THE RIGHT TO LIFE IN ARMED CONFLICT

William Schabas

Reprinted from
JAPANESE YEARBOOK OF INTERNATIONAL LAW
Vol. 66 (2023)

THE INTERNATIONAL LAW ASSOCIATION OF JAPAN

THE RIGHT TO LIFE IN ARMED CONFLICT

William Schabas*

Introduction

The sanctity of human life is affirmed in the laws of all countries. Criminal law treats deliberate killing as one of the most heinous offences. The taking of human life is subject only to very narrow justifications such as self-defence. In the constantly shrinking number of States where capital punishment is still permitted, it is reserved for the gravest of crimes. Most criminal justice systems leave simply unmentioned one of the direst threats to human life, killing in armed conflict. Citing Euripides ("The laws permit harming a foe, wherever he is taken"), Grotius declared that enemies "may be killed with impunity on our own soil, on enemy's soil, on no man's soil, or on the sea".[1] The law of nations "permits the killing of enemies indiscriminately", he said.[2] In more recent times, at the dawn of codification of the law of armed conflict, Francis Lieber wrote: "Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war".[3] The taking of human life, to the extent that it respects the "lawful acts of war", to borrow the formula in Article 15(2) of the European Convention of Human Rights, is not only immune from punishment, it is often glorified as noble and patriotic. This is the "combatant's privilege", "transform[ing], almost magically, what would otherwise be

* Professor of International Law, Middlesex University London, the United Kingdom; Emeritus Professor of International Criminal Law and Human Rights, Leiden University, the Netherlands; Emeritus Professor of Human Rights Law, University of Galway, Ireland.

1 Hugo Grotius, *The Law of War and Peace* (translation by Louise Ropes Loomis, 1949; originally published in Latin, in 1625), p. 297.

2 *Ibid*., p. 413.

3 *Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863*, in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts* (1988), pp. 3–23, Art. 15 (hereinafter "Lieber Code").

an unlawful act of murder into a lawful killing consistent with *jus in bello*".[4]

Within the system of international human rights law, the right to life is understood as "the supreme right",[5] one that is "basic to all rights",[6] invariably listed among the very first of fundamental rights in the applicable declarations[7] and treaties.[8] The right to life has been recognised as part of customary international law.[9] Moreover, it has also been described as a peremptory norm, one of *jus cogens*.[10] On the other hand, the system of international humanitarian law, although often conceived of as being complementary to that of human rights law in terms of its principles and objectives, tolerates the taking of human life during armed conflict. Since the beginning of the twentieth century, tens of millions of human beings

---

[4] Jens David Ohlin, "When Does the Combatant's Privilege Apply?", *Opinio Juris*, *available at* < http://opiniojuris.org/2014/08/01/combatants-privilege-apply/ > (posted on 1 August 2014; last visited on 12 September 2023).

[5] *General Comment No. 36, Article 6: Right to Life*, U.N. Doc. CCPR/C/GC/36 (2018), para. 2. Also *General Comment No. 6*, U.N. Doc. CCPR/C/2l/Add.1 (1982), para. 1.

[6] *General Comment No. 14*, U.N. Doc. CCPR/C/21/Add.4 (1984), para. 1.

[7] *American Declaration on the Rights and Duties of Man, Final Act of the Ninth International Conference of American States*, Res. XXX, Art. I; *Universal Declaration of Human Rights*, U.N. Doc. A/RES/217 A (III) (1948), Art. 3.

[8] International Covenant on Civil and Political Rights, *United Nations Treaty Series*, Vol. 999, p. 171 (No. 14668), Art. 6; Convention for the Protection of Human Rights and Fundamental Freedoms, *United Nations Treaty Series*, Vol. 213, p. 221 (No. 2889), Art. 2; American Convention on Human Rights, *United Nations Treaty Series*, Vol. 1144, p. 123 (No. 17955), Art. 4; African Charter on Human and Peoples' Rights, *United Nations Treaty Series*, Vol. 1520, p. 271 (No. 26363), Art. 4; Arab Charter on Human Rights, Art. 5; International Convention on the Suppression and Punishment of the Crime of Apartheid, *United Nations Treaty Series*, Vol. 1015, p. 243 (No. 14861), Art. II(a); Convention on the Rights of Persons with Disabilities, *United Nations Treaty Series*, Vol. 2515, p. 3 (No. 44910), Art. 10; International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, *United Nations Treaty Series*, Vol. 2220, p. 3 (No. 39481), Art. 9; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Para), *OAS Treaty Series*, No. 61, Art. 4(a).

[9] *Prosecutor v, Blaškić* (IT-94/14-A), Judgment, 29 July 2004, para. 143; *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-A), Judgment, 17 December 2004, para. 106.

[10] *General Comment No. 29, Article 4: Derogations during a State of Emergency*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 11; *Mario Alfredo Lares-Reyes et al. v. United States*, Case 12.379, Report No. 19/02, 27 February 2002, para. 46, fn. 23; *Victims of the Tugboat "13 de Marzo" v. Cuba*, Case 11.436, Report 47/96, 16 October 1996, para. 79; *Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v. Zimbabwe*, No. 295/04, 12 October 2013, para. 137. See also Pierre d'Argent, "Conclusions générales: « Le droit à la vie en tant que *jus cogens* donnant naissance à des obligations *erga omnes* »", in Christian Tomuschat, Evelyne Lagrange and Stefan Oeter eds., *The Right to Life* (2011), pp. 405–414.

have lost their lives in a manner that is entirely consistent with international humanitarian law. The issue this article addresses is whether the taking of human life in armed conflict that may be permissible under international humanitarian law is also a violation of international human rights law.

The article begins by criticising the *lex specialis/lex generalis* approach adopted by the International Court of Justice in the 1996 Advisory Opinion on *Nuclear Weapons* case and repeated, with some nuances, in subsequent judgments. According to the Court, apparent conflicts or inconsistencies between human rights law and the law of armed conflict are to be resolved by viewing the two legal regimes as part of a coherent system with distinct fields of application. The article then examines, in Part III, the right to life as such and its codification in international legal instruments. Particular attention is devoted to the provision in the European Convention on Human Rights that explicitly contemplates the suspension of the right to life with respect to "lawful acts of war". Part IV discusses the protection of the right to life of the combatant, examining its limited recognition under the law of armed conflict and arguing that international human rights law provides additional protection. The law of armed conflict dealing with prohibitions on certain weapons raises particular issues under international human rights law, an issue considered in Part V. The topic of prohibited weapons is of particular relevance because it is directly addressed by both bodies of law. Indeed, the initial debate about the relationship between the two bodies of law took place within the International Court of Justice within the context of nuclear weapons. Finally, in Part VI the place of the human right to life in the context of violations of the prohibition on the use of force is considered. The article develops the thesis that killing in the context of an aggressive war is *ipso facto* a violation of the right to life, an idea advanced in 2018 by the Human Rights Committee in the final paragraph of General Comment No. 36.

I. *Lex Specialis, Lex Generalis*

The protection by human rights treaties of the right to life is not absolute. Article 6(1) of the International Covenant on Civil and Political Rights affirms that "[n]o one shall be *arbitrarily* deprived of his life" (emphasis added). In the 1996 advisory opinion on *Nuclear Weapons* case, the International Court of Justice addressed the application of this text during armed conflict. "In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities", the Court acknowledged. "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". According to the Court, "whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6

of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself".[11] Subsequently, the Court may have tried to formulate this in a somewhat more nuanced fashion.[12] Nevertheless, as Françoise Hampson has pointed out, "[i]t appears to have meant, first, that where both [international humanitarian law] and human rights law are applicable, priority should be given to [international humanitarian law]".[13]

The Human Rights Committee has addressed this issue somewhat differently. "While rules of international humanitarian law may be relevant for the interpretation and application of article 6 when the situation calls for their application, both spheres of law are complementary, not mutually exclusive",[14] it said in General Comment No. 36, issued on 30 October 2018. According to the General Comment, "article 6 continues to apply also in situations of armed conflict to which the rules of international humanitarian law are applicable, including to the conduct of hostilities". The Committee implicitly rejects the *lex specialis/lex generalis* formula set out by the International Court of Justice in the *Nuclear Weapons* advisory opinion.[15]

The European Court of Human Rights has also had occasion to address the relationship between international humanitarian law and international human rights law. As a general proposition, the Court considers that the European Convention on Human Rights "cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part".[16] These include "the rules of international humanitarian law which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict".[17] In using the phrase "so far as possible"

---

[11] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, para. 25.

[12] *Legal Consequences of the Construction of a Wall the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, para. 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 168, para. 216.

[13] Françoise J. Hampson, "The Relationship Between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body", *International Review of the Red Cross*, Vol. 90/No. 871 (2008), p. 559.

[14] The view that the two bodies of law are not "mutually exclusive" also appears in an earlier general comment: *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (2004), para. 11. See also *General Comment No. 29*, *supra* note 10, para. 16.

[15] *General Comment No. 36, supra* note 5, para. 65.

[16] *Milanković v. Croatia*, no. 33351/20, para. 55, 20 January 2022; *Hassan v. the United Kingdom* [GC], No. 29750/09, para. 77, ECHR 2014-VI.

[17] *Varnava and Others v. Turkey* [GC], Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, para. 185, ECHR 2009.

the Court appears to acknowledge that the two bodies of law may not always be in perfect harmony. In its January 2023 admissibility decision in the case of *Ukraine and the Netherlands v. Russia*, the Grand Chamber of the Court observed that "[i]n so far as the incidental killing of civilians may not be incompatible with international humanitarian law subject to the principle of proportionality, this may not be entirely consistent with the guarantees afforded by Article 2 of the Convention".[18]

There is certainly a close relationship between international humanitarian law and international human rights law. Over the decades, human rights law has softened some of the harshness of the laws and customs of war. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia pointed to "the more recent and comprehensive notion of 'international humanitarian law', which has emerged as a result of the influence of human rights doctrines on the law of armed conflict".[19] In the words of Vera Gowland-Debbas, "the penetration of human rights law into IHL has led to its normative transformation: the humanitarian character of both the Geneva Conventions of 1949 and the Additional Protocols of 1977 has been largely the result of influence from human rights instruments, beginning with the Universal Declaration of Human Rights".[20] Somewhat cynically, G.I.A.D. Draper described the *raison d'être* of humanitarian law as "how to kill your fellow human being in a nice way".[21]

Very early evidence of synergies between the two bodies of law has been provided in an article by Katherine Fortin.[22] There is an example of the influence of the law of armed conflict on human rights law in the prohibition of execution of juvenile offenders set out in Article 6(5) of the International Covenant on Civil and Political Rights, a principle derived from the fourth Geneva Convention.[23] The European Court of Human Rights applied the third Geneva Convention in holding that detention of prisoners of war was not arbitrary and therefore consistent with Article 5 of the European Convention on Human Rights, despite silence on the

---

[18] *Ukraine and the Netherlands v. Russia* [GC] (dec.), Nos. 8019/16, 43800/14 and 28525/20, para. 720, 30 November 2022.

[19] *Prosecutor v. Tadić* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 87.

[20] Vera Gowland-Debbas, "The Right to Life and the Relationship between Human Rights and Humanitarian Law", in Christian Tomuschat, Evelyne Lagrange and Stefan Oeter eds., *The Right to Life* (2011), p. 126.

[21] Colonel G.I.A.D. Draper, "The Relationship Between the Human Rights Regime and the Law of Armed Conflict", *Israel Yearbook on Human Rights*, Vol. 1 (1971), p. 191.

[22] Katharine Fortin, "Complementarity Between the ICRC and the United Nations and International Humanitarian Law and International Human Rights Law, 1948–1968", *International Review of the Red Cross*, Vol. 94/No. 888 (2012), p. 1433.

[23] Geneva Convention relative to the Protection of Civilian Persons in Time of War, *United Nations Treaty Series*, Vol. 75, p. 287 (No. 973), Art. 68.

subject in its enumeration of exceptions to the protection against arbitrary detention. It said the Convention should be interpreted "against the background of the provisions of international humanitarian law", adding that this was consistent with the case law of the International Court of Justice.[24] The March 2023 report of the Independent International Commission of Inquiry on Ukraine has described wilful killings of civilians or persons *hors de combat* as both "war crimes and violations of the right to life".[25]

The *lex specialis/lex generalis* formulation appears to have been cut from whole cloth by the International Court of Justice, as Marko Milanovic has demonstrated.[26] The Court seems to have adopted the idea from written pleadings of the United Kingdom in the *Nuclear Weapons* case. It is a rule of interpretation used in legal reasoning that is based upon common sense when rules that are apparently contradictory are found within the same legal instrument. The drafters are assumed to have intended that a special rule take precedence over a general rule even if this is not stated explicitly. The presumption of precedence for the special rule is also quite logical when legislation on a particular subject is adopted by the same legislative body but at different times. It is presumed that the intent was to create a seamless, harmonised legal framework. But when the legislation has different sources, the *lex specialis/lex generalis* principle of interpretation loses its salience. This is true even within a branch of international law such as human rights law. For example, is it reasonable to think the drafters of the International Covenant on Civil and Political Rights intended that the text they were negotiating was to be entirely consistent and compatible with an existing treaty such as the European Convention on Human Rights? There is certainly no evidence to support such a thesis.

It seems that as a general rule, human rights law will always provide protection that is superior to that of international humanitarian law. This is because human rights law not only absorbs the protections of the right to life contained within the law of armed conflict but it adds additional layers to such protection. Furthermore, international human rights law offers a range of mechanisms for implementation that are largely absent from international humanitarian law. Geneva law recognises the need to apply humanitarian principles to "protected persons" but contributes little or nothing to those who lack this status. Similarly, Hague law provides a range of protections to lawful combatants while leaving those who do

---

[24] *Hassan v. the United Kingdom* [GC], No. 29750/09, para. 104, ECHR 2014-VI.

[25] *Report of the Independent International Commission of Inquiry on Ukraine*, U.N. Doc. A/HRC/52/62 (2023), paras. 56, 59.

[26] Marko Milanović, "The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law", in Jens David Ohlin ed., *Theoretical Boundaries of Armed Conflict and Human Rights* (2016), pp. 78–117.

not fit this description with modest comfort other than the general words of the Martens clause. Human rights law, on the other hand, is universal in scope. It applies to everyone, regardless of borders and nationality, in peacetime and in war.

Of course, international human rights law is subject to limitations and restrictions but these are invariably qualified by principles of proportionality, reasonableness and necessity. Derogation may be permitted by the human rights treaties but its scope is tightly controlled. Moreover, derogation may reduce a State's obligations under the relevant treaty but it can in no way diminish the reach of customary law. The same is true for the jurisdictional rules that may limit a State's liability, notably when its armed forces are active outside the national territory.[27] There is sometimes a tendency to confuse the territorial application of treaty law with the general scope of human rights norms. When the European Court of Human Rights rules that the Convention is inapplicable during active combat, it is interpreting the text of the Convention and not trying to set out any general principle of human rights law. The norms of customary international law, including the right to life, remain applicable with respect to the conduct of a State even if the treaty provisions are held to be inert in certain circumstances.

Where Geneva law applies, some of the detailed norms of international humanitarian law may contribute to the elaboration of human rights law. They can fill gaps where these appear to exist, as was the case in the *Hassan* case at the European Court of Human Rights.[28] The Geneva Conventions apply to persons under the control of a party to the conflict, notably to civilians and prisoners of war, and to that extent the circumstances of their application closely resemble the context of human rights law in peacetime. However, in the conduct of hostilities, where the right to life is concerned, there appears to be little potential for added value from international humanitarian law. It does nothing but provide exceptions, loopholes and justifications for the deprivation of human life that have the practical consequence of narrowing the protections provided by international human rights law.

II. Codification of the Right to Life

An examination of the history of codification of the right to life sheds some light on its application to armed conflict. Probably the earliest, and most familiar,

---

[27] *Georgia v. Russia (II)* [GC], No. 38263/08, para. 144, 21 January 2021; *Ukraine and the Netherlands v. Russia* [GC] (dec.), No. 8019/16, 43800/14 and 28525/20, paras. 557–558, 30 November 2022.

[28] Cedric De Koker, "Hassan v United Kingdom: The Interaction of Human Rights Law and International Humanitarian Law with Regard to the Deprivation of Liberty in Armed Conflicts", *Utrecht Journal of International and European Law*, Vol. 31 (2015), p. 90.

recognition of a right to life in positive law is attributable to Thomas Jefferson's phrase, in the Declaration of Independence of 1776: "We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness". Actually, even before the American revolution declarations of the right to life appeared in legal texts authored by Puritans who had fled religious persecution in England. For example, the Massachusetts Body of Liberties, dated 10 December 1641, proclaims: "No mans life shall be taken away [...] unlesse it be by bertue or equitie of some expresse law of the Country warranting the same, established by a generall Cort and sufficiently published [...]".[29] The drafters of the French Declaration of the Rights of Man and Citizen did not include the right to life, an omission that one scholar has explained with the observation that it is unnecessary to state a right without which all others have no *raison d'être*.[30] The Marquis de Lafayette, who had been inspired by American models and assisted by Thomas Jefferson, included the right to life in his drafts of the Declaration, as did Marat and others.[31]

Several national constitutions of the nineteenth and early twentieth century recognized the right to life, generally associated with a phrase acknowledging the exception of capital punishment. In the course of preparing an initial draft of what was to become the Universal Declaration of Human Rights, in 1947, the Secretariat of the Commission on Human Rights compiled the fundamental rights in national legislation of United Nations Member States. "Right to life" provisions were identified in the constitutions of China, Costa Rica, Czechoslovakia, the Dominican Republic, Ecuador, Guatemala, Haiti, Iran, Nicaragua, Poland, Sweden, Turkey and the United States.[32] The text proposed by the Secretariat read: "Everyone has the right to life. This right can be denied only to persons who have been convicted under general law of some crime against society to which the death penalty is attached".[33] Eventually, the reference to capital punishment was removed so that the Declaration could not be invoked to impede its abolition.

The right to life provisions in the principal human rights treaties do not refer expressly to armed conflict. The first to be adopted, the European Convention on

---

[29] William H. Whitmore, *A Bibliographical Sketch of the Laws of the Massachusetts Colony, from 1630 to 1686* (1890), p. 33.

[30] René Brunet, *La garantie internationale des droits de l'homme d'après la Charte de San Francisco* (1947), p. 211.

[31] Stéphane Rials, *La Déclaration des droits de l'Homme et du citoyen* (1988), p. 736.

[32] *Documented Outline, Part I — Texts*, U.N. Doc. E/CN.4/AC.1/3/Add.1 (1947), pp. 15–18.

[33] *Draft Outline of International Bill of Rights (prepared by the Division of Human Rights)*, U.N. Doc. E/CN.4/AC.1/3 (1947), p. 2.

Human Rights, enumerates cases in which deprivation of life is not to be regarded as inflicted in contravention of the right to life. None of these categories relates to armed conflict.[34] The International Covenant on Civil and Political Rights takes a different approach, stating that no one shall be deprived of the right to life *arbitrarily*.[35] The right to life texts in the American Convention on Human Rights,[36] the African Charter on Human and Peoples' Rights,[37] and the Arab Charter of Human Rights[38] are comparable to that of the Covenant. The *travaux préparatoires* of Article 6 of the Covenant do not provide any useful insight with respect to the application of the right to life during armed conflict.[39]

The major human rights conventions provide for derogation under certain circumstances. The International Covenant on Civil and Political Rights, the American Convention on Human Rights and the Arab Charter of Human Rights explicitly prohibit derogation with respect to the right to life.[40] Early in the drafting of the Covenant by the Commission on Human Rights, the United Kingdom proposed adding the words "except in respect of deaths resulting from lawful acts of war" to the derogation clause.[41] The British representative said that "[w]hile reference to war might seem inappropriate in a document dealing with human rights, the facts must be faced, and her delegation wished to incorporate that phrase, which had been used in the Hague Convention, in its proposal". In fact, the phrase "lawful acts of war" does not appear in the 1907 Hague Convention on the laws and customs of war. The Soviet delegate reacted saying such an exception "would seem sheer mockery to the peoples of the world".[42] The British never formulated their proposal in a written amendment.

The European Convention on Human Rights authorises derogation from the

---

[34] Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 2.

[35] International Covenant on Civil and Political Rights, Art. 6(1).

[36] American Convention on Human Rights, Art. 4.

[37] African Charter on Human and Peoples' Rights, Art. 4.

[38] Arab Charter on Human Rights, Art. 5.

[39] *General Norms Concerning Respect for Human Rights in Their Applicability to Armed Conflicts*, U.N. Doc. A/8052 (1971), Annex I, paras. 26–31.

[40] International Covenant on Civil and Political Rights, Art. 4(2); American Convention on Human Rights, Art. 27(2); Arab Charter on Human Rights, Art. 4(b).

[41] *Summary Record of the 126th Meeting of the Commission on Human Rights*, U.N. Doc. E/CN.4/SR.126 (1949), p. 5. See the reference to these remarks by Judge Keller: *Georgia v. Russia (II)* [GC], No. 38263/08, 21 January 2021, Concurring opinion of Judge Keller, para. 24.

[42] *Summary Record of the 126th Meeting of the Commission on Human Rights*, *supra* note 41, p. 6.

right to life "in respect of deaths resulting from lawful acts of war".[43] This provision has never been invoked by a State Party to the Convention and it seems to have been discussed in only a few individual opinions.[44] The term "acts of war" does not appear in any of the relevant treaties, whether they date from before or after the adoption of the European Convention on Human Rights. It was used very occasionally during the negotiations of the Geneva Conventions in August 1949.[45] The term is also found, but rarely, in national military manuals.[46] Historically, the term "act of war" had significance in the context of the *jus ad bellum*. It described conduct such as an armed attack that would initiate a state of war even in the absence of a declaration of war. Even prior to adoption of the European Convention, the legality of the use of force by one State against another was confined to the exceptional circumstances laid out in the Charter of the United Nations, namely measures authorised by the Security Council in the interests of international peace and security and those taken in exercise of the inherent right of self-defence. Consequently, to avail of the "lawful acts of war" exception to killing in the course of armed conflict, the use of force itself must be consistent with international law. In other words, a declaration of derogation with respect to the right to life by a State with respect to the use of force against another State that is not in the exercise of the inherent right of self-defence or authorised by the Security Council would be ineffective. The lawfulness of the use of force would be assessed in light of international case law, notably the judgment of the International Military Tribunal,[47] the General Assembly resolution on aggression,[48] and the definition of aggression in the Rome Statute of the International Criminal Court.[49]

It is also possible to consider the term "lawful acts of war" from the standpoint of the *jus in bello*. In this context, it refers essentially to means and methods of warfare. There is a *jus in bello* reference to the term "lawful acts of war" in the

---

[43] Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 15(2).

[44] *Georgia v. Russia (II)*, *supra* note 41, Concurring opinion of Judge Keller, paras. 24–25; *Şandru and Others v. Romania,* No. 22465/03, 8 December 2009, Separate opinion of Judge Popescu.

[45] *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II, Section A, pp. 56, 57, 492.

[46] Jean-Marie Henckaerts and Louise Doswald-Beck eds., *Customary International Humanitarian Law*, Vol. II: Practice, Part I (2005), pp. 117, 676, 677, 858, 1014, 1382; Jean-Marie Henckaerts and Louise Doswald-Beck eds., *Customary International Humanitarian Law*, Vol. III: Practice, Part II (2005), pp. 2548, 3103, 3622.

[47] *France et al. v. Goering et al.*, in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946,* Vol. 22 (1947), p. 411.

[48] *Definition of Aggression*, U.N. Doc. A/RES/3314 (XXIX) (1974), annex.

[49] *The Crime of Aggression*, RC/Res.6 (2010), Annex I.

British Military Manual of 1958 that may well have been inspired by Article 15 of the Convention: "Assassination, the killing or wounding of a selected individual behind the line of battle by enemy agents or partisans, and the killing or wounding by treachery of individuals belonging to the opposing nation or army, are not lawful acts of war".[50]

III. The Right to Life of the Combatant

Does a combatant engaged in an armed conflict enjoy the protection of the right to life? Lawful combatants benefit from the "privilege" accorded to them by which they are entitled to deprive others of their lives without incurring criminal liability or punishment. Their victims may include non-combatants who pose no threat to them, and who themselves have no corresponding immunity to criminal responsibility, providing that such killings constitute "collateral damage". To some, the suggestion that the combatant is also entitled to protection of his or her right to life may seem absurd.

Yet specific norms of the law of armed conflict provide such recognition by prohibiting the killing of combatants who have ceased to participate actively in hostilities because of serious injury or because they have offered to surrender. The Hague Convention asserts that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited".[51] Killing an adversary is forbidden if the victim, "having laid down his arms, or having no longer means of defence, has surrendered at discretion".[52] Even before its codification by treaty, the rule was recognised in such authoritative instruments as the Lieber Code,[53] the Brussels Declaration[54] and the Oxford Manual.[55] Additional Protocol I forbids such attacks, labelling them

---

[50] *United Kingdom Military Manual*, 1958, para. 115, cited in: Henckaerts and Doswald-Beck eds., *supra* note 46 (Vol. II), p. 1382. For other references to "acts of war", see *ibid.*, pp. 117, 676, 677, 858, 1014; Henckaerts and Doswald-Beck eds., *supra* note 46 (Vol. III), pp. 2548, 3103, 3622.

[51] Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, *United Kingdom Treaty Series*, No. 9 (1910), Art. 22.

[52] *Ibid.*, Art. 23(c).

[53] Lieber Code, *supra* note 3, pp. 3–23, Art. 75.

[54] *Project of An International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874*, in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts* (1988), pp. 22–34, Art. 13(c) (hereinafter "Project of An International Declaration").

[55] The *Laws of War on Land, Oxford, 9 September 1880*, in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts* (1988), pp. 36–48, Art. 9(b) (hereinafter "Laws of War on Land, Oxford").

grave breaches.[56] They are listed in Article 8 of the Rome Statute as a war crime: "killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion".[57] In practice, the surrender of combatants may be one of the most dangerous moments in warfare. The soldier who offers surrender is fearful that this will be disregarded; now defenceless after having laid down arms, he or she is at the mercy of the enemy. But the adversary may be equally terrified that the offer of surrender is not genuine, that it is merely a ploy to facilitate an attack. In *Korbely v. Hungary*, the Grand Chamber of the European Court of Human Rights considered that a surrender had not been clear and unequivocal when an irregular combatant "embarked on an animated quarrel with the applicant, at the end of which he drew his gun with unknown intentions".[58]

The duty to accept surrender is further underscored by the prohibition on "denial of quarter", that is, a refusal to accept an adversary's offer or attempt at surrender. According to the customary law study of the International Committee of the Red Cross, "[o]rdering that no quarter will be given, threatening an adversary therewith or conducting hostilities on this basis is prohibited".[59] The norm has roots in the Lieber Code,[60] the Brussels Declaration,[61] the Oxford Manual,[62] the Hague Convention,[63] and Additional Protocol I.[64] The prohibition was first recognised as a war crime in the 1919 report of the Commission on Responsibilities.[65] It is punishable by the International Criminal Court under the Rome Statute.[66] Although the

---

[56] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *United Nations Treaty Series*, Vol. 1125, p. 3 (No. 17512), Art. 85(3)(e).

[57] Rome Statute of the International Criminal Court, *United Nations Treaty Series*, Vol. 2187, p. 689 (No. 38544), Art. 8(2)(b)(iv).

[58] *Korbely v. Hungary* [GC], no. 9174/02, para. 91, ECHR 2008-IV.

[59] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Law*, Vol. I: Rules (2005), p. 161.

[60] Lieber Code, *supra* note 3, pp. 3–23, Art. 60.

[61] Project of an International Declaration, *supra* note 54, pp. 22–34, Art. 13(d).

[62] Laws of War on Land, Oxford, *supra* note 55, pp. 36–48, Art. 9(b).

[63] Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, Art. 23(d).

[64] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 40.

[65] *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report to Presented to the Preliminary Peace Conference, 29 March 1919*, reprinted in *American Journal of International Law*, Vol. 14 (1920), pp. 114–115.

[66] Rome Statute of the International Criminal Court, Art. 8(2)(b)(xii).

texts focus on the order, and are therefore directed at those in command, the International Committee observes that "if it is prohibited to order or threaten that no quarter shall be given then, a fortiori, it is prohibited to carry out such an order or threats and to conduct military operations on that basis".[67]

The prohibition of killing combatants who are wounded or who have offered to surrender is complemented and indeed enhanced by the prohibition of killing as a result of perfidious conduct. The Brussels Declaration prohibits "murder by treachery of individuals belonging to the hostile nation or army".[68] The Oxford Manual prohibits the making of "treacherous attempts upon the life of an enemy".[69] The prohibition of treacherous killing was codified in the Hague Conventions and, subsequently, in Additional Protocol I, where the word "perfidy" is employed. It constitutes a war crime listed in Article 8 of the Rome Statute of the International Criminal Court. Additional Protocol I defines perfidy as "acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence".[70] This definition is restated in the Elements of Crimes for the International Criminal Court.[71] Examples of perfidious conduct include simulating surrender by advancing under a flag of truce or white flag, use of red cross emblems in order to feign protected status, and faking disability or illness in order to appear to be *hors de combat*.[72]

The protection is rather limited and the line between unlawful perfidy and lawful ruses of war is not necessarily easy to draw. Article 37(2) of Additional Protocol I confirms the legality of "ruses of war" and offers a definition that explicitly distinguishes them from perfidy: "[R]uses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law". Additional Protocol I adds as examples of ruses the use of camouflage, decoys, mock operations and misinformation.

These limitations that protect the right to life of the combatant are premised on the notion that a soldier who has ceased to participate actively in hostilities because of injury or as a consequence of a genuine and unequivocal offer to

---

67 Henckaerts and Doswald-Beck, *supra* note 59, p. 172.

68 Project of an International Declaration, *supra* note 54, pp. 22–34, Art. 13(b).

69 Laws of War on Land, Oxford, *supra* note 55, pp. 36–48, Art. 8.

70 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 37.

71 *Elements of Crimes*, ICC-ASP/1/3, p. 137.

72 Henckaerts and Doswald-Beck, *supra* note 59, p. 224.

surrender cannot be attacked. But what of the soldier who is healthy and who has no intention to surrender, yet who is in a vulnerable situation that poses no threat to the adversary? The International Committee of the Red Cross addressed this issue in 2008, in its controversial Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law: "In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances".[73]

According to the commentary on this paragraph, "the fact that a particular category of persons is not protected against offensive or defensive acts of violence is not equivalent to a legal entitlement to kill such persons without further considerations. At the same time, the absence of an unfettered 'right' to kill does not necessarily imply a legal obligation to capture rather than kill regardless of the circumstances".[74] The commentary recognises that "[w]hile it is impossible to determine, *ex ante*, the precise amount of force to be used in each situation, considerations of humanity require that, within the parameters set by the specific provisions of IHL, no more death, injury, or destruction be caused than is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances".[75] The text concludes: "This observation does not exclude the continued applicability during the conduct of hostilities of normative frameworks other than IHL, such as human rights law, which depends on circumstances that cannot be discussed within the scope of this Interpretative Guidance". According to one critic, the reference to human rights law "was quickly recognized by participating experts as an ICRC challenge to the *lex specialis* stature of the law of war through insertion of human rights law across the conflict spectrum, not only with respect to protection of civilians taking a direct part in hostilities but also in applying combat power against uniformed (regular) enemy forces".[76]

---

[73] "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009", *International Review of the Red Cross*, Vol. 90/No. 872 (2008), p. 996.

[74] *Ibid*., p. 1041.

[75] *Ibid*., p. 1042.

[76] W. Hays Parks, "Part IX of the ICRC Direct Participation in Hostilities Study: No Mandate, No Expertise, and Legally Incorrect", *New York University Journal of Law and Policy,* Vol. 42 (2009), p. 800. Parks describes the reference as being in a footnote, but he is referring to an unpublished revised draft of the Guidance. In the version published in the *International Review* that statement is in the main text of the commentary.

This is sometimes referred to as the "kill or capture" conundrum. Is the killing of a combatant who is not *hors de combat* lawful under the law of armed conflict, even if he or she can be captured without significant risk to the adversary? The issue was addressed as early as the 1868 St Petersburg Declaration: "That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy. That for this purpose it is sufficient to disable the greatest possible number of men. That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable".[77] More recently, Jean Pictet wrote that "[i]f we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil".[78] Pictet observed that the human forces of a party to a conflict could be reduced in three ways: death, wound or capture. He described each of the three as "equivalent as regards military results" because they were equally capable of eliminating the enemy's strength. But, said Pictet, "[h]umanitarian reasoning is different. Humanity demands capture rather than wounds, and wounds rather than death".[79] Ryan Goodman has provided a compelling defence of the position taken in the Interpretive Guidance from the standpoint of international humanitarian law.[80]

Critics of the statement in the Interpretive Guidance understood that it was underpinned by recognition of the combatant's right to life. One of the most vociferous, American military lawyer Hays Parks, attacked the "law enforcement paradigm" that was directed at applying "a human rights 'right to life' standard", adding that "it disregards the substantial body of case law that recognizes that the law of war is *lex specialis* in armed conflict".[81] Indeed, the relevance of the "right to life" was an issue during the various consultations that led to the issuance of the Interpretive Guidance. According to the commentary, during expert meetings "some experts suggested that the arguments made in Section IX should be based on the human right to life. The prevailing view was, however, that the Interpretive Guidance should not examine the impact of human rights law on the kind and

---

[77] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, 29 November / 11 December 1868, in Schindler and Toman, *supra* note 3, p. 102.

[78] Jean Pictet, *Development and Principles of International Humanitarian Law* (1985), p. 75.

[79] Jean Pictet, *Humanitarian Law and the Protection of War Victims* (1975), p. 32.

[80] Ryan Goodman, "The Power to Kill or Capture Enemy Combatants", *European Journal of International Law*, Vol. 24 (2013), p. 819.

[81] Parks, *supra* note 76, p. 797.

degree of force permissible under IHL".[82]

Discussion of the "kill or capture" issue in the context of armed conflict is generally concerned with international armed conflict. A significant body of literature on the subject is also addressed to targeted assassination, which often takes place in the absence of armed conflict altogether. With respect to non-international armed conflict, a useful distinction may be made between the law applicable on the battlefield and the use of lethal force by State authorities against insurgents outside the context of hostilities.[83] Generally, however, the academic debate has considered the "kill or capture" issue exclusively from the standpoint of the law of armed conflict, assuming, perhaps only implicitly, the validity of the *lex specialis* doctrine.

However, if the parallel application of international human rights law is recognised, the role of the right to life in "kill or capture" dilemmas remains to be examined. There does not appear to be anything directly relevant to armed conflict in the case law of international human rights organs. Practical reasons may explain this given a reluctance to extend the jurisdiction of human rights treaties to the battlefield. For example, the European Court of Human Rights has taken the view that the European Convention applies to an armed conflict but only with respect to territory under the control of one of the parties to the conflict, and not on the battlefield as such.[84] In General Comment No. 36, the Human Rights Committee addressed issues concerning prohibited weapons but it did not speak to the protection of the right to life on the battlefield.

For this reason, it is necessary to reason by analogy with the law enforcement context. One of the leading cases on these issues is *McCann et al. v. United Kingdom*, an application to the European Commission of Human Rights by relatives of three persons suspected of travelling to Gibraltar for terrorist activities. All three were killed by British soldiers who feared they might detonate a bomb although they were in fact unarmed at the time and had no explosives in their possession. The European Commission of Human Rights noted that "a policy of shooting to kill terrorist suspects in preference to the inconvenience of resorting to the procedures of criminal justice would be in flagrant violation of the rights guaranteed under the Convention". Even a terrorist suspected of having committed or of intending to commit an act of violence "continues to enjoy the protection of the

---

[82] "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009", *supra* note 73, p. 1044, footnote 222.

[83] David Kretzmer, Aviad Ben-Yehuda and Meirav Furth, "'Thou Shall Not Kill': The Use of Lethal Force in Non-International Armed Conflicts", *Israel Law Review*, Vol. 47 (2014). p. 191.

[84] *Georgia v. Russia (II)*, *supra* note 41, para. 144.

right to life guaranteed by Article 2" of the Convention as well as the right to a fair trial.[85] However, a majority of the Commission concluded that given the soldiers' perception of the risk to the lives of the people of Gibraltar, the shooting of the three suspects could be regarded as absolutely necessary for the legitimate aim of the defence of others from unlawful violence.[86] There were several dissenting members.[87]

The Commission referred the case to the European Court of Human Rights. The Court agreed "that the soldiers honestly believed, in the light of the information that they had been given, as set out above, that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life".[88] Nevertheless, the Court held that there was a violation of the right to life because it had not been established that the soldiers "had been trained or instructed to assess whether the use of firearms to wound their targets may have been warranted by the specific circumstances that confronted them at the moment of arrest".[89] It said that "[t]heir reflex action in this vital respect lacks the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects, and stands in marked contrast to the standard of care reflected in the instructions in the use of firearms by the police which had been drawn to their attention and which emphasised the legal responsibilities of the individual officer in the light of conditions prevailing at the moment of engagement".[90]

An early decision by the United Nations Human Rights Committee is also of some relevance. Colombian police raided a house where they suspected that a diplomat was being held hostage by a guerrilla organisation. Although they did not find the diplomat in the building, they remained there, hidden, awaiting the "suspected kidnappers", who were then killed as they arrived. The Committee concluded that this was a violation of the right to life, and that "the police action was apparently taken without warning to the victims and without giving them any opportunity to surrender to the police patrol or to offer any explanation of their presence or intentions".[91]

---

[85] *McCann, Farrell and Savage v. United Kingdom*, No. 18984/91, Commission report of 4 March 1994, para. 206.

[86] *Ibid*., para. 250.

[87] *Ibid*., Dissenting Opinion of Mr. S. Trechsel, joined by Mr. F. Ermacora; Dissenting Opinion of Mrs. J. Liddy, joined by Mr. Reffi and Nowicki.

[88] *McCann and Others* v. *the United Kingdom*, 27 September 1995, para. 200, Series A, No. 324.

[89] *Ibid*, para. 212.

[90] *Ibid.*

[91] *Suárez de Guerrero v. Colombia,* No. 45/1979, U.N. Doc. CCPR/C/OP/1 (1982), p. 112,

These are of course "law enforcement" cases and they do not concern armed conflict as such. The incidents involved persons who were almost certainly involved in violent terrorist activities directed at the State. The victims were unarmed at the time although this could not have been known to those who killed them. Although there are differences in context, these decisions provide useful guidance to the application of the right to life to the conduct of hostilities. They are fully aligned with the vision of the International Committee of the Red Cross in the Interpretive Guidance in terms of authorising lethal force only when it is truly necessary.

In General Comment No. 36, the Human Rights Committee provided some indications of the right to life issues that arise in armed conflict. It showed a considerable degree of deference to international humanitarian law norms, saying they were, "in general, not arbitrary".[92] There may be killings that are consistent with international humanitarian law yet that also violate the right to life. The Committee turned to the norms of international humanitarian law applicable to civilians who do not participate directly in hostilities. It spoke of "practices inconsistent with international humanitarian law" that entail a risk to the lives of civilians and other persons protected by international humanitarian law. Several examples were provided: the targeting of civilians, civilian objects and objects indispensable to the survival of the civilian population, indiscriminate attacks, failure to apply the principles of precaution and proportionality, and the use of human shields.[93] In concluding observations, the Committee has referred to "the principles of precaution, distinction and proportionality in the context of an armed conflict".[94]

The Committee then turned to the protection of the right to life of combatants. States Parties should, "in general, disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including the legal basis for specific attacks, the process of identification of military targets and combatants or persons taking a direct part in hostilities, the circumstances in which relevant means and methods of warfare have been used, and whether less harmful alternatives were considered".[95] With the exception of the reference to the desirability of "less harmful alternatives" being taken into account, this statement is essentially procedural rather than substantive. Perhaps the Committee will find an opportunity to develop its thinking on applicable criteria.

---

para. 13.2.

[92] *General Comment No. 36, supra* note 5, para. 64.

[93] *Ibid*., para. 65.

[94] *Concluding Observations, Fourth Periodic Report, United States of America*, U.N. Doc. CCPR/C/USA/CO/4 (2014), para. 9(a).

[95] *General Comment No. 36, supra* note 5, para. 65.

The Committee also insisted upon the need to investigate alleged or suspected violations of Article 6 "in situations of armed conflict in accordance with the relevant international standards".[96] In concluding observations on Israel's third periodic report, the Committee referred to the "military offensive" in Gaza of 2008–2009, lamenting "the lack of independent and credible investigations into serious violations of international human rights law, such as the direct targeting of civilians and civilian infrastructure, such as waste water plants and sewage facilities, the use of civilians as 'human shields', refusal to evacuate the wounded, firing live bullets during demonstrations against the military operation and detention in degrading conditions".[97]

With respect to Russia's conduct in the armed conflict in Chechnya, the Committee discussed violations of "human rights" rather than breaches of "humanitarian law". The Committee "deplore[d] the excessive and disproportionate use of force by Russian forces in Chechnya indicating grave violation of human rights". It also lamented the fact that investigations of "human rights violations by Russian forces, including killing of civilians, have been so far inadequate, that civilian installations such as schools and hospitals were destroyed by Government forces, and that a large number of civilians have been killed or displaced as a consequence of the destruction of their homes".[98]

IV. Weapons of War

Grotius wrote that "if you are permitted to kill a man, it makes no difference from the standpoint of the law of nature whether you kill him with a sword or by poison". However, he explained that the law of nations, "if not of all nations, undoubtedly of the better kind – has now forbidden the killing of an enemy by poison". Grotius also condemned the poisoning of arrow points, noting that it too was contrary to the law of nations, "not of all nations but of the European peoples, and of such others as come near in culture to the higher level of Europe".[99] This Eurocentric view of the use of weapons in armed conflict persisted for several centuries. At the 1899 Hague Conference, the British opposed an absolute prohibition on hollow tipped or "dum-dum" bullets, which they said had been developed in colonial India to stop "fanatical tribesmen". Major-General Sir John Ardagh told the Conference that while in "civilized war" a soldier hit by a bullet withdraws from

---

[96] *Ibid.*

[97] *Concluding Observations, Third Periodic Report, Israel*, U.N. Doc. CCPR/C/ISR/CO/3 (2010), para. 9.

[98] *Concluding Observations, Fourth Periodic Report, Russian Federation*, U.N. Doc. CCPR/C/79/Add.54 (1995), para. 28.

[99] Grotius, *supra* note 1, p. 300.

the battlefield, "[i]t is very different with a savage" who "continues on, and before anyone has time to explain to him that he is flagrantly violating the decisions of the Hague Conference, he cuts off your head".[100]

Two broad principles of international humanitarian law govern the use of weapons. First, they must be capable of distinguishing between military objectives and civilian objects, as Andrew Clapham has explained.[101] According to the International Court of Justice, "States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets".[102] This first principle is directed to the protection of civilian non-combatants. Second, the weapons must not cause unnecessary suffering *to combatants*. Once again, as the International Court of Justice stated, "it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering".[103]

In General Comment No. 36, the Human Rights Committee declared that "States parties engaged in the deployment, use, sale or purchase of existing weapons and in the study, development, acquisition or adoption of weapons, and means or methods of warfare, must always consider their impact on the right to life".[104] In this respect, the Committee focussed on autonomous weapon systems, describing them as "lacking in human compassion and judgment". According to the Committee, this "raises difficult legal and ethical questions concerning the right to life, including questions relating to legal responsibility for their use".[105] It took the view that "such weapon systems should not be developed and put into operation, either in times of war or in times of peace, unless it has been established that their use conforms with [the right to life] and other relevant norms of international law".[106] One of the Committee members at the time General Comment No. 36 was adopted, Christof Heyns, had written at length on the subject of robotic weapons while serving as Special rapporteur on extrajudicial, summary or arbitrary executions. "[T]he introduction of such powerful yet controversial new weapons systems has the potential to pose new threats to the right to life", he wrote in his report to

---

[100] Third meeting, 31 May 1899, in James Brown Scott ed., *The Proceedings of the Hague Peace Conferences, The Conference of 1899* (1920), p. 343.

[101] Andrew Clapham, *War* (2021), p. 317.

[102] *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 11, para. 78.

[103] *Ibid.*

[104] *General Comment No. 36, supra* note 5, para. 65.

[105] *Ibid.*

[106] *Ibid.*

the Human Rights Council.[107]

The other great concern of the Human Rights Committee has been the threat to the right to life posed by nuclear weapons. This has featured in its consideration of the right to life since the early years of its activities. In its first General Comment on the right to life, adopted in 1982, the Committee stated that "[e]very effort [States Parties to the Covenant] make to avert the danger of war, especially thermo-nuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life".[108] Two years later, the Committee devoted its second General Comment on the right to life to the issue of nuclear weapons. The Committee described the "designing, testing, manufacturing, possession and deployment of nuclear weapons [to be] among the greatest threats to the right to life which confront mankind today".[109] Furthermore, the Committee said 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".[110] The Committee thus demanded that the "production, testing, possession, deployment and use of nuclear weapons ... be prohibited and recognized as crimes against humanity".[111] Moreover, it appealed to "all States, whether Parties to the Covenant or not, to take urgent steps, unilaterally and by agreement, to rid the world of this menace".[112]

Committee members Felix Ermacora and Roger Errera contended that the demand that the production and possession of nuclear weapons be recognized as crimes against humanity, as well as the appeal in paragraph 7 to all States of the world, exceeded the Committee's competence because it is not a judicial organ. They said that a distinction should have been drawn between the use and the mere possession of nuclear weapons and that reference should have been made to the exception to the prohibition of the use of force set forth in Article 51 of the

---

[107] Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/HRC/23/47 (2013), para. 30.

[108] *General Comment No. 6, supra* note 5, para. 2.

[109] *General Comment No. 14, supra* note 6, para. 4. Cited with approval: *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, Dissenting Opinion of Judge Cançado Trindade, para. 210; *Legality of the Threat or Use of Nuclear Weapons, supra* note 11, Dissenting Opinion of Judge Koroma; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, supra* note 11, Dissenting Opinion of Judge Weeramantry.

[110] *General Comment No. 14, supra* note 6, para. 5.

[111] *Ibid*., para. 6.

[112] *Ibid*., para. 7.

Charter of the United Nations.[113] On the other hand, Torkel Opsahl, Gisèle Côté-Harper, Vojin Dimitrijević and Christian Tomuschat emphasized that in applying the right to life, the Committee must not close its eyes to the immense danger threatening all of humanity by nuclear weapons. They also stated that the Committee's competence to publish a General Comment on this issue clearly derived from Articles 2(2), 6(1) and 40(4) of the Covenant.[114] Individual complaints invoking the language in General Comment No. 14 have been declared inadmissible.[115]

Returning to the subject in General Comment No. 36, adopted in 2018, the Human Rights Committee stated that the "threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale is incompatible with respect for the right to life and may amount to a crime under international law".[116] The Committee called upon States parties to take all necessary measures "to stop the proliferation of weapons of mass destruction, including measures to prevent their acquisition by non-state actors, to refrain from developing, producing, testing, acquiring, stockpiling, selling, transferring and using them, to destroy existing stockpiles, and to take adequate measures of protection against accidental use, all in accordance with their international obligations".[117] It has also recalled the existence of international obligations "to pursue in good faith negotiations in order to achieve the aim of nuclear disarmament under strict and effective

---

[113] *Summary Record, Human Rights Committee*, U.N. Doc. CCPR/C/SR.563 (1984), para. 6; *Summary Record, Human Rights Committee*, U.N. Doc. CCPR/C/SR.571 (1984), paras. 3–7.

[114] *Summary Record, Human Rights Committee*, U.N. Doc. CCPR/C/SR.563 (1984), paras. 4–23.

[115] *J.P.K. v. the Netherlands,* U.N. Doc. CCPR/C/43/D/401/1990 (1991), paras. 3.2, 6.5; *Brinkhof v. the Netherlands*, U.N. Doc. CCPR/C/48/D/402/1990 (1993), paras. 3.65, 6.4; *T.W.M.B. v. the Netherlands,* U.N. Doc. CCPR/C/43/D/403/1990 (1991), paras. 3.2, 6.5; *C.B.D. v. the Netherlands,* U.N. Doc. CCPR/C/45/D/394/1990 (1992), paras. 3.2, 6.3; *E.W. et al. v. the Netherlands*, U.N. Doc. CCPR/C/47/D/429/1990 (1993), paras. 3.23, 6.4; *A.R.U. v. the Netherlands*, U.N. Doc. CCPR/C/49/D/509/1992 (1993), paras. 3.1, 4.2; *E.C.W. v. the Netherlands*, U.N. Doc. CCPR/C/49/D/524/1992 (1993), paras. 3, 4.2; *Bordes et al. v. France*, U.N. Doc. CCPR/C/57/D/645/1995 (1996), paras. 2.2, 5.7.

[116] *General Comment No. 36, supra* note 5, para. 66.

[117] *Ibid*., citing Treaty on the Non-Proliferation of Nuclear Weapons, *United Nations Treaty Series*, Vol. 729, p. 161 (No. 10485); *Comprehensive Test Ban Treaty*, U.N. Doc. A/RES/50/245 (1996), Annex (not yet in force); *Treaty on the Prohibition of Nuclear Weapons*, U.N. Doc. A/CONF.229/2017/L.3/Rev.1 (2017) (not yet in force); Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, *United Nations Treaty Series*, Vol. 1015, p. 163 (No. 14860); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, *United Nations Treaty Series* , Vol. 1974, p. 45 (No. 33757).

international control".[118]

The European Court of Human Rights addressed weapons-related issues in a case arising from the Chechen conflict. Russian authorities had used heavy combat weapons, including bombs and missiles, in an urban area. Describing the weapons as "indiscriminate", a Chamber of the European Court said "using this kind of weapon in a populated area, outside wartime and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society".[119] The judgment seemed to suggest that use of indiscriminate weapons in an urban area during a full-fledged armed conflict might be acceptable, but this can hardly be correct.

V. Wars of Aggression

In its first general comment on the right to life, in 1982, the Human Rights Committee hinted at the issue of war itself. It observed that "war and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year". The Committee referred to the prohibition on the threat or the use of force set out in the Charter of the United Nations. It said that States have "the supreme duty to prevent wars". The Committee returned to its anti-war message in 2018. In the final paragraph of its third General Comment on the right to life, the Committee addressed the *jus ad bellum*. Paragraph 70 declares:

> States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant. At the same time, all States are reminded of their responsibility as members of the international community to protect lives and to oppose widespread or systematic attacks on the right to life, including acts of aggression, international terrorism, genocide, crimes against humanity and war crimes, while respecting all of their obligations under international law. States parties that fail to take all reasonable measures to settle their international disputes by peaceful means might fall short of complying with their positive obligation to ensure the right to life.

This is a dramatic departure entirely from the paradigms of international humanitarian law, which manifest a rigorous neutrality about the responsibility for

---

[118] *General Comment No. 36, supra* note 5, para. 66.

[119] *Isayeva v. Russia,* no. 57950/00, para. 191, 24 February 2005. See also *Khamzayev and Others v. Russia,* no. 1503/02, para. 185, 3 May 2011; *Kerimova and Others v. Russia*, nos. 17170/04, 20792/04, 22448/04, 23360/04, 5681/05 and 5684/05, para. 253, 3 May 2011.

the conflict itself. Here, the Human Rights Committee is clearing new ground by holding that killing by an aggressor during an armed conflict, regardless of whether it respects the norms of international humanitarian law in terms of targeting and proportionality, is in any case a violation of the right to life.

The final paragraph of General Comment No. 36 has begun to attract attention, particularly in light of Russian aggression against Ukraine that began in February 2022. The second mission of the Organisation for Security and Cooperation in Europe, in its report on the conflict in Ukraine of 14 July 2022, cited the first sentence of paragraph 70 of the General Comment. It also stated that "[b]oth Ukraine and the Russian Federation thus have the obligation to seek to prevent or minimize incidental losses of life in the military operations carried by their armed forces and to investigate instances of death, especially civilian death, that occur during such operations in the areas under their control".[120]

Others have been struck by the incoherence of some human rights bodies taking measures to protect civilians but remaining silent on the situation of combatants. The logic of paragraph 70 of General Comment No. 36 applies to Ukrainian combatants just as much as it applies to civilians who do not participate directly in hostilities. Ukrainian soldiers may also be victims of a violation of the right to life as a consequence of aggression. In its interim measures decision of 1 March 2022, the European Court of Human Rights ordered Russia "[…] to refrain from military attacks against civilians and civilian objects, including residential premises, emergency vehicles and other specially protected civilian objects such as schools and hospitals, and to ensure immediately the safety of the medical establishments, personnel and emergency vehicles within the territory under attack or siege by Russian troops".[121] Four days later the Court said the interim measure "should be considered to cover any request brought by persons falling into the above category of civilians who provide sufficient evidence showing that they face a serious and imminent risk of irreparable harm to their physical integrity and/or right to life".[122] In their analysis of the European Court's initiatives, Andrew Dzremczewski and Rick Lawson very legitimately question why the Court's order is limited to civilians. "What about the fate of Ukrainian military personnel?", they ask. Dzremczewski

---

[120] Organisation for Security and Cooperation in Europe, *Report on Violations of International Humanitarian Law and Human Rights Law, War Crimes and Crimes against Humanity Committed in Ukraine (1 April-25 June 2022)*, 14 July 2022, ODIHR.GAL/36/22/Corr.1, p. 61.

[121] *The European Court Grants Urgent Interim Measures in Application Concerning Russian Military Operations on Ukrainian Territory*, 1 March 2022, press release 068(2022).

[122] *Decision of the Court on Requests for Interim Measures in Individual Applications Concerning Russian Military Operations on Ukrainian Territory*, 4 March 2022, press release 073(2022).

and Lawson acknowledge that "from the perspective of international humanitarian law one could understand that distinctions might have to be made". But, they say, "the ECHR applies to 'everyone', including members of the armed forces. There is no reason to abandon that position if servicemen happen to become targets of lethal violence unleashed by an invading country".[123]

That killing by an aggressor is not necessarily a violation of international humanitarian law should not make it acceptable under international human rights law. After all, there is no discussion about *lex specialis* when international humanitarian law is set alongside the law on the use of force. An act of aggression may violate the Charter of the United Nations despite the neutrality of international humanitarian law. Why should human rights law be treated differently? Article 6(1) of the International Covenant protects against "arbitrary" deprivation of life. The Human Rights Committee has shown a considerable degree of deference to international humanitarian law norms, saying they were, "in general, not arbitrary".[124] In her analysis of the General Comment, Sarah Joseph wrote that according to General Comment No. 36, "killings that take place in accordance with international humanitarian law (IHL) are not 'arbitrary'".[125] This may be too absolute a statement, however, bearing in mind the qualification "in general" with which the Committee preceded its statement. There may be killings that are consistent with international humanitarian law yet that also violate the right to life.

Whether international human rights law in general and the right to life in particular apply to the *jus ad bellum* as well as the *jus in bello* has been a matter of controversy for many years. At the Kampala Review Conference of 2010, where the amendments on the crime of aggression were adopted for inclusion in the Rome Statute, several human rights non-governmental organisations expressed disinterest in the subject. They had campaigned enthusiastically for the Court itself, and for robust definitions of offences that often seemed to reformulate human rights violations as war crimes, crimes against humanity and genocide. When it came to responsibility for starting the war itself, they stepped aside saying this was not a matter of concern as far as human rights law was concerned.[126]

---

[123] Andrew Dzremczewski and Rick Lawson, "Exclusion of the Russian Federation from the Council of Europe and the ECHR: An Overview", *Baltic Yearbook of Human Rights*, Vol. 21 (2022), forthcoming.

[124] *General Comment No. 36, supra* note 5, para. 64.

[125] Sarah Joseph, "Extending the right to life under the International Covenant on Civil and Political Rights: General Comment 36", *Human Rights Law Review*, Vol. 19 (2019), p. 365.

[126] Amnesty International, "International Criminal Court, Concerns at the Seventh Session of the Assembly of States Parties", October 2008, Index: IOR 40/022/2008, p. 22; Human Rights Watch, "Memorandum for the Sixth Session of the Assembly of States Parties of the International Criminal Court", *available at* < https://www.hrw.org/report/2007/11/14/human-rights-watch-memorandum-sixth-session-international-criminal-court-assembly >

But that indifference to the *jus ad bellum* seems to have weakened following the Russian aggression against Ukraine. On the day following the launching of the invasion, two of the leading organisations, Human Rights Watch and Amnesty International, warned both parties to the conflict to respect the norms of international humanitarian law. They did not speak to the invasion as such.[127] However, a few days later Amnesty International appeared to shift its position with a declaration condemning the aggression.[128]

This shift in human rights discourse was also visible at the Human Rights Council. Its resolution, adopted on 4 March 2022, invoked the 1974 General Assembly resolution defining aggression and "[s]trongly condemn[ed] the aggression against Ukraine by the Russian Federation".[129] It might be said that the Council was merely echoing the General Assembly's resolution of a few days earlier.[130] But the General Assembly was acting pursuant to a "uniting for peace" determination by the Security Council. The Human Rights Council had no similar authorisation to make pronouncements about acts of aggression, a subject assigned to the Security Council by Article 39 of the Charter of the United Nations.

The reaction of the Human Rights Council contrasts with that of its predecessor, the Commission on Human Rights. Its 2003 session took place while the unlawful attack on Iraq by the United States and the United Kingdom was underway. Weeks after the armed attack on Iraq, on 25 April 2003, the Commission adopted a resolution that began by condemning human rights violations attributable to the government of Iraq and then proceeded with a request to "all parties to the current conflict in Iraq to abide strictly by their obligations under international humanitarian law".[131] The Commission never addressed the aggression

---

(last visited on 12 September 2023).

[127] Amnesty International, "Russian Military Commits Indiscriminate Attacks During the Invasion of Ukraine", *available at* < https://www.amnesty.org/en/latest/news/2022/02/russian-military-commits-indiscriminate-attacks-during-the-invasion-of-ukraine/ > (posted on 25 February 2022; last visited on 12 September 2023); Human Rights Watch "Russia, Ukraine & International Law: On Occupation, Armed Conflict and Human Rights", *available at* < https://www.hrw.org/news/2022/02/23/russia-ukraine-international-law-occupation-armed-conflict-and-human-rights > (posted on 23 February 2022; last visited on 12 September 2023).

[128] Amnesty International, "Russia/Ukraine: Invasion of Ukraine Is An Act of Aggression and Human Rights Catastrophe", *available at* < https://www.amnesty.org/en/latest/news/2022/03/russia-ukraine-invasion-of-ukraine-is-an-act-of-aggression-and-human-rights-catastrophe/ > (posted on 1 March 2022; last visited on 12 September 2023).

[129] *Situation of Human Rights in Ukraine Stemming from the Russian Aggression*, U.N. Doc. A/HRC/RES/49/1 (2022).

[130] *Aggression Against Ukraine*, U.N. Doc. A/RES/ES-11/1 (2022).

[131] *Situation of Human Rights in Iraq*, U.N. Doc. E/CN.4/RES/2003/84 (2003), OP 1–2.

committed by two permanent members of the Security Council, who attempted to justify their conduct with lies about the presence of weapons of mass destruction in Iraq.

Conclusion

This article has attempted to address some of the difficulties in the implementation of the right to life during an armed conflict. There are some obstacles that need to be overcome. The first is the popular theory, rooted in pronouncements of the International Court of Justice, that suggests human rights law give way to norms of international humanitarian law. This is premised on the claim that international humanitarian law is *lex specialis* rather than *lex generalis*. The theory is flawed for a number of reasons. Moreover, it appears to have been rejected by bodies like the Human Rights Committee and the European Court of Human Rights. Although it may be desirable that the law of the International Court of Justice and that of human rights treaty bodies be knit together rather than fragmented, it does not necessarily follow that the jurisprudence of the International Court of Justice should prevail. At times the Court has itself shown considerable deference to legal findings of human rights treaty bodies while on other occasions it has been rather dismissive. In one case, referring to the Human Rights Committee, the Court said "it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty".[132] In another, it bluntly rejected the approach of the Committee on the Elimination of Racial Discrimination.[133]

On certain issues, human rights law will inform positively debates within the realm of international humanitarian law. This article has discussed the "kill or capture" debate. Some writers adopt a harsh and rather brutal position whereby combatants forfeit any right to life to the extent that they participate actively in hostilities and are not *hors de combat*. Others, who are certainly more imbued with the values of fundamental human rights, recognize that even a combatant is entitled to a degree of protection from arbitrary killing. This is not a problem of a conflict between the two legal regimes. Rather, it is a debate among international humanitarian lawyers, albeit with a contribution by international human rights law weighing in on one side of the balance.

On other matters, the conflict between the two legal systems is more direct.

---

[132] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010,* p. 639, para. 66.

[133] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 71, para. 101.

This article rejects the view that if there is no possibility of reconciliation then it is humanitarian rather than human rights law that triumphs. The main point of contention is the attitude taken to killing by an aggressor. In this context, the distinction between civilians and combatants hardly seems significant. Under international humanitarian law, there is no violation when a civilian is killed by the aggressor, providing that the civilian is not targeted, that the weapons used are not indiscriminate, and that the use of force was proportionate to the military objective. Similarly, a soldier participating as part of the exercise of the inherent right of self-defence, enshrined in Article 51 of the Charter, is entitled to the protection of the right to life even if the adversary fully complies with the laws and customs of war.

Writing about the *Nuclear Weapons* advisory opinion of the International Court of Justice, Michael Bothe described the "correct core of the somewhat problematic pronouncement" on *lex specialis* as recognition that killing that is lawful under the law of armed conflict is not "arbitrary" in the sense of Paragraph 1 of Article 6 of the International Covenant on Civil and Political Rights.[134] But if killing resulting from an act of aggression is "arbitrary", as paragraph 70 of the General Comment on the right to life contends, then it is irrelevant whether the killing was in conformity with norms of international humanitarian law.

This is an area where the law is in the process of progressive development. Just over a century ago, in the aftermath of the first great World War, there were proposals to try the German emperor for launching an aggressive war. Then, the law was not yet consolidated. Agreement could not be reached on holding a head of State to be criminally liable for provoking a war in which more than 15,000,000 perished. New developments between the wars led to greater clarity, manifested in the prohibition of the resort to force in the Charter of the United Nations and the condemnation of crimes against peace by the international military tribunals. It is now time for international law to take yet further steps that confirm the prohibition of aggressive war. Paragraph 70 of General Comment No. 36 makes an important contribution in this respect.

---

[134] Michael Bothe, "The Status of Capture Fighters in Non-International Armed Conflict", in Christian Tomuschat, Evelyne Lagrange and Stefan Oeter eds., *The Right to Life* (2011), p. 201.