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## **Colloquium in Legal, Political, and Social Philosophy**

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Sophia Moreau and Liam Murphy**

**Speaker: Marcela Prieto, USC Gould School of Law  
Paper: Is International Humanitarian Law Humanitarian?**



**Colloquium Website: <http://www.law.nyu.edu/node/22315>**

## Is International Humanitarian Law Humanitarian?

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*Abstract.* The *jus in bello*, that is, the law that regulates conduct during armed conflict, is often called “International Humanitarian Law” (IHL). This name suggests that the law that regulates conduct in war is, indeed, “humanitarian.” But is it? Should it be? And does it matter? This Article argues that it isn’t (at least not in any obvious sense), that it probably shouldn’t be, and that the misperception that IHL is humanitarian matters.

The Article starts by distinguishing two senses in which something can be “humanitarian:” the negative-utilitarian and the rights-based sense. Then, in section 2, the Article argues that IHL does not qualify as “humanitarian” in any of these senses, unless we make major concessions that end up robbing the label “humanitarian” of its positive connotations. In section 3, the Article considers whether the label “humanitarian” is nothing but an aspiration for IHL to realize. It argues that even as an aspiration, it does little work. Finally, the Article argues that the misperception that IHL is humanitarian might obscure the political choices and the moral costs of regulating war.

### INTRODUCTION

When I teach International Humanitarian Law (IHL), my students are often surprised to learn that the law doesn’t categorically prohibit the killing of civilians in war, but only killings that are intentional or disproportionate to the concrete and direct military advantage gained by an attack against a lawful military objective.<sup>1</sup> They are also surprised to find out that IHL is symmetrical—that is, that under IHL combatants are lawful targets irrespective of whether they are fighting a legal or illegal war.

Their surprise seems entirely understandable to me. The laws that regulate conduct in war (also known as the *jus in bello*) are often referred to as “International Humanitarian Law.” Referring to the *jus in bello* in this

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Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.

way is, of course, a relatively recent phenomenon.<sup>2</sup> The term “IHL” was not mentioned in the documents leading to the 1949 Geneva Diplomatic Conference, the four Geneva Conventions, or the Additional Protocols.<sup>3</sup> There is no mention of “IHL” in any international treaty before the 1981 Convention on Certain Conventional Weapons.<sup>4</sup> In fact, the name “IHL” is largely a twentieth-century invention of the International Committee of the Red Cross (ICRC)<sup>5</sup> and of a group of international lawyers operating during the 1990s.<sup>6</sup>

Further, referring to the *jus in bello* as “International Humanitarian Law” is not universally embraced. David Luban recounts an observation made by a military lawyer about those who refer to the *jus in bello* as IHL and those who refer to it as the law of armed conflict (LOAC): the first ones are in the “business of saving lives;” the latter are “in the business of killing.”<sup>7</sup>

As we study IHL, my students become increasingly baffled by its name. How do we measure the value of lives against some concrete and direct military advantage? Why can combatants be killed at any time and no matter what they are doing? What is “humanitarian” about *that*? What is, in fact, humanitarian at all about IHL?

My students confront what military advisors and some scholars are already keenly aware of: IHL is not the same as International Human Rights Law (IHRL). It is also not just a set of prohibitions but also contains permissions (or immunities) that both constrain and facilitate conduct in war—conduct that would be unlawful in times of peace.

Like my students, recent scholarship has expressed varying degrees of discomfort with both the humanitarian project and its label.<sup>8</sup> And, like

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<sup>2</sup> Nathaniel Berman, *Privileging Combat-Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT’L L. 1, 3 (2004).

<sup>3</sup> Page Wilson, *The Myth of International Humanitarian Law*, 93 INTERNATIONAL AFFAIRS 563, 564 (2017).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 567.

<sup>6</sup> Sagnik Das, *The Humanitarian Lawyers*, 135 YALE LJ 1619 (2025).

<sup>7</sup> David Luban, *Military Necessity and the Cultures of Military Law*, 26 LEIDEN JOURNAL OF INTERNATIONAL LAW 315, 315 (2013).

<sup>8</sup> See e.g., Eitan Diamond, “Humanitarian” Killing Zones, EJIL: Talk! (Aug. 22, 2025), <https://www.ejiltalk.org/humanitarian-killing-zones>; Wilson, *supra* note 3; Luban, *supra* note 7; SAMUEL MOYN, *HUMANE: HOW THE UNITED STATES ABANDONED PEACE AND REINVENTED WAR* (First edition ed. 2021).

my students, I have often wondered the same: Is International Humanitarian Law actually *humanitarian*? What does it mean for it to be “humanitarian?” Can it be? And should we be worried if there is a widespread misperception about whether it is? These are the questions I aim to answer.

I begin, in Section 1, by canvassing possible conceptions of “humanitarianism,” “humanization,” and “humanitarian.” I distinguish, following David Luban, between two conceptions of humanitarianism: negative-utilitarian humanitarianism and rights-based humanitarianism. Then, in Section 2, I argue that IHL cannot be easily understood as “humanitarian” in either of these senses. In Section 3, I argue that even as an aspiration, humanitarianism is not a good fit for IHL. Finally, in Section 4, I explain why the misperception that IHL is “humanitarian” matters.

To be clear, I am not interested in the verbal dispute over what to call the *jus in bello*. Although I will argue that the *jus in bello* is not obviously humanitarian in any of the senses I explore, it doesn’t matter much to me what we call it. What ultimately matters to me is the question of whether the laws of war are actually humanitarian (in the relevant senses that I discuss), whether they can be, and whether the common misperception that they are matters.

## 1. WHAT DOES “HUMANITARIAN” MEAN?

Whether IHL is “humanitarian” depends on what we understand by “humanitarian.” IHL scholarship often employs a series of interconnected terms: “humanitarian,” “humanitarianism,” “humanization,” and “the principle of humanity.”

“Humanitarian” refers to a property something might have or lack; “humanization” refers to the process through which something might acquire the property of being “humanitarian;” the “principle of humanity” refers to an interpretive principle in IHL that privileges the property of being “humanitarian;” and “humanitarianism” is an ideology that aims, precisely, towards the “humanization” of society or certain social practices.

If we are to find out whether IHL is “humanitarian,” we must have a sense of what the property “humanitarian” means and what kind of property it is. In order to do so, I will start with the ideology (i.e., humanitarianism), move on to the process (i.e., humanization), and finish with the property itself (i.e., humanitarian).

a. Humanitarianism

“Humanitarianism” is used in a wide variety of contexts. Policies or actions we associate with humanitarianism include helping those in need due to natural or political emergencies, prosecuting individuals for international crimes, bombing a country to protect endangered civilians (i.e., “humanitarian interventions”), and interfering in the domestic affairs of other states.<sup>9</sup>

As Tim Allen points out, humanitarianism is best understood, like many *isms*, as an ideology or as, at the very least, containing certain ideological features.<sup>10</sup> Generally speaking, its core lies in saving lives at risk, often through the provision of relief as a response to an emergency.<sup>11</sup> Humanitarianism is mostly aimed at damage control—not at its prevention.<sup>12</sup>

Since the establishment of the Red Cross, humanitarianism has been linked to the provision of medicine and, importantly, to the regulation of war.<sup>13</sup> Within the latter context, and from the beginning of the late 19<sup>th</sup> century, “humanitarianism” has also been closely associated with the protection of civilians in war.<sup>14</sup>

David Luban defines “humanitarianism” as

“the desire to alleviate suffering. Humanitarianism has little to do with human rights; its source is compassion and pity, not recognition of individuals as right bearers. Its philosophical motivation is the

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<sup>9</sup> Tim Allen, *Humanitarianism*, in HUMANITARIANISM: A DICTIONARY OF CONCEPTS 142, 142 (Tim Allen, Anna Macdonald, & Henry Radice eds., 2005); Bronwyn Leebaw, *The Politics of Impartial Activism: Humanitarianism and Human Rights*, 5 PERSPECTIVES ON POLITICS 223, 233 (2007); Roberto Belloni, *The Trouble with Humanitarianism*, 33 REVIEW OF INTERNATIONAL STUDIES 451 (2007).

<sup>10</sup> Allen, *supra* note 9 at 142.

<sup>11</sup> See Michael Barnett & Thomas G. Weiss, *Humanitarianism: A Brief History of the Present*, in HUMANITARIANISM IN QUESTION: POLITICS, POWER, ETHICS, 11 (Michael Barnett & Thomas G. Weiss eds., 2008).

<sup>12</sup> Belloni, *supra* note 9 at 457.

<sup>13</sup> Allen, *supra* note 9 at 143; Mary Kaldor, *War*, in HUMANITARIANISM: A DICTIONARY OF CONCEPTS 340, 340 (Tim Allen, Anna Macdonald, & Henry Radice eds., 2005); Michael Barnett, *Evolution without Progress? Humanitarianism in a World of Hurt*, 63 INTERNATIONAL ORGANIZATION 621, 622–623 (2009).

<sup>14</sup> Henry Shue, *Laws of War*, in THE PHILOSOPHY OF INTERNATIONAL LAW, 286 (Samantha Besson & John Tasioulas eds., 2010).

Benthamite desire to diminish pain and suffering, not the Kantian injunction to respect human dignity.”<sup>15</sup>

In this understanding, which is also consistent with its ordinary usage,<sup>16</sup> humanitarianism embraces a negative-utilitarian moral outlook. It cares about a particular set of consequences (aggregate human suffering) and aims, thus, at its reduction.<sup>17</sup> I will refer to this conception of humanitarianism, as Luban does, as “negative-utilitarian humanitarianism.”<sup>18</sup>

Negative-utilitarian humanitarianism is consistent with how “humanitarianism” is most often understood in IHL scholarship, with treaty language,<sup>19</sup> and (at least partially) with the ICRC’s usage of the term. On the welcome page of its website, the ICRC states that

“Because we are neutral, impartial, and independent, we can reach those who need us when others cannot, providing humanitarian assistance, protecting lives, upholding rights, *and relieving the suffering of people around the world whose lives have been torn apart by armed conflict and violence.*”<sup>20</sup>

Negative-utilitarian humanitarianism is not, however, the only understanding of “humanitarianism” present in IHL scholarship and advocacy. It coexists with what I will call “rights-based humanitarianism.” In the ICRC’s statement quoted above, there is a reference not just to the reduction of suffering but also to “upholding rights.”<sup>21</sup>

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<sup>15</sup> Luban, *supra* note 7 at 327–328.

<sup>16</sup> *Humanitarianism*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/humanitarianism> (last visited Oct. 6, 2026).

<sup>17</sup> David Luban, *Human Rights Thinking and the Laws of War*, THEORETICAL BOUNDARIES OF ARMED CONFLICTS AND HUMAN RIGHTS, FORTHCOMING, 8 (2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2589082](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2589082).

<sup>18</sup> Luban, *supra* note 7.

<sup>19</sup> See e.g., Boyd Van Dijk, *Historicizing the Humanization of Human Shields*, 10 INT POLIT REV 51, 52 (2022).

<sup>20</sup> Int’l Comm. of the Red Cross, <https://www.icrc.org/en> (last visited Oct. 6, 2026). Emphasis added.

<sup>21</sup> See also Press Release, Security Council, *Geneva Conventions More Crucial than Ever; Humanitarian Experts Stress, as Security Council Marks Seventieth Anniversary of Key Instruments*, U.N. Press Release SC/13917 (Aug. 13, 2019), <https://press.un.org/en/2019/sc13917.doc.htm>.

These two conceptions of humanitarianism coexist uneasily. Upholding rights is not the same as reducing suffering and, in fact, can easily be in contradiction with it. This tension between upholding rights and reducing suffering is just the reflection of the well-known tension, in ethics, between non-consequentialism and consequentialism: reducing suffering can sometimes be achieved through rights violations. To use a common example, Mary could kill John and distribute his organs among ten different people, thus saving their lives. This would plausibly reduce aggregate suffering, but it would hardly count as an instance of “upholding rights”—at least not John’s rights.

Rights-based humanitarianism is common in IHL scholarship, even though it is inconsistent with the ordinary use of the term. It has also been partially adopted by humanitarian organizations in recent decades, which have incorporated human rights into their activities, as well as other indirectly related goals, like the promotion of democracy.<sup>22</sup> This turn towards a more political, rights-based humanitarianism has not, however, been universally embraced. The ICRC, most notably, sees it warily.<sup>23</sup>

This wariness toward rights-based humanitarianism is partly related to humanitarianism’s commitment to the principles of “neutrality” and “impartiality.” Although these principles were not historically part of humanitarian movements (aid agencies didn’t take no-politics pledges before the 1990s), they are now essential to organizations like the ICRC.<sup>24</sup> They were embraced by the latter in 1965 and were already thought fundamental by aid agencies in allowing them to do their jobs.<sup>25</sup> Eventually, they “came to define who is and is not a *bona fide* humanitarian actor,”<sup>26</sup> and are sometimes considered as defining features of the humanitarian identity.<sup>27</sup>

Impartiality and neutrality, as embraced by the ICRC and the United Nations, refer to the ideas that humanitarian efforts do not take “sides” in a conflict and that aid should be distributed without discrimination based on

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<sup>22</sup> Barnett, *supra* note 13 at 623; Mark Cutts, *Politics and Humanitarianism*, 17 REFUGEE SURVEY QUARTERLY 1, 1 (1998); Michael Barnett, *Humanitarianism Transformed*, 3 PERSPECTIVES ON POLITICS 723, 723 (2005).

<sup>23</sup> Michael Barnett, *Humanitarianism Transformed*, 3 PERSPECTIVES ON POLITICS 723, 728 (2005).

<sup>24</sup> MICHAEL BARNETT, EMPIRE OF HUMANITY: A HISTORY OF HUMANITARIANISM 1, 5 (2013).

<sup>25</sup> *Id.* at 137.

<sup>26</sup> *Id.*

<sup>27</sup> See Barnett and Weiss, *supra* note 11 at 12.

group membership of any kind. These commitments bring about, in practice, significant controversies, as humanitarian organizations are often perceived as both selfless and as assisting warring factions.<sup>28</sup>

The commitment to or rejection of these principles creates an ideological divide between those who believe humanitarianism should focus exclusively on emergency relief and saving lives while remaining apolitical and those who criticize its short-term and limited aspirations, which do nothing to address—and, eventually, eradicate—the causes of suffering (which are, of course, often political in nature).<sup>29</sup> More recent and progressive understandings of humanitarianism (called “new humanitarianism”) have departed from absolute neutrality to embrace projects that address underlying political causes of conflict.<sup>30</sup> By contrast, the ICRC tends to see politics as a moral pollutant that can risk its ability to perform its mandate.<sup>31</sup>

Despite these controversies, the principles of neutrality and impartiality have proved resilient. Already in 1859, Henri Dunant argued that humanitarian aid could only be possible and justifiable insofar as it didn’t favor any warring parties.<sup>32</sup> Pictet, for example, rejected the idea that humanitarian goals could be achieved through political struggle.<sup>33</sup> And the ICRC, of course, remains committed to both impartiality and neutrality, understood as non-discrimination “that would facilitate proximity to suffering populations and an immediate response to need.”<sup>34</sup> Impartiality understood as “not taking sides in a conflict” is, however, inconsistent with rights-based humanitarianism, which perhaps explains why the ICRC and other organizations are reluctant to embrace the latter. I will come back to this later.

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<sup>28</sup> Allen, *supra* note 9 at 146.

<sup>29</sup> See Michael N. Barnett, *Humanitarian Governance*, 16 ANNU. REV. POLIT. SCI. 379, 383 (2013); Barnett, *supra* note 13 at 623.

<sup>30</sup> Leebaw, *supra* note 9 at 228; Michael Barnett & Jack Snyder, *The Grand Strategies of Humanitarianism*, in HUMANITARIANISM IN QUESTION: POLITICS, POWER, ETHICS 143, 144 (Michael Barnett & Thomas G. Weiss eds., 2008).

<sup>31</sup> Barnett and Weiss, *supra* note 11 at 4.

<sup>32</sup> Nicholas Stockton, *In Defence of Humanitarianism*, 22 DISASTERS 352, 359 (1998).

<sup>33</sup> Leebaw, *supra* note 9 at 225.

<sup>34</sup> *Id.* at 226.

Negative-utilitarian humanitarianism and rights-based humanitarianism coexist in IHL scholarship and advocacy, even if uncomfortably. This discomfort is, nonetheless, not always acknowledged.<sup>35</sup>

Unlike Luban, who is clear about the incompatibility between rights-based and negative-utilitarian humanitarianism, Jean Pictet (IHL jurist and former Vice-president of the ICRC ) seems to have glossed over the tension.<sup>36</sup> He tended to oscillate between, on the one hand, an understanding of humanitarianism as the mitigation of suffering and, on the other hand, an understanding of humanitarianism as what is owed to individuals, sometimes describing it as dedicated to the “well-being of the greatest number” and others as dedicated to the “attenuation of injustice.”<sup>37</sup> He argued that in humanitarianism “[t]he evil itself should be fought systematically, one should try to find out the reasons, however remote, and seek to prevent its ill-effects and finally have it eliminated from the world.”<sup>38</sup>

To sum up, humanitarianism is, like any project, contested.<sup>39</sup> There are two main conceptions of humanitarianism alive in IHL scholarship and advocacy: negative-utilitarian humanitarianism, which aims at the reduction of suffering and stays close to the ordinary use of humanitarianism, and rights-based humanitarianism, which aims at upholding fundamental rights. These two conceptions of humanitarianism are also present in discussions regarding the process of “humanization” and the property of being “humanitarian.”

#### b. Humanization

“Humanization” refers to the process through which something acquires or gets closer to acquiring the property of being “humanitarian.” This process has been widely discussed in IHL scholarship, starting with Theodor

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<sup>35</sup> BARNETT, *supra* note 24 at 16. He notes that “Humanitarianism and human rights share various traits, but they are not synonymous, a point that needs stressing because the better-known field of human rights is often assumed to incorporate humanitarianism. It’s a confusion that human rights activists and scholars unintentionally propagate.”

<sup>36</sup> Luban, *supra* note 17.

<sup>37</sup> Jean Pictet, *The Principles of International Humanitarian Law*, 6 INTERNATIONAL REVIEW OF THE RED CROSS (1961-1997) 455, 461, 463–464, 467–468 (1966).

<sup>38</sup> *Id.* at 465.

<sup>39</sup> See Barnett and Weiss, *supra* note 11 at 10.

Meron's famous article, *The Humanization of International Humanitarian Law*.<sup>40</sup>

Meron understands “humanization” as a “contradictory process,” which is “driven to a large extent by human rights and the principle of humanity.”<sup>41</sup> This process is reflected in certain changes in IHL, such as the diminishing importance of reciprocity, the fostering of accountability, and innovations concerning the interpretation of particular rules.<sup>42</sup>

Like Pictet, Meron oscillates between negative-utilitarian humanitarianism and rights-based humanitarianism. Meron suggests that humanization, at least in the short-term, aims at reducing human suffering and protecting human dignity, however imperfectly.<sup>43</sup> At other times, and in the long-term, Meron understands humanization as the process through which IHL evolves to more closely resemble International Human Rights Law (IHRL). The developments in IHL that Meron identifies as evidence of its humanization suggest that he gives more importance to the latter understanding (i.e., rights-based humanization). These developments are the movement from an interstate to an individual rights perspective, the decline of reciprocity, the inalienability of certain rights, personal autonomy, and so on.<sup>44</sup> In this conception, humanization is a process through which IHL more effectively secures individual rights.<sup>45</sup>

Humanization is also sometimes equated with “individualization.” At other times, individualization is just one dimension of the process of humanization. For example, Blum understands humanization to be the same as individualization. She defines the humanization of IHL as

“a shift from collectivism toward cosmopolitan individualism in the regulation of wartime conduct. In other words, wartime regulation has evolved from a predominantly state-oriented set of obligations—which viewed war as an intercollective effort—to a more individual-focused regime; and consequently, these wartime obligations are owed not only

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<sup>40</sup> Theodor Meron, *The Humanization of Humanitarian Law*, AMERICAN JOURNAL OF INTERNATIONAL LAW 239 (2000).

<sup>41</sup> *Id.* at 239.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 241.

<sup>44</sup> *Id.* at 275.

<sup>45</sup> Janina Dill, *Should International Law Ensure the Moral Acceptability of War?*, 26 LEIDEN JOURNAL OF INTERNATIONAL LAW 253, 268 (2013); Ruti G. Teitel, *Humanity's Law: Rule of Law for the New Global Politics*, 35 CORNELL INT'L LJ 355, 359 (2001).

to other parties to the conflict but, at least in aspiration, to the entire international community.”<sup>46</sup>

Humanization, understood as individualization, takes the individual as the fundamental unit of concern, regardless of sovereignty and nationality.<sup>47</sup> This could be consistent with both negative-utilitarian and rights-based humanitarianism, albeit to different degrees and in different ways. Nonetheless, sometimes Blum suggests that individualization is related to the aspiration that wartime regulation more closely resembles law enforcement operations.<sup>48</sup> This idea coincides with Meron’s understanding of the humanization of IHL as a process through which IHL follows IHRL more closely, and thus, with a rights-based understanding of humanization. This rights-based understanding of individualization, whereby individualization is often seen as IHL’s evolution toward an IHRL framework, applicable even in armed conflict, is quite common.<sup>49</sup>

Dill also understands “individualization” as a shift from the collective to the individual. She writes:

“The individualization of war consists of a decrease in the importance of international norms for the regulation of war that focus on the interests, rights, and duties of the state and the increase in the importance of norms for the regulation of war that focus on the interests, rights, and duties of individuals. International norms for when and how war ought to be waged more and more take the individual, not the state, to be their addressee and beneficiary.”<sup>50</sup>

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<sup>46</sup> Gabriella Blum, *The Individualization of War: From War to Policing in the Regulation of Armed Conflicts*, 48–49 (2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2231168](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2231168).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Jennifer Welsh, Dapo Akande & David Rodin, *Introduction: Understanding Individualization*, in *THE INDIVIDUALIZATION OF WAR: RIGHTS, LIABILITY, AND ACCOUNTABILITY IN CONTEMPORARY ARMED CONFLICT* 1, 7–8 (Jennifer Welsh, Dapo Akande, & David Rodin eds.); Martino Tognocchi, *The ‘Individualization of War’: Discussion and Critique of a Discourse*, 12 *CRITICAL STUDIES ON SECURITY* 126, 126 (2024); Eliav Liebllich, *The Humanization of Jus Ad Bellum: Prospects and Perils*, 32 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 579, 579–580 (2021); Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 *HARV. INT’L LJ* 1, 21 (2002).

<sup>50</sup> Janina Dill, *Do Attackers Have a Legal Duty of Care? Limits to the ‘Individualization of War,’* 11 *INTERNATIONAL THEORY* 1, 4 (2019).

c. Humanitarian

We arrive, finally, at the term “humanitarian.” Like humanitarianism, the use of “humanitarian” in IHL scholarship and advocacy oscillates between the negative-utilitarian and the rights-based senses.

“Humanitarian” is both an adjective and a noun. As an adjective, it is used to describe a property that IHL might have or lack. Whether IHL is humanitarian is a question of whether IHL possesses that property—at all or in degrees.

In its ordinary usage, “humanitarian,” like “humanitarianism,” seems to refer to the negative-utilitarian conception. Dictionaries define “humanitarian” as a person or thing that “is involved in or connected with improving people’s lives and reducing suffering”<sup>51</sup> and as “connected with helping people who are suffering and improving the conditions that they are living in; describing an event or situation that causes or involves a lot of human suffering, especially one that requires aid to be provided to a large number of people.”<sup>52</sup>

This emphasis on the reduction of suffering is widespread in IHL.<sup>53</sup> In this context, something is humanitarian if it “tame[s] war by minimizing death and suffering.”<sup>54</sup> Sometimes, humanitarian is used in the sense of the “practical and humanitarian business of saving lives in war.”<sup>55</sup>

The “humanitarian” nature of IHL, reflected in the principle of humanity recognized in the Martens clause, is often contrasted with “military necessity.”<sup>56</sup> Indeed, IHL is often understood as a compromise

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<sup>51</sup> *Humanitarian*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/humanitarian> (last visited Oct. 6, 2026).

<sup>52</sup> *Humanitarian*, Oxford Learner's Dictionaries, [https://www.oxfordlearnersdictionaries.com/us/definition/english/humanitarian\\_1](https://www.oxfordlearnersdictionaries.com/us/definition/english/humanitarian_1) (last visited Oct. 6, 2026).

<sup>53</sup> See e.g., Berman, *supra* note 2 at 3.

<sup>54</sup> Leebaw, *supra* note 9 at 224.

<sup>55</sup> Frédéric Mégret, *International Criminal Justice as a Peace Project*, 29 EUROPEAN JOURNAL OF INTERNATIONAL LAW 835, 857 (2018).

<sup>56</sup> Meron, *supra* note 40 at 245; Dill, *supra* note 50 at 22; YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 19 (2004); Alexander Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?*, 19 EUROPEAN JOURNAL OF INTERNATIONAL LAW 161, 167 (2008); Henry Shue, *Laws of War, Morality, and International*

between military necessity and the principle of humanity (or humanitarian considerations).<sup>57</sup>

The principle of military necessity recognizes the permissibility of actions, not otherwise prohibited by IHL, that are necessary to achieve legitimate military objectives.<sup>58</sup> It ensures that IHL treaties do not unduly limit states' actions in war to the point of making war or victory impossible.<sup>59</sup> As a result, there is an ongoing interpretive struggle between those who would privilege humanity over military necessity and vice versa.

Mégret opts for a different understanding of “humanitarian,” which he relates to the *human*. Something would be humanitarian, then, if it universally protects all human beings.<sup>60</sup> Pictet had a similar understanding: humanitarian, for him, was “any action beneficent to men;”<sup>61</sup> and “humanitarian law” had a more restrictive sense of “ensuring respect for the individual and his well-being.”<sup>62</sup> Humanitarian law, according to Pictet, is centered on the protection of the individual.<sup>63</sup>

Again, this suggests that two understandings of “humanitarian” are present in IHL scholarship and advocacy. “Humanitarian” would be predicated of something that (1) reduces suffering (the negative-utilitarian understanding of humanitarian); or (2) upholds fundamental rights (the rights-based understanding of humanitarian.)

“Humanitarianism” is the ideology; “humanitarian” is the property. As a property, it can be binary or scalar. Put simply, a property is binary when it is predicated of something in an all or nothing fashion: it is present or, simply, absent.<sup>64</sup> For example, an action can be morally permitted or

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*Politics: Compliance, Stringency, and Limits*, 26 LEIDEN JOURNAL OF INTERNATIONAL LAW 271, 284 (2013).

<sup>57</sup> Orakhelashvili, *supra* note 56 at 167; Shue, *supra* note 56 at 284.

<sup>58</sup> Rebecca Sutton & Orly Stern, *International Humanitarian Law*, in HUMANITARIANISM: A DICTIONARY OF CONCEPTS, 171 (Anna Macdonald, Henry Radice, & Tim Allen eds., 2005).

<sup>59</sup> *Id.*; Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VIRGINIA JOURNAL OF INTERNATIONAL LAW 795 (2010).

<sup>60</sup> Frédéric Mégret, *From 'savages' to 'unlawful Combatants': A Postcolonial Look at International Humanitarian Law's 'Other'*, 265–266 (2006), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=918541](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=918541).

<sup>61</sup> Pictet, *supra* note 37 at 461.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 455.

<sup>64</sup> See Lawrence B. Solum, *Legal Theory Lexicon: Scalars and Binaries*, Legal Theory Blog (Apr., 2024),

prohibited, but it can't be anything in between.<sup>65</sup> By contrast, scalar properties admit of degrees: something might be more or less bitter, someone might be taller or shorter, and so on.

Whether the property “humanitarian” is scalar or binary depends on whether we are referring to negative-utilitarian or rights-based humanitarianism. I will thus leave this issue for the next section.

## 2. IS IHL HUMANITARIAN?

Is IHL “humanitarian”?

Some think that the answer to this question is, obviously, *no*. War, as Berman notes, is far from a “humanitarian” activity, and to attach the label “humanitarian” to its regulation seems like a joke.<sup>66</sup> Kaldor speaks of the “profound contradiction between humanitarianism and war.”<sup>67</sup> And Geoffrey Best has stated that “it is obviously most confusing that the same word should be used both for the branch of international law which legitimizes the infliction of death and damage, and for the branch of international organization which aims to prevent them.”<sup>68</sup>

Some also question whether IHL has, in fact, turned out to be humanitarian. Hill-Cawthorne claims that certain contemporary trends in the law “[paint] a worrying picture of the capacity of international law to regulate conflict and reduce suffering in war.”<sup>69</sup> The formalization of the laws of war, Mégret writes, “turned out to be the prelude to a deluge of violence, as if the rules had only been formulated to be broken.”<sup>70</sup>

At the same time, the fact that IHL is “humanitarian” seems to be taken for granted. Referring to the *jus in bello* as “International

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<https://lsolum.typepad.com/legaltheory/2024/04/legal-theory-lexicon-scalars-and-binaries.html>.

<sup>65</sup> See Larry Alexander, *Scalar Properties, Binary Judgments*, 25 J. APPLIED PHIL. 85, 85 (2008); Anthony Ellis, Deontology, *Incommensurability and the Arbitrary*, 52 PHIL. & PHENOMENOLOGICAL RSCH. 855 (1992).

<sup>66</sup> Berman, *supra* note 2 at 3.

<sup>67</sup> Kaldor, *supra* note 13 at 348–349.

<sup>68</sup> Cutts, *supra* note 22 at 2–3.

<sup>69</sup> Lawrence Hill-Cawthorne, *International Law in Extremis*, 1 UNIVERSITY OF BRISTOL LAW WORKING PAPER SERIES, 3 (2025), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5304392](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5304392). Hill-Cawthorne, IHL in *extremis*, 3

<sup>70</sup> Mégret, *supra* note 60 at 317.

Humanitarian Law” is, in fact, pervasive in both scholarship and advocacy. And, in section 1, I have already discussed some examples of scholars and activists who see the regulation of war as a humanitarian activity.

Who is right? Before attempting to answer this question, we must first define what “International Humanitarian Law” is; that is, we need a sense of the object to which the property “humanitarian” applies.

The body of law known as IHL, the LOAC, or the *jus in bello* includes seemingly disparate norms. Some, like Wilson, have argued that IHL is not a body of law, but a political project, and that, in fact, IHL and the LOAC are two different bodies of law.<sup>71</sup> Why else, Wilson wonders, would different actors reach different results when interpreting their respective provisions?<sup>72</sup>

Wilson is, of course, right to note that many IHL rules are indeterminate.<sup>73</sup> This indeterminacy might partly explain why some actors emphasize what they see as the “humanitarian” dimension of IHL, while others place more emphasis on military necessity.<sup>74</sup> We can easily refer to the first as applying and interpreting IHL and the latter as applying and interpreting the LOAC.<sup>75</sup>

There is, however, *a* body of law to which different stakeholders refer and regarding which they disagree. That body of law, although indeterminate, consists of customary and treaty-based law that regulates conduct during armed conflict.

This body of law includes different rules with different purposes: rules regarding the internment of prisoners of war and their immunity from prosecution for their participation in hostilities; the treatment of *hors de combat*, the sick, and the wounded; the targeting of military objectives, including combatants; rules regarding proportionate collateral harm against civilians; the prohibition on intentionally directing attacks against civilians and civilian objects, and so on.

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<sup>71</sup> Wilson, *supra* note 3 at 564.

<sup>72</sup> *Id.* at 575.

<sup>73</sup> Adil Ahmad Haque, *Indeterminacy in the Law of Armed Conflict*, 95 INTERNATIONAL LAW STUDIES (2019).

<sup>74</sup> Wilson, *supra* note 3 at 571.

<sup>75</sup> Luban, *supra* note 7.

When we ask “is IHL humanitarian?”, we ask it of the complete body of law, rather than of some of its parts. Indeed, some rules (e.g., the prohibition on cruel and inhuman treatment) might qualify as humanitarian under one or both senses (the negative-utilitarian and the rights-based sense.) Pictet, for example, thought that the rules that safeguard *hors de combat* and civilians are obviously humanitarian in nature.<sup>76</sup> This might be true of most of IHL’s prohibitive rules (e.g., the prohibition on intentionally targeting civilians, the prohibition against torture), at least if we mean humanitarian in the rights-based sense. But, again, the question I am interested in includes not just the prohibitive rules but the “permissive” or “facilitative” ones too; that is, it concerns the regulation of war as a whole.<sup>77</sup>

Let us start with whether IHL is “humanitarian” in the negative-utilitarian sense.

a. Is IHL “humanitarian” in the negative-utilitarian sense?

Something is “humanitarian” in the negative-utilitarian sense if it reduces human suffering.<sup>78</sup> This definition, although close to the ordinary sense of “humanitarian,” already gives rise to important difficulties.

First, as I mentioned earlier, we must decide whether the property “humanitarian” is binary or scalar.

At first sight, it might appear that in its negative-utilitarian variety “humanitarian” naturally lends itself to being a scalar property. Things could be “more” or “less” humanitarian, depending on whether they reduce more or less aggregate suffering. But this fully scalar sense of “humanitarian” has significant counterintuitive implications. First, *anything* that reduces suffering compared to something else could be aptly called “humanitarian” in the context of that comparison. And second, anything

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<sup>76</sup> Pictet, *supra* note 37 at 457.

<sup>77</sup> On whether IHL includes permissions or only prohibitions, see Eliav Lieblich, *The Facilitative Function of Jus in Bello*, 30 EUROPEAN JOURNAL OF INTERNATIONAL LAW (2019); ADIL AHMAD HAQUE, LAW AND MORALITY AT WAR (2017); MARCELA PRIETO RUDOLPHY, THE MORALITY OF THE LAWS OF WAR: WAR, LAW, AND MURDER (2023); Alejandro Chehtman, *Combatant Privilege in Asymmetrical Warfare: A Reexamination of Belligerent Equality*, 66 HARV. INT’L LJ 509 (2025).

<sup>78</sup> I am going to set aside the question of whether we should also consider non-human suffering in this equation, even though there is important work in the area. See Alexandra Huneus & Pablo Rueda-Saiz, *Environmental Protection in War: Beyond Humans and Nature*, 67 HARVARD INTERNATIONAL LAW JOURNAL 1 (2026).

that reduces *any* amount of suffering, no matter how small or insignificant the reduction, could be aptly called “humanitarian.”

Consider serial killers A and B. A burns his victims alive. B shoots them. Suppose we can establish that shooting hurts less than being burned alive. If we understand “humanitarian” in a scalar fashion, we could aptly call B’s methods of killing “humanitarian” in relation to A’s. Yet this seems patently contrary to the ordinary usage of the word “humanitarian.” In fact, it seems contrary to the ordinary usage of “humanitarian” to refer to any killing methods employed by serial killers as “humanitarian,” regardless of whether they reduce suffering compared to other alternatives.

Now consider an example where both counterintuitive implications are present: Dictator1 is responsible for the deaths of Y number of people, thus creating X units of suffering. Dictator2 is responsible for the deaths of Y number of people, but, for a variety of reasons, he creates  $X - 0.00000001$  units of suffering. We would hardly call the second one a “humanitarian dictator,” even if it is true that Dictator2’s actions are a reduction of suffering relative to the actions of Dictator1.

We balk at the use of “humanitarian” in these examples because, in its ordinary usage, describing something as “humanitarian” has a clearly positive connotation.<sup>79</sup> To be a humanitarian “is to respond to the suffering of others,” and humanitarianism itself is often treated as “a symbol of what is good about the world.”<sup>80</sup>

If we want the property “humanitarian” to preserve these positive connotations (and thus, to stay somewhat close to its ordinary sense), then we cannot just conceive of it as a fully scalar property. We cannot call “humanitarian” just anything that reduces any degree of suffering, no matter how small, relative to some other alternatives.

Consider more grounded examples: the death penalty might produce more suffering than life without parole. But it is difficult to think seriously of life without parole as “humanitarian.” It might be humanitarian in relation to the death penalty, if it indeed reduces suffering relative to the death penalty. But the positive connotations attached to humanitarian seem inapt in this case. Similarly, beheading women for adultery might produce

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<sup>79</sup> Cutts, *supra* note 22 at 3.

<sup>80</sup> Barnett and Weiss, *supra* note 11 at 6.

less suffering than stoning them, but one would hardly refer to the first practice as “humanitarian.”

Perhaps these counterintuitive results of understanding “humanitarian” as a scalar property have to do with seeing it as a comparative notion. Perhaps we should opt for a non-comparative conception. Such a non-comparative conception might rely on something like intentions: for something to be humanitarian, it must intend to reduce suffering. This is consistent with the use of “humanitarian” in certain circles, particularly to describe individuals active in humanitarian organizations.<sup>81</sup> The serial killer and the dictator, one might then say, lack an intention to improve people’s lives; they are in “the business of killing people.”

The introduction of intentions would also allow us to preserve the use of “humanitarian” to refer to “humanitarian” movements and actors. We could easily, for example, describe the movement to abolish the death penalty and replace it with life without parole as some kind of “humanitarianism,” aimed at the reduction of suffering—the suffering brought about by the death penalty.

Similarly, one might also describe the movement to regulate war (and those involved in it) as “humanitarian.” This might be because advocates in the movement are motivated by a desire to reduce suffering, to whatever extent possible, and so, we would be comfortable labeling *them* and *their movement* “humanitarian” (meaning, engaged in “humanitarianism.”) But whether the thing itself—life without parole or the laws that permit or regulate life without parole—is humanitarian seems to be a different question. The same is true for IHL. Even if the ICRC’s activities and purpose can be aptly described as humanitarian, based on the organization’s purpose and activists’ intentions, whether the laws that regulate war can be so described is a different question.<sup>82</sup>

This is partly because the intentions-based solution is a poor fit for the purposes of assessing a body of law (IHL) or any social practice that, ultimately, lacks intentions. Further, the intentions-based version cannot avoid the counterintuitive results I pointed out earlier if we stick with the negative-utilitarian conception of humanitarian. Even if Dictator1 chose to

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<sup>81</sup> See *Id.* at 11.

<sup>82</sup> In fact, the ICRC was established in response to conditions of fallen and injured soldiers, which does fit with a humanitarian original purpose. See *Id.* at 21–22.

execute 1,000 instead of 30,000 out of a genuine desire to reduce suffering, we would not call him a “humanitarian” nor would we refer to his policy of extra-judicial executions as “humanitarian.”

If intentions do not solve our problem, perhaps we can introduce another modification to the definition: if X is to be aptly called “humanitarian” in relation to Y, X must exclusively reduce suffering. X cannot be morally or causally responsible for any of the suffering up for comparison.

This definition would allow us to say that the dictators and the serial killers are not humanitarians. Each of them is responsible (morally and causally) for at least one of the units of suffering up for comparison. By contrast, even without relying on intentions, humanitarian activists and organizations are not often causally or morally responsible for the suffering up for comparison.

Things are, however, different when we assess a body of law. Laws lack moral agency, and as such, it is difficult to understand them as “morally” responsible for the social practices they shape. But we can understand them as causally responsible, directly or indirectly, in creating, shaping, or contributing to those social practices.

For example, laws establishing the death penalty and life without parole are causally responsible, quite directly, for the units of suffering up for comparison. If we introduce this modification to the negative-utilitarian variety of “humanitarian”, we would have to conclude, quite confidently, that IHL could not be humanitarian. After all, IHL is responsible for the quality, if not necessarily the quantity, of suffering that contemporary warfare creates.

At this point, one might object that IHL does not permit any behaviors like targeting combatants or killing civilians as collateral harm—that is, one might posit that IHL is not responsible for *creating* any of the suffering brought about by war. IHL, one might insist, is only prohibitive in nature; it does not contain any “permissions.”<sup>83</sup> This position has been put into question in recent scholarship. Several scholars, including me, have argued that IHL contains privileges or permissions, has a facilitative function in war, or constructs certain kinds of violence.<sup>84</sup>

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<sup>83</sup> HAQUE, *supra* note 77; Chehtman, *supra* note 77; ARTHUR RIPSTEIN, *KANT AND THE LAW OF WAR* (2021).

<sup>84</sup> PRIETO RUDOLPHY, *supra* note 77; Lieblich, *supra* note 77; Berman, *supra* note 2.

Berman, for example, thinks it is misleading to see the *jus in bello*'s relationship to violence as one of limitation and that, in fact, IHL has been central in "the construction of war as a separate sphere of human activity."<sup>85</sup> Or, as Mégret puts it, it "constructs" a certain kind of war,<sup>86</sup> or, as Alexander says, "legitimizes" certain kinds of "ethical violence" and constructs certain ideas of "innocence."<sup>87</sup>

Further, the existence of IHL is deeply entwined with a certain kind of war machinery, which has been built, to some extent, under the wings of IHL. Combat persists, Arkin argues, because the apparatus of people and ships and bases and satellites and planes and drones and analysts and contractors has grown so vast that it can no longer be understood, much less controlled, by any single person; it has become "a gigantic physical superstructure" that "sustains endless warfare."<sup>88</sup>

Whatever notion of responsibility we employ, it seems difficult to argue that IHL is not responsible for the suffering caused by contemporary warfare, in the same way that it would be difficult to argue that laws that establish the death penalty are not responsible for the judicial executions that take place. IHL, after all, contributes to shaping modern warfare. Even if warfare would still exist without IHL, the *kind* of warfare that exists today—which allows for massive civilian casualties as collateral harm, which permits certain weapons while prohibiting others, which allows states to conscript their own citizens—is partly shaped by the law.

This responsibility-based conception of "humanitarian" leads to the conclusion that IHL is not—could not be—humanitarian. But if we eliminate the responsibility condition, we reintroduce the possibility of calling the dictators, the serial killers, and laws that establish the death penalty as "humanitarian," at least in a comparative sense.

Now, let us temporarily assume that IHL's responsibility for the suffering caused by modern warfare is normatively inert and does not, then,

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<sup>85</sup> Berman, *supra* note 2 at 4–5.

<sup>86</sup> Mégret, *supra* note 60.

<sup>87</sup> Amanda Alexander, *The Ethics of Violence: Recent Literature on the Creation of the Contemporary Regime of Law and War*, 25 JOURNAL OF GENOCIDE RESEARCH 235, 236 (2023).

<sup>88</sup> Dexter Filkins, *Did Making the Rules of War Better Make the World Worse?*, New Yorker (Sept. 2, 2021), <https://www.newyorker.com/magazine/2021/09/13/did-making-the-rules-of-war-better-make-the-world-worse> (reviewing Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War* (2021)).

preclude the application of the label “humanitarian.” This might be because we fully embrace the idea that IHL only contains prohibitions and thus is not responsible for *any* of the suffering brought about by war or because we employ a narrow conception of responsibility, causal or otherwise, which leaves IHL off the hook. Is IHL humanitarian then, in the negative-utilitarian sense?

Recall that the Dictators example has two problems. First, they are both directly responsible for the suffering up for comparison. I have momentarily cabined this problem. Second, Dictator2 reduces suffering negligibly, and it seems odd to call him a “humanitarian” on the basis of that negligible reduction of suffering.

Perhaps, we can avoid this counterintuitive result if we can conceive of some sort of threshold above or below which the property “humanitarian” would apply. Similarly to how some things can be “blue” to different degrees but other things are, simply, “not blue” (even if they have more blue pigment than others), “humanitarian” could also apply in this way. There are many properties that have this nature, that is, that can be aptly used comparatively but that also require a threshold. For example, we might aptly say that Mary is taller than John. But we would not say that Mary is “tall” if she’s 5’ 1”.

This solution has some potential, but it requires us to establish the threshold, that is, it requires us find the point at which Mary can be called “tall.” Accordingly, we might redefine “humanitarian” and say that something can be aptly called humanitarian only when it *reduces* more than X amount of suffering. This version of the property is not fully scalar/comparative. It works, in fact, like “tallness,” which allows us to say that Mary is taller than John, while saying that, because she’s under 5’ 1”, she is not “tall.” This conception of “humanitarian,” then, would allow us to say that something is “more humanitarian” than something else but still *not* “humanitarian” if it reduces less than X amount of suffering.

The problem now lies with setting that threshold. A statistical average (which is how we assess and apply “tallness”) requires us to choose what things to average. Presumably, we should not average only phenomena that cause suffering (similarly to why we don’t just select people who are “tall” to get an average of height in the population). But if we average all phenomena (or all laws, or all policies), including those that produce little or no suffering, the resulting threshold might be so demanding that IHL

could not possibly be humanitarian—not to mention the empirical difficulties in the assessment.

A second answer would set the threshold for the apt application of the property “humanitarian” at the point in which something becomes morally *right*. Given that “humanitarian” in the negative-utilitarian sense adopts a consequentialist moral outlook, what is “morally right” is whatever course of action generates not just *any reduction* of suffering, but the *most reduction* of suffering possible. This answer can more easily explain why we would ordinarily not call the serial killer and the dictators’ actions “humanitarian,” to the extent that consequentialist theories can explain why, ordinarily (but not *always*) killing the innocent is wrong: they are not humanitarian because, ordinarily, killing people does not reduce suffering. In fact, when individuals choose to kill people, they tend to create more suffering.

This definition of the threshold for the application of humanitarian would imply that “humanitarian” is the same as “morally justified.” This use of “humanitarian” is somewhat contrary to the ordinary use of “humanitarian”, as there seems to be conceptual space between what is “morally justified”(in the utilitarian sense) and what is “humanitarian.” If we want to preserve the ordinary use, it is not a satisfactory solution.

A third alternative for setting the threshold would attempt to preserve the ordinary use of “humanitarian” as something that has positive connotations of “moral acceptability” while, at the same time, not being necessarily morally *right* or *justified*. We could thus conclude that something is “humanitarian” while being morally wrong, because, while it does not reduce the *most* suffering, it does reduce *sufficient* suffering to reach the relevant threshold. The difficulty here, lies, of course, in identifying a principled basis for establishing that threshold.

Perhaps we could set the threshold normatively and within a limited domain, so that we only consider bodies of law. Conceived in this way, IHL could be more or less humanitarian compared to other legal regimes, but it would only be aptly “humanitarian” if it reduces more suffering than the baseline we have chosen.

For example, laws regulating imprisonment under the Scandinavian model might be aptly called “humanitarian” (insofar as we abandon the

responsibility conception, of course).<sup>89</sup> Laws regulating imprisonment in high security facilities, however, likely can't be, even if they reduce suffering relative to the laws that regulated imprisonment in the early 19<sup>th</sup> century and, so, we can say that one body of law is "more humanitarian" than the other. Neither laws that regulate imprisonment in high security facilities nor those that regulated imprisonment in the early 19<sup>th</sup> century *are*, however, "humanitarian."

We might thus consider other possible ways of regulating war, that is, other bodies of law—existent or imagined—as apt points for setting the threshold. But this generates additional difficulties. First, we have endless alternatives. I will only discuss two. Second (and related to the first), we have a temporal problem, which the examples I have used regarding dictators and serial killers can't illuminate, as they are temporally bounded.

Our first alternative is to compare IHL with unregulated or total war, that is, with what war would be like with no international regulation. If IHL generates less suffering than total war, then we would aptly call IHL "humanitarian." Naturally, this threshold seems exceedingly low, to a point that saying that IHL is "humanitarian" in this sense risks losing its positive connotations (which we were trying to preserve).

A second problem arises from the temporal problem I mentioned. Over what period of time ought IHL to reduce more suffering than total war in order to be aptly called "humanitarian"?

There is, in fact, a well-known debate about how the humanization of war via its regulation might have legitimized war and, in doing so, might have contributed to more and longer wars. This is, precisely, what Moyn argues: that the focus on making war more humane via its regulation has had pernicious effects, such as the entrenchment of war, the existence of "forever wars," and the neglect of questions about the justness or legality of wars.<sup>90</sup> The "reformist zeal for humane war" affords actors engaged in conflict more tolerance and legitimation of their (humane) violence.<sup>91</sup> Even Human Rights NGOs have largely left issues of aggression aside, to focus on humanitarian efforts and assessments.<sup>92</sup>

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<sup>89</sup> The reason why we might think of the Scandinavian model as humanitarian might have little to do with the suffering it creates, and more to do with whether it upholds the fundamental rights of those subject to it.

<sup>90</sup> MOYN, *supra* note 8.

<sup>91</sup> *Id.* at 13.

<sup>92</sup> Mégret, *supra* note 55 at 857.

Applied to the question of whether IHL is humanitarian, we might then think, plausibly, that the regulation of war might produce less suffering than total war in particular wars or in the short-term, but that, in entrenching war, IHL has generated *more* suffering in the long-term than total war. In fact, Lieber believed that the more violent the war, the shorter it would be, and thought this was a reason to advocate for harsh wars.<sup>93</sup> In other words, the humanization of war risks, in the long term, undermining the prohibition of war,<sup>94</sup> and in doing so, it generates a risk of more wars, and hence, more suffering.

If IHL has reduced suffering in particular wars or in the short-term but, by entrenching war, has generated *more* suffering over the long-term than total war, then IHL could not be aptly called humanitarian in comparison to total war—regardless of our concerns about whether total war sets too low a threshold.

Now suppose we switch tactics and opt for a higher threshold: International Human Rights Law (IHRL). If IHL generates *less* suffering than IHRL, then we could aptly call IHL “humanitarian.” But in this comparison, it seems like IHL would obviously lose. For example, IHL does not prohibit behaviors that are likely to create suffering that IHRL does prohibit (such as killing someone based on their status as combatants or collaterally harming civilians.)

Perhaps this conclusion is too quick. One might posit that we should not compare the law in the books, and decide, based on that, which of the two bodies of law (IHL or IHRL) is humanitarian, that is, which one reduces more aggregate suffering than the other. Instead, we should compare how IHL does in war with how IHRL would do in war, and decide, on that basis, whether IHL is “humanitarian” compared to IHRL.

Understood in this way, one could plausibly argue that if IHRL applied to war, states and actors involved in war would completely or mostly ignore the law. In fact, every party to the conflict would argue that they are upholding human rights while the enemy party is violating them. Further, epistemic difficulties associated with war would make IHRL assessments about the need to use lethal force, which requires an individual assessment that an individual’s threat is imminent, almost impossible—so

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<sup>93</sup> Theodor Meron, *Francis Lieber’s Code and Principles of Humanity*, 36 COLUM. J. TRANSNAT’L L. 269, 271 (1998).

<sup>94</sup> Mégret, *supra* note 55 at 853.

impossible, in fact, that states and non-state actors would make mistakes and frequently target individuals who would pose no threats in the future.<sup>95</sup> The combination of these factors would thus likely result in IHRL producing *more suffering* in war than IHL. If that is true, then perhaps we could say that IHL is humanitarian, insofar as we temporally bound the question appropriately.

Note, however, the compromises we have made to reach the conclusion that IHL is humanitarian in the negative-utilitarian sense. First, we have set the responsibility problem aside. We have assumed that IHL has no responsibility, causal or otherwise, in the suffering created by modern warfare. In doing so, we have reintroduced the dictators and the serial killers as possible candidates for the “humanitarian” label. They will be humanitarian if they reduce more suffering than the threshold we set. Second, IHL will be humanitarian if it reduces more suffering than IHRL in war, even if it does so by a negligible amount. This is because something will be humanitarian if it reduces more suffering, no matter how much, than our threshold. This makes it so that calling IHL “humanitarian” in the negative-utilitarian sense does not amount to much. It barely retains any of the positive connotations I was trying to preserve.

It should be clear, by now, that whether IHL is humanitarian in the negative-utilitarian sense presents significant theoretical and empirical difficulties. Some of the empirical difficulties apply generally to utilitarianism. Others are particular to war: it is often very difficult to develop and deploy assessment tools during and after armed conflict.<sup>96</sup> In the context of weapon regulations, Matthews and MacCormack claim that any analysis of the last one hundred years must lead to the conclusion that humanitarian principles have had limited success.<sup>97</sup> Further, recent conflicts

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<sup>95</sup> See argument along similar lines in Marcela Prieto Rudolphy, *Who Is at War? On the Question of Co-Belligerency*, 25 in YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW, VOLUME 25 (2022) 141 (Heike Krieger et al. eds., 2024), [https://link.springer.com/10.1007/978-94-6265-619-2\\_5](https://link.springer.com/10.1007/978-94-6265-619-2_5); Shue, *supra* note 56; Shue, *supra* note 14; Henry Shue, *Do We Need a “Morality of War”?*, in JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS (David Rodin & Henry Shue eds., 2008); Jeremy Waldron, *Deep Morality and The Laws of War*, in THE OXFORD HANDBOOK OF ETHICS OF WAR (Seth Lazar & Helen Frowe eds., 2015).

<sup>96</sup> See Barnett and Weiss, *supra* note 11 at 44.

<sup>97</sup> Robert J. Mathews & Timothy LH McCormack, *The Influence of Humanitarian Principles in the Negotiation of Arms Control Treaties*, 81 INTERNATIONAL REVIEW OF THE RED CROSS 331, 333 (1999).

have resulted in widespread civilian harm, death, and destruction and almost non-existent prosecutions for *in bello* violations.<sup>98</sup>

Theoretically, setting the threshold or temporally bounding the question requires contested normative judgments. These issues, paired with the fact that IHL is a body of law and thus, subject to interpretation and evolution, add an additional difficulty: IHL's capacity to reduce less or more suffering is not fixed once and for all by the establishment of the rules themselves. It depends, primarily, on states' and non-state actors' interpretations and applications of those rules and is, thus, a moving target.

Further, permissive interpretations of the law by states can, under certain circumstances, eventually lead to changes in some of the rules themselves, due to the nature of Customary International Law. In IHL, where mechanisms of institutional oversight are scarce, changing law through its permissive interpretation, as adopted in state practice, is easier than in other, more institutionalized areas.<sup>99</sup> For example, in its 2024 Challenge Report, the ICRC partly blamed "permissive" interpretations of IHL for the widespread damage brought about in modern conflicts.<sup>100</sup> Yet some of these permissive interpretations are not blatantly unlawful and find some basis on positive law.<sup>101</sup> Take, for example, the rise of the concept of dual-use objects, that is, objects that have both a military and civilian use. The porous nature of these objects appears to have reduced inhibitions to target them, thus generating some of the worst suffering by civilians in current conflicts.<sup>102</sup> Further, the rise of dual-use objects also threatens to erode the distinction between civilians and combatants, and between civilian objects and military objectives,<sup>103</sup> thus endangering IHL's ability to reduce suffering in the long term.

In summary, whether IHL is humanitarian in the negative-utilitarian sense remains unanswered. If we require IHL not to have caused, shaped, or contributed to the suffering up for comparison, then the answer is that IHL is not humanitarian. If we do away with this limitation, we can speculate that IHL in war might plausibly be more humanitarian than IHRL in war. But note that we have made a significant concession by doing away with the

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<sup>98</sup> Hill-Cawthorne, *supra* note 69 at 44.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 37–38.

<sup>102</sup> Oona A. Hathaway, Azmat Khan & Mara R. Revkin, *The Dangerous Rise of "Dual-Use" Objects in War*, 134 YALE LJ 2645, 2652–2653 (2024).

<sup>103</sup> *Id.* at 2748.

responsibility condition. In doing so, we might have lost the positive connotations we were trying to preserve, have reintroduced the Dictators as possible candidates for the label “humanitarian,” and have, ultimately, made it so that saying that IHL is “humanitarian” is not saying much at all—that is, it might not mean much more than saying that Dictator2 is more humanitarian than Dictator1 or that life without parole is more humanitarian than the death penalty.

b. Is IHL “humanitarian” in the rights-based sense?

Rights-based humanitarianism is about upholding rights, thus placing IHL and IHRL on a continuum or as bodies of law that have similar goals.

The rights-based understanding of “humanitarian” is more consistent with recent understandings of the relationship between IHL and IHRL as two complementary systems. Traditionally, IHL was considered *lex specialis* in relation to IHRL, taking precedence over IHRL’s protections during armed conflict. However, it is now relatively well accepted—though not uncontroversial—that IHRL also applies during armed conflict, even if some human rights obligations might be subject to derogation.<sup>104</sup>

This understanding, according to which IHL and IHRL share the same goals or respond to similar values, is reflected, for example, in the Interamerican Commission on Human Rights’ jurisprudence, which speaks of an “integral linkage” between the two regimes, because they share a “common nucleus of non-derogable rights and a common purpose to protect human life and dignity.”<sup>105</sup> Similarly, the ICTY has identified human dignity as the core value underlying both IHL and IHRL.<sup>106</sup>

Pictet had a similar view. For him, IHRL and IHL were placed along a continuum rather than in tension with each other. He spoke of “humanitarian law,” in a wide sense, to refer to all international legal rules “ensuring the respect for the individual and his well-being,” including the

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<sup>104</sup> Mary Ellen O’Connell, *Historical Development and Legal Basis*, 11 (2013), [https://scholarship.law.nd.edu/book\\_chapters/60/](https://scholarship.law.nd.edu/book_chapters/60/).

<sup>105</sup> *Coard v. United States*, Case 10.951, Inter-Am. Comm’n H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 3 rev. ¶ 37 (1999) (quoting *Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L/V/II.98, doc. 6 rev. ¶ 158 (1997)).

<sup>106</sup> *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, ¶ 183 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

laws of war and human rights.<sup>107</sup> IHRL, he said, represented the most “generous” principles in humanitarian law.<sup>108</sup>

The idea that IHL and IHRL share the same underlying values is relatively recent, and, some argue, constitutes a reinterpretation of IHL.<sup>109</sup> In recent years, many scholars, courts, and advocates have adopted the “convergence thesis,” which emphasizes the rights dimension of IHL and claims that IHRL applies concurrently with IHL during armed conflict and in ways that strengthen the latter’s protective constraints.<sup>110</sup> This rights-based understanding of IHL co-exists with the negative-utilitarian variety, and sometimes IHL is characterized as “humanitarian” only in the rights-based sense.

In this rights-based sense (and unlike the negative-utilitarian sense), “humanitarian” does not naturally lend itself to being a scalar property. This is so because something is “rights-based humanitarian” if it *upholds* rights. But although something can uphold more or fewer rights, it cannot uphold rights in a scalar fashion: something either respects rights or doesn’t. For example, Dictator1 could execute 1,000 or 1,500. The first alternative upholds more rights than the second (the rights of the 500 people that were not executed). However, because both alternatives involve wrongfully killing the innocent, *neither* of these alternatives can be aptly described as upholding rights—in fact, both alternatives violate rights.

Something similar can be said of a body of law. American Criminal Law included a marital exception to rape until well into the 20<sup>th</sup> century. If asked whether the law of rape upheld rights during that time, we could confidently answer that it did not uphold the rights to sexual autonomy of married women—even if it upheld *some* sexual autonomy rights.

If we are to fully embrace the rights-based sense of “humanitarian,” then we must use it in the way that is most consistent with rights. We must therefore understand it as a binary property: we can predicate it of IHL, or we cannot.

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<sup>107</sup> Pictet, *supra* note 37 at 456.

<sup>108</sup> *Id.* at 458.

<sup>109</sup> Luban, *supra* note 17 at 1–2.

<sup>110</sup> Pablo Kalmanovitz, *Ius Post Bellum and the Imperative to Supersede IHL*, 193 (2016), <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/ius-post-bellum-and-the-imperative-to-supersede-ihl/6A8B54BBBDA1CA058C082F70355A3F3B>.

Of course, we can ask whether IHL upholds *more* or *fewer* rights than other possible alternatives. This involves a kind of consequentialism (or instrumentalism) about rights, where the aim is to uphold as many rights as possible. This aim stands, of course, in tension with what rights are. Rights are not interchangeable units of agent-neutral value; it isn't obviously the case that we can violate the rights of one individual in order to ensure that *more* rights are upheld.<sup>111</sup>

This way of thinking about moral rights is not, however, a necessarily incoherent way of thinking about legal rules or systems. We can coherently ask whether a legal system upholds more rights than another one. This way of thinking about rights returns us to what is, for all practical purposes, a variant of the negative-utilitarian sense of "humanitarian:" instead of aggregate suffering, we are concerned with aggregate rights violations. This rights-based variant faces similar difficulties to the negative-utilitarian one, both in terms of its appropriate theoretical conceptualization and in the answer to the question of whether IHL is humanitarian in this sense. As a result, I won't treat it separately.

Let us go back to considering "rights-based humanitarian" as a binary property, on account of which rights are not interchangeable units of value. Because the rights-based understanding of humanitarian is not consistent with the ordinary language use of the term (indeed, it seems to be almost exclusively employed in IHL scholarship and advocacy), it is difficult to gauge when our intuitions would find its application inapt. Certainly, the murders of a serial killer, no matter how much he wishes to reduce suffering, would never qualify as humanitarian in a rights-based sense, for the simple reason that his murders do not uphold rights; they violate them. Rights violations cannot be humanitarian in a rights-based sense (even if they could be humanitarian in the negative-utilitarian sense, by reducing overall suffering or the most rights violations).

Further, a rights-based conception of "humanitarian" moves us away from principles strongly associated to "humanitarianism," such as the principles of neutrality or impartiality, in at least some sense. Rights tend to be asymmetrical: someone is violating them and someone is the victim of such violation. Yet assigning victimhood and perpetrator status at the

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<sup>111</sup> See Jonathan Quong & Rebecca Stone, *Rules and Rights*, in *OXFORD STUDIES IN POLITICAL PHILOSOPHY*, VOLUME 1 222 (David Sobel, Peter Vallentyne, & Steven Wall eds., 2015); SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM: A PHILOSOPHICAL INVESTIGATION OF THE CONSIDERATIONS UNDERLYING RIVAL MORAL CONCEPTIONS* (Reprint ed. 1995).

international level is often riddled with political implications. This can stand in conflict with humanitarian organizations' aims to "support" or "help" everyone in conflict or to maintain "impartiality." It is also harder to justify such impartiality when it involves a failure to distinguish between victims and perpetrators.

The question of whether IHL is humanitarian in a rights-based sense depends, ultimately, on what kinds of rights we have in war and whether these are upheld by IHL. By this, I do not mean that IHL must effectively eliminate or prevent all rights violations from taking place. That is an impossible task for any conceivable legal system for human beings. What I mean is whether IHL's *rules* establish prohibitions and permissions that are largely consistent with the rights that individuals have in war.<sup>112</sup>

There are certain rights that are obviously upheld by IHL: rights against torture, inhumane treatment, and degradation, among others.<sup>113</sup> But we are asking the question of IHL as a whole and regarding all the moral rights at stake in war.

What (moral) rights, then, do we have in war? The answer to this question is, unsurprisingly, the subject of much controversy. There are, in fact, three main moral perspectives one might have regarding war.

First, one might be a pacifist, regarding all forms of violence or only regarding war.<sup>114</sup> Second, one might hold a "revisionist" view of the ethics of war.<sup>115</sup> And, finally, one might hold a more traditionalist view about war.<sup>116</sup>

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<sup>112</sup> I say "largely" or "generally" consistent with the moral rights that individuals have in war because law is not morality, even when it is built around moral constraints, and thus there are considerations of administrability, feasibility, etc., that might make it the case that law cannot perfectly mirror morality. See Jeremy Waldron, *Torture, Suicide, and Determinatio*, 55 AMERICAN JOURNAL OF JURISPRUDENCE 10 (2010).

<sup>113</sup> Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (common to all four Geneva Conventions); Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 90.

<sup>114</sup> See Cheyney C. Ryan, *Self-Defense, Pacifism, and the Possibility of Killing*, ETHICS 508 (1983); Larry May, *Contingent Pacifism and the Moral Risks of Participating in War*, 25 PUBLIC AFFAIRS QUARTERLY 95 (2011).

<sup>115</sup> JEFF McMAHAN, *KILLING IN WAR* (2009); HELEN FROWE, *DEFENSIVE KILLING* (First edition ed. 2014).

<sup>116</sup> MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (2006).

If pacifism about war is true, IHL is clearly not humanitarian in a rights-based sense. This is so because all the killing that is authorized or facilitated by IHL constitutes a rights violation—from the killing of combatants to the killing of civilians as collateral harm.

Revisionist just war theory poses a slightly different challenge. Revisionist just war theorists are committed to the idea that war, just like self-defense, is morally asymmetrical in nature. Combatants who fight in a just war often act with moral justification when they kill unjust combatants and when they inflict proportionate collateral harm on civilians. By contrast, when unjust combatants kill just combatants or civilians, they are often engaged in what is, morally speaking, the equivalent of murdering the innocent (that is, killing without moral justification.)

IHL is, unlike revisionist just war theory, symmetrical in nature. This effectively means that combatants are *legally equal*. It is not an international crime for a combatant to target other combatants or to cause collateral harm against civilians, even if they do so in the context of pursuing an unjust or illegal war. It is also not a crime for states to conscript their own citizens into fighting illegal wars.<sup>117</sup>

If revisionists are correct about the morally asymmetrical nature of war, then IHL is, quite obviously, not humanitarian in a rights-based sense. IHL simply fails to uphold the rights of just combatants and civilians by facilitating, permitting, or failing to prohibit their killings (whether intentionally or as collateral damage). It also, arguably, fails to uphold the rights of citizens conscripted to fight in unjust wars.

Further, IHL does not universally uphold rights against criminal prosecution (which we might think of as rights pertaining to personal autonomy). As Mégret points out, IHL is not universally inclusive: non-state actors and irregular fighters fall outside the protection of IHL, understood in the limited sense of being outside the scope of having immunity from prosecution for their participation in hostilities.<sup>118</sup> Given that these individuals might be fighting just wars, the fact that they can be criminally punished for doing what is, under the revisionist framework, morally justified can also be conceptualized as a failure of the law to uphold

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<sup>117</sup> See Marcela Prieto Rudolphy, *War and Coercion*, SOUTHERN CALIFORNIA LAW REVIEW 24 (2024).

<sup>118</sup> Mégret, *supra* note 60 at 265–266.

certain rights, insofar as we think individuals have rights or privileges to act with moral justification.

It doesn't necessarily follow from this that IHL, as a regime, lacks moral justification. But it does necessarily follow that it isn't humanitarian in the rights-based sense.

Finally, one might embrace a more traditionalist (or Walzerian) view about war, whereby combatants are not only legally but also morally equal.<sup>119</sup> In this view, most, many, or some lower-level unjust combatants who participate in an unjust war are acting with excuses or, even, with moral justifications or permissions.<sup>120</sup>

If the traditionalist view is correct about the rights we have in war, then we might be able to say that IHL is humanitarian in the rights-based sense. However, no author writing within the traditionalist view argues that just wars are morally equal to unjust wars. What traditionalist views about war argue is that most or many unjust combatants cannot be fully blamed for their participation in war; that they might have special moral permissions to participate in war (based on democratic authority or agent-relative reasons); or that they have not forfeited their rights against lethal harm.<sup>121</sup> Everyone acknowledges that just and unjust wars are morally asymmetrical.

Still, for some traditionalists, unjust combatants themselves are not engaged in rights violations.<sup>122</sup> It is the military and political leadership of the state who is morally and politically responsible. It is thus open to the traditionalist to argue that IHL is humanitarian in the rights-based sense: IHL does not immunize or permit any rights violations. In fact, the traditionalist might continue, International Law criminalizes aggression, thus making the political and military leadership of the aggressor state subject to prosecution for the rights violations they are responsible for.

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<sup>119</sup> This is Walzer's view on war. WALZER, *supra* note 116.

<sup>120</sup> RIPSTEIN, *supra* note 83; PRIETO RUDOLPHY, *supra* note 77.

<sup>121</sup> David Estlund, *On Following Orders in an Unjust War*, 15 JOURNAL OF POLITICAL PHILOSOPHY 213 (2007); Massimo Renzo, *Democratic Authority and the Duty to Fight Unjust Wars*, 73 ANALYSIS 668 (2013); Yuan Yuan, *Public War and the Requirement of Legitimate Authority*, 179 PHILOS STUD 265 (2022).

<sup>122</sup> WALZER, *supra* note 116; YITZHAK BENBAJI & DANIEL STATMAN, *WAR BY AGREEMENT: A CONTRACTARIAN ETHICS OF WAR* (First Edition ed. 2019).

Note, however, that things are hardly so simple, even for the traditionalist. There is an important gap between who is subject to prosecution—only those high up in the political and military chain of command—and those who are arguably morally responsible for rights violations. That is, there is a large swath of conduct in war that traditionalists would agree violates the rights of the innocent and which is immunized or permitted by IHL and not prosecutable as a war crime or as part of the crime of aggression.

As a result, even if IHL upholds *more* rights if the traditionalist view is true than if pacifism or revisionism are true, it still fails to uphold important rights. It fails to uphold the rights of victims (combatants or civilians) who die at the hands of unjust combatants, even if it is not lower unjust combatants who are to blame for those deaths.

To sum up, it is open to the traditionalist to argue that IHL is humanitarian in the rights-based sense. But, once more, we have made significant concessions to reach this conclusion. First, it requires us to adopt an increasingly controversial view about war (traditionalism) over competing views (pacifism and revisionism). Second, it requires us to embrace the *status quo* as rights-upholding with very little space for reform, which strikes me as an unnecessarily conservative move that not even traditionalists would embrace. Many traditionalists see the regulation of war as a significant moral compromise and, in fact, would like to see IHL enact further restrictions on both the targeting of combatants and civilians. If these reforms are significant, they would imply that IHL is not, then, rights-upholding in these areas. But if we want to preserve the label, we must minimize the need for reforms as well as their extent.

### 3. “HUMANITARIAN” AS AN ASPIRATION

If IHL is not clearly humanitarian in the rights-based and the negative-utilitarian senses without significant concessions, then one might say that whether IHL *is* “humanitarian” is the wrong question to ask. Perhaps, “humanitarian” conveys nothing but an aspiration for the law to realize. Aware of the law’s many flaws, we just hope that, some day, IHL will become humanitarian—in the rights-based or negative-utilitarian sense.<sup>123</sup> As Meron soberly concluded, the discourse around the

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<sup>123</sup> Naturally, this would mean that IHL is not, in fact, humanitarian.

humanization of IHL has triumphed mostly rhetorically,<sup>124</sup> and the contradicting aspirations of IHL and IHRL cannot be easily resolved.<sup>125</sup>

But it seems that “humanitarian” cannot even convey such an aspiration. In fact, it is far from clear how this aspiration could be realized, and it is quite possible that it should not be realized at all. Perhaps the *jus in bello* cannot be, and should not be, humanitarian.

In the negative-utilitarian sense, even if it is theoretically possible for IHL to eventually become humanitarian, the concessions we made in section 2 risked doing away with the positive connotations of the property. Once “humanitarian” loses those positive connotations, there remains very little that is aspirational about it. The aspiration is akin to an aspiration that Dictator1 becomes more like Dictator2. And while we can prefer Dictator2 over Dictator1, all things considered, it would be odd to refer to this preference as an aspiration towards humanitarianism.

In the rights-based sense, whether IHL could be humanitarian depends on the theory we embrace about the rights we have in war. If we embrace traditionalism, as I explained, it is open to us to say that IHL is humanitarian in this sense. If so, “humanitarian” is not an aspiration but a reality (more or less realized, depending on the perceived need for legal reform).

If we embrace revisionism or pacifism, it is possible that to make IHL fully humanitarian in the rights-based sense, we would have to abolish war or turn war into something that resembles a law enforcement operation. This means that for IHL to be humanitarian in the rights-based sense, it would have to cease to exist as such; it would become, in effect, a different body of law: IHRL. This is related to the fact that the “humanitarian” regulation of war strikes many as a contradiction: “to genuinely humanize humanitarian law, it would be necessary to put an end to all kinds of armed conflict.”<sup>126</sup> As Schmitt notes, “if humanitarianism reigned supreme, war would not exist.”<sup>127</sup> “The best we can do for the preservation of individual

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<sup>124</sup> Meron, *supra* note 40 at 276.

<sup>125</sup> See Yuval Shany, *Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror*, 19 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW, HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW 1 (2009); Leebaw, *supra* note 9 at 226.

<sup>126</sup> Meron, *supra* note 40 at 240.

<sup>127</sup> Schmitt, *supra* note 59 at 837.

rights,” Dill says, is to dedicate our efforts to building institutions and preventing as many confrontations between states as possible.<sup>128</sup>

If we made IHL “humanitarian” in the rights-based sense (thus turning IHL into IHRL), we would also likely make IHL *not* humanitarian in the negative-utilitarian sense. After all, as I explained at the beginning, these two senses of “humanitarian” are in tension with each other.

This tension is well known. If the *jus in bello* aims to effectively constrain conduct in war, it needs to consider what is feasible and what level of non-compliance the system can accommodate without collapsing. In fact, as Shue notes, it is likely that the more permissive the *jus in bello* is the more warring parties are likely to comply with it.<sup>129</sup>

The ICRC has been aware of this necessity for a “realistic approach” to the laws of war and of the need to prepare a text that would be accepted by governments, which would require a careful balance between “the requirements of humanity” and military necessity.<sup>130</sup> Further, war has some epistemic constraints (the fog of war) that may make fine-grained rules unlikely to effectively achieve its goals.<sup>131</sup> This is partly why authors worry about the “individualization” of IHL. It creates tensions or dilemmas for actors engaged in war and its regulation, who can either be impartial or partial in a conflict, who can either fight war or conduct law enforcement operations.<sup>132</sup>

Plausibly, then, there is a level at which IHL becomes “too humanitarian” (in the rights-based sense)—that is, a level at which, by too closely resembling IHRL, it becomes unacceptable to the relevant actors and produces, in practice, high levels of non-compliance and contempt for the law, which creates more suffering or produces more rights violations,<sup>133</sup> thus ceasing to be humanitarian in the negative-utilitarian sense.

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<sup>128</sup> Dill, *supra* note 45 at 270.

<sup>129</sup> Shue, *supra* note 56 at 284; Shany, *supra* note 125 at 27.

<sup>130</sup> Int’l Comm. of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May–12 June 1971: Report on the Work of the Conference ¶ 13 (1971), *excerpted in* 11 Int’l Rev. Red.

<sup>131</sup> Shany, *supra* note 125 at 22–24.

<sup>132</sup> Welsh, Akande, and Rodin, *supra* note 49 at 21; Glenn J. Voelz, *The Individualization of American Warfare*, 45 THE US ARMY WAR COLLEGE QUARTERLY: PARAMETERS 10, 109 (2015); Blum, *supra* note 46 at 48–49; Schmitt, *supra* note 59 at 796.

<sup>133</sup> This would make IHL indirectly or directly self-defeating. See John Gardner, *What Is Tort Law for? Part 1. The Place of Corrective Justice*, 30 LAW AND PHILOSOPHY 1 (2011).

Note that saying that IHL cannot be fully humanitarian, or that it would cease to exist if it were fully humanitarian, doesn't imply that the *jus in bello* should cease to exist right now. IHL might be justified, under current circumstances, as the best compromise.<sup>134</sup> This, however, does not imply that the feasible compromise is morally acceptable, unless we qualify it in several ways.<sup>135</sup> Most importantly, it doesn't imply that the feasible compromise, just by being feasible and a compromise, is "humanitarian."

#### 4. DOES IT MATTER?

If IHL is not humanitarian and humanitarian is not a workable aspiration for IHL to realize, does it matter whether we think that IHL is humanitarian?

Although I believe that the most important question is whether IHL *is* humanitarian, I do not wish to underestimate the effects of thinking of the *jus in bello* as "humanitarian" when it is not, particularly given the positive connotations usually associated with the label. The misperception that IHL is "humanitarian" seems like a relevant mistake we ought to avoid. Of course, whether such a mistake has significant consequences remains highly speculative. There are, however, a few things we could say in this regard.<sup>136</sup>

First, the misperception might have a certain propagandistic effect—a "prettifying" of the law that makes it (and war) more morally palatable than what it should be.<sup>137</sup> Although it is important that IHL has legitimacy among a wide variety of stakeholders, legitimacy should not come at the expense of acknowledging what the law is, what it permits, and what it fails to prohibit: the killing of human beings—at a massive scale.

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<sup>134</sup> PRIETO RUDOLPHY, *supra* note 77; Philipp Gisbertz-Astolfi, *The Legal Status of Combatants as a Moral Compromise*, LAW AND PHILOS (2026), <https://link.springer.com/10.1007/s10982-026-09567-6>.

<sup>135</sup> PRIETO RUDOLPHY, *supra* note 77.

<sup>136</sup> Note how these consequences, if true, would be part of the question of whether IHL is humanitarian in the negative-utilitarian sense.

<sup>137</sup> MOYN, *supra* note 8. Recently, similar concerns have been raised about just war theory by Pope Leo XIV: "Today, more than ever, without prejudice to the right to self-defense in the strictest sense, it is important to reaffirm that the "just war" theory, which has all too often been used to justify any kind of war, is now outdated. Humanity possesses far more effective and capable tools for promoting human life and resolving conflicts, such as dialogue, diplomacy and forgiveness. The use of force, violence and weapons reflects a relational poverty that always has disastrous consequences for civilian populations." Pope Leo XIV, Encyclical Letter, Magnifica Humanitas: On Safeguarding the Human Person in the Time of Artificial Intelligence ¶ 5 (May 15, 2026), <https://capp-usa.org/magnifica-humanitas/>.

This misperception, particularly when people think IHL is “humanitarian” in its rights-based variety, can easily obscure the differences between IHL and IHRL, thus masking the role that military necessity plays in the *jus in bello*.<sup>138</sup> We might fail to come to terms with the fact that, under IHL, combatants can be targeted as a first, not last, resort<sup>139</sup> or with the fact that civilians can be killed as collateral damage.

Of course, one might hope that this misperception would do work in the right direction: that it might motivate states and armies to interpret and apply the law in ways that are responsive to their own understandings of “humanitarianism,” and that, in doing so, IHL becomes more humanitarian by, say, restricting the targeting of combatants or collateral harm against civilians. But there is no reason to think that the misperception that IHL is rights-based humanitarian will work in that direction, that is, in the direction of IHRL’s progressive encroachment into, and restriction of, IHL. It is quite possible that the misperception does the opposite—that by obscuring the differences between the two legal regimes, it results in IHL encroaching into IHRL. This might happen because placing overtly onerous demands on belligerents can have the perverse effect of diminishing IHRL’s protections<sup>140</sup> Or it might happen because military action taken under the guise of the *jus in bello* can be easier to justify. The United States’ recent designation of drug-cartels as terrorist organizations, coupled with its claim that there is a non-international armed conflict with them, presumably in order to gain some degree of legitimacy for targeting them with military force, is but one example.<sup>141</sup>

Second, the misperception of IHL as “humanitarian” can also make the law appear non-political. This is not so much a result of the negative-utilitarian and rights-based senses of humanitarian but of the principled association—historical and otherwise—of humanitarianism with neutrality. It is possible that conceiving of IHL as “humanitarian” makes it seem like the choice to regulate war is entirely neutral. It is about not taking

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<sup>138</sup> Schmitt, *supra* note 59 at 805–806.

<sup>139</sup> Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUROPEAN JOURNAL OF INTERNATIONAL LAW 819 (2013); Michael N. Schmitt, *Wound, Capture, or Kill: A Reply to Ryan Goodman’s ‘The Power to Kill or Capture Enemy Combatants,’* 24 EUROPEAN JOURNAL OF INTERNATIONAL LAW 855 (2013).

<sup>140</sup> Kalmanovitz, *supra* note 110 at 193.

<sup>141</sup> Helene Cooper, Maggie Haberman, Charlie Savage & Eric Schmitt, *Trump Directs Military to Target Foreign Drug Cartels*, N.Y. Times (Aug. 8, 2025), <https://www.nytimes.com/2025/08/08/us/trump-military-drug-cartels.html>.

sides in armed conflict while doing the most to reduce suffering or uphold rights.

Although there are important advantages to neutrality, like its plausible commitment to cosmopolitanism (understood as universal concern for the plight (or certain plights) of human beings, unmoored from state affiliations),<sup>142</sup> it has well known dangers.<sup>143</sup> Neutrality risks ignoring the material causes of organized violence<sup>144</sup> or, even, the role that the *jus in bello* itself plays in constructing and perpetuating certain kinds of violence. It also risks presenting IHL as an apolitical body of law. But there are many political choices in both the existence of the *jus in bello* and the rules we have adopted; that is, there is a political choice in *regulating war* and in *how* we regulate war.

Thinking about *how* IHL regulates war, a common critique is that the laws have a clear state bias.<sup>145</sup> States are allowed to conscript their own citizens while non-state armed groups are not; members of non-state armed groups are not generally accorded POW status or immunity from prosecution for their participation in hostilities; and so on.<sup>146</sup> Some even suggest that the law decreases non-state actors' ability to effectively wage war, thus enhancing the ability of powerful states to come out victorious.<sup>147</sup> These choices deserve close attention—attention we might direct somewhere else if we think of IHL and the choices it makes in regulating war as, simply, “humanitarian.”

The symmetrical regulation of war itself is also a political choice, which, while remaining neutral about the causes of violence and between belligerents, can have the perverse effect of undermining, even if symbolically, the prohibition on the use of force.<sup>148</sup> It can divert attention

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<sup>142</sup> See, e.g., Barnett, *supra* note 29 at 380, 383. But Barnett and Weiss, *supra* note 11. note Humanitarianism's Western and Christian roots, which might press in an opposite direction.

<sup>143</sup> Allen, *supra* note 9.

<sup>144</sup> Leebaw, *supra* note 9 at 226.

<sup>145</sup> See e.g., Alexander, *supra* note 87 at 248. She argues that “the overriding theme in the laws of war has never been to protect “innocent” civilians, but to make sure that the state has a monopoly over violence and political action.”

<sup>146</sup> See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 6(5), June 8, 1977, 1125 U.N.T.S. 609.

<sup>147</sup> See e.g., Berman, *supra* note 2 at 45.

<sup>148</sup> Mégret, *supra* note 55 at 843.

from question about what kinds of policies states should pursue to minimize the possibility of war, which might include advancing democracy, human rights, equality, and so on.<sup>149</sup>

In the words of Mégret,

“The classic humanitarian argument that one must continue to regulate war in a *jus contra bellum* era until war is effectively abolished, can thus quickly lapse into the suggestion (clearly entertained by some international lawyers) that aggression will never be significantly abolished and so one might as well give up on such a lofty ‘political’ goal and concentrate on the serious, practical and humanitarian business of saving lives in war.”<sup>150</sup>

For a significant part of history, IHL, International Criminal Law, and international law were part “of a larger genus of ‘peace projects.’”<sup>151</sup> Gustave Moynier, who collaborated with Dunant in creating the ICRC, believed that the latter would and could contribute to the abolition of war.<sup>152</sup> The ICRC still stresses the importance of the maintenance of peace, which is also a fundamental goal of the international legal system.<sup>153</sup> Yet Dunant himself eventually became disillusioned with humanitarianism. Thinking it had been coopted by states, he walked away from reformism and embraced pacifism.<sup>154</sup> And Tolstoy, who was a great critic of the hope to make war “civilized,” was concerned, precisely, that making war humane through its legal regulation would entrench it.<sup>155</sup>

But this larger political project that sought broader anticolonial, disarmament, and pacifist ends eventually lost out to the “humanitarian” project as we know it: a project focused on individual criminal accountability to the detriment of the systemic conditions that produce mass violence and international law’s complicity in it.<sup>156</sup>

It is comforting to think of this choice, of this compromise, as “humanitarian.” It is even more comforting to think about regulated war

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<sup>149</sup>Ned Dobos, *Jus Ante Bellum, Reckless Threats and Irresponsible Promises*, 101 INTERNATIONAL AFFAIRS 2235, 2 (2025).

<sup>150</sup>Mégret, *supra* note 55 at 857.

<sup>151</sup>*Id.* at 835.

<sup>152</sup>Leebaw, *supra* note 9 at 225.

<sup>153</sup>ICRC Report, Reaffirmation of principles, para. 12.

<sup>154</sup>Barnett, *supra* note 23 at 733.

<sup>155</sup>MOYN, *supra* note 8 at 13.

<sup>156</sup>Das, *supra* note 6 at 731–732.

itself as “humane” or “humanitarian.” As Moyn cautions, if we think that war, through its regulation, has become “humane,” we are less likely to worry about controlling the use of force and about building a world free of domination.<sup>157</sup>

We might think that if only wars were fought in the way the law commands, it would be alright. That is, we might think of IHL as “a justificatory narrative of tragic necessity, which can license war and the war-building and sustaining machinery.”<sup>158</sup>

Wars might tend to be judged by how many war crimes are committed, not for what made them possible—not for their root causes. This avowedly humanitarian law has also contributed to the creation of a system compatible with assigning different worth to human lives and with weighing lives against military gains.<sup>159</sup> This is what compliance with the *jus in bello* looks like; this is what “humanitarian” war requires.

A war in compliance with IHL, a “humanitarian” war, seems to leave little conceptual space for the victims of such humanitarianism. There is a particular kind of hermeneutical injustice in the misperception; it might make it harder to adequately conceptualize certain people (civilians killed in armed conflict; soldiers conscripted into war) as victims.<sup>160</sup>

At this point, we might want to insist, once more, that IHL does not permit or facilitate any behaviors that produce suffering. But whatever the case, at the very least IHL *fails* to prohibit certain behaviors (like the targeting of combatants and the killings of civilians as collateral harm), and the fact that it does can be more easily neglected if we think of this failure as “humanitarian” in nature. That is, IHL permits (or, by failing to prohibit, facilitates) a certain kind of war, and, in doing so, it has set the “the contemporary ideal of acceptable warfare:” wars where civilians are protected, to whatever extent possible; wars where the ultimate

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<sup>157</sup> MOYN, *supra* note 8 at 13.

<sup>158</sup> See Christopher Elliott, Neil Christopher Renic & Jessica Wolfendale, *Dirty Hands, Savage Enemies, and Bad Apples: A Taxonomy of War Crimes Apologia*, 52 REVIEW OF INTERNATIONAL STUDIES 698 (2026).

<sup>159</sup> Some authors have tried to reconceptualize these in terms of lives on both sides. See Helen Frowe, *Lesser-Evil Justifications for Harming: Why We’re Required to Turn the Trolley*, 68 THE PHILOSOPHICAL QUARTERLY 460 (2018); Uwe Steinhoff, *Against a “Combined Liability-Lesser-Evil Justification,”* 47 PHILOSOPHIA 533 (2019).

<sup>160</sup> On the idea of hermeneutical injustice, see MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING* (2007).

transgressions are the commission of war crimes and genocide.<sup>161</sup> In doing so, other morally relevant questions can be more comfortably set aside.

#### CONCLUSION

Is IHL “humanitarian”? I have argued that it probably isn’t, that it probably shouldn’t be, and that, in fact, it probably can’t be. This doesn’t mean that the *jus in bello* is not a valuable legal system or that we should simply discard it. It only means that under plausible conceptions of what it means to be “humanitarian” it isn’t, or that, in order to characterize it as “humanitarian,” we must let go of the positive connotations associated with the label.

The *jus in bello* is a political project that both restrains and facilitates war through its regulation. Calling it “humanitarian” risks unduly obscuring this political choice and, perhaps, it prevents us from imagining a radically different world—a world where we can work toward the abolition of war.

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<sup>161</sup> Alexander, *supra* note 87 at 235.