) 114 *Ethics* 650, 690.

[58] ICRC Study (n 15) rule 25: Medical Personnel.

[59] Jeff McMahan, 'Necessity and Proportionality in Morality and Law' in Claus Kreß and Robert Lawless (eds), *Necessity and Proportionality in International Peace and Security Law* (Oxford University Press 2020) 3, 22.

[60] Raphaël van Steenberghe, 'Proportionality under *Jus ad Bellum* and *Jus in Bello*: Clarifying their Relationship' (2012) 45 *Israel Law Review* 107, 123–24.

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enables all humans to grasp the rules that bring them together in civil communities'.[61]

Utility fails to account for the absolute nature of some rules, as[62]

> the claim that one's basic values are served, by a given rule, as far as a rule can be contrived to serve them, when it is admitted that individual acts prohibited by the rule can be seen to serve those values more effectively than compliance with the rule.

There are, however, some rules which are never to be violated within IHL, an example of which would be the absolute prohibition of the intentional killing of civilians.[63] IHL does not allow the argument that non-combatants are sometimes a legitimate target because some might contribute to the broader unjust act (or war effort).[64] IHL does not allow for a 'threshold of causal significance in order for its author to be liable'.[65] Even what Draper refers to as a moderate deontological perspective finds no basis in IHL. Instead, current practice matches more closely with what is portrayed as the absolutist perspective:[66]

> The absolutist believes that certain kinds of actions (intentionally taking innocent life and torture are typical examples) are always wrong, regardless of their consequences. By contrast, the moderate deontologist believes that, although, for example, killing (even intentionally) someone who has a right not to be killed cannot be justified simply by an appeal to overall consequences, if its consequences are good enough, it is justified. Thus, given a moderate deontological perspective, killing one person (who has a right not to be killed) to prevent two murders is (ceteris paribus) unjustified, but killing one person to prevent 10,000 murders is (ceteris paribus) justified.

IHL supports this absolutist perspective, not emphasising any consequence-based reasoning that would allow for intentionally killing civilians. It accepts the proposition that 'the most serious of the prohibited acts, like murder and torture, are not just supposed to require unusually strong justification. They are supposed *never* to be done'.[67]

This is also visible in the minimal ability of states to derogate from their obligations under IHL. Only Article 5 of GC IV seemingly allows for the possibility of minor derogation.[68] In a similar fashion, pleas of a state of necessity

[61] Martti Koskenniemi, 'Imagining the Rule of Law: Rereading the Grotian "Tradition"' (2019) 30 *European Journal of International Law* 17, 50.

[62] Lyons (n 11) 27.

[63] ICRC Study (n 15) Rule 1: The Principle of Distinction between Civilians and Combatants.

[64] Jeff McMahan, 'The Ethics of Killing in War' (2004) 114 *Ethics* 693, 726.

[65] Cécile Fabre, 'Guns, Food, and Liability to Attack in War' (2009) 120 *Ethics* 36, 61.

[66] Kai Draper, *War and Individual Rights* (Oxford University Press 2016) 165.

[67] Thomas Nagel, 'War and Massacre' (1972) 1 *Philosophy & Public Affairs* 123, 142–43.

[68] Yet, even in derogation it would require a baseline of humanity. We have also seen a steady decline in the ability of states to employ reprisals: Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff 2006) 12.

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and self-defence are rejected within IHL.[69] This further highlights how IHL is very much phrased in absolute terms, limiting how states can avoid their obligations. It contrasts with IHRL, under which states are allowed to derogate from their duties in times of emergency.[70]

IHL reflects that 'while the utility of targeting civilians varies, the morality of targeting civilians remains constant'.[71] This further rejects it as a body concerned mainly with minimising harm. Instead, it might refer to more fundamental, deontological notions underlying these legal obligations. An example is Haque's work, in which he argues for a service-based perception of the law of war based upon the deontological norms that morally support these notions.[72] In his view, these norms do not allow for any utilitarian-based reasoning as they offer an inadequate explanation of the current body of rules surrounding armed conflict.

3.2.3. IHL as an enabling law

Recently, a more sophisticated argument surrounding the enabling nature of IHL has been made. This reflects a different utilitarian perception of IHL: one of a law that enables fighting under the banner of the greater good. This argument centres on the enabling function of IHL in relation to the more restrictive regime of IHRL, highlighting the practice in the war on terror. Within this conflict, states have been more willing to avoid the IHRL regime by arguing for the existence of an armed conflict and thus the consequent applicability of IHL. Lieblich highlights that this reflects an enabling function of IHL, as 'if IHL had a primarily constraining function, we would expect the exact opposite'.[73] This is based on the less restrictive status-based targeting regime available within IHL as opposed to a necessity-based regime within IHRL and a more philosophical argument that 'prohibitive law might be understood formally as also implying what is allowed'.[74]

The notion that IHL is facilitative, however, does need to be rejected. The reference to the war on terror does not seem to provide a strong argument. Whereas, in some cases, reference is made to IHL, this represents mainly what Modirzadeh refers to as folk law: 'a law-like discourse that relies on a confusing and soft admixture of IHL, jus ad bellum, and IHRL to frame operations that do not ultimately seem bound by international law'.[75] It represents, at best, a pick and choose of which rules to apply, not based on substantial

[69] International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), UN Doc A/56/10, Commentary to art 25 para 21.

[70] European Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 3 September 1953) 213 UNTS 222 (ECHR), art 15.

[71] Adil Ahmad Haque, *Law and Morality at War* (Oxford University Press 2017) 40.

[72] Adil Ahmad Haque, 'Law and Morality at War' (2014) 8 *Criminal Law and Philosophy* 79, 84–85.

[73] Eliav Lieblich, 'The Facilitative Function of *Jus in Bello*' (2019) 30 *European Journal of International Law* 321, 331.

[74] ibid 330.

[75] Modirzadeh (n 5) 225–26.

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legal reasoning.[76] In this way many of these cases are more of a perversion rather than a strict application of IHL.

The notion that what is prohibited also implies what is allowed finds little support within the legal application of IHL. In general, it has been argued that there should be a restrictive interpretation when considering rules which have not been adequately defined based on the Martens clause.[77] An example of this is visible in many of the cases covering this body of law. The International Criminal Tribunal for the former Yugoslavia (ICTY), for example, has held that a rule of IHL that is not precise enough 'must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians'.[78] It can thus not be assumed that if IHL is silent on a topic, this automatically entails that it is not prohibited.[79]

Doubts can also be cast over the more permissive nature of IHL vis-à-vis IHRL. Human rights courts have hesitated to apply notions of IHRL in armed conflicts. Most notably, the ECtHR, in the recent *Georgia v Russia II* decision, rejected the idea that Russia has jurisdiction, and therefore responsibility, for human rights violations within an armed conflict. In this judgment the Court held that the reality of armed conflict leads to fundamental issues when attempting to apply a human rights framework, as '[t]he very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos means that there is no control over an area'.[80] This has represented a long-standing uneasiness of the Court to consider many cases originating from armed conflict that fall within the human rights jurisdiction of states.[81]

Even where courts have found jurisdiction, IHRL is inherently limited by IHL in many considerations. This is based on the principle of *lex specialis*:[82]

> In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the

[76] An example of this would be consideration of the status of those detained in Afghanistan; see Silvia Borelli, 'Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the "War on Terror"' (2005) 87 *International Review of the Red Cross* 39, 47–52.

[77] Hague Convention (II) (n 38) Preamble.

[78] ICTY, *Prosecutor v Kupreškić*, Judgment, IT-95-16-T, Trial Chamber, 14 January 2000, para 525.

[79] This was known as the 'Lotus' principle, based on an earlier judgment of the Permanent Court of International Justice: PCIJ, *SS Lotus Case (France v Turkey)* (1927) PCIJ Rep (Ser A) No 10. IHL, however, seems to move against such a principle through the earlier cited Martens clause: Hague Convention II (n 38) Preamble.

[80] ECtHR, *Georgia v Russia II*, App No 38263/08, 21 January 2021, para 126.

[81] There has been a general conflict with the ECtHR not wanting to be seen as 'too political' and considering all use of force, especially within armed conflict, and the desire to protect human rights. In practice, however, it has led mainly to the Court using jurisdiction as a limiting factor to apply human rights obligations within armed conflict; see Marko Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23 *European Journal of International Law* 121, 123.

[82] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1966] ICJ Rep 226, [25].

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> conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the [ECHR], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

Outside the International Court of Justice (ICJ), this has also become a generally accepted practice by regional human rights courts, which have a history of employing IHL-based reasoning in dealing with specific cases from armed conflicts.[83]

Whereas it is beyond the scope of this article to engage completely with the notions of extraterritorial jurisdiction and *lex specialis*, it suffices to say for now that the protection offered by human rights might not be as much as initially assumed. Even in cases in which they might be applicable, human rights conventions also still allow for a practice of derogation in instances of war or other public emergencies. This highlights that even human rights 'cannot be disconnected from the reality of armed conflict'.[84] Combining all these factors leads this author to reject the argument that IHL is ultimately facilitative.[85]

This argument is also supported by a further reference to more philosophical considerations. The idea that IHL is facilitative relies upon comparing IHL with a peacetime perspective. The question is whether such a comparison can be justified. Using a Kantian viewpoint, Ganesh recently has argued convincingly for a different perception because '[w]ar, then, is not a fog rendering rights indiscernible or inconvenient, but a tear in the fabric of the *Doctrine of Right*, through which all the contradictions of the state of nature re-emerge'.[86] IHL, in this case, 'represent[s] the adaptation of this morality to the circumstances of war'.[87] Crucial in this consideration is that war lacks the typical public institutions to guarantee regular liberty.[88]

This argument can also be supported by reference to the functioning of IHL. At its very core, IHL limits any pleas of military necessity. This represents a historical change compared with the previous situation, which would be akin to the earlier mentioned *Kraigsraison*. An example is the ban on ammunition below 400 grams in the St Petersburg Declaration and the prohibition of

[83] Floris Tan and Marten Zwanenburg, 'One Step Forward, Two Steps Back? Georgia v Russia (II), European Court of Human Rights, Appl No 38263/08' (2021) 22 *Melbourne Journal of International Law* 136, 144–48.

[84] Nancie Prud'homme, 'International Humanitarian Law and International Human Rights Law: From Separation to Complementary Application', PhD thesis, National University of Galway (Republic of Ireland), 2012, 308.

[85] Practice has indeed demonstrated that courts have considered situations in which IHL applies to be unique and limits the applicability of IHRL; see ECtHR, *Hassan v United Kingdom*, App No 29750/09, 16 September 2014, paras 96–106.

[86] Aravind Ganesh, 'Between Wormholes and Blackholes: A Kantian (Ripsteinian) Account of Human Rights in War' in Ester Herlin-Karnell and Enzo Rossi (eds), *The Public Uses of Coercion and Force: From Constitutionalism to War* (Oxford University Press 2021) 151, 160.

[87] Michael Walzer, 'Response to McMahan's Paper' (2006) 34 *Philosophia* 43, 45.

[88] Ganesh (n 86) bases this on the work of Ripstein: Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press 2009) 9.

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disproportionate attacks. Whereas Lieblich argues correctly that this implies that proportionate attacks and ammunition of or above 400 grams are allowed, this does not entail that IHL loses its prohibitive element and becomes an enabling law.[89] It leads to a situation where it might only be partly prohibitive.

Examples of this are visible in IHL, allowing only for proportionate collateral damage in otherwise legal attacks.[90] Likewise, IHL limits the cases in which claims of military necessity can be invoked.[91] In this way it is argued that IHL is still prohibitive. Whereas this prohibition might only be partial, it still represents a prohibition of the historical 'all is fair in love and war' principle. In such a way it is believed that the law of war should still be considered prohibitive.

This prohibitive nature poses further difficulty when framing IHL in utilitarian terms. If this were the case, IHL would ultimately facilitate the greater good. It, however, directly moves against the earlier mentioned statement in the Lieber Code, in which it was argued that sharp wars are better as they limit the exposure to armed conflict.[92] IHL does, in this way, adopt a prohibitive viewpoint.

A combination of these arguments leads this article to reject the notion that the basis of IHL can be framed in utilitarian terms. Instead of a utilitarian basis, it will be argued in the next section that IHL is best perceived as a combination of two principles to which objection cannot reasonably be made. The following section will present the argument that IHL moves beyond a utilitarian basis and has its moral validation within a core principle of humanity limited by military necessity.

4. International humanitarian law and contractualism

As utilitarianism is rejected as a basis for IHL, different moral considerations must be explored. The alternative basis that this article proposes is that of contractualism. This is based upon the traditionalist moral perception of just war theory, as put forward by Walzer.[93] This represents a more principle-based approach to the morality of war than the previously mentioned pieces.[94] Instead of emphasising utilitarian-based reasoning, he takes the perspective that the ethics of war is based on more than utilitarian terms. For example, Walzer argues for broad protection of individuals unless they are 'currently

[89] Lieblich (n 73) 330.

[90] Jeroen van den Boogaard, *Proportionality in International Humanitarian Law: Principle, Rule and Practice*, PhD thesis, University of Amsterdam (The Netherlands), 2019, 376–79.

[91] Hayashi (n 43) 58.

[92] Lieber Code (n 39) art 29.

[93] For a broader overview of the debate of both theories see James Pattison, 'The Case for the Nonideal Morality of War: Beyond Revisionism versus Traditionalism in Just War Theory' (2018) 46 *Political Theory* 242, 256–62.

[94] As opposed to another main approach: namely, that of the revisionists who argue for a more utilitarian-based reasoning; see Seth Lazar, 'Evaluating the Revisionist Critique of Just War Theory' (2017) 146 *Dædalus, Journal of the American Academy of Arts & Sciences* 113, 113–14.

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engaged in the business of war' as combatants.[95] The key to this loss of protection is their participation in the war and not any negative utility that might be caused.

This example highlights that Walzer, throughout his work, argues for a more robust perception than negative utility forming the moral validations for IHL. He argues:[96]

> A legitimate act of war is one that does not violate the rights of the people against whom it is directed … no one can be forced to fight or to risk his life, no one can be threatened with war or warred against, unless through some act of his own he has surrendered or lost his rights.

Outside those who have surrendered their rights by participating in the conflict, '[e]veryone else retains his rights, and states remain committed, and entitled, to defend these rights'.[97] Instead of the awkward fit with utilitarianism, such an explanation does more justice to the current practice of IHL. It also correctly reflects that this body of law is less concerned with legal harm inflicted upon combatants, but mainly serves to protect those outside the conflict.

The work of Walzer is also a rejection of utilitarian principles. It does so on grounds similar to contractualism, highlighting that '[t]he role of principles in contractualism is fundamental; they do not enter merely as devices for the promotion of acts that are right according to some other standard'.[98] This presents a fundamental conflict with a utilitarian perception, where 'it makes no moral difference how benefits and burdens are distributed between different people'.[99] It seemingly points towards stronger, deontological notions underlying this law.

Instead of a utilitarian-maximising regime, IHL seemingly adopts an approach closely related to this contractualist perspective. Instead of focusing on negative utility, it poses some vital moral principles that ultimately lead to rules.[100] Within this reasoning, it is the case that '[e]veryone ought to follow the optimific principles, because these are the only principles that everyone could rationally will to be universal laws'.[101] What matters is not the aggregate of maximal utility; instead, preference is given to a logical system in which the principles can be defended. This has also been held by Scanlon, arguing that[102]

> [w]hat is primary, it might be said, is the value of people's lives, or the moral legitimacy of their claims … To say that a moral person cares about the justifiability of his or her actions to others is at best a roundabout way of saying that such a person is concerned to act in a way that is responsive to the value of others' lives and to their valid moral claims.

[95] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Basic Books 2015) 43.
[96] ibid 135.
[97] ibid 136.
[98] Scanlon (n 12) 120.
[99] Derek Parfit, *On What Matters: Volume Two* (Oxford University Press 2011) 196.
[100] Scanlon (n 12) 110.
[101] Derek Parfit, *On What Matters: Volume One* (Oxford University Press 2011) 411.
[102] TM Scanlon, *What We Owe to Each Other* (Harvard University Press 1999) 169.

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These arguments and value of human life are similar to those of Walzer and his point about combatants. Indeed, Scanlon agrees with Walzer, 'seeing human lives as something to be respected, where this involves ... reasons to protect them'.[103] Ultimately, this value of human life 'makes it reasonable for us to treat others only in ways that accord with the principles that reasonable individuals would not reject'.[104]

This principle of humanity reflected within IHL forms the first basis for the moral nature of IHL. An example of this is found in the work of Corn, highlighting in his article on responsible command that[105]

> IHL provides them with a moral framework that allows them to reconcile their individual participation in the brutal endeavour that is 'war' with the innate sense of morality that we hope all individuals will retain as they transition from civilian to soldier and back again.

It points towards a rejection of utilitarian-based principles and instead highlights more vital underlying notions that provide moral validation.

This ties in with the notion of IHL as a prohibitive body of law,[106] concerned with protecting the principle of humanity within armed conflict. Such an interpretation supports a similar perception of rights as those that Scanlon holds, as[107]

> [t]he moral rights I was concerned with place demands on what laws and other institutions must be like. ... If rights serve as 'trumps' or 'side constraints' limiting what can be done for such apparently strong reasons, this special moral authority needs to be explained.

Walzer held that IHL would be based upon what is 'entailed by our sense of what it means to be a human being'.[108] This points towards humanity as an underlying principle of IHL, in a similar philosophical sense to IHRL.

Like the argument made here, within IHRL it is visible that human rights have a robust deontological basis, based upon a shared notion of humanity. Whereas there have been utilitarian critiques of these notions,[109] we currently see in practice that human rights are seen mainly as a protection against 'unbridled calculations of utility'.[110] IHL and IHRL serve to protect individuals against utility-based reasoning leading to the abandonment of their rights. Like the argument advanced by Lyons and throughout this article, they

[103] ibid 104.

[104] Eric Mack, 'Scanlon as Natural Rights Theorist' (2007) 6 *Politics, Philosophy & Economics* 45, 62.

[105] Geoffrey S Corn, 'Contemplating the True Nature of the Notion of "Responsibility" in Responsible Command' (2014) 96 *International Review of the Red Cross* 901, 908.

[106] Haque (n 71) 19–55. This is also supported by the earlier reference to the work of Ganesh and the return of the state of nature within armed conflict.

[107] TM Scanlon, 'Reply to Leif Wenar' (2013) 10 *Journal of Moral Philosophy* 400, 401.

[108] Walzer (n 95) 54.

[109] Schofield (n 46).

[110] Andrew Heard, 'Human Rights: Chimeras in Sheep's Clothing?' (1997), http://www.sfu.ca/~aheard/417/util.html.

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seem to reflect a more substantial basis, meaning that calculations based upon utility cannot displace these rights.[111]

To reflect this similarity, contractualism provides a better moral grounding for the role that humanity and military necessity play within IHL. It matches up better with many of the critiques posed towards utilitarianism earlier in this article. IHL, however, is not only formed by a principle of humanity, as it is generally accepted that it is also influenced by a notion of military necessity present throughout this body of law. Here it is worth considering further what Scanlon meant with his principles. The basis of principles is formed by the consideration that[112]

> [a]n act, A, is wrong [in the narrow sense of violating moral demands arising within DDO] if and only if any principle that permitted A could reasonably be rejected by people moved to find principles for the general regulation of behavior that others, similarly motivated, could not reasonably reject (or, equivalently, if and only if A would be disallowed by any principle that such people could not reasonably reject).

In this author's eyes, military necessity also represents a principle which could not be reasonably rejected on the grounds of the unique nature of armed conflict.

Some arguments can be presented to support such a perception of military necessity. This can be based upon the individual principle, which entitles individuals to protection accumulated within existing states.[113] In this way the simple fact that military necessity might lead to potential harm is not enough for a moral rejection of the principle. It represents an ethical recognition that whereas the moral aim within armed conflict is humanity, the realities of the situations occasionally require actions that might not completely follow this principle. In this sense, military necessity represents the desire of states to retain 'an ability to pursue and safeguard vital national interests'.[114] A rejection of that principle would amount to an overtly optimistic viewpoint on the absence of conflict. It also fails to understand the application of IHL, as IHL applies only in situations in which an armed conflict is already occurring.[115] In this way, it has already moved past pacifist arguments.

Scanlon also took this on board when considering the notions of 'terror bombing' and 'tactical bombing'. We can see this in the following section, which is worth citing in full:[116]

[111] Lyons (n 11) 27.

[112] DDO here refers to the 'domain of duties to others', pivotal within Scanlon's philosophy of what individuals owe to each other and what can be morally validated: Thomas W Pogge, 'What We Can Reasonably Reject' (2001) 11 *Philosophical Issues* 118, 119.

[113] Walzer (n 95) 54.

[114] Michael N Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50 *Virginia Journal of International Law* 795, 799.

[115] ICTY, *Prosecutor v Tadić*, Judgment, IT-94-1-A, Appeals Chamber, 15 July 1999, para 70.

[116] Note here that Scanlon does not rely upon utility but emphasises the role of principles which can be defended: TM Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Harvard University Press 2008) 28–29.

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> The principle relevant to these cases states a class of exceptions to the general prohibition against the use of deadly force, and specifies the limits of those exceptions. It can be seen as having something like the following form. In war, one is sometimes permitted to use destructive and potentially deadly force of a kind that would normally be prohibited. But such force is permitted only when its use can be expected to bring some military advantage, such as destroying enemy combatants or war-making materials, and it is permitted only if expected harm to noncombatants is as small as possible, compatible with gaining the relevant military advantage, and only if this harm is 'proportional' to the importance of this advantage ....
>
> If there is no munitions plant, but a bombing raid that would kill the same number of noncombatants would hasten the end of the war by undermining morale, this raid (a pure case of 'terror bombing') would be not permissible under the rationale just given. It is impermissible because it can be expected to kill people, and the circumstances do not provide a justification for doing this under the principle just stated.

This demonstrates how a contractualist perspective can also incorporate conflicting interests. Whereas the general rule would be one of humanity, contractualism can recognise that specific situations might sometimes trump this principle. Military necessity would reflect the reality of armed conflict in these situations, forming a principle that cannot be reasonably rejected.

This matches closely the reasoning visible within IHL. We can see that, as a general principle, it aims to limit the application of military necessity through humanity consistently. IHL attempts 'to reduce, as far as possible, the range of belligerent conduct whose compliance or non-compliance with the law is left to a crude utilitarian interest-balancing exercise'.[117] Wherever such exercises are allowed, they are inherently limited and not visible throughout the entire body of law. The prime example here is proportionality, which is applicable only in otherwise lawful attacks in specific cases.[118] It reflects the view that whereas positive law, which would allow for intentional targeting, cannot be reasonably defended, the notion that there is occasional collateral damage represents the reality with which the law functions. This matches up closely with the above-cited considerations by Scanlon, with military necessity and humanity as two principles that cannot reasonably be rejected.

It is worth highlighting here that this does not entail that the consequences of such principles are always positive. Contractualism can also allow for actions that harm some, provided that the underlying motivation is just. Crucial here is that they can be defended coherently. The general interest can, in these ways, also trump a personal interest.[119] In such cases proper weight must be given to these interests, leading to a critical instead of deliberative use of

[117] Hayashi (n 45) 63.

[118] Van den Boogaard (n 90) 376–79.

[119] For a negative example of this, with regard to duelling and contractualism, see Hon-Lam Li, 'Contractualism and Punishment' (2015) 34 *Criminal Justice Ethics* 177, 186–87.

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principles.[120] IHL reflects this by limiting the instances in which military necessity is allowed to be invoked. This would be based upon a balance between the solid personal reasons against it by individuals who are negatively affected by harm as a community, which has a vested interest in ending the conflict. It does so in a way that matches closely with the philosophical reasoning visible in contractualism.

In this way, military necessity allows for some deviation from the core principle of humanity. However, it does so in a way that is in line with the contractualism advanced by Scanlon, on grounds justifiable to others. Military necessity is justified with reference to the principle that some actions are morally just if they are aimed at ending the conflict. It forces combatants, whenever they claim that an act is militarily necessary, to explain this in both a legal and moral sense that can be defended in the context of armed conflict. In this way, military necessity can be supported as it needs to be explained whenever invoked. Furthermore, it is not arbitrary and is inherently limited to only a narrow range of permissible actions.

In this way, the philosophical reasoning within contractualism matches up closely with the practice in IHL.[121] This leads this article to argue that, in a moral sense, IHL is best seen as a form of contractualism. Crucial here is the critical notion that IHL represents duties that we owe to others on the ground of a shared sense of humanity, limited by the recognition of military necessity. The role played here by the principles of humanity and military necessity highlights how this matches up more closely with a contractualist than the utilitarian viewpoint.

4.1. Core principles and notions of redress

Accepting that the moral foundations of IHL are formed by principles and very much inspired by the core tenets of humanity and military necessity should also influence the approach towards reparations. It would be, in this context, an oversimplification to say that an annulment thesis can justify the lack of the ability of an individual to claim compensation for violations. This would fail to emphasise the equality that is assumed within this moral reasoning as actions that need to be able to be defended towards other human beings.[122] It would fail to recognise the equality of human beings assumed here, and fail to account for the notion that there would be an ethical demand to pose an explanation to the individual.

These principles highlight how it is not a utilitarian balancing exercise but how IHL is built upon what Scanlon refers to as the roundabout recognition of

[120] Kasper Lippert-Rasmussen, 'Scanlon on the Doctrine of Double Effect' (2010) 36 *Social Theory and Practice* 541, 546.

[121] Perhaps the most notable difference is that Scanlon does not seem to give the same weight to intention as a morally justifiable clause, which IHL seemingly does in the difference between distinction and proportionality. His use of principles, however, lead his conclusion to be similar to the reasoning under IHL; see Scanlon (n 116) 32.

[122] Scanlon (n 102).

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moral equality.[123] By demanding an explanation in principles which can be reasonably defended, IHL seems also to recognise very much, in a philosophical sense, the value of human beings. This also places a moral emphasis on recognising individuals within redress, as a consequence of their humanity. An example of this can be found in the considerations by Honneth, who argues that[124]

> [t]o this extent every human subject is dependent, in an elementary way, on a context of social forms of interaction that are regulated by normative principles of mutual recognition; and the absence of such recognition relations will be followed by experience of disrespect or humiliation that cannot be without damaging consequences for the single individual's identity formation.

This emphasis on recognising would also be crucial for violations of IHL, with their core reference towards humanity. Violations, in this context, are seen as an infringement upon personal dignity.[125]

This should also influence the approach taken towards reparations. Emphasis should be given to the individual's autonomy and ability to act. It supports the conception that 'the point of liability is to undo the injustice that the plaintiff suffers at the defendant's hand'.[126] This would already lead to a need to further consider the relationship between the offender and the victim. This is visible in Coleman's combined view, arguing that[127]

> [c]orrective justice imposes on wrongdoers the duty to repair their wrongs and the wrongful losses their wrongdoing occasions. The duty to repair the wrong follows from the relational view; the importance of wrongful losses to the demands of corrective justice is a remnant of the annulment view.

This relationship makes it more important that individuals themselves have standing. As opposed to the annulment view, the notion that this relationship matters makes it insufficient to have a third party – in this case, the state – to advocate for the relationship between individuals.

Redress would then also need to recognise the basic humanity upon which these notions are based. A failure to recognise these human deontological grounds represents a further humiliation representing 'any sort of behavior or condition that constitutes a sound reason for a person to consider his or her self-respect injured'.[128] This would be based upon a failure to argue for

[123] ibid.

[124] Axel Honneth, 'Recognition and Justice: Outline of a Plural Theory of Justice' (2004) 47 *Acta Sociologa* 351, 354.

[125] Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 2015) 19.

[126] For the purpose of this article, the defendant here refers to the offending state; see Ernest J Weinrib, *Corrective Justice* (Oxford University Press 2012) 9.

[127] Coleman (n 32) 441.

[128] Avishai Margalit, *The Decent Society* (Naomi Goldblum tr, Harvard University Press 1996) 9.

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restoring the core tenet of humanity, which should have led to respect for these rights.

This is further highlighted in the work of Pemberton and Letschert. Relying upon sociology to analyse the effects of atrocity crimes, they put forward the notion that this leads to a situation akin to an ontological assault. This represents two key characteristics:[129]

> First, it concerns the direct onslaught on the victim's existence or the confrontation with the actuality of one's demise, and the end of one's being. Second, precisely in what the ontological assault diminishes/damages/destructs, it also exposes features of one's being that hitherto were taken for granted and/or remained implicit.

Taking the deontological humanitarian nature of IHL as a starting point, it becomes visible how violations also represent such an ontological assault. It can do so in the first way by denying the humanity of victims of violations. Similarly, the second element can also be relevant by highlighting that respect for their status as human beings is not a given. Both situations lead to a strong moral imperative to allow for individual redress. Relying upon other parties in this context does not adequately address these issues.

Accepting that violations of IHL thus do not simply represent a violation of negative utility, but rather a violation of a core moral value of humanity, places emphasis on the standing of individuals to be able to take a proactive position within these processes and have their harm recognised. It highlights the need for 'public acknowledgements of victims' harm and symbolic redress to reaffirm their dignity'.[130] This is especially true as we are referring to 'maximally weighty moral claims' because of their basis within the value of humanity.[131] In such a way it is argued that the notion of humanity also reflects a need to recognise this within the consideration of redress for violations.

Some, however, might argue that prerogatives are validated through military necessity. Historically, claims of necessity have been used mainly to deny individuals redress because 'functionalism is the logical choice of the recognized theories when searching for a general theory for international prerogatives'.[132] Framed in such a context, it would be necessary for the military to conduct operations at liberty and not be limited by any redress claims. Two points, however, are worth making in this context.

The first is that state practice has moved in a different direction. An example is the engagement of many states with *ex gratia* payments, which

[129] Antony Pemberton and Rianne Letschert, 'Victimology of Atrocity Crimes' in Barbora Holá, Hollie Nyseth Nzitatira and Maartje Weerdesteijn (eds), *The Oxford Handbook on Atrocity Crimes* (Oxford University Press 2022) 461, 462.

[130] Luke Moffett, 'Transitional Justice and Reparations: Remedying the Past?' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar 2017) 377, 381.

[131] Shelton (n 125) 19.

[132] David B Michaels, *International Privileges and Immunities: A Case for a Universal Statute* (Martinus Nijhoff 1971) 50.

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are based often on the need to engage with the population.[133] Such an approach was also visible in the philosophy of former US Army General David Petraeus regarding the conflict in Iraq.[134] As is visible in the discussion surrounding the immunities of international organisations during military operations, the argument is now made that a functional (or necessary) argument can also be made for engaging with redress to achieve operational objectives.[135] This seems to recognise a perception that military necessity might also look favourably upon realising an individual right to reparation.

As a second point, it is worth highlighting that military necessity is ultimately neutral in the moral sense. Whereas humanity places demands on individuals in a moral sense, military necessity only allows for derogation; however, it does not demand derogation.[136] Military necessity is also inherently limited to those positive legal obligations explicitly referring to them.[137] Humanity does not share this weakness, as '[a]ffirmative aspects of humanity and chivalry may survive the process of LOAC norm-creation and operate as additional layers of lawfulness determination over positive LOAC'.[138] As an example, reference can be made to the commentary on Common Article 3 in which the ICRC stated:[139]

> Care has been taken to state, in Article 3, that the applicable provisions represent a compulsory minimum. The words 'as a minimum' must be understood in that sense. At the same time they are an invitation to exceed that minimum.

This also points towards the limited role of military necessity when compared with humanity.

Arguing against individual redress, or standing for such redress, upon grounds of military necessity also fails to understand the contractualist notions upon which these claims are based. It fails to acknowledge the role that military necessity has as a principle, which can explain some actions. Yet, it does not allow for an argument that no response has to be given.

[133] Amsterdam International Law Clinic, 'Monetary Payments for Civilian Harm in International and National Practice', Center for Civilians in Conflict, 2013, https://ailc.uva.nl/binaries/content/assets/subsites/amsterdam-international-law-clinic/reports/monetary-payments.pdf.

[134] HQ Multi-National Force, 'Multi-National Force Iraq Counterinsurgency Commanders Guidance' in Thomas E Ricks, *The Gamble: General David Petraeus and the American Military Adventure in Iraq, 2006–2008* (Penguin Books 2010) 367.

[135] Such an argument has not only been made for states, but also for, among others, non-state armed groups and international organisations: Niels Blokker, 'International Organizations: The Untouchables?' (2013) 10 *International Organizations Law Review* 259, 275; and Luke Moffett, 'Violence and Repair: The Practice and Challenges of Non-State Armed Groups Engaging in Reparations' (2020) 102 *International Review of the Red Cross* 1057, 1071.

[136] Hayashi (n 53).

[137] ICRC Study (n 15) rule 50: Destruction and Seizure of Property of an Adversary.

[138] Hayashi (n 42) 105.

[139] JS Pictet (ed), *Commentary to the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC 1958) 52.

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This fails to account for the (moral) notion that these principles must be defended in duties owed to others.

Lastly, it is worth highlighting that there might also be utilitarian arguments towards recognising individual redress. It could, for example, be advanced that general recognition of individual claims would lead to a net gain of utility. Yet, within the context of this article, the chosen approach is different as it argues why such an approach is necessary. It is argued here that the contractualist nature of IHL requires a notion of individual redress to recognise the core value of humanity.

To conclude, it can be seen that there is a robust moral demand that individual violations are also recognised as violations of rights based upon the humanity of individuals. Whereas a historical perception of military necessity might argue otherwise, it should be concluded that this notion is changing. Likewise, military necessity is neutral because it does not pose moral demands but only allows for specific derogations and has given way to humanitarian concerns within the reasoning of IHL.

This leads to a moral demand for the recognition of individuals within IHL. This demand is, however, moral. As noted in the first section, currently it is not legally enforceable and has not led to broad recognition of individual claims based on IHL. As a potential bridge between the demands of morality and current legal practice, this work proposes that human rights law can be used as an intermediary.

5. The intermediary role of human rights

Reflecting upon the role of principles, it becomes clear then that this also ultimately represents the requirement of validating moral justification to others. This demonstrates a need for the principle of humanity to pose a moral obligation to be able to defend these notions towards others. Yet, the principle of humanity currently does not have any legal effect. This position is supported by case law, in which humanity is often posed as an 'underlying' principle. Such a position also seems to be taken by the ICJ in the *Nicaragua* case, basing its application of the general principles of IHL on the 'elementary considerations of humanity'.[140] Dinstein appears to indicate within the citation in the introduction to this article that humanity represents the considerations underlying the notions of IHL.[141] Here it has often been argued that this entails not the form of a legal principle but more of a foundation of the legal framework. Humanity, here, has a different effect, serving as a foundation: 'Foundations of a legal framework are norms underlying the legally binding norms. Unlike principles and rules, foundations are not legally binding, but contain the rationale for that legal framework'.[142]

[140] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* Merits, Judgment [1986] ICJ Rep 14, [218].

[141] Dinstein (n 8).

[142] Jeroen van den Boogaard, 'Reimagining IHL Principles Part I: The Wrong Principles', *Articles of War*, 8 December 2020, https://lieber.westpoint.edu/reimagining-ihl-principles-part-i-wrong-principles.

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This creates a difference between humanity and the 'cardinal' principles of IHL.[143] As noted by Winter, humanity cannot supersede positive rules.[144] This further leads to it not satisfying the criteria of a legal principle.[145] In concrete terms, this was confirmed by the ICTY with the statement that humanity is not 'elevated to the rank of independent sources of international law, for this conclusion is belied by international practice'.[146] This entails that direct legal obligations cannot be derived from it.[147]

Instead, the status of humanity is more that of a moral principle. This is best put forward by Larsen, arguing that 'whereas a "principle of humanity" has little (if any) legal effect … a "principle of humanity" can, at best, be perceived as a moral obligation'.[148] Instead of offering a legal effect, it poses a moral obligation at the core of the conception of IHL. This is also visible in the jurisprudence of the ICTY in stating that '[t]he general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law'.[149] This does not give it legal effect but does make a moral demand of the regime. The critical value of humanity here morally demands that redress is seen as more than the replacement of utility.

Whereas IHL has not been very forthcoming in recognising individual claims, human rights have a long tradition of considering such claims. This is based on regional and international systems that recognise the direct standing of individuals.[150] The Universal Declaration of Human Rights, seen as the starting point of the human rights reasoning within international law, already referred to the notion that everyone who has these rights violated should have recourse to a remedy.[151] Whereas reference here is first made to national authorities, we have also seen the adoption of a wide range of bodies that can hear complaints from individuals.

[143] Elliot Winter, 'Pillars not Principles: The Status of Humanity and Military Necessity in the Law of Armed Conflict' (2020) 25 *Journal of Conflict and Security Law* 1, 3.

[144] ibid 16–17.

[145] Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 *Yale Law Journal* 823, 837.

[146] *Prosecutor v Kupreškić* (n 78) para 525.

[147] For more on principles, specifically within IHL, see Jeroen C van den Boogaard, 'Fighting by the Principles: Principles as a Source of International Humanitarian Law' in Mariëlle Matthee, Brigit Toebes and Marcel Brus (eds), *Armed Conflict and International Law: In Search of the Human Face* (TMC Asser 2013) 6–10.

[148] Kjetil Mujezinović Larsen, 'A "Principle of Humanity" or a "Principle of Human-Rightism"?' in Kjetil Mujezinović Larsen, Camilla Guldahl Cooper and Gro Nystuen (eds), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge University Press 2013) 124, 143.

[149] ICTY, *Prosecutor v Furundžija*, Judgment, IT-95-17/1-T, Trial Chamber, 10 December 1998, para 183.

[150] For regional obligations, see ECHR (n 70) art 13; American Convention on Human Rights (entered into force 22 November 1969) 1144 UNTS 123, arts 10, 63 and 68. Whereas the African Charter does not contain an explicit reference to a remedy, the court has interpreted it to hold an obligation to offer an effective remedy: African Commission on Human and Peoples' Rights, *Jawara v The Gambia*, Comm. No. 147/95-149/96, 11 May 2000, para 31.

[151] Universal Declaration of Human Rights, UNGA Res 217A(III) (10 December 1948), UN Doc A/810, art 8.

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Individuals have mostly been able to apply to these institutions directly, without the need for a state to argue on their behalf.[152] In a similar fashion, reparations have also been awarded to the individual and not to states. Whereas IHRL has not been unique in this sense, as in other cases, mention has been made of the potentiality of recognising individual rights; the scale and systematic nature at which the human rights field has done so has very much inspired this development within international law.[153]

As direct legal interpretations that support this notion of humanity have been lacking in both case law and the practice of established reparations programmes, the practice of IHRL could be used to strengthen this argument. It could do so by highlighting the broad recognition of individuals within this field of law. This development could support an interpretation that would look favourably upon recognising claims of individuals, as it supports the argument that[154]

> [t]here is a set of fundamental rights that protect individuals in times of peace and war. When these substantive rights are breached, victims have a right to reparation by virtue of the applicable human rights conventions and CIL. There is no clear competing rule in IHL that excludes individual reparation.

We can already see how human rights have inspired individual claims in other traditional state-dominated fields of international law. A prime example of this is the case of diplomatic protection, which has changed from a state prerogative to a right based on an individual claim for compensation.[155] Similarly, the International Criminal Court has recognised a personal right to reparation.[156]

Relying on these broader developments, courts could argue for an interpretation that would recognise individuals' direct standing. This would be justified by considering that international law, inspired by an engagement with human rights law, has developed towards a general recognition of individuals and that conventions should be interpreted in line with these developments. This would reflect the notion that 'there does appear to be a right to compensation for

[152] Some conventions require states to adopt an additional optional protocol (eg International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171; Convention on the Elimination of All Forms of Discrimination against Women (entered into force 3 September 1981) 1249 UNTS 13).

[153] Shelton (n 125) 241–49.

[154] Gabriela Echeverria, 'The UN Principles and Guidelines on Reparation: Is there an Enforceable Right to Reparation for Victims of Human Rights and International Humanitarian Law Violations?', PhD thesis, University of Essex (United Kingdom), 2017, 211; CIL here refers to 'customary international law'.

[155] cf ICJ, *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* Judgment [2012] ICJ Rep 2012, [57] with PCIJ, *The Mavrommatis Palestine Concessions*, Objection to Jurisdiction of the Court (1924) PCIJ Rep (Ser A No 10) 12.

[156] This is at the discretion of the Prosecutor, though, and is not available directly through individuals, as is the case with bodies such as the human rights court; see Luke Moffett and Clara Sandoval, 'Tilting at Windmills: Reparations and the International Criminal Court' (2021) 34 *Leiden Journal of International Law* 749, 758.

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victims under international law'.[157] The human rights reasoning could further inspire these developments and allow individual victims to claim redress for violations of IHL directly. This could also be argued upon the grounds that such an interpretation would more closely reflect the current interpretations visible in international law.[158]

In such a way, IHRL can make a valuable contribution to ensuring normative consistency within IHL. IHRL can help to bridge the gap between the moral foundations of IHL and its current legal practice, offering a coherent normative framework.[159] It can give legal effect to the moral reasoning visible throughout the body of IHL, ensuring that the value of humanity is given its proper weight and legal appreciation. It can lead to a situation in which the moral value of humanity is consistent, and is also reflected within international law after a violation has taken place.

6. Conclusion

As noted by Modirzadeh in her opening to the 16th Minerva Conference, philosophical considerations contribute to the difficulty in applying IHL.[160] This article would argue that this difficulty is not only limited to application issues but also to redress after a violation. Whereas much attention has been paid to ethical considerations during applications, moral considerations of redress within IHL have been more limited. Relying upon the broader philosophical work surrounding the law of war, this article attempts to draw some conclusions.

In broad terms, it has been argued that the moral underpinning of IHL by humanity also entails that it is essential to recognise the humanity of victims whenever these rights are violated. Not allowing individuals to claim reparations directly does so in an insufficient way. This would be acceptable only if we accept the notion that IHL represents consequentialist reasoning based upon limiting the negative utility impact of armed conflict. Such reasoning does not fit within the current practice of IHL, as it can be seen to be worded in stronger terms. It represents a core moral principle of humanity, which morally validates an approach in which individuals would have a direct claim for redress. This moral foundation of IHL validates the role of human rights in bridging the gap between morality and legal practice. In this way, human rights can be used to match more closely the moral foundations of

[157] This statement, however, did point to a general difficulty in finding a forum through which this right could be enforced: United Nations Security Council, 'Letter dated 2 November 2000 from the Secretary-General Addressed to the President of the Security Council' (3 November 2000), UN Doc S/2000/1063, para 21.

[158] See also, eg, the argument by Gaeta that customary law should be interpreted as to what it constitutes now rather than the historic definition: Gaeta (n 14) 310.

[159] Hans Köchler, 'Normative Inconsistencies in the State System with Special Emphasis on International Law' in Giuliana Ziccardi Capaldo (ed), *The Global Community Yearbook of International Law and Jurisprudence 2016* (Oxford University Press 2017) 175, 175–76.

[160] Naz Modirzadeh, 'Keynote Lecture', speech delivered at the 16th Minerva Conference, 8 November 2021, https://en.minervacenter.huji.ac.il/2021-events.

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the current IHL system and ensure that the role of humanity within IHL is given its proper weight.

Ultimately, this work concludes that there is value in using IHRL to bridge the gap between morality and IHL. IHRL can offer a bridge towards the moral demands of redress, currently not given legal effect in IHL. This work thus argues for a heightened interaction between the two bodies, but in a limited fashion. It has no desire to argue for a broader application of IHRL during armed conflict or for it to overturn IHL.[161] It mainly sees the value of human rights in a more limited fashion, ensuring that the redress for violations of the existing *lex lata* of IHL is taken more seriously. It believes this to be supported by a reference to the moral underpinnings of this body of law, as these seem to indicate strong support for a core tenet of humanity.

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[161] Dinstein argued passionately against this, stating that it would lead to 'a legal regime change that will revolutionize the field by making hostilities impossible to engage in effectively': Yoram Dinstein, 'Concluding Remarks: LOAC and Attempts to Abuse or Subvert It' (2011) 87 *International Law Studies* 483, 492.

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