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Demystifying the Right to Life during the Conduct of Hostilities: Theories, Methods, Practices

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Abstract

In determining the right to life under international human rights law (IHRL) during the conduct of hostilities, the traditional approach defers to the relevant rules of international humanitarian law (IHL) as 'lex specialis', while the 'normative' approach adopts an open-ended 'contextual application' of 'systemic integration'. Neither approach provides a theoretical account that speaks to the heart of the matter – the just assignment of legal responsibility for the deprivation of life in war-fighting, where 'responsibility' implies the correct location of a 'cause' that is answerable, or 'able' to provide a 'response', for such deprivation. The invocation of causality in the social world in turn requires an account of social ontology, the study of what exists in society to cause anything at all. This article outlines a social ontological approach that reconnects the relevant norms under IHL and IHRL with different types of causes of deprivation of life in war-fighting in order to demystify the right to life in hostilities theoretically. It then demonstrates the proper use of systemic integration together with the legally prescribed 'context' and analyses concrete scenarios of deprivation of life in war-fighting in order to demystify the right to life in hostilities methodologically and practically.

1 Introduction

The assertion of a right to life in the hostilities of war under international human rights law (IHRL),[1] just to allow huge numbers of deaths afflicted in accordance

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[1] The right to life is enshrined in many international human rights conventions – for example, International Covenant on Civil and Political Rights (ICCPR) 1966, 999 UNTS 171, Art. 6(1) (which provides that

with the law of armed conflicts or international humanitarian law (IHL),[2] could sound anomalous,[3] illusory[4] or incredulous.[5] Yet this was what many understood the International Court of Justice (ICJ) to have done when it stated the following in the *Nuclear Weapons* advisory opinion:

> 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, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the [International Covenant on Civil and Political Rights], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[6]

In a recent contribution to this journal,[7] Gus Waschefort succinctly named this an '"if-then" approach – if IHL is violated during the use of lethal force, then the killing is arbitrary [under IHRL]. Conversely, if IHL is strictly complied with, resulting loss of life is not arbitrary [under IHRL]'.[8] Waschefort criticized this 'if-then' approach for

'[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'). For an account of the right to life under customary international law, see W.A. Schabas, *The Customary International Law of Human Rights* (2021), ch. 4.

2 On the conduct of hostilities, international humanitarian law (IHL) broadly provides that warring parties shall direct operations only against military objectives, not target civilians, not conduct indiscriminate attacks such as area bombardment or disproportionate attacks, not use certain means and methods of warfare and shall use precaution. See Protocol Additional I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I) 1977, 1125 UNTS 3, Arts 48, 51, 57; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts 1977, 1125 UNTS 609, Art. 13; International Committee of the Red Cross (ICRC) Customary IHL Database (CIHL), rules 1, 2, 11–22, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/home. Thus, under IHL, military objectives may be targeted directly and civilians may be killed incidentally if it is not 'excessive' to the anticipated military advantage during hostilities.

3 Mégret, 'What Might a Human-Rights-Harmonious International Regime on the Use of Force Look Like?', 14(2) *Transnational Legal Theory* (2023) 211, at 214.

4 E. Wicks, *The Right to Life and Conflicting Interests* (2010), at 79.

5 Modirzadeh, 'The Dark Sides of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict', 86 *International Law Studies* (2010) 349, at 379.

6 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226, at 240. Commenting on this shortly after its pronouncement, Louise Doswald-Beck wrote: 'This is a very significant statement, for it means that humanitarian law is to be used to actually interpret a human rights rule. Conversely, it also means that, at least in the context of the conduct of hostilities, human rights law cannot be interpreted differently from humanitarian law.' See Doswald-Beck, 'International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons', 37 *International Review of the Red Cross* (*IRRC*) (1997) 35, at 50–51. Similarly, Dapo Akande wrote: '[T]hough the right to life provided in the Covenant continues to subsist during war or armed conflict, the question whether that right had been violated can only be determined by looking to see whether the taking of the life is prohibited by the law of armed conflict. The recognition of the applicability of the right to life during war and armed conflict did not therefore create any new substantive right which the victim would not already possess under international humanitarian law.' See Akande, 'Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court', 68 *British Yearbook of International Law* (1998) 165, at 175.

7 Waschefort, 'The Alchemy of the Right to Life during the Conduct of Hostilities: A Normative Approach to Operationalizing the "Supreme Right"', 34 *European Journal of International Law* (*EJIL*) (2023) 615.

8 *Ibid.*, at 624.

sacrificing the normative value of the right to life, triggering a state's responsibility under IHRL for its agents' technical violations of IHL and leaving no room for difference in requirements between IHL and IHRL.[9] He proposed instead a 'normative' approach to interpret the right to life in hostilities by taking into account IHL in a 'contextual application' of systemic integration, which 'is to be given effect to by way of *de novo* analysis in each instance of treaty interpretation … because the extent to which other rules are to be taken into account depends on factors including both the normative features of the rules in question as well as the factual situation in which they are given effect to'.[10]

Applying this normative approach, Waschefort first derived a rebuttable presumption that compliance with IHL renders the deprivation of life non-arbitrary under IHRL and then added other 'factors', with no prescribed limits, to see if they are sufficiently compelling to rebut the presumption.[11] Conversely, non-compliance with an IHL norm resulting in loss of life renders the deprivation of life arbitrary on two conditions. These conditions are (i) the values of the violated IHL norm include as a core consideration the safeguarding of human life,[12] and (ii) there is a sufficient nexus between the conduct in question and the loss of the life protected by IHL (or a threat that can result in such loss of life).[13] This 'normative' approach is, in effect, an 'if-then-plus' approach because it pegs IHRL (non-)compliance to IHL (non-)compliance (the same as the 'if-then' approach) subject to certain additional, 'plus' factors. This fluid, 'normative' approach in practice wrests power from the dogmas of the 'if-then' approach and openly vests it in the individual decision-makers to determine the relationship between IHRL on the right to life and IHL on the conduct of hostilities 'as they see fit'.[14]

This article argues that both the dogmatic, 'if-then' approach, and the fluid, 'normative' approach, despite their apparent opposition, similarly mystify what is at heart

[9] *Ibid.*

[10] *Ibid.*, at 628–629.

[11] *Ibid.*, at 634.

[12] *Ibid.*, at 637–638.

[13] *Ibid.*, at 637–639.

[14] Because of its currency and representativeness, Gus Waschefort's contribution is often referenced in this article in describing the 'normative' approach, the broad tenets of which are however shared by many other commentators in reacting to the crudity of the 'if-then' approach. Marko Milanovic, for instance, often acknowledged that determining the relationship between international human rights law (IHRL) on the right to life and IHL on the conduct of hostilities is a matter of value or policy judgments. See M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011), at 252, 256; Milanovic, 'The Lost Origins of Lex Specialis Rethinking the Relationship between Human Rights and International Humanitarian Law', in J.D. Ohlin (ed.), *Theoretical Boundaries of Armed Conflict and Human Rights* (2016) 78, at 115; Milanovic, 'Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court', in A. van Aaken and I. Motoc (eds), *The European Convention on Human Rights and General International Law* (2018) 97, at 110. In a similar vein, see Report of the Study Group of the International Law Commission, finalized by Mr. Martti Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (Report of the ILC Study Group), UN Doc. A/CN.4/L.682 and Add.1, 13 April 2006, at 27–28, para. 104. For other commentators who suggested a similar set of variables for flexible determination on a case-by-case basis, see F. Hampson and N. Lubell, '*Amicus Curiae* Submitted by Professor Francoise Hampson and Professor Noam Lubell of the Human Rights Centre, University of Essex' (2014) to the ECtHR in relation to *Hassan v. United Kingdom*, Appl. no. 29750/09, paras 26–30, available at www1.essex.ac.uk/hrc/documents/practice/amicus-curae.pdf.

a social problem (the deprivation of life in war-fighting and what to do about it). Both approaches mystify this social problem by offering solutions that disengage and distract from its underlying social mechanisms.[15] The 'if-then' approach, by rejigging different legal norms on paper through *lex specialis*, essentially offers a linguistic solution to a substantive social problem, reducing the latter to a 'puzzle' to be resolved by linguistic criteria.[16] The 'normative' approach, by adopting a 'free-style' interpretation, essentially offers singularized, haphazard solutions to a systemic social problem, reducing the latter to some 'free-floating bad events'[17] to be 'plotted' onto an imaginary spectrum of arbitrariness.[18] Both approaches, through different reductions of this social problem, inadvertently disconnect it from the social reality that grounds its substantivity and systematicity, thereby creating a mystery out of a problem that is staring us in the face.

This article demystifies the right to life during the conduct of hostilities theoretically, methodologically and practically. Section 2 traces the theoretical roots of the 'if-then' approach and the 'normative' approach that predispose them to their insulation from the social mechanisms underlying the deprivation of life in war-fighting. It then proposes a social ontological approach that reconnects these mechanisms with the relevant rules of IHL and IHRL. By contrasting the content of IHL requirements on the conduct of hostilities with the content of IHRL requirements on the right to life, it uncovers their relative social ontological characters. The content of IHL requirements on the conduct of hostilities has a relatively agentic character in that it concerns matters over which individuals' agency, as opposed to structural conditions, has relatively greater causal power. By contrast, the content of IHRL requirements on the right to life has a relatively structural character in that it concerns matters over which structural conditions, as opposed to individuals' agency, have relatively greater causal power. This contrast illuminates how the IHL requirements on the conduct of hostilities address the more agentic causes of the deprivation of life in war-fighting (for example, directly targeting civilians who do not pose a threat). It also illuminates how the IHRL requirements on the right to life address the more structural causes of the deprivation of life in war-fighting (for example, general conditions in society that may give rise to direct threats to life). By obscuring the connections between these legal requirements and the causes they respectively address, both the 'if-then' approach and the 'normative' approach enfeeble these legal requirements and mystify the theoretical dimension of the right to life in hostilities. In response, the social ontological approach, by re-establishing these connections, revitalizes these legal requirements and demystifies the right to life in hostilities theoretically.

Section 3 unmasks the frequent deployment of systemic integration as either a covert application of *lex specialis* or an overt exercise of personal discretion in disregard

[15] In this article, 'social mechanisms' refer to 'causal process[es] … that … mediate between cause and effect', 'unfold in time' and '[peer] into a layer of social reality that serves as a substratum for the phenomenon under investigation'. See Gross, 'A Pragmatist Theory of Social Mechanisms', 74 *American Sociological Review* (2009) 358, at 362–363.

[16] Waschefort, *supra* note 7, at 624.

[17] Marks, 'Human Rights and Root Causes', 74 *Modern Law Review* (2011) 57, at 75.

[18] Waschefort, *supra* note 7, at 634.

of specific legal requirements. It then demonstrates the proper use of systemic integration in treaty interpretation by taking into account 'relevant rules of international law' according to the specific legal requirement that it be done 'together with context'. 'Context' is delineated under the Vienna Convention on the Law of Treaties (VCLT) to encompass a highly circumscribed set of materials that nonetheless reveal the substantive character of the treaty.[19] Proper use of systemic integration thus precludes conforming 'arbitrariness' in Article 6 of the International Covenant on Civil and Political Rights (ICCPR) to IHL on the conduct of hostilities, either dogmatically (as in the 'if-then' approach) or presumptively (as in the 'normative' approach), because of their contrasting contexts. The formal legal rules on treaty interpretation by taking into account other relevant rules of international law 'together with the context' thus also give indirect expression to the substantive requirements of both IHL on the conduct of hostilities and IHRL on the right to life. Clarifying the use of 'systemic integration' in this way demystifies the right to life in hostilities methodologically.

Section 4 applies the theoretical and methodological approach proposed in this article to concrete scenarios to derive legal outcomes for contrast with the legal outcomes derived under other approaches. Theoretically grounded in social ontology to address the causality of deprivation of life in war-fighting and methodologically grounded in systemic integration 'together with the context', these legal outcomes demystify the assertion of a right to life in the hostilities of war practically.

2 Theoretical Demystification

This section elaborates how the positivist, 'if-then' approach based on legal technicality and the naturalist, 'normative' approach based on what the individual decision-makers see fit both sidestep the social core of the problem of the deprivation of life in war-fighting. It then proposes a social ontological approach that reconceptualizes the relationship between IHL on the conduct of hostilities and IHRL on the right to life in light of the social mechanisms underlying the deprivation of life in war-fighting.

A *Lifting the Technical Cloak of the 'If-Then' Approach*

The 'if-then' approach presupposes the divergence between IHL and IHRL on the deprivation of life in war-fighting as 'a technical problem'. The 'technical streamlining and coordination' of this problem,[20] by deferring IHRL to the linguistically more precise, explicit, detailed and exacting regulation in IHL as *lex specialis*,[21] 'expressive of common sense and normal grammatical usage',[22] seems to '[make] perfect sense'.[23]

[19] Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331.
[20] Report of the ILC Study Group, *supra* note 14, para. 9, at 10.
[21] M. Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (2nd edn, 2024), at 477.
[22] R. Jennings and A. Watts (eds), *Oppenheim's International Law*: vol. 1: *Peace* (9th edn, 2008), at 1280.
[23] Milanovic, 'Lost Origins', *supra* note 14, at 107.

But a technical, linguistic solution to a substantive social problem risks papering over the different social mechanisms underlying the deprivation of life in war-fighting that, when properly differentiated, could be intelligently addressed by different legal regulations.[24]

As IHL and IHRL 'reflect the differing pursuits and preferences that actors in a pluralistic (global) society have',[25] the perceived authority of *lex specialis* to make them speak with one voice rests on a positivist vision of the 'formal unity' of international law.[26] This 'hypothesis of juristic thinking', comparable to Hans Kelsen's basic norm constituting 'the unity of the multiplicity of these norms'[27] in a unified system of rules,[28] dictates 'that the legal order provides only one solution'.[29] The use of *lex specialis* thus satisfies the 'logical impulse to systematise law's authority' in the absence of 'a political superior in the international legal system'.[30] But this approach also risks flattening the multiple causes of deprivation of life in war-fighting in 'conditions of social complexity'[31] into one of legal discourse to be resolved linguistically.

The apparently 'technical' application of *lex specialis*, which is characteristic of the positivist separation between law and 'natural reason, moral principles and political ideologies',[32] thus conveniently masks the structural bias of its substantive outcomes.[33] A prime example is the *Nuclear Weapons* advisory opinion itself.[34] Its use of *lex specialis* to determine IHRL on the right to life by deference to IHL on the conduct of hostilities clearly privileges the logic underlying IHL, a privilege that cannot be questioned unless the technical cloak of *lex specialis* is lifted.

B *Identifying the Missing Ground of the 'Normative' Approach*

Waschefort characterized a question as 'intrinsically normative' if 'it cannot be addressed through the application of a mechanical principle but must be grounded in normative content interpreted contextually'.[35] But he defined the word 'normative' only negatively by what it is not: 'formulaic reasoning as the if-then approach'.[36] This begs the question of what positively is 'normative' – literally, what 'ought to be'. Waschefort's central reliance on the concept of the 'normative' to reach a wide range of conclusions without seeing the need to positively specify its meaning is underpinned

24 Anja Lindroos questioned 'whether the applicability of human rights law in an armed conflict should be reduced to such a technical question'. See Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of "Lex Specialis"', 74 *Nordic Journal of International Law* (2005) 27, at 44.
25 Report of the ILC Study Group, *supra* note 14, at 11, para. 16.
26 *Ibid.*
27 H. Kelsen, *Pure Theory of Law* (2nd edn, 2005), at 205.
28 B. Simma and A.L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View', 93 *American Journal of International Law* (1999) 302, at 304.
29 Sassòli, *supra* note 21, at 475.
30 Hovell, 'The Elements of International Legal Positivism', 75 *Current Legal Problems* (2022) 71, at 78, 89.
31 Report of the ILC Study Group, *supra* note 14, at 11, para. 16.
32 Simma and Paulus, *supra* note 28, at 304.
33 Koskenniemi, 'The Politics of International Law: 20 Years Later', 20 *EJIL* (2009) 7, at 11–12.
34 *Nuclear Weapons*, *supra* note 6.
35 Waschefort, *supra* note 7, at 636.
36 *Ibid.*, at 629.

by natural law thinking in its deontological form.[37] It is 'de'-ontological in the sense of being unmoored from ontology ('what is'), following which the 'normative' ('what ought to be') is necessarily self-evident, indemonstrable and underived[38] and its validity universal and objective.[39] In contrast to the 'if-then' approach, which masks the social problem of deprivation of life in war-fighting as a technical, linguistic one, the normative approach dives into the 'context' of this social problem through its various factual descriptions.[40] But a simple declaration of a supposedly 'self-evident' judgment over these 'contexts', without demonstrating how their connection to the social problem supports that judgment, precludes a commonly accessible 'ground' for any solution it offers to the problem. And the solutions it does offer only render the problem itself fundamentally mysterious.

As the deontological form of natural law thinking, stemming from Immanuel Kant,[41] rejects every form of heteronomy[42] – that is, the determination of oneself other than by oneself[43] – it privileges individuality over sociality, a privilege discernible from the normative approach. The factual circumstances singled out by Waschefort as relevant for 'contextual interpretation' tend to focus on the individuals' characteristics. These include the target's age,[44] the feasibility for the target to be captured rather than killed[45] and the target's potential unawareness of the cessation of hostilities[46] as opposed to the social mechanisms that bring these individuals into their structured conditions.[47] This individualist focus explains why, under the normative approach, even the codified legal principle of systemic integration 'cannot serve to establish general rules to be applied to future cases' and can only 'be given effect to by way of *de novo* analysis in each instance of treaty interpretation'.[48] It denies the structured, patterned nature of the deprivation of life in war-fighting, each instance of which is instead treated as a new, stand-alone, individual occurrence, 'free-floating', unhinged from any enduring social context. Ironically, then, the microscopic scrutiny of the 'context' performed by the normative approach ends up decontextualizing the object of its scrutiny – it misses the forest for the trees.

37 L.L. Weinreb, *Natural Law and Justice* (1987), at 3.
38 J. Finnis, *Natural Law and Natural Rights* (2nd edn, 2011), at 33–34, 64–69.
39 J. Crowe, *Natural Law and the Nature of Law* (2019), at 27.
40 Waschefort also did not define 'context', although he used the term occasionally to refer to the various factual circumstances of the deprivation of life in war-fighting. See, e.g., Waschefort, *supra* note 7, at 632.
41 Weinreb, *supra* note 37, at 90. See in general I. Kant, *Moral Law: Groundwork of the Metaphysics of Morals* (2013).
42 Weinreb, *supra* note 37, at 96.
43 *Ibid.*, at 91; Williams, 'Kant's Account of Reason', in E.N. Zalta and U. Nodelman (eds), *The Stanford Encyclopedia of Philosophy* (2024), available at https://plato.stanford.edu/ENTRIES/kant-reason.
44 Waschefort, *supra* note 7, at 635.
45 *Ibid.*
46 *Ibid.*, at 636.
47 For example, the violation of *jus ad bellum* that creates the structured conditions of armed conflict was addressed by the Human Rights Committee in its General Comment no. 36, UN Doc. CCPR/C/GC/36, 3 September 2019, para. 70, which was footnoted by Waschefort but not considered in the text itself. See Waschefort, *supra* note 7, at nn 48, 88.
48 Waschefort, *supra* note 7, at 628.

While rightly critical of the 'if-then' approach for being formulaic, the normative approach swings to the other extreme of foreclosing any commonly accessible principles that can consistently regulate the deprivation of life in war-fighting. The result is a series of under-justified propositions on the right to life in hostilities that miss the ground for demanding legal 'responsibility' for the deprivation of life in war-fighting: a 'cause' that is answerable, or 'able' to provide a 'response', for such deprivation.

C *De-conflating the Agentic Requirements of IHL on the Conduct of Hostilities and the Structural Requirements of IHRL on the Right to Life under a Social Ontological Approach*

Neither approach surveyed above provides a theoretical account of the relationship between IHL on the conduct of hostilities and IHRL on the right to life that speaks to the heart of the matter – the just assignment of legal responsibility for the deprivation of life in war-fighting. Assigning legal 'responsibility' for such deprivation implies the correct location of a 'cause' that is answerable, or 'able' to provide 'response', for it. Causality in the social world, that is, the mediation between cause and effect through various social mechanisms, in turn requires an account of what exist in the social world to activate those mechanisms – it is only when something is recognized to exist that it can be attributed with the status as a 'cause'. What exist in the social world – human individuals versus social wholes[49] – and what are their nature and interaction – individuals' agency versus structural conditioning[50] – are the dedicated subjects of study in social ontology.[51] Social ontology thus provides critical conceptual tools for theorizing who or what should or should not be legally responsible[52] for which deprivation of life in war-fighting – the real, substantive question behind the apparent, formal one of how IHL norms relate to IHRL norms. This section outlines a social ontological approach that reconceptualizes the relationship between the relevant norms in IHL and IHRL by reading them in a social ontological light – what exist in the social world that cause the deprivation of life in war-fighting. By explicitly confronting the substantive basis of a just assignment of legal responsibility, the social ontological approach thus demystifies the theoretical dimension of the right to life in hostilities.

[49] Baker, 'Just What Is Social Ontology?', 5 *Journal of Social Ontology* (2019) 1.

[50] Stones, 'Structure and Agency', in G. Ritzer, C. Rojek and M. Ryan (eds), *The Wiley Blackwell Encyclopedia of Sociology* (2015), available at https://onlinelibrary.wiley.com/doi/10.1002/9781405165518.wbeoss293.pub2; J. Zahle and F. Collin (eds), *Rethinking the Individualism-Holism Debate: Essays in the Philosophy of Social Science* (2014).

[51] Epstein, 'Social Ontology', in E.N. Zalta and U. Nodelman (eds), *The Stanford Encyclopedia of Philosophy* (2021), available at https://plato.stanford.edu/archives/win2021/entries/social-ontology/.

[52] A corresponding divide in international law can be gleaned from the contrasting views of international lawyers. To the more individualist among them, the 'international community is so primitive that the archaic concept of collective responsibility still prevails'. See A. Cassese, *International Law* (2nd edn, 2005), at 241. To the more holist/structuralist among them, a state 'is not the same as any "collectivity" of natural persons' but is analogizable to a 'company' with its own emergent properties. See Crawford and Watkins, 'International Responsibility', in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (2010) 289, at 296.

This social ontological approach predicates on a 'common presupposition' among all Western legal theories: law is a mirror of society.[53] Émile Durkheim compared law's role in society to that played by the nervous system in the organism,[54] whereby law always varies as the social relations that it governs.[55] Niklas Luhmann noted that 'norms are equipped with assumptions about reality'.[56] Reading the relevant norms in IHL and IHRL in a social ontological light reveals important assumptions about which social relations, or which parts of social reality, these norms address – the structural conditions that enable the deprivation of life in war-fighting or the individual's agency that effects it. That the relevant norms in IHL and IHRL are informed by these social ontological visions finds resonance in Alexander Wendt's observation, in the adjacent field of international relations, that 'all social scientific theories embody an at least implicit solution to the "agent-structure" problem'.[57]

Although the substantive, procedural and cultural distinctions between the relevant norms in IHL and IHRL are well recognized in the literature,[58] their implications have not been systematically worked out. The social ontological approach, drawing on widely used sociological concepts like 'structure'[59] and 'agency',[60] provides an accessible analytical framework to study these well-known distinctions and their implications on the meanings of, and the relationship between, these norms. Section 2.C.1 articulates the relatively agentic character of the content of IHL requirements on the conduct of hostilities. Section 2.C.2 then articulates the relatively structural character of the content of IHRL requirements on the right to life. These characterizations are necessarily made in relative terms because the notions of structure and agency, which undergird all social mechanisms, are interdependent in that they can be defined and experienced only by contrast to each other. Section 2.C.3 reconnects the relatively agentic requirements of IHL on the conduct of hostilities with the agentic causes of the deprivation of life in war-fighting. It also reconnects the relatively structural requirements of IHRL on the right to life with the structural causes of the deprivation of life in war-fighting. These reconnections pave the way to reconceptualizing

[53] B.Z. Tamanaha, *A General Jurisprudence of Law and Society* (2001), at 1–2.

[54] E. Durkheim, *The Division of Labor in Society* (1997), at 128.

[55] *Ibid.*, at 132.

[56] N. Luhmann, *Law as a Social System* (2004), at 469.

[57] Wendt, 'The Agent-Structure Problem in International Relations Theory', 41 *International Organization* (1987) 335, at 337.

[58] See, e.g., Gowland-Debbas, 'The Right To Life and the Relationship between Human Rights and Humanitarian Law', in C. Tomuschat, E. Lagrange and S. Oeter (eds), *The Right to Life* (2010) 121, at 126; I. Park, *The Right to Life in Armed Conflict* (2018), at 4; Waschefort, *supra* note 7, at 639.

[59] In this article, 'structure' refers to the collectivities manifested ideationally in institutionalized norms or 'social currents' or materially in the 'anatomical' or 'morphological' facts of society constituting 'the substratum of collective life'. See E. Durkheim, *The Rules of Sociological Method and Selected Texts on Sociology and Its Method* (1982), at 57.

[60] In this article, 'agency' refers to the 'possibility of intention' or 'freedom of subjectivity' manifested in externally embodied practice. See Spivak, 'Subaltern Talk: Interview with the Editors', in D. Landry and G. MacLean (eds), *The Spivak Reader: Selected Works of Gayatri Chakravorty Spivak* (1996), at 294; R. Bhaskar, *Dialectic: The Pulse of Freedom* (1993), at 153. In simpler terms, it is 'the ability to make a difference'. See M.S. Archer, *Realist Social Theory: The Morphogenetic Approach* (1995), at 118.

the relationship between the IHL requirements on the conduct of hostilities and the IHRL requirements on the right to life.

1 Relatively Agentic Character of the Requirements of IHL on the Conduct of Hostilities

The relatively agentic character of the IHL requirements on the conduct of hostilities is rooted in their content. Ideationally, these requirements are often 'more permissive' of the use of lethal force,[61] more 'modest' in ambition.[62] This minimalism[63] reflects the diminished agency of individuals who are allowed to commit acts of hostility in the structural relations of war,[64] with immunity from prosecution upon meeting these minimalist requirements as a trade-off.[65] These requirements are thus necessarily blind to the structural question of the cause of war[66] under *jus contra bellum*.[67] They establish relatively practical, sometimes mechanistic,[68] guidelines that individuals reacting in a pressing time frame can follow relatively easily.[69] Their underlying principle of distinction[70] replaces culpability-based liability to attack (culpability for aggression) with threat-based liability to attack (the threat presumed from the non-civilian status).[71]

61 Waschefort, *supra* note 7, at 616, 618–619.

62 Modirzadeh, *supra* note 5, at 357.

63 As Doswald-Beck observed, '[t]he respect of [IHL] rules will not prevent the death, destruction, suffering, and longterm misery, economic and otherwise, that armed conflict inevitably entails. Concentrating on IHL as the principal means to alleviate violence and horror is a major mistake, as this is to expect too much of what IHL can do'. See Doswald-Beck, 'Unexpected Challenges: The Increasingly Evident Disadvantage of Considering International Humanitarian Law in Isolation', 11 *Santa Clara Journal of International Law* (2012) 1, at 5. As Sassòli also acknowledged, 'even a war in which IHL is perfectly respected causes unpredictable human suffering'. See Sassòli, 'The Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?', in M.N. Schmitt and J. Pejic (eds), *International Law and Armed Conflict, Exploring the Faultlines: Essays in Honour of Yoram Dinstein* (2007) 241, at 245. For the view that IHL is functionally negative in its prohibitive nature, see Baxter, 'The Municipal and International Law Basis of Jurisdiction over War Crimes', in D.F. Vagts *et al.* (eds), *Humanizing the Laws of War* (2013) 58, at 388. Even positive obligations under IHL on the conduct of hostilities – for example, precaution – serve the function of minimizing human suffering instead of promoting human flourishing.

64 For an empirical study on the depersonalization, loss of independence and a high degree of conformity of combatants and, to some extent, also civilians in war, see Muñoz-Rojas and Frésard, 'The Roots of Behaviour in War: Understanding and Preventing IHL Violations', 86 *IRRC* (2004) 189.

65 Mégret, *supra* note 3, at 238.

66 Galtung, 'A Structural Theory of Aggression', 1 *Journal of Peace Research* (1964) 95.

67 Common Article 1 of the 1949 Geneva Conventions states that '[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention *in all circumstances*' (emphasis added). Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, 75 UNTS 31; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949, 75 UNTS 85; Geneva Convention III relative to the Treatment of Prisoners of War 1949, 75 UNTS 135; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287 (Geneva Conventions). Doswald-Beck called it an 'absolute dogma' in Doswald-Beck, *supra* note 6, at 53.

68 See, for example, the rules on status-based targeting and the elaborate definition of the status – for instance, combatancy.

69 Modirzadeh, *supra* note 5, at 356.

70 CIHL, *supra* note 2, rule 1.

71 J. McMahan, *Killing in War* (2009), at 11.

This shifts the emphasis from indirect, structural responsibility (for contributing, even by a civilian, to aggression) to direct, agentic responsibility (for posing threats, even by a combatant defending against aggression). Materially, these requirements seek to modify more specific 'incidents' (for example, targeting military objectives)[72] over which individuals are better placed to use their diminished, remaining agency to 'make a difference' (for example, by cancelling an attack if the objective transpires to be civilian).[73] They do not seek to modify a more general 'condition' that would require structural changes beyond an individual's agency (for example, ensuring everyone's inherent right to life).[74]

The characterization of the IHL requirements on the conduct of hostilities as relatively agentic in their content does not entail any empirical claim that these requirements are actually observed by, or enforced on, individuals, and no such claim is made in this article. Nevertheless, the relatively agentic character of these requirements does make them suitable standards for guiding individuals' conduct and for defining impermissible behaviour that could potentially entail individual criminal responsibility. Hence, even though IHL is a separate body of law from, and cannot be reduced to, criminal law, they are intricately related. Serious violations of IHL constitute *actus reus* of war crimes,[75] thereby creating the potential for individual criminal responsibility under international law.[76] Combatant immunity in international armed conflicts,[77] and cognate defences, justifications and excuses in non-international armed conflicts,[78] immune or otherwise, exculpate individuals from liability under municipal criminal law for acts of hostilities committed in compliance with IHL. Thus,

72 AP I, *supra* note 2, Art. 48.

73 *Ibid.*, Art. 57(2)(b).

74 ICCPR, *supra* note 1, Art. 6.

75 CIHL, *supra* note 2, rule 156.

76 The responsibility is only potential because actual responsibility will depend on, among other things, the finding of *mens rea* in an actual trial.

77 Under the customary international law rule on combatant immunity, 'those who are entitled to the juridical status of "privileged combatant" are immune from criminal prosecution for those warlike acts which do not violate the laws and customs of war but which might otherwise be common crimes under municipal law'. See further historical citations in Solf and Cummings, 'Survey of Penal Sanctions under Protocol I to the Geneva Conventions of August 12, 1949, A', 9 *Case Western Reserve Journal of International Law* (1977) 205, at 212–213. For different views on its origin, see H. Fox and P. Webb, *The Law of State Immunity* (3rd edn, 2015), at 593; R.A. Kolodkin, Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/CN.4/631, 10 June 2010, at 424, para. 86.

78 A recent example can be seen in the German case of Aerial Drone Deployment on 4 October 2010 in Mir Ali/Pakistan, Case no. 3 BJs 7/12-4, Decision to Terminate Proceedings by the Federal Prosecutor General of Germany, 23 July 2013, 157 ILR 722, at 754–755 (where it was stated that '[t]he killing of human beings in the context of an armed conflict is adjudicated in accordance with the international laws of war. If the conduct in question remains within these legal boundaries, then a generally recognised justifiable reason is deemed given and the deed will, as a general principle, not be liable to punishment. This presupposes, however, that the actor complied with the rules of warfare to which he was bound under international law. If the conduct of the actor was prohibited under international law, however, then the act may be punishable under general criminal law, even if international criminal law does not itself stipulate sanctions for said act').

compliance with IHL on the conduct of hostilities constitutes the flip side to, and creates a close, inverse relationship with, individual criminal responsibility.[79]

Moreover, the Geneva Conventions oblige state parties to 'take measures necessary for the suppression of all acts contrary to the provisions of the present Convention', including violations of IHL that do not constitute *actus reus* of war crimes.[80] Its drafting intention, as reflected in the International Committee of the Red Cross' (ICRC) model municipal legislation implementing the Geneva Conventions and the Pictet commentary, was to suppress them by penal sanctions.[81] This drafting intention can also be traced back in history to earlier attempts to enforce IHL through individual penal responsibility.[82] Where a state has implemented this obligation, a violation of IHL not amounting to a war crime could also be prosecuted as an ordinary crime under the relevant municipal legislation.[83] Hence, as Peter Rowe observed, IHL 'lends itself to the prohibition of certain forms of conduct and thus the creation of criminal or disciplinary offences'.[84] It is therefore also no coincidence that, 'in the aftermath of the Second World War, individual penal responsibility replaced state responsibility as the main sanction for violations of the laws and customs of war'.[85] To René Provost, '[t]he place of individual criminal responsibility within the framework of international humanitarian law has grown to become central'.[86]

Characterizing the content of the IHL requirements on the conduct of hostilities as relatively agentic does not imply the denial of the structural dimensions of IHL. Any law, including IHL, as an institutionalized norm, is necessarily part of the organizational

[79] Hence, even a violation of IHL on the conduct of hostilities that does not amount to war crimes – for example, failure to take precautions – could still implicate individual criminal responsibility under municipal law. See, e.g., Explanatory Memorandum of the German Code of Crimes against International Law, BTDrucks 14/8524, available at http://dip21.bundestag.de/dip21/btd/14/085/1408524.pdf.

[80] Geneva Conventions, *supra* note 67, Common Art. 49/50/129/146, para. 3.

[81] International Committee of the Red Cross (ICRC) Model Law Geneva Conventions (Consolidation) Act, Art. 4, available at https://www.icrc.org/en/document/geneva-conventions-consolidation-act-model-law. According to the ICRC Pictet commentary in 1958 on Geneva Convention IV, *supra* note 67, Art. 146, para 3: '[T]here is no doubt that what is primarily meant is the repression of breaches other than the grave breaches listed and only in the second place administrative measures to ensure respect for the provisions of the Convention. … This shows that all breaches of the Convention should be repressed by national legislation. The Contracting Parties who have taken measures to repress the various grave breaches of the Convention and have fixed an appropriate penalty in each case should at least insert in their legislation a general clause providing for the punishment of other breaches.' See J. Pictet (ed.), *Commentary on the Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), at 594. Indeed, in AP I, the word 'suppression' was substituted by 'repression'. See AP I, *supra* note 2, Art. 85.

[82] Art. 29 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field 1929 called on states parties to 'propose to their legislatures, should their penal laws be inadequate, the necessary measures for the repression in time of war of any act contrary to the provisions of the convention'. See D. Schindler and J. Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents* (1988), at 326–334. Articles 228 and 229 of the 1919 Treaty of Versailles recognized the 'right of the Allied and Associated Powers to bring before military tribunals Germans accused of having committed acts in violation of the laws and customs of war'. Treaty of Versailles 1919, 225 Parry 188.

[83] See, e.g., Geneva Conventions Act (Ireland), 1962, s. 4. Not all states have implemented this obligation. See ICRC, Commentary on the First Geneva Convention (2016), at 2897.

[84] P. Rowe, *The Impact of Human Rights Law on Armed Forces* (2005), at 116.

[85] R. Provost, *International Human Rights and Humanitarian Law* (2002), at 106.

[86] *Ibid.*, at 105.

structure of society and its implementation by the political and military apparatuses always involves structural measures. The collective nature of war itself has long been memorialized by Jean-Jacques Rousseau's statement that 'war is not a relation between individuals but a relation between states where individuals are enemies only by accident'.[87] Outside the context of hostilities, IHL imposes numerous obligations such as training and dissemination of IHL,[88] legislation and disciplinary mechanisms to redress IHL violations,[89] procurement of third parties' respect for IHL[90] and weapons review.[91] These obligations can only be effectively fulfilled by structural and systematic measures rather than by individuals' discreet actions. Within the context of hostilities, IHL influences policies, strategies, tactics, decisions and military provision at collective levels, which in turn influence individuals' actions in conducting hostilities. Importantly, despite the intricate relationship between the IHL requirements on the conduct of hostilities and criminal law, IHL also creates obligations for states[92] – hence, actions violating IHL can entail state responsibility if they are attributable to a state.[93]

While these structural, systemic and collective dimensions of the implementation of IHL serve to facilitate, promote and enhance compliance with the IHL requirements on the conduct of hostilities, the intrinsic content of these requirements itself remains relatively agentic in character. Such character is unaffected by the structural, systemic or collective measures of implementation of IHL. The mere possibility of success or failure (for example, by a state, a superior commander or a structural arrangement) to prevent a violation of these relatively agentic IHL requirements on the conduct of hostilities does not somehow change the character of their content to make it more 'structural'. The content of the IHL requirements on the conduct of hostilities is relatively agentic in the sense that, because these requirements are intrinsically less onerous, individuals have relatively greater agency – that is, greater ability to 'make a difference'[94] over their compliance.[95] For example, the requirement under IHL of refraining from targeting civilians[96] or fighting with prohibited weapons[97] is less onerous than the requirements

87 J.-J. Rousseau, *The Social Contract: And the First and Second Discourses* (2002), at 160.

88 Geneva Conventions, *supra* note 67, Common Art. 47/48/127/144; AP I, *supra* note 2, Art. 83.

89 Geneva Conventions, *supra* note 67, Common Art. 49/50/129/146; AP I, *supra* note 2, Art. 85.

90 Geneva Conventions, *supra* note 67, Common Art. 1; AP I, *supra* note 2, Art. 1.

91 AP I, *supra* note 2, Art. 36.

92 As Sassòli noted, '[a]lthough international humanitarian law has increasingly been implemented against and for the benefit of individuals, it is also … implemented between States'. See Sassòli, 'State Responsibility for Violations of International Humanitarian Law', 84 *IRRC* 401, at 402.

93 Note that '[p]rivate entities or individuals may violate international humanitarian law even if their conduct cannot be attributed to a State' for '[v]iolations are committed by individuals. International humanitarian law is one of the few branches of international law attributing violations to individuals and prescribing sanctions against such individuals'. See *ibid.*, at 402, 411. This is supported by the International Criminal Tribunal for Rwanda's (ICTR) Appeals Chamber's finding that a 'special relationship with one party to the conflict' is not a 'condition precedent to the application of common Article 3'. See Appeal Judgment, *Prosecutor v. Jean-Paul Akayesu* (ICTR-96-4-A), ICTR Appeals Chamber, 1 June 2001, para. 444.

94 See note 60 above.

95 See the qualities articulated at the beginning of this subsection.

96 See AP I, *supra* note 2, Art. 51(2).

97 See *ibid.*, Art. 35.

under *jus contra bellum* of refraining from targeting even combatants or from fighting altogether.[98] Likewise, the requirement under IHL of taking care to spare civilians[99] is less onerous than the requirement under IHRL of taking care to spare even 'dangerous terrorist suspects' who intend to carry out attacks.[100] Individuals thus have greater agency, relatively speaking, over compliance with these IHL requirements.

The IHL requirements on the conduct of hostilities are either complied with or violated by the specific actions or omissions in the relevant military operations, regardless of the background structural conditions. Structural conditions that are unfavourable to compliance may include poor training, dissemination, legislation, accountability mechanisms on these requirements, omission to ensure third parties' respect for these requirements, wrong weapons review or inadequate military provision. They may even include official policies, strategies, tactics or decisions to act in violation of these requirements. But these unfavourable structural conditions do not in themselves violate the IHL requirements on the conduct of hostilities in the absence of any action or omission that actually violates them, even if these structural conditions may make such action or omission more likely. Vice versa, structural conditions favourable to compliance may include good training, dissemination, legislation, accountability mechanisms on these requirements, utmost efforts to ensure third parties' respect for these requirements, correct weapons review and adequate military provision. They may also include official policies, strategies, tactics or decisions to act in accordance with these requirements. But these favourable structural conditions do not by themselves comply with the IHL requirements on the conduct of hostilities in the presence of an action or omission that actually violates them, even if these structural conditions may make such action or omission less likely. In other words, these structural conditions neither constitute the actual compliance with or violation of the IHL requirements on the conduct of hostilities nor preclude the wrongfulness of any such violation.

As an illustration, consider a soldier without adequate military provision other than weapons that discharge exploding bullets because of state-level policy decisions to acquire those weapons and equip soldiers with only those weapons based on a wrong weapons review. This soldier would be more likely to violate the IHL prohibition on the anti-personnel use of exploding bullets because they have no other weapon to attack enemy personnel than the one that discharges exploding bullets.[101] However, it is not the state-level policy decisions to acquire those weapons and equip soldiers with only those weapons or the wrong weapons review that constitutes a violation of the IHL rule against the anti-personnel use of exploding bullets. Rather, it is their actual anti-personnel 'use' by the soldier in a military operation that constitutes the violation and triggers the responsibility of that soldier, their commanders going all the way up to the highest level[102] as well as their state. The state-level policy decisions and the

98 See Charter of the United Nations 1945, 1 UNTS 15, Art. 2(4).

99 See AP I, *supra* note 2, Art. 57(1).

100 See, e.g., *McCann and Ors v. United Kingdom*, Appl. no. 18984/91, Judgment of 27 September 1995, paras 207, 211–212. All ECtHR decisions are available at http://hudoc.echr.coe.int/.

101 CIHL, *supra* note 2, rule 78.

102 AP I, *supra* note 2, Art. 87; C. Pilloud *et al.*, *Commentary on the Additional Protocols: Of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), at 3553.

wrong weapons review all created the structural conditions of possibility for, but do not by themselves violate the IHL rule without, the actual anti-personnel 'use' of exploding bullets by the soldier. Those structural conditions neither constitute nor preclude the wrongfulness of an eventual violation of IHL on the conduct of hostilities, which can only be actualized through some human agency in the actual conduct of hostilities itself.

Individuals in reality might not exercise their agency to resist the anti-personnel use of exploding bullets as required by IHL, particularly for foot soldiers under attack, but this does not mean that IHL does not require the individuals to exercise that level of agency.[103] The exercise of this level of agency for individuals' compliance with IHL is required by IHL even under, but also precisely because of, and, therefore, can only be understood against, their dire structural constraints. When pre-existing social relations, sustained in peacetime by the monopoly of legitimate violence, collapse to various degrees as that monopoly is in contest, what remains to uphold the minimum standards in warfare to prevent a 'total war' could be just the individuals' diminished agency. Thus, even when all structural conditions favour targeting civilians, attacking indiscriminately or disproportionately, using prohibited means and methods and omitting precautions, IHL still requires individuals to exercise their remaining agency to uphold relatively minimalist standards. It is in this sense that the IHL requirements on the conduct of hostilities are characterized as relatively agentic, which does not at all imply that these individuals act without any structural conditioning but precisely the opposite.

To re-emphasize, the agentic characterization of the IHL requirements on the conduct of hostilities relates to their intrinsic content, not their extrinsic observance by, or enforcement on, individuals, over which this article makes no claim. The IHL requirements on the conduct of hostilities may or may not be observed by individuals due to a variety of interacting factors – for example, consideration of reciprocity, influence by other actors such as peers, superiors, ICRC or third states, personal impulses, habits or the threat of accountability. These requirements also may or may not be legally enforced against individuals due to a variety of interacting factors –for example, political will to prosecute, availability of evidence, jurisdiction of tribunals, prosecutorial discretion or recourse against collective entities. None of these factors concern this article for they have no impact on the claim that the article does make – the relatively agentic character of the content of the IHL requirements on the conduct of hostilities. Indeed, the mere inobservance or un-enforcement of a legal obligation or their underlying reason has no impact on the content of the legal obligation itself.[104]

[103] The level of agency actually exercised by individuals caught up in armed conflicts is an inquiry beyond the scope of this article, which only claims that individuals have relatively greater agency – that is, greater ability to 'make a difference' over whether or not to comply with the IHL requirements on the conduct of hostilities, as compared to other legal requirements under other bodies of international law. In this particular example, foot soldiers even situated in these structural conditions may still exercise their agency to observe the prohibition by refraining from going into a battle against enemy personnel when armed only with weapons that fire exploding bullets or, even in a battle, by surrendering.

[104] 'Law also creates obligation even when the parties do not fulill their obligations'. See J.D. Morrow, *Order within Anarchy: The Laws of War as an International Institution* (2014), at 17.

As James Morrow argued, '[i]nternational law helps to restrain violence by fostering expectations, but it does not guarantee that everyone will follow its precepts in every situation'.[105] Yet the 'common knowledge about what the law is' remains crucial in setting up enemy belligerents' attitudes and calculations that would be translated into multi-layered institutional arrangements for the conduct of hostilities.[106] Hence, individuals conducting hostilities may not be acting consciously in accordance with IHL requirements, yet their conduct is already shaped by arrangements such as training, policy and operational guidelines that do take into account the relatively agentic content of these requirements.[107] It is this intrinsic content of the IHL requirements on the conduct of hostilities, rather than any extrinsic mechanism for inducing their observance by, or triggering their enforcement against, individuals that is characterized as relatively agentic. This characterization underlies Janina Dill's observation that, while 'strictly speaking, in IHL as in most [international law] the international community speaks to states … wars are fought by individuals and that is who IHL's rules regarding the conduct of hostilities ultimately address'.[108] It also echoes Marco Sassòli's characterization of IHL as a set of 'objective rules of behaviour',[109] and his emphasis that their '[v]iolations are committed by individuals' even when discussing state responsibility for the violations of IHL.[110]

2 Relatively Structural Character of the Requirements of IHRL on the Right to Life

Both the ideational and material content of IHRL on the right to life can be characterized as relatively structural by contrast to the content of IHL on the conduct of hostilities. Ideationally, the IHRL requirements on the right to life are not limited by the kind of minimalism inherent in the IHL requirements on the conduct of hostilities. To the contrary, the preamble to the Universal Declaration of Human Rights (UDHR) affirmed the idea that 'the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want' is 'the highest aspiration of the common people'.[111] Both the preamble to the UDHR and the preamble to the ICCPR

[105] *Ibid.*, at 5.
[106] *Ibid.*, at 19.
[107] One anecdotal indicator of how operational guidelines are supposed to take into account the agentic character of IHL requirements on the conduct of hostilities is the ICRC's recognition of an IHL obligation to use the least lethal force (akin to IHRL) in targeting those directly participating in hostilities and the resistance to it, notably from the perspective not of states or other collective entities but, rather, of the individuals, questioning their agency to do something that would put their own lives at risk in the highly structured circumstances of war. See Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (4th edn, 2022), at 48; Parks, 'Part IX of the ICRC Direct Participation in Hostilities Study: No Mandate, No Expertise, and Legally Incorrect', 42 *New York University Journal of International Law and Policy* (2009) 769, at 793; 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law', 90 *IRRC* (2008) 991, at ix. This resistance was shared by Waschefort in Waschefort, *supra* note 7, at 635.
[108] Dill, 'Should International Law Ensure the Moral Acceptability of War?', 26 *Leiden Journal of International Law* (2013) 253, at 264.
[109] Sassòli, *supra* note 63, at 245.
[110] Sassòli, *supra* note 92, at 402.
[111] Universal Declaration of Human Rights, GA Res. 217A (III), 10 December 1948.

proclaimed that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. The preamble to the UDHR associates human rights with the pledge in the preamble to the UN Charter 'to promote social progress and better standards of life in larger freedom'. This laid the ground for an open-ended conception of the obligation to fulfil human rights, the realization of which 'must become the object of a policy aimed at improving them'.[112] Hence, Philip Allott argued that '[t]he idea of human rights should intimidate governments or it is worth nothing. If the idea of human rights reassures governments it is worse than nothing'.[113]

In more theoretical terms, human rights have been seen as 'instruments that mitigate adverse consequences of … how international law deploys the concept of sovereignty to organize global politics into a legal order'.[114] On that logic, the ideational resources availed by IHRL on the right to life are bound to be mobilized to address war itself as a violent expression of discontent with the distribution of sovereignty in the international order. The UN Human Rights Committee has a history of this kind of mobilization. It opined in General Comment no. 6 on the right to life that

> [W]ar and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands 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.… 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.[115]

This mobilization was escalated in General Comment no. 36, which unequivocally stated 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 [ICCPR]'.[116] This marked a decisive break from IHL, which, for the reasons explained in section 2.C.1 above, is oblivious to the structural question of legality under *jus contra bellum*.

The material content of IHRL on the right to life seeks to modify 'conditions' that give rise to 'incidents' rather than the 'incidents' themselves. Hence, General Comment no. 36 stated the general principle that 'States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity'.[117] Deeming all deprivation of life resulting from acts of aggression violations of the right to life is merely the logical result of applying this general principle. This general principle entails not only that aggression violates the right to life but also that 'States parties that fail to take all reasonable measures to settle their international disputes by peaceful

[112] O.D. Schutter, *International Human Rights Law* (2019), at 5.
[113] P. Allott, *Eunomia: New Order for a New World* (2001), at 288.
[114] P. Macklem, *The Sovereignty of Human Rights* (2015), at 22.
[115] Human Rights Committee, General Comment no. 6, UN Doc. HRI/GEN/1/Rev.1, 30 April 1982, at 6, para. 2.
[116] General Comment no. 36, *supra* note 47, para. 70.
[117] *Ibid.*, para. 26.

means might fall short of complying with their positive obligation to ensure the right to life'.[118]

The focus on 'condition' in the material content of IHRL on the right to life can also be seen in the Human Rights Committee's General Comment no. 14, which recognized nuclear weapons as 'among the greatest threats to the right to life which confront mankind today'.[119] It further recognized that 'the very existence and gravity of this threat generates a climate of suspicion and fear between States, which is in itself antagonistic to the promotion of universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations and the International Covenants on Human Rights'.[120] IHRL's requirements to modify conditions to promote and maximize life, rather than modify incidents to avoid or minimize deaths or certain specific kinds of deaths, is exemplified by the broad provisions of Article 6(1) of the ICCPR.[121] These provisions can only be realized in certain structural conditions, not merely by individual actions. This explains why the ICCPR does not oblige or envisage states to criminalize violations of its own provisions on the right to life but requires the adoption of 'such laws or other measures as may be necessary to *give effect to the rights recognized*' in these provisions.[122] While these measures may include criminalization[123] and punishment, they are for violations of the right recognized in the IHRL provisions, not for violations of those provisions themselves. The compliance with these provisions would require much more than individuals refraining from committing crime – it would require a socio-politico-legal infrastructure with wide-ranging measures of protection, fulfilment and promotion beyond the agency of identifiable individuals.[124]

Highlighting the relatively structural character of the requirements of IHRL on the right to life does not imply the denial of their impact on individuals' actions. However, the guidance provided by the broad and abstract provisions of Article 6 of the ICCPR to individuals conducting hostilities is significantly less than the guidance provided by the detailed and concrete provisions of the IHL requirements on the conduct of hostilities. Detailed elaboration of Article 6 of the ICCPR may of course be provided by collective entities (for example, government departments) to guide individuals'

[118] *Ibid.*, para. 70.

[119] Human Rights Committee, General Comment no. 14, UN Doc. HRI/GEN/1/Rev.1 at 18, 9 November 1984, para. 4.

[120] *Ibid.*, para 5.

[121] ICCPR, *supra* note 1, Art. 6(1) ('[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life').

[122] ICCPR, *supra* note 1, Arts 2(2), 2(3)(a) (emphasis added).

[123] Criminalization, as opposed to merely disciplinary or administrative remedies, was required by the Human Rights Committee for the discharge of states' obligation under ICCPR, *supra* note 1, Art. 2(3), in relation to the right to life. See, e.g., UN Human Rights Committee, *Bautisa de Arellana v. Colombia*, Communication no. 563/93, UN Doc. CCPR/C/55/D/563/1993, 27 October 1995, paras 8.2, 10; *Sanjeevan v. Sri Lanka*, Communication no. 1436/05, UN Doc. CCPR/C/93/D/1436/2005, 8 July 2008, para. 6.4.

[124] See also Leloup, 'The Concept of Structural Human Rights in the European Convention on Human Rights', 20 *Human Rights Law Review* (2020) 480; Mavronicola, 'The Case against Human Rights Penality', 44 *Oxford Journal of Legal Studies* (2024) 535.

actions. But such elaboration would be embedded within a larger structural arrangement that itself constitutes the determining factor for (non-)compliance with Article 6 of the ICCPR. For example, the European Court of Human Rights (ECtHR) in *McCann v. United Kingdom* found a violation of the right to life of the 'terror' suspects killed by United Kingdom (UK) special forces in Gibraltar. It did so on the grounds not of the actions of the individual personnel themselves but, rather, of the overall organization that failed to prevent these suspects from travelling to Gibraltar in the first place, to allow for the possibility of intelligence error and to restrain the automatic recourse to lethal force.[125] In other words, the right to life was violated by the structural conditions surrounding the incident of killing rather than the individuals' actions of killing.

Even in cases of wrongful killings by individuals, it is ultimately the failure by the entity holding structural power (for example, the state) to 'do all that could be reasonably expected … to avoid a real and immediate risk to life' that violates the obligations under IHRL to protect life.[126] This goes deeper than the fact that the formal obligors of IHRL are states or some other collective entities, but it flows logically from the IHRL requirements on the structural conditions that affect the right to life. This point was incisively articulated by the Inter-American Court of Human Rights in *Velasquez Rodriguez v. Honduras*:

> [W]hile the State is obligated to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures. On the other hand, subjecting a person to official, repressive bodies that practice torture and assassination with impunity is itself a breach of the duty to prevent violations of the rights to life and physical integrity of the person, even if that particular person is not tortured or assassinated, or if those facts cannot be proven in a concrete case.[127]

3 Reconceptualizing the Relationship between IHL on the Conduct of Hostilities and IHRL on the Right to Life in a Social Ontological Light

Recognizing the relatively agentic character of IHL on the conduct of hostilities and the relatively structural character of IHRL on the right to life has substantive implications on the different ways of conceptualizing their relationship. To hold that the right to life under Article 6 of the ICCPR can be satisfied by complying with IHL on the conduct of hostilities ignores or occludes the impact of structural conditions on the right to life, which is not addressed by the relatively agentic requirements of IHL on the conduct of hostilities. The 'if-then' approach, by deferring IHRL to IHL as a matter of logic (with a linguistic flavour), substantively reduces the wide-ranging, structural requirements on the right to life to a set of minimalist prescriptions of conduct catered to the diminished agency of individuals in war. The 'normative' approach, by making the same deference as a matter of presumption (with unspecified rebuttability), blurs the distinctions between the relatively agentic character of IHL on the conduct of

[125] *McCann*, *supra* note 100, paras 200–213.
[126] ECtHR, *Osman v. United Kingdom*, Appl. no. 23452/94, Judgment of 28 October 1998, para. 116.
[127] IACtHR, *Velásquez Rodriguez v. Honduras*, Merits, 29 July 1988, para. 175. All IACtHR decisions are available at www.corteidh.or.cr/index.php/en/jurisprudencia.

hostilities and the relatively structural character of IHRL on the right to life. This dims the social ontological characters of these norms and severs their respective connections with the agentic and structural causes of the deprivation of life in war-fighting. The result is the substantive reduction of a violation of the right to life to some acausal, 'free-floating bad event' that is to be dealt with ad hoc. Both approaches abandon the demands by IHRL to transform the structural conditions that shape, and, to different degrees, pre-determine, the enjoyment or denial of the right to life in hostilities.

The value of the social ontological approach outlined in section 2.C lies in the conceptual tools that it provides. These conceptual tools help reconnect the relatively agentic requirements of IHL on the conduct of hostilities with the agentic causes of the deprivation of life in war-fighting. They also help reconnect the relatively structural requirements of IHRL on the right to life with the structural causes of the deprivation of life in war-fighting. Recovering these rational connections can help reconceptualize the relationship between these laws to demystify the theoretical dimension of the right to life in hostilities. For example, the deliberate killing of combatants/fighters and the incidental, proportionate killing of civilians, which are both allowed by IHL in the conduct of hostilities, would be deemed compliant with IHRL on the right to life under the 'if-then' approach. The same killings would also be presumed to be so compliant subject to some unspecified factors for rebuttal under the 'normative' approach. In so deeming or presuming, both approaches overlook the relatively structural requirements of IHRL on the right to life. Both deny the reality of the structural causes of these killings, thus relegating these killings as fateful, or 'tragic', in terms of both their randomness (wrong place, wrong time) and necessity (military), while ignoring what causes the structural conditions that give rise to the military necessity.

Under the social ontological approach, IHL-compliant killings remain subject to a different scrutiny under IHRL, the 'responsibility' under which hinges on the conditions of possibility for such killings – that is, the structural causes answerable, or 'able' to provide a 'response', for them. Foremost among these conditions is the cause of war itself – hence, the link between Article 6 of the ICCPR and legality under *jus contra bellum* recognized by the Human Rights Committee in its General Comment no. 36, in direct contrast to the separation between IHL and *jus contra bellum*.[128] This contrast mirrors the one between the relatively structural character of the IHRL requirements on the right to life and the relatively agentic character of the IHL requirements on the conduct of hostilities. It is the structural character of the content of *jus contra bellum* that makes its separation from IHL and its link with IHRL imperative. IHL's separation from *jus contra bellum* is thus merely one manifestation of IHL's necessary tolerance of the structural conditions of armed conflicts for it to modestly regulate matters over which individuals have greater remaining agency to make a difference.[129] On this logic, IHL must be tolerating other structural conditions causally relevant to the

[128] See Doswald-Beck, *supra* note 6, at 53; Roberts, 'The Equal Application of the Laws of War: A Principle under Pressure', 90 *IRRC* (2008) 931; Sassòli, *supra* note 63.

[129] See further in section 2.C.1 above.

deprivation of life in war-fighting, which can then be addressed under IHRL on the right to life, on their own terms, under the social ontological approach.

Waschefort's critique that the 'if-then' approach sacrifices the normative value of the right to life[130] is correct. But the 'normative' approach could be subject to the same critique in that it does not demand a separate scrutiny under IHRL on the structural conditions leading to the deprivation of life in war-fighting. Waschefort's observation that violations of IHL have their own sanctions and consequences[131] is also correct. But that does not mean that, *ipso facto*, a state or another collective entity should not be responsible under IHRL for failing to create the structural conditions necessary to promote and maximize life, if nothing else, by procuring its own agents to comply with the law. This is particularly important because one criterion – indeed, the first one – for assessing the notion of 'arbitrariness' is (il)legality.[132] Waschefort's critique that the 'if-then' approach leaves no room for difference in requirements between IHL and IHRL[133] is again correct. But differentiation between these requirements is not in itself the goal, only the means to the principled goal of just assignment of legal 'responsibility'. Honouring the distinct social ontological characters of IHL on the conduct of hostilities and IHRL on the right to life refocuses them on the distinct causes answerable, or 'able' to provide a 'response', for the deprivation of life in war-fighting, thereby revitalizing their legal scrutiny.

This reconceptualization of the relationship between IHL on the conduct of hostilities and IHRL on the right to life has major implications for how the deprivation of life in war-fighting should be approached by international legal bodies, including human rights bodies. Thus far, not many international legal bodies have directly assessed the legality of the deprivation of life in war-fighting by the substantive yardsticks of IHRL that reflect the relatively structural character of their content. Some of them have assessed its legality by the procedural yardsticks of IHRL,[134] while others have assessed its legality by the substantive yardsticks of IHL after importing them into IHRL,[135] and yet others simply consider it outside the 'jurisdiction' of the relevant IHRL obligors.[136] Still, some of them have assessed its legality by the substantive yardsticks of IHRL, albeit, except in the case of the Human Rights Committee,[137] in occasionally ambivalent terms.[138] The reasons for this relative paucity in the assessment of the legality of

[130] Waschefort, *supra* note 7, at 624.
[131] *Ibid.*, at 624, 637.
[132] General Comment no. 36, *supra* note 47, para. 12.
[133] Waschefort, *supra* note 7, at 624.
[134] See, e.g., ECtHR, *Al-Skeini v. United Kingdom*, Appl. no. 55721/07, Judgment of 7 July 2011, paras 161–177; ECtHR, *Jaloud v. The Netherlands*, Appl. no. 47708/08, Judgment of 20 November 2014, paras 186–228.
[135] See, e.g., *Nuclear Weapons*, *supra* note 6, at 240; Eritrea-Ethiopia Claims Commission, *Civilians Claims Ethiopia's Claim* 5 (*EECC Claim* 5), Partial Award, 17 December 2004, para. 26.
[136] See e.g. ECtHR, *Georgia v. Russia (II)*, Appl. no. 38263/08, Judgment of 21 January 2021, paras 109–144.
[137] See detailed discussion in section 2.C.2 above.
[138] See e.g. IACtHR, *Santo Domingo Massacre v. Colombia*, Judgment (Preliminary Objections, Merits and Reparations), 20 November 2012, paras 24, 187–237; African Court of Human and Peoples' Rights, *Democratic Republic of Congo v. Burundi, Uganda and Rwanda*, Communication no. 227/99, Judgment of 29 May 2003, paras 66, 68, 79–80, 83–84, 86–87. For further analysis of these cases, see K. L. Yip, *The Use of Force against Individuals in War under International Law: A Social Ontological Approach* (2022), at 31–34, 40–42.

the deprivation of life in war-fighting directly against the substantive requirements of IHRL on the right to life are manifold. At a practical level, prior to the issue of General Comment no. 36, legal counsels who, in practice, drive legal arguments before international legal bodies had been operating in the long shadow of the *Nuclear Weapons* advisory opinion.[139] They might not have felt sufficiently resourced jurisprudentially to make a direct claim that a certain deprivation of life in war-fighting violates the substantive IHRL obligations on the right to life, independently of IHL and the procedural obligations under IHRL.[140] At a strategic level, the advocacy value of strategic litigation encourages focus on 'problems whose causes can be assigned to the deliberate (intentional) actions of identifiable individuals' with a 'sufficiently short and clear' causal chain.[141] These problems often underlie the violations of IHL requirements on the conduct of hostilities because of the relatively agentic character of their content. This focus diverts attention away from 'problems whose causes are irredeemably structural' – that is, problems addressed by the relatively structural requirements of IHRL on the right to life.[142] At a doctrinal level, the articulation of the IHRL requirements on obligors to take positive measures to transform structural conditions for the deprivation of life in war-fighting has been hampered by legal methodological confusion, to which the next section will turn.

3 Methodological Demystification

The mystification of the right to life in hostilities under different theoretical approaches also finds expression in their legal methodology. Section 2.A demonstrated how the 'if-then' approach, in deploying *lex specialis* as 'technical streamlining' of the divergence between IHRL and IHL on the deprivation of life in war-fighting, conceals the substantive, social core of the problem. Another legal technique, explicitly deployed by the normative approach, is systemic integration provided in Article 31(3)(c) of the VCLT: 'There shall be taken into account, together with the context … any relevant rules of international law applicable in the relations between the parties.' Systemic integration is often used to mask the covert application of *lex specialis* or an overt exercise of personal discretion in disregard of the legal requirement in interpreting IHRL on the right to life by taking into account IHL on the conduct of hostilities 'together with

[139] Note, for example, counsels to both Eritrea and Ethiopia before the Eritrea-Ethiopia Claims Commission 'essentially urged … that, as a practical matter, international humanitarian law is a *lex specialis* providing rules directly applicable in the course of armed conflicts'. See *EECC Claim 5*, *supra* note 135, para. 26. There might have also been pragmatic considerations behind the prioritization of claim for violation of procedural requirements over that of substantive requirements under IHRL. See, e.g., *Al-Skeini*, *supra* note 134, paras 73, 151.

[140] This may however be changing with new cases filed before the Human Rights Committee that rely explicitly on General Comment no. 36, *supra* note 47. See, e.g., 'NGOs File Landmark Complaint to UN Human Rights Committee on Russian Aggression in Ukraine', *Reliefweb* (2024), available at https://reliefweb.int/report/ukraine/ngos-file-landmark-complaint-un-human-rights-committee-russian-aggression-ukraine.

[141] M.E. Keck and K. Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (2014), at 27.

[142] *Ibid.*

the context'. By recovering the true meaning of 'context' to be taken into account together with IHL on the conduct of hostilities in interpreting IHRL on the right to life, this section demonstrates the proper use of systemic integration and demystifies the right to life in hostilities methodologically.

A *Unmasking Systemic Integration as* Lex Specialis

Article 31(3)(c) of the VCLT plainly does not provide for deferring a treaty provision to 'any relevant rules of international law' as the deployment of *lex specialis* under the 'if-then' approach would defer an IHRL provision to an IHL provision. But this has not stopped the deployment of Article 31(3)(c) of the VCLT to precisely reach that result,[143] thereby reducing systemic integrity to a mask for the covert application of *lex specialis*. Sassòli thus insightfully, though perhaps not without a hint of cynicism, called systemic integration a 'more modern approach' that generates very similar outcomes as the technique of *lex specialis*.[144] He attributed the 'almost allergic' reaction by some to *lex speciailis* to the fear of being associated with 'IHL supremacists' and supporters of the 'War on Terror', who are often perceived as staunch proponents of the *lex specialis* lexicon.[145] Conversely, Martti Koskenniemi characterized the deployment of *lex specialis* in the *Nuclear Weapons* advisory opinion as 'an aspect of the pragmatics of the [ICJ]'s reasoning' in 'a systemic view of the law'.[146]

The confusion and controversies over the precise distinction and relationship between these two legal techniques, however, risk distracting us from the substance of the problem.[147] No doubt, the flexibility of systemic integration[148] allows its deployment to reach the same substantive result as *lex specialis* under the 'if-then' approach,[149]

[143] For example, the European Court of Human Rights (ECtHR) has, in *Hassan v. United Kingdom*, partially relied on the VCLT, *supra* note 19, Art. 31(3)(c) to interpret Art. 5(1) of the European Convention on Human Rights (ECHR) 'against the background of the provisions of [IHL]' to permit 'the taking of prisoners of war and the detention of civilians who pose a threat to security' as 'accepted features of [IHL]' when Article 5(1) of the ECHR does not at all contemplate these. *Hassan v. United Kingdom*, Appl. no. 29750/09, Judgment of 16 September 2014, para. 104.

[144] Sassòli, *supra* note 21, at 470–471.

[145] *Ibid.*, at 479.

[146] Report of the ILC Study Group, *supra* note 14, at 28, para. 104.

[147] Marko Milanovic characterized *lex specialis* as merely a sub-species of systemic integration. See Milanovic, *Extraterritorial*, *supra* note 14, at 251. Similarly, Jean D'Aspremont and Elodie Tranchez argued that *lex specialis* serves as a guise for the application of systemic integration. See d'Aspremont and Tranchez, 'The Quest for a Non-Conflictual Coexistence of International Human Rights Law and Humanitarian Law: Which Role for the Lex Specialis Principle?', in R. Kolb and G. Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (2013) 223 at 238. Waschefort, while criticizing these characterizations as failing to appreciate the International Court of Justice's (ICJ) explicit identification of IHL on the conduct of hostilities as *lex specialis* in the *Nuclear Weapons*, *supra* note 6, also referred to the ICJ's 'implicit application' of systemic integration, only that it does not expunge the explicit determination by *lex specialis* 'as a device to determine the extent to which the IHL framework was to be taken into account in the circumstances, as per systemic integration', raising doubt on the precise distinctions between the proclaimed differences between these positions. See Waschefort, *supra* note 7, at 628.

[148] Waschefort, *supra* note 7, at 627.

[149] Borelli, 'The (Mis)-Use of General Principles of Law: Lex Specialis and the Relationship between International Human Rights Law and the Laws of Armed Conflict', in L. Pineschi (ed.), *General Principles of Law: The Role of the Judiciary* (2015) 265 at 285–286.

while escaping the predictable criticism of the latter's formal invocation.[150] But such deployment of systemic integration, rather than being celebrated uncritically as the mastery of legal reasoning, ought to be unmasked as a trojan horse that lowers our guard to the right to life in hostilities being 'read down'[151] through seemingly more sophisticated legal technicality.[152]

B *Unmasking Systemic Integration as Personal Discretion*

The subtlety of systemic integration lies in its perceived 'vagueness', given the variety of ways in which other 'relevant rules of international law' could be 'taken into account' in interpreting a treaty.[153] Under the normative approach, this 'vagueness' provides the 'necessary flexibility' to accommodate 'a range of factors' in determining how IHL on the conduct of hostilities shall be taken into account in interpreting IHRL on the right to life.[154] These factors include 'the context, the closeness of the relationship between the norm under interpretation and the other "relevant rules" and the degree of relevance of these other rules to the regulation of the matter at hand'.[155] The normative approach appropriately includes 'context' as the first among these factors for this is explicitly provided for in Article 31(3) of the VCLT, which requires that other relevant rules of international law be taken into account in interpreting a treaty 'together with the context'.[156] However, the normative approach has omitted the specific delineation of 'context' provided in Article 31(2) of the VCLT:

> The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

This delineation of 'context' is important for understanding and applying the principle of systemic integration under Article 31(3)(c) of the VCLT. It means that the act of 'taking into account' relevant rules of international law in treaty interpretation is not totally free, unqualified or unconstrained but is required to be conducted 'together with the context', as specified in Article 31(2) of the VCLT. The normative approach completely bypasses this delineation in adopting its 'contextual interpretation

[150] See Milanovic, *Lost Origins*, *supra* note 14, at 112–113.
[151] Milanovic, *Jurisdiction*, *supra* note 14, at 109.
[152] Lindroos, *supra* note 24, at 44.
[153] See analysis and citations provided in Waschefort, *supra* note 7, at 627.
[154] *Ibid.*
[155] *Ibid.*
[156] This formulation was also repeated explicitly: 'Following loss of life during the conduct of hostilities, the interpreter is tasked with interpreting the right to life, taking into account the context, as well as IHL, as other relevant rules.' *Ibid.*, at 632.

by way of systemic integration'.[157] Under that 'contextual interpretation', 'the extent to which other rules are to be taken into account' is instead based 'on factors including the normative features of the rules in question as well as the factual situation in which they are given effect'.[158] These factors should certainly be taken into account in applying a treaty provision such as Article 6 of the ICCPR to the facts – for example, as 'arbitrary' incorporates notions of illegality,[159] illegal factual situation concerning a deprivation of life can render it 'arbitrary' under Article 6 of the ICCPR. Likewise with other notions envisaged by 'arbitrary'. But applying the content of the requirements under Article 6 of the ICCPR to a deprivation of life by examining these, in principle, unlimited factors to see whether the legal requirements are met in reality is an 'application' of the provision, not 'interpretation – the giving of meaning to a text'.[160] Although closely related, interpretation 'is separate from application of the provision and, logically, must come before it' as 'it is not possible to apply a treaty except on the basis of some interpretation of it'.[161] It certainly is not the specific mode of 'interpretation by way of systemic integration', prescribed by Article 31(3)(c) of the VCLT, that requires treaty interpretation to take into account other relevant rules of international law 'together with the context', as defined by Article 31(2) of the VCLT. The 'interpretation' of law under the normative approach thus collapses into 'application' of law by deferring the ascertainment of the meaning of the law until its application to concrete facts to reach a 'judgment'. Such a 'judgment' is effectively immune from principled challenge because its purported basis, a law empty of pre-existing meaning, can necessarily accommodate, thereby providing *ex post facto* justification for, virtually any 'judgment'.

It is true that the variety of actions encompassed by the requirement of 'taking into account' under Article 31(3) of the VCLT bars its appropriation to dictate the determination of IHRL on the right to life by IHL on the conduct of hostilities as in the 'if-then' approach. But the limit set on 'taking into account' under Article 31(3) of the VCLT by the requirement to do so together with a specifically defined 'context' also bars its appropriation to justify a completely open-ended interpretation as in the normative approach. The latter allows unlimited selection of undefined contextual factors to discriminate how to take IHL into account in interpreting IHRL, effectively substituting specific legal requirements with personal discretion that goes far beyond the generic subjectivity inherent in all human judgments. Article 31(3)(c) of the VCLT imposes a requirement, not merely grants a discretion, to interpret treaty provisions by taking into account other relevant rules of international law in a specified way

[157] *Ibid.*, at 635.

[158] *Ibid.*, at 628–629. This in practice translates into numerous descriptions of factual circumstances. *Ibid.*, at 632.

[159] M. Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2nd rev. edn, 2005), at 127–128.

[160] R. Gardiner, *Treaty Interpretation* (2015), at 28.

[161] *Ibid.*, at 28, 30. As explained in the Harvard draft convention on the law of treaties, '[i]nterpretation is the process of determining the meaning of a text; application is the process of determining the consequences which, according to the text, should follow in a given situation'. See Harvard Law School, 'Draft Convention on the Law of Treaties', 29 *AJIL Supplement* (1935) 653, at 938.

– that is, together with a carefully circumscribed context. Not only does the substitution of this legal requirement with personal discretion deviate from the law, but it also allows systemic integration to be used to reach outcomes based purely on policy grounds.[162]

The legitimacy concern with this licensed discretion in taking into account IHL on the conduct of hostilities to interpret IHRL on the right to life[163] is exacerbated first by the gravity of the subject matter. It is further exacerbated by the frequent occurrences that such discretion is exercised by judges, politicians, military personnel and other officials over the deprivation of lives perpetrated by their own political communities on hostile political communities in armed conflicts. The mere imaginary of exercising one's discretion in determining the 'normative content and underlying values' of the rights[164] of others from hostile political communities ought to provoke alarm. As Jürgen Habermas has cautioned, even 'the "well-intentioned hegemon" will … encounter insuperable cognitive obstacles … [in] distinguishing its own national interests from the universalizable interests that all the other nations could share'.[165] This explains Sassòli's warning on this approach: '[S]uggest[ing] a flexible set of variables depending on the case to be decided … on a spectrum between situations where a violation of IHRL only exists when IHL is violated, on the one hand, and situations in which the two branches must be blended together, on the other … opens the door to abuse, subjectivity and manipulation'.[166] The ensuing, perceived double standards could undermine the legitimacy of not only the individuals or legal bodies that exercise the discretion but also that of the underlying international human rights system as a whole.

C *Recovering the 'Context' in Systemic Integration to Take IHL on the Conduct of Hostilities into Account in Interpreting IHRL on the Right to Life*

The social ontological approach outlined in section 2.C can be operationalized methodologically by just a more careful reading of Article 31(3)(c) of the VCLT to take into account IHL on the conduct of hostilities, 'together with the context', in interpreting Article 6 of the ICCPR. Despite its apparent formalism or legalism, the definition of 'context' in Article 31(2) of the VCLT actually includes rich materials containing substantive content that vindicates the respective social ontological characters of IHL on the conduct of hostilities and IHRL on the right to life. The first element of 'context' of a treaty under Article 31(2) of the VCLT is the treaty text itself. In a social ontological light, the text of ICCPR, which provides for the adoption of structural measures to give

[162] See, e.g., Milanovic, *Extraterritorial*, *supra* note 14, at 252, 256; Milanovic, 'Jurisdiction', *supra* note 14, at 110; see also Fionnuala Ní Aoláin, *Just Security*, 2 February 2017, www.justsecurity.org/37013/detain-lawfully-detain-question-reflection-uk-supreme-court-decision-serdar-mohammed/.

[163] Milanovic, *Extraterritorial supra* note 14, at 257.

[164] Waschefort, *supra* note 7, at 617.

[165] J. Habermas, *The Divided West* (2006), at 184.

[166] Sassòli, *supra* note 21, at 475.

effect to the right to life,[167] rather than the criminalization of breaches of Article 6 of the ICCPR itself,[168] indicates the relatively structural character of its requirements. When Article 6 of the ICCPR is interpreted by taking into account IHL on the conduct of hostilities, it can only be done 'together with' this important context.

This context stands in contrast to the context of Additional Protocol I, the text of which provides for individual accountability for breaches of its own provisions on the conduct of hostilities.[169] This contrast suggests that 'taking into account' IHL in interpreting Article 6 of the ICCPR, 'together with the context', does not result in conforming the requirements of the latter to those of the former, as dictated by the 'if-then' approach or presumed by the 'normative' approach. Quite the opposite, this contrast suggests that 'taking into account' IHL in interpreting Article 6 of the ICCPR requires distinguishing the requirements of the latter from those of the former *a contrario*,[170] owing to their different characters revealed by their 'contexts'. Proper systemic integration between Article 6 of the ICCPR and IHL on the conduct of hostilities, according to the VCLT, thus entails reconnecting these legal requirements respectively with the causes of deprivation of life in war-fighting that are relatively distinct in social ontological terms.

A similar, substantive reading of the 'context' of a treaty to contrast its character against the character of 'other rules of international law' in systemic integration was adopted by Judge Rosalyn Higgins in the *Oil Platforms* case.[171] It directly refuted the majority's reliance on Article 31(3)(c) of the VCLT to interpret 'measures' necessary to protect essential security interest under an Iran-US economic treaty to include only those that are lawful under *jus contra bellum*:

> The Court reads [Article 31(3)(c) of the VCLT] as incorporating the totality of the substantive international law … on the use of force. But this is to ignore that Article 31, paragraph 3, requires 'the context' to be taken into account: and 'the context' is clearly that of an economic and commercial treaty. What is envisaged by Article 31, paragraph 3 (c), is that a provision that requires interpretation … will be illuminated by recalling what type of a treaty this is and any other 'relevant rules' governing Iran-United States relations.[172]

Judge Higgins then opined that '[i]t is not a provision that on the face of it envisages incorporating the entire substance of international law on a topic not mentioned in the clause – at least not without more explanation than the Court provides'.[173] This sentence may be read as an invitation to explore what Article 31(3)(c) of the VCLT is

[167] ICCPR, *supra* note 1, Art. 2(2).
[168] See section 2.C.2 above.
[169] API, *supra* note 2, Art. 85. See further section 2.C.1 above.
[170] This has been termed the method of 'exclusory' or 'negative' interpretation in P. Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (2015), at 66.
[171] *Oil Platforms Case (Islamic Republic of Iran v. United States of America)*, Judgment (Merits), 6 November 2003, ICJ Reports 161, Separate Opinion of Judge Higgins.
[172] *Ibid.*, para. 46. Other examples of *a contrario* interpretation based on the different contexts of the treaty provisions being interpreted can be found in *Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels*, Advisory Opinion, 1931 PCIJ Series A/B, No. 43, 127, at 141; *Case of the S.S. Wimbledon*, 1923 PCIJ Series A, No. 1, 15, at 24.
[173] *Oil Platforms*, *supra* note 171, para. 46, Separate Opinion by Judge Higgins.

capable of incorporating into the treaty being interpreted, in light of the limits of 'context' as defined in the VCLT.

Proper systemic integration, 'together with the context', applies in both directions of interpreting Article 6 of the ICCPR by taking into account IHL on the conduct of hostilities and interpreting IHL on the conduct of hostilities by taking into account Article 6 of the ICCPR.[174] In both cases, the two norms ought to be distinguished from each other given the different characters of their requirements revealed by their 'contexts'. When Article 6 of the ICCPR is interpreted by taking account of the IHL requirements on the conduct of hostilities, the former cannot be deferred to the latter because the latter's relatively agentic requirements cannot substitute the former's relatively structural requirements. This way of distinguishing between the two does not mean that IHL on the conduct of hostilities is irrelevant to interpreting Article 6 of the ICCPR. The relatively structural requirements of the latter impose a duty on its obligor to create structural conditions to maximize and promote life, which entails the requirement to procure all those within its power to comply with IHL on the conduct of hostilities. But merely procuring compliance with the IHL requirements on the conduct of hostilities does not by itself equal compliance with Article 6 of the ICCPR given their different 'contexts'. The same applies when certain IHL requirements on the conduct of hostilities (for example, the prohibition of incidental loss of civilian life excessive in relation to the concrete and direct military advantage anticipated)[175] are interpreted by taking account of Article 6 of the ICCPR. The relatively structural requirements of the latter (for example, assessing whether the military advantage is for a lawful cause under *jus contra bellum*)[176] will be distinguished for their distinct 'context' from the former. Incorporating the latter into the former would impose requirements on individuals beyond their agency.[177]

Unlike the normative approach, this approach to systemic integration enables concrete facts to be assessed substantively and transparently according to the interpreted meaning of the law itself. The application of the law thus remains separate from the interpretation of the law, allowing the results of its application to be challenged in principle on commonly accessible grounds. The practical implications of this approach will be illustrated by the concrete scenarios in section 4.

4 Practical Demystification

Waschefort used concrete scenarios to illustrate why, unlike the 'if-then' approach, 'IHL compliance does not always render loss of life non-arbitrary' and 'IHL non-compliance does not always render loss of life arbitrary' under IHRL according to the normative approach.[178] This section analyses some of these scenarios through the

[174] This is an issue raised in Waschefort, *supra* note 7, at 625.
[175] AP I, *supra* note 2, Art. 51(5)(b).
[176] General Comment no. 36, *supra* note 47, para. 70. One this point, see further discussion in section 2.C above.
[177] This supplies the principled justification for the outcome, 'compliance with the IHL use-of-lethal-force framework is not dependent on IHRL', which is accepted in Waschefort, *supra* note 7, at 625.
[178] *Ibid.*

theoretical and methodological lenses developed in sections 2 and 3 to demystify the right to life in hostilities in practice.

A *Lethal Targeting of Child Soldiers Where the Use of Lethal Force Is Not Necessary*

Waschefort analysed the legality under IHRL of a lethal targeting of child soldiers where the use of lethal force was not necessary but was assumed, for the sake of argument, to be legal under IHL.[179] Waschefort proposed a presumption, similar to the default position of a light switch, 'that loss of life sustained in an IHL-compliant manner during the conduct of hostilities is not arbitrary' under Article 6 of the ICCPR. This presumption is rebuttable exceptionally by 'sufficiently compelling factors ... such as the age of the targets ... and the feasibility of a less than lethal operation', that could exert sufficient pressure to flip the light switch.[180] This leaves the salience of the selected factors and the pressure they bring to 'flip the light switch' unexplained, implicitly representing that they are objectively self-evident and universally sensible when those with a different viewpoint may find this intellectual operation mysterious.

In contrast, the social ontological approach to the problem adopts clearly articulated principles to interpret Article 6 of the ICCPR by taking into account IHL on the conduct of hostilities, together with the 'context'. Pursuant to this approach, the relatively agentic requirements of IHL on the conduct of hostilities, while being 'taken into account' in interpreting Article 6 of the ICCPR, do not exhaust the latter's relatively structural requirements, not even as a rebuttable presumption. Pursuant to Article 31(1) of the VCLT, the prohibition of the 'arbitrary' deprivation of life should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. According to General Comment no. 36, the word 'arbitrary' 'must be interpreted more broadly than "illegal" to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality'.[181] Importantly, '[t]he duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity'.[182]

The broad scope of prohibition of arbitrary deprivation of life requires scrutiny of the structural conditions that lead to the targeting of these child soldiers, who do not just mysteriously emerge onto a battlefield, but do so out of profound social causes susceptible to legal intervention. Such scrutiny includes, most importantly, why there is an armed conflict in the first place that gives rise to the occasion for targeting these child soldiers and that has triggered the application of IHL, which potentially permits such targeting. General Comment no. 36 explicitly identifies multiple causes of

[179] *Ibid.*, at 634.
[180] *Ibid.*, at 634, 635.
[181] General Comment no. 36, *supra* note 47, para. 12.
[182] *Ibid.*, para. 26.

conflict that could lead to a violation of the right to life under Article 6 of the ICCPR. If the targeting of the child soldiers is conducted pursuant to a war of aggression, Article 6 is *ipso facto* violated.[183] If the targeting of child soldiers occurs in an armed conflict that results from the failure to take all reasonable measures to settle international disputes by peaceful means, the positive obligation to ensure the right to life under Article 6 is likewise violated.[184] If the targeting of child soldiers occurs in an armed conflict that results from the lack of efforts to avert the risks of armed conflict and to strengthen international peace and security, the most important safeguards of the right to life under Article 6 of the ICCPR are still lacking.[185]

Apart from the overall question of why the structural condition of armed conflict comes into existence in the first place, Article 6 of the ICCPR also requires scrutiny of other conditions affecting the right to life of the child soldiers. Such scrutiny may implicate not just the targeting party but also the party that has recruited the child soldiers and therefore brought these child soldiers into the structural conditions that expose them to being targeted in hostilities. As the recruitment of child soldiers is illegal,[186] these structural conditions are tainted with 'illegality', one of the elements that renders a deprivation of life 'arbitrary'[187] and, therefore, in violation of Article 6, for which the recruiting party is responsible. In addition, one should also scrutinize whether or not the state in which the child soldiers are located has fulfilled its positive obligations to create conditions to guarantee these children's right to life. This is important bearing in mind the social conditions conducive to the recruitment of children into armed conflicts – for example, poverty, widespread displacement or long-term, intergenerational suffering in armed conflicts sustained by the lack of transitional justice measures. The failure of the party with sufficient structural power to address these 'general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity' may lead to a violation of Article 6 of the ICCPR.[188] Likewise, a party that fails to use its structural power to create conditions that could minimize, through overall organization and planning, the loss of life, including that of a child soldier, in a military operation that is legal under *jus contra bellum*,[189] could also violate Article 6 of the ICCPR.[190]

The above are the structural conditions predetermining the child soldier's exposure to lethal targeting that are required by Article 6 of the ICCPR to be transformed. This requirement remains even if the lethal targeting itself fully complies with the IHL requirements on the conduct of hostilities, which are catered to the diminished agency of individuals in a battlefield where the real age of a target is often unknown. Under

[183] *Ibid.*, para. 70.
[184] *Ibid.*
[185] *Ibid.*, para. 69.
[186] See AP I, *supra* note 2, Art. 77(2); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000, 2173 UNTS 222.
[187] General Comment no. 36, *supra* note 47, para. 12.
[188] *Ibid.*, para 26.
[189] For the relationship between *jus contra bellum* and IHRL, see further discussion in sections 2.C.2 and 2.C.3 above.
[190] *McCann*, *supra* note 100, paras 200–213.

the social ontological approach, failure to address these structural conditions leads to a violation of Article 6. This stands in contrast to the normative approach, which allows unlimited selection of some rather than other contextual factors to be taken into account in determining whether or not an IHL-compliant targeting nonetheless violates Article 6 of the ICCPR. Such determination thus becomes a matter of personal discretion exercised on a completely ad hoc basis, causing not only legitimacy concerns, as outlined in section 3.B, but also operational uncertainty and possibly perverse side effects. For example, selecting the target's age as a key 'contextual factor' in determining whether IHL-compliant targeting complies with IHRL may be seen to confer quasi-immunity on child soldiers from being targeted, thereby creating a perverse incentive to use young children in hostilities.

B *Anti-personnel Use of Exploding Bullets*

Waschefort then cited the example of the anti-personnel use of exploding bullets, which is clearly prohibited by IHL,[191] to illustrate why IHL non-compliance does not always render a loss of life 'arbitrary' under IHRL. He argued that, because the IHL prohibition on the anti-personnel use of exploding bullets is motivated by the desire to avoid unnecessary suffering, the prohibition does not serve to protect life, and its violation does not render the resulting death a violation of Article 6 of the ICCPR.[192] The normative approach thus relies on one contextual factor – that is, the motivation for prohibiting the anti-personnel use of exploding bullets – at the expense of others (for example, its effects), to justify the characterization that the prohibition does not protect life. This particular characterization is further relied on, at the expense of other characterizations (for example, it reduces the injury of the target and others nearby), to reach a judgment, all without explanation other than that it is self-evidently 'normative'.

In contrast, the social ontological approach recognizes the relatively agentic character of the IHL prohibition on the anti-personnel use of exploding bullets. It requires individuals to maintain a minimum level of agency (to abstain from causing superfluous injury or necessary suffering to a combatant) while allowing actions commensurate with their diminished agency (to kill a combatant in hostilities by non-prohibited means).[193] When this IHL requirement is violated by the actual anti-personnel use of exploding bullets, the entity (for example, a state) for which such use is made also violates Article 6 of the ICCPR for failing to create the structural conditions that guarantee the right to life as it fails to prevent this IHL violation. In general, 'deprivation of life is, as a rule, arbitrary if it is inconsistent with international law'.[194] In particular, 'the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity', which are required to be addressed by Article 6 of the ICCPR,[195]clearly include the anti-personnel use of

[191] CIHL, *supra* note 2, rule 78.
[192] Waschefort, *supra* note 7, at 636–637.
[193] See section 2.C.1 above.
[194] General Comment no. 36, *supra* note 47, para. 12; see also Nowak, *supra* note 159, at 127–128.
[195] General Comment no. 36, *supra* note 47, para. 26.

exploding bullets. General Comment no. 36 specifically recognizes a serious effect on health,[196] an effect shared by the anti-personnel use of exploding bullets, as generating the risk of deprivation of life in violation of Article 6 of the ICCPR.

It is well known that severe wounds inflicted by exploding bullets are likely to be fatal or result in long-term disability. Bullets exploding upon impact with the human body were found to cause much more dangerous wounds than non-exploding bullets. States subscribing to the Saint Petersburg Declaration considered that such bullets caused extreme suffering or rendered death inevitable, and hence went beyond what was necessary and justified to put an enemy soldier out of combat.[197] Thus, whether the person ultimately receiving the exploding bullet is a combatant or a civilian, from an IHRL perspective, its anti-personnel use cannot be said to '[m]inimize damage and injury, and respect and preserve human life'.[198] Not only would the right to life of the person receiving the exploding bullet be affected, but also that of any bystander next to them as the incendiary effect of the exploding bullet can start a fire.[199] It also affects the right to life of surgeons and pathologists who treat the person receiving the exploding bullets, which might fail to detonate and remain in the body during medical treatment, thereby endangering the surgeons and pathologists.[200] The right to life could also be affected in the longer term where the exploding bullets contain tungsten or depleted uranium for better target penetration. Such substances could have toxic and carcinogenic effects through the inhalation of dust or through shrapnel fragments embedded in the body, generally posing longer-term environmental and health risks.[201]

Under a social ontological approach, the above are the principled reasons to interpret the right to life under IHRL to prohibit the anti-personnel use of exploding bullets in hostilities, which reasons are easily occluded in the 'contextual interpretation' under the normative approach.

C *Specific Prohibitions*

To delink IHL violation from IHRL violation, Waschefort adopted two criteria to limit the instances where IHL violation would trigger a violation of Article 6 of the ICCPR. The first is that 'the values of the violated IHL norm must include as a core

[196] *Ibid.*, para 54.

[197] G. F. Martens et al., *Nouveau recueil général de traités, conventions et autres transactions remarquables: servant à la connaissance des-relations étrangères des puissances et états dans leurs rapports mutuels* (1873), at 459–460.

[198] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 7 September 1990, Principle 5(b).

[199] ICRC, *Weapons That May Cause Unnecessary Suffering or Have Indiscriminate Effects, Report on the Work of Experts* (1972), at 58, 63.

[200] Knight, 'Explosive Bullets: A New Hazard for Doctors', 284 *British Medical Journal (Clinical Research Ed.)* (1982) 768; Swift and Rutty, 'The Exploding Bullet', 57 *Journal of Clinical Pathology* (2004) 108.

[201] Ghalaieny, 'Toxic Harm: Humanitarian and Environmental Concerns from Military-Origin Contamination', in *Toxic Remnants of War Project* (2013); Kalinich, 'Heavy Metal-Induced Carcinogenicity: Depleted Uranium and Heavy-Metal Tungsten Alloy', in G. Banfalvi (ed.), *Cellular Effects of Heavy Metals* (2011) 221.

consideration the safeguarding of human life'.[202] The second is that there must be a sufficient nexus between the conduct in question and the loss of the life protected by IHL (or a threat that can result in such a loss of life).[203] These two criteria were then deployed by Waschefort to argue that various types of conduct that violate specific prohibitions under IHL need not violate Article 6 of the ICCPR. Waschefort envisaged that indiscriminate attacks prohibited by IHL need not violate Article 6 because it might not satisfy the second criterion above. This would be the case if the fatalities do not 'include persons the lives of whom are protected in terms of the values of the IHL norm(s) violated or an actual threat to life meeting the threshold of the right to life' has not occurred.[204] As the notion of a 'sufficient nexus' between the conduct and a loss or threatened loss of life is undefined, the satisfaction of the criterion remains a matter of 'normative' discretion. From this author's perspective, it is difficult to imagine an indiscriminate attack that would not create at least a threat to the lives of civilians protected by IHL as the conduct of the indiscriminate attack is so defined and proscribed by IHL precisely to prevent the endangerment of civilians.[205] It is therefore difficult to fathom how, even under the normative approach itself, an indiscriminate attack prohibited by IHL would not trigger a violation of Article 6 of the ICCPR.

The social ontological approach provides much clearer reasoning that leads to the opposite conclusion that indiscriminate attacks would result in a violation of Article 6 of the ICCPR. As argued in section 3.C, IHRL's relatively structural requirements impose a duty on an IHRL obligor to create structural conditions to protect life by procuring all those within its power to comply with the relatively agentic requirements of IHL on the conduct of hostilities. Failure to so procure, as indicated in the actual launching of indiscriminate attacks, contributes to the creation of 'general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity'.[206] Thus, taking the IHL prohibition on indiscriminate attack into account in interpreting Article 6 of the ICCPR would suggest that violation of the prohibition would also result in a violation of Article 6 by undermining the structural condition required to protect life.

Waschefort also envisaged that attacks on specially protected objects under IHL such as hospitals and buildings for humanitarian relief operations need not violate Article 6 of the ICCPR. In his view, these protected objects do not meet the first criterion above, their 'underlying values' not being 'sufficiently proximate to the direct protection of life'.[207] Waschefort argued that attacks on these protected objects resulting in the death of only combatants would violate IHL but not Article 6 of the ICCPR.[208] Given the critical functions of hospitals and humanitarian relief operations in treating injuries, providing for basic survival needs and generally saving lives in

[202] Waschefort, *supra* note 7, at 637–638.
[203] *Ibid.*, at 637–639.
[204] *Ibid.*, at 639.
[205] Pilloud *et al.*, *supra* note 102, at 620.
[206] General Comment no. 36, *supra* note 47, para. 26.
[207] Waschefort, *supra* note 7, at 641.
[208] *Ibid.*, at 641–642.

war, it is difficult to understand why their protection does not 'include as a core consideration the safeguarding of human life'.[209] It is thus difficult to fathom how, even under the normative approach, targeting these protected objects would not violate Article 6 of the ICCPR. Waschefort then contrasted this with the following:

> [T]he cumulative effect of a systematic campaign of targeting such infrastructure, resulting in reduced capacity to administer medical treatment, including lifesaving and life-sustaining treatment, and thus leading to loss of life, may well amount to a right-to-life violation. Nevertheless, this assessment would not be made on an IHL-cantered interpretation of arbitrary deprivation of life, but, rather, these would be circumstances in which arbitrariness is to be recalibrated in light of these compelling factors.[210]

The requirement that targeting health care infrastructure reach the level of a 'systematic campaign' before it 'may well amount to' a violation of Article 6 of the ICCPR seems like a very high threshold. Yet this threshold cannot be challenged on principled grounds under the normative approach, where the qualities that make a factor 'compelling' enough to violate Article 6 remain unarticulated and their identification unaccountably discretionary. By contrast, the social ontological approach characterizes access to health care as part of the structural conditions for protecting the right to life required by IHRL, as clearly articulated in General Comment no. 36: 'The measures called for to address adequate conditions for protecting the right to life include, where necessary, measures designed to ensure access without delay by individuals to essential goods and services such as … health care … and other measures designed to promote and facilitate adequate general conditions, such as the bolstering of effective emergency health services.'[211]

Through this social ontological lens, regardless of whether targeting these health care facilities involves a 'systematic' design, their destruction to the extent of undermining the conditions for protecting the right to life already breaches Article 6 of the ICCPR. Furthermore, IHRL requires an IHRL obligor to create structural conditions protective of life by procuring all those within its power to comply with the IHL prohibition on targeting health care facilities. The actual violation of this prohibition creates 'general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity', thereby also resulting in a violation of Article 6 of the ICCPR.[212] Finally, in both scenarios of indiscriminate attacks and targeting health care facilities above, the resulting deaths, even if consisting only of the combatants' death[213] (itself an extremely unlikely event), would also result in a violation of Article 6 of the ICCPR if these attacks are acts of aggression.[214]

[209] *Ibid.*, at 637–638.

[210] *Ibid.*, at 642. Whatever 'IHL-cantered interpretation of arbitrary deprivation of life' may mean under the normative approach, there is no such thing, as seemingly implied by contrast, as an autonomous, self-contained interpretation of ICCPR, *supra* note 1, Art. 6, in isolation from the rest of international law, including IHL, for systemic integration is always required by the VCLT, *supra* note 19, Art. 31(3)(c).

[211] General Comment no. 36, *supra* note 47, para. 26.

[212] *Ibid.*, para. 26.

[213] Waschefort, *supra* note 7, at 639, 641.

[214] General Comment no. 36, *supra* note 47, para. 70.

5 Conclusion

Does or should the right to life transmute during the conduct of hostilities under the influence of IHL just like matter transmutes during an alchemical process? To continue the metaphor, this article could also be read in alchemical terms as an attempt to distil the IHRL requirements on the right to life and the IHL requirements on the conduct of hostilities to their quintessential elements through a social ontological investigation. Their relative distinctions suggest that the best way to integrate them is not to simply dissolve and merge them into some new amalgam that short-changes either the IHRL requirements on structural conditions or the IHL requirements on agentic actions or both. Rather, the best way to integrate the two sets of legal requirements is to preserve their respective integrity for them to complement and complete each other in the alchemical process of the social world.

The 'demystification' of the right to life during the conduct of hostilities attempted in this article by no means denies or devalues the inherent mystery of life, which is perhaps what gives the right to life its 'supremacy' among all human rights.[215] It is in honour of this mystery that the article seeks to derive some common, or at least commonly accessible, grounds for theorizing, methodizing and practising the right to life even during the conduct of hostilities. The article has sought to derive this commonality, incidentally in the alchemical tradition, by uniting the opposites between form and substance, law and society, structure and agency. True, its social ontological characterizations of the IHRL requirements on the right to life and the IHL requirements on the conduct of hostilities relate to their intrinsic content, not to their extrinsic observance or enforcement. But going inside the fundaments of matters, just like the alchemists did in deriving the alchemical table that would later evolve into the periodic table in modern chemistry, is also the only way towards their intelligent use from the outside.

[215] *Ibid.*, para. 2.