

## COHERENCE AND ACCEPTANCE IN INTERNATIONAL LAW: CAN HUMANITARIANISM AND HUMAN RIGHTS BE RECONCILED?

### ABSTRACT

The relationship between international humanitarian law and international human rights law has been widely debated. Influential discussions have been produced by both the International Court of Justice and the International Law Commission. This article brings a new perspective to this issue, emphasising and contrasting the underlying concepts that the two areas of law rely on for their legitimacy. I argue that while international human rights law derives its legitimacy largely from the value of coherence, international humanitarian law emphasises the notion of acceptance. This contrast has important implications for efforts to integrate the two fields.

### I INTRODUCTION

The relationship between international humanitarian law and international human rights law has long been debated.<sup>1</sup> Influential discussions have been produced by both the International Court of

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<sup>1</sup> See, eg, Gerald Irving Anthony Dare Draper, 'Humanitarian Law and Human Rights' [1979] *Acta Juridica* 193; Leslie C Green, 'Human Rights and the Law of Armed Conflict' (1980) 10 *Israel Yearbook on Human Rights* 9; Dietrich Schindler, 'Human Rights and Humanitarian Law: Interrelationship of the Laws' (1982) 31 *American University Law Review* 935; Louise Doswald-Beck and Sylvain Vit , 'International Humanitarian Law and Human Rights Law' (1993) 293 *International Review of the Red Cross* 94; Vera Gowlland-Debbas, 'The Right to Life and Genocide: The Court and an International Public Policy' in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge University Press, 1999) 315; Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 *American Journal of International Law* 239; Dale Stephens, 'Human Rights and Armed Conflict: The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case' (2001) 4 *Yale Human Rights and Development Law Journal* 1; Ren  Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press, 2002); Hans-Joachim Heintze, 'On the Relationship between Human Rights Law Protection and International Humanitarian Law' (2004) 856 *International Review of the Red Cross* 789; William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16 *European Journal of International Law* 741;

Justice ('ICJ')<sup>2</sup> and the International Law Commission ('ILC').<sup>3</sup> These two bodies have helped forge a general consensus that international humanitarian law and international human rights law should be viewed as part of an integrated body of rules governing armed conflicts. The orthodox view developed by these bodies is that the two fields of law can be reconciled by drawing on the maxim *lex specialis derogat legi generali* (the specialised law overrides the general law).<sup>4</sup> International humanitarian law effectively amends international human rights law to the extent that they are in tension.

This article highlights a shortcoming in the orthodox account of the relationship between international humanitarian law and human rights. It does so by examining the underlying concepts that the two areas of law rely on for their legitimacy. I argue that while international human rights law derives its legitimacy largely from the value of coherence, international humanitarian law emphasises the notion of acceptance. This contrast has important implications for efforts to integrate the two fields. The article begins by clarifying the challenges raised by tensions between the two bodies of law. It then engages critically with the approaches of the ICJ and the ILC, drawing on the conceptions of coherence and legitimacy offered by theorists such as Ronald Dworkin. I argue that genuine progress in integrating the two areas depends upon recognising the differences in their organising values.

## II RESOLVING CONFLICTS OF NORMS

The following discussion focuses on the challenges posed by tensions between international humanitarian law and international human rights law. However,

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Hans-Joachim Heintze, 'The European Court of Human Rights and the Implementation of Human Rights Standards During Armed Conflicts' (2005) 45 *German Yearbook of International Law* 60; Noam Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict' (2005) 87 *International Review of the Red Cross* 737; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (International Committee of the Red Cross, 2005) 299–305; Anthony Cassimatis, 'International Humanitarian Law, International Human Rights Law and Fragmentation of International Law' (2007) 56 *International and Comparative Law Quarterly* 623.

<sup>2</sup> *Legality of the Threat or Use of Nuclear Weapons* (International Court of Justice, Advisory Opinion, 8 July 1996) [25]–[26] ('*Nuclear Weapons Advisory Opinion*'); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (International Court of Justice, Advisory Opinion, 9 July 2004) [106] ('*Israeli Wall Advisory Opinion*'); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (International Court of Justice, Judgment, 19 December 2005) [216]–[217] ('*Democratic Republic of the Congo v Uganda*').

<sup>3</sup> International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (Report of the Study Group of the International Law Commission, 13 April 2006).

<sup>4</sup> See, eg, *Legality of the Threat or Use of Nuclear Weapons* (International Court of Justice, Advisory Opinion, 8 July 1996) [25]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (International Court of Justice, Advisory Opinion, 9 July 2004) [106]; International Law Commission, above n 3, 47–8.

it bears noting at the outset that although these two bodies of law sometimes conflict, in many ways they are mutually supporting.<sup>5</sup> The lists of fundamental guarantees found in the 1949 *Geneva Conventions* and the *Additional Protocols* of 1977, which protect everyone affected by armed conflict, enshrine many of the basic protections of human rights law on issues ranging from freedom from torture to equality before the law.<sup>6</sup> These provisions exhibit no conflict with human rights. Arguably, the same is not true of other aspects of these treaties.

It is useful at this point to distinguish the different ways in which international humanitarian law and international human rights law might be said to be in tension. The most obvious way this might happen is through a direct clash of norms: for example, if international humanitarian law *requires* an action that international human rights law *prohibits*. However, it is hard to conjure examples of direct clashes of this sort. Generally, neither body of law requires action that would be precluded under the other. It is usually possible to follow both sets of rules by respecting the more demanding standard.

A second way that international humanitarian law and international human rights law might be in tension is if one field of law *permits* an action that the other *prohibits*. This comes closer to capturing the problem, though, as we will see later, there are broader issues at stake. An obvious and often cited example of a tension of this kind concerns the right to life under international law, as enshrined in art 6 of the *International Covenant on Civil and Political Rights*.<sup>7</sup> This right purports to

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<sup>5</sup> Cf Henckaerts and Doswald-Beck, above n 1, 299–305.

<sup>6</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) art 3 ('*Geneva Convention I*'); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (Second Geneva Convention)*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1949) art 3 ('*Geneva Convention II*'); *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 3 ('*Geneva Convention III*'); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 3 ('*Geneva Convention IV*'); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 12 December 1977, 1125 UNTS 3 (entered into force 7 December 1979) art 75 ('*Additional Protocol I*'); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 12 December 1977, 1125 UNTS 609 (entered into force 7 December 1978) arts 4, 5 ('*Additional Protocol II*'). See also Henckaerts and Doswald-Beck, above n 1, ch 32.

<sup>7</sup> For discussion of the status of this right during armed conflict, see *Legality of the Threat or Use of Nuclear Weapons* (International Court of Justice, Advisory Opinion, 8 July 1996) [25]; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

restrain states from launching deadly attacks on individuals within their territories. However, international humanitarian law permits such attacks against combatants, provided that the rules on matters such as proportionality and prohibited weapons are respected.<sup>8</sup>

It is possible that even this kind of tension can be reconciled through existing legal mechanisms. There are two related strategies that might be pursued in this context. The first strategy makes use of provisions in human rights treaties that allow derogations in emergency situations. According to art 4(1) of the *ICCPR*, for example, states may derogate from their duties under the treaty in times of ‘public emergency threatening the life of the nation’ to ‘the extent strictly required by the exigencies of the situation’. Similar provisions appear in the European and American human rights conventions.<sup>9</sup>

It might therefore be argued that those aspects of international humanitarian law that initially seem to licence violations of human rights standards really just reflect the derogable character of the rights in question. Armed conflict, it might be said, is an exceptional situation in which derogations from the normal requirements of international human rights law are necessary. This view of warfare as an emergency scenario is explicitly enshrined in some human rights conventions. Article 15(1) of the *European Convention on the Protection of Human Rights and Fundamental Freedoms*, for example, provides that:

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.<sup>10</sup>

Likewise, art 15(2) of the *ECHR* expressly allows derogations from the right to life under art 2 ‘in respect of deaths resulting from lawful acts of war’.<sup>11</sup> The *American Convention on Human Rights* contains a similar provision to art 15(1).<sup>12</sup> Derogations

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<sup>8</sup> See, eg, *Additional Protocol I* arts 48, 57.

<sup>9</sup> See *European Convention on the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953) art 15(1) (*‘ECHR’*); *American Convention on Human Rights*, opened for signature 22 November 1969, OAS 36, 1144 UNTS 123 (entered into force 18 July 1978) art 27 (*‘ACHR’*). The scope given to states to derogate from human rights treaties in light of regional circumstances is further expanded by the margin of appreciation doctrine developed in European human rights jurisprudence. See, eg, *Brannigan and McBride v United Kingdom* (European Court of Human Rights, Judgment, 26 March 1993). For critical discussion, see Susan Marks, ‘Civil Liberties at the Margin: The UK Derogation and the European Court of Human Rights’ (1995) 15 *Oxford Journal of Legal Studies* 69.

<sup>10</sup> *ECHR* art 15(1).

<sup>11</sup> See also *ECHR* art 2(2).

<sup>12</sup> *ACHR* art 27.

from international human rights standards based on wartime exigencies cannot extend to violations of *jus cogens* norms (overriding norms of international law from which no derogation is permitted), but it is hard to see how international humanitarian law could reasonably be construed as permitting acts such as torture, genocide and slavery.<sup>13</sup> The basic rules of international humanitarian law are also widely viewed as having *jus cogens* status.<sup>14</sup>

A more difficult issue arises in relation to the right to life under art 6 of the *ICCPR*. While art 4(1) of the *ICCPR* allows for derogations in emergency situations, that provision is expressly made inapplicable to art 6.<sup>15</sup> The ICJ has therefore relied on a second strategy to reconcile art 6 with international humanitarian law. This strategy relies on the malleability of the human rights standards themselves. The application of human rights norms, on this view, depends on the context. The demands of human rights law in wartime might therefore prove significantly different from those in peacetime. A version of this approach to art 6 was developed by the ICJ in the *Nuclear Weapons Advisory Opinion*:

[T]he protection of the International Covenant of Civil and Political Rights 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. 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 ... 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.<sup>16</sup>

This analysis suggests that wartime modifies the requirements of international human rights law, while the nature and extent of this modification is governed by international humanitarian law. In other words, during armed conflict, the former set of norms is amended by the latter to the extent that they are in tension. In wartime, international human rights law is the *lex generalis* (general law) and yields to the *lex specialis* (specialised law) of international humanitarian law. This accords with the statutory interpretation maxim *lex specialis derogat legi generali* (the specialised law overrides the general law).

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<sup>13</sup> Cf *Geneva Conventions I-IV* art 3; *Additional Protocol I* art 75; *Additional Protocol II* arts 4, 5. For discussion of whether international humanitarian law may legitimately be construed as permitting genocide, see *Legality of the Threat or Use of Nuclear Weapons* (International Court of Justice, Advisory Opinion, 8 July 1996) [26].

<sup>14</sup> International Law Commission, above n 3, 189.

<sup>15</sup> *ICCPR* art 4(2).

<sup>16</sup> *Legality of the Threat or Use of Nuclear Weapons* (International Court of Justice, Advisory Opinion, 8 July 1996) [25].

The ICJ further clarified its analysis of the relationship between international humanitarian and international human rights law in the *Israeli Wall Advisory Opinion*:

The protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation ... 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. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.<sup>17</sup>

This passage, read with the excerpt from the *Nuclear Weapons Advisory Opinion*, suggests that the ICJ's approach effectively combines the two strategies mentioned above. In the context of armed conflict, any tension between human rights and humanitarian norms is resolved in favour of the latter. This is accomplished by relying on the notion of derogations or by using international humanitarian law to determine the contours of the rights themselves. The analysis set out in the *Israeli Wall Advisory Opinion* was later reiterated by the ICJ in *Democratic Republic of the Congo v Uganda*.<sup>18</sup>

Each of the above strategies for reconciling international humanitarian law and human rights implicitly presents the two sets of norms as part of a unified framework. They assume that we can make sense of the applicability of human rights in armed conflict by treating humanitarian norms as either specifying the application of human rights standards in wartime or reflecting exceptions already built into human rights by virtue of their derogable character. The assumption that humanitarian and human rights standards can be coherently integrated is now commonplace. However, this raises important questions about the conceptions of legitimacy underlying the two fields of law.

### III MONISM AND SYSTEMIC INTEGRATION

It is useful at this point to introduce two competing views that might be taken on the question of whether international human rights law applies in wartime. The dualist view, as we might call it, holds that international humanitarian law applies only in wartime and international human rights law applies only in peacetime. There is no overlap between the two legal regimes. Conversely, the monist view holds that international human rights law applies in both wartime and peacetime. This

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<sup>17</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (International Court of Justice, Advisory Opinion, 9 July 2004) [106].

<sup>18</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (International Court of Justice, Judgment, 19 December 2005) [216]–[217].

view entails that during an armed conflict international humanitarian law and international human rights law coexist.<sup>19</sup>

The dualist view was defended in an early article on humanitarian law and human rights written in 1979 by distinguished military lawyer and scholar Colonel Gerald Irving Anthony Dare Draper.<sup>20</sup> However, the position has few supporters today. Dualism removes the prospect of conflict between international humanitarian law and international human rights law, but it is difficult to reconcile with human rights treaties that specifically envisage that their provisions will apply in wartime.<sup>21</sup> It is also inconsistent with the ICJ judgments considered above. The monist view, by contrast, is now generally accepted, partly, but certainly not only, as a result of its adoption by the ICJ. The authors of the International Committee of the Red Cross ('ICRC') study on customary international humanitarian law note that '[t]here is extensive state practice to the effect that human rights law must be applied during armed conflicts'.<sup>22</sup> They also cite numerous United Nations resolutions and investigations where the applicability of human rights norms during armed conflict has been noted and violations condemned.

In situations of armed conflict, the monist view aspires to a unified body of international law that incorporates standards from both international humanitarian law and international human rights law, as appropriate. This project inescapably raises difficult questions about precisely how the two sets of norms are to be integrated. The notion of international humanitarian law as the *lex specialis* represents a useful device for analysing these types of conflicts, but it does not automatically resolve all the questions that arise on specific issues.

The general presumption under the *lex specialis* maxim is that international humanitarian law will prevail during armed conflicts. However, the framework also entails that human rights standards will generally still operate in such circumstances, even though international humanitarian law does not provide for them. The difficulty, then, is to decide which human rights norms continue unaltered in armed conflict and which do not. This will involve assessing whether the norms are in tension with humanitarian law and, if so, to what extent. It may be that this type of question can only be fully resolved on a case-by-case basis.

A more complete understanding of the motivations for the monist view can be gained from the report on fragmentation of international law produced in 2006 by a high profile study group of the ILC.<sup>23</sup> The study group was chaired by Martti

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<sup>19</sup> My use of the terms 'dualism' and 'monism' in this context differs from their use in the literature on the relationship between national and international law. Cf Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 6th ed, 2003) 31–3.

<sup>20</sup> Draper, above n 1.

<sup>21</sup> See, eg, *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 38; *ECHR* arts 2(2), 15(2).

<sup>22</sup> Henckaerts and Doswald-Beck, above n 1, 303.

<sup>23</sup> International Law Commission, above n 3. For a helpful overview, see Cassimatis, above n 1.

Koskenniemi, who had previously explored the issue in his academic publications.<sup>24</sup> The ILC study group placed particular emphasis on the need for what it termed ‘systemic integration’ of different fields of international law.<sup>25</sup> Decision-makers in international law have a responsibility to seek coherence between the various norms that are relevant to a dispute that comes before them. This aspiration reflects the nature and normative aims of law as an institution:

[L]aw is also about protecting rights and enforcing obligations, above all rights and obligations that have a backing in something like a general, public interest. Without the principle of ‘systemic integration’ it would be impossible to give expression to and to keep alive any sense of the common good of humankind, not reducible to the good of any particular institution or ‘regime’.<sup>26</sup>

This argument is worthy of sustained attention. The claim in this passage is that systemic integration is a value inherent in the notion of law. This is because law is concerned with advancing rights and the common good, rather than furthering the objectives of any particular regime.<sup>27</sup>

The argument articulated above clearly owes something to the jurisprudence of Dworkin, who is cited elsewhere in the ILC report in connection with the claim that ‘systemic thinking penetrates all legal reasoning’ by virtue of a political obligation that legal decision makers owe to the community.<sup>28</sup> It is unclear, however, whether the ILC study group meant to adopt Dworkin’s view that coherence (or ‘integrity’<sup>29</sup>) is of inherent value in legal decision-making. There are two possible interpretations of the study group’s argument in the above passage, reflecting two possible views of the value of coherence in law.

Dworkin treats coherence in law as holding inherent political value; in his view, integrity is valuable in and of itself. He supports this position by appealing to our deeply held intuitions about the undesirability of certain legal practices that reject integrity.<sup>30</sup> An alternative view is that integrity holds instrumental value as part of a legal framework that seeks to realise a particular collection of normative goals. Law

<sup>24</sup> See, eg, Martti Koskenniemi, ‘The Politics of International Law’ (1990) 1 *European Journal of International Law* 4; Martti Koskenniemi and Päivi Leino, ‘Fragmentation of International Law? Postmodern Anxieties’ (2002) 15 *Leiden Journal of International Law* 553.

<sup>25</sup> International Law Commission, above n 3, 25–8. See also Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 *International and Comparative Law Quarterly* 279.

<sup>26</sup> International Law Commission, above n 3, 244.

<sup>27</sup> *Ibid* 65–73. The ILC report uses the term ‘regime’ in a specialised sense to mean self-contained systems of international legal rules that deviate from general international law in their remedies, requirements or guiding principles.

<sup>28</sup> *Ibid* 24.

<sup>29</sup> Ronald Dworkin, *Law’s Empire* (Belknap Press, 1986) chs 6–7.

<sup>30</sup> *Ibid*.



should not be coherent just for the sake of it, but rather to ensure consistency with its deeper motivations.<sup>31</sup>

Suppose, by way of illustration, that I am engaged by a charitable organisation to draft a mission statement. I am instructed that the document must be consistent with the aims and values of the organisation, which are expressed to me in a general form. It seems clear that, in order to do the job well, I should do my best to ensure that my statement coheres with the values of the organisation. I must pay attention to what Dworkin calls integrity. Coherence, in this situation, holds instrumental value. I must respect coherence in order to fulfil my brief of drafting a document that gives expression to the values of the group. We can contrast the instrumental value of coherence in this example with Dworkin's account of integrity as a 'distinct political virtue' and an 'independent ideal'.<sup>32</sup> Integrity, for Dworkin, is valuable in itself and is not merely a means to pursue a deeper set of values.

Which of these conceptions of coherence is intended by the ILC study group in the passage cited above? There is room for argument here, but the wording of the passage suggests the instrumental conception just outlined may be closest to the mark. On this view, coherence in international law may or may not be valuable in and of itself, but it is of instrumental value if one conceives of international law as protecting the 'rights and obligations' that are necessary for the 'common good of humankind'.<sup>33</sup> In other words, legal decisions should strive to be consistent with the underlying source of value represented by the common good. Consistency with the common good is therefore a central virtue of legal reasoning.

This is a plausible line of argument,<sup>34</sup> but it rests on some significant assumptions. For our purposes, the most significant assumption is that all facets of international law place equal emphasis on coherence with the common good or, more precisely, that all fields of international law work to achieve this coherence in reconcilable ways. I suggest below that there is reason to doubt this assumption. This is because some forms of law promote the common good not by seeking coherence with fundamental human ideals, but by creating a level of more detailed norms that promote social coordination. International humanitarian law arguably provides an example: its legitimacy stems more from general acceptance of its norms than its strict coherence with deeper values.

#### IV COHERENCE AND ACCEPTANCE

Some of the tensions between international humanitarian law and international human rights law can potentially be resolved by treating armed conflict as an

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<sup>31</sup> For further discussion, see Jonathan Crowe, 'Dworkin on the Value of Integrity' (2007) 12 *Deakin Law Review* 167.

<sup>32</sup> Dworkin, above n 29, 176.

<sup>33</sup> International Law Commission, above n 3, 244.

<sup>34</sup> Cf Crowe, 'Dworkin on the Value of Integrity', above n 31.

exceptional situation that modifies the usual requirements imposed by human rights standards. However, there is arguably a deeper source of tension between the two fields of law: they rest on fundamentally different, and perhaps opposing, motivations and theories.<sup>35</sup>

An argument along these lines can be found in the article by Draper mentioned earlier.<sup>36</sup> Draper argues that international humanitarian law exists mainly to regulate the relationship between states engaged in armed hostilities, whereas human rights law aims to regulate the relationship between governments and their subjects. He then contends that '[h]ostilities and government governed relationships are different in kind, origin, purpose, and consequences'.<sup>37</sup> International humanitarian law is not concerned with regulating the condition of humans in normal society and human rights instruments do not address the problem of what to do under conditions of armed conflict. Furthermore, international humanitarian law operates between communities, whereas human rights law concerns the relationship of government and governed within extant community structures.

Draper's argument is now somewhat dated in its treatment of both international humanitarian law and international human rights law. The former is increasingly concerned with non-international conflicts and the position of non-state armed groups,<sup>38</sup> while the latter is frequently invoked in communications between states in both peacetime and wartime. However, Draper's concerns about the conflicting aims and emphases of humanitarian and human rights law are echoed in more recent work by René Provost. Provost contends that international humanitarian law focuses on imposing obligations on individuals, whereas human rights law is concerned with regulating the actions of governments. It follows that the former body of law focuses on duties, while the latter emphasises rights.<sup>39</sup>

My concern in this article, however, is not with the different types of entities humanitarian and human rights law seek to regulate or the kinds of normative standards they impose. Rather, I wish to distinguish two aspirations that often guide the development of legal principles. The first aspiration is to create a coherent and consistent body of norms. This corresponds generally to what the ILC study group calls the goal of systemic integration and Dworkin calls the value of integrity. The second aspiration is to achieve general acceptance of the norms that comprise

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<sup>35</sup> Cf Doswald-Beck and Vité, above n 1.

<sup>36</sup> Draper, above n 1.

<sup>37</sup> Ibid 204.

<sup>38</sup> International Committee of the Red Cross, *International Humanitarian Law and the Challenge of Contemporary Armed Conflicts* (International Committee of the Red Cross, 2011) 6. For discussion of the position of non-state armed groups under international humanitarian law, see Antonio Cassese, 'The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflicts' (1981) 30 *International and Comparative Law Quarterly* 416; Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 *International and Comparative Law Quarterly* 369.

<sup>39</sup> Provost, above n 1, 13.

the legal system, ensuring that these norms are respected. These two objectives frequently go hand-in-hand.<sup>40</sup> A legal system is more likely to be respected if it contains a coherent and dependable body of rules.<sup>41</sup>

It is no accident that legal systems often cite coherence and acceptance as their guiding aims.<sup>42</sup> A good case can be made that these two values lie at the heart of the legitimacy of law as an institution. Legal philosopher Joseph Raz famously argues that one of the distinctive features of law is that it claims legitimate authority.<sup>43</sup> As Raz puts it, legal systems ‘claim authority to regulate any type of behaviour’ to the exclusion of other varieties of social norms.<sup>44</sup> However, philosophers have long debated whether law’s claim to authority can be justified.<sup>45</sup>

The twin values of coherence and acceptance figure prominently in attempts to explain the legitimacy of legal institutions.<sup>46</sup> Sometimes law simply requires us to behave in accordance with our pre-existing obligations. Consider the law prohibiting assault. This law prohibits people from punching random strangers on the street. Most people would readily accept that punching strangers on the street is something we have a moral obligation not to do. We might rely on this pre-existing obligation to explain why we should obey the relevant law.

This view of legal authority relies centrally on law’s coherence with pre-existing norms. Something like this seems to lie behind the ILC study group’s remarks about the value of systemic integration.<sup>47</sup> A problem immediately arises, however, in that

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<sup>40</sup> Koskenniemi argues that legal rules will only be regarded as legitimate if they exhibit both normativity and concreteness: that is, if they simultaneously aspire to higher ideals and reflect the political interests of their subjects. However, he sees these two impulses as ultimately contradictory. See Koskenniemi, ‘The Politics of International Law’, above n 24, 7–9.

<sup>41</sup> For further discussion of the value of coherence in law, see Crowe, ‘Dworkin on the Value of Integrity’, above n 31.

<sup>42</sup> For discussion, see Joseph Raz, *The Authority of Law* (Clarendon Press, 1979) ch 2.

<sup>43</sup> Ibid. See also Jonathan Crowe, ‘Natural Law in Jurisprudence and Politics’ (2007) 27 *Oxford Journal of Legal Studies* 775, 785–6.

<sup>44</sup> Joseph Raz, *Practical Reason and Norms* (Oxford University Press, 1999) 150–2.

<sup>45</sup> Raz argues that although law *claims* legitimate authority, it does not in fact *possess* such authority. See Raz, above n 42, ch 12. See also AJ Simmons, *Moral Principles and Political Obligations* (Princeton University Press, 1979); AJ Simmons, ‘The Duty to Obey and Our Natural Moral Duties’ in Christopher Wellman and AJ Simmons (eds), *Is There a Duty to Obey the Law?* (Cambridge University Press, 2005) 91; MBE Smith, ‘Is There a Prima Facie Obligation to Obey the Law?’ (1973) 82 *Yale Law Journal* 950; Leslie Green, *The Authority of the State* (Clarendon Press, 1990).

<sup>46</sup> Thomas Franck, for example, treats ‘coherence’ and ‘adherence’ as two important ‘indicators of legitimacy’ in both national and international law. See Thomas M Franck, *Fairness in International Law and Institutions* (Clarendon Press, 1995) 38–46.

<sup>47</sup> International Law Commission, above n 3, 244.

a significant proportion of laws do not simply reproduce pre-existing obligations. Rather, they purport to bring new obligations into existence. For example, zoning regulations prohibit people from running certain types of businesses in particular neighbourhoods. These types of rules typically go beyond pre-existing norms.

Examples from international humanitarian and human rights law are not difficult to find. It seems plausible that legal norms requiring participants in armed conflict to refrain from ‘mutilation, cruel treatment or torture’ of people placed *hors de combat* simply reproduce pre-existing moral obligations.<sup>48</sup> The same could reasonably be said of most, if not all, of the substantive provisions of the *ICCPR* and the *ECHR*. At the other end of the spectrum lie the highly detailed provisions of *Geneva Convention III* dealing with the treatment of prisoners of war. The rule that prisoners of war who have worked for one year shall be granted a rest of eight consecutive days with full pay imposes more detailed obligations on detaining authorities than can plausibly be found in pre-existing moral requirements.<sup>49</sup> The four *Geneva Conventions* of 1949 contain numerous examples of similarly detailed rules.

Philosophers have long wondered why this second kind of rule should be regarded as binding.<sup>50</sup> Why should people simply accept the detailed requirements imposed by legal regimes on topics where morality plausibly leaves them some discretion? Many of the most popular responses to this issue have relied on the role of law in promoting mutually beneficial social coordination. Some theorists have argued that our obligation to obey the law stems from a natural duty to promote the wellbeing of members of the community.<sup>51</sup> It is best for the community as a whole that people act according to a shared set of rules. Other theorists have argued that when we gain benefits and protections from the cooperative efforts of others, we have a duty of fairness to make our own contribution.<sup>52</sup>

The common thread in these explanations lies in the emphasis they place on the salience of legal solutions as a mode of social coordination. One question such theories must answer is why citizens should follow the requirements of law, rather

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<sup>48</sup> *Geneva Conventions I-IV* art 3. See also *ICCPR* art 7; *ECHR* art 3.

<sup>49</sup> *Ibid* art 53.

<sup>50</sup> This way of framing the question goes back at least to Thomas Aquinas. See Thomas Aquinas, *Summa Theologiae*, I-II, q 95, art 2.

<sup>51</sup> See, eg, John Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980) ch 9; John Finnis, ‘The Authority of Law in the Predicament of Contemporary Social Theory’ (1984) 1 *Notre Dame Journal of Law, Ethics and Public Policy* 115; Mark C Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge University Press, 2006) ch 5; Christopher Wellman, ‘Samaritanism and the Duty to Obey the Law’ in Wellman and Simmons, above n 45, 1.

<sup>52</sup> See, for example, John Rawls, ‘Legal Obligation and the Duty of Fair Play’ in Sidney Hook (ed), *Law and Philosophy* (New York University Press, 1964) 3; John Rawls, *A Theory of Justice* (Harvard University Press, 1999) 96–8, 301–8; H L A Hart, ‘Are There Any Natural Rights?’ (1955) 64 *Philosophical Review* 175; George Klosko, *The Principle of Fairness and Political Obligation* (Rowman and Littlefield, 1992).

than adopting other plausible methods of fulfilling their duties to others. A standard response to this difficulty is that it makes sense for citizens to follow the law, rather than devising their own strategies, because law represents the solution that is most likely to be adopted by other members of the community. In other words, law represents the salient response to problems of social coordination, because it is generally accepted as binding by affected parties. This feature of law suggests that, if we are under a duty to cooperate with others to solve social problems, the best way to do this is often to follow legal rules.<sup>53</sup>

Law, then, may be legitimate in some cases because it exhibits coherence with underlying norms and in other cases because it supplies a generally accepted solution to a social coordination problem. These twin sources of legal legitimacy help to explain why legal systems that claim legitimate authority in Raz's sense also tend to appeal to the values of coherence and acceptance. They represent two distinct ways that laws may seek to promote the common good.

## V HUMANITARIANISM AND HUMAN RIGHTS

Both coherence and acceptance plausibly lie at the heart of legal legitimacy. These two values are often mutually supporting and many fields of law place significant emphasis on both. Nonetheless, legal systems may differ in the extent to which they prioritise one or the other. It is arguable that international human rights law places particularly high value on coherence, due to its aspirational character and its reliance on concepts such as human dignity and natural rights. The normative force of human rights, in other words, rests substantially on their claim to embody shared human goals.

International humanitarian law, by contrast, might be said to lie towards the other end of the spectrum. Since the primary aim of this body of law is to secure recognition and respect from all participants in armed conflict, humanitarian norms often prioritise simplicity and clarity over coherence with underlying ethical principles. An example is provided by the distinction between the *jus ad bellum* and the *jus in bello*. The former area of law concerns when an armed conflict may legitimately be commenced, while the latter sets out the standards of conduct applicable once the conflict has started. The two bodies of rules have traditionally been kept separate, meaning that all parties to an armed conflict are subject to the same standards, regardless of how the conflict began.<sup>54</sup>

International humanitarian law, then, applies the same fundamental guarantees and responsibilities to all participants in armed conflict. It avoids the need to draw difficult and controversial distinctions between just and unjust causes. It also avoids

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<sup>53</sup> For critical discussion of this line of argument, see Crowe, 'Natural Law in Jurisprudence and Politics', above n 43; Jonathan Crowe, 'Five Questions for John Finnis' (2011) 18 *Pandora's Box* 11.

<sup>54</sup> For a helpful overview, see Christopher Greenwood, 'The Relationship Between *Ius ad Bellum* and *Ius in Bello*' (1983) 9 *Review of International Studies* 221.

passing judgment on which of the parties to a conflict may be at fault. Let us call this feature of humanitarian norms the *principle of neutrality*. There is good reason why international humanitarian law adopts this principle: if it imposed different rules on unjust aggressors and innocent parties, both sides of a conflict would try to exploit this distinction for their own advantage. This would undermine the underlying goal of establishing dependable limits on warfare.

The principle of neutrality has, however, long been considered controversial. A series of authors have noted that the principle sits poorly with attempts by just war theorists to provide a principled account of the ethical duties of participants in armed conflicts.<sup>55</sup> A significant strand of the just war tradition holds that the most plausible ethical basis for international humanitarian law lies in an analogy with self-defence.<sup>56</sup> However, this analogy does not support neutrality between the parties to a conflict. Imagine, by way of illustration, that Kate is asleep in her bed when she hears a noise downstairs. She comes down to find that Andrew has broken into her house and is brandishing a gun. Kate also happens to have a gun nearby, which she keeps for self-defence. The two confront each other in Kate's living room.

Let us suppose that Kate and Andrew each see that the other is armed. They are in genuine fear for their lives. Most people would agree that Kate is entitled to defend herself from Andrew. This is a classic case of self-defence. She should probably disarm him or flee if she can, but she may use force to defend herself if necessary. Andrew, however, seems to be in a different position. He is the one who caused the altercation by wrongfully breaking into Kate's house. If Kate defends herself against Andrew and injures him, she is not culpable. If Andrew ends up injuring Kate, he is to blame, even if he feared for his life.

An analogy between humanitarian norms and self-defence suggests that different rules of conduct apply to aggressors and innocent parties. This is what Jeff McMahan calls the 'deep morality' of warfare.<sup>57</sup> However, as McMahan points out, the deep morality of warfare imposes significantly different requirements to the law of war.<sup>58</sup> The international law of armed conflict, then, does not derive its legitimacy from its strict coherence with the deep morality of warfare, but rather from the need

<sup>55</sup> See, eg, Michael Walzer, *Just and Unjust Wars* (Basic Books, 1977) ch 3; Jeff McMahan, 'Innocence, Self-Defence and Killing in War' (1994) 2 *Journal of Political Philosophy* 193; Jeff McMahan, 'The Ethics of Killing in War' (2004) 114 *Ethics* 693; Gerhard Øverland, 'Killing Civilians' (2005) 13 *European Journal of Philosophy* 345; Gerhard Øverland, 'Killing Soldiers' (2006) 20 *Ethics and International Affairs* 455. For some responses to these arguments, see Patrick Emerton and Toby Handfield, 'Order and Affray: Defensive Privileges in Warfare' (2009) 37 *Philosophy and Public Affairs* 382; David Luban, 'War Crimes: The Law of Hell' in Larry May (ed), *War: Essays in Political Philosophy* (Cambridge University Press, 2008) 266, 270–3.

<sup>56</sup> The analogy is far from universally accepted. Cf David Rodin, *War and Self-Defence* (Clarendon Press, 2002); Emerton and Handfield, above n 55.

<sup>57</sup> McMahan, 'The Ethics of Killing in War', above n 55, 730.

<sup>58</sup> *Ibid* 730–3.

for clear and generally accepted conventions to ‘mitigate the savagery of war’.<sup>59</sup> These conventions bear some relation to underlying values, but their most important feature is that they are generally followed.

McMahan’s observation that the principle of neutrality derives its legitimacy less from its strict coherence with underlying values than from its conventional status connects with a long tradition of thought about the relationship between the *jus ad bellum* and the *jus in bello*. Hersch Lauterpacht, for example, argues in a classic article that the distinction rests on pragmatic foundations.<sup>60</sup> He acknowledges that it would be ‘logical and fully consistent with principle’ to deny an unjust aggressor the protection of international law, but goes on to note that such a course would undermine the reciprocity that makes rules of war possible:

It is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from them without being bound by them. ... The result would be the abandonment of most rules of warfare, including those which are of a humanitarian character.<sup>61</sup>

Lauterpacht’s comments make it clear that the issue is not merely that self-defence is an unpromising candidate to provide the ethical basis for the distinction between the *jus ad bellum* and the *jus in bello*. A more robust foundation for international humanitarian law might lie in something like the notion of respect for human dignity. However, this seems equally hard to square with the principle of distinction, according to which combatants may be targeted with impunity,<sup>62</sup> subject only to the prohibition on superfluous injury and limitations on particular forms of weaponry. The deeper point is that the nature and origins of the law of war militate against the search for a coherent set of underlying values. As a whole, international humanitarian law prioritises acceptance above coherence. Its primary aim is to place reliable limits on warfare.

The comparison with human rights law is instructive here. International human rights treaties tend to focus on setting out general principles, whereas the *Geneva Conventions* are full of detailed rules for the protection of particular groups. The *ICCPR*, for example, with its broad standards and aspirational tenor, contrasts notably with *Geneva Convention III*, with its highly detailed standards for the treatment of prisoners of war. This is no accident. The two regimes were designed with fundamentally different aims in mind. International human rights law seeks to articulate the shared goals that should guide the governance arrangements of humans in community. Humanitarian law, by contrast, exists precisely to regulate situations where human values and community structures have broken down.

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<sup>59</sup> Ibid 730.

<sup>60</sup> Hersch Lauterpacht, ‘The Limits of the Operation of the Law of War’ (1953) 50 *British Yearbook of International Law* 206.

<sup>61</sup> Ibid 212.

<sup>62</sup> *Additional Protocol I* art 48; *Additional Protocol II* art 13(2).

Humans living together under conditions of peace should aspire to more than mere coexistence. They should set their sights on the pursuit of a full conception of human flourishing. International human rights law is intended to guide human communities in this aim. International humanitarian law, on the other hand, seeks primarily to prevent armed conflict from descending into what Carl von Clausewitz famously termed ‘absolute warfare’, where the only objective is to annihilate the enemy.<sup>63</sup> It is the last-ditch hold-out position of humanity against arbitrary violence. It is not surprising, then, that humanitarian law prioritises the certainty of detailed and reliable rules over strict coherence with underlying values.

The above argument does not mean that international humanitarian law lacks an ethical basis. However, its ethical basis is not found in coherence with a unifying set of values. Acceptance provides an ethical foundation for legal rules in its own right, provided those rules effectively promote mutually beneficial social coordination. Most legal regimes emphasise both coherence and acceptance to some degree. However, I argue that the focus international humanitarian law places on mitigating the savagery of armed conflict means that, unlike many other regimes, it relies more heavily on acceptance as the source of its legitimacy. It contrasts sharply, in particular, with international human rights law.

## VI CONCLUSION

International human rights standards seek to recognise and protect the basic components of human flourishing in a range of diverse social contexts. International humanitarian law, by contrast, aims primarily at universal acceptance of a common set of rules to moderate the harmful effects of armed conflict. Claims to the legitimacy of human rights law and humanitarian norms rest on distinct and, to some extent, conflicting theories. If the legitimacy of human rights law stems primarily from its coherence with an underlying narrative of human flourishing, the legitimacy of humanitarian law might be said to rest mainly on its widespread acceptance by the international community.

Human rights scholars sometimes complain that the pragmatism of international humanitarian law is inconsistent with the lofty aspirations of human rights norms. Humanitarian law, from this perspective, involves ‘a grim “balancing” or “equation” between military necessity and human suffering, shrouded in euphemisms such as collateral damage’.<sup>64</sup> However, the opposite charge can also be made: allowing the relatively vague and aspirational demands of human rights law to apply in wartime risks undermining humanitarian law’s central quest for a clear and uniform set of rules that all parties to a conflict can agree upon.

The monist vision of international law, endorsed by the ICJ and the ILC study group, assumes that this tension can be overcome and that humanitarian and human rights law can be integrated into a unified collection of norms. However, neither body

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<sup>63</sup> Carl von Clausewitz, *On War* (Wordsworth, 1997) 6–7 [bk I ch I, § 3].

<sup>64</sup> Gowlland-Debbas, above n 1, 335.



provides a detailed road map for how this can be accomplished while still upholding the claims to legitimacy associated with both fields of law. The monist view is now widely endorsed. It is doubtful, in any case, that dualism provides a desirable alternative, given that it entails a general suspension of human rights norms in wartime. Nevertheless, the challenges involved in integrating humanitarianism and human rights should not be understated.

What, then, is lost or gained by highlighting the different organising values underpinning the two fields of law? The program of integrating the two areas need not be abandoned, but a shift in focus is needed to ensure that the restraining function of international humanitarian law is maintained. I suggested earlier that tensions between specific norms of international humanitarian law and human rights law can only be fully identified and addressed on a case-by-case basis. The analysis offered in this article suggests that this exercise should be conducted on two parallel levels. The first question that arises concerns tensions between individual norms. The second issue concerns tensions between the application of a particular norm and the general claims to legitimacy of the relevant bodies of law.

It is at this second level that tension may arise between the application of a human rights norm in wartime and the emphasis international humanitarian law places on the value of acceptance. Any attempt to reconcile the tensions between the two bodies of law needs to take issues such as these into account. This may involve reconceptualising or reframing the human rights norm in question in order to render it more consistent with the emphasis on certainty that underpins the law of armed conflict. With these overarching factors in mind, a gradual process of harmonisation may ultimately prove more stable and adaptable than the narrower *lex specialis* framework articulated by the ICJ.

The central point of this article is not that the quest to integrate humanitarianism and human rights be abandoned, but rather that it needs to be approached with a full appreciation of the contrasting claims to legitimacy presented by the two areas of law. The ICJ is correct to insist that human rights norms apply in armed conflicts, but it would be a mistake to think that coherence with basic human values is the sole, or even the primary, motivation for the law of armed conflict. It is crucial that the application of human rights in wartime is carried out with the goal of acceptance firmly in mind. It is only by maintaining clear, stable and predictable conventions concerning conduct on the battlefield that the international community can place reliable and effective limits on warfare.

