University of Glasgow

How International Legal Humanitarianism Legitimises War and the Deprivation of Human Life: A Critique

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Submitted in fulfilment of the requirements of the
Degree of Doctor of Philosophy in Law

School of Law

College of Social Sciences

University of Glasgow

April 2025

Abstract

This thesis argues that the international humanitarian vision comprises two main, antagonistic intellectual traditions: one that seeks to abolish war and another that deems such an endeavour hopeless and is instead devoted to regulating it. It suggests that the latter, termed the 'Regulated War tradition', has become hegemonic today. The thesis reveals the discursive strategies by which this tradition legitimises war and sustains its own hegemony. Through its hegemony, the Regulated War tradition defines the structure of international humanitarian legal argument which oscillates between two rhetorical poles: the rhetoric of aspiration, advocating for a more protective interpretation of the law, and the rhetoric of limitation, justifying a more permissive reading based on the so-called necessities of war. Having uncovered the grammar of international humanitarian legal discourse, this thesis advances an ideology critique of the Regulated War tradition by shedding light on the discursive ways in which it legitimises the deprivation of human life. The thesis contends that the hegemony of this tradition has led to the rise of instrumental humanitarian reason—a calculative logic that sidesteps the fundamental question of why human beings kill one another, focusing instead on how they should be killed. It concludes with an immanent critique of the Regulated War tradition, aiming to chart a path toward the realisation of the humanitarian promise to safeguard human life.

To my mother, a daughter of the scourge of war. To my father, a son of the working class.

Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Printed Name: Andreas Piperides

Date: 25 April 2025

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Acknowledgements

This journey, like all journeys, has been a collective endeavour. The weight of not doing justice to all those who have supported me throughout this PhD is a heavy burden, but I hope that by thanking, from the outset, all fellow travellers and interlocutors, I may convey my sincere appreciation. I am grateful to my parents for their unconditional love and support. I thank my sisters, whose unwavering belief in me was so persistent that they have spent the last couple of years asking when my graduation ceremony is, just so they can finally book their tickets to Glasgow. I am also indebted to my nephews, who grew at a pace far quicker than the writing of this thesis, awakening in me a rare sense of urgency.

I have been most fortunate to have crossed paths with kind and brilliant human beings who have become friends and comrades. To my broulinakia in Cyprus, my comrades at the European Court of Human Rights, in particular Fritz and Lucilla, the Cypriot and Greek communities of Glasgow and Edinburgh, and my fellow PhD travellers, Andreas and Remi, I extend a warm and very, very strong embrace in celebration of your loving footprints in this era. For sharing with me the subaltern indignation for the genocide of the Palestinian people: Yussef shukran, Sare teşekkürler.

Deep gratitude goes to the people of Glasgow, the Celtic fans, and especially the students and staff of the University of Glasgow, whose steadfast support for Palestinian liberation has been a source of inspiration and strength. I will be forever thankful to the colleagues at the School of Law who entrusted me with teaching and marking as a Graduate Teaching Assistant and to Kasia who has been a kind rock of support for all GTAs. A sincere appreciation is owed to Christian and Asli for their trust and cooperation in the Erasmus Mundus Master in International Law of Global Security, Peace, and Development. I am indebted to Amanda for her true friendship and for restoring my faith in British humour. Last but not least, it was an immense privilege to have a brilliant and truly world-class supervision team. Asli, Marco, and Akbar, thank you for all that you taught me and forgive me for all that I have yet to learn.

Above all, I want to thank the people of Palestine and all the struggling peoples across the globe for reminding us that the old mole is still burrowing.

1. Prologue

1.1 Research Questions

The first Nobel Peace Prize was awarded to two men with very different conceptions of the road to peace. Henry Dunant, the founder of the International Committee of the Red Cross (ICRC), and Frédéric Passy, the founder of the French Pacifist League, shared the prize in a symbolic moment marking the convergence of their paths in a common aspiration to address the carnage of war. They disagreed, however, on one fundamental assumption, which had led them down different paths from the outset. Dunant believed that war cannot be avoided and thus sought to humanise it, whereas Passy contended that if humanity were to become more humane, it must avoid war altogether.[1] This thesis explores the tensions between these two paths at the crossroads of international humanitarian legal discourse. It seeks to retrace their shared roots, identify their limitations, and ask why both paths have come to stumble beneath the weight of their own humanitarian promise.

Humanitarianism is today framed as a compromise between the lofty aspiration for human protection and the inherent constraints of the human condition. The hegemonic incarnation of international legal humanitarianism presupposes that war is an inescapable aspect of human existence and thus ought to be governed by legal frameworks to mitigate its impact. Only in an era where the end of the world is more conceivable than the end of war can the notion of regulated warfare emerge as the hegemonic expression of humanitarianism. These are the furrows leading to this thesis. It is the fruit of intertwining personal and professional encounters. The thesis becomes meaningful, however, only because the social conditions of the present epoch render it possible. Among the historically specific conditions that originally fuelled the research questions of this work are the rise of the 'humane war' model of conducting warfare and the development of military technology that facilitates this model.[2] As this thesis has taken shape, real life has echoed—in the case of Ukraine—or even amplified—in the case of Palestine—the central arguments advanced below. It is profoundly regrettable that even the intended ruthless critique of international legal humanitarianism has proven to be overly optimistic when confronted with the sheer ruthlessness of reality. The final text has refined and broadened its critique to capture the dynamics of the current historical moment.

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[1] Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War* (Verso 2021) 80.

[2] For the former see ibid. For the latter see Bradley Smith, 'Civilian Casualty Mitigation and the Rationalization of Killing' (2021) 20(1) Journal of Military Ethics 47-66.

This thesis investigates how the international humanitarian legal discourse produced in the languages of International Humanitarian Law (IHL) and International Human Rights Law (IHRL), though ostensibly intended to safeguard human life, ultimately serves to legitimise war and the deprivation of life. The research questions guiding this thesis are five, addressed in five steps. First, the thesis maps the key international humanitarian legal projects and organises the discourse they generate. Chapter 2 classifies these legal projects under two intellectual traditions, while Chapter 3 examines the discourse produced by the hegemonic tradition, categorising it into its two main legal projects. Second, the thesis explores how this hegemonic tradition legitimises war. Chapter 4 engages with this question through the ideology critique of the hegemonic tradition's discursive strategies. Third, the question of the grammar of this international humanitarian legal discourse arises. What is the structure of the international humanitarian legal argument that makes the production of international humanitarian discourse possible? Chapter 5 argues that the structure of international humanitarian legal argument is binary and operates on a constant oscillation between its two poles: aspiration and limitation. It illustrates this oscillation with reference to particular international humanitarian legal texts. After demonstrating the workings of the international humanitarian legal argument, the thesis proceeds to answer the fourth research question: how does international humanitarian legal discourse legitimise the deprivation of human life in wartime? Chapter 6 employs the tools of ideology critique to expose the discursive strategies that render the deprivation of human life ideologically palatable. Finally, the thesis confronts its overarching research question that animates the rest: how can the humanitarian promise be fulfilled through the enhanced protection of human life? A sketch of an answer to that pivotal question is painted, in the form of immanent critique, in Chapter 7, which also concludes this thesis.

1.2 Situating the Thesis in the Relevant Literature

To address these research questions, which arise from the tangible reality of war and the stance of international legal humanitarianism towards it, this thesis draws upon a diverse range of scholarly contributions. While there is considerable scholarship in the critique of international law and its various sub-fields, there are only a handful of interventions in the critique of IHL that align with the approach of the present work. This thesis is a reaction to the paradoxical discourse and practices that legitimise war and the deprivation of human life in the name of humanitarianism. The starting point, therefore, at least the textual one for the purposes of a literature review, is the hegemonic discourse about IHL.[3] This

[3] Inter alia, Emily Crawford and Alison Pert, *International Humanitarian Law* (CUP 2020); Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC 2019); William Bouthy, *The Law of*

hegemonic tradition of IHL, which chapter 2 renders as the 'Regulated War' intellectual tradition, is the one taught in law schools, disseminated by organisations such as the ICRC, and operationalised by militaries.[4] For instance, a recent textbook has explicated one of the problematic motifs of international humanitarian legal discourse: 'Even though civilians may not be attacked directly, IHL acknowledges the *unavoidable* reality that they may still be affected by armed violence'.[5] This discourse is the main object of study of the present work. It is posited to advance a critique of this hegemonic intellectual tradition and the discourse it produces in order to expose the relations of domination which it sustains. The critique deployed in the following pages wishes to go beyond the surface of discourse and to reach the source of their articulations. In this sense, it is a critique of capitalism as well.

The most influential text for ideology critique in international law has proved to be Marks book 'The Riddle of all Constitutions'.[6] In this work, Marks draws on various social theorists and philosophers to bring to the fore the discursive strategies employed to legitimise relations of domination in the name of democracy in international law. This text, together with the work of Thompson, has inspired the ideology critique put forward in this thesis.[7] In the course of writing, of course, the discussion also benefited from multiple other contributions on ideology critique.[8] Notwithstanding these important texts on other sub-fields of international law, prior to this thesis, no other work had developed a detailed and focused ideology critique of IHL. The closest to such an endeavour is a series of two articles published in mid-1990s by Jochnick and Norman.[9] Since these articles put forward a claim similar to the central claim of this thesis, it is worth examining the convergences and divergences between the two works in detail.

Targeting (OUP 2012); Michael Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' (2010) 1 Harvard National Security Journal.

[4] See inter alia, International Committee of the Red Cross (ICRC), *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (CUP 2016), United States of America, *Department of Defense Law of War Manual* (Department of Defense 2015, updated 2023) and United Kingdom Ministry of Defence, *Joint Service Manual of the Law of Armed Conflict* (Joint Doctrine and Concepts Centre 2004).

[5] Jeroen van den Boogaard, *Proportionality in International Humanitarian Law: Refocusing the Balance in Practice* (CUP 2023) 152 (emphasis added).

[6] Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (OUP 2000).

[7] John Thompson, *Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication* (Polity Press 1990).

[8] See inter alia, Terry Eagleton, *Ideology: An Introduction* (Verso 1991) and Louis Althusser, *On the Reproduction of Capitalism: Ideology and Ideological State Apparatuses* (Verso 2014). Influential works on ideology and the law include Justin Desautels-Stein and Akbar Rasulov, 'Deep Cuts: Four Critiques of Legal Ideology' (2021) 31 Yale Journal of Law and the Humanities 85 and Tor Krever, 'International Criminal Law: An Ideology Critique' (2013) 26 Leiden Journal of International Law 701.

[9] Chris Jochnick and Roger Norman, 'The Legitimation of Violence: A Critical History of IHL' (1994) 35(1) Harvard International Law Journal 49 and Chris Jochnick and Roger Norman, 'The Legitimation of Violence: A Critical Analysis of the Gulf War' (1994) 35(2) Harvard International Law Journal 389.

In these two articles, Jochnick and Norman maintain that IHL legitimises violence. In the first article, which delves into the history of IHL, they argue that:

> The laws of war have been formulated deliberately to privilege military necessity at the cost of humanitarian values. As a result, the laws of war have facilitated rather than restrained wartime violence. Through law, violence has been legitimated.[10]

The two authors contended that already from the Hague Peace conference and 'despite the humanitarian rhetoric' the 'military concerns have dictated the substantive content of the laws of war'.[11] For them, IHL 'operates to shape discourse and lends credence and inevitability to existing arrangements'.[12] They criticise the early 20th century IHL's 'deliberate vagueness' which allows almost any military manoeuvre, including the bombardment of civilian populations, by boldly declaring that IHL 'helped to legitimate the very atrocities that they purportedly intended to deter, leading to the "lawful" slaughter of civilians'.[13] Jochnick and Norman assert that with the development of new military technology such as the airplane and long-range artillery, the early 20th century saw the 'advent of total war'.[14] The authors also warn against the attempt to naturalise the relationship between war and law, which 'was constructed piece by piece in response to a series of particular, historically contingent events'.[15] By denaturalising the current relationship between war and law, they want to open up the possibility for 'the development of alternative legal frameworks that effectuate different values and yield different results'.[16]

A more concrete proposal of such alternatives is found in the second article of this series. This article, which is applying the previous assumptions to the case study of the Gulf War, suggests that 'the laws of war permit virtually any form of military conduct as long as such conduct is directed towards achieving clear military objectives',[17] which, similar to the previous article,[18] is traced back to the Nuremberg tribunal.[19] Then, the article attacks the

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[10] Ibid Jochnick and Norman, 'The Legitimation of Violence: A Critical History of IHL' 50.
[11] Ibid 56.
[12] Ibid 58.
[13] Ibid 77.
[14] Ibid 78.
[15] Ibid 95.
[16] Ibid.
[17] Jochnick and Normand, 'The Legitimation of Violence: A Critical Analysis of the Gulf War' (n 9) 389.
[18] Jochnick and Norman, 'The Legitimation of Violence: A Critical History of IHL' (n 9) 90-93.
[19] Jochnick and Normand, 'The Legitimation of Violence: A Critical Analysis of the Gulf War' (n 9) 409-410.

'myth that the laws of war restrain war conduct' by demonstrating how in the case of the Gulf War 'the laws serve to shield violence from humanitarian scrutiny'.[20] With this, the article concludes its criticism and proceeds to engage with a possible alternative. As it made clear from the outset:

> This analysis of the Gulf War provides a sobering lesson about the difficulty of using law to humanize war, but does not condemn the effort itself. Law is not fated to serve the ends of military violence. The requirements of global security and prosperity in an interdependent world may yet lead us to reform the laws of war to serve their supposed ends-a reasonable balancing of military necessity and humanity.[21]

Despite their well-meaning criticism of IHL, Jochnick and Normand could not escape from the fundamental assumption of the hegemonic way of thinking about IHL, as they concede that 'war will be a feature of international relations for the foreseeable future'.[22] Operating on this assumption of the unavoidability of war, they consider 'even minor limitations on belligerent conduct and marginal humanitarian gains' as worth pursuing.[23] The two authors posit that such an endeavour 'needs not be viewed as subverting efforts to abolish war, but rather as stages toward the realization of that goal'.[24]

The main thesis of these two articles appears identical with the main argument of the present work: Jochnick and Normand argue that IHL legitimises violence and this thesis suggests that the discourse produced in the language of IHL and IHRL legitimises war and the deprivation of human life. Similarly to the critique in chapters 4 and 6, the two articles challenge the naturalisation of the existing relationship between law and war by highlighting that the current configuration is historically contingent.[25] The two projects also converge on the critique of the humanitarian façade of IHL, which ultimately favours military necessity while shaping discourse and reinforcing the legitimacy of the status quo.[26] There are, however, fundamental and irreconcilable differences between the project pursued by Jochnick and Normand and this thesis. Firstly, their work fetishises law by perceiving it as a determined and coherent collection of normative commands. In fact, one of the main criticisms of IHL is that it fails the ostensibly proper standards of law because

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[20] Ibid 399 and 403-407.
[21] Ibid 389.
[22] Ibid 416.
[23] Ibid.
[24] Ibid.
[25] Jochnick and Norman, 'The Legitimation of Violence: A Critical History of IHL' (n 9) 94.
[26] Ibid 56 and 58.

of its 'deliberate vagueness'.[27] This thesis, on the contrary, takes the contribution of critical legal studies (CLS) seriously,[28] by deconstructing IHL and bringing to the fore the unstable and contradictory structure of the international humanitarian legal argument in Chapter 5. This core conceptual disagreement leads also to a second methodological divergence of the two projects. While the two articles centre their analysis on the law itself, assuming its coherence, this thesis advances its ideology critique with a focus on the way different legal projects talk about IHL and IHRL. The analytical emphasis of this thesis is thus on international humanitarian legal discourse. With this as the object of analysis, Chapters 4 and 6 examine the discursive strategies that serve to legitimise war and the deprivation of human life respectively. In extension, the scope of the present critique goes well beyond the limited discussion of IHL rules in the work of Jochnick and Normand. This thesis explores in much greater detail and breadth the rules and discourse of IHL and IHRL.

Above all, the most critical difference between the two projects lies in the fundamental assumption that guides them. The two articles only criticise IHL in order to introduce a reformed IHL.[29] They operate on the assumption that 'war will be a feature of international relations for the foreseeable future'.[30] This hinders them from any meaningful anti-war legal critique and condemns their work at the level of mere criticism. Instead, the present work operates on the assumption that not only is war not inevitable for the foreseeable future, but even more that the end of war is necessary if there is to be a foreseeable future for humanity. This thesis rejects the gradualist approach suggested by Jochnick and Normand.[31] In opposition, it supports that efforts of anti-war movements should be channelled against war itself. Legal reforms to maintain humane war ultimately serve the legitimation of war and the deprivation of human life.

Jochnick and Normand were not the first to touch upon the ways IHL 'normalizes and routinizes the power relations of violence of international society'.[32] In fact, their work does refer directly to the most important figure in the critique IHL:

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[27] Ibid 77.
[28] See Mark Tushnet, 'Essay on Rights' (1984) 6*2* Texas Law Review *1*363. For the fundamental contradiction that has animated the structuralist critique of international law as well see Duncan Kennedy, 'The Structure of Blackstone's Commentaries' (1979) 28 Buffalo Law Review 205, 211-219. For the legal realists that inspired the CLS critique see Felix Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Columbia Law Review 809.
[29] Jochnick and Normand, 'The Legitimation of Violence: A Critical Analysis of the Gulf War' (n 9) 414-415.
[30] Ibid 416.
[31] Ibid.
[32] Ibid 414.

> The law in war (*Jus in Bello)* […] turns force into a discourse of regulation, detailing a space within reason for martial horror. Modern force law tells us that force has been excluded from the legal realm by admitting it, taming it, rendering it knowable, revealing it in all its nuances and subtleties.[33]

Kennedy's scholarship not only opened new paths for critical approaches to IHL,[34] but also critically engaged with IHL and IHRL together under the theme of humanitarianism in the 'Dark Sides of Virtue'.[35] The latter, although laying the groundwork for a critique of humanitarianism, was written with a different purpose from this thesis, something that is also reflected in its methodology. In this book, Kennedy offers a sociological account of the shortcomings of existing humanitarianism.[36] From the outset, where he recounts a personal experience on a US air carrier in the Persian Gulf,[37] Kennedy makes clear that his own experience informs how he perceives humanitarian professionals and the dark sides of their profession. Notwithstanding the valuable insights of this work, it was his next book, 'Of War and Law', from which this thesis has benefited more.

In this work, Kennedy claims that '[l]aw no longer stands outside of violence, silent or prohibitive'.[38] Instead, law 'has increasingly become the vocabulary for international politics and diplomacy, it has become the rhetoric through which we debate—and assert—the boundaries of warfare'.[39] Kennedy emphasises that law has created 'practical as well as the rhetorical bridges between war and peace' to the extent that 'war has become a modern legal institution'.[40] With Clausewitz as his starting point, Kennedy suggests that the legalisation of modern war is the reflection of the parallel legalisation of modern politics.[41] The contribution of his work for the purposes of this thesis is not only that he recognises the legitimating role of IHL discourse which means that 'killing, maiming, humiliating, wounding people is legally privileged, authorized, permitted, and justified',[42] but even more so, his emphasis on IHL as a 'common vocabulary' for military and humanitarian professionals.[43] While the humanitarians intend to restrain violence in warfare and the

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[33] David Kennedy, *International Legal Structures* (Nomos 1987) 278, cited in ibid.
[34] David Kennedy, *Of War and Law* (Princeton University Press 2006).
[35] David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press 2004).
[36] Ibid.
[37] Ibid 8.
[38] David Kennedy, *Of War and Law* (n 34) 167.
[39] Ibid 5.
[40] Ibid.
[41] Ibid 13.
[42] Ibid 8.
[43] Ibid 41.

military seeks to facilitate such violence,[44] Kennedy was surprised to notice the 'ways in which modern warfare has become the product of a complex dance between their different perspectives on a common set of issues'.[45] He argues that humanitarians 'sought in law a stern and rational hand, a fatherly limit' to violence.[46] However, the military professionals themselves did not oppose the legalisation of war. Kennedy confesses that 'nothing was as striking about the military culture I encountered there as its intensely regulated feel'.[47] The reason behind this legalisation is illuminating the argument developed in Chapter 6. According to Kennedy, the military profession seeks in law a vocabulary that can assure that 'their killing is authorized and legitimate'.[48]

It is the need to legitimise the deprivation of human life that motivated military professionals to engage more actively with law. Law is not any more the sum of the rules but a 'vocabulary for judgment, for action, for communication', an invaluable tool for acquiring legitimation.[49] In extension to the legalisation of modern war, Kennedy underlines two other developments in the relationship of law and war. The first is the professionalisation of this relationship.[50] The density of both humanitarian and military legal professionals increased exponentially. Even more, Kennedy notes the increase in the power of experts as well: 'expert consensus can and does influence the politics of war'.[51] This observation enhances the intellectual mapping of the different legal projects that follows in the next chapter by underscoring the pivotal role of the social actors articulating the international humanitarian legal discourse. The second is the bureaucratisation of war. As a legal institution, modern war is fought by institutions that have become 'complex bureaucracies, managed by professionals'.[52] This thesis integrates this insight on the bureaucratisation of war in its critique of instrumental humanitarian reason that culminates in Chapter 7. Finally, Kennedy guides the present work in one more crucial respect. He introduces the relationship between the military and humanitarian professionals as a dance of 'divergent campaigns in the shadow of endless background rules' which can be called 'battling in the shadow of law'.[53] This battle of meaning, that is translated in lethal practice, 'requires complex shifting predictions of fact and law' and is not a 'simple matter of

[44] Ibid 10.
[45] Ibid 28.
[46] Ibid 31.
[47] Ibid 33.
[48] Ibid 32.
[49] Ibid 45.
[50] Ibid 25-26.
[51] Ibid 17.
[52] Ibid 33-34.
[53] Ibid 34.

looking things up in a book'.[54] Most importantly, Kennedy suggests that humanitarian and military professionals change IHL while they are working on it.[55] Practising IHL is to enforce one interpretation over the other. And while there may be the perception that the shape of IHL is determined in peacetime, through negotiations, codification, and advocacy, Kennedy illuminatingly points out that it is in combat that IHL is really 'open to change'.[56] While this claim works both ways for him—that war presents an opportunity to change IHL for both humanitarian and military professionals—Chapter 5 argues the contrary. The fact that IHL tends to be shaped more significantly during wartime is a strong indication of its bias in favour of military necessity. After all, it is the military professionals, or in the language of IHL the 'military commander', that possess the final say in its practice.

Notwithstanding Kennedy's significant contribution to critical approaches to IHL, this thesis rejects his celebratory conclusions for the language of IHL, which identifies 'the emergence of a powerful legal vocabulary for articulating humanitarian ethics in the context of war' as a 'real achievement of the intervening years'.[57] Instead of cherishing the common vocabulary 'for military and humanitarian professionals assessing the legitimacy of warfare' as a 'great accomplishment',[58] the present work attempts to demonstrate why military and humanitarian professionals share the same vocabulary, what the grammar of this vocabulary is, and why a vocabulary that assumes war as a feature of the foreseeable future from the outset is not appropriate for assessing the legitimacy of warfare. Chapter 5 highlights the dead ends of the hegemonic international humanitarian legal discourse by bringing to the fore the oscillation between protective and permissive discourse, articulated by both humanitarian and military professionals and institutions. By turning Kennedy on its head, it submits that this international humanitarian legal discourse is part of the problem, not part of the solution.[59] Similarly, Kennedy's optimism about IHL's openness to change in wartime,[60] which disregards that it is the military that is the privileged combatant in this battle of meaning, reflects a legal naivete that is paradoxical for a critical scholar of his breadth. Nevertheless, his account of a constant negotiation of the meaning of IHL paved the way for further investigation of its indeterminacy and structure.

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[54] Ibid 35.
[55] Ibid 37.
[56] Ibid 37.
[57] Ibid 8.
[58] Ibid 41.
[59] Cf. David Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 Harvard Human Rights Journal 101.
[60] David Kennedy, *Of War and Law* (n 34) 37.

Such an investigation, albeit without delving into the structure of the international humanitarian legal argument, was attempted by Haque.[61] Despite the lack of structuralist insights in his work, Haque offers one of the very few accounts of the indeterminacy of IHL. He breaks down legal indeterminacy into four forms: 'ambiguity, vagueness, incompleteness, and inconsistency'.[62] This classification is used to advance a purposive interpretation of the law by leveraging the language of IHL. Haque relocates the purpose of IHL from balancing military necessity with humanity to the protection of 'persons and objects to the greatest extent practically possible, that is, without depriving other rules of international law, which authorize certain uses of armed force, of practical effect'.[63] Haque goes on to demonstrate how certain legal articulations in IHL are ambiguous; they 'carry multiple meanings in ordinary language' such as 'armed conflict'.[64] He performs this by using the example of 'armed conflict' as an 'ambiguous term'.[65] Haque suggests that IHL possesses some vague terms that are either descriptive, like 'concrete' and 'direct' or evaluative, such as 'humanely' and 'reasonable'.[66] The problem with these vague terms, he argues, is their application to particular facts. In these cases, there may be different viewpoints because of different normative standards.[67] He is in favour of the construction of 'mediating doctrines to give determinate effect to a legal rule whose correct application is indeterminate over some range of cases'.[68] Such a mediating doctrine can be comprised of 'default or closure' rules.[69] For instance, in case of doubt whether civilian harm would be excessive to the military advantage anticipated, a default rule would be not to proceed with the attack.[70] Haque underscores that legal indeterminacy may exists 'not from what a legal text says, but instead from what it leaves unsaid'.[71] This silence of IHL on certain issues, such as the definition of civilians in non-international armed conflicts (NIAC), is described as a form of 'incompleteness'.[72] Finally, Haque discusses the cases of 'inconsistency' between different applicable legal rules, which raise the persistent issue of norm conflict.[73]

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[61] Adil Haque, 'Indeterminacy in the Law of Armed Conflict' (2019) 95 International Law Studies 118.
[62] Ibid 120.
[63] Ibid 120.
[64] Ibid.
[65] Ibid121-126.
[66] Ibid 126.
[67] Ibid 130
[68] Ibid 126.
[69] Ibid 128
[70] Ibid 128.
[71] Ibid 135.
[72] Ibid 135-136.
[73] Ibid 138.

This thesis is in opposition to the positivist project pursued by Haque. First, it refutes the operating assumption of Haque that the purpose of IHL is 'the protection of civilians and other persons not taking direct part in hostilities'.[74] Instead, it builds on the claim that IHL 'operates to shape discourse and lends credence and inevitability to existing arrangements'.[75] Second, while Haque's contribution does highlight the need to engage with the indeterminacy of IHL, his semantic conception of indeterminacy does not enable him to escape the constraints of positivist legal analysis.[76] On the contrary, the present work elaborates a structuralist account of the indeterminacy of IHL. Chapter 5 outlines how the international humanitarian legal argument oscillates between a protective and a permissive rhetoric when it comes to the protection of human life.

This structuralist endeavour is indebted to the seminal work of Koskenniemi.[77] Although his first book sent shock waves across international legal scholarship, this thesis is the first work that engages extensively in the effort to apply his method to the field of IHL. It does not, however, follow his method blindly. The thesis introduces a materialist twist to the deconstructive method in order to ground its analysis at the level of real life instead of the realm of ideas. This materialist deconstruction is not unprecedented in international legal scholarship, as has been exercised perspicaciously by Tzouvala.[78] Her work has proved to be methodologically illuminating in the uncharted waters of the effort to undertake a materialist deconstruction of the international humanitarian legal argument. More discussion on Koskenniemi's and Tzouvala's methodological contributions to this thesis follows in Chapters 2 and 5.

The path to the present project was also paved by two other contributions in the critique of IHL. The first is Escorihuela's analytic breakdown of the politics of distinction in IHL and IHRL.[79] His discussion of the 'two normative universes' of IHL and IHRL which present 'two fundamentally distinct perspectives on death and killing' guided the development of

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[74] Ibid 145.
[75] Jochnick and Norman, 'The Legitimation of Violence: A Critical History of IHL' (n 9) 58.
[76] For semantic indeterminacy and its difference from structural indeterminacy, the indeterminacy of legal realism, and the version of indeterminacy adopted by neo-realists see Cameron Miles, 'Indeterminacy' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law* (Edward Elgar Publishing 2019) 447-457. For the phenomenological model of indeterminacy propounded by CLS see Akbar Rasulov, 'What CLS Meant by the Indeterminacy Thesis' (Law and Political Economy Project, 27 March 2023) https://lpeproject.org/blog/what-cls-meant-by-the-indeterminacy-thesis/ accessed 13 January 2025.
[77] Martii Koskenniemi, From Apology to Utopia: The Structure of International Legal (CUP 2006).
[78] Ntina Tzouvala, *Capitalism As Civilisation: A History of International Law* (CUP 2020).
[79] Alejandro Lorite Escorihuela, 'Humanitarian Law and Human Rights Law: The Politics of Distinction' (2011) 19 (2) Michigan State Journal of International Law 299, 316.

the critique of the discursive strategy of normalisation in Chapter 6.[80] Similarly, the central claim of his article, which heavily draws on Rousseau, that modern wars are fought between states and that human beings are only 'accidentally' taking part in it, informs the critique of the discursive strategy of reification in Chapter 6.[81] Escorihuela eloquently brings attention to the fact that IHL distinguishes the soldier from the human being in its regulatory emphasis.[82] Furthermore, this insight also illuminates the understanding of the particular mechanisms of the legitimation of the deprivation of life. Following Rousseau, Escorihuela contends that 'the right to legitimate killing is attached to the notion of the human being carrying out the function of soldiering'.[83] He highlights that IHL operates on 'the possibility of legitimately ending the life of human beings, as an unfortunate accident (and sometimes a necessary byproduct) in the activity of war'.[84] In addition to IHL's acceptance of the 'deliberate ending of life',[85] Escorihuela also emphasises that war is presented as 'a legitimate activity'.[86] His claim that IHL never discusses 'the legitimacy of "war" as an existing context, but rather polices its boundaries, which results in the very possibility of a "correct" way of performing warlike activities' is one of the fundamental assumptions upon which this thesis builds its critique.[87]

The second path-breaking text is Berman's article on the legal construction of war, against the backdrop of the war on terror.[88] Berman's point of departure, which is common with this thesis, is his rejection of the idea that IHL limits violence or even more of the perception of IHL 'as historically progressing toward an ever-greater limitation of violence'.[89] Instead, Berman argues that IHL is 'directly involved in *the construction of war*'.[90] He underlines that 'by granting the combatants' privilege, law thus facilitates war'.[91] In extension, Berman contends that not only does IHL not oppose violence but 'the legal construction of war serves to *channel violence* into certain forms of activity engaged in by certain kinds of people'.[92] The most unique contribution of his article to this thesis is that he made explicit, against the sensitivities of international lawyers, one of the

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[80] Ibid 316-318.
[81] Ibid 321.
[82] Ibid 322.
[83] Ibid 323. See also 325-326.
[84] Ibid 333.
[85] Ibid.
[86] Ibid 332.
[87] Ibid 333.
[88] Nathaniel Berman, 'Privileging Combat? Contemporary Conflict and the Legal Construction of War' (2004) 41 (1) Columbia Journal of Transnational Law 1.
[89] Ibid 4.
[90] Ibid 4-5 (emphasis in the original).
[91] Ibid 12.
[92] Ibid 5 (emphasis in the original).

cornerstones of this thesis, that '*jus ad bellum* both *must be* and *cannot be* neutrally separated from *jus in bello'*.[93]

Indeed, the present work operates on the assumption that the artificial wall separating IHL and the law on the use of force needs to be torn down in order to be able to grasp the dynamics of both. Furthermore, Berman highlights the historical contingency of the particular forms of the legal construction of war, which are under constant contestation through 'myriad discursive and practical activities' of the competing groups and their views.[94] Even more, he underscores that IHL has been under heavy destabilising pressure in light of the corrosion of the line dividing acts characteristic of wartime and peace.[95] These pressures can be traced at the level of legal discourse on the ways a 'wide range of actors seeks to permeate war with values from other fields of social life', such as the application of IHRL in wartimes and the application of IHL in anti-terrorist operations.[96] Especially after 9/11, the dividing line between war and peace has been strategically instrumentalised to expand and contract the legal construct of war at will, depending on the particular interest in each situation.[97] Berman demonstrates these strategies of instrumentalisation with the example of how the USA instrumentalised the legal category of unprivileged combatants, in the name of the war on terror, to detain individuals without trial.[98] This case study of unprivileged or unlawful combatants proved to be of significant analytical value for the critique of IHL, as the discussion of the following text demonstrates.

Like all international law, IHL has been the object of post-colonial scholarship. While not a central theme of this thesis, critiques highlighting the connection between the development of IHL and the colonial encounter deeply inform its understanding of the role of international humanitarian legal discourse and its Western origins.[99] Mégret posits that IHL is 'unmistakably a project of Western expansion and even imperialism, one that carries its own violence even as it seeks to regulate violence'.[100] The entangled relationship between imperialism and the structure of the international humanitarian legal argument is

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[93] Ibid 57 (emphasis in the original).
[94] Ibid 6.
[95] Ibid 7.
[96] Ibid.
[97] Ibid.
[98] Ibid 68.
[99] The most influential has been Frédéric Mégret, 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other"' in Anne Orford (ed), *International Law and Its Others* (CUP 2006).
[100] Ibid 310.

investigated in this thesis, albeit from a different point of entry. Nevertheless, the work of Megret reinforces the scepticism of this thesis towards IHL, since he identifies the sinister character of IHL from its very birth: The perceived 'savagery' of 'savages', perhaps even more than Europe's self-perception as 'civilized', was the initial moment of the laws of war.[101] Aside from his critique of IHL as an instrument of inclusion and exclusion,[102] Megret emphasises that IHL 'like a language, must assist us in recognizing war when we see it, and transform the perception of inchoate violence into a legally intelligible concept'.[103] Even more importantly for this thesis Megret explains the ideological function of the language of IHL which determines the 'legitimate actors of warfare',[104] before advancing a claim that has become fundamental for this thesis: 'the laws of war necessarily promote *a certain idea of what legitimate warfare is*, as that warfare for the benefit of which the laws of war were invented'.[105] His conclusion that IHL 'was the solution to the problem it simultaneously crystallized' is the starting point of the current research project.[106]

This thesis was developed during a period when discussions about 'humane war' and the anti-war tradition were revived by Moyn's work.[107] His critique of the project of humanising war had an immense impact on the present work. In his book, Moyn makes clear that he intends to present an 'antiwar history of the laws of armed conflict in the American experience'[108] and to trace 'one of the subtlest developments in warfare since September 11' which could be merely a 'stage in a continuing transition toward less and less brutality'.[109] Moyn highlights the use of drones as a characteristic representation of the US choice to make war more humane, under the pressure from 'diverse communities of activists and armed forces',[110] a new form of war that is now 'tolerated by audiences'[111]. It is clear that for Moyn an 'antiwar law' needs to focus more on the 'crime of war' than on

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[101] Ibid 315.
[102] Ibid 266.
[103] Ibid 304.
[104] Ibid.
[105] Ibid (emphasis in the original).
[106] Ibid 312.
[107] Moyn (n 1). See for instance the book symposium on Moyn's book in the Yearbook of International Humanitarian Law with two significant contributions: Craig Jones and Nisha Shah, 'Wars with and for Humanity' (2021) 24 Yearbook of International Humanitarian Law 143 and Doreen Lustig, 'The Peace Movement and Grassroots International Law' (2021) 24 Yearbook of International Humanitarian Law 165.
[108] Moyn (n 1) 7.
[109] Ibid 8.
[110] Ibid 5.
[111] Ibid 6.

war crimes and thus, he turns to the history of ideas to trace how this antiwar stance has played out in the past.[112]

His first and probably main dramatis persona is Leo Tolstoy, whose criticism of humanised warfare was, according to Moyn, well ahead of his time and is only applicable to Americans now.[113] In parallel to his presentation of Tolstoy's ideas, Moyn sketches a basic timeline of the anti-war movement. While the idea of making war more humane can be traced 'deep in the mists of history', the idea of the abolition of war was 'a genuine novelty'.[114] This starts with modernity that 'afforded a new sense of possibility' but culminates under the banner of religion, with the booming 'Christian pacifism' in the 19th century.[115] Moyn discerns three main tactics of pacification: humanisation of war, abolishing war, and the intensification of war that would make it too costly to be sustainable, at least for a long period of time.[116] The first is the dominant today, supported even by critiques of modern IHL.[117] The second has a long history in the anti-war movement as its central demand, although it had been sidelined when the disarmament movement was in full flower and enjoyed the support of the Soviet Union.[118] The third was a tactic more popular in the 19th century and was propounded by figures like Francis Lieber, who is today celebrated as one of the fathers of IHL.[119]

Moyn's work helps to bring to light early critiques of the rationalisation of war through law.[120] His historical account of the entangled relationship between the peace movement and those in favour of humanising war starts with the exchange of letters between Dunant and Suttner,[121] focuses on the movement against the Vietnam war, and culminates with Obama's technologically advanced wars which saw the flourishing of drone strikes.[122] He underscores how the war in Vietnam produced a 'crystalline moment of insight, in which concerns about how the United States fought were explicitly linked to what justification

[112] Ibid 10.
[113] Ibid 13.
[114] Ibid 20.
[115] Ibid 21.
[116] Ibid 31-32.
[117] Such as Jochnick and Normand 'The Legitimation of Violence: A Critical Analysis of the Gulf War' (n 9) 416, discussed above.
[118] For the peace movement see Cecelia Lynch, 'Peace Movements, Civil Society, and the Development of International Law' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 198 and Martin Ceadel, 'The Peace Movement and Human Rights' in Pamela Slotte and Miia Halme-Tuomisaari (eds), *Revisiting the Origins of Human Rights* (CUP 2015) 189. For the era of disarmament and the role of Soviet Union see Victor Karpov, 'Soviet Stand on Disarmament' (1963) 7(3) Journal of Conflict Resolution 333.
[119] Moyn (n 1) 29.
[120] Ibid 68 and 269.
[121] Ibid 80.
[122] Ibid 166-177 and 267.

the country had to fight at all'.[123] Nevertheless, Moyn recounts the story of how from the late 20th century, with the Gulf War as inauguration point,[124] and especially after 9/11 the idea of humane war became hegemonic.[125] He then criticises the legacy of humane war, not as one of eternal peace, but as one of 'endless control'.[126] Overall, in this work, Moyn historicises the inverse relationship between the rise of the humanisation of war and the fall of the hope of its abolition.[127]

Equally important for this thesis, Moyn documents how the humanisation of war as a US policy was directly linked to its legitimation.[128] His warning to the good-faith humanitarian professionals that 'they have lost their way in helping to entrench continuing violence' motivates this thesis and is one of its cornerstones.[129] This thesis builds on the historiography put together by Moyn but supplements important elements missing, such as the Marxist anti-war movement, which is introduced as the legal project of Materialist Pacifism in Chapter 2. At the same time, this work uses the history of the relationship between proponents of humane war and the pacifists not as its main object of discussion but as a starting point which enables the ideology critique of international humanitarian legal discourse. In extension, this thesis offers a more systematic account of the ideological function of IHL and IHRL. More importantly, this thesis proposes a different course of action to address the legitimation of war and the deprivation of human life than the one espoused by Moyn. Although his work, unlike Jochnick, Normand, and Kennedy, rejects altogether the idea of 'humane war', he seems to follow Suttner and what Chapter 2 terms as 'Idealist Pacifists', who argue that peace can be achieved through law. In fact, it is on this note that he chose to conclude his book: 'our task is to aim for a law that not only tolerates less pain but also promotes more freedom'.[130] Instead, this thesis, aspiring to contribute to the Materialist Pacifist legal project, concludes on the need for structural change as the only way to transcend war.

This overview of the major contributions in the critique of IHL was necessary not only in order to situate this thesis in the relevant literature but also to orient the direction of its critique. With the hypothesis that international humanitarian legal discourse legitimates war and the deprivation of human life as a springboard, it embarks on the journey of

[123] Ibid 163.
[124] Ibid 225.
[125] Ibid 184 and 193-195.
[126] Ibid 196.
[127] Ibid 226.
[128] See for instance ibid 236, 261, and 263.
[129] Ibid 324.
[130] Ibid 325.

painting the picture of this legitimation process, guided by its research questions. Of course, the discussion of the literature above is by no means exhaustive and throughout the thesis it becomes evident that it benefits from a wide variety of scholars from within and outside the discipline of international law. Even when not directly engaging with them, several other important contributions stimulate and sharpen the critique developed in this thesis.[131] While this work was already in its final stages, the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 issued her report for the 'humanitarian camouflage' of genocide in Gaza, which echoes and amplifies the importance of the questions posed in this thesis.[132]

1.3 Overview of the Thesis

After presenting the research questions and situating them in the surrounding literature, it becomes visible that this thesis wishes to intervene in two academic conversations. Both have at their heart the humanitarian promise, which can be encapsulated in the imperative that human life should be protected. Firstly, and primarily, it aspires to contribute to the formation of an anti-hegemonic pole of anti-war, anti-capitalist international humanitarian legal scholarship. To achieve this, it takes a conscious decision to begin its investigation from a different vantage point. Contrary to the hegemonic international humanitarian legal scholarship, which is termed as 'Regulated War' tradition, the thesis operates on the assumption that a war-free future is possible. In fact, a great part of its focus is to attack the ways in which the discourse of the Regulated War tradition has been presenting war as inevitable, withholding the possibility of peace from the international legal imaginary. The vantage point of the impossibility of a war-free present is what enables the legitimation of war and the deprivation of life via the discourse produced by the hegemonic Regulated War intellectual tradition. Even more, the Regulated War tradition moves a step further in its claim to humanitarian vision, which consists of the progressive development in the protection of human life, by posing as the humanitarian vision itself. The success of this attempt to align the Regulated War intellectual tradition with the humanitarian vision

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[131] Inter alia, Tracey Dowdeswell, 'How Atrocity Becomes Law: The Neoliberalisation of Security Governance and the Customary Laws of Armed Conflict' (2013) 6 Journal of Critical Globalisation Studies 30; Boyd van Dijk, 'Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions' (2018) 112 (4) American Journal of International Law 553; Rebecca Sutton, *The Humanitarian Civilian: How the Idea of Distinction Circulates Within and Beyond International Humanitarian Law* (OUP 2021); Janina Dill, *Legitimate Targets?: Social Construction, International Law and US Bombing* (CUP 2014); Larissa Fast, *Aid in Danger: The Perils and Promise of Humanitarianism* (University of Pennsylvania 2014); Luigi Daniele, 'Incidentality of the civilian harm in international humanitarian law and its *Contra Legem* antonyms in recent discourses on the laws of war' (2024) 29 (1) *Journal of Conflict and Security Law* 21.

[132] United Nations Human Rights Council, 'Anatomy of a Genocide – Report of the Special Rapporteur on the situation of human rights in the Palestinian territory occupied since 1967, Francesca Albanese' (24 March 2024) UN Doc A/HRC/55/73.

reflects the level of hegemony this tradition holds within contemporary international humanitarian legal scholarship. The thesis attempts to trace how exactly the Regulated War tradition succeeds in legitimating war and killing while claiming at the same time that it operates from within the humanitarian vision. This is achieved with the deconstruction of the international humanitarian legal argument and ideology critique, which explores the ancillary assumptions, rhetorical tropes and in general, argumentative structures of the hegemonic international humanitarian legal discourse.

The second academic conversation that the thesis engages with is that of critical approaches to international law. It joins the rich literature of critical international legal scholarship, the most relevant of which is discussed above. By following the path laid down by Susan Marks,[133] it articulates an ideology critique of international humanitarian legal discourse to highlight the ways war and the deprivation of life in times of war are legitimised. In doing so, it draws on structuralist works of international law and influenced by the landmark work of Koskenniemi,[134] it argues that the international humanitarian legal argument oscillates between two rhetorics, the rhetoric of aspiration, aspiring for more protection of human beings, and the rhetoric of limitation, highlighting the ostensibly inherent limitations of humans and the supposed inevitability of war. Nevertheless, the thesis wishes to go beyond the level of linguistics. Drawing on Tzouvala,[135] it traces the oscillation of the international humanitarian legal argument between the two rhetorics to a material contradiction of capitalism. This materialist outlook also informs its ideology critique. Following the Marxian critique, this thesis does not argue that a person can be emancipated merely on the level of ideas: human beings cannot stop gravity from drowning them in water merely by 'avowing it to be a superstition'.[136] Inspired by Marxist legal theory, which views legal ideology not merely as false consciousness, but as deeply rooted in material reality, the thesis argues that the perceived inevitability of war which mutilates the international legal imaginary, holds true under capitalism.[137] In this sense, the operative assumption of the Regulated War tradition that war is inevitable is not a mere product of false consciousness. It becomes false consciousness only to the extent it conceals the historical specificity of this inevitability of war and presents it as a transhistorical truth of all human societies. In order to overcome this static theorising, this

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[133] Marks, *The Riddle of All Constitutions* (n 6).
[134] Koskenniemi, *FATU* (n 77).
[135] Tzouvala (n 78) 16.
[136] Karl Marx and Friedrich Engels, 'The German Ideology' in *Marx and Engels Collected Works* vol 5 (Lawrence & Wishart 2010) 24.
[137] Eugeny Pashukanis, 'The General Theory of Law and Marxism' in Piers Beirne and Robert Sharlet (eds), *Selected Writings of Marxism and Law* (Academic Press 1980) 123.

thesis draws on Lukacs and the Frankfurt School,[138] to propose a turn to an international legal philosophy of praxis. The only way to transcend the dead-ends of the Regulated War tradition and fulfil the humanitarian promise, it argues, is by reorganising our efforts towards an anti-capitalist anti-war international legal theory in the form of immanent critique, coupled with anti-capitalist, anti-war collectively organised praxis.

To address the research questions and engage meaningfully in the two academic conversations presented above this thesis is structured in seven chapters. It begins by sketching an intellectual map of the distinctive legal projects under the rubric of the humanitarian vision. Chapter 2 identifies two antagonistic intellectual traditions within the humanitarian vision. These two are the 'Regulated War' and the 'Anti-War' intellectual traditions. The former is an intellectual tradition that, starting from the assumption that war is inevitable, strives to regulate war, to make war more 'humane'.[139] The latter is an intellectual tradition that, by not conceding that war is inevitable, aspires to abolish war. In turn, the thesis identifies two main legal projects in each intellectual tradition. Under the Regulated War tradition, it situates the Military legal project and the ICRC legal project, which are named after the central players in each project. The Military legal project tends to emphasise the permissive aspect of what they usually call the Laws of Armed Conflict (LOAC), while the ICRC legal project emphasises the protective aspect of what they call 'International Humanitarian Law' (IHL). Chapter 3 provides an exposition of the discourse produced by these two projects to render this taxonomy more visible and to prepare the empirical ground for the forthcoming critique. Under the Anti-War tradition are the Materialist Pacifist legal project which operates on the assumption that a war-free world is possible only through the change of the socio-economic conditions and the Idealist Pacifist legal project which aspires to abolish war with the power of ideas, usually through a new international convention outlawing war or a new international tribunal to adjudicate violations of the international law on the use of force.

The thesis argues that the Regulated War tradition is today hegemonic in the international humanitarian legal discourse. It employs Williams' concept of hegemony in order to understand the dominant position of the Regulated War tradition, its relationship with a possible alternative hegemony of the Anti-War tradition, and with contemporary counter-hegemonic pressures.[140] This thesis aspires to be a part of or expression of the latter. The

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[138] Andrew Feenberg, *The Philosophy of Praxis: Marx, Lukács and the Frankfurt School* (Verso 2014).
[139] Moyn is documenting succinctly this idea in Moyn (n 1).
[140] Raymond Williams, *Marxism and Literature* (OUP 1977) 109-114.

two main legal projects within the Regulated War tradition (the Military and the ICRC legal projects) are initiatives within the specific hegemony of the intellectual tradition of Regulated War. The hegemony of this intellectual tradition is exemplified by both how commonsensical its basic tenets seem to be for the vast majority of legal practitioners and by how it excludes the articulation of counter-hegemonic initiatives from the horizon of the real, automatically rendering them as wishful thinking or non-realistic moral cliches. Chapter 4 outlines the discursive ways in which the Regulated War tradition reproduces its hegemony and simultaneously legitimises war.

Given the hegemonic character of the Regulated War tradition, this thesis puts forward that the structure of the international humanitarian legal argument today overlaps and is largely identical with the grammar of the Regulated War tradition. Therefore, it proceeds with a deconstruction of the international humanitarian legal argument as shaped by the Regulated War tradition. This grammar is founded on the presupposition of the Regulated War tradition that war is an inescapable feature of the human condition. This is why it is crucial to explain first how this intellectual tradition became hegemonic before proceeding with an analysis of its grammar. Chapter 5 argues that the structure of the international humanitarian legal argument, which is common to both the Military legal project and the ICRC legal project, oscillates between two rhetorics: the rhetoric of aspiration and the rhetoric of limitation.[141] While one of the main differences between the two legal projects is their different emphasis on the two rhetorics, with the Military legal project weighing more on the rhetoric of limitation and the ICRC legal project employing the rhetoric of aspiration more often, ultimately, the two rhetorics constantly collapse into each other. The thesis provides a materialist grounding of this deconstructive reading by emphasising that capitalism and imperialism shape the horizon of legal possibilities within the Regulated War tradition.[142] Imperialism is a key analytical category to access the political unconscious of the international humanitarian legal discourse.[143] This thesis does not hold

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[141] Obvious source of inspiration is the landmark text of critical international legal scholarship: Koskenniemi, *FATU* (n 77).

[142] The argument in this regard is informed by Tzouvala (n 78).

[143] See also Akbar Rasulov, 'Imperialism' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Elgar 2019) 428. Fredric Jameson introduced the concept of the political unconscious in Fredric Jameson, *The Political Unconscious: Narrative as a Socially Symbolic Act* (Cornell University Press 1981) to elucidate the implicit political underpinnings of creative works. Drawing on Freud's notion of wish-fulfillment and Lévi-Strauss's idea of the savage mind ('pensée sauvage'), Jameson posits that artistic works serve as symbolic resolutions to latent social and cultural issues. The role of the critic, according to this hypothesis, is to uncover and reconstruct the underlying problems for which the text serves as a symbolic solution. This approach to textual criticism shifts the focus from deciphering what a particular text means to understanding why it takes the specific form it does. The argument here is that international humanitarian legal discourse treats war as an eternal truth because imperialism narrows the emancipatory horizon of the international legal imaginary.

that a post-capitalist world will magically be free of war. Its core premise is much more modest, although still ambitious compared to the status of contemporary critical international legal scholarship: the fact that we cannot think of a world after capitalism and imperialism does not allow the international legal imaginary to entertain seriously the idea of a war-free world. That IHL would be considered humanitarian is possible only in a historical era when it is easier to imagine the end of the world rather than the end of wars.

Finally, in Chapter 6, the thesis exposes the political effects produced by the international humanitarian legal discourse of the hegemonic Regulated War tradition. It employs Thompson's concept of ideology to argue that this international humanitarian legal discourse interpellates, reifies, normalises, rationalises, and ultimately legitimises the deprivation of human life.[144] Chapter 7 critiques the dominant instrumental humanitarian reason. It arrives to the conclusion that an immanent critique of the shortcomings of the Regulated War tradition and the idealist Anti-War tradition, can enable us to understand that the liberal promise for humanitarian progress can be achieved only in the vein of the Materialist Pacifist instantiation of the Anti-War tradition, through an anti-capitalist philosophy of praxis that grounds its humanitarian vision on the breaking of the material chain of the reproduction of capitalism.

[144] John Thompson, *Studies in the Theory of Ideology* (Polity Press 1984). See also, Marks, *The Riddle of All Constitutions* (n 6).

2. Intellectual and Theoretical Framework

2.1 Introduction

This chapter introduces core terms, concepts, and methods employed throughout this thesis. It also lays the ground for the forthcoming analysis by sketching a map of the humanitarian vision and its legal projects. This map and its accompanying intellectual history by no means purport to be exhaustive. Instead, it is a sketch that enables the organisation of the critique advanced in the forthcoming chapters.

Two main terms define this thesis. First, the term international legal humanitarianism and second, international humanitarian legal discourse. The former is an umbrella term that in its broader conception can include a wide range of legal professionals working within the ambit of humanitarianism.[145] Some of the legal fields involved are IHL, IHRL, International Criminal Law (ICL), Law and Development,[146] and International Refugee Law. This thesis focuses primarily on IHL and secondarily on IHRL applicable to wartime. Consequently, when it refers to international legal humanitarianism it signals a narrower definition, which better serves the purposes of this thesis. International legal humanitarianism is a sub-discipline of the discipline of international law of which central actors include international organisations such as the United Nations (UN), North Atlantic Treaty Organization (NATO), non-governmental organisations like ICRC, Amnesty International, and Human Rights Watch, educational institutions like universities and military academies, international tribunals such as the International Court of Justice (ICJ) and the European Court of Human Rights (ECtHR), and states, especially their militaries. International humanitarian legal discourse is the discourse produced by these social actors, albeit narrowed down to discourse expressed in the languages of IHL and IHRL. Notwithstanding that, during the discussion, the thesis may also engage with discourse produced by international legal humanitarianism in the broader sense, such as discourse articulated in the language of International Criminal Law (ICL), to reinforce its argumentation.

These two terms also necessitate a definition of humanitarianism itself. Such a definition is deferred to Chapter 4.1. It is valuable, however, to introduce succinctly here two more supporting terms used throughout this work. The first is the term ‘international legal imaginary’ and in extension the concept of ‘legal imagination’. The act of imagining is an

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[145] For a similar understanding of humanitarians see Kennedy, *The Dark Sides of Virtue* (n 35).
[146] See Hugo Slim, ‘Dissolving the Difference between Humanitarianism and Development: The Mixing of a Rights-Based Solution’ (2000) 10(3/4) Development in Practice 491.

'inextricable part of discoursing, arguing, interpreting and performing international law'.[147] One cannot speak about the principle of distinction without imagining in a certain shape and form its hypothetical application in real life: where exactly the line is drawn and who falls within the legal categories of civilians and combatants? In this sense, for international lawyers 'there is nothing but imagination at work'.[148] At the same time, imagination in the contemporary international legal discourse also connotes a utopian aspiration, an act of 'denaturalizing what comes naturally for international lawyers'.[149] This meaning of imagination is often repressed as a theoretical and practical enterprise which 'a serious international lawyer ideally ought to reject, resent and refrain from'.[150] The concept of international legal imaginary encompasses both the descriptive and the utopian meaning of imagination. It expresses the horizons of the thinkable and the confines of what can be articulated in the language of international law, while its dynamic nature simultaneously permits the broadening of these horizons to include novel reflections and articulate new aspirations.

The second term is that of the 'subaltern'. The term 'subaltern' is used in this thesis to encompass 'all oppressed and marginal groups in society. It therefore includes exploitation and oppression based on class, gender, race, and caste'.[151] This term is not only broader than the concept of the working class but also emphasises the exploitation between the imperialist core and the periphery.[152] It connotes that the social formation of classes goes beyond the idea of an autonomous economic level, being 'the result of an ensemble of structures and of their relations'.[153] The subaltern is not a mere 'cultural formation, but a historical category'.[154]

More central concepts to the development of the argumentation of this thesis are discussed below in separate sections. Section 2.2 provides an intellectual mapping of the humanitarian vision and an overview of its legal projects. Section 2.3 elaborates on how this thesis employs the concept of hegemony. Section 2.4 introduces the method of

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[147] Jean d'Aspremont, 'Legal Imagination and the Thinking of the Impossible' (2022) 35 (4) Leiden Journal of International Law 1017, 1017.
[148] Gerry Simpson, 'Imagination' in Jean d'Aspremont and Sahib Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought* (Elgar 2019) 413, 414.
[149] Aspremont, 'Legal Imagination and the Thinking of the Impossible' (n 147) 1018.
[150] Akbar Rasulov, 'The Utopians' in Jean d'Aspremont and Sahib Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought* (Elgar 2019) 879, 880.
[151] B.S. Chimni, 'An Outline of a Marxist Course on Public International Law' in Susan Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (CUP 2008) note 1.
[152] Immanuel Wallerstein, *World-Systems Analysis: An Introduction* (Duke University Press 2004) 11-12.
[153] Nicos Poulantzas, *Political Power and Social Classes* (Verso 1978) 63-64.
[154] Chimni, 'An Outline of a Marxist Course on Public International Law'(n 151) note 1.

deconstruction and explains why it is essential in order to unearth the workings of international humanitarian legal discourse in their contradictory movement. Finally, section 2.5 advances a conception of ideology critique that is simultaneously a form of immanent critique, transforming it from a purely negative exercise into one that gestates a positive programme to transcend the one critiqued.

2.2 Intellectual Mapping of the Humanitarian Vision

2.2.1 Total War and Introduction to the Humanitarian Vision

This thesis questions the 'ready-made synthesis' of humanitarianism and its international legal expressions.[155] It attempts to excavate the common root of the Anti-War and the Regulated War traditions in order to repack them together under what is dubbed as the humanitarian vision. The modern humanitarian vision, as a child of the Enlightenment, has at its core the vision for human progress.[156] Born in parallel with other emancipatory movements, like the abolitionist movement against slavery in the USA, the humanitarian vision for war focused broadly on the improvement of the protection of human life. This broad vision has proved to be an umbrella for different legal projects, without them necessarily acknowledging this explicitly. As a consequence, this humanitarian vision encompasses struggles that range from the reduction of human suffering in war to the abolition of war itself.

Without prejudice to these divergent legal projects, the modern humanitarian vision is coherent in its rejection of the old total war vision, in which the whole of society is waging war and is to be waged war on. Hugo Grotius sums up this idea of total war that was still the dominant paradigm in early 17th century with a short passage under the subtitle 'the right to kill and injure all who are in the territory of the enemy: '[the right to kill and injure the enemy in war] extends not only to those who actually bear arms, or are subjects of him that stirs up the war, but in addition to all persons who are in the enemy's territory'.[157] Contrary to the total war vision, the humanitarian vision is dominated by the separation of the political from the economic and the creation of the two ostensibly distinct spheres of public and private. This is evident in IHL's principle of distinction which can be traced back directly to Enlightenment: 'sometimes it is possible to kill a state without killing any of its members; and a war doesn't give any right that isn't needed for the war to

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[155] Michel Foucault, *Archaeology of Knowledge and the Discourse on Language* (Pantheon Books 1972) 22.
[156] Especially, progress through reason, see Max Horkheimer and Theodor Adorno, *Dialectic of Enlightenment: Philosophical Fragments* (Stanford University Press 2002) xvi.
[157] Hugo Grotius, 'On the Right of Killing Enemies in a Public War, and on Other Violence against the Person' in Stephen Neff (ed), *Hugo Grotius on the Law of War and Peace: Student Edition* (CUP 2012) 351.

gain its objective'.[158] The humanitarian vision on war has expelled the total war vision to the realm of pre-humanitarian past.

Discursive traces of the transition from the total war vision to the humanitarian era can be found in Suttner's book 'Lay down your arms':

> 'That is horrible, abominable!' broke in the chief chaplain. 'It could only be a rough soldier of the *savage times* of the Thirty Years' War to whom it would appear natural to produce examples like these out of the Bible, in order to found thereon a justification for their cruelties against the enemy. We *preach quite other doctrine now* — nothing more is to be striven for in war than to make your adversary incapable of harm — even up to his death — but without any evil design against the life of any individual'.[159]

This transition from the total war vision to the humanitarian (legal) vision started in the early 19th century.[160] If one were to pinpoint the specific chronological period of the rise of the humanitarian vision it would be 1815-1816, the founding years of peace societies in the UK and the USA, with the end of imperialist wars in which their countries were part of.[161] This process had not been a straight path. The resistance to the transition from one vision to the other is captured in the words of two landmark figures in the modern intellectual history of the two visions. On the one hand, Carl Klausewitz, one of the most influential proponents of total war,[162] was slowly moving away from the total war vision by adopting it only as one of the 'contingencies' in war and not the default: 'among the contingencies for which the state must be prepared is a war in which every element calls for policy to be eclipsed by violence'.[163] On the other hand, Lieber, who is considered today to be one of

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[158] Jean-Jacques Rousseau, 'Of Social Contract' in Victor Gourevitch (ed), *Rousseau: The Social Contract and Other Later Political Writings* (CUP 2018) Book I Section 4.
[159] Bertha von Suttner, *Lay Down Your Arms: The Autobiography of Martha von Tilling* (first published 1889, Modern Humanities Research Association 2019) 273 (emphasis added).
[160] Cf. Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (first published 1948, McGraw-Hill 1993) 228-231, which traces the fall of the total war vision at the end of the Thirty Years' War.
[161] For the British peace movement see Martin Ceadel, *The Origins of War Prevention: The British Peace Movement and International Relations 1730-1854* (OUP 1996) and Paul Laity, *The British Peace Movement 1870-1914* (OUP 2002). For the US peace movement see Oona Hathaway and Scott Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (Simon and Schuster 2018). The latter provides an identical chronology of the birth of the new, humanitarian, world starting in 1816, see Oona Hathaway and Scott Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (Simon and Schuster 2018) 311. For a periodisation of IHL see Robert Kolb, 'The Main Epochs of Modern International Humanitarian Law since 1864 and Their Related Dominant Legal Constructions' in Kjetil Mujezinović Larsen, Camilla Guldahl Cooper and Gro Nystuen (eds), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (CUP 2012) 23, 23-71.
[162] See Michael Howard, *Clausewitz: A Very Short Introduction* (OUP 2002) 49-61.
[163] Carl Clausewitz, *On War* (first published 1832, Princeton University Press 1989) 88.

the grandfathers of IHL, in his famous Lieber Code, adopts a half-baked approach that does not yet overcome entirely the vision of total war:

> Article 22. Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.[164]

Of course, history does not move in a linear line, there were many instances of total war in the first half of the 20th century. One of the most explicit proponents of total war during that time was Nazi General Erich Ludendorff who published a pamphlet titled 'Total War' in 1935.[165] From the Zeppelin raids aiming to demoralise the civilian population in World War I, to the terror bombing of civilian populations, most notably in the town of Guernica, from the German Luftwaffe and Italian Aviazione Legionaria during the Spanish Civil War (1936-1939), to the doctrine of strategic bombing which aim was to disrupt the enemy's industrial and economic capabilities with attacks on urban areas, and of course with the biggest terrorist attacks in history, the atomic bomb attacks in Hiroshima and Nagasaki, the transition from the total war vision to the humanitarian vision had been a slow and painful process. The end of World War II and the adoption of the four Geneva Conventions of 12th of August 1949 signalled a big blow to the legitimacy of the total war vision, which was met with a parallel rise of the humanitarian vision, especially its incarnation under the Regulated War tradition.[166] The role of the Geneva Conventions in the gradual abandonment of the total war vision is recognised in most narrations of IHL, even in official UN Documents: 'created in the aftermath of the bitter experiences of total war and extreme civilian suffering in the nineteenth and twentieth centuries'.[167]

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[164] General Orders No 100: Instructions for the Government of Armies of the United States in the Field (24 April 1863) (Lieber Code, issued by President Abraham Lincoln). For a discussion of the Lieber Code see Christopher Bailey, *The Laws of Yesterday's Wars: From Indigenous Australians to the American Civil War* (Brill 2021) 187–208.

[165] For the historical and intellectual context see Roger Chickering, 'Sore Loser: Ludendorff's Total War', in Roger Chickering and Stig Förster (eds), *The Shadows of Total War: Europe, East Asia, and the United States, 1919-1939* (CUP 2003) 151-178.

[166] Another milestone in the maturisation process of the humanitarian vision is of course the adoption of the two Additional Protocols to the Geneva Conventions in 1977, two years after the end of Vietnam War. See, similarly, the argument of Moyn, which although overstating the importance of the additional protocols, is capturing well that 1977 inaugurated a new chapter in the humanitarian era, a more a mature phase of a particular kind of humanitarian sensibility that will soon be shared with political decision makers of the highest level and in turn to be intensively bureaucratised, Moyn (N 1) 199-203.

[167] Albanese (n 132).

In the era of the humanitarian vision, the two main traditions of thought are the Regulated War and Anti-War traditions. The former is an intellectual tradition that, starting from the assumption that war is inevitable, strives to regulate war, to make war more 'humane'.[168] The latter is an intellectual tradition that, by not conceding that war is inevitable, aspires to abolish war. Bringing together under the humanitarian vision these two distinct traditions of thought, even if they have rarely understood themselves as operating from within the same vision, is an attempt to problematise the assumptions of mainstream international legal discourse.[169] Challenging the common sense of the international humanitarian legal field imposes a different reading on the international humanitarian legal text.[170] By asking different questions, that is by starting from the question of what is the relationship between international humanitarian legal discourse and imperialism, it can now become sensible, or even it can give birth to a new common sense about the Anti-War tradition as a par excellence tradition of thought under the humanitarian vision. At the same time, it may become evident that the fall of the Anti-War tradition in conjunction with the rise of the Regulated War tradition has not been a totally contingent historical development.[171] Similarly, the displacement of the Anti-War tradition from the intellectual terrain of the humanitarian vision and its nearly total absence from the mainstream international humanitarian legal discourse is a result of the prevailing problematic.[172]

This thesis is not the first to suggest pairing different intellectual traditions under the humanitarian vision. Michael Barnett identifies two distinct camps in humanitarianism: the 'emergency-focused camp', which prioritises saving lives without delving into the causes of war and the 'alchemist camp', which aims to address the root factors contributing to suffering, seeking a more comprehensive approach to humanitarian challenges.[173] Furthermore, Barnett underscores the dominant position of the emergency camp over that of the alchemist camp while also locating the notion of progress at the heart of

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[168] Moyn is documenting succinctly this idea in Moyn (n 1).
[169] Patrice Maniglier, 'Bachelard and the Concept of the Problematic' (2012) 173 Radical Philosophy 31.
[170] Louis Althusser, 'Introduction' in Louis Althusser and Etienne Balibar (eds), *Reading Capital* (Verso 1979) 28-33.
[171] Susan Marks, 'False Contingency' (2009) 62 (1) Current Legal Problems 1.
[172] Tzouvala (n 78) 13. In sum, the symptomatic reading practiced here is an interrogation of the international humanitarian legal discourse against the background of pressures and restraints existing beyond the international legal text: of capitalism and imperialism.
[173] Michael Barnett, *Empire of Humanity: A History of Humanitarianism* (Cornell University Press 2011) 10. See also Craig Calhoun, 'The Imperative to Reduce Suffering: Charity, Progress, and Emergencies in the Field of Humanitarian Action' in Michael Barnett and Thomas G. Weiss (eds), *Humanitarianism in Question: Politics, Power, Ethics* (Cornell University Press 2012) 73.

humanitarianism.[174] Barnett does a great job of identifying the division between the two broad camps within humanitarianism. However, due to the different nature and focus of his inquiry, his classification of the emergency camp and the alchemist camp merely overlaps and does not fully coincide with the classification undertaken in this thesis. One notable example of divergence between the two classifications is that Barnett does not engage with pacifism as a political movement but only through their involvement in international institutions. Even more, a certain strand of the pacifist tradition, which is termed Materialist Pacifists and discussed below, evades completely the analytical scope of his concept for the 'alchemist camp'. Barnett, as one of the strongest proponents of constructivism, puts forward an idealist understanding of humanitarianism. He not only accepts Kant's naturalisation of the limitation of humans but also extrapolates it in order to naturalise the failure of humanitarianism itself:

> Humanitarianism is a crooked timber. I am appropriating Immanuel Kant's celebrated observation about humanity, later popularized by Isaiah Berlin: 'Out of the crooked timber of humanity, no straight thing was ever made'.[175]

The pessimism fuelling this naturalisation of the failure of humanitarianism in Barnett is partly right. As he underscores, 'humanitarianism contains elements of emancipation and domination', it contains 'rescuers' and 'victims'.[176] However, as already hinted above, Barnett's broader than the ordinary understanding of humanitarianism may still fail to be broad enough to encompass other emancipatory political projects. Indeed, while the dominant political projects within Western humanitarianism—and this thesis limits its scope to Western humanitarianism—have articulated a top-down approach, interpellating the victims, there are also political projects that were not articulated from the standpoint of the imperialist privilege of the West.[177] The most important of these emancipatory political projects, which was in fact in direct confrontation with the Western imperialist privilege, is the Materialist Pacifist political project.

The Materialist Pacifist political project is under the intellectual umbrella of the Anti-War tradition. Within the Anti-War tradition this thesis identifies two main political projects:

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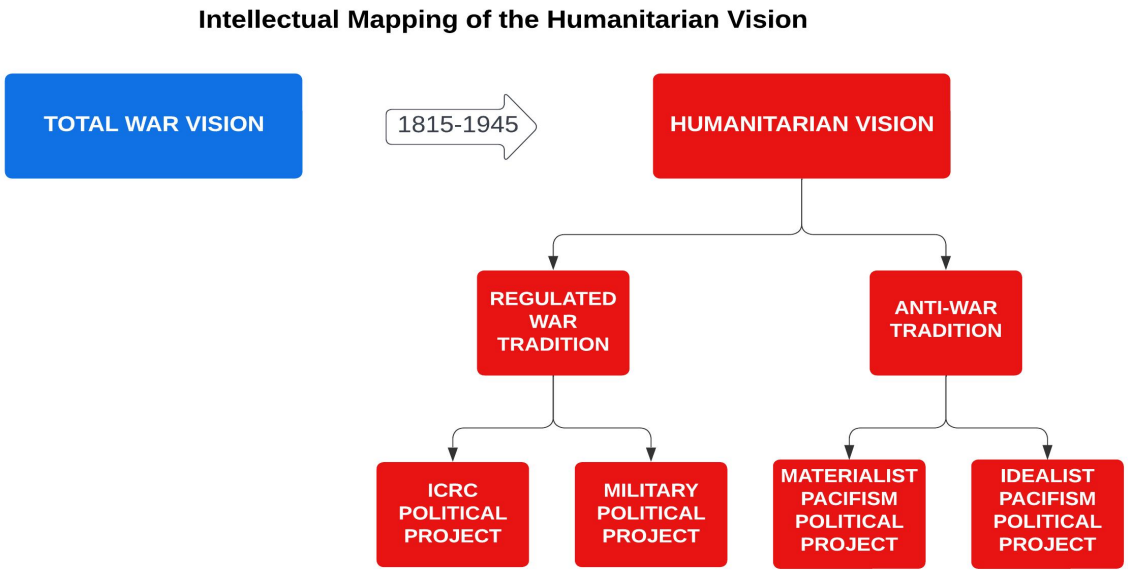
[174] Barnett, *Empire of Humanity* (n 173) 14.
[175] Ibid.
[176] Ibid. Cf. Makau Mutua, Savages, Victims, and Saviors: The Metaphor of Human Rights (2001) 42 (1) Harvard International Law Journal 201.
[177] 'By the critique of imperialism, in the broad sense of the term, we mean the attitude of the different classes of society towards imperialist policy in connection with their general ideology', Vladimir Lenin, *Imperialism, the Highest Stage of Capitalism* (first published 1917, Wellred Books 2019) 113.

the Idealist Pacifist and the Materialist Pacifist.[178] Both are discussed in more detail in the next section. In turn, within the Regulated War tradition, the two main political projects identified are the Military and the ICRC political projects (see Table 1 below). Insofar as the main object of research of this thesis is the international humanitarian legal discourse, its focus is on the international legal articulation of these political projects. Therefore, it discusses the international legal aspects of these political projects, or, more precisely, it delves into the legal projects within these political projects. To reflect this narrower scope of investigation, hereinafter they will be referred to as legal projects.

Table 1



Both the ICRC and the Military legal projects still operate against the background of an overarching single intellectual tradition.[179] Their antagonism shapes the internal dynamic of the mainstream international humanitarian legal discourse. Kennedy's incisive observation for the post-1945 period that 'the signature theme for this modern vocabulary of force was *realism*—about war, about sovereign power, about politics', can be traced back to the founding days of the two legal projects.[180] Both were expressions of a set of historically specific structural constraints. In other words, the institutions involved in the Regulated War tradition, states, the ICRC, NGOs, military and educational institutions, and

[178] In this thesis 'idealist' and 'idealism' are to be understood in juxtaposition with the notions of 'materialist' and 'materialism' in the context of the classic philosophical dichotomy, particularly as elaborated by Karl Marx and Friedrich Engels in Marx and Engels, 'The German Ideology' (n 136).
[179] Kennedy, *The Dark Sides of Virtue* (n 35) 154.
[180] Ibid 122 (emphasis added).

international tribunals, as 'constellations of social relations' and 'reservoirs of material resources' are the loci of power and the 'crystallization of relations of domination'.[181] The structural pressures, developed in more detail in Chapter 5, condition and structurate these institutions.[182] In the framework of this structuration process, the institutions do not determine action but 'generate, in the sense of establishing, loosely and tentatively, the parameters of permissible conduct'.[183]

2.2.2 The Anti-War Intellectual Tradition

2.2.2.1 The Idealist Pacifist Legal Project

Notwithstanding that the roots of the Regulated War tradition can be traced in practices of restraint in warfare throughout history, the possibility of a war-free world, the founding assumption of the Anti-War tradition, was not available in the social imaginary until the 18th century.[184] In its early stages, the Anti-War tradition was dominated by religious, mainly Christian, voices. The first pacifist non-governmental organisation was founded in New York in 1815, the New York Peace Society, shortly after the end of the war of 1812 against American indigenous tribes.[185] One year later and in the aftermath of the battle of Waterloo, the first pacifist organisation of Europe was founded in London, as the Society for Abolishing War. In the same year, Britain saw another, much more influential and long-lived peace initiative, the 'Society for the Promotion of Permanent and Universal Peace' also known as the 'Peace Society'. The first was an initiative of mostly Painite radicals and 'rational Christians'.[186] The founders of the second, like most of the founders of these organisations, were Christian abolitionists and Quakers. Unsurprisingly, the Christian-dominated pacifist movement of the 19th century was defined by the idea of a metaphysical transcendence of war, an early expression of the Idealist Pacifist political project.

By the end of the 19th century, secular radical voices were joining the Idealist Pacifist camp.[187] For instance, Charles Sumner was proposing to ban war through international law, a characteristic idealist way of thinking which was highly influential in the 20th century as well, in which war could be abolished by virtue of a legal promise arising from an

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[181] John Thompson, *Studies in the Theory of Ideology* (n 144) 135.
[182] Ibid.
[183] Ibid.
[184] One of the founding texts for the Idealist Pacifist legal project is Immanuel Kant, *Perpetual Peace* (first published 1795, Columbia University Press 1939).
[185] Moyn (n 1) 20.
[186] Laity (n 161) 13-15.
[187] Moyn (n 1) 21.

international legal text.[188] Tolstoy, on the other hand, based his pacifism on Christian religion in parallel with the necessity of individual activism. In his activist pacifism, Tolstoy contended that war could be abolished through a strong conscientious objector movement.[189]

The par excellence figure of the Idealist Pacifist legal project in the 19th century is Countess Bertha Von Suttner a pacifist, novelist and the first woman to be awarded the Nobel Peace Prize in 1905.[190] Suttner in her landmark book 'Lay down your arms' rejected vehemently the usual positions in favour of war, inter alia, that 'wars are ordained by God Himself', that 'there have always been wars, and consequently there always will be wars', and more interestingly that:

> Men will always contend. Perfect agreement in all their views is impossible; divergent interests must be always impinging on each other, consequently everlasting peace is a contradiction in terms.[191]

When confronted with the classic naturalising argument that 'war is inevitable' Suttner responded that 'it could be avoided [...] by alliances of states, arbitration courts and so forth'.[192] At the same time, even the most fervent advocate of moral peace like Suttner could not escape, at least the hunch of, the limitations of her Idealist Pacifism; after the Prussian victory in the Second Schleswig War and the London Peace Conference of 1864, Suttner wrote for the first time in her red book the aspiration '[l]ay down your arms down with them for ever', but added 'despondingly' and in brackets the word 'Utopia'.[193] In a similar vein and furthering the work of Kant, Hans Kelsen's writings on peace through a federated global community and international law render him one of the biggest proponents of the Idealist Pacifism legal project in the 20th century.[194] This sort of liberal way of thinking about peace is today organised around the neoliberal institutionalism theory of international relations.[195]

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[188] Ibid 22.
[189] Leon Tolstoy, *The Kingdom of God is Within You: Christianity Not as a Mystic Religion but as a New Theory of Life* (Cassell Publishing Company 1894) 89.
[190] The Nobel Peace Prize, 'Bertha von Suttner – Facts' (Nobel Prize Outreach) https://www.nobelprize.org/prizes/peace/1905/suttner/facts/ accessed 20 April 2025.
[191] Suttner, *Lay Down Your Arms* (n 159) 197-198.
[192] Ibid 198.
[193] Ibid 142-143.
[194] See inter alia, Hans Kelsen, *Peace through Law* (University of North Carolina 1944).
[195] The seminal text for neoliberal institutionalism in international relations is Robert Keohane and Joseph Nye, *Power and Interdependence: World Politics in Transition* (Longman 2000). See also, Arthur Stein,

The Idealist Pacifist camp also includes those liberals who believe that the globalisation of trade will bring global peace. William Cobden, one of the most influential figures of the pacifist movement in the late 19th century, was one of the proponents of the idea that with the globalisation of free trade, states would be forced to cooperate and war would be abolished.[196] This idea, which can be traced back to Smith and Ricardo, persists still today in the thought of scholars associated with the commercial liberalism theory in international relations.[197] The emphasis on the sphere of circulation of capital rather than that of production, although operating on very shaky grounds which lead to false conclusions, is perhaps the furthest the Idealist Pacifist project has conceded to the Materialist Pacifism project. In any case, with the turn of the 20th century, the anti-war movement went through a phase of secularisation and compromise, in which the already emerged 'new breed of internationalists' that counted on international law to address the problem of war was gaining ground.[198] By the end of World War I, the dominant idea in the Idealist Pacifist project was that peace can be achieved through international institutions, such as the League of Nations, the UN, and the ICJ.[199] Hathaway and Shapiro trace the intellectual history of Idealist Pacifism, while themselves also subscribe to its idealism when claiming that 'ideas shape law' and '[l]aw creates real power'.[200]

2.2.2.2 The Materialist Pacifist Legal Project

The distinction between the two legal projects within the Anti-War intellectual tradition is not always visible. Marx himself had cautioned against the Idealist Pacifist's demands of the League of Peace and Freedom, which was founded in Switzerland in 1867 and its eminent membership included Victor Hugo and Giuseppe Garibaldi.[201] Engels explicates this critique in a letter to August Babel, co-founder of the Social Democratic Party of Germany: 'the League asserted that it was possible to prevent wars by creating the "United States of Europe." Its leaders did not disclose the social sources of wars and often confined

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'Neoliberal Institutionalism' in Duncan Snidal and Helen Milner (eds), *The Oxford Handbook of International Relations* (OUP 2009) 201–221.

[196] Moyn (n 1) 22.

[197] One of the founding texts of commercial liberalism in international relations is Richard Rosecrance, *The Rise of the Trading State: Commerce and Conquest in the Modern World* (CUP 1986). During the inter-war period commercial liberalism culminated in utopian liberalism and texts like Norman Angell, *The Great Illusion: A Study of the Relation of Military Power to National Advantage* (G. P. Putnam's Sons 1913) became prominent.

[198] Moyn (n 1) 25.

[199] For an overview see David Kennedy, 'The Move to Institutions' (1987) 8 Cardozo Law Review 841.

[200] Hathaway and Shapiro (n 161) 422-423. Cf. Charlotte Peevers, 'Liberal Internationalism, Radical Transformation and the Making of World Orders' (2018) 29 (1) European Journal of International Law 303, 317.

[201] Karl Marx, 'Letter to W. Bracke' in *Marx and Engels Selected Works* vol 3 (Progress Publishers 1970) 11.

anti-militarist activity to mere declarations'.[202] While the Materialist Pacifists were polemically active in the battle of ideas within the humanitarian vision in the second half of the 19th century, it was with the dawn of the 20th century that a strong anti-imperialist Materialist Pacifist movement was born. The Second International, before its split because of this very issue, had a clear anti-war position. In its 'Resolution against War and Militarism', adopted at the 1907 Stuttgart Congress of the International, it reiterated that it is their duty 'to coordinate and increase to the utmost the efforts of the working class against war'.[203] The anti-war position of the Second International was manifestly in the Materialist Pacifist vein:

> Wars, therefore, are part of the very nature of capitalism; they will cease only when the capitalist system is abolished or when the enormous sacrifices in men and money required by the advance in military technique and the indignation called forth by armaments, drive the peoples to abolish this system.[204]

In the same year, Liebknecht framed the position of Materialist Pacifism in rational terms as follows: 'If we consider the question simply from a logical point of view, the need for an army organization could also be eliminated as far as capitalism is concerned by removing the possibilities of conflict'.[205] With this framing, he paved the path for an anti-war stance that is not founded on ethics but on rationality. The present work walks this path.

Perhaps the most eloquent and sharp exponent of the Materialist Pacifists in the early 20th century was no other than Rosa Luxemburg. In her work 'Peace Utopias' in 1911, she ruthlessly criticised 'bourgeois apostles of peace' for relying on 'fine words' alone in contradistinction to the anti-capitalist pacifism of the Social Democrats.[206] Luxemburg writes:

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[202] Friedrich Engels, *Letter to August Bebel In Zwickau* (1875) note 8 https://www.marxists.org/archive/marx/works/1875/letters/75_03_18.htm#n8 accessed 21 January 2025.

[203] The Socialist International, *Resolution adopted at the Seventh International Socialist Congress at Stuttgart* (Vorwärts Publisher 1907) https://www.marxists.org/history/international/social-democracy/1907/militarism.htm accessed 20 April 2025. In this declaration the International condemend 'wars of aggression' while 5 years later in the Extraordinary Congress of the International it condemned war without any qualification, see Marc Mulholland, 'Marxists of Strict Observance? The Second International, National Defence, and the Question of War' The Historical Journal 58 (2) 615, 616-617.

[204] The Socialist International (n 203). For the later debates within the second international see Craig Nation, *War on War: Lenin, the Zimmerwald Left, and the Origins of Communist Internationalism* (Haymarket Books 2009).

[205] Karl Liebknecht, *Militarism and Anti-Militarism* (Rivers Press Limited 1973) Part II Ch.4

[206] Rosa Luxemburg, *Peace Utopias* (1911) https://www.marxists.org/archive/luxemburg/1911/05/11.htm accessed 20 April 2025.

> Our very points of departure are diametrically opposed: the friends of peace in bourgeois circles believe that world peace and disarmament can be realised within the frame-work of the present social order, whereas we, who base ourselves on the materialistic conception of history and on scientific socialism, are convinced that militarism *can only be abolished from the world with the destruction of the capitalist class state*. From this follows the mutual opposition of our tactics in propagating the idea of peace. The bourgeois friends of peace are endeavouring – and from their point of view this is perfectly logical and explicable – to invent all sorts of *"practical" projects for gradually restraining militarism*, and are naturally inclined to consider every outward apparent sign of a tendency toward peace as the genuine article, to take every expression of the ruling diplomacy in this vein at its word, to exaggerate it into a basis for earnest activity. The Social Democrats, on the other hand, must consider it their duty in this matter, just as in all matters of social criticism, to expose the bourgeois attempts to restrain militarism as pitiful half-measures, and the expressions of such sentiments on the part of the governing circles as diplomatic make-believe, and to oppose the bourgeois claims and pretences with the ruthless analysis of capitalist reality.[207]

In the same spirit, Lenin exposes the limitations of 'pacifist bourgeois', 'whose talk about peace and disarmament is a lot of empty phrases, since without revolutionary action by the proletariat there can be neither a democratic peace nor disarmament'.[208] Lenin's emphasis on the distinction between Idealist Pacifism ('bourgeois pacifism') and Materialist Pacifism ('socialist pacifism') is a recurring theme in his writings.[209] With the outbreak of World War I and with the Second International already split, Lenin and Zinoviev rendered the position of their Russian Social-Democratic Labour Party on war in the following clear terms:

> Socialists have always condemned war between nations as barbarous and brutal. But our attitude towards war is fundamentally different from that of the bourgeois pacifists (supporters and advocates of peace) and of the Anarchists. We differ from the former in that we understand the inevitable connection between wars and the class struggle

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[207] Ibid (emphasis added).
[208] Vladimir Lenin, *British Pacifism and the British Dislike of Theory* (1915) https://www.marxists.org/archive/lenin/works/1915/jun/x02.htm accessed 20 April 2025.
[209] Vladimir Lenin, *Bourgeois Pacifism and Socialist Pacifism* (1924) https://www.marxists.org/archive/lenin/works/1917/jan/01.htm. accessed 20 April 2025.

> within the country; *we understand that war cannot be abolished unless classes are abolished and Socialism is created*.[210]

At the same time, in the English-speaking world, one of the leading voices of this Materialist Pacifist project was the Irish Republican, trade unionist, and socialist James Connolly.[211] In fact, the depth of Connolly's thinking consisted in that he was not just developing the Anti-War tradition, but he also juxtaposed it to the Regulated War tradition of his times in order to reinforce his arguments:

> The progress of the great war and the many extraordinary developments accompanying it are rapidly tending to bring home to the minds of the general public the truth of the Socialist contention that all war is an atrocity, and that the attempt to single out any particular phase of it as more atrocious than another is simply an attempt to confuse the public mind.[212]

Although less strong than Europe, a Materialist Pacifist movement also flourished in the USA. Helen Keller was an author and influential member of the Socialist Party of America. Her passionate call for a strike against war resonates to this day:

> Strike against all ordinances and laws and institutions that continue the slaughter of peace and the butcheries of war. Strike against war, for without you no battles can be fought. Strike against manufacturing shrapnel and gas bombs and all other tools of murder. Strike against preparedness that means death and misery to millions of human being. Be not dumb, obedient slaves in an army of destruction. Be heroes in an army of construction.[213]

Like Luxemburg, Lenin and Connolly, Keller's anti-war writings belong to the Materialist Pacifist project due to the importance attributed to historicising war and the firm identification of the connection between capitalism and war.[214] In Keller's words: 'every

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[210] Vladimir Lenin and G. Y. Zinoviev, *Socialism and War: The Attitude of the Russian Social-Democratic Labour Party Towards the War* (first published 1915, Foreign Language Press 1970) 299 (emphasis added).
[211] See for instance, James Connolly, *War: What It Means To You* (1914) https://www.marxists.org/archive/connolly/1914/xx/war.htm accessed 20 April 2025.
[212] James Connolly, *Can Warfare be Civilised?* (1915) https://www.marxists.org/archive/connolly/1915/01/warfrcvl.htm accessed 20 April 2025.
[213] Hellen Keller, 'Strike Against War' in Philip Foner (ed), *Helen Keller: Her Socialist Years* (first published in 1916, International Publishers 1967).
[214] 'We Marxists differ from both the pacifists and the Anarchists in that we deem it necessary historically (from the standpoint of Marx's dialectical materialism) to study each war separately. […] Therefore, it is

modern war has had its root in exploitation'.[215]

But one may ask, are the Materialist Pacifists really pacifists? How can a revolutionary, that is a person ready to use or at least condone some sort of violence to overthrow the status quo, claim to be a pacifist? These were the questions that the Materialist Pacifist were confronted with already from the early 20th century. The Presidential candidate of the American Socialist Party in 1920, Eugene Debs, responds in unambiguous terms in 1915:

> No, I am not opposed to all war, nor am I opposed to an under all circumstances, and any declaration to the contrary would disqualify me as a revolutionist. When I say I am opposed to war I mean ruling class war, for the ruling class is the only class that makes war. […] *I am opposed to every war but one*: I am for that war with heart and soul, and that is the worldwide war of the social revolution. In that war I am prepared to fight in any way the ruling class may make it necessary, even to the barricades.[216]

Evidently, then, Materialist Pacifists are not against the use of violence in all cases and especially they were not opposed to the kind of war which in the contemporary international legal jargon would be classified as a non-international armed conflict (NIAC). How can they be labelled pacifists then? To create a world where peace will become possible, the Materialist Pacifists call for the overthrow of the current socio-economic formation by any means necessary, including armed struggle. But would that position not lead to similar results with the hawkish position of the latin maxim 'si vis pacem, fac bellum'? Is this not a paradox? These questions are not only helpful in explaining the exact position of the Materialist Pacifists on war, but also to clarify their differences with Idealist Pacifists.

Starting from the Idealist Pacifist project, while in its strongest expression has been dominated by proponents of early international law as the panacea to the scourge of war, it has also historically included socialists, especially of the first current of socialism known as utopian socialism. One of the founders of Saint-Simonianism,[217] named after the father

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necessary to examine the historically specific features of precisely the present war', Lenin and Zinoviev (n 210) 299.

[215] Keller (n 213).

[216] Eugene Debs, *In What War Shall I Take Up Arms and Fight?* (first published 1915, Socialist Appeal 1939) https://www.marxists.org/history/etol/newspape/themilitant/socialist-appeal-1939/v03n21/debs.htm accessed 20 April 2025.

[217] The Saint-Simonenians contributed in the systematisation of a central assumption of the 'sociological tradition', that Industrialisation marks the transcendence of historical forms of military domination, replacing

of utopian socialism, captures the Idealists Pacifists position on war with a modification of the aforementioned latin maxim: 'the famous dictum […] seems to me much less true, for the 19th century, than si vis pacem, para pacem'.[218] With the position 'if you want peace, prepare for peace' the Idealists Pacifists, are trying to centre the emphasis on developing the conditions for perpetual peace, whilst in peacetime. The crucial difference between utopian socialists, who are idealists[219] and operate in furtherance of the Idealist Pacifist project, and the later Marxist socialists—or the disciples of scientific socialism if one wants to sustain Engels's distinction[220]—is that the latter, having a different starting point in their social analysis, that of material reality, hold that humanity is never in a state of peace. What is called peace today is, in fact, an imperialist peace concealing the existing societal (class) war.[221] The machinations of imperialism do not cease with a peace treaty or a ceasefire but just 'turn from imperialist war to imperialist peace'.[222] This imperialist character of peace may not always be visible to the workers of imperialist states, but it has repeatedly revealed its actual nature in the loudest ways to the workers of exploited countries.

It is in this sense that not only the militarist 'si vis pacem, para bellum' differs completely from the Materialist Pacifist legal project but even the more nuanced position 'si vis pacem, fac bellum', that is 'if you want peace, make war', while it may appear identical, actually runs contrary to the Materialist Pacifists position. If the classic variation of the Latin maxim expresses a militarist clothing for imperialism, this last variation reflects what the then President of the USA called as war for democracy,[223] which in the 21st century has become known as 'humanitarian intervention wars'.[224] In other words, these were situations in which an imperialist power, like the USA, intervenes in order to restore 'democratic peace'.[225] It becomes now evident why the Materialist Pacifist legal project, that operates on the assumption that imperialist peace carries within it an ongoing war

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warfare with commerce and production, see Etienne Balibar, 'Marxism and War' (2010) 160 Radical Philosophy 10.

[218] Barthélemy-Prosper Enfantin, 'Letter to General Saint-Cyr Nugues' (1841) in Edouard Dentu (ed), *Œuvres d'Enfantin* vol 14 (Conseil Institué par Enfantin 1875) 34.

[219] Frederick Engels, 'Socialism: Utopian and Scientific' in *Marx Engels Selected Works* (n 201).

[220] Ibid.

[221] See, for instance, Vladimir Lenin, *The Question of Peace* (1915) https://www.marxists.org/archive/lenin/works/1915/jul/x02.htm accessed 20 April 2025.

[222] Lenin, 'Bourgeois Pacifism and Socialist Pacifism' (n 209).

[223] Woodrow Wilson, *Joint Address to Congress Leading to a Declaration of War Against Germany* (1917) https://www.archives.gov/milestone-documents/address-to-congress-declaration-of-war-against-germany accessed 20 April 2025.

[224] Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (CUP 2009) 82-87.

[225] For the term democratic peace see Lenin, *The Question of Peace* (n 221).

which periodically escalates in full blown armed conflicts, either against the exploited states or inter-imperialist conflicts like World War I, has not only rejected standing behind any of these positions but instead has opposed them fervently.

In the same way, the Materialist Pacifist legal project has opposed the Idealist Pacifist legal idea of peace through international law and international institutions. Lenin, even before the foundation of the League of Nations was explicit about the limitations of such international organisations in achieving long-lasting peace:

> Our 'peace programme' must explain that the imperialist Powers and the imperialist bourgeoisie cannot grant a democratic peace. Such a peace must be sought and fought for, not in the past, not in a reactionary utopia of a non-imperialist capitalism, *nor in a league of equal nations under capitalism*.[226]

For the Materialist Pacifist project, the only way to fulfil the humanitarian promise of the protection of human life and thus of transcending war, is the change of the current socio-economic system, which inherently incubates violence that escalates in war.[227] The Regulated War tradition is in unity and depends on this socio-economic system. A lengthy overview of this intellectual tradition follows in Chapter 3. Section 2.3 below elaborates on how this thesis understands and employs the concept of hegemony.

2.3 Hegemony

The material limitations of capitalism define the horizon of possibilities for international legal consciousness. This thesis, however, does not adopt a monolithic understanding of ideology that equates consciousness with the 'articulate formal system which can be and ordinarily is abstracted as "ideology"'.[228] This understanding of ideology neglects the 'relatively mixed, confused, incomplete, or inarticulate consciousness of actual men […] in the name of this decisive generalized system [that is ideology], and indeed in structural

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[226] Vladimir Lenin, *The Peace Program* (1916) (emphasis added) https://www.marxists.org/archive/lenin/works/1916/mar/25.htm accessed 20 April 2025.

[227] A wide range of movements embraced the Materialist Pacifist premises. For an example, see the black radical tradition in Andrew Lanham, 'Radical Visions for the Law of Peace: How W.E.B. Du Bois and the Black Antiwar Movement Reimagined Civil Rights and the Laws of War and Peace' (2024) 99 (2) Washington Law Review 433.

[228] Ideology in this sense is split between the ideology of the dominant class and the ideology of the subordinate class which has 'in one version, nothing but this ideology as its consciousness (since the production of all ideas is, by axiomatic definition, in ,the hand of those who control the primary means of production) or, to another version, has this ideology imposed on its otherwise different consciousness, which it must struggle to sustain or develop against "ruling-class ideology"', Williams (n 140) 109.

homology is procedurally excluded as peripheral or ephemeral'.[229] The thesis, drawing on Williams, employs the concept of hegemony as a more useful route to understand the ways meaning sustains relations of domination, while simultaneously it does not reduce the consciousness of a given society to this dominant ideology.[230] The concept of hegemony captures the social process and dynamics of the relations of domination and subordination, 'in their form as practical consciousness, as in effect a saturation of the whole process of living'.[231] Its analytic power penetrates the categories of politics and economy, digging in the whole lived social process to such depth that what seems to most of us as 'pressures and limits of simple experience and common sense' is exposed as 'the pressures and limits of what can ultimately be seen as a specific economic, political, and cultural system'.[232]

For Williams hegemony differs from ideology in a crucial way:

> Hegemony is then not only the articulate upper level of 'ideology', nor are its forms of control only those ordinarily seen as 'manipulation' or 'Indoctrination'. It is a whole body of practices and expectations, over the whole of living; our senses and assignments of energy, our shaping perceptions of ourselves and our world. It is a lived system of meanings and values -constitutive and constituting- which as they are experienced as practices appear as reciprocally confirming. It thus constitutes a sense of reality for most people in the society, a sense of absolute because experienced reality beyond which it is very difficult for most members of the society to move.[233]

Essentially, hegemony is a broader, all-encompassing concept than Ideology as defined by Thompson and discussed below. Within the intellectual boundaries of every 'lived hegemony', as the privileged historical space of Ideology, there are nascent counter-hegemonic tendencies.[234] Lived hegemony 'can never be singular'.[235] As a lived, continuous process hegemony's internal structures exist in an active form. On the one hand, hegemony is constantly 'renewed, recreated, defended, and modified'.[236] On the other hand, is constantly 'resisted, limited, altered, challenged by pressures not at all its own'.[237] The

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[229] Ibid.
[230] Ibid 110.
[231] Ibid.
[232] Ibid.
[233] Ibid.
[234] Ibid 112.
[235] Ibid.
[236] Ibid.
[237] Ibid.

latter pressures are those of a 'counter-hegemony' that strives for an 'alternative hegemony'.[238]

In the context of this thesis, it is particularly useful to employ Williams' concept of hegemony to understand the dominant position of the Regulated War intellectual tradition, its relationship with a possible alternative hegemony of the Anti-War tradition, and with contemporary counter-hegemonic pressures. This thesis aspires to be a part of or expression of the latter. Against this background, it is critical to differentiate between 'alternative and oppositional initiatives and contributions which are made within or against specific hegemony' from other independent initiatives, 'irreducible to the terms of the original or the adaptive hegemony'.[239] The two central legal projects of the Regulated War tradition are initiatives within the specific hegemony of this intellectual tradition. This hegemony is exemplified by both how commonsensical its basic tenets seem to be for the vast majority of international legal practitioners and by how it excludes the articulation of counter-hegemonic initiatives from the horizon of the real, automatically rendering it as wishful thinking or non-realistic moral cliches.

At the same time, the legal project of Idealist Pacifism, although in the Anti-War intellectual tradition, leaves unchanged and adopts the material limits of the hegemonic intellectual tradition. This legal project vindicates the hegemonic reaction to initiatives in the Anti-War tradition as moral cliches. Indeed, the legal project of Idealist Pacifism works within capitalism: its moral pronouncements do not account for any change in its foundations. In fact, morality is the concession of defeat to find a rational way out of the given logic. It is the non-rational negation of the system's rationality.[240] When the moral demand of abolishing war is articulated, war is naturalised and only through this theological process becomes a sin. This realm of metaphysics is, usually, the privileged intellectual terrain of the dominant class and its hegemonic narrative; Niebuhr, subscribing to Kierkegaard,[241] easily refutes Idealist Pacifism: 'man sins *inevitably*, yet without escaping responsibility for his sin'[242] and 'our dreams of bringing the whole of human history under the control of the human will are ironically refuted by the fact that no group

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[238] Ibid 113.
[239] Ibid 114.
[240] Georg Lukács, *History and Class Consciousness: Studies in Marxist Dialectics* (MIT 1971) 38.
[241] Niebuhr cites approvingly Kiergarden's 'Concept of Anxiety' in Reinhold Niebuhr, *The Nature And Destiny Of Man* (Nisbet 1941) 258.
[242] Ibid 266 (emphasis added).

of idealists can easily move the pattern of history toward the desired goal of peace and justice'.[243]

Morality, as a result of a fatalistic stance that accepts and naturalises the existing system and in extension war, is 'action directed wholly inwards' and thus, 'remains merely normative and fails to be truly active in its creation of objects'.[244] A counter-hegemonic initiative can be founded only in a legal project that opposes the material presuppositions of the hegemonic Regulated War tradition. The Materialist Pacifist legal project of the Anti-War intellectual tradition, notwithstanding that it has not recovered from the defeats of the 20th century, is the only project that is irreducible to the hegemonic ideological assumptions about the unchanged nature of lived social relationships and institutions vis-a-vis war.

Be that as it may, this concept of hegemony does not render irrelevant a narrow critical conception of ideology.[245] In other words, it 'does not exclude the articulate and formal meanings, values, and beliefs which a dominant class develops and propagates'.[246] Such a narrow concept of ideology is provided by Thompson, who describes the study of ideology as the study of 'the ways in which meaning, or signification serves to sustain relations of domination'.[247] The discussion of how this thesis employs the concept of ideology is undertaken below in section 2.5. The next section, 2.4, introduces deconstruction as a method.

2.4 Deconstruction

Building on the intellectual mapping above, this thesis proceeds with a deconstruction of the international humanitarian legal argument of the Regulated War tradition. This is why the intellectual mapping does not focus on the perceptions of the social actors: it is not a phenomenological enterprise, but is an endeavour to study the 'operative organisation' of the international humanitarian legal discourse.[248] The thesis puts forward that the structure of the international humanitarian legal argument oscillates between two rhetorics: the

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[243] Reinhold Niebuhr, *The Irony of American History* (California University Press 1952) 2-3.
[244] Lukács (n 240) 38.
[245] On the contrary, broader and neutral conceptions of ideology such as a descriptive one that includes all symbolic practices are not able to shed light to the lived process of sustaining asymmetrical relations of power, Thompson, *Studies in the Theory of Ideology* (n 144) 4.
[246] Williams (n 228) 109.
[247] Thompson, *Studies in the Theory of Ideology* (n 144) 5.
[248] Akbar Rasulov, 'International Legal Universalism: A Reactionary Ideology of Disciplinary Self-Aggrandizement' in Isil Aral and Jean d'Aspremont (eds), *International Law and Universality* (OUP 2024) 71-92.

rhetoric of aspiration and the rhetoric of limitation, which ultimately collapse into each other.

This thesis attempts to provide a materialist grounding of this deconstructive reading by examining the ways capitalism and imperialism shape the horizon of legal possibilities within the Regulated War tradition.[249] It holds that the Regulated War tradition itself is the international humanitarian legal consciousness of imperialist realism.[250] Then, it argues that this rhetorical contradiction of the Regulated War tradition is a manifestation of the material contradiction between the liberal promise of human progress[251] and the material limitations of capitalism as an exploitative system with war as an inherent feature in its process of reproduction.[252] It is this contradiction that 'makes available for the decision of every case matched pairs of arguments that are perfectly plausible within the logic system but that cut in exactly opposite directions'.[253] International law itself cannot resolve it. The materialist grounding of this contradiction avoids the displacement of 'one set of texts […] to another' and illuminates how the Regulated War tradition carries 'these impossible contradictions in the first place and, more importantly, why and how these contradictions become invisible'.[254]

The consequences of this discourse that flows from the contradictory argumentative structure of humanitarianism and the ramifications of the structural pressures that define it are discussed in more detail in the following chapters. Deconstruction provides the tools through which the structure of the international humanitarian legal argument can be studied in its parts and as a whole. Most importantly, it exposes the outer limits of the argumentative space of international humanitarian legal discourse by highlighting how the Regulated War tradition has turned this intellectual space into a roundabout in the middle of a two-way tunnel connecting aspiration and limitation, where the exit toward aspiration is permanently blocked. In other words, by bringing to the fore the entrapment of the international legal argument in an interminable oscillation between the rhetoric of

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[249] In this sense, the two rhetorics are antagonist variants of 'problem-solving' theorising, Robert Cox, 'Social Forces, States and World Orders: Beyond International Relations Theory' (1981) 10 (2) Millennium 126, 128.
[250] Cf. Mark Fisher, *Capitalist Realism: Is There No Alternative?* (Zero Books 2009).
[251] Liberal or Liberalism capitalised refer to the 'larger unit that includes liberalism and conservatism' whose 'abstract normative part' encompasses 'the theoretical commitments that liberals and conservatives share, including rights, majority rule, the rule of law, Judeo-Christian morality, and a regulated market economy with safety nets', Duncan Kennedy, *The Critique of Adjudication (fin de siècle)* (Harvard University Press 1998) 56.
[252] The liberal concept of human progress is both an ideology and a promise like the concept of equality in Theodor Adorno, *Negative Dialectics* (Routlege 1990) 146-147.
[253] Robert Gordon, 'Critical Legal Histories' (1984) 36 Stanford Law Review 57, 115.
[254] Tzouvala (n 78) 35.

aspiration and the rhetoric of limitation, this method exposes the rules of production of international humanitarian legal discourse today. This insight is crucial for the ensuing ideology critique proper, undertaken in Chapter 6.

Alongside describing the contradictions inherent in the international humanitarian legal argument, this thesis also critiques international humanitarian legal discourse. Koskenniemi, when explaining how his method is different from Foucault's 'archaeology', underscores that:

> The description of the functioning of the contradiction entails also an internal criticism of the discourse (a criticism based on its own, not on externally introduced principles). In the tension which provides the unity of the discourse lies also the potential – if not for undoing the contradiction – for extending the discourse, developing it so as to achieve alternative legitimating principles.[255]

Instead of focusing on the ways this discourse can be extended to achieve 'alternative legitimating principles', the present work moves beyond mere criticism and engages in an immanent critique of the contradictory structure of the argument, in light of the potential for 'undoing the contradiction'.

Essentially, this thesis suggests that the internal argumentative structure of humanitarianism, with all its instability, oscillations and contradictions, is a reflection of the material realities of capitalism, a system that itself produces contradictory patterns.[256] In this sense, to bring to the fore and critique the internal contradiction of the humanitarian argument that oscillates between human progress and human's natural(ised) limitations it is also to critique capitalism and how its contradictions structure the international legal argument and define the international legal discourse.

In this context, while Williams finds an ironic connotation to the early 20th century term 'humane killer',[257] it would be more useful to understand the use of the term 'humane killer' and most importantly for the purposes of this thesis, that of 'humane war', as not an ironic contradiction itself but as the literal expression of a materially existing contradiction;

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[255] Koskenniemi, *FATU* (n 77) 73-74.
[256] Drawing on Tzouvala (n 78) 40. For the relationship between Marxism and deconstruction from the Derridean point of view see Michael Ryan, *Marxism and Deconstruction: A Critical Articulation* (Johns Hopkins University Press 2019) 43-62.
[257] Williams (n 228) 151.

of a really existing historical irony. This irony, which runs in the veins of the international humanitarian legal text, is the key to the gate of the 'deeper logic of the text'.[258] Once this gate is unlocked, the international humanitarian legal text is susceptible to a different reading, one that unearths its silences and implied assumptions and ultimately its concealed relations of domination. Hence, this venture in deconstruction is part and parcel of ideology critique.

Late Derrida himself acknowledged that there are two ways in which deconstruction could be pursued. The first is a more formal structuralist a-historical exercise seeking to highlight 'logico-formal paradoxes' or aporias.[259] This style of deconstruction is evident in the discussion of the oscillation between the two rhetorics, of aspiration and limitation, undertaken in Chapter 5.2. The second style of deconstruction takes seriously the need to situate historically discursive formations. This mode of deconstruction is 'more anamnesic' and proceeds 'through readings of texts, meticulous interpretations and genealogies'.[260] Both modes of deconstruction, however, find themselves between the same two poles: the abstract humanitarian aspiration of protecting human beings and the concrete material limitation of imperialism that renders war to appear as inevitable in the legal imaginary of international lawyers. This materialist aporia is the main object of investigation in Chapter 5.[261]

2.4 Ideology Critique as a form of Immanent Critique

As noted above, to study ideology is to study 'the ways in which meaning, or signification serves to sustain relations of domination'.[262] The critique of ideology, then, is to uncloak these ways and the relations of domination they sustain. A core hypothesis of this thesis is that the Regulated War tradition employs various discursive strategies that legitimise war and the deprivation of human life in wartime. The relations of domination sustained by the ideology of the Regulated War tradition are those of capitalism and imperialism. Ideology critique is, therefore, an indispensable tool in the endeavour to detail and demonstrate the merit of this hypothesis. According to Thompson, the study of ideology is necessarily a process of depth-interpretation. This process consists of three non-sequential phases.

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[258] Tzouvala (n 78) 9. See also Bennett Capers 'Reading Back, Reading Black' (2006) 35 Hofstra Law Review 9.
[259] Jaqcues Derrida, 'Force of Law: The Mystical Foundation of Authority' in Cornell, Rosenfeld, and Carlson (eds) *Deconstruction and the Possibility of Justice* (Routledge 1992) 21.
[260] Ibid.
[261] Cf. Ibid 23.
[262] Thompson, *Studies in the Theory of Ideology* (n 144) 5.

In the phase of social analysis, ideology is examined in light of a 'social-historical analysis of the forms of domination which meaning serves to sustain'.[263] This analysis can be carried out at three levels. First, at the level of action, which involves identifying the specific contexts in which individuals act and interact to achieve their goals. Actions and expressions are influenced by the particular agents, times, and settings in which they occur.[264] Second, at the level of institutions as social frameworks comprising relationships and resources. While they do not determine action, they provide a relatively stable structure within which action and interaction occur. Institutions are centres of power and the embodiment of dominant relationships. Thompson argues for reconstructing institutions, considering both their organisational aspects and their spatio-temporal features, as a contribution to the analysis of ideology.[265] The third level focuses on the structural elements that shape institutions.[266] Rather than directly analysing institutions, this level explores the elements that condition and structure them. These structural elements form the foundation for important relationships of domination at the institutional level. In summary, the study of ideology in the phase of social analysis involves examining the contextual aspects of action, the 'parameters of permissible conduct' generated by institutions, and the underlying structural elements that shape and sustain dominant relations.[267]

Next is the phase of discursive analysis. The analysis of ideology involves examining 'forms of discourse', which are not only 'socially and historically situated practices' but also 'linguistic constructions which display an articulated structure'.[268] Forms of discourse are something more than just situated practices, precisely because they are 'linguistic constructions which claim to say something'.[269] Studying them in a discursive analysis aims to elucidate their role in the operation of ideology.[270] This analysis can be carried out again at three levels. First, examining discourse as narratives.[271] Narrative forms exhibit a particular logic and often serve to legitimise a particular discourse and its political effects. Think, for instance ICRC's narrative of Henry Dunant and the progress of humanitarianism, which at the same time suppresses the Anti-War tradition or downplays the failures of the Regulated War tradition. Examining these narratives helps reveal their ideological functions.

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[263] Ibid 133.
[264] Ibid 135.
[265] Ibid.
[266] Ibid.
[267] Ibid.
[268] Ibid 136.
[269] Ibid.
[270] For the discursive strategies in international law see Marks, *The Riddle of All Constitutions* (n 6) 62-66.
[271] Thompson, *Studies in the Theory of Ideology* (n 144) 136.

The second level is the analysis of the argumentative structure of discourse.[272] Discourse takes the form of supra-sentential linguistic constructions, including explanations and chains of reasoning that can be reconstructed and made explicit in various ways. These reconstructions shed light on the ideological aspects of discourse by revealing not only its legitimising procedures but also its strategies of dissimulation. Concealing relations of domination and the process of concealment itself is a complex and conflicting endeavour prone to contradictions and distortions. Analysing the argumentative structure exposes the 'dissimulating function of ideology' by identifying contradictions, inconsistencies, silences, and lapses that characterize the texture of discourse.[273]

In the third level the discursive analysis examines the syntactic structure of discourse, such as nominalisation, passivisation, the use of pronouns, and tense structure that provide initial insights into processes of reification within language.[274] These syntactic techniques represent dynamic processes as static objects, eliminate agency, and present time as an eternal extension of the present tense. All of these syntactic choices serve to reinforce the idea of an ahistorical society at the core of historical society.[275] In summary, the analysis of ideology involves studying forms of discourse, including their narrative structure, argumentative organisation, and syntactic features, in order to understand their role in expressing and perpetuating ideology.[276]

Finally, is the phase of depth interpretation proper. Interpretation, as a creative process of constructing meaning, can be facilitated by analytical methods that go beyond the superficial form of discourse.[277] However, interpretive explication always involves projecting a potential meaning that may be subject to disagreement. In the act of explicating what is being said, interpretation surpasses the closed structure of discourse as a constructed entity.[278] Here, the concept of split reference introduced by Ricoeur becomes useful. According to Ricoeur, the inscription of discourse in writing involves suspending ostensive denotation and uncovering a secondary reference that highlights aspects of being and experience which cannot be directly expressed in an ostensive way.[279]

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[272] Ibid.
[273] Ibid 137.
[274] Ibid.
[275] Ibid.
[276] Ibid 136-137.
[277] Ibid 137.
[278] Ibid.
[279] Paul Ricoeur, T*he Rule of Metaphor: Multi-Disciplinary Studies of the Creation of Meaning in Language (*Routledge & Kegan Paul 1978) Chs 7 and 8.

The terms used in discourse fulfil their ideological role by explicitly referring to one thing while implicitly referring to another, thereby entangling these multiple references in a manner that serves to perpetuate relations of domination.[280] Interpreting discourse as ideology involves constructing a meaning that unravels the referential dimension of discourse, delineating the multiple referents and demonstrating how their entanglement sustains relations of domination. For instance, this thesis posits that the Regulated War tradition explicitly refers to a humane way of conducting warfare, while the referential dimension of its discourse, in effect, legitimises war and the deprivation of human life. This legitimising process is made possible by capitalism and imperialism, which it then helps to sustain. Of course, legitimation as a function of law is not a novel idea.[281] The task of interpretation, however, is also to reconnect discourse with the relations of domination it reproduces. This interpretation is informed by discursive analysis of linguistic constructions and social analysis of the conditions that shape discursive production. Thus, interpreting ideology entails a form of deep hermeneutics that delves into the underlying layers of meaning.[282]

The critique of ideology employed in this thesis extends one step further from Thompson's depth interpretation. It has a double function. It not only unearths the underlying machinations of international humanitarian legal discourse but also evaluates them against the humanitarian promise itself. If international humanitarian legal discourse fails to meet the standards it professes to serve, then it needs to be replaced with an alternative way of thinking and practising of international legal humanitarianism. In this sense, the critique of ideology advanced in this thesis is not only negative but also brings with it a positive programme for completing the humanitarian promise. It is a form of immanent critique. This kind of critique 'seeks to occupy the categories of bourgeois society from within, in order to highlight those points of internal conflict, indeterminacy and contradiction where its own logic might be led to surpass itself'.[283] It is practised in this work as part of its endeavour to render it an exercise in the philosophy of praxis.[284]

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[280] Thompson, *Studies in the Theory of Ideology* (n 144) 137-138.
[281] Duncan Kennedy, *A Critique of Adjudication* (n 251) 236. Cf. Alan Hyde, The Concept of Legitimation in the Sociology of Law (1983) Wisconsin Law Review 379. In response to Hyde, Gordon correctly notes that the assumption that only empirically falsifiable statements about the probabilities of legal behaviors triggering social behaviors under specific conditions are worth considering sometimes leads to 'the absurd claim that whatever you can't make such a statement about must not be there at all' Gordon (n 253) note 85.
[282] Thompson, *Studies in the Theory of Ideology* (n 144) 138.
[283] Eagleton (n 8) 171.
[284] See Andrew Feenberg, *The Philosophy of Praxis: Marx, Lukács and the Frankfurt School* (Verso 2014).

This term, coined by Gramsci as a veiled reference to Marxism in his Prison Notebooks, asserts that legal or 'cultural dilemmas' devoid of clear solutions are essentially social contradictions conceptualised in an abstract manner.[285] Their solution cannot be found in the law itself. It can only come from outside the internal argumentative structure of the international humanitarian legal argument by addressing the social contradictions that caused it in the first place. In this sense, the philosophy of praxis is a call for action to transcend in practice those conditions that lead to an oscillating impasse. International legal humanitarianism is confronting an impasse of this nature.

Having outlined the above, the following chapter, Chapter 3, introduces the discursive material that enables the identification of the two distinct legal projects within the hegemonic Regulated War intellectual tradition. Chapter 4 proceeds with the analysis of a set of ideological strategies that have largely succeeded in the identification of the tradition of 'Regulated War' with humanitarianism. It argues that the main medium of these ideological strategies is the IHL and IHRL discourse. The legitimating role of IHL discourse has been argued persuasively by David Kennedy: '[l]aw is a strategic partner for military commanders when it increases the perception of outsiders that what the military is doing is legitimate'.[286] Chapter 4 puts forward that the identification of Regulated War tradition with Humanitarianism leads to the justification of the former via the appropriation of the legitimacy enjoyed by the latter.

The political effects of this acquired legitimacy of the Regulated War tradition, through its legal projects, that legitimise the deprivation of human life, are discussed in Chapter 6. The grammar of this legitimising discourse is the object of Chapter 5. In Chapter 7, the thesis concludes with the suggestion that the immanent critique of these shortcomings of the Regulated War tradition and the idealist Anti-War tradition enables us to understand that the realisation of the liberal promise of humanitarian progress is possible only through the Materialist Pacifist project.[287] This project advocates for an anti-capitalist philosophy of praxis, where the focus is on dismantling the material processes that perpetuate capitalism. By doing so, a fertile foundation can be established for the humanitarian vision to flourish.

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[285] Ibid.

[286] Of course, the same legal discourse can work on the opposite direction: 'it is a strategic partner for the war's opponents when it increases the perception that what the military is doing is not legitimate', David Kennedy, *Of War and Law* (n 34) 41.

[287] See for instance Karl Marx, 'Marx Letter to Ruge' in Rodney Livingstone and Gregor Benton (trs), *Karl Marx Early Writings* (Penguin 1992) 208. On how the concept was employed by the Frankfurt School, see Raymond Geuss, *The Idea of a Critical Theory* (CUP 1981) 65.

3. The Regulated War Tradition and Its Legal Projects

3.1 Introduction

What used to be called the 'Laws of War' is today increasingly known as IHL.[288] Jean Pictet's article on the principles of IHL that appeared in the International Review of the Red Cross in September 1966 marks the official birth of the term IHL.[289] Nevertheless, it was only in 1981 and the Conventional Weapons Convention that an international treaty used the term IHL.[290] The traditional understanding of the term 'Law of War' can be considered broader than that of IHL as it governed the relations between belligerent states from the time of formal declaration of war.[291] In this respect, it can also be considered narrower as it did not used to encompass non-international armed conflicts.[292] The narrative of the ICRC legal project is that the early law of war, the so-called Law of the Hague, is different in nature from the latter Law of Geneva (the former focusing on means and methods of war and the latter on protected categories of persons).[293] Over time, this narrative says, the two converged into what is now called IHL. Nevertheless, USA persists in using the term 'Law of War' to describe both 'that part of international law that regulates the resort to armed force' and 'the conduct of hostilities and the protection of war victims in international and non-international armed conflict; belligerent occupation; and the relationships between belligerent, neutral, and non-belligerent States'.[294] In any case, when referring to the discourse about the legal regulation of warfare this thesis employs the term IHL that highlights both the promise and the ideological function of this sphere of international law.

An initial indication of whether a text forms part of the ICRC legal project or the Military legal project is the terminology used itself. A text using the terms LOAC, Law of War,

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[288] Wilson Page, 'The Myth of International Humanitarian Law' (2017) 93 (3) International Affairs 563-579. See also, Emily Crawford, Annabelle Lukin, and Jacqueline Mowbray, 'The Terminology of the Law of Warfare: A Linguistic Analysis of State Practice' (2023) 14 Journal of International Humanitarian Legal Studies 197.

[289] Jean Pictet, 'The Principles of International Humanitarian Law' (1966) 66 International Review of the Red Cross 455-469. Although the term was already being used, the efforts to explicitly mention human rights, which were considered back then as part of this humanitarian law in Common Article 3 of GC failed. 'Between 1952 and 1960, in each of the four lengthy commentaries to the Geneva Conventions published by the ICRC, 21 references to "humanitarian law" or IHL are made, though these terms appear less than a dozen times. In three of these commentaries, LoW or "the laws and customs of war" are mentioned more than 40 times; in the fourth, they are mentioned 25 times', Page ibid 567.

[290] Article 2 of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 137.

[291] Melzer, *International Humanitarian Law: A Comprehensive Introduction* (n 3) 56.

[292] Ibid.

[293] François Bugnion, 'Law of Geneva and Law of the Hague' (2001) 844 International Review of the Red Cross.

[294] NATO Standardization Office, *AJP-3.9: Allied Joint Doctrine for Joint Targeting* (NATO 2021) USA Reservation 6.

Law of Military Operations, or Law of Armed Forces is more likely to fall within the Military legal project while a text employing the term IHL is more probable to be on the side of the ICRC legal project. This phenomenon is the by-product of the institutional preferences themselves: ministries of defence employ LOAC or Law of War in their military manuals,[295] while the ICRC is, of course, an adamant supporter of the term IHL.[296] Nevertheless, the use of which term is far from decisive in classifying them under one of the two antagonistic legal projects; NATO, one of the most powerful institutional agents of the Military legal project, employed the term IHL when announcing their 'policy on the protection of civilians'.[297]

The strongest indication in the classification of a text in the Military legal project or the ICRC legal project is the emphasis on military necessity for the former and 'humanitarian' concerns for the latter. Since the proportionality vocabulary enjoys a central intellectual position in the development of international legal arguments, the Military legal project, emphasising the principle of military necessity, tends to construct a more permissive interpretation while the ICRC legal project has the propensity to react by putting forward a more protective, or at least less permissive interpretation of IHL and IHRL. When the permissive and protective constructions of IHL and IHRL by the two legal projects are in reaction or contradistinction to each other, which is often the case, the strong indication becomes a critical indication: the most accessible way to classify international legal texts

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[295] The term 'LOAC' can be found in the legal manuals of the Ministries of Defence of the United Kingdom, Australia, and Germany, see United Kingdom, *Joint Service Manual of the Law of Armed Conflict* (n 4); Australia, *Australian Defence Doctrine Publication 06.4 – Law of Armed Conflict* (Defence Publishing Service 2006); Germany, *Law of Armed Conflict – Manual – Joint Service Regulation (ZDv) 15/2* (Ministry of Defence, 2013); New Zealand, *Manual of Armed Forces Law* (Defence Force 2021). The term 'Law of War' is used by the USA in USA, *Department of Defense Law of War Manual* (n 4). The term 'Law of Military Operations' is more rare but can be found in the military manual of France, see France, *Manuel de Droit des Opérations Militaires* (Ministry of Defence 2022).

[296] This is the general rule and as with every rule it has several exceptions. For an ICRC publication using the term LOAC (note that throughout the rest of the text the term IHL is used) see Melzer, *International Humanitarian Law: A Comprehensive Introduction* (n 3) 265. For a NATO publication using the combinatory term IHL/LOAC throughout the whole text see NATO Standardization Office (n 294). The conclusions drawn merely by virtue of the term used should only be prima facie. For instance, the journey of these early conclusions when encountering Rain Liivoja and Tim McCormack (eds), Routledge Handbook of the Law of Armed Conflict (Routledge 2016) would start from the Military legal project and then transit for a while through the ICRC legal project in Kalshoven's chapter, which is the only one empoying the term IHL, Frits Kalshoven, 'The history of international Humanitarian Law Treaty-Making' in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016).

[297] NATO, *NATO Policy for the Protection of Civilians* (2016) http://www.nato.int/cps/en/natohq/official_texts_133945.htm?selectedLocale=en accessed 20 April 2025. See also, NATO, *NATO Policy on Children and Armed Conflict* (2023) https://www.nato.int/cps/en/natohq/official_texts_217691.htmpo?selectedLocale=en#footnote accessed 20 April 2025.

to one of the two legal projects is in their dialectic co-existence.[298] This is why, as much as possible, this section chooses to present examples depicting the two legal projects in a dialogical form. For instance, in the form of an explicit or implicit reply in an academic article or a separate opinion to a judgement.

The principle of proportionality is an obvious site of argumentative contestation for determining the level of protection of human life between the two legal projects. Nevertheless, the following examples provided in this chapter aim to exemplify that the argumentative terrain cuts through the principles of proportionality and distinction and across IHL itself into IHRL, going even beyond the right to life. This chapter provides an exposition of the discourse produced by the ICRC legal project in juxtaposition to the discourse produced by the Military legal project. It starts with the main principles of IHL, the principle of distinction, the principle of proportionality, and the principles of military necessity and humanity, which are considered the cornerstones of IHL.

Then it furnishes discursive evidence of the two legal projects concerning the issues of the law of occupation and jurisdiction of states before the ECtHR. In the first example, which presents the diverging views on whether the law of occupation applies during the invasion phase, this chapter illustrates how international humanitarian legal discourse is far-reaching and encompasses discourse engaging with the issue of applicable law. In the second example, a text produced by the ECtHR—steeped in an IHRL vocabulary that, in some parts, is ineptly fused with IHL— this chapter highlights that the international humanitarian legal discourse also extends to procedural matters before human rights courts. The latter judgement of the ECtHR was particularly relevant to this thesis for two reasons. Firstly, because the arguments advanced by the two legal projects are structured around the question of whether the ECtHR has jurisdiction over alleged violations, most notably of Article 2 ECHR regarding the deprivation of life, occurring during the active phase of hostilities. Secondly, due to a stark juxtaposition between the permissive and protective interpretations of the Convention, as put forward by the majority and the minority, respectively. In the same vein, the chapter reads the case law of the ICJ and the ECtHR on the relationship between IHL and IHRL identifying the two legal projects in the majority and the minority of the bench in each case discussed, to bolster further its claim that IHRL is also an important locale of international humanitarian legal discourse. Finally, the

[298] 'Indeed, these voices can best be distinguished by contrast with one another. We know the humanitarian as the one who is not a military strategist', Kennedy, *The Dark Sides of Virtue* (n 35) 154. See also, mutatis mutandis, Koskenniemi, *FATU* (n 77) 164.

chapter concludes by highlighting the limited discursive evidence of the Anti-War intellectual tradition, in an endeavour to both fortify its argument about the hegemony of the Regulated War intellectual tradition and to serve as a reminder that counter-hegemonic seeds are still planted in international humanitarian legal discourse.

3.2 Principle of Distinction

3.2.1 Introduction

The four principles discussed in the following three sections 'underpin the modern law of targeting'.[299] In turn, the law of targeting, that is the legal rules applicable in the targeting process of an enemy military target, is referred to as the '*sine qua non* of warfare'.[300] The most accessible starting point to the discussion of the law of targeting is the principle of distinction. The main focus of the discussion below is on the divergent legal discourse produced by the ICRC legal project and the Military legal project on this principle when applied to international armed conflicts (IAC).

In order to apply or even understand the principle of distinction between civilians and combatants, one needs first to define the terms 'civilian' and 'combatant'. In Article 50(1) of AP I, the term 'civilian' is defined negatively as 'any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol'.[301] Hence, civilians are all persons who are not 'members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces', 'members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied', provided that they fulfil the four conditions of Article 4 A (2),[302] members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power', and persons participating in a levée en masse.[303] At the same time, Article 43(2) of AP I, citing Article 33 of the Third Geneva Convention,

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[299] Crawford and Pert (n 3) 186.
[300] Michael Schmitt, 'Foreword' in William Bouthy, *The Law of Targeting* (n 3) vii.
[301] Article 50(1) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (AP I).
[302] Being commanded by a person responsible for their subordinates, having a fixed distinctive sign recognizable at a distance, carrying arms openly, and conducting their operations in accordance with the laws and customs of war.
[303] Article 4 A (1)(2)(3)(6) Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GC III).

underscores that all members of the armed forces, except medical personnel and chaplains, are to be considered combatants.[304]

Furthermore, Article 43(1) of AP I provides the first conventional definition of 'armed forces' for IACs, which is as follows:

> The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, ' inter alia ', shall enforce compliance with the rules of international law applicable in armed conflict.

This definition integrates all armed personnel fighting under the responsible command of a Party to the conflict. It leaves out only participants in levée en masse that by definition could not be under a responsible command.[305]

According to Article 43(2), combatants have the right to participate directly in hostilities. This means that, as long as they conform with IHL rules, they possess the so-called 'combatant privilege'; they are immune from national criminal prosecutions for any deaths or injuries they may have incurred to others during combat.[306] The combatant privilege together with the prisoners of war (POW) status are the two fundamental guarantees afforded to combatants (combatants in the narrow sense) by IHL. However, these guarantees come with the respective cost of being lawfully targeted.[307]

So, IHL creates two seemingly rigid, mutually exclusive legal categories. On the one hand, the legal category of combatants, in which IHL assigns to all persons who are members of armed forces (minus medical personnel and chaplains) and persons participating in a levée en masse. On the other hand, the legal category of civilians, which, as negatively defined, IHL assigns to all persons who do not fall within the former. In case of doubt, Article 50(1) AP I establishes the presumption of civilianness, to ensure a greater protection of

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[304] Article 43(2) AP I (n 301).
[305] Nils Melzer, *Targeted Killing in International Law* (OUP 2008) 306.
[306] Knut Ipsen, 'Combatants and Non-combatants' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (OUP 2013) 86.
[307] While combatant privilege is afforded to combatants in the narrow sense of the term, that is members of the armed forces of a Party to the conflict as defined in its national legislation, the licence to kill combatants refers to the broader meaning of the term combatants, the one shaped by IHL.

civilians.[308] In fact, this presumption of civilian status was one of the most controversial provisions of AP I and attracted reservations from some of the largest military powers of the globe.[309]

One of the challenges, blurring the lines of this phenomenally rigid distinction of civilians and combatants, is the case of civilians taking a direct part in the hostilities, without becoming members of the armed forces in the conflict. Even though when referring to the concept of civilians participating in hostilities Article 51(3) of AP I uses the term 'direct' while Common Article 3 of the Geneva Conventions goes with the term 'active', the International Criminal Tribunal for Rwanda (ICTR) has ruled that the two terms can be used interchangeably (this is also supported by the equally authoritative French text of both legal instruments; 'participent directement').[310] To explore this issue, which is one of the main points of contention between the ICRC legal project and the Military legal project, in 2003 the ICRC set up the Direct Participation in Hostilities (DPH) Project, which brought together 40 experts in the field of IHL,[311] and culminated in the publication, on behalf of the ICRC,[312] of the Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law.[313] Although initially the DPH Project focused on the cases of private contractors (particularly private security contractors) and civilian government employees, the focus shifted considerably, influenced by states' interests, towards the status of civilians linked to non-state armed groups in the Middle East.[314]

According to ICRC's Interpretative Guidance, which forms discursive evidence of the ICRC legal project *par excellence*, the notion of direct participation in hostilities 'essentially comprises two elements, namely that of "hostilities" and that of 'direct participation' therein'.[315] The former, refers to the spatio-temporal phase(s) in which the parties to the conflict resort to (violent) action that could potentially injure the enemy and

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[308] Article 50 AP I (n 301).
[309] See for instance France, *Reservations and Declarations Made Upon Ratification of AP I* (11 April 2001) and United Kingdom, *Reservations and Declarations Made Upon Ratification of AP I* (28 January 1998).
[310] *Prosecutor v Akayesu* (Judgement) ICTR-96-4-T (ICTR Trial Chamber I, 2 September 1998) para 629.
[311] ICRC, *Overview of the ICRC's Expert Process* (2003-2008) https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/overview-of-the-icrcs-expert-process-icrc.pdf accessed 20 April 2025.
[312] The strong disagreements between the experts participating in the DPH project led a significant number of them to even ask that their names be deleted as participants to the process of drafting the Interpretative Guidance, Schmitt, 'The Interpretive Guidance' (n 3) 5-6.
[313] Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (ICRC 2009).
[314] Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities' (n 313) 10-11.
[315] Melzer, *Interpretative Guidance* (n 313) 43.

the latter refers to the individual involvement in these activities. The Interpretative Guidance argues that since private contractors and civilian government employees do not have a 'continuous combat function', they should be accorded the status of civilians and treated as such.[316] This concept of 'continuous combat function' is the delineating line between civilians becoming combatants and civilians that, albeit keeping their status, lose their protection as long as they directly participate in hostilities. The important criteria to distinguish the two are that in the latter case, civilians participate in hostilities directly in a spontaneous, sporadic, or unorganised basis, or by assuming solely political, administrative or other non-combat functions.[317] Hence, a civilian loses their protection under IHL when engaging in specific hostile acts.

The Interpretative Guidance offers three constitutive elements that need to be fulfilled cumulatively in order for a specific act to be qualified as direct participation in hostilities; the act must be likely to negatively affect the enemy's military capacities or compromise its military operations, there must be a 'direct causal link' between the act and the negative impact on enemy's military capacities, and the act must be characterised by a belligerent nexus.[318] The latter means that the act of the civilian should be a product of their specific intention to directly cause harm, in support of one party and in the detriment of the other. Drawing on the Commentary to AP I, the Interpretative Guidance claims that hostile acts include not only the active use of weapons but, inter alia, the act of carrying weapons, or other acts of violence even without the use of weapons.[319] The Interpretative Guidance gives several examples of individual conduct that, satisfying the required threshold of harm, amount to direct participation in hostilities: sabotaging the enemy's military operations by 'disturbing deployments, logistics and communications', 'denying the adversary the military use of certain objects, equipment and territory', guarding captured military personnel of the adversary to prevent them being forcibly liberated (as opposed to exercising authority over them)', 'clearing mines placed by the adversary', and engaging in 'electronic interference with military computer networks'.[320]

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[316] Nevertheless, the Guidance also notes the practical difficulties of distinction, arising from private contractors and civilian government employees necessary physical proximity to lawful military objectives, ibid 38.
[317] Ibid 38-39.
[318] Ibid 16-17.
[319] Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) para 1943.
[320] Melzer, *Interpretative Guidance* (n 31) 48.

In this regard, the Interpretative Guidance is in line with the ICTY reasoning in Strugar.[321] There, the Appeals Chamber emphasised that the concept of direct participation in hostilities cannot be held to embrace neither all activities in support to a belligerent party operations, nor only the involvement in violent acts, citing Article 67(1)(e) of AP I, Article 15 of Geneva Convention IV, and Article 3 of the Mercenaries Convention.[322] The Appeals Chamber also provides a number of examples of conduct that fall short of direct participation in hostilities, such as 'selling goods to one of the parties to the conflict', 'expressing sympathy for the cause of one of the parties to the conflict', 'failing to act to prevent an incursion by one of the parties to the conflict', and 'accompanying and supplying food to one of the parties to the conflict'.[323]

3.2.2 Direct Participation in Hostilities

While there is some agreement on the fundamentals of what kind of conduct can constitute direct participation in hostilities, the issue of the temporal scope of protection —how long does a civilian directly participating in hostilities lose their protection— proved to be much more contentious among IHL experts. The discussion below juxtaposes the discursive products of the ICRC legal project and the Military legal project: the Interpretative Guidance and the US Department of Defense Law of War Manual, respectively. It will also briefly introduce discourse produced by courts and academics to fully flesh out the distinctive discursive products of the two legal projects.

After long discussions, the final text of the Interpretative Guidance of ICRC deplores any extension of the concept of direct participation in hostilities beyond specific acts as this could 'blur the distinction made in IHL between *temporary, activity-based loss of protection* (due to direct participation in hostilities), and *continuous, status or function-based loss of protection* (due to combatant status or continuous combat function)'.[324] This conclusion follows the Appeals Chamber of the ICTY, which underlined in Strugar that the 'temporal scope of an individual's participation in hostilities can be intermittent and discontinuous'.[325] The Interpretative Guidance also responds to the position of the Military legal project examined below regarding the 'revolved door' protection of civilians, that is whether civilians can regain their civilian protection every time they cease to directly participate in hostilities, by arguing that not only is not a malfunction but an 'integral part

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[321] *Prosecutor v Strugar* (Judgement) IT-01-42-A (ICTY Appeals Chamber, 17 July 2008).
[322] Ibid para 176.
[323] Ibid para 177.
[324] Melzer, *Interpretative Guidance* (n 31) 45 (emphasis in the original).
[325] *Prosecutor v Strugar* (n 321) para 178.

of IHL'.[326] The resumption of legal protection against attacks for civilians sleeping in their homes or working reflects the fact that they do not 'represent a military threat' at that time.[327] Even if 'a civilian has repeatedly taken a direct part in hostilities', the Interpretative Guidance argues, it would not amount to a 'reliable prediction as to future conduct'.[328] Finally, it acknowledges that this interpretation poses obstacles for the opposing armed forces, especially for an invading army having to face the local population, but holds that 'it remains necessary to protect the civilian population from erroneous or arbitrary attack'.[329]

The Interpretative Guidance's construction of the concept of direct participation in hostilities has been vehemently opposed by the Military legal project.[330] The US Department of Defense Law of War Manual, in section 5.8.1.2 argues that Article 51(3) is not a mere reflection of the customary rule of international law, which the USA accepts as such.[331] Similarly, the Manual claims that ICRC's Interpretative Guidance is not 'accurately reflecting customary international law'.[332] According to the position expressed in the Manual, while civilians regain their protection when they permanently cease to directly participate in hostilities, they 'do not benefit from a "revolving door" of protection'.[333] This means that they remain legitimate military objectives even when they return to their homes with their families. Ultimately, whether a civilian has permanently ceased to participate in hostilities or not will be determined on a 'case-by-case analysis of the specific facts'.[334]

The Manual further elaborates this distinction between permanent cessation of participation in hostilities and the 'revolved door' protection, by underlining that a civilian will normally be considered to have permanently ceased to participate in hostilities when their participation 'was an isolated instance that will not be repeated'.[335] This distinction is not only professed but practised in real life by the USA:

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[326] Melzer, *Interpretative Guidance* (n 31) 70.
[327] Ibid.
[328] Ibid 71.
[329] Ibid.
[330] Schmitt, one of the prominent figures of the Military legal project has characterised ICRC's argument on the temporal scope of protection of civilians directly participating in hostilities as 'fatally flawed', Michael Schmitt, 'Deconstructing Direct Participation in Hostilties: The Constitutive Elements' (2010) 42 New York University Journal of International Law and Politics 697, 738.
[331] USA, *Department of Defense Law of War Manual* (n 4) 235.
[332] Ibid.
[333] Ibid 242.
[334] Ibid.
[335] Ibid 243.

> The law of war, as applied by the United States, gives no 'revolving door' protection; that is, the off-and-on protection in a case where a civilian repeatedly forfeits and regains his or her protection from being made the object of attack depending on whether or not the person is taking a direct part in hostilities at that exact time.[336]

The Manual puts forward that if a 'revolving door' protection was accepted, these civilians directly participating in hostilities would be placed 'on a better footing than lawful combatants'.[337] It even goes as far as to argue that in the case IHL embraced a civilian who is a 'farmer by day, guerilla by night' it would 'risk diminishing the protection of the civilian population'.[338] In this plot twist, protecting civilians will endanger them. In support of this 'teleological' interpretation and application of the customary rule of IHL for civilians directly participating in hostilities a retired Air Commodore of the Royal Air Force offers a textual argument: 'dictionary definition of "be involved in, take part" is equally applicable, in my [his] view, either to individual acts or to groups or sequences of activity spread over a period'.[339] Finally, the 'creative' use of legal indeterminacy by the Military legal project manifests in various forms; yet, as with any art, not all performances are lege artis. The suggestion that IHL's presumption of civilian status does not entail a presumption of non-direct participation in hostilities falls on the weaker side of the Military legal project's discourse.[340] Of course, when articulated by (with) the 'right' power, even the weakest legal argument can produce material effects in the theatre of war.

3.3 Principle of Proportionality

3.3.1 Introduction

The principle of proportionality is the heart of IHL. Its theoretical underpinnings place it as the cornerstone of the Regulated War tradition. For the same reason, almost any reference to this principle *ipso facto* renders the discourse outside the Anti-War tradition. The legal basis of this principle is found in both custom and treaty. The customary rule is rendered by the ICRC as follows:

> Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would

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[336] Ibid.
[337] Ibid, 244.
[338] Ibid.
[339] See for instance, Bill Boothby, '"And for such Time as": The Time Dimension to Direct Participation in Hostilities' (2010) 42 New York University Journal of International Law and Politics 741, 765.
[340] Ibid 766.

> be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.[341]

This customary rule is applicable both in IACs and NIACs. Although implied from the early stages of IHL, the principle of proportionality was codified for the first time only in 1977. Article 51(5)(b) of AP I, which is applicable to IACs, stipulates this principle in the exact same way as the customary rule.[342] The ICRC in its Commentary to AP I outlines its understanding of IHL and the principle of proportionality in unequivocal terms:

> The entire law of armed conflict is, of course, *the result of an equitable balance between the necessities of war and humanitarian requirements*. There is no implicit clause in the Conventions which would give priority to military requirements. The principles of the Conventions are precisely aimed at determining where the limits lie; the principle of proportionality contributes to this.[343]

The principle of proportionality also encompasses the principle of necessary suffering. Where the two legal projects diverge on the construction of this principle is whether it also applies to civilians. The Military legal project contends that 'in exploring unnecessary suffering, remember, first, that the principle applies only to enemy forces'.[344] On the contrary, the ICRC legal project has argued that the principle obliges belligerents 'to avoid infliction of excessive suffering to all those on the opposite belligerent side, whether civilians or soldiers'.[345] The two legal projects concur, however, in that the principle of proportionality is 'based upon two elements: the principle of soldier's efficiency, and the principle of humanitarianism'.[346] In this line of thinking, the introduction of one of the most recent book-length texts on the topic begins as follows:

> In war, people die. But that does not mean that war is totally stripped of humanity. […] When military forces attack a legitimate military objective during armed conflict, they may be expected to cause civilian harm, even after feasible precautions to avoid or minimise any collateral damage have been taken. But how many civilians may die when a legitimate military objective is attacked during an armed conflict? Or, how many civilian objects may be destroyed for what type of military advantage? To

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[341] ICRC, *Customary International Humanitarian Law* (CUP 2005) Volume I: Rules, Rule 14.
[342] Article 51(5) AP I (n 301).
[343] Sandoz, Swinarski, and Zimmerman (eds), Commentary on AP I (n 319) para 2216 (emphasis added).
[344] Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (CUP 2021) 239.
[345] ICTY, *Prosecutor v Galić* (Judgement) IT-98-29-T (ICTY Trial Chamber, 5 December 2003) para 39.
[346] Ibid.

> determine the answer to these vexing questions, military commanders must apply the proportionality rule which is part of IHL.[347]

This passage encapsulates the privileged questions of the hegemonic international humanitarian legal discourse. The fact that these questions emphasise how humans could be lawfully killed instead of why indicates that the rationality of the Regulated War tradition is manifested in the form of instrumental humanitarian reason, for which this thesis expands further in Chapter 7. Below, sections 3.3.1-3.3.4 grapple with the dialogue between the ICRC and the Military legal projects on four sub-issues falling under the principle of proportionality. At least two of them, the 'dual-use objects' and 'human shields' could have also been discussed under the previous section on the principle of distinction. In one fundamental sense, the discussion about proportionality falls under the principle of distinction.[348] Whether these two are falling under the principle of distinction or the principle of proportionality is a doctrinal issue that is irrelevant to the present conversation. What the sections below seek to highlight is the dialectical formation of hegemonic international humanitarian legal discourse in two legal projects. The four issues presented here were selected because the internal dialogue of the Regulated War tradition brings into relief the delineating lines between the ICRC and the Military legal projects.

3.3.2 The Concept of 'Dual-Use Objects'

One of the open debates between the Military legal project and the ICRC legal project is about the targeting of dual-use objects. The updated 2023 Department of Defense's Law of War Manual rejects the existence of an 'intermediate legal category', asserting that a dual-use object can be either a military objective or not.[349] The position put forward by this manual is that 'if an object is a military objective, it is not a civilian object and may be made the object of attack'.[350] This means that even if only one apartment of the building is used for military purposes, the whole building is presumed to be a military objective, losing its civilian protection.[351] Therefore, the damage to the rest of the apartments of the building, which are of purely civilian use, will not be taken into account in the

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[347] Boogaard (n 5) 1. While the tendency for quantitative analysis is strong is not unopposed neither from the ICRC legal project: 'the determination of excessiveness is not amenable to a precise or mathematical tabulation', *Prosecutor v Strugar* (Brief Pursuant to Rule 65) IT-01-42 (ICTY Pre-Trial, 27 August 2003) para. 152, nor from the Military legal project, see USA, *Department of Defense Law of War Manual* (n 4) para. 5.12.4. and Program On Humanitarian Policy And Conflict Research At Harvard University, *HPCR Manual on International Law Applicable to Air and Missile Warfare* (CUP 2013) 98.

[348] See Escorihuela (n 79) 299.

[349] USA, *Department of Defense Law of War Manual* (n 4) 217.

[350] Ibid.

[351] Michael Schmitt, 'Targeting Dual-Use Structures: An Alternative Interpretation' (Articles of War, 28 June 2021) https://lieber.westpoint.edu/targeting-dual-use-structures-alternative/ accessed 20 April 2025.

proportionality assessment. In this sense, the rest of the apartments of this building, which in a wholesale fashion is considered a military objective, do not even fall within the legal category of collateral damage. The manual only goes as far as to accept that the military commander should 'consider in applying the principle of proportionality the harm to the civilian population that is expected to result from the attack on such a military objective'.[352] This interpretation of the principle of proportionality is elaborated further in the 2019 Army Commander's Handbook on the Law of Land Warfare which states that:

> The principle of proportionality does not impose an obligation to reduce the risk of harm to military objectives. For example, an attack against an enemy combatant might also injure other enemy combatants who were not the specific targets of the attack. There is no obligation under the principle of proportionality to reduce the likelihood of harm to other enemy combatants or other military objectives, even if such harm was an unintended result of the attack.[353]

The same position is propelled by the 2020 Danish Ministry of Defense Military Manual on the International Law Relevant to Danish Armed Forces in International Operations which claims that:

> As far as dual-use objects are concerned, the entire object constitutes a military objective. Under international law, this means that damage to the dual-use object in itself is not regarded as collateral either in whole or in part if the object is effectively indivisible. As a general rule, the non-military 'share' of the object should not be taken into consideration in the proportionality assessment.[354]

This less protective interpretation of the principle of proportionality in the targeting process of dual-use objects is also supported by the IDF.[355]

In contradistinction with the interpretation favoured by the Military legal project, the head of Director of International Law and Policy at the ICRC, expressing the ICRC legal project, argues that 'an object has to be strictly defined: for example, a school comprising of

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[352] USA, *Department of Defense Law of War Manual* (n 4) 217.
[353] USA Department of the Army, *Commander's Handbook on the Law of Land Warfare* (Army Publishing Directorate 2019). Similarly see 5.10.1.1 023 USA, *Department of Defense Law of War Manual* (n 4) 249.
[354] Danish Manistry of Defence, *Military Manual on the International Law Relevant to Danish Armed Forces in International Operations* (Defence Command 2020) 310.
[355] John Merriam and Michael Schmitt, 'Israeli Targeting: A Legal Appraisal' (2015) 68 (4) Naval War College Review 15-33.

several buildings is not one object for the purpose of the definition of military objective. Each object needs to be looked at individually'.[356] For example, in the case of a school complex, only the particular building used for military purposes would be considered as a military objective and the rest of the school buildings would be still be civilian objects protected under the principle of distinction and taken into account as collateral damage in the proportionality assessment following the definition of civilian objects of Article 52(1) of AP I which reflects customary international law: 'civilian objects are all objects which are not military objectives as defined in paragraph 2'.[357] However, the ICRC concedes that when it is not a complex of buildings but a single multi-storey building, even if only one of its apartment is used for military purposes, 'the prevailing understanding of the notion of military objective is that once an object is used in such a way as to fulfil the definition of military objective, the entire object becomes a lawful target'.[358] To mitigate this less protective approach, the ICRC claims that still 'only the part of the building used for military purposes should be targeted, to the extent feasible' in order to fulfil the requirements of the principle of precautions.[359]

Opposed to both the ICRC and the military manuals' interpretation, Schmitt suggests that 'the aspect of the structure the enemy is using qualifies as a military objective, but its separate and distinct components that are not being used for military purposes retain their civilian character'.[360] In this regard, Schmitt's interpretation of Article 52 of AP I on the definition of military objectives can be identified as emanating from within the ICRC legal project as he argues for a partly more protective approach.[361] Nevertheless, this does not reflect the full picture of his approach as he also introduces the element of military 'feasibility assessment' in determining whether the building as a whole is a military objective, depending on the targeting capabilities and the particular circumstances in each case. Schmitt claims that his ad hoc 'feasibility assessment' approach 'reflects the general principle of military necessity that informs many IHL rules—that military operations should not be more destructive than they need to be to fight effectively'.[362] Finally, Schmitt precludes the applicability of the principle of precautions in case the whole building is

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[356] Helen Durham, 'Keynote address' in Edoardo Greppi (ed), *Conduct of Hostilities: The Practice, the Law and the Future, International Institute of Humanitarian Law* (FrancoAngeli 2015) 30.
[357] Article 52(1) AP I (n 301).
[358] Durham (n 356) 30.
[359] Ibid.
[360] Schmitt, 'Targeting Dual-Use Structures: An Alternative Interpretation' (n 351).
[361] Ibid.
[362] Ibid.

considered a military objective.[363] For Schmitt, this approach 'accords with operational reality'.[364]

The trope of 'operational reality' or operationality of IHL, although it is more popular within the Military legal project, does not place Schmitt's interpretation neatly within either of the two projects. It can be that, as with every classification, there are borderline cases and surely one of the main actors of the Military legal project arguing for a potentially more protective interpretation of what is a military objective than the main actor of the ICRC legal project could be seen as such a case. Notwithstanding this, the fact that this operational approach of Schmitt does not fit perfectly within any of the two legal projects is perhaps not merely a contingent symptom of classifying complex discourse in two broad legal projects. It could also be a foreshadowing of the collapse of the discourse produced by the two legal projects into each other. With the operational approach, Schmitt seems to argue simultaneously for a more protective and more permissive interpretation of the principle of proportionality, in effect deferring the judgement of what the principle is supposed to dictate to a later point. Whether the multi-storey building is a military objective as a whole or not will be determined on a case-by-case basis, depending on the circumstances and the military capabilities of the attacking army. Until then, his interpretation could be both more protective and less protective, as in its argumentative pattern, the discourse of the ICRC legal project and the Military legal project collapse into each other. In light of the above, Schmitt's argument not only interrogates the classification of the two legal projects but also consists a stronger discursive evidence of their eventual convergence. Further elaboration on the collapse of the two legal projects and the pervasive nature of 'ad-hocism' in international humanitarian legal argument is undertaken in Chapter 5.

3.3.3 The Concept of 'Human Shields'

The application of the principle of proportionality, together with the principle of precautions, in cases of what is termed as 'human shields', is another point of contention between the ICRC legal project and the Military legal project. The two legal projects have a common starting point that the use of human shields is prohibited under customary IHL and AP I.[365] Article 51 of AP I is titled 'Protection of the Civilian Population' and in paragraph 7 stipulates that 'the presence or movements of the civilian population or

[363] Ibid.
[364] Ibid.
[365] See Rule 97 in ICRC, *Customary International Humanitarian Law* (n 341) and Article 57 of AP I (n 301).

individual civilians shall not be used to render certain points or areas immune from military operations'.[366] The very next paragraph of Article 51 provides that a violation of the prohibition to use human shields 'shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57'.[367] It is on the latter point—specifically, whether civilians voluntarily acting as human shields lose their civilian status for the purposes of the proportionality calculations or precautions-in-attack analysis—that the two legal projects diverge.

An article on human shields by Stephanie Bouchie de Belle, then a diplomatic officer with the ICRC, which won the 2008 Henry Dunant Prize, provides discursive evidence for the ICRC legal project on this point. The winner of the Henry Dunant Prize, currently, receives 5000 Swiss Francs and the opportunity to publish their paper in the International Review of the Red Cross, the journal of the ICRC. Thus, this article is not only discourse produced by the ICRC legal project but also a typical example of how the ICRC legal project is institutionally reproducing itself. At the same time, it is also useful to read this article in conjunction with a stricto sensu discursive product of the ICRC legal project: ICRC's 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law'.[368]

The article dispenses swiftly with the question of a civilian involuntarily used as a human shield who can 'hardly be considered a combatant'.[369] Then it moves on to discuss the question of civilians who become human shields voluntarily. Firstly, it argues that voluntary human shields are still civilians as they do not meet the criteria of Article 4 of the Third Geneva Convention or Article 43 of AP I, since they are not members of the armed forces of a party to the conflict or a group which is under a command responsible to one of them.[370] Secondly, it examines whether the civilian volunteering as a human shield can be considered as a person taking direct part in hostilities and thus lose their protection for as long as they are willingly acting as a human shield.[371] ICRC's interpretative guidance on this issue puts forward that 'where civilians voluntarily and deliberately position themselves to create a physical obstacle to military operations of a party to the

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[366] Article 51(7) AP I (n 301).
[367] Article 51(8) AP I (n 301).
[368] Melzer, *Interpretative Guidance* (n 31).
[369] Stéphanie Bouchie de Belle, 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' (2008) 872 IRRC 892.
[370] Ibid 892-893.
[371] Ibid 893.

conflict, they could directly cause the threshold of harm required for a qualification as direct participation in hostilities'.[372] However, in attacks involving artillery or air attacks, where the presence of voluntary human shields does not impede the attacker from identifying and destroying the military objective, the civilians willingly acting as human shields are not considered to be directly participating in hostilities and thus they do not lose their protection.[373] What changes is not that they cannot be killed but 'the parameters of the proportionality assessment to the detriment of the attacker, thus increasing the probability that the expected incidental harm would have to be regarded as excessive in relation to the anticipated military advantage'.[374] In this sense, they only 'pose a *legal* – rather than a *physical* – obstacle to military operations'.[375]

Upon continuing the reading of the article, it argues that civilians acting as human shields voluntarily are assuming an 'inherent risk' similar to that of civilian workers in armed factories who are regarded to be indirectly participating in hostilities.[376] Unsurprisingly, the conclusion of the article is in the same direction with the ICRC interpretative guidance: it argues in favour of a case by case determination of whether a voluntary human shield is to be deemed as direct participation in hostilities or not, with one of the decisive factors being whether the civilians poses a physical obstacle or a legal obstacle in the process of targeting the shielded military objective.[377] In those cases where a civilian willingly acting as a human shield is considered to directly participating in hostilities they become military objectives, while their behaviour falls short of directly participating in hostilities they continue to enjoy the civilian protection and they can be lawfully killed only incidentally, if after a proportionality assessment, the military advantage gained from that particular attack prevails.[378]

Dinstein, one of the main academic voices of the Military legal project, disagrees with the above position of the ICRC legal project in two respects; firstly that civilians acting voluntarily as human shields lose their civilian protection and secondly that although involuntary human shields do not lose their civilian protection, in the proportionality assessment their life weighs less than that of civilians in other situations.[379] Let's first read

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[372] Melzer, *Interpretative Guidance* (n 31) 56. According to note 138 of the Interpretative Guidance the above view 'was generally shared during the expert meeting'.
[373] Ibid 57.
[374] Ibid.
[375] Ibid (emphasis in the original).
[376] Bouchie de Bell (n 369) 896-897.
[377] Ibid 896.
[378] Ibid 899.
[379] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (CUP 2016).

what he is saying on the former: 'it is impossible to hold the attacking force liable for the fact that civilians have deliberately decided to put their lives at risk'.[380] According to Dinstein, civilians voluntarily acting as human shields should be excluded from the estimation of incidental injury in the proportionality assessment, because they lose their protection as civilians directly participating in hostilities.[381] Then he attacks the position of the ICRC as expressed in the Interpretative Guidance, which distinguishes between urban fighting and air attacks, claiming that the distinction is artificial.[382] Furthermore, Dinstein adds that when captured, voluntary human shields should not enjoy the rights of civilians but should be treated as 'unlawful combatants'.[383] He acknowledges that voluntary human shields are the exception rather than the rule but underscores that in 'the "fog of war", it is not always easy to verify – especially from a high altitude in the air – whether civilian "human shields" are voluntary or involuntary'.[384] Dinstein concedes that in case of a lack of information, the presumption should be that the civilians are used involuntarily as human shields.[385]

Turning to his position on the protection of involuntary human shields, Dinstein, after describing the relevant Article 51(8) AP I as a 'curious provision' which punishes the party to the conflict that complies with the law for the adverse party's violation, reads Article 51(8) of AP I as to 'signify' that 'the principle of proportionality remains applicable'.[386] However, how exactly this principle will be applied should take into account the 'exceptional circumstances of "human shields"'.[387] He argues that 'the test of what amounts to "excessive" injury to civilians must be relaxed' to take into account that by virtue of the existence of human shields 'the number of civilian casualties can be foreseen to be higher than usual'.[388] Finally, Dinstein concludes his argument by a claim that customary international law, which is 'more rigorous' on this matter, has been 'traditionally' understood to ultimately attribute the responsibility for the death of involuntary human shields to the Belligerent Party which placed them at risk in the first place.[389]

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[380] Ibid 183.
[381] Ibid 184.
[382] Ibid.
[383] Ibid.
[384] Ibid.
[385] Ibid.
[386] Ibid 185.
[387] Ibid.
[388] Ibid. Dinstein also invokes the UK Manual on the Law of Armed Conflict (n 4) to support this view.
[389] Ibid 186.

3.3.4 Reasonableness in Proportionality Assessment

The element of reasonableness is at the core of the application of the principle of proportionality. It has been argued that reasonableness is the common law equivalent to the civil law concept of proportionality.[390] This element is relevant both to measure the level of care taken to protect civilians before the attack and to measure whether the decision of the attacking military commander was lawful or not. The ICTY has elaborated on the former in Kupreškić case: 'reasonable care must be taken in attacking military objectives so that civilians are not needlessly injured through carelessness'.[391] Speaking from within the ICRC legal discourse the Trial Chamber in Kupreškić notes that the principle of proportionality leaves a 'wide margin of discretion to belligerents by using language that might be regarded as leaving the last word to the attacking party'.[392] That is why it suggests that the 'elementary considerations of humanity' as elaborated by the ICJ and the Martens clause should 'be fully used when interpreting and applying loose international rules'.[393] According to the Trial Chamber the 'principles of humanity' and the 'dictates of public conscience' should be taken into account 'any time a rule of international humanitarian law is not sufficiently rigorous or precise', in order to allow the military commander applying the principle of proportionality 'as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians'.[394]

This legal duty of reasonable care in attacking is interpreted narrowly by legal texts under the Military legal project. These kinds of texts will typically start the discussion by emphasising that although IHL should protect civilians, it 'must not make wars too difficult to wage'.[395] This is why the principle of proportionality permits 'killing civilians, if this is foreseen, necessary and non-excessive' while prohibiting 'intentional, avoidable, and disproportionate harming'.[396] In this instance, Dill's article waters down the duty of care of the attacker by introducing it itself in a proportionality assessment, between the competing intuitions of the attacker and the civilian arguing that the IHL doctrine needs to

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[390] Laurent Gisel (ed), Report on the Principle of Proportionality in the Rules Governing the Conduct of Hostilities Under International Humanitarian Law (ICRC 2016) 57.
[391] *Prosecutor v Kupreškić* (Judgement) IT-95-16-T (ICTY Trial Chamber, 14 January 2000).
para 524.
[392] Ibid.
[393] Ibid paras 524-525
[394] Ibid para 525. The looseness of the principle of proportionality is a recurring theme and constant source of anxiety in international humanitarian legal discourse, see for instance Robert Sloane, 'Puzzles of Proportion and the "Reasonable Military Commander": Reflections on the Law, Ethics, and Geopolitics of Proportionality' (2015) 6 Harvard National Security Journal 299.
[395] Janina Dill, 'Do Attackers Have a Legal Duty of Care? Limits to the "Individualization of War"' (2019) 11 (1) International Theory 1, 5.
[396] Ibid.

balance what appears reasonable 'from of the point of view of the individual attacker' on the one hand and 'the point of view of the individual civilian' on the other hand.[397]

Turning now to the standard of reasonableness when applying the principle of proportionality, the Final Report to the Prosecutor Reviewing the NATO Bombing Campaign in the FRY established the standard of the reasonable military commander, which is the one favoured by the Military legal project.[398] This standard seemed to be adopted by the ICRC as well: 'interpretation must above all be a question of common sense and good faith for [p.684] military commander'.[399] Another standard used is also that of 'honest judgement of a responsible commander'.[400] Certain military manuals avoid providing a personified standard centred around the military commander and formulate it as a standard of reasonableness. For example, the Commander's Handbook on the Law of Naval Operations of the USA refers to the need for 'an honest and reasonable' estimation of the situation,[401] the Military Manual of Canada, speaks of a required 'rational balance,[402] and the Military Naval Academy of Ecuador introduces the requirement for 'an objective and reasonable estimate of the available information'.[403] The reasonable military commander standard and its variations have been challenged on the grounds that the standard should be expressed 'in more civilian terms', a position which could be classified under the ICRC legal project.[404]

This discourse in the form of definitions of the standard of reasonableness cannot immediately be classified under one of the two legal projects. What is crucial in the classification are the ramifications embedded in each definition in a given legal text. Bothe, operating from within the ICRC legal project criticised the standard of 'reasonable military

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[397] Ibid 6. Note that Dill's discussion is explicitly of both descriptive and normative nature, as she employs the concept of the 'individualization of war' to formulate a normative argument.
[398] International Criminal Tribunal for the former Yugoslavia (ICTY), *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (2006) para 50.
[399] Sandoz, Swinarski, and Zimmerman (eds), *Commentary on AP I* (n 319) para 2208. See also, Paolo Benvenuti, 'The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia' (2001) 12 European Journal of International Law 517.
[400] Frits Kalshoven, 'Bombardment: From "Brussels 1874" to 'Sarajevo 2003"', in José Doria, Hans-Peter Gasser, Cherif Bassiouni (eds), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (Martinus Nijhoff Publishers 2009) 127.
[401] USA, *The Commander's Handbook on the Law of Naval Operations* (Department of Navy 2022) para. 8.3.1. Canada, *Joint Doctrine Manual: Law of Armed Conflict at the Operational and Tactical Levels* (Office of the Judge Advocate General 2001) 44.
[402] Ibid 23.
[403] Ecuador, *Aspectos Importantes del Derecho Internacional Marítimo que Deben Tener Presente los Comandantes de los Buques* (Academia de Guerra Naval 1989) para 8.1.2.1.
[404] Michael Bothe, 'The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on the Report to the Prosecutor of the ICTY' (2001) 12 European Journal of International Law 535.

commander' by arguing that 'the value system on the basis of which the military is operating has to conform to that of the civil society, not vice versa'.[405] In this way, he underscores the different normative commitments of the value system of the military compared to that of the general society and insinuates that a 'reasonable person' standard would be more appropriate.[406] This issue is particularly relevant in the framework of international criminal justice and Bothe argues that the latter standard could mitigate the democratic gap between the military and civil society.[407] Bothe concludes his argument by adding that the applicable standard can vary depending on the nature of a conflict. For instance, in a 'humanitarian intervention' to protect human rights in a foreign country 'more severe restraints would be imposed on the choice of military targets and on the balancing test applied for the purposes of the proportionality principle than in a "normal" armed conflict'.[408] Here, the connection of the law on the use of force with IHL does not fall under the Anti-War tradition, since Bothe, while arguing for a higher level of protection of civilians, affirms the possibility of shaping the law of use of force in a way that can accommodate 'humanitarian interventions'. This oxymoron is, in fact, a common theme in discourse produced by the ICRC legal project.

3.3.5 Aggravated Civilian Casualties and Aggravated Military Advantage

The ICTY has often applied the principle of proportionality in a rather permissive fashion. For instance, the formulation of the Trial Chamber in Blaskić that 'targeting civilians or civilian property is an offence *when not justified by military necessity*',[409] falls short of making clear that 'only' incidentally the death of civilians can be justified under the principle of proportionality, as it is the position evidenced in the discourse produced by the ICRC legal project. Another similar instance where the ICTY produced discourse of the Military legal project was in Kordić when the Trial Chamber ruled that:

> Prohibited attacks are those launched deliberately against civilians or civilian objects in the course of an armed conflict and are not justified by military necessity. They must have caused deaths and/or serious bodily injuries within the civilian population or extensive damage to civilian objects.[410]

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[405] Ibid.
[406] The Trial Chamber in Galić referred to the standard of 'a reasonably well-informed person' *Prosecutor v Galić* (n 345) para 57.
[407] Ibid.
[408] Ibid.
[409] *Prosecutor v Blaskić* (Judgement) IT-95-14-T (ICTY Trial Chamber, 3 March 2000) para 180 (emphasis added).
[410] *Prosecutor v Kordić* (Judgement) IT-95-14/2-T (ICTY Trial Chamber, 26 February 2001) para 328.

The latest formulation also puts forward the position that the principle of proportionality does not prohibit attacks that cause 'non-serious' bodily injuries, at least in the context of international criminal justice. This interpretation was contested by another Trial Chamber of the ICTY in Galić:

> The Trial Chamber does not however subscribe to the view that the prohibited conduct set out in the first part of Article 51(2) of Additional Protocol I is adequately described as 'targeting civilians when not justified by military necessity'. This provision states in clear language that civilians and the civilian population as such should not be the object of attack. It does not mention any exceptions. In particular, it does not contemplate derogating from this rule by invoking military necessity.[411]

In contradistinction to the two aforementioned Trial Chamber judgements, this passage is discursive evidence of the ICRC legal project. In fact, the judgement in Galić is ripe with such discursive evidence, for example: 'the Trial Chamber considers that certain apparently disproportionate attacks may give rise to the inference that civilians were actually the object of attack'.[412] Given the centrality of this principle in IHL, it is unsurprising that its exact meaning and ramifications, in every concrete instance, are one of the biggest battlegrounds for the two antagonistic legal projects of the Regulated War tradition.

Both legal projects of the Regulated War tradition accept that in a proportionality assessment the harm to civilians assessed should be limited to the harm caused by the examined particular military attack.[413] In other words, this interpretation puts forward that the principle of proportionality does not entail an obligation to include in the proportionality assessment the aggravated civilian casualties of previous attacks in the spatio-temporal framework of the same conflict.[414] According to the Ministry of Foreign Affairs of the State of Israel 'one attack causing 500 casualties should logically, and legally, be seen differently than 500 attacks against military objectives resulting overall in

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[411] *Prosecutor v Galić* (n 345) para 44.
[412] Ibid para 60.
[413] For the ICRC legal project see Diakonia, 'The Principle of Proportionality' (Diakonia International Humanitarian Law Centre) https://www.diakonia.se/ihl/resources/international-humanitarian-law/ihl-principle-proportionality/ accessed 22 April 2025 and for the Military legal project see Israel's Ministry of Foreign Affairs, 'Hamas-Israel Conflict 2023: Key Legal Aspects' (2 November 2023) https://www.gov.il/en/pages/hamas-israel-conflict2023-key-legal-aspects accessed 22 April 2025.
[414] Note that this is different from the issue of 'reverberating effects' of an attack, which is the negative impact to civilians that will be manifested in the long term, see Ian Henderson and Kate Reece, 'Proportionality under International Humanitarian Law: The "Reasonable Military Commander" Standard and Reverberating Effects' (2021) 51 Vanderbilt Law Review 835, 846-854.

the same number of casualties'.[415] Mutatis mutandis, the killing of 10 million civilians can be deemed lawful under this interpretation of the principle, if the death of a civilian is deemed to be non-excessive to the concrete and direct military advantage in each of the 10 million different attacks. It would be cumbersome, even for discourse in the vein of the Military legal project, to argue for a concrete and direct military advantage that would 'justify' the killing of 10 million civilians in a single strike.[416] Having this in mind, with a dose of exaggeration, the claim of the State of Israel that it respects IHL, via the articulation of a hard version of the Military legal project discourse, and the claim of South Africa that the State of Israel is violating the Genocide Convention may not be mutually exclusive.[417]

One of the few discursive pieces of evidence of the ICRC legal project opposing this interpretation of the principle of proportionality comes from the Trial Chamber judgement of the ICTY in Kupreškić:

> As an example of the way in which the Martens clause may be utilised, regard might be had to considerations such as the cumulative effect of attacks on military objectives causing incidental damage to civilians. In other words, it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul per se of the loose prescriptions of Articles 57 and 58 (or of the corresponding customary rules). However, in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the *cumulative* effect of such acts entails that they may not be in keeping with international law. Indeed, this *pattern* of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity.[418]

In this way, the Trial Chamber in Kupreškić put forward a more protective interpretation by embedding into the process of proportionality assessment a 'cumulative effect' of such acts to track down a 'pattern of military conduct'. The strong and explicit language referencing directly the Martens clause leaves no doubt that this is a piece of international

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[415] Israel's Ministry of Foreign Affairs, 'Hamas-Israel Conflict 2023: Frequently Asked Questions' (8 December 2023) https://www.gov.il/en/Departments/General/swords-of-iron-faq-6-dec-2023#8 accessed 22 April 2025.
[416] Cf. *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996, ICJ Rep 1996
[417] *South Africa v Israel* (Application Instituting Proceedings) ICJ 29 December 2023.
[418] *Prosecutor v Kupreškić* (n 391) para 526 (emphasis added).

humanitarian legal discourse falling on the most protective side of the ICRC legal project. The legal text responding directly to Kupreškić, on behalf of the Military legal project, came from within the ICTY. The Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia rejected vehemently the Trial Chamber dictum in Kupreškić: 'where individual (and legitimate) attacks on military objectives are concerned, the mere cumulation of such instances, all of which are deemed to have been lawful, cannot ipso facto be said to amount to a crime'.[419]

Where the two legal projects diverge even more clearly is on whether the principle of proportionality should accommodate an aggravated military advantage. In other words, the disagreement is on whether the military advantage taken into account during a proportionality assessment can escape the confines of a particular attack and include the military advantage of a series of attacks grouped together under a military operation, or even the war as a whole. Typical discourse produced by the ICRC legal project on this matter can be found in the final trial brief of the Prosecution in the Galić case mentioned above, where the Prosecution asked the Tribunal to analyse the 'concrete and direct military advantage' concerning each sniping and shelling incident alone.[420]

On the contrary, recently, the Ministry of Foreign Affairs of the State of Israel, as one of the usual hard-line producers of international humanitarian legal discourse from within the Military legal project, has updated its position on the principle of proportionality as follows:

> According to this rule, it is prohibited to carry out an attack when the expected incidental loss of civilian life, injury to civilians, or damage to civilian objects will be excessive in relation to the concrete and direct military advantage anticipated from the attack. Under customary international law, military advantage may include a variety of operational considerations such as disrupting enemy activities, weakening the enemy's military forces, gaining ground, and protecting the security of one's own forces and civilians. *Military advantage moreover may refer to the advantage anticipated from an operation as a whole.*[421]

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[419] ICTY, *Final Report to the Prosecutor* (n 398) para 52.
[420] *Prosecutor v Galić* (n 345) Prosecution Final Trial Brief para 24.
[421] Israel's Ministry of Foreign Affairs, 'Hamas-Israel Conflict 2023: Key Legal Aspects' (n 413) (emphasis added).

With this permissive interpretation of the principle of proportionality, the principle is extended to cover attacks that will cause incidental loss of civilian life that exceeds the concrete and direct military advantage of the particular attack but may not exceed the overall military advantage of the operation, as argued by the military commander of the attacker. Taking into account the plasticity of the term 'operation', this permissive interpretation can go as far as to argue that the operation overlaps with the war itself. If this potential stretch of the interpretation was to be pursued, that discourse would have gone beyond even the Military legal project and the humanitarian vision itself, entering the realm of the total war vision.[422]

3.4 Principle of Humanity and Principle of Military Necessity

If the principles of distinction and proportionality are the protagonists at the IHL main stage, the principles of humanity and military necessity are the supporting actors which guide their application. While the historiography of the ICRC legal project often traces the principle of humanity back to the Martens clause,[423] it is usually employed only in a declarative fashion and is rarely present in legal analysis in practice. This reality is also implicitly acknowledged by the ICRC legal project itself:

> *Complementing and implicit in the principle of military necessity* is the principle of humanity, which 'forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes'.[424]

In this passage of the Interpretative Guidance, the principle of humanity is constructed as a secondary principle, flowing from the primary principle of necessity. In any case, both the ICRC and the Military legal projects acknowledge the importance of balancing between humanity and military necessity.[425]

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[422] See also Leonard Rubenstein, 'Israel's Rewriting of the Law of War' (Just Security, 21 December 2023) https://www.justsecurity.org/90789/israels-rewriting-of-the-law-of-war/ accessed 22 April 2025.

[423] Crawford and Pert (n 3) 49-50. Note, however, that Pictet considered the principle of humanity as the primary principle of the ICRC 'from which all other principles are derived', Jean Pictet, 'The Fundamental Principles of the Red Cross: Commentary' (1979) 210 International Review of the Red Cross 135. In treaty law it can be traced in common Article 3 of the Geneva Conventions and Article 27 of GC IV.

[424] Melzer, *Interpretative Guidance* (n 31) 79 (emphasis added). The fact that this is the only reference to the principle of humanity in the entire text reinforces the conclusion about the diminishing relevance of the principle in international humanitarian legal discourse in international humanitarian legal discourse.

[425] For the ICRC legal project see Melzer, *International Humanitarian Law: A Comprehensive -Introduction* (n 3) 17-18. For the Military legal project see USA, *Department of Defense Law of War Manual* sections 2.2 and 2.3, but see also a diverging minority view in Solis (n 344) 236-238.

The two legal projects, however, diverge on how these principles should be understood and applied in practice. The recent updated ICRC Commentary to Geneva Convention III, which is a par excellence discursive product of the ICRC legal project, argues that common Article 1 of the Geneva Conventions 'attests to the special character of the Conventions, a great many of whose rules give expression to "elementary considerations of humanity"'.[426] In this instance, the Commentary quotes a phrase from the judgement of the ICJ in the Paramilitary Activities in Nicaragua case.[427] At the same time, it concedes that not all rules of the Geneva Conventions are aligned with these 'elementary considerations of humanity'.[428] According to the Commentary, in every armed conflict IHL is called upon to set standards which are 'carefully balancing considerations of military necessity and humanity'.[429] This is why the ICRC study on customary IHL claims that the principle of proportionality flows from the principle of humanity.[430] Regarding the obligation for humane treatment for persons protected under common Article 3 of the Geneva Conventions, the Commentary provides a textual argument:

> In accordance with the ordinary meaning of the word 'humane', what is called for is treatment that is 'compassionate or benevolent'[306] towards the persons protected under common Article 3. This is more directly reflected in the French version of the text in which the obligation is formulated as requiring that persons protected under common Article 3 'are treated with humanity' ('traitées avec humanité').[431]

This interpretation, the Commentary argues, is reflected in state practice which requires states to respect 'a person's inherent dignity as a human being'.[432]

Melzer, in the official introductory handbook to IHL of the ICRC, cites ICJ's Nuclear Weapons Advisory Opinion, which classified the principle of humanity among the 'cardinal principles' of IHL, in order to argue that even if existing treaty rules of IHL do not prohibit certain conduct, the principle of humanity as a general principle of

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[426] International Committee of the Red Cross, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War* (CUP 2021) para 151.
[427] *Corfu Channel Case (United Kingdom v Albania)* (Merits)1949, ICJ Rep 1949 22 and *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America)* (Merits) 1986, Rep 1986 para 218. The principle has also been discussed repeatedly before the ICTY in *Prosecutor v Kupreškić* (n 391), *Prosecutor v Martić* (Judgement) IT-95-11-T (ICTY Trial Chamber, 12 June 2007), and *Prosecutor v c* (Judgement) IT-95-17/1-T (ICTY Trial Chamber, 10 December 1998).
[428] ICRC, *Commentary on Geneva Convention III* (n 426) para 151.
[429] Ibid para 424.
[430] Rule 14, ICRC, *Customary International Humanitarian Law* (n 341).
[431] ICRC, *Commentary on Geneva Convention III* (n 426) para 590.
[432] Ibid para 591.

international law can still provide additional safeguards.[433] This interpretation of the principle of humanity is also reinforced by the text of Article 1(2) of AP I and was adopted by the Commentary to AP I.[434] Finally, Crawford not only supports that the principle of humanity should be understood as a 'limiting factor' for the 'laws of armed conflict' but a fortiori that is 'an explicit rejection of the nineteenth-century doctrine of Kriegsraison'.[435] Kriegsraison, which is the pre-humanitarian model of total war, is in this sense 'the unlimited application of military necessity' which the principle of humanity 'seeks to place a limit on'.[436]

The Military legal project rejects that the principle of humanity has any legal effect. Solis also questions whether it is one of the core principles of IHL.[437] He quotes Dinstein at length to reinforce his interpretation of the principle of humanity as a mere 'aspect' of IHL:

> The principles of humanity should be viewed not as legal norms but as extra-legal considerations … The difference between principles and considerations (or requirements) transcends semantics and goes into substance. Humanity is not an obligation (or a set of obligations) incorporated *per se* in positive IHL. There is no overarching, binding, norm of humanity that tells us what we must do (or not do) in wartime. What we actually encounter are humanitarian considerations, which pave the road to the creation of legal norms… These considarations do not by themselves amount to law … Considerations of humanity are inspiring and instrumental, yet they are no more than considerations.[438]

In the same vein, Solis seconds the view that the principle of humanity merely consists of extra-legal considerations by arguing that there is no case which was decided with the principle of humanity as the determinative legal principle.[439] He also claims that there is no definition of the principle and a lack of identifiable prohibitions or requirements in its application.[440] He concludes his argument by claiming that although it is not a legal

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[433] Melzer, *International Humanitarian Law: A Comprehensive Introduction* (n 3) 123. Note however, that the text uses the formulation in the plural found in the Martens clause: principles of humanity instead of principle of humanity.
[434] Sandoz, Swinarski, and Zimmerman (eds), *Commentary on AP I* (n 319) para 195.
[435] Crawford and Pert (n 3) 50.
[436] Ibid 50-51.
[437] Solis (n 344) 238.
[438] Ibid 238 quoting Yoram Dinstein, 'The Principle of Proportionality' in Kjetil Mujezinović Larsen, Camilla Guldahl Cooper and Gro Nystuen (eds), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (CUP 2012) 73 (emphasis in the original).
[439] Solis (n 344) 238.
[440] Ibid.

principle, military commanders may still act in conformity with the concept ex gratia.[441] In the end, he offers a piece of discourse exemplary of the Military legal project:

> If one wishes to consider humanity a core principle that is not a bad thing. Every battlefield can use all the humanity it can get. But keep in mind that we study the *law* of armed conflict, not the *philosophy* of armed conflict.[442]

The principle of military necessity negates the doctrine of necessity (Kriegraison) which was born in the interregnum between the total war vision and the humanitarian vision, while still bearing its mark.[443] The ICRC Commentary of AP I places in direct dialogue the principle of necessity and the maxim of Kriegraison, which propounds that the 'necessities of war take precedence over the rules of war':

> These maxims imply that the commander on the battlefield can decide in every case whether the rules will be respected or ignored, depending on the demands of the military situation at the time. It is quite obvious that if combatants were to have the authority to violate the laws of armed conflict every time they consider this violation to be necessary for the success of an operation, the law would cease to exist. [444]

According to the Commentary, which is articulating discourse from within the ICRC legal project, in contradistinction to the doctrine of necessity, the principle of military necessity 'means the necessity for measures which are essential to attain the goals of war, and which are lawful in accordance with the laws and customs of war'.[445] IHL, as the product of a 'compromise based on a balance between military necessity […] and the requirements of humanity', questions directly the 'unlimited right' of military commanders, which existed under the Total War Vision.[446] Both the ICRC Commentary of AP I and the most recent updated version of the Commentary to Geneva Convention III underscore that the military necessity 'may not justify violations of the Conventions as military necessity has already been taken into account in the formulation of their provisions'.[447]

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[441] Ibid.
[442] Ibid (emphasis in the original).
[443]The concept of Kriegsraison emerged in German literature at the end of the 18th century and remained a recurring theme among a minority of military officers, persisting until the end of World War II, see William Downey, 'The Law of War and Military Necessity' (1953) 47 (2) American Journal of International Law 251, 253. Legal references to military necessity appear in this context for the first time in Lieber Code.
[444] Sandoz, Swinarski, and Zimmerman (eds), *Commentary on AP I* (n 319) para 1386.
[445] Ibid para 1389.
[446] Ibid para 1388-1389.
[447] ICRC, *Commentary on Geneva Convention III* (n 426) para 223. See also Sandoz, Swinarski, and Zimmerman (eds), *Commentary on AP I* (n 319) para 1389.

The Commentary to AP I takes great pains to address criticisms over the 'element of uncertainty' and 'risks [of] arbitrary behaviour' caused by expressions employed already in the Geneva Conventions such as 'if possible', 'as far as possible' and other form of exceptions based on military considerations introduced by the words 'urgent', 'absolute' or simply 'necessary'.[448] In this process, it refers to Max Huber who argued that:

> Provisions which take reality into account are at risk of becoming a source of reciprocal accusation for the belligerents or a pretext for questioning all laws of war; but this will not be the case if the Conventions combine a high moral tone with a sense of reality.[449]

After reading out loud Huber, the Commentary reminds itself that the agreement on the final text of international treaties is 'often only reached at the cost of the clarity and precision of the text', in order to confess that 'the lack of clarity frequently conceals more or less unadmitted "military necessities"'.[450] In any case, the Commentary concludes that the principle of necessity:

> In exceptional cases, and only in those where it has been explicitly provided for, justify a certain degree of freedom of judgment, though it can never justify a degree of violence which exceeds the level which is strictly necessary to ensure the success of a particular operation in a particular case.[451]

For the ICRC legal project, the principle of military necessity is a compromise and becomes directly relevant in 'exceptional cases'. Similar to the ICRC legal project, the Military legal project rejects Kriegsraison and that 'necessity cannot be used to justify actions prohibited by law'.[452] For the UK military manual on the law of war, a par excellence text produced from the Military legal project, 'armed conflict must be carried on within the limits of international law, including the restraints inherent in the concept of necessity'.[453] The principle of military necessity, however, is often overemphasised by discourse of the Military legal project to justify, inter alia, the killing of civilians:

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[448] Sandoz, Swinarski, and Zimmerman (eds), *Commentary on AP I* (n 319) para 1390.
[449] Ibid.
[450] Ibid para 1391-1392.
[451] Ibid para 1395.
[452] United Kingdom, *Joint Service Manual of the Law of Armed Conflict* (n 4) 23.
[453] Ibid 23.

> This principle of necessity is noteworthy because it signals that causing the harmful outcome an attack risks causing, that is killing civilians, is not itself a reason not to engage in an attack. Instead, the risk of harmful consequences must merely be minimized. If the harmful consequences are likely to occur anyway, they must be reduced as much as possible.[454]

Here, the formulation, especially of the last sentence ('likely to occur anyway'), gives away the different normative orientation of the text, compared to the discourse produced by the ICRC legal project. The more permissive articulation of the principle of necessity by the Military legal project is evident also in its transformation into a principle of military economy:

> Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money.[455]

In this passage, the UK military manual introduces into the considerations of necessity other elements, aside from civilian objects and persons endangerment, such as the time and money of the attacking party. The discourse between the two legal projects over the principle of necessity is exemplary of both their distinctive centres of emphasis and their shared presuppositions.

3.5 Protection of Civilians during a Military Invasion

After introducing the discourse produced by the two legal projects on the main principles of IHL, this chapter brings to the fore how the dialogue between the ICRC and the Military legal project encompasses every corner of the international humanitarian legal discourse. The examples in sections 3.7-3.9 also underscore that the social actors propounding each of the legal projects need not be the usual suspects who are always on one of the two sides of the fence. This section displays the internal dialogue of the Regulated War tradition regarding the protection of civilians during a military invasion.

The position put forward by the Military legal project is that following the ordinary meaning of the words in the Hague Regulations, the protections of Geneva Convention IV for civilians under occupation arise only when the invading army has acquired effective

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[454] Dill, 'Do Attackers Have a Legal Duty of Care?' (n 395) 9-10.
[455] United Kingdom, *Joint Service Manual of the Law of Armed Conflict* (n 4) 22.

control over the territory. On the contrary, the position proposed by the ICRC legal project, termed as the 'Pictet theory', is that the law of occupation protects civilians when the invading army puts them under its control. This position follows a teleological interpretation of Geneva Convention IV and holds that otherwise there will be a legal vacuum in the protection of civilians during the invasion phase. The discussion below captures the position of the two legal projects in a conversation in the 'debate' section of the Review of the ICRC in 2012 between Marten Zwanenburg, a military legal advisor at the Dutch Ministry of Defense and Marco Sassoli, a well-known IHL scholar and professor at the University of Geneva with close ties to the ICRC. [456] The format of this conversation as a direct debate and the professional backgrounds of the participants renders the distinction between the two legal projects of the Regulated War tradition starker.

Starting with the position classified as within the Military legal project, it argues that 'traditionally, occupation was clearly distinguished from invasion' and that Article 42 of the 1907 Hague Regulations reflects a requirement for 'a minimum level of stability', before the application of the law of occupation.[457] Although Article 2(2) of the Geneva Convention IV broadens the scope of application of the law of occupation to cases of occupation without resistance, it does not explicitly clarify when an invasion becomes an occupation for the purposes of IHL. After rejecting the position of the ICRC legal project, which claims that in light of Article 4 of Geneva Convention IV, the law of occupation applies when enemy forces exercise control over a protected person.[458] This position is termed 'Pictet theory' because Jean Pictet first put it forward in the 1958 commentary to Geneva Convention IV.[459] This position was adopted by International Criminal Tribunal for the former Yugoslavia (ICTY) in the Naletilić and Martinović case.[460] The rationale of this teleological interpretation of Geneva Convention IV is that this reading prevents a gap in the protection of individuals under IHL.

The counter-arguments of the Military legal project navigate through most of the usual modes of legal interpretation. Firstly, it employs the travaux preparatoires of the Geneva Conventions to claim that there is no evidence for the intention of the drafters to depart

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[456] Marten Zwanenburg, Michael Both, and Marco Sassoli, 'Is the Law of Occupation Applicable to the Invasion Phase?' (2012) 94 (885) IRRC 29.
[457] Ibid 32.
[458] Ibid.
[459] Jean Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary, (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of Wa*r (ICRC 1958) Article 6 (1).
[460] *Prosecutor v Naletilić and Martinović* (Judgement) IT-98-34-T (ICTY Trial Chamber 31 March 2001) paras 219–221.

from the traditional understanding of occupation and especially of when it starts.[461] Then it makes an argument about the nature of IHL: the hierarchy of protections, such as those afforded in IACs or NIACs or between the protection of persons in the hands of invading forces compared to the protection of persons in the hands of the occupying power is '*part and parcel of IHL*' and that 'the object and purpose of the Geneva Conventions are of a *humanitarian nature does not change this*'.[462] It does add that the object and purpose should be taken into account, but restrains the consequences of this teleological interpretation.[463] It is coming to light already that the two legal projects exhibit a different interpretative outlook.

Moving on, the effectiveness argument is also raised by the author; the principle of effectiveness cannot condone imposing upon the Occupying Power obligations which is materially impossible to meet, because it has yet to establish effective control over a certain territory, such as those of Article 56 of Geneva Convention IV.[464] Then it anticipates a response to this argument by suggesting that a selective application of certain obligations arising from the law of occupation would be 'undesirable from the perspective of legal certainty'.[465]A systematic interpretation is also hinted at when the author suggests that Pictet theory would lead to the protection of persons under Article 4, while there is Section III of Part III devoted to them already.[466] Plus, he adds, with such reading, the law of occupation will be protecting persons before it starts protecting goods.

The argument concludes with normative considerations, regarding the issue of respecting IHL. In particular, it follows the 'lesser evil approach' to argue that since there are already issues of respecting IHL under the traditional understanding of occupation, there would be even greater violations of the law of occupation if the Pictet theory were to be adopted. In this way, the argument, while accepting the protective intentions of those advocating for the Pictet theory, claims that the application of their position will have the contrary effects in practice.[467]

Contrary to the view of Zwanenburg, the position identified from within the ICRC legal project, unsurprisingly, defends the Pictet theory. Sassoli puts forward a systematic

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[461] Zwanenburg, Bothe, and Sassoli (n 456) 33.
[462] Ibid 33 (emphasis added).
[463] Ibid 34.
[464] Ibid 34-35.
[465] Ibid 35.
[466] Ibid 33.
[467] Ibid 36.

interpretation of Geneva Convention IV to avoid a gap in the protection of persons during the invasion phase.[468] In particular, he argues that Article 4 of the Geneva Convention IV includes another alternative to that of occupation for the application of the protective status, that is the 'case of a conflict'.[469] Sassoli response mirrors Zwaenburg's employment of the methods of legal interpretation; he also calls for a systemic interpretation and invokes the travaux preparatoires which, according to Sassoli, demonstrate the intention of the drafters of the Geneva Convention IV to have Section III, Part III covering both aliens in the territory of a party to the conflict and the local population in occupied territories.[470] Then, Sassoli accompanies this teleological interpretation by pointing out that 'if invaded territory were not considered as occupied' the inhabitants of the invaded territory would not enjoy any of the protections of Section III and such gap in the protection of civilians would run contrary to the 'main purpose and object of Convention IV [which] is to protect "protected civilians"'.[471] He also repeats Pictet's original example on the prohibition of deportation of civilians, which would be absurd to start only after the invasion has turned into an occupation.[472] Even more, the protective net of Section III, Sassoli argues, takes into consideration the particular situation of these civilians who are 'enemy nationals encountering a belligerent on their own territory, independently of their will'.[473]

The interpretation of Geneva Convention IV put forward by Sassoli and identified as within the ICRC legal project claims that the protective net of Section III should be applicable once the invading force establishes control over a person, instead of effective control over the territory itself. The argument continues with a 'functional understanding of the amount of the territory that must be occupied' which suggests that any 'piece of land of an invaded territory where the invading soldier is standing' is under the soldier's control and thus can be considered occupied. After outlining why Section III of Part III of Geneva Convention IV should apply during the invasion phase, Sassoli attempts to rebut some of the concerns of the Military legal project which, as elaborated below, reflect the overarching divergence but also convergence between these two legal projects. Their overarching convergence is acknowledged in unmistakable terms by Sassoli:

> Unrealistic interpretations of IHL rules must be avoided (and here I agree with Zwanenburg), not only according to the rules of treaty interpretation but also because

[468] IBid 43.
[469] Ibid 43.
[470] Ibid 44.
[471] Ibid.
[472] Ibid 45.
[473] Ibid.

> unrealistic rules do not protect anyone and weaken the willingness of belligerents to respect even the realistic rules of IHL.[474]

Both legal projects are founded on this notion of what is feasible or 'realistic'. After this acknowledgement, Sassoli moves forward with sketching the divergence between the ICRC legal project and the Military legal project by arguing that Section III of Part III of Geneva Convention IV does not introduce only obligations of result, which would be admittedly impossible to fulfil. On the contrary, taking for example Articles 50 and 56, there are some obligations of means, which require the invading army to do only what is 'feasible' under the given circumstances.[475] Sassoli's next move echoes the archetypical argument of the ICRC legal project and deserves to be quoted in full:

> The provisions of Convention IV find the right balance between necessity and humanity. Necessity, *limited* means, and other priorities have been taken into account with regard to provisions imposing positive obligations upon a Party to the conflict in that they usually leave the Parties with some leeway as to how they can achieve their duties. Often, the positive obligations are obligations of means, which take into account the circumstances and the means available to the invading forces. Humanity, on the other hand, ensures that fundamental rights and safeguards *cannot be abrogated.* Those provisions are absolute, but they are of a negative nature and hence do not require invading forces to provide anything.[476]

This passage, as another instance of the overarching convergence between the two legal projects, encompasses the two rhetorics of limitation and of aspiration, which are discussed in Chapter 5. It is, in fact, supplemented, with an additional illustration of the convergence of the ICRC legal project and the Military legal project: if the law of occupation does not apply during the invasion phase, that would be detrimental to the invading army as well, since the rules of Section III of Part III of Geneva Convention IV also provide a legal basis for arresting and detaining civilians who threaten their security.[477] In conclusion, Sassoli calls for a 'functional understanding of occupation', in which some rules of Section III of Part III of the Geneva Convention IV can be applicable depending on the nature of the rule and the situation on the ground:

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[474] Ibid.
[475] Ibid 46.
[476] Ibid 47 (emphasis added).
[477] Ibid.

> On such a sliding scale of obligations according to the degree of control, obligations to abstain would be applicable as soon as the conduct they prohibit becomes materially possible (the person benefiting from the prohibition is in the hands of the invading forces), while obligations to provide and to guarantee would apply only at a later stage.[478]

Having considered Sassoli's approach, it may appear now that Zwanenburg argument lacks nuance. However, the lack of nuance in Zwanenburg argument, one could argue, is compensated for by the legal certainty promised from his approach. The fact is that both legal scholars, operating from within their respective legal projects, articulate state-of-the-art arguments by employing the accepted methods of international legal interpretation. The overarching recurring themes of disagreement or points of conflict between the two legal projects are captured by the arguments raised in this discussion at the ICRC Review. The ICRC legal project argues that the interpretation of the Military legal project leaves a gap in protection and fails to take into account the humanitarian object and purpose of IHL while the Military legal project supports that the interpretation of the ICRC legal project puts a materially impossible burden on the shoulders of the military by failing to take into account the realities of war.

3.6 Establishing Jurisdiction of the Invading Army before the ECtHR

The example below highlights that together with the most usual agents of the Military legal project, that are military legal advisors and IHL scholars linked to the military, the Military legal project produces international humanitarian legal discourse through human rights lawyers and ECtHR judges. At the same time, the ECtHR judges who dissented are identified as operating from within the ICRC legal project. This example also showcases that a judgement declaring a violation is not the only way courts determine the level of protection of life in war. An international judicial body can make such a determination by the act of refraining from such a declaration as well. In Georgia v Russia (II), the ECtHR found that it had no jurisdiction and thus rejected as inadmissible any complaints arising during the active phase of hostilities. There are several interesting points in this enormous judgement of 278 pages with some strong dissenting opinions, but the forthcoming analysis will be restricted to the points strictly related to the ways the arguments of the majority and minority construct a more permissive or, respectively, protective legal framework for human life in times of war.

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[478] Ibid 49.

To begin with, in its inter-state application filed on 11 August 2008, Georgia complained, inter alia, that Russia's military operations during the conflict resulted in the loss of civilian lives in violation of Article 2 of ECHR. Russia had raised a preliminary objection ratione materiae, asserting that the Convention does not apply in international armed conflicts and IHL applies instead.[479] The Chamber, in its decision, noted that in the past the ECtHR has affirmed the applicability of certain provisions of the Convention in armed conflicts but reserved the question of the interplay between IHL and IHRL to be decided by the Grand Chamber together with the merits of the case.[480] So what was the ruling of the Court on jurisdiction?

The Court held that a State cannot exercise extraterritorial jurisdiction during the active phase of the hostilities.[481] With the 'lack of jurisdiction' approach the Court narrows down significantly the interface of possible coexistence between IHL and IHRL. Essentially, the Court is establishing a duality of human rights: on the one hand, individuals continue to possess human rights in times of armed conflict, on the other hand, they cannot seek their protection before the Court.

Even more puzzling is that the Court seems to acknowledge the hypocrisy of this approach when saying that such interpretation of Article 1 of the Convention 'may seem unsatisfactory to the alleged victim',[482] before it proceeds to explain apologetically its rationale:

> However, having regard in particular to the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances and the fact that such situations are predominantly regulated by legal norms other than those of the Convention (specifically, international humanitarian law or the law of armed conflict), the Court considers that it is not in a position to develop its case-law beyond the understanding of the notion of 'jurisdiction' as established to date.[483]

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[479] *Georgia v Russia (II)*, Preliminary Objections, App No. 38263/08 (ECtHR, 13 December 2011) para 69.
[480] Ibi, paras 71-72.
[481] *Georgia v Russia (II)*, Judgement, App No. 38263/08 (ECtHR, 21 January 2021) para 138.
[482] Ibid para 139.
[483] Ibid para 141.

This must be one of the few instances where the Court felt the need to apologise for the legal path it had chosen. In fact, the way the Court entangled applicable law (IHL) with jurisdiction gives away that paragraph 141 is an admission of the influential role of the Military legal project. In essence, the Court is making clear that it does not welcome applications for violations occurring in the active phase of international armed conflicts and it attempts to mitigate the results of this approach by saying that at least IHL, which 'predominantly' regulates these situations, still applies.

Nevertheless, the majority proceeded to discuss the interplay between IHL and IHRL for the purposes of the occupation period. After an exposition of the case law of the ICJ,[484] they rejected Russia's argument that IHL displaces IHRL and quoted extensively the relevant passages in Hassan.[485] In effect, the Court does not take into account any of the objections raised by the minority in Hassan and repeats that a) there is no need for a notification of formal derogation under Article 15 of the Convention before it take into account IHL and that b) 'the Convention must be interpreted in harmony with other rules of international law of which it forms part'.

The finding that the events in the active phase of hostilities did not fall within the jurisdiction of Russia was the main bone of contention between the judges of the Grand Chamber.[486] The two camps formed already from the Hassan judgment 7 years before, are showing their colours again: the majority propounding a more permissive interpretation of the Convention, operating from within the Military legal project, and the minority pushing back with a more protective interpretation, in the vein of the ICRC legal project. Among the many Separate Opinions there is even a Concurring Opinion that discusses at some length the interplay between IHL and IHRL in light of the travaux preparatoire of the Convention.[487] However, the rebuke of the Dissenting Opinions is striking: Judge Lemmens finds the statements of the majority 'troubling',[488] Judge Grozev notes that the majority failed to acknowledge that both parties to the conflict are contracting parties to European Convention on Human Rights (ECHR) and thus, their territory forms part of the

[484] Ibid para 89-91.
[485] Ibid para 92-94.
[486] Decided by eleven votes to six, ibid operative paragraph 1.
[487] *Georgia v Russia (II)*, Concurring Opinion of Judge Keller, App No. 38263/08 (ECtHR, 21 January 2021).
[488] *Georgia v Russia (II)*, Partly Dissenting Opinion of Judge Lemmens, App No. 38263/08 (ECtHR, 21 January 2021) para 2.

espace juridique of the Convention.[489] Similarly, Judge Chanturia stress out that the majority has created a legal vacuum contrary to the spirit of the Convention,[490] while Judge Pinto de Albuquerque characterises the position of the majority as 'morally and legally untenable' and notes that the apology of paragraph 139 '*could look like crocodile tears*' to victims and their relatives.[491]

Judges Yudkivska, Chanturia, and Wojtyczek accuse the majority of resurrecting the latin maxim silent enim leges inter arma (in times of war law falls silent).[492] Then, they analyse in depth the relationships of power constructed by IHL and underline that 'civilians thus become an essential element in the military decision-making process'.[493] In that sense, they argued that there is a 'normative link' between civilians and the belligerent power, which is enough to rule that the civilians are under its jurisdiction.[494] Furthermore, Judges Yudkivska and Chanturia also joined powers with Judge Pinto de Albuquerque, in their joint Dissenting Opinion, where contrary to the majority, referred to the jurisprudence of Human Rights Committee (HRC) and the Inter-American Commission on Human Rights (IACHR),[495] before deploring the approach of the majority as a '[s]ubversion of the Convention by international humanitarian law'.[496] Coupled with this criticism, the Dissenting Opinion outlines an alternative approach to the problem which consists of the following: a) only a derogation under Article 15 allows the Court to expand the exceptions of Article 2 in light of IHL[497]; b) when a notification of derogation is lodged, the Court applies the proportionality test envisaged in Article 15[498]; c) the Court does not give a wide margin of appreciation to States when reviewing the legality of a derogation under Article 15[499]; d) in light of Article 53 of the Convention, in times of occupation a Contracting party is obliged to follow together with the Convention, IHL and the domestic law of the occupied country, 'where they offer a higher level of protection of human rights' and IHL 'cannot be used to undermine the Convention, in clear subversion of the

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[489] *Georgia v Russia (II)*, Partly Dissenting Opinion of Judge Grozev, App No. 38263/08 (ECtHR, 21 January 2021).
[490] *Georgia v Russia (II)*, Partly Dissenting Opinion of Judge Chanturia, App No. 38263/08 (ECtHR, 21 January 2021) para 55.
[491] *Georgia v Russia (II)*, Partly Dissenting Opinion of Judge Pinto de Albuquerque, App No. 38263/08 (ECtHR, 21 January 2021) paras 22 and 30 (emphasis added).
[492] *Georgia v Russia (II)*, Joint Partly Dissenting Opinion of Judges Yudkivska, Wojtyczek, and Chanturia, App No. 38263/08 (ECtHR, 21 January 2021) para 1.
[493] Ibid para 7, see also para 15.
[494] Ibid para 7.
[495] *Georgia v Russia (II)*, Joint Partly Dissenting Opinion of Judges Yudkivska, Pinto de Albuquerque, and Chanturia, App No. 38263/08 (ECtHR, 21 January 2021) para 8.
[496] Ibid title 3.
[497] Ibid para 14.
[498] Ibid para 15.
[499] Ibid.

logic and purpose of its Article 53'.[500] The latter approach affords the greatest possible protection to the individual.[501]

Lastly, the Dissenting Opinion rebukes the majority in Hassan and reiterates the observations of the minority there, on the irreconcilability of IHL and IHRL in particular instances.[502] The finishing touch to this ICRC legal project manifesto is a final attack on the majority for breaking the promise given at the admissibility decision, by not discussing 'the most important legal issue at stake', the interplay between IHL and IHRL.[503] It becomes evident that the minority, operating within the ICRC legal project, did not wish to reject any instance of deprivation of life, particularly that of civilians, as a violation of the ECHR. Rather, they favoured a more protective interpretation compared to the majority, who, perhaps with a heavy heart, if their apologies within the judgement are taken into account, endorsed an interpretation of the Convention that placed the deprivation of life during the active phase of hostilities outside the Court's purview. Of course, the legal dialogue between the two sides of the Grand Chamber did not take place in a vacuum. Numerous decisions by international bodies have brought into relief the persistent difficulty of establishing a stable legal framework for the protection of life in times of armed conflict. The following section illuminates this internal legal dialogue.

3.7 The Relationship between the Right to Life and IHL Before the ICJ

The first time the issue of the relationship between IHRL and IHL was raised before the ICJ was in the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, which was requested by the UN General Assembly on 15 December 1994.[504] In this Advisory Opinion, issued two years later, the bench of the Court was split in half on whether the use of nuclear weapons could be lawful under IHL 'in an extreme circumstance of self-defence, in which the very survival of a State would be at stake', with the issue of lawfulness remaining open with the President's casting vote.[505] Although there is no reference to IHRL in the operative paragraphs, the Advisory Opinion and several of the separate and dissenting opinions engaged in the construction of the relationship between IHRL and IHL. The focus of the discussion below is on how the majority judges and judges in the minority constructed this relationship, in particular vis-a-vis the right to

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[500] Ibid para 24.
[501] Juan Carlos *Abella v Argentina (La Tablada case)*, Inter-American Commission on Human Rights, Case No 11.137, Rep No 55/97 (18 November 1997) para 165.
[502] Ibid para 23.
[503] Ibid para 26.
[504] UNGA Res 49/75 K (15 December 1994) 'Request for an Advisory Opinion from the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons' UN Doc A/RES/49/75.
[505] *Legality of the Threat or Use of Nuclear Weapons* (n 416) operative paragraph E.

life. When their arguments are examined in their dialectical unity, it becomes evident that the majority is furthering the Military legal project while two of the minority judges, Judges Weeramantry and Koroma are contributing to the ICRC legal project with their dissenting opinions.

The relevant passages of the Advisory Opinion, reflecting the view of the majority, are found in paragraphs 24 and 25. After summarising the arguments of the intervening states, the Court proceeds in making clear that, in its view, the protection of the International Covenant on Civil and Political Rights (ICCPR) 'does not cease in times of war' except in cases of derogation in emergency situations as stipulated by Article 4.[506] In any case, the right to life protected under Article 6 is not one of the provisions that can be derogated under Article 4.[507] Therefore, the Court finds that the right to life, which is rendered in a negative fashion 'as the right not arbitrarily to be deprived of one's life', continues to apply during armed conflicts.[508] Nevertheless, the majority finds another way to restrict the protection of life, in order to construct a more permissive legal framework:

> The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[509]

In this way the majority achieves two main victories for the Military legal project: firstly, it reinforces the dichotomy of 'arbitrary' and 'non-arbitrary' deprivation of life linking it with the question of such deprivation in times of war; secondly, it displaces IHRL vocabulary from the argumentative process of determining the arbitrariness, replacing it with the more favoured for the Military legal project language of IHL. The political effects of this ideological move are examined in detail in Chapter 6.

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[506] Ibid para 25.
[507] Ibid.
[508] Ibid.
[509] Ibid, emphasis in the original. Note that the US army, from within the Military legal project, holds a less protective position by arguing that the Law of War is lex specialis to IHRL and thus the latter would need to make way for the former, see USA, *Department of Defense Law of War Manual* (n 4), section 1.3.2.

The fact that every judge of the ICJ wished to clarify their individual position through a declaration, a separate opinion or a dissenting opinion indicates that the stakes were high in this Advisory Opinion. The socio-political tension, exemplified also by the number of states with opposing views participating in the proceedings, is evident in the dissenting opinions of the minority judges. Two of them are relevant to the discussion undertaken here.

The first one is the famous dissenting opinion of Judge Weeramantry. The lengthiness of this massive dissenting opinion of 127 pages by the judge from Sri Lanka is not its only unorthodox element. When engaging with the right to life, Judge Weeramantry claims that the right to life is a non-derogable right, not only under the ICCPR but also in the frameworks of regional human rights treaties such as the ECHR and the ACHR.[510] Apropos, it should be noted that Article 15(2) of the ECHR does provide for the possibility of a derogation from the protection of life 'in respect of deaths resulting from lawful acts of war'.[511] Already, it is clear that Judge Weeramantry vehemently opposes the interpretation put forward by the Military legal project. His contribution to the ICRC legal project, continues with the reframing of the opposing position in the following terms: 'it has been argued that the right to life is not an absolute right and that the taking of life in armed hostilities is a *necessary* exception to this principle'.[512] Then he proceeds to explain his position:

> When a weapon has the potential to kill between one million and one billion people, as WHO has told the Court, human life becomes reduced to a level of worthlessness that totally belies human dignity as understood in any culture. Such a deliberate action by a State is, in any circumstances whatsoever, incompatible with a recognition by it of that respect for basic human dignity on which world peace depends, and respect for which is assumed on the part of all Member States of the United Nations.[513]

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[510] Dissenting Opinion of Judge Weeramantry, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996, ICJ Rep 1996, 284-285.
[511] Article 15(2) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5.
[512] Dissenting Opinion of Judge Weeramantry (n 510) 285 (emphasis added).
[513] Ibid.

In this passage, Judge Weeramantry almost crosses the river to the Anti-War tradition.[514] However, his discussion of IHL as well as his concluding remarks where he declares that 'rationality, humanity and concern for the human future are built into the structure of international law' while 'international law contains within itself a section which particularly concerns itself with the humanitarian laws of war', are situating him well within the ICRC legal project and the Regulated War tradition.[515]

In any case, Judge Weeramantry, also draws from the UN Charter to argue that human dignity is of the highest importance in the protection of life while considering all human rights flow from 'one central right - a right described by René Cassin as "the right of human beings to exist"'.[516] Furthermore, he supports that if the use of nuclear weapons that can 'snuff out life by the million' was lawful, it would 'tear out the foundations beneath this elaborate structure', referring to the central right of human beings to exist.[517] Judge Weeramantry considers this structure as 'one of the greatest juristic achievements of the 20th century' and if nuclear weapons were allowed under international law 'it could well be written off the books'.[518]

The second dissenting opinion contributing to the ICRC legal project comes from Judge Koroma. When he comes to discuss the right to life, Judge Koroma presents the view of the majority as follows: 'the Court found that it was never envisaged that the lawfulness or otherwise of such weapons would be regulated by the International Covenant on Civil and Political Rights'.[519] He accepts such a view as a valid legal position, albeit too narrow.[520] Judge Koroma argues that 'both human rights law and international humanitarian law have as their raison d'être the protection of the individual as well as the worth and dignity of the human person, both during peacetime or in an armed conflict'.[521] This rhetorical move is one of the most typical of the ICRC legal project. Indeed, the fusion of IHRL with IHL is often the privileged argumentative terrain of the ICRC legal project. In addition, similarly to Judge Weeramantry, he also puts emphasis on the UN Charter by supporting

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[514] In fact, Judge Weeramantry participated in pacifist initatives, falling under the Idealist Pacifist project, such as the Hague Appeal for Peace conference in May 1999 see Wathsala Mendis, 'The Hague Appeal for Peace' (Sunday Times, 28 March 1999) https://www.sundaytimes.lk/990328/plus7.html access 22 April 2025. Vice-President Weeramantry is one of the main representatives of the 'first generation of post-colonial international lawyers', Antony Anghie and B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 (1) Chinese Journal of International Law 77, 78-79.
[515] Dissenting Opinion of Judge Weeramantry (n 510) 331.
[516] Ibid.
[517] Ibid 285-286.
[518] Ibid 286.
[519] Dissenting Opinion of Judge Koroma, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996, ICJ Rep 1996, 335.
[520] Ibid.
[521] Ibid.

that a violation of the right to life from a nuclear catastrophe would 'fall within the purview of the Charter and other relevant international legal instruments'.[522] Finally, in his brief engagement with the issue of the right to life, Judge Koroma echoes HRC General Comment 14 on Article 6 of the ICCPR, where the HRC not only found the use of nuclear weapons in violation of the right to life but also called for its recognition as a crime against humanity.[523]

This conversation between the majority and the minority of the ICJ falls within the Regulated War tradition, as evidenced by the outer limits of their legal arguments, which do not extend to imagining the possibility of ending war. The dialectical unity of the two arguments or their collapse into each other is captured well with Vice-President Schwebel's opening lines in his dissenting opinion:

> More than any case in the history of the Court, this proceeding presents a titanic tension between State practice and legal principle. It is accordingly the more important not to confuse the international law we have with the international law we need.[524]

In the same spirit, the then President of the Court and another founding figure of TWAIL,[525] Judge Bedjaoui stated that while nuclear weapons consist of a 'new terror hanging over man, reminiscent of the terror of his ancestors, who feared being struck by a thunderbolt from the leaden, stormladen skies', in the drafting of the Advisory Opinion the Court was guided by 'its wish to state the law as it is' and 'sought to avoid any temptation to create new law'.[526] Notably, for President Bedjaoui, nuclear weapons had for half a century 'formed part of the *human condition*' and the Court had a role 'in this rescue operation for humanity'.[527]

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[522] Ibid.
[523] Ibid 356.
[524] Dissenting Opinion of Judge Schwebel, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996, ICJ Rep 1996, 311
[525] Anghie and Chimni identify Bedjaoui as one of the leading post-colonial international lawyers forming TWAIL I, while they identify themselves as part of the second generation of TWAIL, see Anghie and Chimni, 'Third World Approaches to International Law' (n 514) 79.
[526] Declaration of Judge Bedjaoui, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996, ICJ Rep 1996 paras 3 and 7.
[527] Ibid paras 2 and 6 (emphasis added).

3.8 The Relationship between the Right to Life and IHL Before the ECtHR

3.8.1 Early Case-Law

The first time ECtHR explicitly referred to the relationship between IHL and IHRL was in 2009, when in Varnava and others v Turkey noted that:

> Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict.[528]

This reference has at least two relevant points: first, the Court adopts the 'harmonious interpretation' approach,[529] as it calls for an interpretation of the right to life, in so far as possible', in light of IHL, which already hints towards its placement under the Regulated War tradition; second, there is an obvious internal contradiction in this passage. Without this being a general rule, at least in the case of the protection of life, IHL sets lower protective thresholds than IHRL. Thus, it is significant for categorisation purposes that the Court is calling for a filtering of IHRL through IHL and in the very same sentence, repeats in the form of a mantra that IHL has a 'universally-accepted role in mitigating the savagery and inhumanity of armed conflict'. This latter reference places this evidence of discourse produced by the judges of the Grand Chamber within the ICRC legal project. In any case, with a close examination of the context of this passage, it becomes evident that, at least, the reference to Article 2 is specific to the procedural obligation. Thus, it was not entirely clear whether the Court had moved already away from its previous approach, where, in the absence of a derogation under Article 15, a case must be judged against 'a normal legal background'.[530] Notwithstanding the above, the Court actually interprets Article 2 in light of IHL as it finds a violation of the procedural obligation of Article 2 after an analysis filled with IHL's terminology:

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[528] *Varnava and Others v Turkey*, Judgement, App Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, and 16073/90 (ECtHR, 18 September 2009) para 185. It should be noted that the Grand Chambers decision was preceded by a decision of the 3rd Section where in paragraph 130 the Chamber made clear that '[i]nternational treaties, which have attained the status of customary law, impose obligations on combatant States as regards care of wounded, prisoners of war and civilians[8]; Article 2 of the Convention certainly extends so far as to require Contracting States to take such steps as may be reasonably available to them to protect the lives of those not, or no longer, engaged in hostilities', *Varnava and Others v Turkey*, Judgement, App Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, and 16073/90 (ECtHR, 10 January 2008).

[529] The harmonious interpretation approach was elaborated further in the later case-law of the Court, in particular *Hassan v The United Kingdom*, Judgement, App No 29750/09 (ECtHR, 16 September 2014) paras 104-106.

[530] *Isayeva v the Russian Federation*, Judgement, App No 57950/2000 (ECtHR, 24 February 2005) para 191.

> In a zone of international conflict Contracting States are under obligation to protect the lives of those not, or no longer, engaged in hostilities. This would also extend to the provision of medical assistance to the wounded; where combatants have died, or succumbed to wounds, the need for accountability would necessitate proper disposal of remains and require the authorities to collect and provide information about the identity and fate of those concerned, or permit bodies such as the ICRC to do so.[531]

A few months following the decision in Varnavas and others v Turkey, Judge Popescu, who did not sit at that panel of the Grand Chamber, issued a separate opinion in Sandru et Autres c Roumanie, condemning the reluctance of the Court to openly discuss the relationship between IHL and IHRL.[532] In his dissenting opinion, Judge Popescu stresses that the Court sometimes needs to address the issue of IHL while making clear that the international obligations of contracting parties to ECHR cannot be trumped by other international commitments that each State may have assumed:

> The fact that a State has international commitments other than the Convention does not relieve it of its obligation to ensure respect for the rights guaranteed by the Convention to everyone within its jurisdiction.[533]

It is also indicative of categorising this dissenting opinion to the discourse produced by the ICRC legal project that Judge Popescu does not see IHL as an excuse to violate the Convention but instead understands IHL's role as that of another protective net in the case of derogation under Article 15.[534] Nevertheless, he stays well within the confines of the Regulated War tradition since he agrees with its fundamental assumption that:

> The legal impossibility of derogating from Article 2 does not apply to deaths resulting from 'lawful acts of war', with lawfulness assessed in the light of international humanitarian law. In interpreting and applying these texts of the Convention, the

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[531] *Varnava and Others v Turkey* (n 528) para 185.

[532] *Sandru et Autres c Roumanie*, Opinion Concordante du Juge Popescu, App No. 22465/03 (ECtHR, 8 December 2009) para 2.

[533] Ibid (unofficial translation from French). Original text reads: 'le fait qu'un Etat a d'autres engagements internationaux que la Convention ne le délie pas de son obligation d'assurer le respect des droits garantis par la Convention à toute personne relevant de sa juridiction'.

[534] '[L]es mesures dérogatoires aux droits de l'homme prises en cas de « guerre » (conflit armé international ou noninternational) ou en cas d'autre danger public, menaçant la vie de la nation, ne doivent pas être en contradiction avec les autres «obligations découlant du droit international», à savoir le Droit international humanitaire (applicable en temps de conflit armé)', ibid.

> Court, as a judge of International Human Rights Law, must draw on the rules of International Humanitarian Law and/or International Criminal Law.[535]

Another instance in which a judgment of the ECtHR forms part of the discourse produced by the ICRC legal project is Benzer v Turkey where the Court made clear that:

> An indiscriminate aerial bombardment of civilians and their villages […] cannot be reconcilable with any of the grounds regulating the use of force which are set out in Article 2 § 2 of the Convention or, indeed, with the customary rules of international humanitarian law or any of the international treaties regulating the use of force in armed conflicts.[536]

The most recent case law of the ECtHR, however, has not moved in the same protective pace. The majority of the Grand Chamber in Georgia v Russia (II) is operating from within the Military legal project. The next section turns its focus to this judgement.

3.8.2 Georgia v Russia (II)

The Grand Chamber in Georgia v Russia (II) declared that 'there is no conflict' between Article 2 of the Convention and the rules of IHL applicable in a situation of occupation.[537] It is in contradistinction with the majority that the joint partly dissenting opinion of Judges Yudkivska, Pinto de Albuquerque, and Chanturia is furthering the ICRC legal project when they hold a less permissive view on the exception to the right to life, accepting the application of IHL only in cases of formal derogation under Article 15 ECHR:

> Article 15 is the sole Article in the Convention that refers to war. This was not a whimsical choice of the founding fathers. The aim of Article 15 is precisely to allow the States to derogate from Convention obligations particularly in a situation of 'war', and thus of armed conflict, or in any 'other public emergency threatening the life of the nation', 'to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international

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[535] Ibid (unofficial translation from French). The original text reads: 'l'impossibilité juridique de déroger à l'article 2 ne vise pas le cas de décès résultant «d'actes licites de guerre», licéité appréciée à la lumière du Droit international humanitaire. Dans l'interprétation et l'application de ces textes de la Convention, la Cour doit faire appel, comme juge de Droit international des droits de l'homme, aux règles du Droit international humanitaire et/ou du Droit international criminel'.

[536] *Benzer and Others v Turkey*, App No. 23502/06 (ECtHR, 12 November 2013) para 184.

[537] *Georgia v Russia (II)* (n 481) para 199.

> law'. Article 15 § 2 clarifies which international law is then applicable in the context of Article 2, since it prohibits derogation from Article 2 'except in respect of deaths resulting from lawful acts of war'. There is therefore an explicit reference to international humanitarian law as regards derogation from Article 2. Hence, the Contracting Parties to the Convention expressed their crystal-clear wish that, given the paramount value of the right to life, derogation under Article 15 should be the only mechanism allowing the Court to expand the exceptions to Article 2 in the light of international humanitarian law.[538]

This less permissive approach extends beyond subjecting the application of IHL to a formal derogation under Article 15, arguing that even when a formal derogation is filed, the wording of Article 15 restricts the permissible deprivation of life more than the IHL standards:

> The proportionality requirement of Article 15 of the Convention ('to the extent strictly required by the exigencies of the situation') allows for some accommodation of the needs of military action, while at the same time imposing a *less permissive normative framework governing the use of force than in international humanitarian law* and, most importantly, ensuring the indispensable Strasbourg oversight over military action during armed conflicts.[539]

The three judges in their joint partly dissenting opinion, continue with their suggestion for a 'less permissive normative framework' and underline that the appropriate margin of appreciation for the triggering of events capable to justify a derogation under Article 15 should not be wide, 'otherwise the Court would abdicate its power to uphold the core of the Convention in troubled times, precisely when it is most needed'.[540] The antagonistic character of the two legal projects is revealed in their explicit tension on whether there is a conflict between Article 2 and IHL. The three ECtHR judges articulated their disagreement in unambiguous terms:

> There is an irremediable conflict between Article 2 of the Convention and the relevant provisions of international humanitarian law governing military operations. In particular, the wording of Article 2 § 1 – 'No one shall be deprived of his life

[538] *Georgia v Russia (II)*, Joint Partly Dissenting Opinion of Judges Yudkivska, Pinto de Albuquerque, and Chanturia (n 495) para 14.
[539] Ibid para 15 (emphasis added).
[540] Ibid.

> intentionally' – clashes with the relevant provisions of international humanitarian law governing international armed conflict. Those provisions permit members of the enemy State's armed forces to be deliberately targeted on account of their status, whether or not they represent a threat and are taking part in hostilities when they are targeted, on condition that the principles of distinction, precaution and proportionality are complied with.[541]

In this way, this dissenting opinion acknowledges explicitly an 'irremediable conflict' between Article 2 of the Convention and IHL, while rejecting any interpretation that would consider provisions of IHL, 'such as Articles 48, 51, 52 and 57 of Protocol I […] as exceptions to the prohibition on the intentional infliction of death laid down in Article 2 § 1, going beyond the exceptions provided for in Article 2 § 2'.[542] At the same time the dissenting opinion notes that in absence of a formal derogation under Article 15, the applicable standards are those of 'absolute necessity' of the use of force and 'strict proportionality', arising from the case-law of the Court regarding Article 2, which are 'entirely different from the specific concepts of military necessity and proportionality in international humanitarian law'.[543]

Notwithstanding the conspicuous tension between the judgement and the dissenting opinion, echoing the antagonistic character of the Military legal project and the ICRC legal project, their dialectical unity is established in the acceptance of the deprivation of life in armed conflicts, premised on an unspoken assumption about the inevitability of war. This is captured by the dissenting opinion in the following concluding words:

> In sum, if States have difficulties in upholding their Article 2 obligations during armed conflicts, at home or abroad, inside or outside Europe, they have only one way out of these difficulties: to derogate from the Convention and to comply with both the Article 15 proportionality clause ('to the extent strictly required') and 'the other obligations under international law', namely with international humanitarian law, which sets the lowest permissible level of rights protection.[544]

Going a step further, Judges Yudkivska, Pinto de Albuquerque, and Chanturia, in their dissenting opinion, also pick a fight with the judgement in the Hassan case, where the

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[541] Ibid para 17.
[542] Ibid para 16.
[543] Ibid para 17.
[544] Ibid para 18.

majority, in furthering again the Military legal project, disapplied the Convention for the sake of IHL.[545] In particular, this joint dissenting opinion calls the lex specialis approach which was favoured implicitly in Hassan case as 'an ad terrorem argument, which concedes to a regrettable result, only because it could have been much worse'.[546] Again here the dissenting judges reiterate their position that the Court should not 'read into the exhaustive list of grounds for depriving someone of the right to life the right to kill in conformity with international humanitarian law'.[547] Unfortunately, they do not escape from the confines of the Regulated War tradition but simply put forward a less permissive interpretation of the ECHR under the ICRC legal project, by arguing that there is still a way out of this 'irreconcilable conflict of norms between the two legal regimes' which 'can give precedence to international humanitarian law' and that is to derogate under Article 15 of the Convention.[548] For the majority, operating from within the Military legal project, the harmonious interpretation of the Convention in light of IHL is to allow incidental killings of civilians, while for the more 'protective' minority, the harmonious interpretation does not really mean the protection of civilians in times of war but an additional procedural step. For the three judges furthering the ICRC legal project, this extra step of filing a derogation notice under Article 15 ECHR 'permits a harmonious interpretation, in particular with regard to complaints raised under Article 2 of the Convention'.[549]

3.8.3 Ukraine and Netherlands v Russia

Two contesting interpretations on the right to life in times of war were posed again in the admissibility decision in the Ukraine and Netherlands v Russia case.[550] Since in admissibility decisions the Court does not append dissenting opinion of judges, the succeeding two opposing discursive attempts come from the submissions of the parties to the case, as those were summarised by the Court in its admissibility decision of 30th November 2022.

In these kinds of cases, it is common for the applicant state to adopt argumentation typical to the ICRC legal project and the respondent state to articulate their submissions in the vein of the Military legal project. In this instance, Russia, the respondent state, argued against employing the concept of 'living instrument' for extending 'the Convention's reach

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[545] Ibid para 20.
[546] Ibid.
[547] Ibid para 21.
[548] Ibid paras 23-24.
[549] Ibid para 23.
[550] *Ukraine and the Netherlands v Russia*, App nos. 8019/16 43800/14 28525/20 (ECtHR, 30 November 2022).

into areas of international humanitarian law'.[551] According to the Russian submission, states have 'resisted attempts to extend the Convention to such areas and had not lodged derogations under Article 15 in respect of areas outside their territories that might be under their control. Moreover, manuals for forces operating abroad were based on international humanitarian law'.[552] The respondent moved a step further to argue that the application of the Convention in times of active conflict would 'confound the clarity of international humanitarian law, because there was a need for clear rules in the field, and because interfering with international humanitarian law at potential cost to both service personnel and civilians would carry a very grave responsibility'.[553] This unsubstantiated argument is a classic trope found in the discourse produced by the Military legal project, where additional protective rules for human life are considered as tainting legal certainty and thus achieve the opposite of what is intended, that is the increase of protection. Russia argues that the two legal regimes were historically developed in different ways because they were 'incompatible'.[554]

The respondent invoked ICJ advisory opinion on the Use of Nuclear Weapons in order to argue that one of the examples where IHL and IHRL are 'directly incompatible […] included the right to life under Article 2, the right to liberty under Article 5 and the positive obligation inherent in various articles of the Convention to put in place a legal framework to ensure respect for Convention rights'.[555] Furthermore, even the attempt of the ICJ to reconcile IHL and IHRL Nuclear Weapons advisory opinion 'was based on the specific language of the right to life in Article 4 of the International Covenant on Civil and Political Rights and would not work in the context of Article 2 of the Convention'.[556] By referring also to ICJ's advisory opinion on the Construction of a Wall, Russia concludes that the 'reconciliation of human rights law and international humanitarian law would have to be attempted on a case-by-case basis, with unpredictable results. This would seriously undermine legal certainty'.[557]

Contrary to the submissions of Russia, the applicants adopted a more protective interpretation of the protection of life under Article 2 ECHR. Ukraine invoked the ICJ's jurisprudence concerning armed activities on the territory of the Congo (Democratic

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[551] Ibid para 513.
[552] Ibid.
[553] Ibid 708.
[554] Ibid 709.
[555] Ibid.
[556] Ibid.
[557] Ibid.

Republic of Congo v Uganda) to stress that it is 'well-established that the provisions of international human rights law, including those of the Convention, continued to apply during situations of armed conflict'.[558] Furthermore, Ukraine emphasised that the ECtHR has consistently interpreted the Convention 'in harmony with other rules of international law, including international humanitarian law, of which it formed part'.[559] Nevertheless, although the applicant tried to argue that the Convention is applicable in times of armed conflict, in order to achieve a more protective legal net for its citizens, when the question comes to the right to life they concede that 'the question whether a deprivation of life was to be regarded as "arbitrary" for the purposes of Article 2 would usually be determined by the application of the relevant rules of international humanitarian law'.[560] Albeit the use of the word 'usually', Ukraine's submission is conspicuously favouring an interpretation that accepts the deprivation of life of civilians in times of war in the fashion of the ICRC legal project.

The Netherlands, as the second applicant in this case, raised similar arguments in regard to the continuing applicability of the Convention in times of armed conflict.[561] The Dutch submissions also emphasise the case-law of the Court on the territorial application of the Convention, by invoking the inter-state case Cyprus v Turkey.[562] After arguing for the applicability of the Convention, the second applicant also conceded that the standard of the protection of life in times of armed conflict under the Convention is lower by supporting the 'methodology for deciding cases involving the simultaneous applicability of international humanitarian law and the Convention' developed by the Court in Varnavas v Turkey, Hassan v UK and recently in the merits of Georgia v Russia (II).[563]

To put forward the argument for the application of the Convention in the current case, the Netherlands embraced the case-law of the Court on the disapplication of the Convention in favour of IHL by invoking, inter alia, the Hassan case 'where the Court had also assessed whether the Convention came into conflict with international humanitarian law and had proceeded to interpret Convention standards in light of the applicable rules of that body of law'.[564] It becomes evident that the difference between the ICRC legal project and the Military legal project in this particular instance is whether the ECHR is applicable in times

[558] Ibid para 712.
[559] Ibid para 713.
[560] Ibid para 714.
[561] Ibid para 715.
[562] Ibid para 716.
[563] Ibid para 717.
[564] Ibid.

of war and not whether IHL should take precedence in determining the deprivation of life in these circumstances. Regarding the latter, the two legal projects converged.

Turning to the decision itself, it accepts the applicants' arguments and in that sense forms part of the discourse produced by the ICRC legal project. In particular, the decision reiterates the jurisprudence of the Court and emphasises that 'the Convention must be interpreted in harmony with the other rules of international law of which it forms part'.[565] Furthermore, it clarifies that its reading of Georgia v Russia (II) means that when there is no norm conflict between the Convention and IHL the complaints should be determined 'by reference to Convention principles only'.[566] Then the decision proceeds to declare that there is no conflict between the relevant to the complaints provisions of the Convention and IHL rules, 'with the possible exception of the complaints under the substantive limb of Article 2'.[567] In this regard, the decision becomes one of the most progressive for the protection of human life evidence of the ICRC legal project when it states that:

> In so far as the incidental killing of civilians may not be incompatible with international humanitarian law subject to the principle of proportionality, this may not be entirely consistent with the guarantees afforded by Article 2 of the Convention.[568]

With this argument, the bench of Judges directly antagonises the argument of the Military legal project, that only IHL should be the field of law determining whether a deprivation of life in times of armed conflict is a violation of Article 2 ECHR. Instead, this more progressive version of the position of the ICRC legal project puts forward that even if an incidental loss of life of a civilian is considered lawful under IHL, it can still be an unlawful deprivation of life under Article 2 of the Convention. Notwithstanding that it is a relatively progressive construction of the relationship between Article 2 of the Convention and IHL, even this decision accepts that the deprivation of life of civilians would not necessarily be a violation of the right to life. Finally, the Court promised to 'determine how Article 2 ought to be interpreted as regards allegations of the unintentional killing of civilians in the context of an armed conflict' at the merits stage.[569] It remains to be seen how it will eventually construct this relationship and whether it will push even further the

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[565] Ibid 719.
[566] Ibid.
[567] Ibid 720.
[568] Ibid.
[569] Ibid.

ICRC legal project or whether it will regress back to a position argued by the Military legal project, most notably that of the majority in Hassan v UK case.[570]

3.9 Legal Discourse in the Anti-War Intellectual Tradition

3.9.1 HRC General Comments on the Right to Life and the Kampala Conference

Sections 3.2 to 3.8 provide an exposition of the internal dialogue of the Regulated War tradition. This section introduces the very limited manifestations of the Anti-War tradition in order to both affirm the conclusion on the hegemony of the Regulated War tradition, but also to render visible the counter-hegemonic pressures that lurk in the deep waters of the humanitarian vision.[571] The HRC General Comment 36 contains discourse in the language of human rights that can be classified under the Idealist Pacifist legal project. Firstly, it acknowledges that a 'particular connection exists between article 6 and article 20, which prohibits any propaganda for war'.[572] Secondly, it underlines that Article 6 of the ICCPR continues to apply during situations of armed conflict.[573] This is followed by the most important passage for the purposes of the present discussion:

> While rules of international humanitarian law may be relevant for the interpretation and application of article 6 when the situation calls for their application, both spheres of law are complementary, not mutually exclusive. Use of lethal force consistent with international humanitarian law and other applicable international law norms is, in general, not arbitrary.[574]

In this passage, the HRC articulates discourse of both the Anti-War and the Regulated War traditions, in opposition to the vast majority of international humanitarian legal discourse. However, it constructs the relationship between the two traditions as that of the rule and

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[570] *Hassan v The United Kingdom* (n 529).

[571] This section engages with manifestations of the Idealist Pacifist legal project which have managed to penetrate the hegemony of the Regulated War tradition and entered the mainstream discussion. Unfortunately, the Materialist Pacifist legal project did not present similar achievements as of late. For one of the few recent interventions of the Materialist Pacifist legal project see Robert Knox, 'International Law, Politics and Opposition to the Iraq War' (2021) 9 (2) London Review of International Law 169.

[572] UN Human Rights Committee, 'General Comment No 36: Article 6 (Right to Life')' (30 October 2018) UN Doc CCPR/C/GC/36, para 59. See also African Commission on Human and Peoples' Rights, *General Comment No 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)* (2015) para 34: 'where military necessity does not require parties to an armed conflict to use lethal force in achieving a legitimate military objective against otherwise lawful targets, but allows the target for example to be captured rather than killed, the respect for the right to life can be best ensured by pursuing this option'.

[573] UN Human Rights Committee, 'GC No 36' (n 752) para 64.

[574] Ibid. This paragraph also moves a step further to require that 'State parties should, in general, disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including the legal basis for specific attacks […]'.

the exception: the use of lethal force in conformity with IHL would be 'in general' not arbitrary. The exceptional cases where the use of lethal force, even if consistent with IHL, would be considered arbitrary are cases where lethal force is inconsistent with the international law on the use of force. This is explicated in the last paragraph of General Comment 36: 'States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant'.[575] Here, the argument is that a violation of jus ad bellum can automatically render even lawful killings under IHL as arbitrary deprivations of life. In the older General Comment 6, the HRC argued this point in clearer terms:

> War and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year. Under the Charter of the United Nations the threat or use of force by any State against another State, except in exercise of the inherent right of self-defence, is already prohibited. The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life. Every effort they make to avert the danger of war, especially thermonuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life.[576]

Shany, the chairperson of the HRC during the drafting of General Comment 36, noted that 'some States parties had suggested that the Committee remove the paragraph because it exceeded the Committee's mandate'.[577] A more detailed interpretation of this issue raised in General Comment 36 is articulated by Schabas, who argues that in an unlawful war every deprivation of life, even if lawful under IHL, such as the killing of a combatant, will be a violation of the right to life established under Article 6.[578] Schabas is one of the few international legal practitioners or academics who produces discourse under the Idealist Pacifism legal project:

> Killing in an unlawful war is unlawful killing. It may escape the sanction of the law of armed conflict because of the internal logic of that system. But that rationale should

[575] Ibid para 70.
[576] UN Human Rights Committee, 'General Comment No 6: Article 6 (Right to Life)' (30 April 1982) UN Doc HRI/GEN/1/Rev.1, para 2.
[577] Yuval Shany, 'Human Rights Committee Concludes the Second Reading of its Draft General Comment on the Right to Life' (OHCHR, 24 October 2018) https://www.ohchr.org/en/press-releases/2018/10/human-rights-committee-concludes-second-reading-its-draft-general-comment accessed 22 April 2025.
[578] William Schabas, 'The Right to Life in Armed Conflict' (2023) 66 Japanese Yearbook of International 21-48.

> not and cannot apply to international human rights law, where it is fitting to speak of a human right to peace.[579]

Then he concludes by underlining that the crime of aggression is the 'corollary of this human right of peace'.[580] Indeed, the only serious contribution of the Idealist Pacifism legal project recently is the success of the Kampala conference in 2010, which adopted the new crime of aggression by modifying the Statute of the ICC. Most of the significant institutional actors of the Regulated War tradition consciously decided to stay away from this revival of the Idealist Pacifism Legal Project:

> We have not participated actively in negotiations on the crime of aggression. We believe that we are most effective as a human rights organization if we do not opine on issues of jus ad bellum, the lawfulness of waging war, and instead adopt, like the International Committee of the Red Cross, an approach of strict neutrality during armed conflicts. This neutrality enables us, without taking sides, to focus on the conduct of armed forces in war, or jus in bello.[581]

Nevertheless, the international humanitarian legal discourse surrounding this modification of the ICC Statute revived some of the rhetorical themes of the International Military Tribunal at Nuremberg:

> To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.[582]

Donald Ferencz, who like his late father, a prosecutor at the Nuremberg Trials, is an adamant voice of the Idealist Pacifist legal project in the 21st century, identified an irony in the USA stance on the crime of aggression: 'those most responsible for having elevated the crime to its current status within customary international law are in no rush to see that happen'.[583] This irony, however, is not a product of the 21st century, but was manifested

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[579] William Schabas, 'The Right to Peace' (2017) 58 Harvard International Law Journal 4.
[580] Ibid 5.
[581] Human Rights Watch, 'Making Kampala Count: Advancing the Global Fight Against Impunity at the ICC Review Conference' (HRW, 10 May 2010) https://www.hrw.org/report/2010/05/10/making-kampala-count/advancing-global-fight-against-impunity-icc-review-conference accessed 22 April 2025.
[582] *Trial of the Major War Criminals Before the International Military Tribunal*, vol 22 (1948) 427, cited in Donald Ferencz, 'Continued Debate Over the Crime of Aggression: A Supreme International Irony' (2017) 58 Harvard International Law Journal 24.
[583] Ibid, 25.

already when, four years after the UN Charter outlawed war, the international community adopted the four Geneva Conventions regulating how war should be conducted.[584]

3.9.2 ICJ's Suspended Step

During the course of writing this thesis, several decisions of the ICJ indicated that the Court itself is posed with the humanitarian questions entertained in this work. Its stance on the question of the content of the humanitarian vision vis-a-vis war has been at the centre of attention. In its interim decision in Ukraine v Russia, the majority of the Court found that 'Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine'.[585] After noting the scale of destruction caused by Russia's invasion and the endangerment of the civilian population, including the risk of an increasing number of internally displaced persons and refugees in need of humanitarian assistance,[586] the Court rejects the easy way out by deciding that although Russia has provided other legal justifications for its invasion, for instance by invoking Article 51 of the UN Charter, this does not deprive it of jurisdiction under the Genocide Convention, since a dispute can fall 'within the ambit of more than one treaty'.[587] Therefore, the Court ordered Russia to 'suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine'.[588] Judge Xue, one of the two judges in the minority, issued a 'call that the military operations in Ukraine should immediately be brought to an end so as to restore peace in the country as well as in the region' but opined that the ICJ does not have jurisdiction under the Genocide Convention.[589] Then, Judge Xue went a step further to argue that 'more importantly, given the complicated circumstances that give rise to the conflict between Ukraine and the Russian Federation, the measures that the Russian Federation is solely required to take will not contribute to the resolution of the crisis in Ukraine'.[590]

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[584] The irony of substantively developing IHL with the Geneva Conventions of 1949 after the denunciation of war in the UN Charter of 1945 is also underscored by Clapham in Andrew Clapham, 'The Complex Relationship between the Geneva Conventions and International Human Rights Law' in Andrew Clapham, Paola Gaeta, and Marco Sassoli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 701.
[585] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)* (Provisional Measures) ICJ Order 16 March 2022, para 60.
[586] Ibid para 76.
[587] Ibid para 46.
[588] Ibid para 81.
[589] Declaration of Judge Xue, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)* (Provisional Measures) ICJ Order 16 March 2022, para 1.
[590] Ibid.

Contrary to this line of thinking, the Court preferred to follow the Regulated War intellectual tradition in its interim decision in South Africa v Israel.[591] In this interim order, the Court found that some of the rights claimed by South Africa, guaranteed under the Geneva Convention, are plausible.[592] However, in the dispositif, the majority of the Court did not indicate the requested provisional measure of the cessation of hostilities in Gaza. The vast majority of the judges at the ICJ seemed to take the position that a war that is plausibly endangering rights under the Genocide Convention, can still be fought in a 'humane' way, in essence calling the respondent to rectify their behaviour in that direction: 'the Court deems it necessary to emphasize that all parties to the conflict in the Gaza Strip are bound by international humanitarian law'.[593] This was in partial satisfaction of the argument posed by Israel that:

> The appropriate legal framework for the conflict in Gaza is that of international humanitarian law and not the Genocide Convention […] in situations of urban warfare, civilian casualties may be an unintended consequence of lawful use of force against military objects, and do not constitute genocidal acts.[594]

Judge Bhandari was the only judge at the bench to articulate discourse from within the Idealist Pacifist legal project in the last paragraph of his declaration: 'Going further, though, all participants in the conflict must ensure that all fighting and hostilities come to an immediate halt'.[595]

These limited examples of discourse produced by the Idealist Pacifist legal project do not pose a serious challenge to the hegemony of the Regulated War tradition. Instead, they manifest that within the structure of feeling of the humanitarian vision the pressures of the Anti-War tradition that challenge and resist the 'lived hegemony' are still alive.[596] The present thesis itself is an attempt to reinforce these pressures for an 'alternative hegemony' of the Materialist Pacifist project.[597] This chapter has demonstrated that the Regulated War tradition enjoys almost a total hegemony. It also exhibited the two legal projects within this

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[591] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Provisional Measures) ICJ Order 26 January 2024.
[592] Ibid para 54.
[593] Ibid para 85.
[594] Ibid para 40.
[595] Declaration of Judge Bhandari, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Provisional Measures) ICJ Order 26 January 2024 para 11.
[596] Williams (n 140) 112.
[597] Ibid 113.

tradition in dialogue. This enables the deconstruction of the international humanitarian legal argument in Chapter 5 and the ideology critique of the international humanitarian legal discourse in Chapter 6. The following chapter seeks to demonstrate the discursive strategies that reproduce the hegemony of the Regulated War tradition, which is in unity with the relations of domination that it sustains. At the same time, Chapter 4 also exposes the ways in which international humanitarian legal discourse legitimises war.

4. The Triumph of Hegemony: Regulated War as Humanitarianism

4.1 Introduction

The previous chapter attempted to paint a picture of the current state of international humanitarian legal discourse reflecting the dynamics between the two main traditions of thought claiming to fulfil the humanitarian vision. It is evident, both quantitatively and qualitatively, that the Regulated War tradition is nowadays hegemonic. Quantitatively, the previous chapter provides an insight on what is the ratio of production of Regulated War and Anti-War international legal discourse. Qualitatively, the hegemony of the Regulated War tradition is exemplified by both how commonsensical its basic tenets seem to be for the vast majority of international legal practitioners and by how it excludes the articulation of counter-hegemonic pressures from the horizon of the real, automatically rendering them as wishful thinking or non-realistic moral cliches. The main body of the current chapter is devoted to unearthing the ideological strategies employed by the Regulated War tradition to produce and reproduce its hegemony. They are presented in the form of ideology critique in light of the ambition of this thesis to contribute towards the revival of the Materialist Pacifism legal project.

One of the main objects of study of the present work is the distinctive legal projects social agents pursue through international humanitarian legal discourse. These legal projects can also be conceptualised as a variety of humanitarianisms themselves, as antagonistic legal projects, claiming to be Humanitarianism.[598] As Barnett explains, the ICRC and other actors have 'crafted a definition' of humanitarianism in light of their 'ambitions' and 'challenges'.[599] In other words, Humanitarianism has become an umbrella term that encompasses a variety of legal projects. David Kennedy puts it eloquently:

> International humanitarian sentiments have inspired different projects in different places. Bombing Belgrade to save Kosovo can seem like a humanitarian triumph or a catastrophe, depending on where you sit. There have been humanitarianisms of the left and the right, of the establishment and the margin and everything in between. There are humanitarianisms of Europe of Africa of the global and of the local.[600]

The instrumental ideological role of IHL discourse in the endeavour of the Regulated War tradition to appropriate Humanitarianism is not only owed to the fact that IHL has become

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[598] The humanitarian vision, as the hegemonic vision succeeding the total war vision, will be rendered as humanitarianism with capital H.
[599] Barnett, *Empire of Humanity* (n 173) 10.
[600] Kennedy, *The Dark Sides of Virtue* (n 35) XV.

a ‘common transnational vocabulary of political legitimacy- for understanding, pursuing, and defending political interests on the global stage’ but, a fortiori, is owed to the particular nature of IHL as (international) law.[601] Indeed, by the end of the 20th century, ‘law has become a mark of legitimacy – and legitimacy has become the currency of power’.[602] The Regulated War tradition is not only populated with IHL discourse but also with IHRL discourse. Contrary to the mainstream view that ‘humanitarianism in the human rights discourse is based on a rather optimistic promise, while the conflict-related context and international humanitarian law take a more pessimistic stance’,[603] this thesis refrains from reifying these two fields of law and understands them both as bricks of the contradictory international humanitarian legal argument.

It is essential to explore the various definitions of humanitarianism to set the scene for the forthcoming discussion. A perusal of the relevant literature elucidates that humanitarianism can be and has been defined in a variety of ways. For instance, as a doctrine,[604] an impulse,[605] a combination of practices, a belief, or a set of actions.[606] It can also be described as an ideal which ‘expresses the normative assumption that all human beings are of equal importance’.[607] Baughan insightfully notes that:

> Western humanitarianism has legitimated contradictory ideologies via both political and determinedly apolitical language. If there is anything that unites the diverse range of practices and principles ‘humanitarianism’ encompasses, it is surely fluidity, or even ideological promiscuity. […] The more we understand about historical varieties of humanitarianism, the further we will get from being able to define a single humanitarian agenda or humanitarianism.[608]

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[601] David Kennedy, *Of War and Law* (n 34) 42.
[602] In turn, this new becoming of (international) law is owed to its ‘revolt against formalism’ and its desire to become ‘a practical vocabulary for politics’, David Kennedy, *Of War and Law* (n 34) 45.
[603] Anne Dienel, ‘When Humanitarians go to War: A European Road to “Civilized” Warfare?’ in Anne van Aaken, Pierre d'Argent, Lauri Mälksoo, and Justus Vasel (eds), *Oxford Handbook on International Law in Europe* (OUP 2023) 6.
[604] According to another Jean Pictet landmark essay, humanitarianism is ‘the universal social doctrine which aims at the good of all mankind’ and humanitarian law derives from this social doctrine, Pictet, 'The Principles of International Humanitarian Law' (n 289) 461.
[605] David Kennedy, *The Dark Sides of Virtue* (n 35) XIV.
[606] Matthew Hilton, Emily Baughan, Eleanor Davey, Bronwen Everill, Kevin O’Sullivan, and Tehila Sasson, ‘History and Humanitarianism: A Conversation’ (2018) 241 Past & Present 1, 17.
[607] Johannes Paulmann, ‘Humanity – Humanitarian Reason – Imperial Humanitarianism: European Concepts in Practice’ in Fabian Klose and Mirjam Thulin (eds), *Humanity: A History of European Concepts in Practice* From the Sixteenth Century to the Present (Vandenhoeck & Ruprecht 2016) 287.
[608] Hilton and others (n 606) 18-19.

Going to the core of the international humanitarian legal discourse, Jean Pictet, the influential drafter of the Geneva Conventions and probably the most paramount figure of the ICRC in the 20th century, explicated the meaning of humanitarianism in his commentary on the 'Fundamental Principles of the Red Cross', as follows:

> Humanitarianism is a doctrine which aims at the happiness of the human species, or, if one prefers, it is the attitude of humanity towards mankind, on a basis of universality.
>
> Modern humanitarianism is an advanced and rational form of charity and justice. It is not only directed to fighting against the suffering of a given moment and of helping particular individuals, for it also has more positive aims, designed to attain the greatest possible measure of happiness for the greatest number of people. In addition, humanitarianism does not only act to cure but also to prevent suffering, to fight against evils, even over a long term of time. The Red Cross is a living example of this approach.[609]

This definition of humanitarianism still informs how the ICRC and the International Red Cross and Red Crescent Movement understand and teach humanitarianism.[610] The current work, however, does not adopt such a static definition but understands humanitarianism as an internally contradictory argumentative structure.

Humanitarianism is something more than an all-encompassing umbrella term or just an abundance of humanitarianisms. If Humanitarianism were humanity's magnum opus, there would undoubtedly be numerous social groups vying to be the (hegemonic) one to write it. It is useful to conceptualise Humanitarianism as a vision that has attracted numerous suitors. In this sense, a variety of different and incongruous legal projects are acting as suitors of Humanitarianism. By identifying their own intellectual tradition, expressed in a particular legal project, with Humanitarianism, these suitor-projects borrow the legitimacy enjoyed by the latter and thus achieve universal legitimacy for themselves.

While at the end of the 19th century and at certain periods of the 20th century, the Anti-War tradition was ahead in the claim to Humanitarianism, today the hegemony of the Regulated

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[609] ICRC, 'The Fundamental Principles of the Red Cross: A Commentary' (ICRC, 14 December 1979) https://www.icrc.org/en/article/fundamental-principles-red-cross-commentary accessed 22 April 2025.

[610] For instance, the British Red Cross provides lessons for children aged 11 to 14 see Rob Bowden and Rosie Wilson, 'What is humanitarianism?' (British Red Cross, September 2017) https://www.redcross.org.uk/get-involved/teaching-resources/what-is-humanitarianism accessed 22 April 2025.

War tradition is nearly absolute.[611] The intellectual and professional sensibilities of our era, the era of the Regulated War tradition, exclude from the international legal imaginary any anti-war legal theorising and practice, rendering any vision for a war-free world as mere poetry.[612] In this regard, the ultimate argument of this thesis, which is presented in the form of an immanent critique, is that the humanitarian vision can be fulfilled only through the Materialist Pacifism project, understood as a philosophy of praxis.[613]

The tradition of Regulated War has historically found diverse legal expressions; it incubated different and often antagonistic legal projects. These antagonistic legal projects provide a plethora of discursive evidence of the contradictory international humanitarian legal argument. As will be elaborated further in Chapter 5, the legal discourse produced by the Regulated War tradition is defined by the oscillation between the rhetoric of aspiration and the rhetoric of limitation. This oscillation is the intellectual glue keeping the ICRC legal project and the Military legal project together under the Regulated War tradition.

That this intellectual tradition is not free of its internal contradictions was even more evident in the past. Its contradictions during its formative stages were of such nature that the mainstream legal view today is that historically there were two distinct intellectual traditions. The first one, established by the first Geneva Convention, coined as the 'Law of Geneva', which is the main ancestor of modern IHL in the official narrative of the ICRC, consists of rules aimed at safeguarding victims of war. According to the ICRC's casebook glossary section, the 'Law of Geneva' refers to 'a body of law that mainly deals with the protection of the victims of armed conflicts who are in the power of a party, i.e., non-combatants and those who no longer take part in hostilities'.[614] The second one, called 'Law of The Hague', encompasses provisions governing the conduct of hostilities.[615] Contrary to the 'Law of Geneva', it refers to 'a body of law mainly dealing with rules of conduct of hostilities and establishing limitations or prohibitions of specific means and methods of warfare. The term derives its name from the Hague Conventions of 1899 and 1907. It comprises rules protecting persons who are not in the power of a party to the

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[611] Moyn (n 1) 19-20.
[612] Horkheimer and Adorno (n 156) 5.
[613] Insofar as Humanitarianism offers a promise that is inevitably betrayed under the constraints of capitalism, it is precisely when judged against its own standards that the answer—and indeed the vindication—of the humanitarian aspiration emerges, as advocated by the Materialist Pacifist legal project. On the philosophy of praxis as a unified tradition of theory and action see Andrew Feenberg, T*he Philosophy of Praxis: Marx, Lukács and the Frankfurt School* (Verso 2014).
[614] ICRC, 'Law of Geneva' (ICRC Casebook) https://casebook.icrc.org/a_to_z/glossary/law-geneva accessed 22 April 2025.
[615] Bugnion (n 293).

conflict'.[616] The 'Law of Geneva' can be considered to be the main source of the ICRC legal project, while the 'Law of The Hague' can be deemed the root of the Military legal project.

These two different legal projects, which are the offspring of different institutional actors, share nowadays the same vernacular and are almost indistinguishable. In fact, the glossary section of the ICRC casebook provides a historical reconstruction that enables the 'Hague Law' to come under the label of humanitarianism, through its merge with the 'Geneva Law': '[w]ith the adoption of Additional Protocols to the 1949 Geneva Conventions that deal with rules on conduct of hostilities, the dichotomy between the terms "law of Geneva" and "law of the Hague" has largely lost its relevance'.[617] That Additional Protocol I to the Geneva Conventions (AP I) has brought about the convergence of these two branches of law has been argued in length by François Bugnion, then Director for International Law and Cooperation at the ICRC.[618] It is in this fashion that what was considered in the 20th century, even by the ICRC, as the Regulated War proper, that is the Law of the Hague, by the dawn of the 21st century was now combined with ICRC's legal project into one unified corpus. This unified corpus continued the identification of the Regulated War tradition with Humanitarianism, carrying forward the torch of its ideological process.

The scope of the discussion in this chapter is limited in the exposition of the ideological strategies that have cemented the hegemony of the Regulated War tradition, establishing its humanitarianism as the Humanitarianism in the modern international legal imaginary. The chapter posits that the main medium of these ideological strategies is discourse produced in the language of IHL. The legitimating role of IHL discourse has been argued persuasively by David Kennedy: '[l]aw is a strategic partner for military commanders when it increases the perception of outsiders that what the military is doing is legitimate'.[619] Ultimately, this chapter puts forward that the identification of 'Regulated War' tradition with Humanitarianism leads to the justification of the former via the appropriation of the legitimacy enjoyed by the latter.

The ideology critique that follows challenges the hegemony of the Regulated War tradition which is founded on the assumption that war is inevitable. This critique does not make an

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[616] ICRC, 'Law of The Hague' (ICRC Casebook) https://casebook.icrc.org/a_to_z/glossary/law-hague accessed 22 April 2025.
[617] Ibid.
[618] Bugnion (n 293).
[619] Of course, the same legal discourse can work on the opposite direction, David Kennedy, *Of War and Law* (n 34) 41.

epistemological argument in order to wake up the social actors of the Regulated War tradition from their false consciousness. Instead, it highlights that there are different vantage points from which one can contemplate the social relation of war and, most importantly, interact with it.[620] What seemed written in stone for Dunant and Obama was melting into air for Suttner and Luxemburg. If there were no different vantage points for distinctive social groups, there would be no need to discuss the issue of hegemony altogether.

This hegemony of the Regulated War tradition, measured by the high levels of legitimacy it enjoys, is the object of study of this chapter. What were the ideological strategies fostering its ascendancy and forging its hegemony? The chapter demonstrates that the legitimation of war contributed to the legitimation of the Regulated War tradition and vice versa. It begins with a focus on the naturalisation of war and then examines how the discursive strategy of rationalisation established Regulated War as the only available (possible) humanitarianism. Then, it delves into the dissimulating effect of Regulated War discourse, followed by an exposition of the discursive strategies of unification, fragmentation, universalisation, and simplification. Finally, the chapter concludes with an account of how the Regulated War discourse has normalised itself and expelled the Anti-War intellectual tradition into the realm of exception. The political effects of the operations of the 'Regulated War' tradition, which legitimise the deprivation of human life, are discussed in Chapter 6.

4.2 Ideology and War in the Regulated War Intellectual Tradition

4.2.1 Naturalisation

One of the most important discursive strategies is that of naturalisation. That is to present a contingent social construct as a given natural feature of life.[621] The first, overarching, naturalising move that enables the identification of the Regulated War tradition with Humanitarianism, is to present war as natural. In its more primaeval version, the naturalisation strategy puts forward a metaphysical, thus static and transhistorical, account of war, portraying it as an unavoidable peril of humankind. The misrecognition of the arbitrariness of the established social order, together with its discursive justification, conditions and informs the internalised sense of limits of those involved (e.g. governments,

[620] Susan Marks, *The Riddle of All Constitutions* (n 6) 23. See also Eagleton (n 8) 51.

[621] This chapter and the thesis as a whole operate on the fundamental assumption that 'there is no abstract "human nature", fixed and immutable' but 'that human nature is the totality of historically determined social relations', Antonio Gramsci, *Selections from the Prison Notebooks* (Lawrence & Wishart 1971) 331. See also Lukács who underlines that the starting point of bourgeois thought is 'an apologia for the existing order of things or at least the proof of their immutability', Lukács (n 240) 48.

the ICRC, NGOs, the military, and the general public). By extension, this sense of limits translates into their sense of reality and their aspirations.

The official Regulated War tradition autobiography, mainly produced by the ICRC itself, places its founder as the dramatis persona of the birth and development of war-related humanitarianism. Henry Dunant, a rich Genevan entrepreneur, the usual story goes, was in a business trip in Italy when he arrived in Castiglione delta Pieve on the same day, June 1859, that the Battle of Solferino was fought nearby.[622] Shocked by what he witnessed there, three years later he published his famous book 'A Memory of Solferino' where he advocated for ways to prevent or at least ameliorate the kind of suffering he witnessed in the Battle of Solferino.[623] This book serves as the manifesto and foundational document of the Regulated War tradition, as it outlines the historically specific circumstances in which it was created and its overall ambition.

A mere perusal of this narrative and proto-discourse of the Regulated War tradition brings to the fore the discursive strategy of naturalisation.[624] Dunant writes: 'since finally the state of mind in Europe combines with many other symptoms to indicate the prospect of future wars, the avoidance of which, sooner or later, seems hardly possible' why at least not endeavour to ameliorate war?[625] Before he repeats in a clear-cut naturalising fashion:

> Last of all-in an age when we hear so much of progress and civilization, is it not a matter of urgency, since unhappily *we cannot always avoid wars*, to press forward in a human and truly civilized spirit the attempt to prevent, or at least to alleviate, the horrors of war?[626]

Speaking of war as an unavoidable truth that nature imposes upon humanity is to adopt a static and, in the broader sense, a metaphysical perception of an unchangeable reality. At

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[622] See for example ICRC, '160 Years on the Side of Humanity: A Commitment that has Never Waned' (ICRC, 16 February 2023) https://www.icrc.org/en/who-we-are/history/160-years-humanity accessed 22 April 2025.
[623] Henry Dunant, *A Memory of Solferino* (ICRC 1959). In this short book Dunant proposed, inter alia, the creation of societies of trained volunteers in all countries for the purpose of helping to care for wounded combatants in time of war and the conclusion of an international treaty among nations to assure more humane care of the wounded.
[624] It can also be categorised under what David Kennedy describes as 'primitive legal scholarship' in David Kennedy, 'Primitive Legal Scholarship' (1986) 27 Harvard International Law Journal. In fact, this primitive legal discourse paved the path for the naturalisation of war in a time when natural law was still holding strong, largely, saving contemporary international lawyers from the embarassing position to have to come up with that claim themselves and allowing them to treat it as a truism.
[625] Dunant (n 623) 27.
[626] Ibid 30 (emphasis added).

the same time, it employs the discursive strategy of assumption by assuming what it requires to be demonstrated.[627] When Dunant professes that the avoidance of future wars is 'hardly possible', it forecloses the ability of humans to interact with the development of history and construct their social reality. Of course, humans do not simply construct the world as they please; they do not create history 'under self-selected circumstances, but under circumstances existing already, given and transmitted from the past'.[628] Still, humanity does make its own history.[629]

The discourse produced by the Regulated War tradition removes humanity from the driver's seat, or more precisely, places the train of human history on a track that is pre-determined by nature. In its most sophisticated version, Dunant's naturalising move implies some inherent quality of human nature that makes humans prone to war. This evil side of human nature can often be resisted, but it can never be truly suppressed. Thus, although 'unhappily', 'we cannot always avoid wars'.[630] This more sophisticated version is the most popular instantiation of the naturalisation argumentative move today.[631]

Nevertheless, it is worth noting that in the founding text of this tradition of thought, Dunant also engages in a stricto sensu metaphysical perception of war. 'Since it has actually been stated that "war is divine", according to Count Joseph de Maistre', Dunant writes, virtually adopting the view that war is Godsend, that belongs in the realm of the heaven and, in turn, that it is wiser for the human kind to concentrate in other earthly tasks, like alleviating suffering in war, rather than messing with the politics up in the sky.[632] It is already evident how this naturalising legal discourse is expelling the Anti-War intellectual tradition from the international legal imaginary to the realm of a noble quest to be vindicated, perhaps, only in heavens.

Dunant's naturalisation of war, which runs in the veins of the ICRC's legal project and, more broadly, the Regulated War tradition, culminates in the exclusion and marginalisation of opposing legal projects from the Anti-War intellectual tradition. Writes Dunant:

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[627] Marks, *The Riddle of All Constitutions* (n 6) 22.
[628] Karl Marx, 'The Eighteenth Brumaire of Louis Bonaparte' in Robert Tucker (ed), *The Marx-Engels Reader* (Norton & Company 1978) 595.
[629] Ibid.
[630] Dunant (n 623) 30.
[631] This narrative is largely, adopted and reproduced by the ICRC blindly till this day, see ICRC, '160 Years on the Side of Humanity' (n 622). Often is expressed in the language of the possible/impossible divide: 'we must also consider the future to make sure IHL rules and principles will continue to provide the best *possible* protection to persons affected by armed conflicts' Melzer, *A Comprehensive Introduction* (n 3) 9 (emphasis added).
[632] Dunant (n 623) 27.

> The hopes and aspirations of the Society of the Friends of Peace must be abandoned, like the dreams of the Abbé de St-Pierre and the noble aspirations of such men as the Count de Sellon.[633]

The implications of Dunant's naturalising argument are that the Anti-War tradition must be abandoned as mere 'hopes' and 'aspirations' that disregard and go contrary to human nature. In this way, any bold utterances against war are brushed away from the spectrum of the thinkable, reduced to the level of pure fiction or consigned to poetry.[634] Suttner attacked this naturalisation discursive strategy in its incunabula: 'if the champion of war, driven into a corner, has to confess that peace is more worthy of humanity, more rich in blessing, more favourable to culture, than war, he says "Oh, yes; war is an evil, but it is inevitable"'.[635] A detailed historical account of how the Regulated War tradition was welcomed by states and prioritised over Suttner's Idealist Pacifism legal project in the late 19th and early 20th century, which can also situate Dunant's discursive strategy, can be found in Moyn's work.[636]

Dunant's book 'A Memory of Solferino' is not simply an old instance of proto-discourse about IHL, but its discursive cornerstone. It amounts to a story that is constantly retold by the ICRC and most IHL textbooks. It is a book that is recited as a mantra capable of imposing itself as an unquestionable authority, shaping the contemporary IHL discourse. As an illustration, Cassese replicates the ICRC's official account almost verbatim, contending that:

> It was the idealism and the innovative, ingenious spirit of a single man which originated the idea to create an international institution with an exclusively humanitarian character aiming to mitigate as far as possible the suffering caused by war.[637]

Even Obama referred directly to the fact that Dunant won the first Nobel peace prize in his own Nobel peace prize acceptance speech, after naturalising war himself: 'war, in one

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[633] Ibid.
[634] Horkheimer and Adorno (n 156) 5.
[635] Suttner, *Lay Down Your Arms* (n 159) 197-198.
[636] Moyn (n 1).
[637] Antonio Cassese, 'Current Challenges to International Humanitarian Law' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Humanitarian Law* (OUP 2014) 3, 5.

form or another, appeared with the first man. At the dawn of history, its morality was not questioned; it was simply a fact, like drought or disease'.[638]

It is this kind of narrative structure and argumentative organisation that makes the identification of Regulated War tradition with Humanitarianism appear self-evident.[639] Any attempt to reclaim Humanitarianism for a legal project of another tradition, such as the Materialist Pacifism legal project, collides with the already established hegemonic perception of what is Humanitarianism and fails before even its articulated; falls short to a test which is to be examined by the standards and assumptions of the Regulated War tradition.[640] Any challenge to this hegemonic perception that identifies Regulated War with Humanitarianism is either immediately turned down as incomprehensible or is answered in the form of 'that goes without saying'.[641]

On closer examination, within legal academia, this hegemonic suppression of any challenge to the Regulated War tradition can manifest in particular forms, drawing on existing 'closed issues' of the international legal doctrine. For instance, a ready response to the challenge of the Anti-War tradition is the accusation that conflates the clear separation between jus in bello and jus ad bellum. This type of argument not only claims that the legal projects of the Anti-War tradition are operating on wrong premises, but all the more that they are not even legal and thus irrelevant to any legal discussion about international law and humanitarianism. It is not coincidental that contemporary IHL textbooks, when they break their silence and actually try to answer what IHL is, they always provide a narrow and technical definition.[642] It seems that hegemonic international humanitarian legal scholarship never considers it worthwhile to justify why human societies and legal professionals in the 21st century should spend so many resources promoting a set of rules that licence the killing of humans, with the declared goal of alleviating the suffering of those involved, instead of investing these resources in the struggle to address its root causes and end war itself.

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[638] Barack Obama, 'Remarks by the President at the Acceptance of the Nobel Peace Prize' (The White House, 19 December 2009) https://obamawhitehouse.archives.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize accessed 23 April 2025.

[639] Marks, *The Riddle of All Constitutions* (n 6) 22.

[640] For Eagleton, 'a mode of domination is generally legitimated when those subjeted to it come to judge their own behaviour by the criteria of their rulers', Eagleton (n 8) 55.

[641] Ibid 59.

[642] IHL, according to the ICRC, 'comprises those rules of international law which establish minimum standards of humanity that must be respected in any situation of armed conflict'. Melzer, *A Comprehensive Introduction* (n 3) 17. According to Fleck, 'the term 'international humanitarian law' (IHL) is of relatively recent origin and does not appear in the Geneva Conventions of 1949' and 'comprises all those rules of international law designed to regulate the treatment of persons—civilian or military, wounded or active—in armed conflicts', Dieter Fleck, *The Handbook of International Humanitarian Law* (OUP 2013) 12.

Another naturalising move, evident in the Regulated War discourse, is characterised by the employment of dichotomous reasoning.[643] In this way, Regulated War discourse implies that the only alternative to Regulated War thinking is the unregulated, total war of the past. This narration follows the pattern of progression from total war towards humane war, to colour any challenge to the Regulated War tradition as a danger of returning to the pre-humanitarian past. Here, the linguistic construction naturalising war and thus legitimating the Regulated War tradition takes the form of a narrative which 'displays a certain logic'.[644] This logic is that of progression from the unregulated war to the Regulated War. The Anti-War tradition does not fit in the logic of this narrative. For an intellectual tradition to be recognised as Humanitarianism, it only has to be not savage, not non-regulated. Similarly, the narrative form employed by the Regulated War tradition has an 'actantial structure'.[645] In this narrative schema, developed by Greimas, the Regulated War tradition interpellates the involved social actors, for instance, states or social classes, who are the subjects seeking the object of Humanitarianism, by presenting itself as the heroic musketeer against the opponent of total war.[646] The Regulated War tradition not only establishes a rigid role constellation, positioning itself as the saviour, but also seeks to misrepresent the extent of power held by the subject, thereby discouraging any shift towards alternative intellectual traditions of humanitarianism.

Against this background, the variety of existing forms of humanitarianism, of the legal projects in the Anti-War tradition, becomes difficult to register while 'the inadequacy of those available forms [like that of Regulated War] even more difficult to assert'.[647] Contrary to the assumptions of the Regulated War tradition, this thesis proceeds on the premise that war is not inevitable. An examination of the historical specificity of war, makes it possible to imagine a future society that overcomes it. At the same time, the current capitalist society seems to be very much predicated, or at least its conditions of reproduction are structurally embedded, on war as a generalised form of inter-state or intra-state violence.[648] By affirming these conditions of reproduction, the Regulated War

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[643] Marks, *The Riddle of all Constitutions* (n 6) 22.
[644] Thompson, *Studies in the Theory of Ideology* (n 144) 136.
[645] Greimas is cited in ibid.
[646] For further discussion of the 'actantial structure' see Julien Greimas, *Structural Semantics: An Attempt at a Method* (University of Nebraska Press 1983) and Julien Greimas, *On Meaning: Selected Writings in Semiotic Theory* (Pinter 1987).
[647] Marks, *The Riddle of all Constitutions* (n 6) 67.
[648] 'Neither the imposition of economic imperatives nor the everyday social order demanded by capital accumulation and the operations of the market can be achieved without the help of administrative and coercive powers much more local and territorially limited than the economic reach of capital' Ellen Meiksins Wood, *Empire of Capital* (Verso 2005) 155. Similarly, David Harvey notes that 'the state, with its monopoly

tradition cannot but become an administrative and technocratic language. The humanitarianism of the Regulated War tradition is necropolitical.[649] Its concealment of the possibility of a war-free society naturalises war and makes the regulated war project purportedly a self-evident good: the laws of war constitute 'the laws of humanity and the dictates of public conscience'.[650]

One of the few contemporary voices that have diagnosed this discursive strategy and openly resisted it was Bedjaoui, when he was still a judge at the ICJ:

> The San Francisco Charter [promised] to 'save succeeding generations from the scourge of war'. Much still remains to be done to exorcise this new terror hanging over man, reminiscent of the terror of his ancestors, who feared being struck by a thunderbolt from the leaden, stormladen skies. But twentieth-century man's situation differs in many ways from that of his ancestors: he is armed with knowledge; he lays himself open to self-destruction by his own doing; and his fears are better founded. Although endowed with reason, man has never been so unreasonable […].[651]

In this manner, Bedjaoui acknowledges that the terror of a nuclear war can be equivalent in magnitude to a natural disaster. The difference, however, is that war is humankind's 'own doing'. In this sense, war is an act of unreasonableness. Bedjaoui here follows the steps of Suttner, who in her landmark book asks:

> How is it that men have created for themselves other dangers arbitrarily devised by themselves, and thus of their own will and in pure wantonness thrown into artificial eruption the volcanic soil on which the happiness of this life is founded? It is true that people have also accustomed themselves to think of war too as a natural phenomenon,

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of violence and definitions of legality, plays a crucial role' in the process of what he calls 'accumulation by dispossession', David Harvey, 'Neoliberalism as Creative Destruction' (2007) 610 Annals of the American Academy of Political and Social Science 35.

[649] See, Sara Kendall and Stuart Murray, 'Trump's Law: Toward a Necropolitical Humanitarianism' (Critical Legal Thinking, 10 April 2017) https://criticallegalthinking.com/2017/04/10/trumps-law-toward-necropolitical-humanitarianism/ accessed 22 April 2025. See also, Elliot Dolan-Evans, 'The Wretched of Gaza: the Law and Political Economy of Dehumanisation (Overland, 20 October 2023) https://overland.org.au/2023/10/the-wretched-of-gaza-the-law-and-political-economy-of-discourses-in-dehumanisation/ accessed 22 April 2025. The foundational text of necropolitics is of course Achilles Mbembé, 'Necropolitics' (2003) 15 Public Culture 11.

[650] Convention (II) with Respect to the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) 187 CTS 429 (Preamble, 'Martens Clause').

[651] Declaration of Judge Bedjaoui, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996, ICJ Rep 1996, para 3.

> and to speak of it as eluding calculation in the same category with the earthquake or drought and therefore to think of it as little as possible.[652]

The realisation that war is not a natural phenomenon is an emancipatory moment. As a moment of interrogating one's own position in relation to reality, it is the first victory of a counter-hegemonic ideology critique. Self-reflection, as Marks insightfully persists, is the first step for change.[653]

This section has elaborated on how the Regulated War tradition is employing the discursive strategy of naturalisation and a set of other sub-strategies in order to sustain the legitimation of war and reproduce itself. The naturalisation of war is achieved through certain narrative structures and argumentative constructions. This legitimation, achieved through the naturalisation of war, is not the sole form of legitimation; in theory, there is still space left to argue in favour of the Regulated War tradition without necessarily assuming that war is an inevitable symptom of human nature.[654] The following section 4.2.2 demonstrates that the naturalisation of war is always a form of rationalising war, but rationalisation does not always require naturalisation to succeed in the legitimation of war.

Nevertheless, the centrality of naturalisation in ideology highlights that ideology is a 'system of representations which serves to sustain existing relations of class domination by orientating individuals towards the past rather than the future'.[655] The backwards-looking outlook of ideology cannot go further in the past than tracing the problem of war all the way back to human nature. The naturalising version of legitimation is not only its most profound expression but is also particularly critical for maintaining the hegemony of the Regulated War tradition. Making what seemed to appear as spontaneous and self-evident for Dunant and Obama equally self-evident and inevitable in the eyes of the civilians in Ukraine and Palestine is a cornerstone preventing the collapse of the hegemony of the Regulated War tradition under the weight of subalterns' practical consciousness.[656] This crucial ideological process of naturalisation operates in close affinity with other discursive

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[652] Suttner, *Lay Down Your Arms* (n 159) 129.
[653] Marks, *The Riddle of All Constitutions* (n 137).
[654] Eagleton (n 8) 55.
[655] Thompson, *Ideology and Modern Culture* (n 7) 41.
[656] The antagonism between official ideology and the consciousness born out of practical activity, which is grasped in William's concept of Hegemony, is highlighted lucidly by Gramsci: 'theoretical consciousness can indeed be historically in opposition to his [worker] activity. One might almost say that he has two theoretical consciousnesses (or one contradictory consciousness): one which is implicit in his activity and which in reality unites him with all his fellow workers in the practical transformation of the real world; and one, superficially explicit or verbal, which he has inherited from the past and uncritically absorbed', Gramsci (n 621) 641.

strategies. This section, therefore, passes the torch of critique, to the next one devoted on the ways the Regulated War tradition is rationalised.

4.2.2 Rationalisation

The naturalisation discursive strategy sets in motion a set of other discursive strategies. The most immediate is the strategy of rationalisation. Notwithstanding the synergy between the discursive strategies of naturalisation and rationalisation, the latter may appear without or even in contradistinction to the former. This is most visible in the debates within the field of international relations. For instance, the schools of human nature realism and structural realism both rationalise war as inevitable, but only the former engages systematically in its naturalisation.[657] For human nature realists, politics 'like society in general, is governed by objective laws that have their roots in human nature'.[658] For those realists, war is a manifestation of an innate drive of human beings towards death or of their inherent evil aspect as fallen creatures.[659] Instead, the structural realists contend that the absence of a global government leads to an anarchic structure at the international plane that renders 'contact without at least occasional conflict' as 'inconceivable'.[660] Within these structural realists, offensive realism posits that great powers are confronted with 'powerful incentives' that make them 'think and act offensively with regard to each other'.[661] For offensive realism, it is not human nature that leads to war but the fundamental need of states to survive, which generates three patterns of state behaviour: 'fear, self-help, and power maximization'.[662] Neorealism as a whole emphasises that states are rational actors and defend the idea that war is a 'rational means of securing the objectives of states'.[663] The dialogue between realists and neorealists highlights the continuities and discontinuities between the naturalisation and rationalisation of war. This section builds on these dynamics and exposes the rhetorical devices through which war is rationalised by the Regulated War tradition.

The 'structure of rationalisation' tends to operate on two levels, resembling the structure of metaphor.[664] A particular conceptual framework, such as humanitarianism, serves as a surrogate for the Regulated War intellectual tradition, either by virtue of its portrayal as an

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[657] Chris Brown and Kirsten Ainley, *Understanding International Relations* (Palgrave 2005) 92.
[658] Morgenthau (n 160) 4.
[659] For an early comprehensive account see Kenneth Waltz, *Man, the State, and War: A Theoretical Analysis* (Columbia University Press 2001) 16–41.
[660] Kenneth Waltz, *Theory of International Politics* (Addison Wesley 1979) 102.
[661] John Mearsheimer, *The Tragedy of Great Power Politics* (WW Norton 2001) 32.
[662] Ibid.
[663] Robert Gilpin, *War and Change in World Politics* (CUP 1981) 219.
[664] Eagleton (n 8) 52.

unavoidable course or as the optimal among extant alternatives.[665] IHRL and especially IHL discourse rationalises the promotion of Regulated War on the grounds of what is possible: the sole way to affirm Humanitarianism is through the acceptance of its possible version, the humanitarianism of the Regulated War tradition. Through the exclusion of the humanitarianism of the Anti-War tradition from the international legal imaginary as wishful, utopian thinking that disregards the unfortunate realities of nature, Regulated War thought is presented as the only remaining and available intellectual tradition, the only heir with a legitimate claim to Humanitarianism's throne. Of course, as it will be further elaborated in Chapter 5, the Regulated War tradition is not without its own internal contradictions. Nevertheless, these internal contradictions have rarely undermined the ideological process of identifying the Regulated War tradition with Humanitarianism.

In an attempt to sketch the workings of the rationalising move, one can start from identifying the original aspiration of Humanitarianism. The humanitarian vision, which emerged during the Enlightenment, embodies a developmental ethos characterised by an earnest aspiration toward the continuous advancement and safeguarding of human life. Any legal discourse produced under the humanitarian vision, including discourse produced by the Regulated War tradition, affirms, at least as a starting point, that Humanitarianism expresses and serves this aspiration. The rationalisation strategy leads to the reduction of this initial aspiration into its possible (and often minimum) variation: rationalising, in this context, is the exercise of identifying the humanitarian vision with an aspiration constructed as its p*ossible* alternative. This alternative is a compromise between the aspiration and what is perceived as possible at a given time and by a given social group. Then the possible alternative, instead of being something less than what the humanitarian vision is, becomes the vision itself. The prevailing possible aspiration is now the final thesis. This final thesis of the *possible humanitarianism* is the intellectual tradition of Regulated War, that is known today as humanitarianism, claiming the capital H. International humanitarian legal discourse is the medium of this rationalising process. In the words of the ICRC legal project: 'we must also consider the future to make sure IHL rules and principles will continue to provide the best *possible* protection to persons affected by armed conflicts'.[666]

The rationalisation discursive strategy is so omnipresent in the modern international humanitarian argument that describing the regulation of war as the only possible

[665] Ibid.
[666] Melzer, *A Comprehensive Introduction* (n 3) 9 (emphasis added).

humanitarianism has acquired the level of truism. Henry Dunant had set the rhythm of this rationalising move: 'I do not touch upon the formidable problem of the legality of war nor, given the present state of things, upon the *impossible* dream of peace reigning universally'.[667] The preamble of the Hague Convention of 1899 lays down this reduced version of Humanitarianism, the version of possible humanitarianism declaring 'the desire to diminish the evils of war so far as military necessities permit'.[668] As exemplified in Chapter 3, the Regulated War tradition has been dancing to this rhythm's music since then.

The rationalising move strives to solidify naturalisation's exclusion of any ideas of abolishing war altogether. The premise of the rationalising argument is that the reasonable way of dealing with war, since it cannot be avoided, is to conduct war in the most 'efficient' way, with minimising human casualties. This humanitarian efficiency is professed already by Locke: 'a war doesn't give any right that isn't *needed* for the war to gain its objective' and its evident throughout international humanitarian legal discourse.[669] The outcome of this rationalising process is that priority should be given to 'humanising' the way war is conducted instead of focusing on its abolition.[670] As war is rationalised in the form of 'humane war', a parallel ideological process ensues, attempting to conceal the reasons behind the assumption of the inevitability of war or the sole availability of a humanitarianism that merely aspires to regulate war. This ideological process is the object of the next section.

4.2.3 Mystification

Mystification is a discursive strategy in which relations of domination are 'obscured, masked, or denied'.[671] In this way, imperialist relations of domination leading to war may be altogether rejected as unfounded or obscured both regarding their underlying cause and the extent of their detrimental influence. Mystification, however, also operates on another level. It not only conceals the relations of domination, but also endeavours to conceal this process of concealment.[672] This is achieved with a set of 'supra-sentential linguistic constructions'.[673]

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[667] Henry Dunant, 'La Charite sur les champs de bataille, Geneva' (1864) quoted in Andre Durand, 'The development of the Idea of Peace in the Thinking of Henry Dunant' (1986) 250 IRRC 17 (emphasis added).
[668] Preamble of the 1899 Hague Regulations (n 650).
[669] Rousseau (n 158) Book I Section 4. See also the St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (signed 11 December 1868, entered into force 11 December 1868) (1868–69) 138 CTS 297.
[670] See Moyn (n 1) 13.
[671] Marks, *The Riddle of All Constitutions* (n 6) 20.
[672] Thompson, *Studies in the Theory of Ideology* (n 144) 136-137.
[673] Ibid 136.

Marks identifies 'straightforward *inversion'* as one of the main discursive sub-strategies of mystification.[674] With this discursive sub-strategy, the Regulated War tradition, not only does not paint itself as an intellectual tradition falling short of the aspiration of the humanitarian vision, but instead it claims to be the best version out of the available humanitarianisms or even that they are the only one fulfilling the aspiration of the humanitarian vision. With the strategy of inversion, the Regulated War tradition is perceived as Humanitarianism itself, instead of a tradition undermining Humanitarianism. Dunant, again, had set the stepping stone for the inversion discursive sub-strategy employed in the Regulated War tradition:

> It was indeed the horror of war which inspired in me, a mere individual, this burning determination which, thanks to the world-wide help of many people committed to the cause of humanity, led not only to the accomplishment of an enormous international undertaking but also to the instilling in them of a religious horror of war and thereby converting them into friends of peace.[675]

By acknowledging the 'horror of war' and claiming that the aspiration to alleviate part of the suffering it causes is 'converting' 'many people committed to the cause of humanity' 'into friends of peace', Dunant echoes the inversion strategy of the Regulated War tradition till this day. The claim put forward here is that the Regulated War humanitarianism is not falling short of Humanitarianism, but instead that, through its 'realism', becomes the most suitable humanitarianism to achieve its aspiration.[676] Instead of legitimising war, Dunant argued that his humanitarianism was attacking war, albeit in a 'roundabout way'.[677] Contrary to what has been argued by Moyn,[678] among others,[679] that the legal discourse about a 'humane' way of conducting warfare is legitimising war, the operative assumption of the Regulated War tradition is that it contributes in a 'roundabout way' to the de-legitimation of this 'senseless turmoil' of war.[680] The Regulated War tradition is legitimising war by the presumption that avoiding war 'seems hardly possible'.[681] The mystification discursive strategy of the Regulated War tradition, in combination with the

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[674] Marks, *The Riddle of All Constitutions* (n 6) 20 (emphasis in the original).
[675] Letter of Henry Dunant to Baroness Bertha von Suttner (1896) quoted in Durand (n 667) 18.
[676] The Regulated War tradition still operates on the same assumptions, see for instance how these excerpts of Dunant are discussed in ibid 17-19.
[677] Ibid 19.
[678] Moyn (n 1).
[679] See the discussion of the literature in Chapter 1, for instance Escorihuela (n 79) and Berman (n 88).
[680] Dunant quoted in Durand (n 667) 19.
[681] Dunant quoted in ibid 17.

naturalisation and the rationalisation discursive strategies, achieves the concealment of the relations of domination of imperialism that deprive the international legal imaginary of the possibility for peace, by inverting its legitimation of war and presenting it as the opposite. The tradition of thought whose very birth echoes the death of the possibility of a war-free present under capitalism endeavours to be perceived as Humanitarianism.

Another discursive sub-strategy of mystification is displacement. The sub-strategy of displacement operates closely with the rationalisation discursive strategy and conceals the real qualities of the Regulated War tradition by transferring the qualities of Humanitarianism to the former.[682] In this way, the permissive qualities of Regulated War tradition, allowing the deprivation of life of combatants but also civilians as 'indirect civilian casualties' is downplayed. Instead, there is an overemphasis on the promise of the Regulated War tradition to the restriction of the means and methods of warfare and the protection of certain categories of persons, portrayed to be fulfilling the high aspiration of humanitarianism.

Finally, one of the strongest discursive sub-strategies of concealing the process of concealment is that of the 'performative contradiction'.[683] The linguistic construction of this strategy sets what is said in opposition with the situation or 'act of utterance itself'.[684] The concept of humane war is an example of this performative contradiction in which what is said is in opposition to the underlying situation. This contradiction is not merely traced in the paradoxical nature of the phrase but moves a step further. By assuming the possibility of a war conducted in a humane way, the Regulated War tradition negates peace as the only humane condition. Even more, in conjunction with the naturalisation and rationalisation discursive strategies, it presents humane war as the only humane condition, thus eliminating any influencing elements of the Anti-War tradition still available, together with any intellectual tools which can reveal this process of naturalising war. Simultaneously, the Regulated War tradition employs several other discursive strategies to reinforce the legitimation of war to sustain the capitalist social relations and also reproduce itself.

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[682] Marks, *The Riddle of All Constitutions* (n 6) 20.
[683] Eagleton (n 8) 24.
[684] Ibid. See also Marks, *The Riddle of All Constitutions* (n 6) 22.

4.2.4 Unification, Fragmentation, Universalisation, Simplification

By this point, it is already evident that the different discursive strategies are intertwined and mutually reinforce each other.[685] At the same time, they may mystify and legitimate war and in extension legitimate the Regulated War tradition in contradictory ways. As Thompson underscores, 'ideology operates, not so much as a coherent system of statements imposed on a population from above, but rather through a complex series of mechanisms whereby meaning is mobilized, in the discursive practices'.[686] This is the case with the two ostensibly opposed discursive strategies of unification and fragmentation.[687]

Using the discursive strategy of fragmentation, the Regulated War tradition presents individuals with the same social interests or in similar situations as distinct entities.[688] For instance, civilians taking a direct part in hostilities lose their civilian protection and thus are treated by the IHL differently from the rest of the civilians.[689] However, often, civilians directly taking part in hostilities are persons suffering under military occupation or a colonial regime, like every other civilian in the same state. The international humanitarian legal discourse that legitimises their targeting on the basis of an arbitrary judgement of the degree of their participation in hostilities legitimises the war waged against them through presenting their situation as different to that of the rest civilians. The ideological effect of the discursive fragmentation of the legal category of civilians on the basis of the degree of their resistance becomes clearer in the comparison of a civilian in the West Bank of Palestine attacking the occupation forces with a sling and a civilian carrying RPGs to be used by a fighter of a non-state armed group.[690] Leaving aside the political effects of this fragmentation for the endangerment of human life itself, which will be discussed in Chapter 6, the discursive strategy of fragmentation can legitimise the killing of civilians who are living under the same conditions and have the same social interests as those that the Regulated War tradition promises to protect, which ultimately legitimises war itself.

Mutatis mutandis, this discursive strategy is employed in the fragmentation of the people of a state that is the victim of an act of aggression through the legal construction of the principle of distinction. The ICRC Commentary to AP I reads: 'the Protocol adopted the

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[685] Thompson, *Studies in the Theory of Ideology* (n 144) 131.
[686] Thompson, *Ideology and Modern Culture* (n 7) 63.
[687] Marks, *The Riddle of All Constitutions* (n 6) 20.
[688] This is referred as the 'differentiation' strategy of symbolic construction in Thompson, *Ideology and Modern Culture* (n 7) 65.
[689] See Melzer, *Interpretative Guidance* (n 31). See also more generally the discussion in Chapter 3.2.1. of this thesis.
[690] Note that the concept of direct participation in hostilities 'cannot refer to conduct occurring outside situations of armed conflict, such as during internal disturbances and tensions, including riots' ibid 41.

only satisfactory solution, which is that of a negative definition, namely, that the civilian population is made up of persons who are not members of the armed forces'.[691] Fragmenting the people of a state that is the victim of aggression into combatants and civilians is not the only satisfactory solution, and, as argued by Schabas, it is not a satisfactory solution at all.[692] Schabas resists this fragmentation by employing human rights vocabulary to argue that in a war of aggression, the deprivation of life of both civilians and combatants would amount to a violation of the right to life. Starting from the political effects of the discursive strategy of fragmentation, Schabas reverse-engineered its legitimating effects, ending with a counter-hegemonic strike against war itself. And since any strike against war is a strike to the one and only horcrux of the Regulated War tradition, making explicit the discursive strategy of fragmentation is damaging its legitimation.

Unification as a discursive strategy moves in the opposite direction from fragmentation. It consists of linguistic constructions which assume the unified interests of distinctive groups of persons.[693] The unificatory discourse of the Regulated War tradition operates on two levels. At the first level, it assumes the unity of interests of combatants, by obscuring the different class positions of combatants either within the same side of the war or between the combatants of the opposing belligerent parties. Similarly, the Regulated War discourse assumes the unified interests of civilians.[694] Against this unification, the Materialist Pacifism legal project has persistently emphasised 'cases of fraternisation between the soldiers of the belligerent nations even in the trenches'.[695]

At the second level, the unificatory linguistic constructions of the Regulated War tradition assume a unified vantage point in which Obama or a NATO military legal advisor sees the world in the same way as a working-class American or a subaltern international lawyer. When Obama proclaimed that sometimes 'war is necessary', while holding the Nobel peace prize,[696] he was not acting under false consciousness. In the eyes of the leader of the biggest imperialist power in the world, war is indeed necessary.[697] What the discursive strategy of unification takes for granted is that every social actor wishes to reproduce capitalism and therefore shares the same static view of the world. The subaltern, however, does not approach war from the same vantage point. A subaltern adopting the assumptions

[691] Sandoz, Swinarski, and Zimmerman (eds) (n 319) para 1913 (emphasis added).
[692] Schabas, 'The Right to Life in Armed Conflict' (n 578) 21-48. Chapter 3.10.2 of this thesis elaborates further on Schabas position.
[693] Marks, *The Riddle of All Constitutions* (n 6) 20.
[694] Cf. Kennedy, *The Dark Sides of Virtue* (n 35) 270.
[695] Vladimir Lenin, *Socialism and War* (n 210) 315.
[696] Obama, 'Remarks by the President at the Acceptance of the Nobel Peace Prize' (n 638).
[697] Wood, (n 648) 155.

of the Regulated War discourse is indeed acting in a false consciousness. The subaltern, by becoming a subject of history,[698] can transform material reality and render the aspiration of peace possible. In the Marxian formulation, this is the duty of the subalterns: 'the union of the working classes of the different countries must ultimately make international wars *impossible*'.[699] How the lower classes came to reproduce the unificatory linguistic structures of the Regulated War tradition will be elaborated below in the discussion of the discursive strategy of universalisation. This part of the section focused only on the second operational level of unification since the focus is limited to the way this discursive strategy has legitimised war and thus the Regulated War tradition, enabling its claim to Humanitarianism. The first level of operation is examined in more detail in Chapter 6.

Closely connected with the second operational level of unification is the discursive strategy of universalisation. The goal of this strategy is to universalise an initial assumption or aspiration by convincing other social actors to perceive and adopt it as their own. This discursive strategy employed by the Regulated War intellectual tradition universalised the bourgeois, western, 'civilised' assumption that war is inevitable by extending it not only upon workers of the imperialist states but also to the emerged third world as well. With this discursive strategy, the Regulated War tradition, from a Eurocentric tradition of thought, institutionally founded in Geneva and the Hague, was universalised as Humanitarianism itself.[700] Today, the ICRC has grown into the International Red Cross and Red Crescent Movement, with national societies in almost every state in the world. One of the seven fundamental principles of the movement is universality: 'universality of suffering requires a universal response'.[701] This hegemony of Regulated War tradition is also spread within the human rights language: the ECtHR has professed time and time again that the rules of IHL 'play an indispensable and *universally* accepted role in mitigating the savagery and inhumanity of armed conflict'.[702] The universal ratification of the Geneva Conventions is also a testament to the universalisation of the Regulated War tradition.

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[698] Lukács (n 240).
[699] Karl Marx, 'Record of Speech by Karl Marx On the Attitude of The International Working Men's Association To the Congress of the League of Peace and Freedom' *Marx and Engels Collected Works* vol 20 (Lawrence & Wishart 2010) 426 (emphasis added).
[700] See also Mégret (n 99) 311.
[701] ICRC, 'The Fundamental Principles of the International Red Cross and Red Crescent Movement' (ICRC, August 2015) https://www.icrc.org/sites/default/files/topic/file_plus_list/4046-the_fundamental_principles_of_the_international_red_cross_and_red_crescent_movement.pdf accessed 22 April 2025.
[702] See inter alia, Varnava and Others v Turkey (n 528) para 185 and Ukraine and the Netherlands v Russia (n 550) para 717 (emphasis added).

The Regulated War tradition, albeit a tradition founded by the synergy of bourgeois philanthropists and the imperialists states, achieved to 'present its interest as the common interest of all the members of society, that is, expressed in ideal form: it has to give its ideas the form of universality, and present them as the only rational, universally valid ones'.[703] The Martens Clause, which called for the application of the principles of international law 'as they result from the usages established among *civilized peoples*',[704] once explicitly exclusionary and giving away the origins of the Regulated War tradition as a whole, it has become today a common reference for those attempting to articulate a protective interpretation of IHL. This is captured in the words of Pictet:

> International humanitarian law in particular has this universal vocation, since it applies to all men and countries. In formulating and perfecting this law, [...] the International Committee of the Red Cross has sought precisely this common ground and put forward rules acceptable to all because they are fully consistent with *human nature*. Today the universality of standards governing the behaviours of nations are recognized, and no longer is there belief in the supremacy of any one civilization. When different customs, ethics and philosophies are gathered for comparison, and when they are melted down, their particularities eliminated and only what is general extracted, one is left with a pure substance which is *the heritage of all mankind*.[705]

With this passage, Pictet is perpetrating two main ideological moves. Firstly, he employs the ideological strategy of naturalisation to claim that IHL, as it was formulated with the Geneva Conventions, is 'acceptable to all' because it is 'fully consistent with human nature'. In this fashion, he conceals the Western origins of IHL and the Regulated War tradition more broadly, paving the path for the universalising manoeuvre. Secondly, he uses the discursive strategy of universalisation to claim that IHL is 'the heritage of all mankind' extracted from a process of intellectual comparison rather than a process of imperialist violence.

The discursive strategy of universalisation is often facilitated by the discursive strategy of simplification. With linguistic constructions that simplify the phenomenon of war, the

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[703] Marx and Engels, 'The German Ideology' (n 136) 60.
[704] See Preamble of the 1899 Hague Regulations (n 650). An overview of the work of Martens is provided by Vladimir Pustogarov, 'Fyodor Fyodorovich Martens (1845-1909) — A Humanist of Modern Times' (1996) 312 IRRC 300-314. See also Rupert Ticehurst, 'The Martens Clause and the Laws of Armed Conflict' (1997) 317 IRRC.
[705] Jean Pictet, 'Humanitarian Ideas Shared by Different Schools of Thought and Cultural Traditions' in Henry Dunant Institute, I*nternational Dimensions of Humanitarian Law* (Brill Nijhoff 1988) 3-4 (emphasis added).

Regulated War tradition provides a 'reductive account of social life' while removing the 'unevenness and complexity of social process' from the frame.[706] This reductive dimension of the Regulated War tradition is best exemplified by reference to its foundational text. When Dunant professes lightly that 'since unhappily we cannot always avoid wars, to press forward in a human and truly civilized spirit the attempt to prevent, or at least to alleviate, the horrors of war' it oversimplifies the question of peace and jumps directly to a way of managing the horrors of war. In this way, he also leaves unarticulated the social processes entangled with the historical phenomenon of war and foremost the (inter)active role of humans in sustaining its conditions of reproduction.

Suttner, again resisted this discursive strategy from its first steps: 'it is true that people have also accustomed themselves to think of war too as a natural phenomenon, and to speak of it as eluding calculation in the same category with the earthquake or drought and therefore *to think of it as little as possible*'.[707] Here Suttner identifies a link between the discursive strategies of naturalisation and simplification which persists till this day. By presenting war as a natural phenomenon, the Regulated War tradition is enabled to simplify the question of war and peace and summarily reject the latter by thinking of it 'as little as possible'. In any case, as reductive were the declarations of Dunant about the unavoidability of war, so were the proclamations of Suttner for peace merely through 'an alliance of states' or 'arbitration courts'.[708] Unlike the latter, however, it was Dunant who laid the foundation for the hegemony of the Regulated Tradition.

4.2.5 Normalisation

This chapter has elaborated on the discursive strategies employed by the Regulated War tradition to maintain its hegemony. While this hegemony appears indisputable, still, hegemony is a dynamic lived practice which is constantly renewed and challenged.[709] The tensions of this continuous antagonism are ideologically channelled by the hegemonic Regulated War tradition, aiming to neutralise them or, at the very least, strip them of any revolutionary edge. The discursive strategy of normalisation is a form of this ideological channelling: the limited counter-hegemonic ideas that manage to enter the narrow horizon of international law are then pushed to its margins, as falling outside the proper way of international legal thinking. In this sense, normalisation is one of the very last gatekeepers of hegemonic ideology by neutralising counter-hegemonic ideas as mere exceptions that

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[706] Marks, *The Riddle of All Constitutions* (n 6) 21.
[707] Suttner, *Lay Down Your Arms* (n 159) 129 (emphasis added).
[708] Ibid 198.
[709] Williams (n 140) 112.

prove the hegemonic rule.[710] The construction of what is normal and what is an exception is a deeply ideological weapon in the hands of the social actors of the Regulated War tradition.

The previous chapter has gone into certain detail to explicate that the Regulated War tradition has become hegemonic in the international humanitarian legal discourse. This implies that, at the very least, the Regulated War intellectual tradition has managed to project itself as the normal way of legal thinking about humanitarianism, marginalising the Anti-War tradition of thought into the realm of the exception. This derivative normalisation of the Regulated War tradition is not a one-way street. The Regulated War tradition is also employing the ideological strategy of normalisation in order to cement and reproduce its hegemony. One of the strongest testaments to this is how the HRC General Comment 36 frames the right to life in times of war:

> Use of lethal force consistent with international humanitarian law and other applicable international law norms is, in general, not arbitrary.[711]

As explained in Chapter 3, here the HRC gives the keys to the right to life to IHL language but leaves open a small window of arbitrariness only for cases of wars which are contrary to the international law on the use of force. While this formulation of the HRC, which establishes as a general rule that lethal force which conforms with IHL is not arbitrary, may appear to be more protective than the formulation of the ICJ,[712] however, it is still reversing the general rule of prohibition of use of force established by Article 2(4) of the UN Charter. IHL becomes the privileged space that enables the articulation, even in human rights vernacular, of the reversal of what is normal and what is the exception under the *jus ad* bellum. By establishing IHL as the normal legal toolbox to deal with lethal force HRC's General Comment 36 is normalising the Regulated War tradition of thought.

This normalising move of the HRC is not happening in a legal vacuum. An overarching normalising manoeuvre is the ostensibly absolute distinction between jus in bello and jus ad bellum. This distinction has contributed to the expulsion of the Anti-War tradition of thought from the normal scope of what is considered to be the international legal expression of humanitarianism. This is evident by humanitarian organisations' attitude

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[710] See, inter alia, Marks, *The Riddle of All Constitutions* (n 6) 19.
[711] UN Human Rights Committee, 'General Comment No 36' (n 572) para 64.
[712] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgement) 2005, ICJ Rep 2005.

towards initiatives of the Anti-War intellectual tradition: 'We believe that we are most effective as a human rights organization if we do not opine on issues of jus ad bellum. […] This neutrality enables us, without taking sides, to focus on the conduct of armed forces in war, or jus in bello'.[713] Only exceptionally does jus ad bellum enter the realm of humanitarianism, often for the wrong reasons, as exemplified by the legal debates about humanitarian intervention.[714] This disruption of the continuum of real life in times of war with an artificial construction of two distinctive legal regimes allows international law to prohibit war in the realm of ideas but sustain the Regulated War tradition in material life.

4.3 Conclusion

The main goal of this chapter was to explicate the discursive strategies that contributed to the rise of the Regulated War tradition of thought into the hegemonic force in international humanitarian legal discourse and continue to foster the reproduction of this hegemony which legitimises war. At the heart of the ideology of the Regulated War tradition that sustains imperialism is the discursive strategy of naturalisation. With the presentation of war as a feature of human nature, the Regulated War tradition imposes itself as the sole or the most capable expression of humanitarianism. This claim to humanitarianism is reinforced by a series of other discursive strategies that operate together and simultaneously in a complementary fashion. Only some of the most important of these strategies were discussed in this chapter, namely the discursive strategies of rationalisation, mystification, unification, fragmentation, universalisation, simplification, and normalisation. The chapter endeavoured to provide an elementary ideology critique of the Regulated War tradition of thought to challenge its hegemony. This critique builds on the long historical experience of the counter-hegemonic Anti-War tradition.

Throughout history, the hegemony of the Regulated War tradition was not uncontested. Notwithstanding the costly initial defeat of the Anti-War intellectual tradition in the early 20th century, the legal instruments focusing on the abolition of war itself, produced in that period, are not negligible.[715] After outlawing war for recovery of contract debts and wars of aggression, the experience of World War II led to another institutionalisation of the

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[713] Human Rights Watch, 'Making Kampala Count' (n 581).
[714] For a critical approach to these debates see Orford, *Reading Humanitarian Intervention* (n 224).
[715] A non-exhaustive list includes: a) Hague Convention (II) Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts (1907), b) Hague Convention (I) on the Pacific Settlement of Disputes (1899, 1907) and other Treaties Prohibiting Resort to War, c) the Covenant of the League of Nations and the Prohibition of Resorting to War, d) Crime of aggression (but only for the wars of aggression), e) Kellog-Briand Pact (1928), see a more detailed account in Andrew Clapham, *War* (OUP 2021) 80-118.

prohibition (or permission?) to conduct war in the UN Charter.[716] The anti-war movement was revived in the campaign against the war in Vietnam. Even in the USA, the My Lai massacre did not spark outrage for not being humane enough, but served instead as another dramatic reminder of why war should be abandoned altogether.[717] Since then, however, it has been largely overshadowed by considerations of whether war is conducted lawfully—a concept that has become synonymous with 'humanely'.

In the 21st century, there have been at least three instances of strong anti-war movements, which are reflected in the production of international legal discourse in the vein of the anti-war intellectual tradition. These are the anti-war movements against the USA's invasion of Iraq,[718] the Russian invasion of Ukraine,[719] and Israel's invasion of Gaza.[720] Even at the peak of these anti-war movements, however, the Anti-War intellectual tradition did not manage to dethrone the Regulated War tradition from the hegemonic position it occupies in the humanitarian vision. The next chapter explores further the Regulated War tradition in order to highlight its internally contradictory grammar. Bringing to light its oscillations and structural dead-ends is, essentially, another exercise in ideology critique and hopefully another blow on behalf of the Materialist Pacifism project.

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[716] Article 2(4) of the Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, which extents the logic of prohibiting only 'aggressive' wars, is permissive to wars that are 'inconsistent with the Purposes of the United Nations'. Under the UN system war can lawfully be waged in two occasions: after the authorisation of the Security Council under Articles 39 and 42 of the Charter or as a form of self-defence in case of an armed attack pursuant to Article 51 of the Charter.

[717] Moyn (n 1) 163.

[718] Letter of International Legal Academics to Guardian Newspaper, 'War Would be Illegal' (The Guardian, 7 March 2003) https://www.theguardian.com/politics/2003/mar/07/highereducation.iraq accessed 22 April 2025.

[719] The ICJ called Russia to 'immediately suspend the military operations', ICJ, *Ukraine v Russia* (n 585) para 86 (1). Nevertheless, not all legal discourse about the violation of jus ad bellum are immediately to be considered as anti-war discourse.

[720] Compared to the Russian invasion, the international legal discourse about the invasion of Gaza is much more conflated, see for instance Marko Milanovic, 'Does Israel Have the Right to Defend Itself?' (EJIL blog, 14 November 2023) https://www.ejiltalk.org/does-israel-have-the-right-to-defend-itself/ accessed 22 April 2025.

5. The Structure of the International Humanitarian Legal Argument

5.1 Introduction

Chapter 3 demonstrated that international humanitarian legal discourse, which nowadays overlaps almost entirely with the hegemonic Regulated War discourse, oscillates between the construction of protective and permissive legal arguments. This chapter examines this oscillation. It delves deeper into the structure of the international humanitarian legal argument of the Regulated War tradition. This structure delineates the intellectual terrain for the production of the hegemonic international humanitarian legal discourse. It also determines the conditions of articulation of the Regulated War tradition and its discursive strategies. In this way, it forms the grammar of the Regulated War ideological language.

There are three key archetypes which structurate international humanitarian legal discourse. These are God, human, and animal. The three archetypes function as heuristic devices for the international humanitarian legal discourse. The modus operandi of this discourse involves contrasting two out of the three by creating binaries. International humanitarian legal discourse legitimises war and the deprivation of human life through two binaries. These are the binaries of God-human and human-animal. The former, which is the dominant one today, is employed by the hegemonic international humanitarian legal discourse to naturalise war as an inevitable feature of human nature. The Regulated War tradition presents war as a consequence of the inherent limitations of human beings. To achieve this, it develops its argument on the humane limitations in contradistinction to the unlimited power of God to shape the world at will. Because humans do not shape the world as they please, the Regulated War tradition contends, the most humane way of protecting individuals is to minimise their suffering and civilian casualties as much as possible.

The human-animal binary enables the production of international humanitarian legal discourse that pressures downwards the minimum protections, for instance by legitimising a higher ratio between civilian deaths and fighters in the proportionality assessment,[721] or even a way to return to pre-humanitarian total warfare.[722] With the transition from colonialism to neocolonialism, this binary plays a more latent and usually implicit role. Nevertheless, it has recently resurfaced in the discourse of Israeli state officials regarding

[721] Michael Schmitt, 'Human Shields in International Humanitarian Law' (2009) 47 Columbia Journal of Transnational Law 292, 326.
[722] For the most comprehensive critique of the use of this binary in international humanitarian legal discourse see Mégret (n 99).

their ongoing genocidal attack on the Palestinian people.[723] This chapter focuses on the God-human binary, while it acknowledges that the significance of the human-animal binary is unfortunately far from obsolete and much work needs to be done until this could be achieved.

The two types of international legal rhetoric forming the oscillating poles of the international humanitarian legal argument are the rhetoric of aspiration and the rhetoric of limitation. The former articulates in the international legal idiom aspirations of how IHL and IHRL should foster and protect human life. In this sense, it is animating the abstract liberal promise of humanitarianism for the progressive protection of human beings.[724] In the words of one of the most influential international lawyers of the 20th century, the purpose of the laws of war 'is almost entirely humanitarian in the literal sense of the word, namely to prevent or mitigate suffering and, in some cases, to rescue life from the savagery of battle and passion'.[725] The latter is a permissive rhetoric that calls for a lower standard of protection for human life or, straightforwardly, for the deprivation of human life in wartime. It is a manifestation of the concrete and historically specific limitations of the current socio-economic configuration that make war appear as inevitable and, in extension, produce the need to articulate these 'unfortunate realities of war' in legal terms.

In this regard, two remarks for the sake of clarity are in order. Firstly, this thesis does not hold that these limitations, animating the rhetoric of limitation, are purely ideological or form part of international lawyers' false consciousness. On the contrary, it considers them as really existing limitations posed by imperialism. The Regulated War tradition does not appear in a historical vacuum but is in unity with the existing material relationships which it expresses.[726] This tension between the abstract liberal promise of humanitarianism, as manifested in the international legal jargon and its concrete betrayal in real life, breathes life into the oscillation between the two rhetorics. Secondly, it is worth emphasising again that this chapter is a structuralist and not a phenomenological enterprise. It does not wish to

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[723] The then Minister of Defense announced a complete siege of Gaza by saying that 'we are fighting human animals and we are acting accordingly' Jeremy Bowen, 'US Threat to Cut Israel Military Aid Is Sign of Anger at Broken Promises' (BBC, 16 October 2024) https://www.bbc.co.uk/news/articles/c3e9q4nylwjo accessed 22 April 2025.

[724] The late Antonio Cassese suggested that the humanitarian character of an international rule is to be derived on the basis of whether it protects individual person's life or not: 'The Hague Conventions also limit and channel the powers of belligerents and therefore are, in significant measure, of a humanitarian character: they protect individual persons' Cassese (n 637) 5.

[725] Hersch Lauterpacht, 'The Problem of the Revision of the Law of War' (1952) 29 British Year Book of International Law 360, 363-64.

[726] Pashukanis (n 137) 123. Note that the Regulated War tradition is not the expression of the dominant class interests but of the struggle between the antagonistic material interests of this particular historical era.

bring out the intentions of the various social actors of the Regulating War tradition nor contends to know what their perceptions are every time they articulate a legal argument in the form of one of the two rhetorics.[727] Instead, the main focus of this chapter is to illuminate the formation and current status of the rules of the international humanitarian legal language to enable a critique of the international humanitarian legal discourse as a whole. Chapter 3 has provided an exposition of the discursive evidence of the Regulated War tradition. This chapter builds on this to elaborate on the conditions of articulation of that discursive evidence. The grammar of the international humanitarian legal argument is as much ideological as its language. The emancipatory potential of critique requires, at least, to confront the grammar and the language of the Regulated War tradition in their dynamic unity.

The movement between the two rhetorics is today manifested in the discourse of the hegemonic Regulated War tradition. The contradiction animating the movement, which is grounded in an existing historical limitation, pre-dates the formation and consolidation of the Regulated War intellectual tradition. Even more, the contradiction at the heart of the international humanitarian legal argument pre-dates international humanitarian legal discourse itself. It was only in the 20th century that international lawyers came up with the required legal terms, 'that would help controlling that movement through stable, "enlightened" state authority'.[728] Together with the creation of the legal idiom, international lawyers had to provide a rigid framework separating the ontological from the deontological; this 'doubled sensibility' is paramount in preventing the collapse of the bridge holding together the two rhetorics.[729] Indeed, there is a ready-made reminder for the legal academic opposing the Regulated War tradition: that 'members of our community need to be cautious about wrapping lex ferenda in the cloak of lex lata'.[730] This becomes apparent in the discussion of sub-section 5.2.2 as well.

Such a type of naturalising posture towards the ontological assumptions put forward by the Regulated War tradition is not totally uncontested from within the tradition itself. While the outer limits of what can be finally recognised as lex lata by the Regulated War tradition are largely fixed, there is still some available intellectual space where political negotiation

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[727] In fact, Kennedy highlights the recurring rise and fall of 'humanitarian enthusiasm' among legal practitioners of the Regulated War tradition, Kennedy, *The Dark Sides of Virtue* (n 35) 155-156.
[728] David Kennedy and Martti Koskenniemi, *Of Law and the World: Critical Conversations on Power, History, and Political Economy (*Harvard University Press 2023) 174.
[729] Ibid 179.
[730] Michael Schmitt, 'Year Ahead – International Humanitarian Law at Risk' (Articles of War, 11 January 2024) https://lieber.westpoint.edu/international-humanitarian-law-risk/ accessed 22 April 2025.

and legal argumentation take place. As Koskenniemi persuasively argued, although a tradition of thought may look ascending (limitation) or descending (aspiration), it needs both 'within itself' to survive.[731] The Regulated War tradition cannot be reproduced merely by one of the two rhetorics. It becomes historically meaningful only in their binary interrelationship. This cohabitation of the two rhetorics exists across legal spheres or legal vocabularies. For instance, they are expressed both in the vocabulary of IHL and IHRL. While 'the vocabulary of their articulation merges' the rhetoric of aspiration and the rhetoric of limitation 'remain distinct'.[732] Even when not immediately apparent, the two rhetorics are synchronic; they reinforce each other and continually defer the legal meaning of humanitarianism. In this sense, the rhetoric of aspiration and the rhetoric of limitation do not only construct their raison d'être in their contradictory interrelationship but also in their synchronic existence as rhetorical patterns which constantly collapse into each other.[733]

From the necessity of their co-existence flows the ability of the two rhetorics and in extension of the ICRC and the Military legal projects to articulate adequate, state-of-the-art, legal arguments. Even when these arguments seem inadequate, it is often not because they are not well-crafted according to the prevailing legal standards, but due to the controversial solutions they put forward.[734] For instance, Schmitt is recognised by the international legal community as an excellent legal technician, however, he fails miserably to convince the international public opinion when he argues that the Palestinians who do not follow an evacuation order of Israel, that will displace them once again, become legitimate targets under IHL if 'they are hoping to complicate IDF operations', even though his argument may be paradigmatic of legal craftsmanship.[735] It is in these controversial moments, when the Regulated War tradition appears to be failing, that the tension between the two antagonistic rhetorics within it becomes more stark. Even more, it is in these moments, when the Regulated War tradition's legitimacy, and in extension its hegemony, is at stake, that the rhetoric of aspiration ensues to stabilise the situation again. To reproduce Regulated War's hegemony IHL 'should address our humanitarian aspirations and impose some form of restraint, even if minor, on the forms that war may legitimately take'.[736] To

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[731] Koskenniemi, *FATU* (n 77) 107.
[732] David Kennedy, *The Dark Sides of Virtue* (n 35) 154.
[733] '[T]he condition of a perpetual differentiation suspended in the state of perpetual deferral of the question of its origin –is what makes up difference', Akbar Rasulov, 'International Law and the Poststructuralist Challenge' (2006) 19 Leiden Journal of International Law 799, 810.
[734] Koskenniemi, *FATU* (n 77) 107.
[735] Michael Schmitt, 'Israel – Hamas 2023 Symposium – What is and is not Human Shielding?' (Articles of War, 3 November 2023) https://lieber.westpoint.edu/what-is-and-is-not-human-shielding/ accessed 22 April 2025.
[736] Jochnick and Norman, 'The Legitimation of Violence: A Critical History of IHL' (n 9) 55.

return to Schmitt's text, he hastily adds: '[b]ut everyone else retains full civilian protection regardless of motivation for staying'.[737] This choreography of the rhetoric of the limitation and the rhetoric of aspiration is the driving force of the Regulated War tradition. It is essentially a 'process of reconciliation'.[738] In this process, the rhetoric of limitation guarantees 'the law's concreteness' and the rhetoric of aspiration achieves its legitimacy.[739] Imagining the two rhetorics in the ballroom of Humanitarianism, one is reminded of Kennedy's eloquent formulation:

> Situated in this common rhetorical space, we might imagine the humanitarian and the military strategist, on a good night, dancing beautifully with one another. The one seems effective, the other principled, their steps elegantly coordinated by *pragmatism*.[740]

The following section attempts to expose some of these choreographies between the two rhetorics and their 'strategies of reconciliation'.[741]

One of the main methodological tools that render this endeavour possible is deconstruction.[742] This tool brings to the fore the overarching common nature of the ICRC and the Military legal projects, highlighting that their legal disagreements, ultimately, collapse into each other under the pressure of their shared fundamental assumptions about the nature of war. When studying the international humanitarian legal argument, the deconstructive method functions as a microscope.[743] In its materialist incarnation, it zooms in on the text and its historically specific surroundings to unveil the repressed meanings lurking behind binary oppositions, such as that between aspiration and limitation. It is an enterprise predicated on the suspicious posture and critical distance of the reader from the text.[744] In this regard, deconstruction as a method resonates with Althusser's symptomatic

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[737] Schmitt, 'Israel – Hamas 2023 Symposium – What is and is not Human Shielding?' (n 735).
[738] Koskenniemi, *FATU* (n 77) 108.
[739] Ibid 108.
[740] David Kennedy, *The Dark Sides of Virtue* (n 35) 155.
[741] Koskenniemi, *FATU* (n 77) 108. Note that for Koskenniemi the shift of focus from jus ad bellum to jus in bello is itself a strategy of reconciliation, which he dubs as 'strategy of proceduralization', see *FATU* 150-153.
[742] For its application in legal science see Pierre Schlag, 'A Brief Survey of Deconstruction' (2005) 27 Cardozo Law Review 741.
[743] Calling deconstruction a method and more importantly treating it as such is another key adjustement of this concept compared to Derrida's version, see Jacques Derrida, *Dissemination* (The University of Chicago Press 1981) 271.
[744] Materialist deconstruction is in the vein of the school of suspicion mastered by Marx, Freud, and Nietzche, Paul Ricoeur, *Freud and Philosophy: An Essay on Interpretation* (Yale University Press 1970) 32.

reading.[745] It calls the reader to question the silences, assumptions, and often silent assumptions of a given text in order to place them in dialogue with the text's overall political ambition. It is a way of reading international humanitarian legal texts against the grain.

The following section aspires to perform such reading in order to put the oscillation of the two rhetorics in dialogue with the professed humanitarian vision of the Regulated War tradition. It seeks not only to expose the collapse of the binary but also to upset the hegemonic position of the Regulated War tradition within the humanitarian vision by highlighting the ways in which it narrows the international humanitarian legal horizon. Section 5.2 illustrates the oscillation between the two rhetorics with the use of three discursive examples. Section 5.2.1 demonstrates the internally contradictory structure of the international humanitarian legal argument with reference to the divergent views on dual-use objects, section 5.2.2 draws on the discussion on the right to life in times of war, and section 5.2.3 engages with the debate on human shields that makes even more visible how the two rhetorics collapse into each other. Section 5.3 goes a step further and considers the limits and possibilities of the structure of the international humanitarian legal argument.

5.2 The Oscillation of the Two Rhetorics in Practice

5.2.1 Dual-Use Objects

To illustrate the oscillation of the rhetoric of aspiration and the rhetoric of aspiration, this section places in dialogue texts produced by the Military legal project and a text produced by the ICRC legal project on the concept of dual-use objects. Starting with the former, the US Department of Defense Law of War Manual speaks in the rhetoric of limitation when it rejects the existence of an 'intermediate legal category', asserting that a dual-use object can be either a military objective or not:

> Sometimes, 'dual-use' is used to describe objects that are used by both the armed forces and the civilian population, such as power stations or communications facilities. However, from the legal perspective, such objects are either military objectives or they are not; there is no intermediate legal category. If an object is a military objective, it is not a civilian object and may be made the object of attack.[746]

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[745] Althusser, 'Introduction' (n 170) 28-33.
[746] USA, *Department of Defense Law of War Manual* (n 4) 217.

This legal position paves the path for the lawful destruction of civilian objects that may be essential for the preservation of human life. Then, in a typical move, with the help of a conjunctive adverb, the Manual shifts from the rhetoric of limitation to the rhetoric of aspiration:

> *However*, it will be appropriate to consider in applying the principle of proportionality the harm to the civilian population that is expected to result from the attack on such a military objective.[747]

In this formulation, although the civilian object employed for military purposes loses its civilian protection, the civilian population which is in or within the vicinity of this object retain their protection and is taken into account during the proportionality assessment. However, the Danish Ministry of Defense Military Manual clarifies further this position in the rhetoric of limitation:

> As far as dual-use objects are concerned, the entire object constitutes a military objective. Under international law, this means that damage to the dual-use object in itself is not regarded as collateral either in whole or in part if the object is effectively indivisible. As a general rule, the non-military 'share' of the object should not be taken into consideration in the proportionality assessment.[748]

Following this legal position, if one hospital room is used for military purposes then the hospital as a whole may be deemed by the attacking military commander as a military objective. In that case, the destruction of the operating theatres, the scrub rooms, and medical equipment would not even be taken into account during the process of proportionality assessment.

Opposing this reading propelled by the Military legal project, the ICRC legal project argues in the rhetoric of aspiration that only the specific object used for military purposes loses its civilian protection:

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[747] USA, *Department of Defense Law of War Manual* (n 4) 217 (emphasis added).
[748] Danish Manistry of Defence, *Military Manual* (n 354) 310.

> First of all, an object has to be strictly defined: for example, a school comprising of several buildings is not one object for the purpose of the definition of military objective. Each object needs to be looked at individually.[749]

The text, however, proceeds with a coordinating conjunction to shift in the rhetoric of limitation in order to justify the destruction of a multi-store building, even if only one of its rooms is used for military purposes:

> *But* when looking at one individual object partially used for military purposes, for instance, a multistorey building where only the roof or one apartment is used for military purposes, the prevailing understanding of the notion of military objective is that once an object is used in such a way as to fulfill the definition of military objective, the entire object becomes a lawful target.[750]

This passage, written in the rhetoric of limitation, is immediately followed by another manifestation of the rhetoric of aspiration, which again is introduced with a conjunctive adverb:

> The principle of precaution *nevertheless* requires that only the part of the building used for military purposes should be targeted, to the extent feasible. Those planning a military attack must, indeed, consider the effects of the destruction of the apartment used by civilians and the potentially long lasting effect on health and well-being. The principle of proportionality forbids the attack if incidental or civilian harm is expected, including indirect harm, and if this harm is excessive in comparison to the direct and concrete military advantage.[751]

This last instance of the rhetoric of aspiration carries within it also a fundamental tendency of the international humanitarian legal argument towards 'ad-hocism'. What is to be considered as the 'extent feasible' is deferred and will be decided ad hoc by the military commander during wartime. In a similar vein, Schmitt starts his discussion of the issue of dual-use objects with the rhetoric of aspiration: 'the aspect of the structure the enemy is using qualifies as a military objective, but its separate and distinct components that are not

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[749] Durham (n 356) 30.
[750] Ibid (emphasis added)
[751] Ibid 30-31 (emphasis added).

being used for military purposes retain their civilian character'.[752] Before he retreats to the rhetoric of limitation with recourse to an ad hoc 'feasibility assessment' approach, which 'accords with operational reality'.[753] This tendency towards operationality or 'ad-hocism' is further highlighted in section 5.2.3 and unpacked in section 5.3. The next section continues with an illustration of the oscillation between the two rhetorics in the conversation among the bench of the ICJ in the Nuclear Weapons advisory opinion.

5.2.2 The Right to Life and Nuclear Weapons

Textual evidence of the internally contradictory grammar of international humanitarian legal argument and its oscillation between the two rhetorics can be found in the ICJ's advisory opinion on Nuclear Weapons, read in dialogue with the appended dissenting opinions and declarations. In this divisive for the members of the Court advisory opinion, the ICJ was called upon to decide, inter alia, whether the use of nuclear weapons may violate Article 6 of the ICCPR, which guarantees the right to life.[754] In answering this question, the majority articulated its legal reasoning, which is reflected in the advisory opinion, in the vein of the Military legal project, while Judge Weeramantry wrote his dissenting opinion from within the ICRC legal project. The following exposition of the legal reasoning of the two legal projects brings to the fore the oscillation between the rhetoric of aspiration and the rhetoric of limitation. This oscillation is not only external, in the interaction between the two legal projects, but is also manifested internally within the legal projects and their texts.

The majority of the bench of the ICJ begins its legal reasoning by recalling the arguments submitted before it. As the starting point of its discussion is the rhetoric of limitation, which contends that the ICCPR:

> Made no mention of war or weapons, and it had never been envisaged that the legality of nuclear weapons was regulated by that instrument. It was suggested that the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict. [755]

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[752] Schmitt, 'Targeting Dual-Use Structures: An Alternative Interpretation' (n 351).
[753] Ibid.
[754] *Legality of the Threat or Use of Nuclear Weapons* (n 416) para 24.
[755] Ibid.

That IHL is a more equipped language to deal with the regulation of violence in times of war, is not ipso facto falling within the rhetoric of limitation. Its legal surroundings and the context in which it is articulated here, in an attempt to shut down the argument that the use of nuclear weapons violates the right to life, however, clearly render it within the remit of the rhetoric of limitation. Then, in the very next paragraph, the majority speaks in the voice of the rhetoric of aspiration. It argues that the protection of the ICCPR:

> Does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities.[756]

In this passage, written in the rhetoric of aspiration, the majority constructs an enhanced legal net for the protection of human life by affirming the applicability of the ICCPR in wartime. At the same time, it implicitly constructs the exception in Article 4 of the ICCPR in a narrow manner and does not consider war to fall within the definition of 'national emergency', an argument which would fall within the rhetoric of limitation. This does not prevent the majority from making such an articulation in the rhetoric of limitation immediately after:

> The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[757]

In this formulation, the majority, instead of declaring the ICCPR non-applicable, it repositions the battleground of legal meaning to that of what is arbitrary or not. Through the back door of arbitrariness, it concludes its legal argumentation in the rhetoric of limitation, placing emphasis also on the ad hoc nature of the ultimate decision, which needs to take into account the 'particular loss of life, through the use of a certain weapon in warfare'. In this way, the majority makes a full circle and returns to the initial position

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[756] Ibid para 25.
[757] Ibid.

voiced by the rhetoric of limitation, that the last word about the legality of a deprivation of life in times of war should be left to the language of IHL.

To respond to the legal argumentation of the Military legal project manifested in the advisory opinion, Judge Weeramantry issued a dissenting opinion. From the outset, Weeramantry speaks in the rhetoric of aspiration and claims that the right to life is not derogable:

> It is part of established human rights law doctrine that certain rights are non-derogable in any circumstances. The right to life is one of them. It is one of the rights which constitute the irreducible core of human rights.[758]

He reinforces this claim with reference to the Universal Declaration of Human Rights (UDHR), the ICCPR, the ECHR, and the American Convention on Human Rights (ACHR). Weeramantry, responds to the rhetoric of limitation articulated by the majority, which posits that 'the right to life is not an absolute right and that the taking of life in armed hostilities is a necessary exception to this principle', with a paradigmatic manifestation of the rhetoric of aspiration:

> However, when a weapon has the potential to kill between one million and one billion people, as WHO has told the Court, human life becomes reduced to a level of worthlessness that totally belies human dignity as understood in any culture. Such a deliberate action by an State is, in any circumstances whatsoever, incompatible with a recognition by it of that respect for basic human dignity on which world peace depends.[759]

Weeramantry culminates his rhetoric of aspiration by connecting the right to life and all human rights to their founding premise:

> A right described by René Cassin as the right of human beings to exist. This is the foundation of the elaborate structure of human rights that has been painstakingly built by the world cornmunity in the post-war years.[760]

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[758] Dissenting Opinion of Judge Weeramantry (n 510) 284.
[759] Ibid 285.
[760] Ibid.

This rhetoric of aspiration does not develop, however, in an anti-war position. Weeramantry staunch support for the non-derogable character of the right to life in times of war wanes away when he moves on from the discussion of nuclear weapons to that of conventional war, as he places his faith in IHL to secure a future with humane wars:

> International law contains within itself a section which particularly concerns itself with the humanitarian laws of war. It is in the context of that particular section of that particular discipline that this case is set.[761]

Even Weeramantry, who has explicitly acknowledged the fundamental nature of a 'right of human beings to exist', could not escape the intellectual confines of the Regulated War tradition and imagine an alternative to that of 'humane war'. In the same spirit, Judge Bedjaoui begins his declaration with the rhetoric of aspiration by denaturalising the scourge of war:

> The Atlantic Charter did promise to 'deliver mankind from fear', and the San Francisco Charter to 'save succeeding generations from the scourge of war'. Much still remains to be done to exorcise this new terror hanging over man, reminiscent of the terror of his ancestors, who feared being struck by a thunderbolt from the leaden, stormladen skies. But twentieth-century man's situation differs in many ways from that of his ancestors: he is armed with knowledge; he lays himself open to self-destruction by his own doing; and his fears are better founded.[762]

After proclaiming the deadly dangers of a nuclear war, Bedjaoui justifies his vote in favour of an agnostic stance towards the legality of the use of nuclear weapons in the rhetoric of limitation: 'but the Court could obviously not go beyond what the law says'.[763] The belief in a strict distinction between what the laws say and what the law should say is a common trope of the rhetoric of limitation, which typically concludes in that a court 'could not say what the law does not say'.[764] But the oscillation of the international humanitarian legal argument in Bedjaoui's declaration does not end here. Notwithstanding that he voted in favour of the Military legal project, he follows up his legal argumentation in the rhetoric of aspiration:

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[761] Ibid 331.
[762] Declaration of Judge Bedjaoui, *Legality of the Threat or Use of Nuclear Weapons* (n 651) 46.
[763] Ibid 48.
[764] Ibid.

> I cannot sufficiently emphasize that the Court's inability to go beyond this statement of the situation can in no way be interpreted to mean that it is leaving the door ajar to recognition of the legality of the threat or use of nuclear weapons.[765]

Before he proceeds again to justify his vote and the opinion of the majority in the rhetoric of limitation:

> However, while the Court may leave some people with the impression that it has left the task assigned to it half completed, I am on the contrary persuaded that it has discharged its duty by going as far, in its reply to the question put to it, as the elements at its disposal would permit.[766]

This back-and-forth choreography of the two rhetorics in a single declaration, dissenting opinion, and the advisory opinion of the ICJ itself, demonstrates the constant oscillation and the internally contradictory structure of the international humanitarian legal argument. This oscillation is present in texts produced by both legal projects of the Regulated War tradition. Below, section 5.2.3 further illustrates how this oscillation also leads to the collapse of the two rhetorics into each other with an exposition prompted by the discussion of the legal concept of 'human shields'.

5.2.3 Human Shields

This section is reading two texts forming part of the Regulated War tradition's internal dialogue about the legal concept of human shields, in order to trace the oscillation between the rhetoric of aspiration and the rhetoric of limitation. The first is a product of the ICRC legal project and the second is in the vein of the Military legal project. In this way, it further prepares the ground for addressing the broader ramifications of this oscillation. As it has been explained already in section 5.1, the two rhetorics do not operate independently but are usually both present within a single text. Even more, often, they are just separated by a conjunctive adverb or a punctuation mark.

One characteristic instance of such back-and-forth choreography between the two rhetorics identified in the limited space of a few consecutive sentences is found in the ICRC interpretative guidance's discussion of voluntary human shields. The oscillation between the two rhetorics is often presented in the form of the rule and the exception. The guidance

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[765] Ibid.
[766] Ibid 50.

starts with an argument exemplar of the rhetoric of limitation that intends to introduce an exception to the prohibition of direct attack against civilians:

> Where civilians voluntarily and deliberately position themselves to create a physical obstacle to military operations of a party to the conflict, they could directly cause the threshold of harm required for a qualification as direct participation in hostilities.[767]

Then, the guidance adopts the rhetoric of aspiration to argue that even if civilians voluntarily and deliberately position themselves to create a physical obstacle, they should not be directly attacked with artillery or air attacks, creating an exception when the attacker is using more powerful weaponry:

> Conversely, in operations involving more powerful weaponry, such as artillery or air attacks, the presence of voluntary human shields often has no adverse impact on the capacity of the attacker to identify and destroy the shielded military objective.[768]

With this exception, the guidance is arguing that civilians are now an obstacle, but only a legal obstacle instead of a physical one. The legal effect of this shift is that they regain the civilian protection against direct attacks. Is the life of these civilians protected under IHL then? The guidance answers in the negative. Now, with recourse to a general rule, it argues in the voice of the rhetoric of limitation that even though they should not be directly attacked, it is still possible to kill them in the form of indirect civilian casualties:

> Instead, the presence of civilians around the targeted objective may shift the parameters of the proportionality assessment to the detriment of the attacker, thus increasing the probability that the expected incidental harm would have to be regarded as excessive in relation to the anticipated military advantage.[769]

The guidance then proceeds to recap this choreography by arguing in the rhetoric of aspiration that:

> The fact that some civilians voluntarily and deliberately abuse their legal entitlement to protection against direct attack in order to shield military objectives does not, without

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[767] Melzer, *Interpretative Guidance* (n 31) 56.
[768] Ibid 57.
[769] Ibid.

> more, entail the loss of their protection and their liability to direct attack independently of the shielded objective.[770]

Before it switches its voice again in the rhetoric of limitation:

> Nevertheless, through their voluntary presence near legitimate military objectives, voluntary human shields are particularly exposed to the dangers of military operations and, therefore, incur an increased risk of suffering incidental death or injury during attacks against those objectives.[771]

Two observations are due. Firstly, that the oscillation between the two rhetorics is facilitated linguistically with the use of contrasting conjunctive adverbs such as 'conversely', 'instead', and 'nevertheless'. Secondly, that the oscillation is interminable: what is the conclusion of this back-and-forth choreography? That civilians in certain circumstances can be directly attacked and killed as civilians directly participating in hostilities and that civilians under some other circumstances can be indirectly attacked and killed as civilian collateral casualties. In sum, the protection of the lives of civilians is not guaranteed. Whether it is lawful to endanger their life is decided by the military commander of the enemy belligerent party on an ad hoc basis. In other words, the lawfulness of the endangerment of the life of a civilian is deferred. The protection of human life sways to the rhythm of différance.[772] The question of the protection of life is never resolved in the international humanitarian legal text itself.

This oscillation pervades the entire Regulated War tradition. Following the exposition of discursive evidence from the ICRC legal project, this section proceeds with a similar presentation of the back-and-forth choreography found in a text produced by the Military legal project. Dinstein, a key figure of the Military legal project, starts with an argument in the rhetoric of limitation by quoting Schmitt: 'voluntary "human shields" ought to be "excluded in the estimation of incidental injury when assessing proportionality"'.[773] Then, Dinstein proceeds in the form of the rhetoric of aspiration to claim that:

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[770] Ibid.
[771] Ibid.
[772] See Rasulov, 'International Law and the Poststructuralist Challenge'(n 733) 808-816 and Pierre Schlag, '"Le Hors de Texte, C'est Moi": The Politics of Form and the Domestication of Deconstruction' (1990) 11 Cardozo Law Review 1631.
[773] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (CUP, 2016) 183.

> Even assuming that they are direct participants in hostilities, it must be perceived that voluntary 'human shields' cannot be attacked separately from the lawful target since no preparation is required for either their 'deployment' or 'disengagement'.[774]

In this choreography, the first move is to affirm that voluntary human shields are directly participating in hostilities, thus should not be part of incidental injury estimations in the proportionality assessment. The second move is to mitigate the legal effects of this affirmation by arguing that although they should be considered civilians directly participating in hostilities, they should not be separately targeted. Then there is the third move where Dinstein, again, returns to the rhetoric of limitation to argue that 'captured voluntary "human shields" can be treated as unlawful combatants, without benefiting from the usual privileges accorded to civilians'.[775] With this move, it again attempts to pronounce what exactly the legal ramifications of his claim about the status of voluntary human shields are. Dinstein argues that the fact that voluntary human shields should not be targeted separately does not mean that they would not be treated as civilians directly participating in hostilities when they are captured. He continues with a final move in the rhetoric of aspiration where he makes explicit that this choreography, as argued above, is designed in the rule and exception pattern: 'the phenomenon of voluntary civilian "human shields" is the exception rather than the rule'.[776] Civilians should be considered as voluntary human shields, according to Dinstein, only when they 'overtly express their intentions to serve as "human shields"'.[777] The rule is that civilians are not to be conceived as voluntary human shields: 'when no reliable information as to what has propelled civilians to become "human shields" is available, the presumption must be that they act involuntarily'.[778]

Both the text in the ICRC legal project and that of the Military legal project, albeit starting from different positions, contain the 'same dialectical movement' and arrive at a similar legal construction.[779] The two texts accept that there is an exception to the protection of civilians from direct attack. The nuances of their disagreement over the exact criteria for this exception are of secondary importance when viewed against the deeper question of how and when these rules will take shape in practice.

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[774] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (n 379) 184.
[775] Ibid.
[776] Ibid.
[777] Ibid.
[778] Ibid.
[779] Koskenniemi, *FATU* (n 77) 137.

The oscillation of the two rhetorics in Dinstein's argumentation concludes with a deferral which is characteristic of the international humanitarian legal argument.[780] The deferral due to the complexity of the situation or the 'fog of war': 'in fact, given the "fog of war", it is not always easy to verify –especially from a high altitude in the air– whether civilian "human shields" are voluntary or involuntary'.[781] Again, the international humanitarian legal argument defers the answer to a distant future, on an ad hoc basis. The international humanitarian legal text does not resolve the legal question posed. The legal answer will be provided from the concrete reality, 'based on the facts and circumstances of a particular case'.[782] This constant deferral of the international humanitarian legal discourse is often acknowledged explicitly by the legal actors in the field. When commenting on the legal questions arising from the application of the principle of proportionality, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia recognised that:

> The answers to these questions are not simple. It may be necessary to resolve them on a case by case basis, and the answers may differ depending on the background and values of the decision maker. It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases.

This passage highlights the oscillation between the two rhetorics from the point of view of the legal practitioner. Thus, at first, it unearths a phenomenological insight about indeterminacy in international law.[783] In a closer reading, however, the structural limitations of the international humanitarian legal argument, which, in any case, share the same material roots and cohabit with phenomenological indeterminacy, come to the fore. The passage highlights the deferral on a 'case by case basis' as the modus operandi of the international humanitarian legal argument. The international humanitarian legal text exists in a state of interminable rhetorical oscillation. It rarely provides any concrete answers. It

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[780] A similar deferral on the matter of voluntary human shields is found in another text of the Military legal project which argues that it is only 'based on the facts and circumstances of a particular case, the commander may determine that persons characterized as voluntary human shields are taking a direct part in hostilities'. USA, *Department of Defense Law of War Manual* (n 4) 278. See alsoICTY, *Final Report to the Prosecutor* (n 398) paras 49-50.

[781] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (n 379) 184.

[782] USA, *Department of Defense Law of War Manual* (n 4) 278.

[783] Duncan Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (1986) 36 Journal of Legal Education 518.

is the concrete reality, product of societal struggle, that, ultimately, determines the ostensibly right legal answer, albeit ad hoc negotiated.

5.3 Structure and Possibility

The realisation that the oscillating Gordian knot between the two rhetorics cannot be cut in the international humanitarian legal text but only in the concrete application of international law is a pivotal materialist insight. The method of materialist deconstruction, with its emphasis on the oscillation between the two rhetorics, highlighted that the main modus operandi of the international humanitarian legal argument is the deferral of the legal answer to the future event of the application of the law in practice; 'the rule vanishes into context'.[784] Invoking the complexities of every particular situation is both a rhetorical attempt to escape the problem[785] and to solve it in, the more suitable for the dominant social interests, future event of an armed conflict.[786] This is the main 'strategy of reconciliation' of the Regulated War tradition.[787]

The tendency towards ad hoc answers is conditioned by two key factors. Firstly, that decision on the lawfulness of an attack is, in the first place, and often solely, determined by the attacking military commander. Secondly, deferring the response until wartime creates a spatio-temporal environment conducive to the flourishing of the rhetoric of limitation. Those practising the rhetoric of aspiration in the wake of war tend to find themselves on the weakest side of the competing social interests. Therefore, the method of materialist deconstruction not only highlights the modus operandi of deferral of the legal answer but also indicates a general tendency of the international humanitarian legal argument. This tendency favours the rhetoric of limitation. Notwithstanding the interminable oscillation between the two rhetorics, the international humanitarian legal argument is tilted.[788] It favours, in general, the rhetoric of limitation.

This tilt is both internal and external to the international humanitarian legal argument. Its internal element, which is the constant deferral of the legal answer, prepares the ground for the external element. The latter consists of the time and space for the final negotiation of

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[784] See similarly Koskenniemi, *FATU* (n 77) 150.
[785] Cf. Ibid 105.
[786] See for instance, Michael Schmitt,'The Relationship Between Context and Proportionality: A Reply to Cohen and Shany' (Just Security, 2 March 2015) https://www.justsecurity.org/22948/response-cohen-shany/ accessed 22 April 2025.
[787] Koskenniemi, *FATU* (n 77) 109.
[788] Wythe Holt, 'Tilt' (1984) 52 George Washington Law Review 280.

legal meaning. War is the privileged TimeSpace for the rhetoric of limitation.[789] The proponents of the rhetoric of aspiration start the game with a handicap. Their opponent is playing at home and is already several goals ahead. The game is tilted. That does not mean, however, that the result is pre-determined.[790] It means that it is very hard for the social groups which find themselves articulating the rhetoric of aspiration to comeback and win the game of legal meaning. The comeback is improbable but possible.

What is not possible under the current socio-economic configuration is to change the rules of the game; to move beyond the oscillation between the rhetoric of aspiration and the rhetoric of limitation. The outer limits of the grammar of international humanitarian legal discourse are determined by the material limitations that condemn the abstract humanitarian promise to be betrayed in real life. This is why, despite the indeterminate character of international humanitarian legal discourse,[791] it still produces the political effects outlined in Chapters 4 and 6. Firstly, as elaborated above, the TimeSpace in which the right legal answer is, ultimately, provided guarantees a systematic advantage to the interpretations put forward in the voice of the rhetoric of limitation. In other words, although the constant oscillation of the international humanitarian legal argument between the rhetoric of aspiration and the rhetoric of limitation, there is a general tendency in favour of the latter. The international humanitarian legal discourse is indeterminate but tilted.

Secondly, the plasticity of this discourse is not interminable; it cannot escape the intellectual borders established by the material conditions of our times. The vivid creativity of legal practitioners in the Regulated War tradition fades when the idea of a war-free world emerges on the international legal horizon. Creativity in constructing legal arguments is one of the most important features of a successful agent within the Regulated War tradition, coming second only to an ostensibly pragmatic sensibility.[792] The rationality of this sensibility, which has been imposed as the measure of professionalism in the international humanitarian legal discipline, depends on the socio-economic position of the concerned social groups. While a siege of a city may appear as unthinkable for the subalterns of the global periphery,[793] it can be legally permitted for the capitalist class in

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[789] TimeSpace refers to the constantly evolving, constructed realities of time and space that shape and are shaped by social reality, see more in Wallerstein (n 152) 22.
[790] Law is still ‘an arena of class struggle’, Gordon (n 253) 94-95.
[791] See, inter alia, Haque (n 61).
[792] Koskenniemi suggests that ‘a doctrine's own contradictions force it into an impoverished and unreflective pragmatism’ in Martti Koskenniemi, ‘The Politics of International Law’ (1990) 1 EJ1L 4, 12.
[793] For the relational pair of core-periphery see Wallerstein (n 152) 93.

the imperialist core.[794] The hegemony of the Regulated War tradition lies in its success in universalising its transhistorical assumption about the inevitability of war.

'So part of our challenge is reconciling these two seemingly irreconcilable truths - that war is sometimes necessary, and war at some level is an expression of human folly'.[795] Obama hits the nail on the head. From his vantage point,[796] which is the vantage point of the Regulated War tradition as well, war is part of this world. Part of its inner mechanics. The fundamental assumption that 'war is sometimes necessary', as has been argued in Chapter 2, has been contested time and time again throughout the last two centuries. The genocide perpetrated by Israel in Gaza has revived an anti-war international legal movement that openly impugns the Regulated War tradition. If there is indeed an increasing awareness of 'irresolvable difference' in the international humanitarian legal argument, it is a strong indication of a historical opening: an opportunity for 'foundational rethinking'.[797]

For a long period, the Regulated War tradition dominated international humanitarian legal discourse by the way it offered closure on thanatopolitical questions and often by the way it refrained from doing so.[798] The encounter of the Regulated War tradition with the reality of our historical conjuncture today is agitated by an accelerating wave of disbelief in its 'ability to produce convincing articulations of human relationships'.[799] Especially after Gaza and the 'humanitarian camouflage' of genocide by states and international legal scholars,[800] the Regulated War tradition is now at the brink of an existential challenge: to be perceived as an international legal articulation that is 'no longer of this world'.[801] It is in these circumstances that the international humanitarian legal discourse is flooded with casuistry and abstract claims for the overcomplexity of the law, or of the facts, or the application of the law to the facts; oh, the 'tyranny of the context'.[802] These symptoms may signify the start of the fall of the Regulated War tradition. Burying the humanitarian

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[794] Middle East Monitor, 'Keir Starmer Says Israel Has Right to Carry Out Siege on Gaza' (Middle East Monitor, 4 January 2024) https://www.middleeastmonitor.com/20240104-keir-starmer-says-israel-has-right-to-carry-out-siege-on-gaza/ accessed 22 April 2025.
[795] Obama, 'Remarks by the President at the Acceptance of the Nobel Peace Prize' (n 638).
[796] Ideas as a practice are based on the class position, see also a similar point about philosophy as a practice in Louis Althusser, 'Lenin before Hegel' in *Lenin and Philosophy and Other Essays* (Monthly Review Press 1971) 55.
[797] Kennedy and Koskenniemi, *Of Law and the World* (n 728) 178.
[798] Ibid 179.
[799] Ibid.
[800] Albanese (n 132).
[801] Ibid.
[802] Michael Schmitt and John Merriam, 'The Tyranny of Context: Israeli Targeting Practices in Legal Perspective' (2015) 37 University of Pennsylvania Journal of International Law 53.

promise under the rumbles of Gaza may prove to be the death rattle of this tradition of thought.

If there is an opening to escape the structure of the international humanitarian argument, it is not from within its structure—it is not a linguistic opening. It is a historical one. The international humanitarian legal structure may be a closed system, but history provides the openness. As the limitation of this structure is born externally, the same goes for the possibility of its transformation. The direction of this transformation, however, is provided already from within the structure itself; it is carried in the humanitarian aspiration, in the humanitarian promise. The critique is immanent while its materialisation is external. Immanent critique can flourish only through extrinsic action.

The genocide in Gaza represents a possible historical opening because it lays bare the contradictions within the international humanitarian legal structure. The persistent attacks on civilian populations, hospitals, and schools not only reveal the limitations of the laws of war but also suggest that these laws can be employed to justify the killing of civilians rather than protecting them. It also unearths the ways international humanitarian legal structure can provide space for legal argumentation in denying mass killings or even genocide through the myopic isolation of each military attack from the broader context. Moyn's persuasive argument about the apogee of the Regulated War tradition in the 21st century,[803] is confronting the realities of an uneven and combined world,[804] where in the same region, even by the same states, surgical drone strikes and ethnic cleansing campaigns with tens of thousands of civilian casualties can coexist.[805] The failure to prevent or adequately address mass atrocities undermines the hegemony of the Regulated War tradition and opens the door to immanent critique and action.

By revealing the faulty assumptions of the Regulated War tradition, the genocide in Gaza could serve as a short circuit to the international humanitarian legal argument, pushing beyond its inherent contradictions. The exposure of these contradictions does not merely critique the structure from within but suggests that the humanitarian promise cannot be fulfilled under the current socio-economic system. This critique demands extrinsic action—the transformation of the socio-economic system that sustains violence in Gaza

[803] Moyn (n 1) 265-268.
[804] George Novack, *Uneven and Combined Development in History* (Merit Publishers 1966) 83-84.
[805] See Laila Bassam, Nidal Al-Mughrabi, and Arafat Barbakh, 'Israel's Aircraft, Tanks Step Up Strikes as It Plans to Reduce Troops' (Reuters, 2 January 2024) https://www.reuters.com/world/middle-east/israels-aircraft-tanks-step-up-strikes-it-plans-reduce-troops-2024-01-02/ accessed 22 April 2025 and Rasha Khatib, Hanan Ezzeldin, Sabrina Azhari, and Adam El-Ghazi, 'Counting the Dead in Gaza: Difficult but Essential' (2024) 404 (10449) The Lancet 237-238.

and beyond. Without such external pressure, the legal structure will continue to reabsorb and neutralise internal criticisms, as it has done in the past. Thus, the historical opening exposed by Gaza necessitates a new horizon of action that moves beyond the Regulated War tradition and Idealist Pacifist legal project into concrete political, social, and material change. It is at this juncture that the need to revitalise the Materialist Pacifism legal project reaches its mature phase. This is why the final chapter offers a more in-depth exposition of the immanent critique of the international humanitarian legal argument. This leads to an exploration of how instrumental humanitarian reason has dominated and curtailed the international legal imaginary in Chapter 7. Chapter 6, which follows, engages in an ideology critique of the discourse produced by the Regulated War tradition in order to unearth the discursive strategies by which it legitimises the deprivation of human life.

6. Ideology Critique of the Legal Protection of Human Life in War

6.1 Introduction

The previous chapter discussed the grammar of the international humanitarian legal argument. Its emphasis was on the conditions of the production of international humanitarian legal discourse. Chapter 4 has already introduced how the Regulated War discourse legitimises war. This chapter takes over the torch to elaborate on the ways the Regulated War tradition navigates itself through the international humanitarian legal argument in a fashion that legitimises the deprivation of human life in times of war. In this sense, the main focus of this chapter is to outline the political effects produced by the Regulated War tradition. It puts forward that the legitimisation of war, undertaken through the discursive strategies exposed in Chapter 4, sets in motion four key interrelated rhetorical processes that ultimately achieve the legitimisation of the deprivation of life in armed conflicts.

These four rhetorical processes are at the same time the political effects of the Regulated War tradition. The first two can be classified as discursive strategies whose corresponding political effect is to assign certain social roles or determine the function and nature of human beings in times of war. These are the discursive strategies of interpellation and reification. The first interpellates human beings into particular social roles, for instance, civilians resisting occupation as direct participants in hostilities that can be lawfully targeted, civilians of the invaded state that are defending their country by enrolling in the army as combatants, and men as potential combatants and women into the role of victims. The second operates mainly by reifying individuals as ‘collateral damage’ or ‘human shields’; it relegates human beings to objects. This discursive strategy produces the effects of dehumanisation and weaponisation as well. Especially the latter is achieved, as detailed in the discussion below, through the vernacular of ‘human shields’. The remaining two discursive strategies produce the political effects of normalisation and rationalisation of the killing of individuals. The former shifts the legal paradigm, which prevails in times of peace, toward making the protection of human life the exception in armed conflicts. The latter consolidates the aforementioned political effects and builds upon them to rationalise the deprivation of life: to inaugurate the rise of a calculative logic and organise the killing of human life in the most ‘efficient’ way. This instrumental humanitarian reason will be further explored in the following and last chapter of this thesis.

6.2 Interpellation

Interpellation is a concept first introduced by Althusser. In his words: 'all ideology hails or interpellates concrete individuals as concrete subjects, through the functioning of the category of the subject'.[806] Althusser goes on to explain that interpellation 'can be imagined along the lines of the most commonplace, everyday hailing, by (or not by) the police: "Hey, you there!"'.[807] In this example, the police 'recruits a subject' from the individual hailed.[808] For instance, the individual may now be interpellated into the role of a suspect. In the case of international humanitarian legal discourse, this process of recruitment or subjectification is achieved through the ways the Regulated War tradition speaks about IHL and IHRL.

The first way by which the Regulated War discourse interpellates individuals into concrete subjects is in the language of IHL. This is how combatants are recruited out of abstract individuals: 'Members of the armed forces of a Party to a conflict […] are combatants'.[809] If the individual responds to the Regulated War's discourse with 'recognition that they really do hold the place it marks out for them in the world, a fixed abode —"It really is me, I am here, a [...] soldier!"',[810] then they are reduced to the corresponding social role: they are combatants, 'that is to say, they have the right to participate directly in hostilities'.[811] For instance, '"reservists" are civilians until and for such time as they are called back to active duty', when they are 'recruited' as combatants again.[812] In other words, they are interpellated into a subject, into a new persona, which enjoys a much lower protection of life than their previous one —'human being' in the language of IHRL[813] or 'civilian'[814] in the language of IHL. Although the broader ramifications of the interpellative function of ideology are outside the scope of this chapter, interpellation, both as a discursive strategy and as a political effect of the legitimisation of war, is the stepping stone for the further critique of the legitimation of the deprivation of human life in times of war.

In effect, the recruitment of the subject of combatants by the Regulated War tradition is articulated in IHL's principle of distinction. To mark the importance of this principle for

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[806] Louis Althusser, *On the Reproduction of Capitalism: Ideology and Ideological State Apparatuses* (Verso 2014) 190 (emphasis omitted).
[807] Ibid.
[808] Ibid.
[809] Article 43(2) AP I (n 301).
[810] Althusser, *On the Reproduction of Capitalism* (n 806) 195.
[811] Article 43(2) AP I (n 301).
[812] Melzer, *Interpretative Guidance* (n 31) 34.
[813] Article 6(1) of International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[814] Article 50(1) of AP I (n 301).

the Regulated War tradition, the ICJ itself has stated that it is one of the 'cardinal principles' of IHL and one of the 'intransgressible principles of international customary law'.[815] From the principle of distinction, the Regulated War tradition deduces that a combatant's life no longer enjoys protection against direct attacks from the adverse party. In the voice of the ICRC legal project: 'for the purposes of the principle of distinction, the most important consequence associated with combatant status is the loss of civilian status and of protection against direct attack'.[816] The way the Regulated War tradition constructs the legal subject of the combatant also determines the personal scope of the loss of protection against direct attacks. It is, therefore, crucial to examine the legal construction of combatant within international humanitarian legal discourse in order to highlight how it legitimises the deprivation of human life.

As explained in Chapter 3, the legal construction of combatant becomes possible only with the parallel legal construction of civilian. Article 50(1) of AP I, defines civilian as 'any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol'.[817] As a result in the 1949 formulation, combatants are the 'members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces', 'members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied', provided that they fulfil the four conditions of Article 4 A (2),[818] 'members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power', and persons participating in a levée en masse.[819] By 1977, this formulation became more centralised around the definition of 'armed forces' for IACs, found in Article 43(1) of AP I:

> The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

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[815] *Legality of the Threat or Use of Nuclear Weapons* (n 416) paras 78-79.
[816] Melzer, *A Comprehensive Introduction* (n 3) 83.
[817] Article 50(1) AP I (n 301).
[818] Article 4 (A) (2)
[819] Article 4 A (1)(2)(3)(6) GC III (n 303).

According to Article 43(2) of AP I, citing Article 33 of the Third Geneva Convention, all members of the armed forces, except medical personnel and chaplains, are to be considered combatants.[820] The same applies to members of 'dissident armed forces' and 'organized armed groups' in the case of non-State parties in a NIAC.[821] In this way, individuals who are interpellated to become members of the armed forces of a party to the conflict can lawfully become the target of direct attacks, with the exception of medical personnel or chaplains. For instance, an 18-year-old boy who is involuntarily conscripted to the armed forces of a party to the conflict is also recruited as a legal subject; a combatant. By virtue of the speech act of the international humanitarian legal discourse, the level of protection of their life is now dramatically lower. This reduction of the protection of human life is not only owed to the destruction of their legal shield but also due to the introduction of a legal sword: the combatant's privilege, the Regulated War discourse explains, means that combatants are free from domestic criminal prosecution for any deaths or injuries they may have inflicted upon other combatants.[822] Thus, under this legal construction, combatants have the right to kill as long as they respect the surrounding rules of IHL: 'while all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of *his right* to be a combatant'.[823] In a par excellence ideological fashion, the Regulated War tradition interpellates individuals into combatants and then presents this subjectivation as a 'privilege' or a 'right'.

The international humanitarian legal discourse on combatants is not the only way the hegemonic Regulated War tradition achieves lower protection of human life in times of war. Interpellating individuals as civilians that can be killed indirectly in the legal formulation of incidental casualties is also an instantiation of the political effect of interpellation.[824] The discourse of collateral damage, however, will be unpacked below in sub-section 3, as it is primarily the product of the discursive strategy of reification. At the same time, interpellation functions as the leading discursive strategy, enabling the

[820] Article 43(2) AP I (n 301).
[821] Article 1(1) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (AP II).
[822] Knut Ipsen, Combatants and Non-combatants in Dieter Fleck (ed), The Handbook of International Humanitarian Law (3rd Edition) (Oxford University Press, 2013) 86.
[823] Article 44(2) AP I (n 301) (emphasis added).
[824] It is worth noting that there has been ongoing discussion about whether civilians of the attacking party should be considered in the proportionality assessmen, see for instance Boogaard (n 5) 155. This highlights that civilians may be interpellated into varying sub-identities, resulting in a dynamic and shifting scope of legal protection.

diminished protection of the lives of individuals who, though not combatants, are directly participating in hostilities. These individuals are interpellated by the Regulated War tradition to another subject: the civilian who directly participates in hostilities. On that matter, section 3.2.2 has already provided a succinct exposition of the discourse produced by the ICRC legal project and the Military legal project. This section intends only to underscore how this legal discourse succeeds in the interpellation of individuals into a social role that is afforded lower legal protection.

Starting with the discourse produced by the ICRC legal project, it acknowledges that the legal category of the civilian directly participating in hostilities is not provided in treaty law.[825] Nonetheless, it proceeds to construct itself in the typical 'ad-hocism' of the international humanitarian legal discourse:

> In practice, civilian participation in hostilities occurs in various forms and degrees of intensity and in a wide variety of geographical, cultural, political, and military contexts. Therefore, in determining whether a particular conduct amounts to direct participation in hostilities, due consideration must be given to the *circumstances prevailing at the relevant time and place*.[826]

It concludes with the following formulation:

> The notion of direct participation in hostilities refers to specific hostile acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict. […] [T]he act must be likely to adversely affect the military operations […] there must be a direct causal link between the act and the harm […] and the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).[827]

This is how the Regulated War discourse interpellates individuals into civilians directly participating in the hostilities and thus enables direct attacks against them. Where the two legal projects of the Regulated War discourse appear to split is on the duration of this

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[825] Melzer, *A Comprehensive Introduction* (n 3) 41. For a historical account of civilians participating in war from the point of view of the ICRC legal project see Emily Crawford, *Identifying the Enemy: Civilian Participation in Armed Conflict* (OUP 2015).
[826] Melzer, *A Comprehensive Introduction* (n 3) 41-42 (emphasis added).
[827] Ibid 45-46.

interpellation. The ICRC legal project speaks to their antagonistic legal project about the need to be particularly careful in this regard:

> As civilians lose protection against direct attack 'for such time' as they directly participate in hostilities, the beginning and end of specific acts amounting to direct participation in hostilities must be determined with utmost care.[828]

Therefore, the ICRC legal project puts forward that: 'civilians lose and regain protection against direct attack in parallel with the intervals of their engagement in direct participation in hostilities (so-called "revolving door" of civilian protection)'.[829] A fortiori, it argues that 'the "revolving door" of civilian protection is an integral part, not a malfunction, of IHL'.[830]

On the contrary, the Military legal project speaks of a broader lifespan of the legal subject of the direct participant to hostilities and has criticised the former legal construction as 'fatally flawed'.[831] The more extremist view from within the Military legal project is that civilians directly participating in hostilities become 'unlawful combatants':

> These participants in conflict are also categorizedas "civilians" who lose momentarily the protection of that status, "unless and for such time as they take a direct part in hostilities." However, this civilian categorization can be problematic conceptually in dealing with "unlawful" participants in warfare since the term "civilian" carries with it an aspect of legitimacy.[832]

The US Department of Defense Law of War Manual, in section 5.8.1.2, asserts adherence to the customary rule that permits the killing of civilians, by interpellating them as direct participants in hostilities, before it provides its temporally broader construction of that rule.[833] For the Military legal project, 'persons who take a direct part in hostilities, however, do not benefit from a "revolving door" of protection'.[834] Nevertheless, again, the two legal projects of the Regulated War tradition collapse into 'ad-hocism': 'there may be difficult

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[828] Ibid 65.
[829] Ibid.
[830] Ibid.
[831] Schmitt, 'Deconstructing Direct Participation in Hostilties: The Constitutive Elements' (n 330) 738.
[832] Kenneth Watkin, 'Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy' (2005) 2 Occasional Paper Series Harvard Program on Humanitarian Policy and Conflict Research 6.
[833] USA, *Department of Defense Law of War Manual* (n 4) 235.
[834] Ibid 242

cases not clearly falling into either of these categories, and in such situations *a case-by-case analysis* of the specific facts would be needed'.[835]

Similarly to the temporal expansion of the legal subjects of civilians directly participating in the hostilities and combatants, the Regulated War tradition also expands this interpellation geographically.[836] This is done either by expanding the legal concept of hostilities, when referring to civilians directly participating in them, or by expanding the concept of armed conflict,[837] when referring to members of armed forces and organised armed groups. The US Department of Defense Law of War Manual articulates this explicitly:

> Although supplying weapons and ammunition in close geographic or temporal proximity to their use is a common example of taking a direct part in hostilities, it would not necessarily constitute a hostile act or demonstrated hostile intent. […] Thus, the concept of taking a direct part hostilities must not be understood to limit the use of force in response to hostile acts or demonstrated hostile intent.[838]

In recent years, the Regulated War tradition has rehearsed two main legal narratives by which to enlarge the geographical scope of the lower protection for human life paradigm. The first is the narrative of 'spillover', the second is the narrative of the 'war against terror'. Spillover is a term which legally constructs the situation where a NIAC expands into the territory of neighbouring states.[839] By the assertion of a geographic expansion of the armed conflict,[840] the Regulated War tradition achieves the expansion of its professed legal paradigm on the protection of life by interpellating individuals in the 'spillovered' territories as combatants. The ICRC legal project's signature move when undertaking this interpellation is by contrasting the 'spillover' with the Military legal project broader legal concept of 'war on terror':

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[835] Ibid 242 (emphasis added).
[836] Helen Duffy, *The 'War on Terror' and the Framework of International Law* (CUP 2015) 421.
[837] *Prosecutor v Tadić* (Judgement) IT-94–1-A (ICTY Appeals Chamber, 15 July 1999) para 70.
[838] USA, *Department of Defense Law of War Manual* (n 4) 241.
[839] Jelena Pejic, 'Conflict Classification and the Law Applicable to Detention and the Use of Force' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) 80, 82.
[840] See ICRC, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' (ICRC, April 2024) 18 https://www.icrc.org/sites/default/files/document_new/file_list/armed_conflict_defined_in_ihl.pdf accessed 23 April 2025.

> Even if the situation in Yemen would evolve into an armed conflict, the United States drone attacks take place within the context of an argument of a 'war on terror' which is not included in any definition of conventional armed conflict. It is not contemplated in the existing international law literature or treaties that one can engage in an armed conflict with a concept such as a "War on Terror". To this date the drone attacks conducted by, or with the support of, the CIA, are to be assessed under a peacetime paradigm.[841]

Nevertheless, the ICRC legal project has consistently adopted the legal concept of 'spillover',[842] to 'recruit' individuals into combatants and justify targeted killings:

> The drone attacks conducted by the United States in north-west Pakistan are a 'spillover' effect from the conflict in Afghanistan and therefore to be assessed within that Non-International Armed Conflict. The drone attacks targeting militants outside the tribal areas and the NWFP are ruled by the law enforcement model.[843]

It was by building on this interpellating discourse that the Military legal project introduced the legal concept of the 'war on terror' after 9/11. President Bush, as its political father, expressed its political ambition: 'our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of *global reach* has been found, stopped and defeated'.[844] Shortly before this speech, the US Congress had passed the joint resolution on the 'Authorization for Use of Military Force'.[845]

By using this new national legislation as background material, the Military legal project, especially the one based in the USA, put forward that the armed conflict with international terrorism does not have fixed geographical boundaries.[846] In fact, the interpellative intensity of the Military legal project was so strong that they 'recruited' enemy combatants

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[841] Susan Breau, Marie Aronsson, and Rachel Joyce, 'Discussion Paper 2: Drone Attacks, International Law, and the Recording of Civilian Casualties of Armed Conflict' (2011) Oxford Research Group 9.
[842] 'It now seems increasingly well established that armed conflicts can and do spill over into the territories of states not party to the conflict', Duffy (n 836) 358.
[843] Breau, Aronsson, and Joyce (n 841) 12.
[844] George W Bush, 'Address to a Joint Session of Congress and the American People' (The White House, 20 September 2001) (emphasis added) https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html accessed 23 April 2025.
[845] Authorization for Use of Military Force, Public Law No 107–40, 115 Stat 224 (USA, 18 September 2001).
[846] For an overview, see Rebecca Ingber, 'Legally Sliding into War?' (Just Security, 13 January 2021) https://www.justsecurity.org/75306/legally-sliding-into-war/ accessed 23 April 2025.

even within the territory of the USA.[847] Obama had pledged to reconsider this geographical expansion of the scope of the armed conflict: 'we must define our effort not as a boundless "global war on terror," but rather as a series of persistent, targeted efforts'.[848] However, his administration continued this 'global war on terror' with the help of newly crafted legal categories enabling a greater geographical scope, such as the one of terrorists' 'associated forces'.[849] A leaked US Deparment of Justice White Paper proclaimed that: 'the United States is in an armed conflict with al-Qaeda and its associated forces, and Congress has authorized the President to use all necessary and appropriate force against those entities'.[850] The White Paper makes explicit that: 'any U.S. operation would be part of this non-international armed conflict, even if it were to take place *away from the zone of active hostilities*'.[851] After setting the spatial parameters of the interpellative discursive strategy, the Military legal project's finishing touch in the White Paper comes with a quote from Dinstein: 'When a person takes up arms or merely dons a uniform as a member of the armed forces, he automatically exposes himself to enemy attack'.[852] Still in 2015, the General Counsel of the US Department of Defense was reaffirming that: 'there is no doubt that we remain in a state of armed conflict against the Taliban, al-Qa'ida and associated forces as a matter of international law'.[853]

It must be now evident, that the language of IHL is the privileged rhetorical space for the discursive strategy of interpellation. As the initiating discursive move is to switch the law-enforcement paradigm with the war-paradigm of the protection of life, IHRL has not been particularly useful in this subjectivation process of the Regulated War tradition. On the contrary, the IHRL language has been employed by the Anti-War tradition in order to resist the interpellation of individuals into legal categories that enjoy a lower protection of life. As outlined in Chapter 3, the UN HRC in General Comment 36 declared that 'States parties engaged in acts of aggression as defined in international law, resulting in

[847] John Yoo and Robert Delahunty, 'The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them' (Office of Legal Counsel, U.S. Department of Justice, 23 October 2001) 26.
[848] Barack Obama, 'Remarks by the President at the National Defense University' (The White House, 23 May 2013) https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university accessed 23 April 2025.
[849] See Department of Justice, 'White Paper Draft: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of AI-Qa'ida or An Associated Force' (8 November 2011) and Jeh Johnson, 'National Security Law, Lawyers, and Lawyering in the Obama Administration' (Yale Law & Policy Review, 22 February 2012) https://yalelawandpolicy.org/national-security-law-lawyers-and-lawyering-obama-administration accessed 23 April 2025.
[850] Department of Justice, White Paper Draft (n 849) 2.
[851] Ibid 3 (emphasis added).
[852] Ibid citing Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (n 379) 94.
[853] Stephen Preston, 'The Legal Framework for the United States' Use of Military Force Since 9/11' (USA Department of Defense, 10 April 2015) https://www.defense.gov/News/Speeches/Speech/Article/606662/the-legal-framework-for-the-united-states-use-of-military-force-since-911/ 24 April 2025.

deprivation of life, violate ipso facto article 6 of the Covenant'.[854] In this way, the IHRL language becomes the vehicle of an anti-hegemonic legal discourse that negates the hailing of the Regulated War tradition. In this particular case, the Idealist Pacifist legal project is providing a conscientious objector's argument to oppose the 'recruitment' of the hegemonic Regulated War tradition:

> Killing in an unlawful war is unlawful killing. It may escape the sanction of the law of armed conflict because of the internal logic of that system. But that rationale should not and cannot apply to international human rights law, where it is fitting to speak of a human right to peace.[855]

In fact, this argument produced from the Idealist Pacifist legal project is now tested in practice with the submission of a complaint to the UN HRC by 18 Ukrainian victims of a Russian missile attack.[856] In this complaint the applicants argue that: 'the Vinnytsia attack violates the right to life of both civilians and military personnel in accordance with the HRC's General Comment 36, which states that any killings arising from an act of aggression—as defined by international law—constitute a violation of the victims' right to life under the Covenant'.[857] Whether this litigation strategy will succeed or not depends on various extra-legal factors and does not undermine the argument presented under this section. The discursive strategy of interpellation is still one of the four main discursive ways the Regulated War tradition achieves the legitimation of the lower protection of human life in times of war. This subjectivation of individuals by the Regulated War tradition is undertaken through the use of various legal categories beyond combatants. The present section did not explore in detail the subjectivation of civilians, as the primary discursive strategy that leads to the endangerment of their lives is reification. This will be addressed in the following section.

6.3 Reification

The Regulated War discourse achieves the lowering of the protection of human life by interpellating them in different legal positions. As explained in the previous section, in addition to their 'recruitment' as combatants, the subjectivation of individuals into civilians

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[854] UN Human Rights Committee, 'General Comment No 36' (n 572) para 70.
[855] Schabas, 'The Right to Peace' (n 579) 4.
[856] Legal Action Worldwide, NGOs File Landmark Complaint with UN Human Rights Committee Over Russian Aggression in Ukraine (LAW, 10 July 2024) https://legalactionworldwide.org/accountability-rule-of-law/press-release-ngos-file-landmark-complaint-to-un-human-rights-committee-on-russian-aggression-in-ukraine/ accessed 23 April 2025.
[857] Ibid.

also contributes to the endangerment of human life. While the primary discursive strategy which legitimises the deprivation of human life in the case of civilians directly participating in hostilities is that of interpellation, for the rest of civilians this legitimation is achieved mainly through the discursive strategy of reification. This is because civilians not directly participating in hostilities are often constructed as passive, voiceless objects of war. Hence, while interpellation creates legal subjects that have certain pre-determined but active social roles in the armed conflict, reification takes this subjectivity away from civilians by constructing them as mere objects of the process, as groundlings in the theatre of operations. Reificatory discourse operates in a two-act structure. Firstly, in the Lukácsian sense by reifiying the social relation between human beings, which in the language of IHL is expressed as the relationship between combatants and civilians. Secondly, in the more literal sense of objectification, by picturing civilians as 'collateral damage' and 'human shields'. This trope conceals both that the killing in times of war is a social relation and that those killed are human beings.

Lukács introduced the concept of reification in 1923.[858] Building on Marx's commodity fetishism,[859] he argued that 'the relation between people takes on the character of a thing and thus acquires a "phantom objectivity"' which seems so 'rational and all embracing as to conceal every trace of its fundamental nature: the relation between people'.[860] Lukács conception of reification is far-reaching and an extensive engagement with its full breadth is beyond the scope of this section. Similar to how the previous section employed Althusser's concept of interpellation, this section draws on the concept of reification with a particular interest in its instantiation as a discursive strategy and political effect of the Regulated War tradition. Below, it discusses how the social relation between combatants and civilians becomes a relation between combatants and an object: human shields or collateral damage. Even more, it demonstrates how the Regulated War tradition reifies completely this social relation by presenting it as a relation between objects. To illustrate how the discursive strategy of reification functions between civilians and combatants but also between combatants themselves, the section concludes with an analysis of the discursive ways that reify the social relation between combatants into a thing with a 'phantom of objectivity' that appears 'rational'.[861]

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[858] Lukács (n 240) 83-110.
[859] Karl Marx, *Capital: A Critique of Political Economy* vol I (Penguin Classics 1990) 164-169.
[860] Lukács (n 240) 83.
[861] Ibid.

Starting with the reification of civilians, it should be acknowledged that this reification takes place on the foreground of the already interpellated subject as such. The Regulated War tradition interpellates individuals into the legal subject of civilians and then proceeds with their reification. This does not mean that reification, along with the other discursive strategies discussed in this section, does not interact with and reinforce the interpellatory effects. On the contrary, these four discursive strategies produce their political effects through a dynamic process of cross-fertilisation. The individual is being reified in their interpellated concrete subject-form of the civilian. Furthermore, the discursive strategy of reification operates with the help of various sub-strategies. Some of them are more crucial for its operation than others. For instance, the sub-strategy of objectification, as explained above, is a prerequisite step for the discursive strategy of reification. Other ancillary sub-strategies are those of commodification, dehumanisation, and weaponisation. These sub-strategies are exposed below, appearing consecutively in that order.

An obvious instance of the reification of civilians by the Regulated War tradition is produced by its discourse on 'human shields'.[862] The ICRC legal project speaks about lowering the protection of civilians who become 'voluntary human shields':

> Where civilians voluntarily and deliberately position themselves to create a physical obstacle to military operations of a party to the conflict, they could directly cause the threshold of harm required for a qualification as direct participation in hostilities.[863]

In this way, the ICRC legal project relegated civilians as 'physical obstacles'. These 'physical obstacles' are dubbed as 'human shields', a linguistic construction that conveys this idea of a human being functioning as an object, as a physical obstacle. Going a step further, the Military legal project spares no doubts about this reificatory process when articulating the following:

> [V]oluntary human shields obviously do not merit consideration either in the proportionality assessment or during consideration of alternative plans of attack that might minimize harm to the civilian population.[864]

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[862] Tobias Vestner, 'Strategic Security Analysis: Addressing the Issue of Human Shields' (2019) 8 Geneva Centre for Security Policy.
[863] Melzer, *Interpretative Guidance* (n 31) 56.
[864] Schmitt, 'Human Shields in International Humanitarian Law' (n 721) 326.

This legal articulation leads to a recurring pattern of justification of the killing of civilians by shifting blame to the adverse belligerent party. For instance, after NATO's bombing of Koriša, Pentagon spokesperson Ken Bacon, occupying an institutional position which systematically propagates the Military legal project, said that: 'it may be that as many as half, or certainly a third of the people who may have been killed in NATO attacks, were put there specifically by Milošević as human shields'.[865] This framing enables the attacking party, which killed the civilians, to accuse their opponents of their reification and consequently of their death.

The ICRC legal project, although it shares the 'human shields' vocabulary, raises a reductio ad absurdum counter-argument to the view put forward by the Military legal project: that treating 'voluntary human shields' as civilians directly participating in hostilities would also allow direct attacks against them. The response of the Military legal project to this counter-argument is disarmingly sincere and absurd, if seen outside the internal logic of the international humanitarian legal argument:

> While accurate as a matter of law [to directly target these 'human shields'], doing so would serve little practical purpose. […] In other words, wise commanders will not place forces at risk or waste weapons by directly targeting human shields when their actual objective is *the object that the shields seek to protect*.[866]

This last phrase captures the discursive strategy of reification in its full incarnation. Firstly, the passage not only objectifies the civilians with the help of the 'human shields' vocabulary, but it also objectifies combatants, who are dubbed as 'objects'. Secondly, it expresses in the most conspicuous way the reification of the social relation between human beings. The relationship between the two subjects, the civilian and the combatant, becomes a relationship between two objects: the shield and the object that it seeks to protect. This reification of the human relationship often leads to the elevation of the objects to the role of the active subject: 'Errant U.S. Missile Killed 10, Including 7 Children'.[867] With this syntax device, the Regulated War tradition removes the responsibility from human choices

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[865] USA Department of Defence News Briefing of 17 May 1999 quoted in Amnesty International, 'NATO/Federal Republic of Yugoslavia "Collateral Damage" or Unlawful Killings?' (Amnesty International, 7 June 2000) https://amnesty.no/natofederal-republic-yugoslaviacollateral-damage-or-unlawful-killings accessed 23 April 2025.
[866] Ibid (emphasis added). Cf. Melzer, *Interpretative Guidance* (n 31) 57.
[867] Matthieu Aikins and Najim Rahim, 'Afghan Family Says Errant U.S. Missile Killed 10, Including 7 Children' (The New York Times, 21 September 2021).

and transfers it to the missile itself. The missile now has human qualities, was 'errand' and it was 'he' who killed 7 children.

When the reificatory discourse produced by the Military legal project intersects with the discursive strategy of rationalisation, it descends into straightforward commodification of human life on the backdrop of the 'economy of force'.[868] It is at this discursive juncture that Schmitt articulates an ostensibly more protective interpretation of the legal status of human shields in the vernacular of the market:

> A third approach to voluntary shields '*discounts'* them in proportionality calculations and precautions in attack analyses.[869]

In this articulation, the Military legal project enriches its reification discursive strategy with one of its sub-strategies, commodification. Operating in sync with objectification, commodification constructs human beings as commodities that, due to their particular characteristics and in light of the 'economy of force', can be 'discounted' from the final proportionality 'account'. A true humanitarian bargain!

Another common legal concept employed in this reificatory discursive process is that of 'collateral damage'. This discourse is articulated consistently by the Regulated War tradition as a whole, although the ICRC legal project often appears more careful to supplant the 'collateral damage' term with that of 'civilian casualties' in order to avoid the direct objectification of civilians. In any case, this does not absolve the ICRC legal project from the overall reificatory use of this concept. An instance where the ICRC legal project employs the concept of 'collateral damage'[870] can be located in the words of Sassoli:

> Once a military objective is the target, under additional rules, which are not discussed here, the attack may nevertheless become illegal if excessive collateral damage affecting civilians or civilian objects must be expected.[871]

In this passage, which forms part of Sassoli's description of the principle of distinction, the ICRC legal project reifies civilians in two main ways. Firstly, the discussion of the

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[868] Schmitt, 'Human Shields in International Humanitarian Law' (n 721) 326.
[869] Ibid (emphasis added).
[870] There is a counter-tendency within the ICRC legal project to use the term 'civilian casualties' instead of 'collateral damage', see for instance Duffy (n 836) 344-455.
[871] Marco Sassoli, 'Legitimate Targets of Attacks under International Humanitarian Law' (2003) HPCR International Humanitarian Law Research Initiative 1.

deprivation of human life in terms of 'damage' downplays the protection of human beings to that of the protection of objects or even property. Even more, when this 'damage' is dubbed as 'collateral', a term borrowed from the finance vocabulary, in order to highlight the secondary character of the object that is 'damaged'. Hence, the reification of civilians is achieved both by their objectification but also with their lower position in the hierarchy of protection, relegated to that of objects. Secondly, and relatedly, the ICRC legal project packages civilians together with civilian objects when discussing the 'collateral damage' of an attack.[872] In this manner, the substantive difference between objects and human beings is suppressed in favour of their common civilian nature. In addition, the concept of 'collateral damage' to civilians is legitimised, insofar as it is not 'excessive'. The way the ICRC legal project draws the red line between lawful and unlawful 'collateral damage' both reinforces and is reinforced by reification as a discursive strategy and a political effect.

The Military legal project proceeds with the reification of civilians in the vocabulary of 'collateral damage' in even stronger terms:

> Notwithstanding LOIAC strictures, it is *impossible* to preclude altogether the possibility of civilian casualties and damage to civilian objects in wartime. Indeed, some civilian losses and damage are virtually postulated, as long as they constitute *lawful collateral damage*.[873]

Here, Dinstein both engages in the discursive strategy of reification and provides its backstory. The starting point of this reificatory discourse is the impossibility of avoiding civilian casualties in wartime. Civilian losses are postulated 'as long as they constitute lawful collateral damage'. In this last phrase, what 'constitutes' the permissibility of civilian losses is not only their lawful nature but also their reduction, via reification, to the status of 'collateral damage'. This is an exemplary case of the synergies between the discursive strategies of interpellation and reification in diminishing the legal protection of human life during armed conflict. The deprivation of human life is first interpellated into 'civilian loss', which then is reified into the legal concept of 'collateral damage'. This synergy is what discursively animates the 'lawfulness' of killing human beings who are not actively involved in the hostilities. Furthermore, reificatory rhetorical devices, like the

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[872] Cf. Melzer, *A Comprehensive Introduction* (n 3) 83, which expresses the recent tendency of the ICRC legal project to distinguish the applicable rules to civilians and civilian objects, although it admits that the 'terminus technicus' for both persons and objects subject to lawful indirect attack is that of 'military objectives'.

[873] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (n 379) 139 (emphasis added).

legal concepts of 'human shields' and 'collateral damages', also operate in synchrony to further cement the political effects of this discursive strategy. For instance, the Military legal project employs the legal concept of 'human shields' to propose a lower level of protection for individuals that are then dubbed as 'collateral damage':

> Otherwise lawful targets shielded with protected civilians may be attacked, and the protected civilians may be considered as collateral damage, provided that the collateral damage is not excessive compared to the concrete and direct military advantage anticipated by the attack.[874]

This passage is also typical in its emphasis on the 'concrete and direct military advantage anticipated'. As it will become even more striking in section 6.4, the Regulated War tradition as a whole defers the final judgement of the legality of an attack with the use of the vernacular of 'ad-hocism': 'in these circumstances, we look to all available real-time and historical information to determine whether a potential target would be a lawful object of attack'.[875] This 'ad-hocism' has now become such a vital part of the professional sensibility of the social actors producing the Regulated War tradition that is completely unchallenged by even its more progressive voices.[876] In the rare occasions where this reificatory legal discourse is questioned, the Regulated War tradition and especially its Military legal project shuts down these challenges as non-legal in order to close up the possibility of any dereification of 'military objectives' to the status of human beings again. For instance, when critics of the US 'war on terror' were calling their 'targeted killings' as assassinations, the Military legal project responded fervently:

> On occasion, I read or hear a commentator loosely refer to lethal force against a valid military objective with the pejorative term "assassination". Like any American shaped by national events in 1963 and 1968, the term is to me one of the most repugnant in our vocabulary, and it should be rejected in this context. Under well-settled legal principles, lethal force against a valid military objective, in an armed conflict, is consistent with the law of war and does not, by definition, constitute an "assassination".[877]

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[874] USA, *Joint Publication 3-60: Joint Targeting* (Joint Chiefs of Staff, 13 April 2007) A-2.
[875] Brian Egan, 'State Department Legal Adviser Brian Egan's Speech at ASIL' (Lawfare, 8 April 2016) https://www.lawfaremedia.org/article/state-department-legal-adviser-brian-egans-speech-asil access 23 April 2025.
[876] See the report of Amnesty International which criticises NATO's military attack on Yugoslavia from within the Regulated War tradition, thus accepting its premises, Amnesty International (n 865).
[877] Johnson (n 849).

This excerpt from the speech of the then general counsel of the US Department of Defense at Yale Law School is a definitive example of how the Military legal project suppresses any counter-hegemonic discursive attempt to (re)humanise combatants and civilians.

The brief overview above highlighted how the discursive strategy of reification has reified civilians, combatants, and their social relation itself. It also underscored how this discursive strategy has been facilitated by the sub-strategies of objectification and commodification. Other common sub-strategies of reification are those of dehumanisation and weaponisation. The discursive sub-strategy of dehumanisation overlaps with the discursive sub-strategy of objectification. It may even appear as identical or at least that the former is a broader category of the latter. However, the sub-strategy of dehumanisation differs significantly in its focus on portraying human beings as living creatures, rather than objects, yet as entities of lesser value, as 'beasts of burden'.[878] This focus, which defines the distinction between the two, is born out of the particular historical character of these two sub-strategies. As discursive conditions are historically specific, the dominant relation between the two sub-categories is not that of different levels of abstraction but their different historical function. The fact that they co-exist in the same SpaceTime, is another ramification of the uneven and combined development in history.[879] Objectification suggests that human beings are expendable objects, justified by the necessity of war, whereby some of them must, inevitably, be damaged. Dehumanisation, by contrast, reflects a colonial trope—a racist concept now experiencing a revival, depicting certain people as 'human animals,' and similar derogatory labels.

The discursive sub-strategy of dehumanisation has a long history in international humanitarian legal discourse.[880] In the encounter of the colonial European powers with the subalterns, the former did not consider that IHL protections should be extended to the latter as well. This was expressed through the sub-strategy of dehumanisation:

> The laws of war protect enemies of the same race, class, and culture. The laws of war leave the foreign and the alien without protection. When is one allowed to wage war

[878] See Jean-Paul Sartre, 'Preface' in Frantz Fanon, *The Wretched of the Earth* (Penguin 2001) 13.
[879] Novack (n 804) 83-84.
[880] See Mégret (n 99).

> against savages and barbarians? Answer: always. What is permissible in wars against savages and barbarians? Answer: anything.[881]

This sub-strategy of dehumanisation was identified as a colonial trope already in the early 20th century:

> It appears to us as the totality of forms which the capitalist, bourgeois states apply in their relations with each other, while the remainder of the, world is considered as a simple object of their completed transactions. Liszt, for example, teaches that 'the struggle with states and peoples who are outside the international community must not be judged according to the law of war, but according to the bases of the love for mankind and Christianity'.[882]

The quote from Franz von Liszt gives away that this discursive sub-strategy was first expressed with religious connotations. Nevertheless, throughout the years, the civilised-uncivilised register has been 'secularised' and can be employed by reference to the standard of development, which is, of course, set by the West. The discursive sub-strategy of dehumanisation may not be as common as in the colonial era, but it is still an available discursive move to legitimise the endangerment of human life. Recently, the then Minister of Defense of the State of Israel practised this sub-strategy when announcing a complete siege of Gaza: 'we are fighting human animals and we are acting accordingly'.[883] In contrast to the dominant, for contemporary international humanitarian legal discourse, dialectic of humanity and divinity, dehumanisation operates at the backdrop of the dialectic between animal and human. It is used to exclude the individuals in question from the minimum protections professed by IHL and IHRL.

Similarly, the discursive sub-strategy of weaponisation has also been a colonial trope. The Regulated War tradition had treated the subalterns as unlawful weapons that could not be used by the colonial armies in their inter-imperialist wars:

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[881] Sven Lindqvist, *A History of Bombing* (Granta 2002) 5.
[882] Pashukanis (n 137) 172.
[883] Jeremy Bowen, 'US Threat to Cut Israel Military Aid Is Sign of Anger at Broken Promises' (BBC News 2024) https://www.bbc.co.uk/news/articles/c3e9q4nylwjo accessed 23 April 2025.

> All writers on international law agree, in wars between themselves, the members of the Family of Nations should not make use of barbarous forces – i.e. troops consisting of individuals belonging to savage tribes and barbarous races.[884]

This sub-strategy also operates on the assumption that the civilian population of the enemy are not human beings but weapons at their disposal. The international humanitarian legal discourse on human shields exposed previously in this chapter can serve simultaneously the weaponisation of human beings. Nordon and Perugini observe that the vernacular of 'Human Shields demonstrates how this increasing weaponization of human beings has made the position of civilians trapped in theaters of violence more precarious and their lives more expendable'.[885] The genocide in Gaza provides a recent example of this discursive sub-strategy as well. The government of Israel had declared that: 'there are no innocent civilians' in Gaza because they support Palestinian non-state armed groups.[886] In this fashion, the whole civilian population of this area is weaponised and therefore it becomes possible for a belligerent to argue that they lose their civilian protection. Analogously, the discursive sub-strategy of weaponisation may build on gender stereotypes and portray every male civilian as a potential enemy combatant.[887] The assumption that 'in war we expect the deaths to be men of fighting age' has become commonsensical for the Regulated War tradition.[888] It is how the Regulated War tradition expects things to be in a 'normal conflict situation'.[889] How the Regulated War tradition frames what is normal and what is the exception is the object of the following section 6.4.

6.4 Normalisation

The Regulated War tradition employs the discursive strategy of normalisation in order to enable and cement the political effects discussed above. On the one hand, it enables the discursive strategies of interpellation and reification by reinforcing the primacy of the IHL

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[884] Lassa Oppenheim, *International Law: A Treatise* vol II (Longmans, Green, and Co 1921) 108.
[885] 'Human Shields demonstrates how this increasing weaponization of human beings has made the position of civilians trapped in theaters of violence more precarious and their lives more expendable', Neve Gordon and Nicola Perugini, *Human Shields: A History of People in the Line of Fire* (University of California Press 2020).
[886] David Ingram, 'Israel Posts Video Saying There Are No Innocent Civilians in Gaza' (NBC News 14 June 2024) https://www.nbcnews.com/tech/social-media/israel-posts-video-saying-are-no-innocent-civilians-gaza-rcna157111 accessed 23 April 2025.
[887] For the political effects of this discursive sub-strategy see Charli Carpenter, *Innocent Women and Children: Gender, Norms and the Protection of Civilians* (Routledge 2016).
[888] House of Commons International Development Committee, 'In War We Expect the Deaths to Be Men of Fighting Age. In Gaza They Are Overwhelmingly Women and Children' (UK Parliament, 1 March 2024) https://committees.parliament.uk/committee/98/international-development-committee/news/200175/in-war-we-expect-the-deaths-to-be-men-of-fighting-age-in-gaza-they-are-overwhelmingly-women-and-children-idc-reports-on-the-humanitarian-situation-in-gaza/ accessed 23 April 2025.
[889] House of Commons International Development Committee, *Humanitarian Situation in Gaza: Second Report of Session 2023–24* (House of Commons, 1 March 2024) para 76.

vocabulary over that of IHRL. On the other hand, it cements those political effects by constructing them as the norm and expelling any counter-hegemonic international humanitarian legal discourse to the realm of exception or even to that of wishful thinking. Hence, the discursive strategy of normalisation can be captured in all its breadth only by tracing how the Regulated War tradition speaks in both the language of IHL and IHRL. This section presents these discursive machinations as an ascendance from the latter to the former.

Starting with the articulations of the Regulated War tradition in the IHRL language, the protection of human life in times of 'peace' is presented as the legal norm. As will be discussed below, this norm is reversed in times of war. Of course, peace and war are not two isolated, distinct categories but the two semantic poles in a spatio-temporal continuum. This is why even in times of 'peace', where the language of IHL is largely irrelevant, the protection of human life, as constructed through IHRL, permits certain exceptions to the rule, the right to life. For instance, under the ECHR, the deprivation of life is not violating the right to life when it was: a) in defence of any person from unlawful violence; (b) to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken to quell a riot or insurrection.[890] These exceptions are also deemed to apply to the right to life guaranteed under Article 6 of the ICCPR, as they are not considered as 'arbitrary' deprivations of life.[891] While moving from peacetime to war, the Regulated War tradition changes the language accordingly from IHRL to IHL to achieve the normalisation of the lower protection of human life. The ECtHR itself has acknowledged this continuum of legal languages when transitioning from peace to war. In Benzer v Turkey the Court made clear that 'an indiscriminate aerial bombardment of civilians and their villages […] cannot be reconcilable with any of the grounds regulating the use of force which are set out in Article 2 § 2 of the Convention or, indeed, with the customary rules of international humanitarian law or any of the international treaties regulating the use of force in armed conflicts'.[892]

The shift towards the less protective legal paradigm originates from within the IHRL discourse. Article 15(1) of the ECHR stipulates that:

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[890] Article 2(2) ECHR (n 511).
[891] UN Human Rights Committee, 'General Comment No 36' (n 572) para 11.
[892] *Benzer and Others v Turkey* (n 536) para 184.

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

This already implies that less protective constructions of the rights guaranteed under the ECHR are possible in time of war, insofar as they are not inconsistent with other international legal obligations, such as those arising from IHL. The next paragraph of Article 15 takes this one step further: 'No derogation from Article 2, except in respect of deaths resulting from lawful acts of war'. The text of the ECHR already paints the IHL language as the primary one in time of war. This text itself is a product of the Regulated War tradition. It is common before the ECtHR that the applicant operates from within the ICRC legal project and the respondent articulates their legal arguments in the vein of the Military legal project. In Ukraine and the Netherlands v Russia, the respondent, in the voice of the Military legal project, argued against employing the concept of 'living instrument' for extending 'the Convention's reach into areas of international humanitarian law'.[893] The applicant, replying in the voice of the ICRC legal project, contended that it is 'well-established that the provisions of international human rights law, including those of the Convention, continued to apply during situations of armed conflict'.[894] This dialogue between the applicant and the respondent highlights the internal tensions between the Regulated War tradition. Notwithstanding that, it will become evident from the discussion below that the two legal projects ultimately concur on the primacy of IHL over that of IHRL.

Article 15(3) provides that when a Contracting Party decides to make use of this derogation clause, it should send a formal notice with its reasoning to the Secretary General of the Council of Europe. The ECtHR in its early case law had emphasised that in the absence of a formal derogation under Article 15 of ECHR, the military operation has to be judged against 'a *normal* legal background'.[895] That is, by the norms applied in times of peace. This dictum was reversed by more recent case law of the ECtHR. In 2014, the Grand Chamber of the Court pronounced that IHL is applicable independently of a formal derogation under Article 15, arguing that this conclusion is supported both from Article

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[893] *Ukraine and the Netherlands v Russia* (n 550) para 513.
[894] Ibid para 712.
[895] *Isayeva v Russia* (n 530) para 191 (emphasis added).

31(3)(b) (subsequent practice) and (c) (other relevant rules of international law) of the VCLT.[896] In this way, the ECtHR paved the path for the displacement of the IHRL language on questions regarding the protection of life in times of war. In the same case, the ECtHR continues this shift of language by inventing a new ground of permitted deprivation of liberty, while it proclaims that IHL should be accommodated only 'as far as possible'.[897] A strong minority from within the ICRC legal project resisted this 'harmonious interpretation' argument of the majority of the Grand Chamber judges. In their dissenting opinion, Judges Spano, Nicolaou, Bianku, and Kaladjieva argued that:

> As the *disapplication* option is off the table, since no derogation from the Convention has occurred, this novel method of *accommodation* cannot be implemented in such a manner as to have effectively the same legal effects as *disapplication*. However, by concluding, as the majority does, that the grounds of permitted deprivation of liberty under Article 5 § 1 should be "accommodated, as far as possible", with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions, the majority, in essence, does nothing else on the facts of this case. It effectively disapplies or displaces the fundamental safeguards underlying the exhaustive and narrowly interpreted grounds for permissible detention under the Convention by judicially creating a new, unwritten ground for a deprivation of liberty and, hence, incorporating norms from another and distinct regime of international law, in direct conflict with the Convention provision. Whatever *accommodation* means, it cannot mean this![898]

The shift from the IHRL language to that of IHL is at the heart of their disagreement here. The argument of this minority of four judges does not reject the relevance and accommodation of IHL's language. What they do reject is that IHL's language can completely displace the IHRL language. The minority concluded that in the absence of a way to reconcile the rules of IHL with those of the Convention, the Court should 'give priority to the Convention' in conformity with its obligation under Article 19 of ECHR.[899]

Similar to the jurisprudence of the ECtHR, the ICJ has nominated IHL as the primary discursive framework in times of war. In its early case law, although it had affirmed

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[896] *Hassan v The United Kingdom* (n 529) paras 100-103.
[897] Ibid 104.
[898] *Hassan v The United Kingdom*, Partly Dissenting opinion of Judge Spano joined by Judges Nicolaou, Bianku, and Kaladjieva, App No 29750/09 (ECtHR, 16 September 2014) para 18 (emphasis in the original).
[899] Ibid para 19.

IHRL's applicability in wartime, the ICJ had declared that IHL is lex specialis to IHRL.[900] In particular, the Court holds that since, according to the ICCPR, the right to life cannot be subject to derogation the 'test of what is an arbitrary deprivation of life' should be determined 'by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities'.[901] This leads the ICJ to pronounce that IHRL does not provide the answer to whether the killing of a person in times of war is arbitrary or not. This answer should be sought in the IHL's discursive framework:

> Whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[902]

A few years later, the Court systematised further its view on the relationship between the two fields of law in the Wall Advisory Opinion:

> As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.[903]

Seen together with its dictum in the Nuclear Weapons advisory opinion, this new pronouncement of the ICJ appears to imply that the protection of life in time of war may be exclusively a matter of IHL, since it is the only discursive framework used to judge whether a killing was arbitrary or not. This lex specialis approach and its 'harmonious interpretation' variation are the legal-linguistic devices by which the Regulated War tradition achieves the normalisation of the killing of individuals. It is clear that the IHRL vocabulary is less fertile for this discursive method, hence, the Regulated War tradition plants its seeds in that of IHL. Nevertheless, the Regulated War tradition does not necessarily need Courts to speak in the language of IHL. Not speaking at all also suffices.

The epitome of the latter is ECtHR's judgment in Georgia v Russia (II). In this case, the Grand Chamber of the Court found that it lacked jurisdiction to examine human rights

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[900] *Legality of the Threat or Use of Nuclear Weapons* (n 416) para 25.
[901] Ibid (emphasis in the original).
[902] Ibid.
[903] *Legal Consequences of the Construction of a Wall* (Advisory Opinion) 2004, ICJ Rep 2004, para 106.

violations committed at the active phase of hostilities.[904] As an explanation, the majority of the Grand Chamber offered the following:

> However, having regard in particular to the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances and the fact that such situations are *predominantly* regulated by legal norms other than those of the Convention (specifically, international humanitarian law or the law of armed conflict), the Court considers that it is not in a position to develop its case-law beyond the understanding of the notion of "jurisdiction" as established to date.[905]

By explicitly affirming the predominance of the IHL language, the Court decides not to speak in the language of IHRL at all. The domination of the former language over the latter in the jurisprudence of the most influential IHRL court showcases how hegemonic the Regulated War tradition is in the international humanitarian legal discourse. After relinquishing its jurisdiction for the active phase of hostilities, the Court examined the complaints concerning the phase of occupation. There, the Court reiterates its pronouncements in Hassan that there is no need for a notification of formal derogation under Article 15 of the Convention before it takes into account IHL and that 'the Convention must be interpreted in harmony with other rules of international law of which it forms part'.[906] Hence, as the ECtHR has declared in its jurisprudence, it has no jurisdiction for violations of the ECHR occurring in the active phase of hostilities and even when it has jurisdiction the language of IHL is predominant. Nevertheless, the IHRL vocabulary does not remain innocent in this normalisation process. The jurisprudence of the ECtHR foreshadows that IHRL's language is becoming the purgatory of the deprivation of life in the name lex specialis.

The ascendance from IHRL's discursive framework to that of IHL is completed with reference to the relevant rules of IHL that license the killing of human beings. This license not only includes the killing of combatants but of civilians as well, in their subjectivation as 'collateral damage' and 'civilians directly participating in hostilities'. It also extends to both 'offensive' and 'defensive' use of violence.[907] The reversal of the norm of protecting human life and its marginalisation to the realm of exception is of great geographical scope

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[904] *Georgia v Russia (II)* (n 481) para 138.
[905] Ibid para 141.
[906] Ibid paras 92-94
[907] Article 51(1) AP I (n 301) .

as well. It applies 'to any land, air or sea warfare' even if it 'may affect[s] the civilian population, individual civilians or civilian objects'.[908] With this discursive strategy of normalisation, the Regulated War tradition succeeds in establishing the deprivation of life as the new norm and the protection of life as its exception. The 'normal' in wartime is death. Even for civilians: 'some civilian losses and damage are virtually postulated, as long as they constitute lawful collateral damage.[909] This is also why the Regulated War discourse creates the combatant as the primary legal person and defines the civilian negatively as what is left: 'any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol'.[910]

This normalisation of the deprivation of human life at wartime has not been left uncontested. Notwithstanding the hegemony of the Regulated War tradition, the political effect of normalisation has proven to be one of the most unpalatable of the Regulated War tradition. The structure of feeling of the international legal discourse has produced several instances of counter-hegemonic discourse against the normalisation of death in wartime. For instance, as a reaction to the decision of the majority in Georgia v Russia, three judges of the ECtHR issued a partly dissenting opinion which condemns the 'lower human rights standards' introduced with reference to IHL as an 'an *ad terrorem* argument, which concedes to a regrettable result, only because it could have been much worse'.[911] The three judges hit the head with the nail, the Regulated War tradition is brimming with this type of regrettable arguments: 'the death of civilians always is regrettable, but inevitable'.[912] This criticism goes to the heart of the Regulated War tradition, which is founded in terrorem itself. It rejects its premise that one should legitimise the deprivation of life in the name saving life.

Judges Yudkivska, Pinto De Albuquerque and Chanturia go a step further and explicitly declare that the relationship between IHL and the ECHR 'does not allow the Court to read into the exhaustive list of grounds for depriving someone of the right to *life* the right to *kill* in conformity with international humanitarian law'.[913] This is a clear manifestation of the

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[908] Article 51(2) ibid.
[909] Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (n 379) 139.
[910] Article 50(1) AP I (n 301).
[911] *Georgia v Russia (II)*, Joint Partly Dissenting Opinion of Judges Yudkivska, Pinto de Albuquerque, and Chanturia (n 495) para 20 (emphasis in the original).
[912] USA Department of Defense, 'Report to Congress on the Conduct of the Persian Gulf War-Appendix on the Role of the Law of War' (1992) 31 International Legal Materials 612, 616.
[913] *Georgia v Russia (II)*, Joint Partly Dissenting Opinion of Judges Yudkivska, Pinto de Albuquerque, and Chanturia (n 495) para 21 (emphasis added).

counter-hegemonic Anti-War tradition of thought. It opposes both the in terrorem logic of the Regulated War tradition and its political effect of normalisation of the deprivation of life. What the three judges saw as a rejection of the attempt of the Grand Chamber to resurrect the Latin maxim 'silent enim leges inter arma' ('in times of war law falls silent') was, in essence, one of the few recent challenges to the hegemony of the Regulated War tradition.[914] This challenge seems to have been picking up pace in recent years. One year later, the majority of the Grand Chamber, interrogated the reversal of the norm and exception in the legal paradigm of the protection of human life. In its judgment, the Grand Chamber singled out the substantive limb of the right to life and identified a possible conflict between IHL and the Convention:

> In the present case, the Court would observe that there is no apparent conflict between the provisions of the Convention and the relevant provisions of international humanitarian law in respect of the complaints made, with the possible exception of the complaints under the substantive limb of Article 2. In so far as the incidental killing of civilians may not be incompatible with international humanitarian law subject to the principle of proportionality, this may not be entirely consistent with the guarantees afforded by Article 2 of the Convention.[915]

Certainly, this passage leaves ample room for the continuation of the normalisation discursive strategy. The phrasing 'this may not be entirely consistent' does not subvert the normalisation process, but it does, at least, question the reach of its repercussions. It is a strong indication that there is a brewing frustration within the structure of feeling of the international humanitarian legal discourse, especially for the normalisation of the death of human beings in wartime.

Another expression of this unsettled frustration is evident in HRC's General Comment 36. There, the HRC speaks in the voice of the Idealist Pacifist legal project when it enunciates that 'States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant'.[916] From this legal viewpoint, even the killing of a combatant would be a violation of the right to life if the enemy combatant is a member of the aggressor's armed forces. With this legal construction, the use of force that initiated the war is revived as a crucial factor in the discussion on the

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[914] *Georgia v Russia (II)*, Joint Partly Dissenting Opinion of Judges Yudkivska, Wojtyczek, and Chanturia, (n 492) para 1.
[915] *Ukraine and the Netherlands v Russia* (n 550) para 720.
[916] UN Human Rights Committee, 'General Comment No 36' (n 572) para 70.

protection of human life. The HRC in a previous General Comment had already underlined this connection between the obligation to refrain from war and the protection of human life:

> War and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings very year. Under the Charter of the United Nations the threat or use of force by any State against another State, except in exercise of the inherent right of self-defence, is already prohibited. The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life. Every effort they make to avert the danger of war, especially thermonuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life.[917]

Reading these two excerpts from the General Comments together leads to the conclusion that they form part of the counter-hegemonic international humanitarian legal discourse. Nevertheless, General Comment 36 of the HRC, makes sure that this discursive evidence of the Idealist Pacifist legal project does not subvert the normalisation of killing in wartime: 'use of lethal force consistent with international humanitarian law and other applicable international law norms is, in general, not arbitrary'.[918] HRC entrenches the political effect of normalisation by constructing the relationship between the Regulated War and the Anti-War traditions as that of the rule and the exception: the use of lethal force in conformity with IHL would be 'in general' not arbitrary. By expelling the Anti-War tradition into the realm of exception, instead of ignoring or rejecting it altogether, the Regulated War tradition neutralises its subversive edge. It is a strategy of assimilation of the counter-hegemonic legal discourse.

After exposing the hegemonic and the counter-hegemonic instances of international humanitarian legal discourse, along with their interactions, a more complete understanding of how the discursive strategy of normalisation operates has emerged. Its reverse of the norm and exception paradigm on the protection of human life depends, firstly, on the imposition of the IHL language as primary over that of IHRL; secondly, on the entrenchment of the lower protection paradigm by the purgatorial function of IHRL's discourse; thirdly, on the neutralisation via assimilation of any counter-hegemonic by constructing the relationship between the Regulated War and the Anti-War traditions as

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[917] UN Human Rights Committee, 'General Comment No 6' (n 576) para 2.
[918] UN Human Rights Committee, 'General Comment No 36' (n 572) para 64.

that of the norm and the exception. At the same time, the operation of the discursive strategy of normalisation rests on the political effects of interpellation and reification, discussed above. These three political effects lead to the last discursive strategy explored in this chapter: the discursive strategy of rationalisation.

6.5 Rationalisation

Rationalisation has been a central theme in Weber's oeuvre.[919] In 'Economy and Society', Weber sketches the transition from the total-war vision to the humanitarian vision and especially to its rationalised incarnation, of the Regulated War tradition: the transition from the hero of the war chariot to the rational soldier.[920] A more detailed exposition of Weber's concept of rationalisation falls outside the scope of this chapter. In the present section, his concept of rationalisation functions as background material to situate the international humanitarian legal discourse historically. Weber's discussion of practical and formal rationalities highlights a broader tendency of societal structures in capitalism towards 'means-end rational calculation'.[921] This 'means-end rational calculation' animates the discursive strategy of rationalisation. It is this discursive strategy that is the main object of this section: how the Regulated War discourse rationalises the deprivation of human life.[922]

Chapter 4 has elaborated on the ways the Regulated War tradition legitimises war. Building on this premise, the discursive strategy of rationalisation puts forward that the necessities of war will, unfortunately, lead to the killing of human beings, even civilians. For the Regulated War tradition, IHL 'contemplates that civilians will *inevitably* and tragically be killed in armed conflict'.[923] The Military legal project, in particular, puts forward that for practitioners of international humanitarian legal discourse:

> It is impossible to preclude altogether the possibility of civilian casualties and damage to civilian objects in wartime. Indeed, some civilian losses and damage are virtually postulated, as long as they constitute lawful collateral damage.[924]

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[919] See Guenther Roth and Claus Wittich (eds), *Economy and Society: Max Weber, Economy and Society: An Outline of Interpretive Sociology* (University of California Press 1978) and Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (Routledge 2001).
[920] Roth and Wittich ibid 150-155.
[921] Stephen Kalberg, 'Max Weber's Types of Rationality: Cornerstones for the Analysis of Rationalization Processes in History' (1980) 85 (5) American Journal of Sociology 1145, 1151-1159.
[922] For the discursive strategy of rationalisation in international law see Marks, *The Riddle of All Constitutions* (n 6).
[923] Egan (n 875) (emphasis added).
[924] Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (n 379)139.

The foundational premise of the Regulated War tradition is not only that war and the deaths of those engaged as combatants are inevitable, but that civilian deaths are also postulated from the outset: 'civilian casualties are a tragic and at times unavoidable consequence of the use of force in situations of armed conflict'.[925] This passage from Obama's speech is taken almost verbatim by the seminal work of the father the human nature realism: death of non-combatants 'are regretted as sometimes unavoidable concomitants of war'.[926] It is this fundamental assumption that sets in motion the discursive strategy of rationalisation. The Regulated War tradition assumes the inevitability of civilian death and then proceeds to rationalise it in the name of its minimisation:

> Obviously, the attacking belligerent must take the presence of the civilians into account when weighing the proportionality of a planned attack. This does not detract from the fact that, if the attack goes ahead, civilians will be jeopardised; the aim of the rules that require 'separation' is to minimise the damage done to civilians during legitimate attacks. On the other hand, one should note that the obligation to separate civilians from military objectives exists only 'to the maximum extent feasible'.[927]

With this discursive strategy, the Regulated War tradition consolidates its legitimation of the lower protection of human life and organises its thanatopolitical priorities. One of the earliest textual evidence of this discursive strategy is the St Petersburgh Declaration. This declaration articulates the end and means of the Regulated War tradition:

> That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable.[928]

There is, of course, a tremendous change in the means of war since its publication, but this change has been principally a quantitative one. It has not affected the means-end rationality,

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[925] Barack Obama, 'Executive Order: United States Policy on Pre- and Post-Strike Measures' (The White House, 1 July 2016). Similarly the ICJ when discussing IHL declared that it prohibis 'a harm greater than that *unavoidable* to achieve legitimate military objectives', *Legality of the Threat or Use of Nuclear Weapons* (n 416) para 78 (emphasis added).
[926] Morgenthau (n 160) 178.
[927] Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing 2008) 129.
[928] St Petersburg Declaration (n 669) Preamble.

but on the contrary, it has actually developed it even more. This is evident in US policy during the 'war on terror': 'Federal Armed Forces must be free to use any means necessary to defeat the enemy's forces, even if their efforts might cause collateral damage to United States persons'.[929]

The principle of proportionality plays a central role in the discursive strategy of rationalisation. It is the most available linguistic construction for its articulation and, therefore, functions as the launchpad for the rationalising discourse of the Regulated War tradition. This strategy of rationalisation speaks about human beings in their already interpellated and reified form. It also builds upon the normalisation of the deprivation of human life in wartime. The previous section has elaborated on how the scope of this normalisation includes both combatants and civilians. For the former, the discursive strategies of interpellation, reification, and normalisation have achieved nearly absolute legitimation of their killing.[930] For the latter, however, significant contestation remains about where to draw the line. It is at this juncture that the discursive strategy of rationalisation becomes quintessential for the Regulated War tradition. It is employed to dictate the scope of civilian immunity and thus the scope of the licence to kill as well.

In a recent work dedicated solely to the principle of proportionality in IHL, it has been contended that:

> Even though civilians may not be attacked directly, IHL acknowledges the *unavoidable reality* that they may still be affected by armed violence, without a breach of IHL occurring. It must be noted that not any inconvenience for civilians in armed conflict is included in the phrase 'incidental loss of civilian life [and] injury to civilians'. It is a common understanding that armed conflict causes many unwanted side effects that adversely affect the well-being of the civilian population.[931]

On the basis of this 'unavoidable reality', the text culminates as follows:

> Given the definition of an attack, as mentioned earlier, defensive military operations that may be expected to cause collateral damage must also be proportionate.

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[929] Yoo and Delahunty (n 847).
[930] Cf. UN Human Rights Committee, 'General Comment No 36' (n 572) para 70 and Schabas, 'The Right to Peace' (n 579) 4.
[931] Boogaard (n 5) 152 (emphasis added).

It is commonsensical for the legal professionals of the Regulated War tradition that military operations can lawfully cause 'proportionate collateral damage'. The typical formulation of the principle of proportionality by the Regulated War tradition is along these lines:

> The principle of proportionality requires that any military measures taken by parties to the conflict must be proportionate – the military advantage obtained by a particular operation must outweigh the damage caused to civilians and civilian objects.[932]

For the Regulated War tradition, proportionality is a balancing exercise between the military advantage on the one hand and the collateral damage caused to civilians on the other. An attack that is 'expected to cause incidental loss of civilian life' is not unlawful as long as it is not 'excessive in relation to the concrete and direct military advantage anticipated'.[933] The rationalising discourse overlaps largely with this IHL discussion of which civilian death is 'excessive' and which 'proportionate'. The discursive strategy of rationalisation further relativises human life, in order to engage in calculations; the so-called 'proportionality assessment'. Boogaard introduces a real-life scenario to demonstrate the practical application of this calculative rationality:

> The challenge the pilot is facing is, therefore, a balancing act between the *relative value of the lives of the civilians* and the military advantage that the enemy will not come into possession of the helicopter.[934]

This excerpt is both evidence of the discursive strategy of rationalisation and of the political effect of rationalisation. On the one hand, it is a text that calculates the 'relative value' of human life against the military advantage and on the other hand, it demonstrates how this rationalising discourse is embodied in the practice of the military, in this case of a pilot. It is also striking that, the common denominator introduced, which is essential in a calculative exercise, is that of value: the 'relative value of the lives of the civilians' and the military value anticipated: 'the value of the target, […] determines the level of permissible collateral damage'.[935] This reduction of human life to value or numbers is a prerequisite for the discursive strategy of rationalisation. With the rise of calculative rationality, the

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[932] Crawford and Pert (n 3) 46.
[933] Article 51(5)(b) AP I (n 301).
[934] Boogaard (n 5) 155 (emphasis added).
[935] United Nations Human Rights Council, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Christof Heyns' (9 April 2013) UN Doc A/HRC/23/47.
para 71.

downfall of human beings to that of mere statistics is inevitable. This calculative rationality also interacts with the pressures underlying the discursive sub-strategy of commodification, explaining why evidence of both the rationalising discourse and commodification overlap. An example of such overlap is the passage from Schmitt quoted above: 'a third approach to voluntary shields "*discounts*" them in proportionality calculations and precautions in attack analyses'.[936] In this way, the discursive strategy of rationalisation not only relativises human life and reduces it to the common denominator of 'value', but it can also 'discount' this value depending on the circumstances of each case. The Military legal project even introduced terms such as the Non-Combatant Casualty Cut-Off Value (NCV), which essentially is a numerical representation of the 'value' of civilians.[937] At the same time, the Military legal project acknowledges the subjective nature of the proportionality assessment and its operation with two different denominators:

> In practice, this is a highly subjective determination because it compares dissimilar values – collateral damage and military advantage – that are themselves hard to measure.[938]

It is crystal clear that for the Regulated War tradition, not every life is ascribed equal value, so part of the discursive strategy of rationalisation is to allocate this value. Insofar as the allocated value is translated to the protection afforded to human beings, the rationalising discourse is shaping the political economy of the protection of human life in wartime.

Going beyond the argument that civilian deaths are inevitable, the discursive strategy of rationalisation puts forward that if there were no civilian deaths caused by the good guys, the bad guys would kill even more:

> [I]t is a hard fact that U.S. strikes have resulted in civilian casualties, a risk that exists in every war. […] But as Commander-in-Chief, I must weigh these heartbreaking tragedies against the alternatives. To do nothing in the face of terrorist networks would invite far more civilian casualties -- not just in our cities at home and our facilities abroad, but also in the very places like Sana'a and Kabul and Mogadishu

[936] Schmitt, 'Human Shields in International Humanitarian Law' (n 721) 326 (emphasis added).
[937] This term was removed from the US armed forces vocabulary in 2018, see Bryan Clark, 'Pentagon Removed Non-Combatant Casualty Cut-Off Value from Doctrine in 2018' (Defense Daily, 24 October 2023) https://www.defensedaily.com/pentagon-removed-non-combatant-casualty-cut-off-value-doctrine-2018/pentagon/ accessed 24 April 2025.
[938] Michael Schmitt and John Merriam, 'Avoiding Collateral Damage on the Battlefield' (Just Security, 6 January 2021) https://www.justsecurity.org/74619/avoiding-collateral-damage-on-the-battlefield/ accessed 24 April 2025.

> where terrorists seek a foothold. Remember that the terrorists we are after target civilians, and the death toll from their acts of terrorism against Muslims dwarfs any estimate of civilian casualties from drone strikes.[939]

As explained in more detail in Chapter 4, this logic of the lesser evil is one of the main modus operandi of the rationalisation strategy. It has been theorised under the 'Doctrine of Double Effect' (DDE), founded on the moral philosophy of Thomas Aquinas, which contends that:

> [A]n act may be morally permitted, despite causing bad consequences, provided that the act itself is directed at achieving a moral good, the actor intends solely to achieve that moral good, the bad consequence is not a means to produce the moral good and finally the positive intended effects outweigh the unintended negative ones.[940]

This dichotomous reasoning takes for granted that civilians must die and then falsely sides with the ostensible lower civilian death rate.[941] Building on this false dichotomy, the rationalisation strategy enters the calculative modus operandi. It attempts to justify civilian deaths with algorithmic exercises. The Military legal project has introduced calculative methods for estimating collateral damage, of which the most pivotal is that issued by the US armed forces. According to Joint Publication 3-60 of the Joint Chiefs of Staff on 'Joint Targeting', collateral damage estimation (CDE) is a process conducted by trained personnel at several echelons to evaluate and define the risk and extent of collateral damage for a military commander.[942] For CDE, the US armed forces have adopted a joint methodology, the Collateral Damage Estimation Methodology (CDEM).[943] The US armed forces assert that this methodology is 'a balance of science and art that produces the best judgment of potential damage to collateral concerns'.[944] The scientific claim behind CDEM is owed to its use of 'a mix of empirical data, probability, historical observations,

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[939] Obama, 'National Defense University' (n 848).
[940] Massimo Brega, 'Understanding Collateral Damage in Everyday Life from Military Operations' (*NATO Rapid Deployable Corps Italy*, 18 April 2023) https://www.nrdc-ita.nato.int/newsroom/insights/understanding-collateral-damage-in-everyday-life-from-military-operations accessed 24 April 2025.
[941] 'At its core, the rule is an acknowledgement that collateral damage may be *unavoidable* in order to successfully execute an attack', Michael Schmitt and Eric Widmar, 'Precision and Balance in the Contemporary Law of Targeting' (2014) 7 Journal of National Security Law & Policy 379, 405 (emphasis added).
[942] USA, *Joint Publication* (n 874) II-14
[943] Chairman of the Joint Chiefs of Staff, *No-Strike and the Collateral Damage Estimation Methodology* (JCS 13 February 2009) Enclosure D.
[944] Ibid 1(d).

and complex modeling for CDE assessments'.[945] Due to the limitations of science, such as challenges in gathering the required data and the dynamic nature of the operational environment, art, defined as 'combined expertise, experience, and current intelligence', is used to tailor science to the exigencies of any given situation.[946] The 'supporting technical data and processes of the methodology' for the science element of CDEM 'are derived from physics-based computer models, weapons test data, and operational combat observations'.[947] Processing this information, the CDEM 'provides a numeric estimate of the number of civilians who may be injured or killed if the attack goes forward', which is then assessed against the backdrop of the military value of the attack.[948] The CDEM is a central rationalising discursive loci of the Military legal project, universalised within institutions like NATO.[949] At the same time, the ICRC legal project has come to embrace the CDEM as well: 'collateral damage assessments are a key way for the military to fulfill its obligations under international humanitarian law'.[950] The discursive strategy of rationalisation culminates in the purportedly scientific and statistical justification of the deprivation of civilian life.

The calculative aspect of strategy of rationalisation, however, is part of a broader tendency towards efficiency. Efficiency requires calculation, but also presupposes that this calculation takes place in light of the overarching objective. For instance, the Military legal project professes the importance of non-combatant and the civilian casualty cut-off value (CVM), but at the same time confesses that the CDEM and the CVM:

> Are not the only input to a commander's decision making. Operational objectives, end state considerations, LOW, ROE, target characteristics, risk to friendly forces, and strategic risk are examples of other factors that contribute to a commander's decision making. These factors, either alone or in combination, may outweigh the value of the CDM input.[951]

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[945] Ibid.
[946] Ibid.
[947] Ibid 2(b).
[948] Schmitt and Merriam,'Avoiding Collateral Damage on the Battlefield' (n 938). NATO has declared that 'it will continue to take measures, including institutionalizing civilian harm mitigation measures, North Atlantic Treaty Organization, 'NATO Policy for the Protection of Civilians' (NATO, 9 July 2016) https://www.nato.int/cps/en/natohq/official_texts_133945.htm accessed 24 April 2025.
[949] Schmitt and Merriam ibid.
[950] Human Rights Watch, Off Target: The Conduct of the War and Civilian Casualties in Iraq (HRW, 12 December 2003) https://www.hrw.org/report/2003/12/11/target/conduct-war-and-civilian-casualties-iraq accessed 24 April 2025.
[951] Chairman of the Joint Chiefs of Staff (n 943) Enclosure D 2(c).

This implies that the ratio of civilian deaths may fluctuate, depending on the operational-political environment. It was in this context that Obama issued an executive order on civilian casualties in which he explicitly made the connection between civilian casualties and the efficiency of the military operations.[952] For Obama, the protection of civilians is fundamentally consistent with the effective, efficient, and decisive use of force in pursuit of U.S. national interests'.[953] It is in the name of efficiency that the executive order declares that:

> Minimizing civilian casualties can further mission objectives; help maintain the support of partner governments and vulnerable populations, especially in the conduct of counterterrorism and counterinsurgency operations; and enhance the legitimacy and sustainability of U.S. operations critical to our national security.[954]

Efficiency is the main driving force behind the protection of civilian life: 'an operation that kills five insurgents is counterproductive if collateral damage leads to the recruitment of fifty more insurgents'.[955] The UK manual on the law of armed conflict is even more straightforward in this regard:

> The law of armed conflict is consistent with the economic and efficient use of force. It is intended to minimize the suffering caused by armed conflict rather than impede military efficiency.[956]

The rationalising discourse of the Regulated war tradition draws heavily on this vernacular of efficiency. For instance, Schmitt rejects the killing of voluntary human shields, not because is wrong to kill civilians, but because 'doing so would serve little practical purpose'.[957] Schmitt weighs the 'negative publicity any such action would inevitably generate' and highlights the issue of efficiency:

> [A]ttacking shields would violate the "economy of force" principle of war, which dictates that commanders should preserve assets for use against the most lucrative targets. In other words, wise commanders will not place forces at risk or *waste*

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[952] Obama, 'Executive Order: United States Policy on Pre- and Post-Strike Measures' (n 925).
[953] Ibid.
[954] Ibid.
[955] USA Department of the Army, *Counterinsurgency* (Field Manual and Marine Corps Warfighting Publication 2006) 1-141. See also Duffy (n 836) 425.
[956] UK Manual on the Law of Armed Conflict (n 4) para 2.1.
[957] Schmitt, 'Human Shields in International Humanitarian Law' (n 721) 326.

> weapons by directly targeting human shields when their actual objective is the object that the shields seek to protect.[958]

The efficiency vernacular is used in a wide set of contexts. For instance, the defence of Galić argued before the ICTY that 'the essence of the principle of proportionality' is 'based upon two elements: the principle of soldier's efficiency, and the principle of humanitarianism'.[959] Even more, Kennedy tells the story of how the US attempts to universalise the Regulated War tradition in this vernacular as well:

> In 1996, I traveled to Senegal as a civilian instructor with the Naval Justice School to train members of the Senegalese military in the laws of war and human rights. Most importantly, we insisted, humanitarian law will make your military more effective - will make your use of force something you can sustain and proudly stand behind'.[960]

The linguistic constructions of efficiency are used by the discursive strategy of rationalisation to legitimise killings and become the soul of the Regulated War tradition. In the foreword of the US Department of Defense Law of War Manual the Regulated War tradition emphasises that 'the law of war is part of who we are', while confessing that it 'poses no obstacle to fighting well and prevailing'.[961] In the vernacular of efficiency, the problem with targeting civilians would be the 'waste of weapons' and not the deprivation of human life.[962] This is how the discursive strategy of rationalisation employs the linguistic constructions of efficiency to rationalise the killing of human beings. In the remainder of this section, the focus shifts from rationalisation as a discursive strategy to rationalisation as a political effect, serving as prolegomena for the forthcoming final chapter.

The discursive strategies employed by the Regulated War tradition are not mere words. They produce real-life, material, political effects. For instance, the discursive strategy of rationalisation contributes to the rationalisation of the killing of a suspected combatant's family members in a NIAC, as collateral damage to the bombing of his house while

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[958] Ibid 326 (emphasis added).
[959] *Prosecutor v Galić* (n 345) para 39.
[960] David Kennedy, 'Modern War and Modern Law' (2007) 16 (2) Minnesota Journal of International Law 471, 484.
[961] USA, *Department of Defense Law of War Manual* (n 4) foreword.
[962] Cf. Sassoli, 'Legitimate Targets of Attacks (n 871) 3 which is one of the instances where the ICRC legal project opposes the total dominance of the efficiency vernacular.

sleeping.[963] Even more, with the advance of military technology, the political effects of rationalisation have been growing exponentially. Technology accelerates the rationalisation process and stretches it to its logical conclusions. The use of artificial intelligence (AI) for targeting purposes has elevated the calculative rationality to another level. For instance, Israel has deployed an AI 'target-creation' platform called 'the Gospel' which produces hundreds of possible military targets, multiple times more than with human targeting processes.[964] Smith has insightfully dubbed this updated version of the calculative rationality applicable in times of war as 'techno-rational'.[965] The HRC has acknowledged the dangers of this new 'techno-rational' way of waging war, in particular regarding the use of Lethal Autonomous Robotics (LAR):

> The increased precision and ability to strike anywhere in the world, even where no communication lines exist, suggests that LARs will be very attractive to those wishing to perform targeted killing. The breaches of State sovereignty – in addition to possible breaches of IHL and IHRL – often associated with targeted killing programmes risk making the world and the protection of life less secure.[966]

This excerpt should be read in connection with the previous section on the political effect of normalisation of the deprivation of life. The development of military technology not only accelerates the rationalising effect of the Regulated War tradition but also consolidates the normalisation of killing. In the same text, the HRC, recognises this explicitly: 'LARs may thus lower the threshold for States for going to war or otherwise using lethal force', which would lead to 'the "normalization" of armed conflict'.[967]

One last point remains to be made about the discursive strategy of rationalisation before this thesis proceeds to its final chapter. In the framework of rationalising the killing of human beings, in particular in their interpellated form as civilians, the Regulated War tradition has brought to the fore a concept of reasonableness:

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[963] Schmitt and Widmar (n 941) 406.
[964] Harry Davies, Bethan McKernan, and Dan Sabbagh, 'The Gospel: How Israel Uses AI to Select Bombing Targets' (The Guardian, 1 December 2023). https://www.theguardian.com/world/2023/dec/01/the-gospel-how-israel-uses-ai-to-select-bombing-targets accessed 24 April 2025.
[965] Smith (n 2) 47-66.
[966] Christof Heyns (n 935) para 62.
[967] Ibid para 58.

> International law contains a general principle prescribing that *reasonable* care must be taken in attacking military objectives so that civilians are not needlessly injured through carelessness.[968]

For this concept, and its variations, especially that of 'reasonable man', the legal professionals have spilt much ink throughout the decades.[969] Reasonableness holds a central position in the Regulated War tradition's attempt to appropriate the humanitarian vision. By moulding reason after its image, the Regulated War tradition succeeded in insulating international humanitarian legal discourse from any questions of why the law is as it is and instead overflowed it with hows. International humanitarian legal discourse today is replete with answers on how states can wage war more efficiently or how they can kill civilians 'proportionally'. The hegemony of the Regulated War tradition marks the advent of the instrumental humanitarian reason. Chapter 7 elaborates further on the nature of this form of reason and summarises the key findings of this thesis. It concludes with an immanent critique of the Regulated War tradition, casting its anchor in the waters of aspiration and charting a course for future research endeavours.

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[968] *Prosecutor v Kupreškić* (n 391) (emphasis added) para 524.

[969] For recent works see, inter alia, Boogaard (n 5) 336-340; Henderson and Reece (n 414) 835. More broadly see Sartor Giovanni, Giorgio Bongiovanni, and Chiara Valentini, 'Reasonableness in International Law' (Oxford Bibliographies, 25 February 2016) https://www-oxfordbibliographies-com.ezproxy2.lib.gla.ac.uk/display/document/obo-9780199796953/obo-9780199796953-0127.xml accessed 24 April 2025.

7. Epilogue

7.1 Instrumental Humanitarian Reason

The previous chapter concluded by introducing the concept of instrumental humanitarian reason. This term adapts Horkheimer's concept of instrumental reason to describe the underlying rationality that shapes the discourse of the Regulated War tradition.[970] The main characteristics of instrumental humanitarian reason have already been illustrated throughout the thesis. Calculation, efficiency, and bureaucracy[971] have been explicitly and implicitly themes of the analysis in Chapter 6. The overarching characteristic of instrumental humanitarian reason is the drive to disregard *why* human beings should kill each other and to focus on *how* or how much. In this sense, the instrumental humanitarian reason is what Horkheimer classifies as 'subjective reason'.[972] This type of reason describes the common understanding of the 'reasonable man' who is 'supposed to be able to decide what is useful to him'.[973] What is useful to a subject, then, is the driving force of this reason. What renders subjective reason possible, Horkheimer argues, 'is the faculty of classification, inference, and deduction, no matter what the specific content'.[974] Most importantly, instrumental reason 'attaches little importance to the question whether the purposes as such are reasonable'.[975] The question that arises then is how this critique of instrumental reason translates into a critique of instrumental humanitarian reason?

Firstly, instrumental humanitarian reason, which defines the discursive production of the hegemonic Regulated War tradition, starts from the premise that war is unavoidable or, in its most optimistic variation, that 'we will not eradicate violent conflict in our lifetimes'.[976] It, therefore, refrains from questioning whether the purpose of the

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[970] Marx Horkheimer, *Eclipse of Reason* (OUP 1947) 21-23.

[971] See, for instance, first-hand accounts of military legal advisors in Eric Michael Liddick, 'No Legal Objection, Per Se' (War on the Rocks, 21 April 2021) https://warontherocks.com/2021/04/no-legal-objection-per-se/ accessed 24 April 2025 and Craig Jones, 'In Good Faith: Legal Advice During Aerial Targeting in Urban Areas' (Humanitarian Law & Policy Blog, 4 May 2021) https://blogs.icrc.org/law-and-policy/2021/05/04/in-good-faith/#_ftnref1 accessed 24 April 2025. See also David Kennedy, *Of War and Law* (n 34) 33-34. This tendency of military-legal bureaucracy with an active role in warfare became first starkly visible in the Gulf War when the US 'army alone had about 200 lawyers in the theatre of operations', Steven Keeva and Forrest Cates, 'Lawyers in the War Room' (1991) 77 ABA Journal 52, 54. The bureaucratisation of the Regulated War tradition is also celebrated by the Prosecutor of the ICC: 'Israel has a professional and well-trained military. They have, I know, military advocate generals and a system that is intended to ensure their compliance with international humanitarian law. They have lawyers advising on targeting decisions, and they will be under no misapprehension as to their obligations', International Criminal Court, 'Statement of ICC Prosecutor Karim A. A. Khan KC from Cairo on the situation in the State of Palestine and Israel' (ICC, 30 October 2023) https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-khan-kc-cairo-situation-state-palestine-and-israel accessed 25 April 2025.

[972] Horkheimer, *Eclipse of Reason* (n 970) 3.

[973] Ibid.

[974] Ibid.

[975] Ibid.

[976] Obama, 'Remarks by the President at the Acceptance of the Nobel Peace Prize' (n 638).

Regulated War tradition is reasonable itself. Instead, it proceeds to serve this purpose in the most efficient way possible. The internal workings of the international humanitarian legal argument are coherent from the point of view of this instrumental humanitarian reason. This type of reason achieves internal coherence by classifying individuals into civilians and combatants, by inferring when a civilian is directly participating in hostilities, or by deducing the ratio of civilian deaths during proportionality assessment. It becomes instrumental when it is reduced to a mere technique that is blind to the pursued goal; when the technique absorbs all reason. Instrumental humanitarian reason, 'if it concerns itself at all with ends, it takes for granted that they too are reasonable in the subjective sense, i.e. that they serve the subject's interest in relation to self-preservation'.[977] That is, it takes for granted that war is unavoidable and thus to regulate war is the best one can wish for. It is in this respect that instrumental humanitarian reason is, in particular, also subjective. But if its function is to 'serve the subject's interest in self-preservation', the question that arises is who is the subject?

It appears obvious that the subject of instrumental humanitarian reason is none less than humanity itself. However, humanity is not a unified whole freed of contradictions. On the contrary, there are antagonistic social interests that are in direct conflict about the direction humanity is taking. The two intellectual traditions, dubbed as Regulated War and Anti-War in this thesis, are expressions of this social antagonism. Chapter 4 has elaborated on the ways the Regulated War tradition strives to become hegemonic in order to claim that it is Humanitarianism itself. The fact that the Regulated War tradition has achieved an almost absolute hegemony in international humanitarian legal discourse also responds to the question of who is the subject of instrumental humanitarian reason. The one who gets to speak on behalf of humanity, the one who has managed to universalise their own social interests as interests of the whole of humanity, is the capitalist class. Indeed, 'the ideas of the ruling class are in every epoch the ruling ideas'.[978] It is for the capitalist class, and their political representatives, that war appears 'sometimes necessary'.[979] This is because war is key to the reproduction of capitalism.[980] Therefore, the Regulated War tradition is 'nothing more than the ideal expression of the dominant material relationships, the dominant material relationships grasped as ideas'.[981] International legal humanitarianism 'takes as

[977] Horkheimer, *Eclipse of Reason* (n 970) 3-4.
[978] Marx and Engels, 'The German Ideology' (n 136).
[979] Obama, 'Remarks by the President at the Acceptance of the Nobel Peace Prize' (n 638).
[980] Wood (n 648) 155.
[981] Marx and Engels, 'The German Ideology' (n 136).

natural what is natural for the capitalist social relations'.[982] As long as this tradition is hegemonic, the capitalist class will continue to 'determine the extent and compass' of instrumental humanitarian reason and of the humanitarian vision itself.[983] This does not mean that there can be no challenge to the hegemony of the Regulated War tradition. The structure of feeling of humanitarianism is not devoid of counter-hegemonic seeds. The brilliance of William's concept of hegemony is that it can still capture the dynamics of resistance to the hegemon, leaving a crack of hope for its transcendence.[984]

The ascendance of instrumental humanitarian reason has far-reaching consequences for the humanitarian vision.[985] The subjective reason of the capitalist class, expressed in the Regulated War tradition, has absorbed humanitarianism to the extent that the two appear almost indistinguishable. In this sense, what is humanitarian is what is rational under Regulated War traditions' internal structure. In turn, what is actual—the necessity of war under capitalism—appears as rational.[986] In other words, the social forces that sustain imperialism in practice also impose their rationality to achieve the consensus for its reproduction. If rational has come to replace humanitarian in the era of the hegemony of the Regulated War tradition, then the label 'humane war' can also be rendered as 'rational war'. And since the essence of instrumental humanitarian reason is efficiency, an even more accurate term would be 'efficient war'. This is, of course, not a discovery of this thesis.[987] As illustrated by the discussion in section 6.4, it has been proudly declared from the actors of the Regulated War tradition themselves: 'the law of armed conflict is consistent with the economic and efficient use of force'.[988] The intrinsic connection between humanity, rationality, and international law has been even celebrated by TWAIL scholars: 'rationality, humanity and concern for the human future are built into the structure of international law'.[989] This thesis has endeavoured to interrogate the silent presuppositions that sustain the elephant of efficiency in the room, exposing the conceptual architecture that renders it both present and unexamined.

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[982] Pashukanis (n 137) 95.
[983] Marx and Engels, 'The German Ideology' (n 136).
[984] Williams (n 140) 112.
[985] Cf. John Levi Martin, 'The Objective and Subjective Rationalization of War' (2005) 34 Theory and Society 229–275.
[986] Cf. Georg Hegel, *Philosophy of Right* (Batoche Books) 18.
[987] See for instance the logic of efficiency in US air warfare in Dill, *Legitimate Targets? Social Construction, International Law and US Bombing* (n 131) 181-194.
[988] UK Manual on the Law of Armed Conflict (n 4) para 2.1.
[989] Dissenting Opinion of Judge Weeramantry (n 510) 331.

In the same way that the Regulated War tradition legitimises the killing of human beings under the notion of 'efficient war,' it also delegitimises practices deemed inefficient, casting them as war crimes. The wilful killing of civilians is established as a war crime under article 8(2)(a)(i) of the ICC statute, because attacking civilians 'would violate the "economy of force" principle of war, which dictates that commanders should preserve assets for use against the most lucrative targets'.[990] Patrick Finnegan, an army brigadier and, at the time, dean at West Point, openly stated in a Hollywood interview that 'war crimes are counterproductive.[991] This is underscored in the US Law of War Manual as well:

> We also know that the law of war poses no obstacle to fighting well and prevailing. Nations have developed the law of war to be fundamentally consistent with the military doctrines that are the basis for effective combat operations. […] The law of war's prohibitions on torture and unnecessary destruction are consistent with the practical insight that such actions ultimately frustrate rather than accomplish the mission.[992]

Notwithstanding this, what is generally considered inefficient and classified as a war crime may be deemed efficient under specific circumstances. For instance, the USA during its 'global war on terror' campaign, had argued that the protection against torture is 'not applicable to operations against non-nationals abroad, including in Guantánamo or in the CIA detention programme' on the basis of a reservation regarding the territorial scope attached to its ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[993] Similarly, Israel has argued in the framework of domestic criminal proceedings that the torture of prisoners is justified under the 'necessity defense' and thus 'investigators are entitled to use moderate physical pressure'.[994] If what it passes as humanitarian in the epoch of Regulated War tradition's hegemony is what is efficient, there may well be a time when these exceptional defences of torture become normalised as efficient too. Schmitt, from all people, knows well that 'to confiscate the word humanity, to invoke and monopolize such a term probably has certain incalculable effect' that can lead a war to 'be driven to the most extreme inhumanity'.[995] By supplanting humanity with efficiency, the Regulated War tradition opens a wormhole

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[990] Schmitt, 'Human Shields in International Humanitarian Law' (n 721) 326 (emphasis added).
[991] Moyn (n 1) 257.
[992] USA, *Department of Defense Law of War Manual* (n 4) foreword.
[993] Duffy (n 836) 559.
[994] *The Public Committee Against Torture in Israel v The State of Israel* HCJ 5100/94 (Israeli Supreme Court 1999) para 15.
[995] Carl Schmitt, *The Concept of the Political* (University of Chicago Press 2007) 54.

that can take humanity back to the era of the total war vision, which this time will be appearing as the new humanitarian vision; a neo-Kriegsraison.[996]

Instrumental humanitarian reason, which animates the Regulated War tradition, is the reason of the capitalist class. This does not mean that reason should be abandoned altogether and that humanitarianism should find refuge in morality.[997] Morality works within the logic of imperialism, thus accepting its foundations. The moral imperative to safeguard life amidst war paradoxically cements war as natural, veiling its horror with the veneer of inevitability. Through this theological alchemy, the act of killing transforms into sin, sanctifying violence even as it condemns it.[998] On the contrary, that human beings should not kill each other is a rational proposition, not a moral one. Once this is conceded, the naturalisation of war is demystified and laid bare as a historically specific proposition that goes contrary to reason in its rational form.[999] Therefore, a rational response to this can come only from outside the system's logic. Such a response requires a shift from problem-solving theory to critical theory.[1000]

The hegemony of instrumental humanitarian reason does not exclude the possibility of reviving an antagonistic, counter-hegemonic rationality of the subalterns. With the critique of instrumental humanitarian reason, this thesis wishes to open space for the realisation of this possibility. In this way, the critique of the subjective rationality of the Regulated War tradition is immanent. The emphasis of this thesis was on the exploration of this rationality's discursive product, its rules of reproduction, and its political effects. Below, section 7.2, recasts the main points of discussion of this thesis in light of its research questions. The remaining space in section 7.3 aims to render the immanent critique explicit, offering a glimpse of the way forward.

7.2 Key Takeaways

The starting point of this thesis is the betrayal of the humanitarian promise in practice. This betrayal animated its research questions. The first question invited a reflection on the main international humanitarian legal projects and the discourse they produce. To address it, Chapter 2 provided a mapping of the two main intellectual traditions of the humanitarian

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[996] Scott Horton, 'Kriegsraison or Military Necessity? The Bush Administration's Wilhelmine Attitude Towards the Conduct of War' (2006) 30 Fordham International Law Journal 3.
[997] Cf. Marcela Prieto Rudolphy, *The Morality of the Laws of War: War, Law, and Murder* (OUP 2023).
[998] Lukács (n 240) 38.
[999] 'Reason has always existed, but not always in a rational form', Marx, 'Marx letter to Ruge' (n 287). This rational form of reason is the reason of the subaltern, the reason of self-preservation of humanity.
[1000] Cox (n 249) 128.

vision and their legal projects. It has identified as such the Regulated War and the Anti-War intellectual traditions. Under the former, it classified the Military legal project and the ICRC legal project, while under the latter, it located the Materialist Pacifist and the Idealist Pacifist legal projects. Chapter 2 introduced the discourse produced by the Regulated War tradition and the Anti-War intellectual tradition, with emphasis on the latter, while Chapter 3 engaged in a detailed exposition of the discourse produced by the legal projects of the former. Chapter 4 addresses the first research question in two ways. Firstly, it demonstrated that the Regulated War tradition is the hegemonic tradition producing international humanitarian legal discourse. Secondly, it puts forward that the discourse produced by this tradition legitimises war. This is also how it manages to sustain and reproduce its hegemony.

The second research question intended to unpack the rules of production of international humanitarian legal discourse, by turning the focus to its grammar. Chapter 5 addresses this question with the help of the method of deconstruction. It posited that the international humanitarian legal argument has a contradictory argumentative structure that oscillates between aspiration and limitation. This chapter demonstrates how the two rhetorics of aspiration and limitation oscillate and collapse into each other in a discursive process of interminable instability. The legal answer that the international legal text is supposed to provide never comes. It is constantly deferred to the future, in the privileged SpaceTime of imperialism, in wartime. This deferral is interrupted only when the military commander gives the legal response in practice, which signals that although the international humanitarian legal argument is in interminable contradiction, it is still tilted in favour of the rhetoric of limitation. This bias of the international humanitarian legal argument gives away that the grammar of international humanitarian legal discourse is formed upon the conditions of possibility carved by imperialism. Under this grammar, protecting human beings can be declared, but simultaneously, its realisation in real life is unthinkable. There is always an articulation in the form of the rhetoric of limitation as a caveat. Even more, aspiration is not chased by the shadow of limitation; instead, aspiration ultimately becomes the legitimising shadow for limitation. In other words, the structure of the international humanitarian legal argument is always already tilted towards imperialist interests.

Since the rules of production of international humanitarian legal discourse are tilted, the discourse itself is expressing in the international legal idiom, predominantly, the preferences of imperialism. Chapter 6 sets out to explore the ways by which the hegemonic Regulated War tradition legitimises the deprivation of human life in wartime. It argues that

the Regulated War tradition employs four core discursive strategies that make this possible. The first is the discursive strategy of interpellation. With this strategy, the Regulated War tradition recruits individuals into a certain set of legal subjects. The two main categories of these legal subjects are those of the civilian and the combatant. By this subjectivation process, the Regulated War tradition reduces human beings into their corresponding legal categories and calculates their level of protection accordingly. Interpellation is an indispensable strategy in the toolbox of the Regulated War tradition, enabling the legitimisation of the deprivation of human life during times of war. Second, it is the discursive strategy of reification. With this strategy, the Regulated War tradition reduces human beings into objects. Even more, reificatory discourse reduces the relationship between human beings to a relationship between objects. For instance, human beings are first interpellated into civilians and then reified as human shields. In this way, the starting point of the conversation for their protection is no longer the original humanitarian promise for the protection of human beings, but the role of human shields in military operations.

Notwithstadning their internal contradictions, the Military legal project and the ICRC legal project, ultimately, converge on that the protection of the life of civilians is not absolute. This point leads the discussion to the third discursive strategy, that of normalisation. The Regulated War tradition employs this strategy in order to normalise the deprivation of human life in wartime. The first move of this strategy is to privilege the vocabulary of IHL over the vocabulary of IHRL where the deprivation of life is not the norm but the exception. Then, it proceeds to construct the protection of life as the exception in times of war by negatively defining civilians as the remainder, after subtracting them from combatants, and even then setting in place various exceptions to their protection. The last of the discursive strategies discussed in Chapter 6 is rationalisation. With this strategy, the Regulated War tradition decides, ad hoc, where to draw the line between life and death. The rationalising discourse, which is articulated mostly through the principle of proportionality, revolves around efficiency. It accepts from the outset the deprivation of civilian life and then calculates the exact number of civilian deaths that would not be inefficient for military operations

The contribution of this thesis to existing literature and the academic dialogue comes both from its overall argument but also from several of its sub-arguments. Its overall argument is that international humanitarian legal discourse legitimises war and the deprivation of human life. Chapters 4 and 6, respectively, describe the discursive ways by which this legitimisation occurs. These two chapters form the main argument of the thesis and they

are present-oriented. They aim to capture the current state of international humanitarian legal discourse, albeit within its historical dynamics. In contrast, while engaging with both the past and the present, Chapters 2 and 5 also carry a forward-looking undertone. Chapter 5, with a clear eye toward what lies ahead, outlined the rules of production of international humanitarian legal discourse, along with their limitations and possibilities. Chapter 2 presented an intellectual map of the humanitarian vision, the successor of the total war vision, by sketching the contesting legal projects. Grouping the Regulated War intellectual tradition and the Anti-War intellectual tradition under the rubric of the humanitarian vision unlocks the potential for the immanent critique that culminates in this final chapter of the thesis. This is because the promise of the humanitarian vision, which is the protection of human life, is not only a guiding aspiration but also the measure against which the four legal projects should be judged. By adopting the very promise the humanitarian vision sets for itself as the point of reference, this thesis embarks on a ruthless critique of the Regulated War tradition. This immanent critique also rejects Idealist Pacifism that stands on its head and turns pacifism on its proper side. To the last research question, on how the promise of the humanitarian vision can be fulfilled, the thesis answers that it is with the renewal of the Materialist Pacifist agenda and ultimately with an anti-war, anti-capitalist philosophy of praxis. The remaining lines endeavour to shed some light on this direction.

7.3 Immanent Critique

The Regulated War tradition is a bourgeois intellectual tradition isomorphic to political realism. The starting point of bourgeois thought is 'an apologia for the existing order of things or at least the proof of their immutability'.[1001] This is why both the Regulated War tradition and political realism put forward that society is governed by objective laws rooted in human nature.[1002] This has been highlighted throughout this thesis, inter alia, with reference to Obama's Nobel Peace prize acceptance speech: 'we will not eradicate violent conflict in our lifetimes […] I face the world *as it is*'.[1003] From the vantage point of the capitalist class, this belief in the objectivity of the laws of politics leads to the need to develop a rational theory that reflects, however imperfectly and one-sidedly, these 'objective' laws.[1004] This 'rational' intellectual tradition in international relations is political realism and in international law is the Regulated War tradition. The Regulated

[1001] Lukács (n 240) 83.
[1002] Morgenthau (n 160) 4.
[1003] Obama, 'Remarks by the President at the Acceptance of the Nobel Peace Prize' (n 638) (emphasis added).
[1004] Morgenthau (n 160) 4.

War tradition becomes possible by juxtaposing itself to the previous total war vision.[1005] In this way, it occupies the humanitarian vision and expels the Anti-War tradition from the international legal imaginary. Lukács warned against such a bourgeois dominant ideology that 'postulates eternal laws of nature'.[1006] This ideology, of the hegemonic Regulated War tradition, 'endows the world with a rationality alien to man and human action can neither penetrate nor influence the world if man takes up a purely contemplative and fatalistic stance'.[1007] The hegemonic Regulated War tradition descends into instrumental humanitarian reason, which engages merely with the question of how and cannot even comprehend the idea that someone may ask why. The limitations of capitalism are manifested as limitations of rationality itself.[1008] Questions on why wars still exist or why human beings kill each other are not only unthinkable but also in a non-comprehensive language for the Regulated War tradition. The reified rationality of the Regulated War tradition 'abstracts from specific qualitative contents to quantitative determinations'.[1009] It reduces human beings to civilians and then calculates how many civilian deaths are proportional to the ad hoc defined 'concrete and direct military advantage'.

At the same time, the Idealist Pacifist legal project, while non-hegemonic and noble in intention, is still an offspring of bourgeois thought. In essence, it is a moralistic legal project, which in its idealist negation affirms Regulated War tradition's rationality.[1010] Its anti-war banners are flown on the high horse of morality and in abstract ideas about international institutions and cooperation. There is no army following its banner-men. If the imposed rationality of the Regulated War tradition is left unchallenged, then morality will never succeed in being anything more than the heroic act of exception or worse, merely privileged naivete. It is in this sense that Idealist Pacifism reproduces the Regulated War's rationality and 'fails to be truly active in its creation of objects'.[1011] This is why the Materialist Pacifist project confronts the fundamental premise that gives birth to the rationality of the Regulated War tradition. War is not unavoidable in general, but is unavoidable under the historically specific capitalist socio-economic system existing today.[1012] The Idealist Pacifist legal project, which discusses war in abstracto, fails to grasp

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[1005] Koskenniemi claims that that the modernist international law project became possible only as a reaction to the previous professionalism of international law, Koskenniemi, *FATU* (n 77) 161. The modernists constructed their project by establishing a juxtaposing dialogue with the preceding one.
[1006] Lukács (n 240) 38.
[1007] Ibid.
[1008] Andrew Feenberg, 'Realizing Philosophy: Marx, Lukács and the Frankfurt School' in Stefano Ludovici (ed), *Critical Theory and the Challenge of Praxis: Beyond Reification* (Routledge 2015) 122.
[1009] Ibid.
[1010] Lukács (n 240) 38.
[1011] Ibid.
[1012] Wood (n 648) 155.

in their full extent the historically specific challenges posed by the hegemonic intellectual tradition.

The humanitarian vision is founded on the promise of the ever-increasing protection of human beings. This necessarily implies that the protection of human life should be at the centre of any legal project aiming to fulfil this promise. This thesis has demonstrated how the Regulated War tradition and its two legal projects not only fail glaringly to protect humans but, on the contrary, they legitimise war and the deprivation of life. The Regulated War tradition is an imperialist wolf in humanitarian clothes. This thesis also explained that the legal project of Idealist Pacifism, despite its noble intentions, leaves the relations of domination that shape the hegemonic rationality of the Regulated War tradition unchallenged. It is, therefore, up to the legal project of Materialist Pacifism to develop and *complete* the humanitarian vision by fulfilling its promise. This is the essence of immanent critique, which weaves through this thesis from its first letter to its last: it shares the very goal of its object, and its purpose is to illuminate the path to its achievement. Thus, immanent critique also incubates a positive, programmatic vision. In the words of Marx:

> Our programme must be: the reform of consciousness not through dogmas but by analyzing mystical consciousness obscure to itself, whether it appear in religious or political form. It will then become plain that the world has long since dreamed of something of which it needs only to become conscious for it to possess it in reality. It will then become plain that our task is not to draw a sharp mental line between past and future, but to complete the thought of the past. Lastly, it will become plain that mankind will not begin any new work, but will consciously bring about the *completion* of its old work.[1013]

Written as an immanent critique, this thesis engages in a critique of the Regulated War tradition in an effort to complete the task the latter set out to accomplish. Through the 'self-clarification of the struggles and wishes of the age',[1014] this thesis highlighted the need to revive Materialist Pacifism, not in the name of Marxism but in the name of the humanitarian promise itself. Hence, the programme of Materialist Pacifism does not start anew but is inherited from the past generations of humanitarians. This programme realises the limits of international humanitarian legal discourse and points towards the renewal of an anti-capitalist, anti-war philosophy of praxis. Such a philosophy starts from the

[1013] Marx, 'Marx letter to Ruge' (n 287) (emphasis added).
[1014] Ibid.

immanent critique of the Regulated War tradition and seeks its transcendence through the transformation of the very social relations that made it possible. The agenda of the Materialist Pacifism legal project needs to have anti-capitalist praxis at its heart. Only then could a truly anti-war programme be formed. Ultimately, the Materialist Pacifism legal project needs to also turn against itself insofar as it is a *legal* project. Its anti-war, anti-capitalist philosophy of praxis must penetrate the legal form and venture into new paths of social ordering.[1015]

'We address you, those who don't know what war is'.[1016] This thesis was driven by the pressing need to revive the possibility of peace within the international legal imaginary. It serves as a time capsule for a world beyond the humanitarianism of the hegemonic Regulated War tradition, where the notion of humane war would be inconceivable, a paradoxical anecdote from the distant past. The rise of the humanitarian vision in the early 19th century reflected the maturity of social conditions for ideas of perpetual peace. That two hundred years later humanity has failed to fulfil this humanitarian promise is due to the social relations of capitalism, which condemn it to the solace of mere aspiration. The old world of total war is dying, but the new world of peace is yet to be born. Now, 'morbid symptoms appear'.[1017] It is the time of the Regulated War intellectual tradition. Headlong, this thesis confronts this interregnum. Upon its demise rests the dawn of the new world.

[1015] For the withering away of the legal form and its replacement with technical regulation in light of the emerged 'unity of purpose' see Pashukanis (n 137) 81.

[1016] 'Another letter that addresses the issue of war and peace was retrieved from a time capsule in a monument in Okulovka, a small town near Velikiy Novgorod in North-West Russia. Apart from the overarching topic of the Second World War, the letter, which was written by the employees of a local paper factory in 1969, unexpectedly touches upon another issue topical for former Soviet countries in the 21st century: decommunisation and the removal of Soviet monuments: "We paid a heavy price of millions of lives for our victory. And today, on 22 June 1969, on the 28th anniversary of the treacherous attack by Nazi Germany on our Soviet country, we address you, those who don't know what war is. We urge you to remember and respect the memory of those who gave their lives in the fight for socialism"', New East Digital Archive, 'Soviet Time Capsules: Comrades 1967-2017 - Russian Revolution Centenary' (New East Digital Archive, 7 November 2017) https://www.new-east-archive.org/articles/show/9371/soviet-time-capsules-comrades-1967-2017-russian-revolution-centenery accessed 26 December 2024.

[1017] Antonio Gramsci, Notebook 3 276.

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