

# The right to life in armed conflict: does international humanitarian law provide all the answers?

**Louise Doswald-Beck**

Louise Doswald-Beck is Professor at the Graduate Institute for International Relations in Geneva, Director of the University Centre for International Humanitarian Law

## **Abstract**

*This article describes the relevant interpretation of the right to life by human rights treaty bodies and analyses how this might influence the law relating to the use of force in armed conflicts and occupations where international humanitarian law is unclear. The concurrent applicability of international humanitarian law and human rights law to hostilities in armed conflict does not mean that the right to life must, in all situations, be interpreted in accordance with the provisions of international humanitarian law. The author submits that the human rights law relating to the right to life is suitable to supplement the rules of international humanitarian law relating to the use of force for non-international conflicts and occupation, as well as the law relating to civilians taking a “direct part in hostilities”. Finally, by making reference to the traditional prohibition of assassination, the author concludes that the application of human rights law in these situations would not undermine the spirit of international humanitarian law.*

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It is now generally recognized, even by the most sceptical, that international human rights law continues to apply during all armed conflicts alongside international humanitarian law (IHL). The tendency, however, has been to consider that human rights can only add some clarification to situations outside

the conduct of hostilities, such as further detail to the right to a fair trial. When it comes to the actual use of force, however, it is generally considered that human rights law must be interpreted in a way that is totally consistent with IHL. This is particularly so with the case of the right to life. Typically, the Advisory Opinion of the International Court of Justice in the *Nuclear Weapons* case<sup>1</sup> is cited as support for this proposition.

However, this approach oversimplifies the situation in two ways. First, as international human rights treaties allow for the right to individual petition, which is so far not the case for IHL, it has fallen to human rights treaty bodies to analyse whether there have been violations to the right to life during hostilities. These bodies can only use the provisions of the treaties which created them, and therefore they have interpreted whether there has been a violation of the right to life without reference to IHL.<sup>2</sup> Second, this approach presupposes that IHL is crystal clear as to when and how force can be used in all situations of armed conflict. This is not the case. The International Committee of the Red Cross (ICRC) and the Asser Institute have already held four expert meetings in order to try to determine when civilians can be attacked because they take a “direct part in hostilities”.<sup>3</sup> To date, the divergence in views of the participants reflects the lack of coherence in state practice in this regard. Another area which is totally unclear, since it is not provided for in the relevant treaties, is at what point the IHL rules relating to the conduct of hostilities are applicable to quell serious violence during a military occupation.

These issues, and others relevant to the relationship between the right to life under human rights law and the use of force under IHL, were the subject of an expert meeting organized by the University Centre for International Humanitarian Law (UCIHL).<sup>4</sup> This article will outline the analysis and conclusions of this expert

1 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, in which the Court stated that Article 6 of the International Covenant on Civil and Political Rights is applicable to a use of nuclear weapons, but that “what is an arbitrary deprivation of life ... 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”. ICJ Rep. 1996, § 25.

2 The only exception was a direct use of IHL by the Inter-American Commission of Human Rights, in particular in the case of *Abella v. Argentina* (Report No. 55/97, Case 11.137, 18 November 1997, §§ 152–189). However, the Inter-American Court in the later case of *Las Palmeras v. Colombia* specified that the use of IHL was not possible since the Court is only empowered by States Parties to interpret human rights provisions (Preliminary Objections, Judgment of 4 February 2000, § 33), although in the case of *Bamaca-Velasquez v. Guatemala* it conceded that “the relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention” (Judgment of 25 November 2000, § 209). Although the UN Human Rights Committee stated in its General Comment 31 that “more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant Rights” (26 May 2004, § 11), in practice it has not referred to IHL in its case law relating to the right to life in armed conflicts.

3 A summary of these meetings as well as a copy of the reports are to be found on the following website address: <[www.icrc.org/web/eng/siteeng0.nsf/iwplList575/459B0FF70176F4E5C1256DDE00572DAA](http://www.icrc.org/web/eng/siteeng0.nsf/iwplList575/459B0FF70176F4E5C1256DDE00572DAA)> (last visited 30 January 2007).

4 Report of the expert meeting on the right to life in armed conflicts and situations of occupation, University Centre for International Humanitarian Law, Geneva, 1–2 September 2005, <[www.ucihl.org/communication/Right\\_to\\_Life\\_Meeting\\_Report.pdf](http://www.ucihl.org/communication/Right_to_Life_Meeting_Report.pdf)> (last visited 30 January 2007). As from October 2007, the UCIHL will become the “Geneva Academy of International Humanitarian Law and Human Rights”.

meeting as well as certain thoughts of this author. The article will briefly describe the relevant interpretation of the right to life by human rights treaty bodies and then see how this might influence the law relating to the use of force in armed conflicts and occupations where IHL is unclear. Finally, the question will be asked whether the application of human rights law would involve a major change in the spirit, if not the letter, of IHL, by making particular reference to the traditional prohibition of assassination.

## The right to life under human rights law

### Conditions regulating the use of force

Three of the four major human rights treaties<sup>5</sup> specify that no one may be “arbitrarily” deprived of life without further explanation. The European Convention, however, gives more guidance as follows:

Deprivation of life shall not be regarded as inflicted in contravention of the Article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.<sup>6</sup>

Under all four treaties the right to life is non-derogable.<sup>7</sup> The European Convention does make an exception for “deaths resulting from lawful acts of war”.<sup>8</sup> Thus far this exception has not been used, despite the fact that the European Court has heard a number of cases relating to deaths during hostilities. No state has so far tried to use this exception when depositing its notice of a state of emergency.<sup>9</sup> In the opinion of this author, “lawful acts of war” refers to international armed conflicts. The reference to the use of force to quell an “insurrection” in sub-paragraph (c) quoted above shows that the provision as it stands is meant to apply to non-international conflicts; the provision already

5 Article 6(1) of the International Covenant on Civil and Political Rights, 1966 (ICCPR); Article 4(1) of the American Convention on Human Rights, 1969 (ACHR); Article 4 of the African Charter on Human and Peoples’ Rights, 1981 (ACHPR).

6 Article 2(2) of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (ECHR).

7 Article 4(2) ICCPR; Article 27(2) ACHR; Article 15(2) ECHR. The African Charter does not have a derogation clause.

8 Article 15(2) ECHR.

9 For example, Turkey did not do so in relation to the armed conflict and occupation of Northern Cyprus. In other situations, i.e. Northern Ireland, south-east Turkey and Chechnya, the states concerned denied that there was an armed conflict and therefore by definition could not try to use this exception. In the case of Russia, it has not even used the provision allowing for derogations during a state of emergency.

provides for the need to use force for this purpose and the modalities for doing so. This was also the view of a number of experts at the UCIHL meeting.<sup>10</sup>

How have human rights treaty bodies interpreted these provisions? In many cases the result was the same as if IHL had been used. Thus in cases relating to armed hostilities between rebels and governmental forces, the treaty bodies have examined whether sufficient precautions were taken to avoid civilian casualties. The most relevant cases before the European Court of Human Rights (ECHR) to this effect are the cases of *Ergi v. Turkey*,<sup>11</sup> which concerned the use of force by Turkish forces against Kurdistan Workers' Party (PKK) rebels and the cases of *Isayeva, Yusupova and Bazayeva v. Russia*<sup>12</sup> and *Isayeva v. Russia*,<sup>13</sup> which concerned the use of force against Chechen rebels. In all these cases the European Court found that insufficient precautions were taken during the planning and prosecution of the activities to avoid or minimize civilian casualties. These cases were brought by relatives of the civilians who were killed and not by the relatives of the rebels themselves. Therefore the degree of force used against them directly was not considered. In this regard it is significant that the Court accepted the necessity for the use of potentially lethal force in order to quell an insurrection in two cases concerning aerial bombardments in Chechnya:

The Court accepts that the situation that existed in Chechnya at the relevant time called for exceptional measures by the State in order to regain control over the Republic and to suppress the illegal armed insurgency. Given the context of the conflict in Chechnya at the relevant time, those measures could presumably include the deployment of army units equipped with combat weapons, including military aviation and artillery. The presence of a very large group of armed fighters in Katyr-Yurt, and their active resistance to the law-enforcement bodies, which are not disputed by the parties, may have justified use of lethal force by the agents of the State, thus bringing the situation within paragraph 2 of Article 2.<sup>14</sup>

It is unlikely that a case brought by a rebel complaining about the use of lethal force during hostilities in which he is taking an active part would even be declared admissible. One of the experts at the UCIHL meeting pointed out such a case is unlikely to even arise before the European Court, since the state will always be able to claim that its forces had reason to believe that the rebels killed were using or were about to use force, and the burden would be on the rebels to prove that this was not the case. Another expert cited the practice of Colombia, which regularly bombs Revolutionary Armed Forces of Colombia (FARC) camps even

10 Report of the expert meeting, above note 4, Section B.3.b.

11 In this case the European Court of Human Rights stated that the right to life may be violated where states "fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising incidental loss of civilian life", Judgment of 28 July 1998, § 79.

12 *Isayeva, Yusupova and Bazayeva v. Russia*, Judgment of 24 February 2005, §§ 171 and 199.

13 *Isayeva v. Russia*, Judgment of 24 February 2005, §§ 187–189.

14 *Ibid.*, at § 180, and *Isayeva v. Yusupova and Bazayeva v Russia*, above note 12, at § 178.

when the rebels are not at that time actively involved in hostilities. No one has attempted to argue that this is contrary to human rights law since it is understood that rebels who are organized, armed and assembled cannot be arrested.<sup>15</sup>

Cases in which the degree of force against rebels themselves has been considered all concerned situations that were *not* actual armed hostilities. The common thread in all of these decisions is that if an arrest can easily be effected, then a use of lethal force would be “more than absolutely necessary”. The most significant case is that of *Guerrero v. Colombia* before the United Nations Human Rights Committee. This concerned the suspicion by the government that a “guerrilla organization” had kidnapped a former ambassador and was holding him hostage at a house. When the house was visited no hostage was found, but the government forces nevertheless waited for the return of the rebels and shot each of them at point-blank range, even though they were not armed at that time. The Committee began by reaffirming that the state of emergency that existed in Colombia at the time could not have the effect of derogating from the right to life. It then found the use of force to be a violation of the right to life, since an arrest would have been possible in these circumstances. It came to this conclusion by taking into account the following factors:

[T]he 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. There is no evidence that the action of the police was necessary in their own defence or that of others, or that it was necessary to effect the arrest or prevent the escape of the persons concerned.<sup>16</sup>

Several cases before the ECHR have underlined a distinction between the planning of a police operation and the actual use of force by police officers. The most significant of these is the case of *McCann v. United Kingdom*, which concerned the killing of members of the Irish Republican Army (IRA) in Gibraltar. The Court found that the action of the police officers who fired on them was not a violation of the right to life since they genuinely thought that the IRA members were on the point of detonating a car bomb.<sup>17</sup> On the other hand, the Court found a violation of this right by the United Kingdom because it had had sufficient opportunity beforehand on the same day to arrest the persons (especially when they crossed the border into Gibraltar) and therefore the government had not planned the operation in a such way as to minimize the need to use force against them. In particular the Court did not accept the government’s argument that it waited until the last moment in order to ensure that it had enough evidence against them:

15 Report of the expert meeting, above note 4, Section B.7.

16 Human Rights Committee, Communication No. R.11/45, Views, 31 March 1992, UN Doc. Supp. No. 40(A/37/40), § 13.2.

17 *McCann v. United Kingdom*, European Court of Human Rights, Judgment of 5 September 1995, § 200.

[T]he danger to the population of Gibraltar – which is at the heart of the Government's submissions in this case – in not preventing their entry must be considered to outweigh the possible consequences of having insufficient evidence to warrant their detention and trial.<sup>18</sup>

The mere suspected presence of rebels is not enough to justify the use of lethal force. In the case of *Güleç v. Turkey*, in which the police used a machine gun to restore order during a demonstration, the Court did not accept the argument of the government that the demonstration had lapsed into insurrection because of the presence of members of the PKK who had fired at random.<sup>19</sup> It held that not only was there no evidence that members of the PKK were present but also that the use of force under Article 2(2)(c) of the Convention requires a balance to be struck between the aim pursued and the means employed. In particular, a state of emergency existed in the province concerned. As the authorities should have expected disorder, it should have had the necessary equipment such as truncheons, riot shields, water cannon, rubber bullets or tear gas.<sup>20</sup>

In several cases treaty bodies have considered that the use of lethal force against persons who are not dangerous to be excessive, even in situations where arrest is not possible. The most significant of these are the *Brothers to the Rescue* case, in which Cuban forces shot down a small civilian plane that had allegedly violated Cuban airspace,<sup>21</sup> and the case of *Nachova v. Bulgaria*, in which persons who were absent without leave from the army (and who had previously had convictions for theft) were shot whilst trying to escape.<sup>22</sup> These cases did not concern events in situations of armed conflict, but since human rights law does not make a distinction between armed conflict and peace, this proportionality principle would apply at all times. The finding that the use of lethal force was excessive was explained in the *Nachova case* in the following terms:

[T]here can be no [necessity to put human life at risk] where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence, even if a failure to use lethal force may result in the opportunity to arrest the fugitive being lost.<sup>23</sup>

An *a contrario* reading of this case would be that if they had posed a threat to life or limb or were suspected of having committed a violent offence, then the use of force would not have been a violation if the opportunity to arrest them would have been lost without such use of force.

Finally, a significant document under human rights law, often referred to by treaty bodies, is the United Nations Basic Principles on the Use of Force and

18 Ibid., at § 205.

19 *Güleç v. Turkey*, European Court of Human Rights, Judgment of 27 July 1998, § 67.

20 Ibid., at §§ 71–73.

21 Case of *Armado Alejandro Jr. and Others v. Cuba (Brothers to the rescue)*, Inter-American Commission on Human Rights, Case No. 11.137, Report No. 86/99, 29 September 1999, §§ 37–45.

22 *Nachova v. Bulgaria*, European Court of Human Rights, Judgment of 6 July 2005.

23 Ibid. § 95.

Firearms by Law Enforcement Officials. Principle 9 of this document limits the use of force to that which is strictly necessary

in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.<sup>24</sup>

It should be noted that these grounds for the possible use of force are alternatives and not cumulative. Therefore the possible use of force is not limited to the imminence of the threat but to the real necessity and proportionality of such use. The footnote to these Principles specifies that they also apply to military personnel when such persons “exercise police powers”.

### The requirement to investigate

Although a duty to investigate is not included in the treaties themselves, human rights treaty bodies have stated that in cases of deaths resulting from the use of lethal force, including those occurring during armed clashes, the right to life requires an investigation by state authorities.<sup>25</sup> This conclusion is based on their interpretation of the requirement of states to “ensure respect” of the rights – that is, positive measures are needed to ensure that the rights are respected. An investigation is needed to establish whether the use of force was unlawful and, if so, to prosecute the persons concerned. Although not stated as such by these treaty bodies, another valid reason is that such an investigation allows authorities to learn from any mistake and avoid violations in the future.

The Inter-American Court of Human Rights stated that since states must adopt measures to protect and preserve the right to life, it is essential to investigate extra-legal executions through an effective official investigation and to punish persons responsible; not to do so creates a climate of impunity.<sup>26</sup>

The conditions spelled out for such investigations have been explained by the European Court of Human Rights in the following terms:

[T]he authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures ...

24 Adopted by the UN General Assembly in Resolution 45/166, 18 December 1999.

25 For example, European Court of Human Rights cases: *Mahmut Kaya v. Turkey*, Judgment of 19 February 1998, § 91, and *Isayeva v. Russia*, above note 13, at § 209; African Commission on Human and Peoples’ Rights case: *Commission Nationale des Droits de l’Homme et des Libertés v. Chad*, Com. 74/92, Decision of 11 October 1995, § 22; Inter-American Court of Human Rights cases: *Mynra Mack Chang v. Guatemala*, Judgment of 25 November 2003, §§ 152–158 and *Humberto Sanchez v. Honduras*, Judgment of 7 June 2003, §§ 107–113; UN Human Rights Committee case: *Baboeram v. Suriname*, Com. No. 146, and 148–154/1983, Views, 4 April 1985, § 14.

26 Case of *Mynra Mack Chang v. Guatemala*, above note 25, at §§ 153–158.

For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events ... This means not only a lack of hierarchical or institutional connection but also a practical independence ...

The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances ... This is not an obligation of result, but of means ... Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard ...

A requirement of promptness and reasonable expedition is implicit in this context ... While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts ...

For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny may well vary from case to case. In all cases, however, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests ... <sup>27</sup>

The United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has specifically addressed the issue of accountability for violations of the right to life in armed conflict and occupation. He referred in particular to IHL's specific rules relating to war crimes together with governments' obligations to respect, and ensure respect of, IHL. This requires an obligation effectively to investigate suspected violations, using impartial and independent procedures, and to prosecute and punish violations. More generally, he stressed the need for a systematic supervision and periodic investigation so that institutions, policies and practices ensure that the right to life is upheld as effectively as possible by the military. In this regard he recognized that there are certain unique characteristics of armed conflict, but that investigation would be needed to evaluate, for example, whether the deceased was taking part in hostilities. He also stated that such an investigation would be facilitated if there were indicators and criteria to evaluate a possible breach of proportionality and if belligerents kept records for post-conflict investigation. The advantage for the military would be to allow belligerents to counter false accusations, as well as suggestions by some critics that IHL is not respected in practice.<sup>28</sup>

27 *Isayeva, Yusupova and Bazayeva v. Russia*, above note 12, at §§ 209–213.

28 P. Alston, Report to the Human Rights Commission, 8 March 2006, UN Doc. E/CN.4/2006/53, §§25–26.

The Special Rapporteur deplored in particular policies that have permitted unjustifiable exceptions to these requirements and the lenient punishment of those military personnel who are convicted of murders. He likewise stressed the need for transparency in investigating suspected violations in order to prevent impunity: “the results of the investigation must be made public, including details of how and by whom the investigation was carried out, the findings, and any prosecutions subsequently undertaken”.<sup>29</sup>

Like human rights treaties, a duty of investigation is not spelled out in IHL treaties, but this author agrees with the UN Special Rapporteur; a *bona fide* interpretation of IHL must come to the same conclusion – that is, any suspected violation of IHL needs to be properly investigated for the reasons stated by the human rights treaty bodies.

## Non-international armed conflicts

Unlike international armed conflicts, which clearly categorize people as either “combatants” or “civilians”, IHL does not formally recognize the status of “combatant” in non-international conflicts. This is not due to any altruistic articulation by governments of the need to avoid using force against all persons during such conflicts, but rather because of their insistence that rebels must not in any shape or form benefit from any kind of international recognition. Since combatants generally benefit from prisoner-of-war status during international conflicts, thus protecting them from trial for having taken part in hostilities, such a result could not be envisaged in the case of rebel forces. On the other hand, it is accepted that there cannot be an unlimited use of force by governments during such conflicts.

Common Article 3 of the Geneva Conventions and Additional Protocol II have tried to use the notions of IHL to protect inoffensive persons whilst at the same time avoiding any hint of “combatant” status. The result is confusing and has caused controversy. One interpretation is that the reference to “armed forces”<sup>30</sup> and “armed groups”<sup>31</sup> means that force can automatically be used against them, especially since these same provisions stress the need to avoid using force against persons not taking “an active part in hostilities”<sup>32</sup> or “civilians [not taking] a direct part in hostilities”.<sup>33</sup> Indeed, the Commentary to Additional Protocol II supports this interpretation, since it states that force may be used against armed groups without reference to any further conditions.<sup>34</sup> The second interpretation is that the use of force turns entirely on what the phrase “direct part in hostilities”

29 Ibid., at §§ 33–43.

30 Common Article 3 of the Four Geneva Conventions of 1949.

31 Article 1 of Additional Protocol II, 1977, refers to “dissident armed forces” and “other armed groups”.

32 Common Article 3 of the Four Geneva Conventions of 1949.

33 Article 13 of Additional Protocol II, 1977.

34 Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary to the Additional Protocols of 1977*, ICRC, Geneva, 1987, § 4789.

means. This interpretation is based on the fact that the reference to “armed groups” in Article 1 of Additional Protocol II is only for the purpose of describing the situation that must exist for the Protocol to apply, and that the only reference to the use of force against persons is in Article 13, which protects from attack civilians not taking a direct part in hostilities.

The experts at the meeting held by the UCIHL were divided on which should be the best interpretation. They therefore went on to consider whether human rights law, which applies to such situations, could help resolve the issue of when force could be used and against whom. As already seen, human rights law requires a state’s forces to effect an arrest where possible and to plan operations in such a way as to maximize the possibility of being able to arrest persons. On the other hand, in cases where state bodies do not exercise sufficient control, human rights law does not impose such a requirement.

Some of the experts hesitated in coming to the conclusion that persons belonging to armed groups could be sometimes exempt from attack. However, the majority felt that even fighting members of such groups would be exempt from attack in situations where they presented no threat and could easily be arrested – the hypothetical case of a rebel in the process of doing his shopping in the supermarket was referred to. One basis for this conclusion was that he would be a person not taking “a direct part in hostilities” at that time – this would be based on the second interpretation of the relevant IHL provisions referred to above without the need for reference to human rights law.<sup>35</sup> The second basis for this conclusion is an amalgam of the first interpretation of the IHL provisions and human rights – that is, persons belonging to armed groups can, in principle, be attacked but, under human rights law, must not be if they could be easily arrested.<sup>36</sup>

One concern discussed during the expert meeting was whether a prohibition from attacking rebels when they could be arrested would create an imbalance of responsibilities between government forces and rebel forces.<sup>37</sup> It was pointed out that IHL depended very much on the legal equality of opposing forces. However, others, including this author, stressed that in reality there is no such equality during non-international conflicts, since rebels remain criminals under domestic law and IHL respects this. Rebels are, therefore, at a disadvantage in this respect. A perfect analogy with IHL applicable to international conflicts does not yet exist. On the other hand, it is normal that governments have more responsibilities under international law than their citizens, in this case the restrictions of human rights law.

35 This is the approach taken in the ICRC Commentary when explaining this phrase in Article 51(3) of Additional Protocol I, 1977: “Once he ceases to participate, the civilian ... may no longer be attacked ... there is nothing to prevent the authorities capturing him in the act or arresting him at a later stage”. *Ibid.*, at § 1944.

36 Report of the expert meeting, above note 4, Section F.3–5. This amalgamation of IHL and human rights is proposed by David Kretzmer in his article “Targeted killing of suspected terrorists: extra-judicial executions or legitimate means of defence”, *EJIL*, Vol. 16, no. 2 (2005), p. 171.

37 Report of the expert meeting, above note 4, Section F.6.

This author would support the notion that armed forces are targetable, without the need for imminence of danger, provided that rebel “armed forces” or “armed groups” are narrowly defined to include only those members who regularly do the actual fighting. This was suggested by the ICRC<sup>38</sup> in the context of the meetings on the meaning of “direct participation” after several participants in earlier meetings pointed out the danger of allowing an attack on “armed groups” without further specification. Persons who are involved in the activities of armed groups, whether voluntarily or under pressure, vary and most of them do not use force. Further, it is not uncommon for governments to label an ethnic group as a whole as a “rebel group”, when only some of its members are using force. The second condition is that, even as regards the fighting rebel forces, they must not be attacked on sight if they can be easily arrested without undue risk for government forces. Such situations do occur in reality. These conditions respect both IHL and human rights: they would allow government forces to deal with the insurrection but at the same time require the government to take the necessary measures to plan for an arrest where possible rather than use lethal force. As for persons who are not fighting members of armed groups, then an attack can only be possible if it respects Article 9 of the UN Basic Principles, which, it must be remembered, spells out in which circumstances the use of force by state officials is possible to prevent potentially lethal violence by a person. If these conditions are not respected, then if lethal force is used before the suspected person executes a violent act a government executes a mere suspect, or if the government kills the person after such a violent act, it is in effect punishing the person with an instant death penalty.

It needs to be remembered that IHL relating to the use of lethal force against a *person* is different from the law relating to the attack of military objectives, that is, objects. The two should not be confused. The ICRC Commentary on the meaning of “direct participation in hostilities [by civilians]” in Article 51(3) of Additional Protocol I is as follows: ““direct” participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces”.<sup>39</sup>

The evaluation of whether an *object* may be attacked does not require that the object uses, or is on the point of using, force, but only whether it effectively *contributes* to the military action of the enemy and attacking it gives one a direct military advantage. This is a less restrictive test than that governing the deliberate targeting of persons. Consciously or unconsciously using the reasoning associated with the choice of military objectives when deciding on an attack against persons widens the possible scope of human targets beyond what was in the mind of the negotiators of Article 51(3) of Protocol I and the same provision in Article 13 of Additional Protocol II.

38 Draft Interpretative Guidance on the Notion of “Direct Participation in Hostilities”, Fourth Expert Meeting on the “Notion of Direct Participation in Hostilities”, 27–28 November 2006, Section B.II (on file with the author).

39 Commentary to the Additional Protocols of 1977, above note 34, at § 1944.

## Military occupation

### Combined applicability of human rights law and international humanitarian law

Both the International Court of Justice and human rights treaty bodies have insisted that human rights law applies, alongside IHL, to military occupations.<sup>40</sup> Although the US and Israeli governments have both stated that only IHL applies, there is extensive state practice, in the form of General Assembly and Security Council resolutions, insisting on respect of both human rights and IHL in such situations.<sup>41</sup>

The conditions relating to the use of lethal force in occupation is different from non-international conflicts in that occupation relates to an international conflict, albeit with its own specific rules under IHL. As such it is a condition *sui generis*. Nevertheless, The Hague Regulations of 1907 and the Fourth Geneva Convention, which regulate occupation,<sup>42</sup> do not spell out when lethal force may be used, thus leaving a significant degree of uncertainty. The participants in the UCIHL expert meeting considered the situation in some detail.<sup>43</sup> The discussions carefully took into account the fact that the situation on the ground can vary considerably, not only in time but also in different parts of the territory; thus some parts of the territory can be relatively calm whereas in others there may be an outbreak of hostilities.

### The use of lethal force in “calm” occupations

It is generally agreed that in situations that are relatively calm, the use of potentially lethal force during occupation is governed by the “law enforcement model” – that is, human rights law which requires that a state effect an arrest where possible. The United Nations Human Rights Committee, in its report on Israel, stated that “Before resorting to the use of deadly force, all measures to arrest and detain persons suspected of being in the process of committing acts of terror must be exhausted”.<sup>44</sup>

A minority view in the expert meeting was that when an occupying power needs to take measures to protect its own security, then IHL provisions apply

40 International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Rep. 2004, §§ 102–114, and the *Case Concerning Armed Activities on the Territory of the Congo*, Judgment, 19 December 2005, ICJ Rep. 2005, § 216; UN Human Rights Committee, General Comment 31 § 10 and its Concluding Observations on the Second Periodic Report of Israel, 21 August 2003, § 11; European Court of Human Rights, *Loizidou v. Turkey*, Preliminary Objections, Judgment of 23 March 1995, §§ 63–64, and supporting Resolution DH 105 by the Council of Europe Committee of Ministers, adopted 24 July 2000.

41 See discussion of this point in Report of the expert meeting, above note 4, Section B.6.

42 Regulations annexed to the Hague Convention 1907, Articles 42–56; Fourth Geneva Convention 1949, Articles 1, 2, 4–34, 47–149.

43 Report of the expert meeting, above note 4, Section D.

44 Concluding Observations, Israel: UN Doc. CCPR/CO/78/ISR, 21 August 2003, § 15.

because such action is connected with the international armed conflict rather than the pure maintenance of order in the occupied territory.<sup>45</sup> However, in the opinion of this author, such a distinction would be difficult to apply in practice, and such treaty provisions as do exist do not point to such a distinction. In particular, Articles 5 and 64 of the Fourth Geneva Convention do imply that persons who are a danger to the security of the occupying state will be subject to criminal legislation and detention rather than fired on as a matter of course. All agreed, however, that the response to a riot or violent demonstration needs to be that of the law-enforcement model.

Another issue that was considered was whether lethal force could be used against members of the armed forces of the occupied state. It was generally agreed that if such forces are in the process of conducting combat operations in the occupied territory then the normal rules of IHL would apply, including the categorization as combatants of resistance movements which comply with the conditions set forth in Article 4.A(2) of the Third Geneva Convention.

Finally, the group discussed the possible use of force against foreign fighters acting against the occupying state. It was generally agreed that as the threshold of the outbreak of an international armed conflict is low (i.e. any use of force by the armed forces of a state against another state), if foreign fighters are sent by a third state to fight the occupying state and if they fulfil the conditions of being “combatants”, then they may be targeted on sight in accordance with the rules of IHL. If they do not fulfil these conditions, then they are civilians who can be attacked only while they are taking a “direct part in hostilities”.<sup>46</sup>

### The situation where there has been a resumption or outbreak of hostilities<sup>47</sup>

It was generally agreed that when there is a situation of armed hostilities in an occupied territory, the IHL rules relating to the conduct of hostilities apply. The question was, therefore, when it can be determined that such a situation exists. If the situation in an occupied territory is relatively calm, then the mere use of military force by the occupying state cannot of itself trigger IHL rules – otherwise this would render meaningless the rule that the law enforcement model applies to such a “calm” occupation. Therefore the hostilities must result from combat activity initiated by those challenging the occupation. The distinction was made between violence and disorder which resemble riots or ordinary criminal activity, which are governed by the law-enforcement model, and military hostilities, which would be governed by IHL.

As already mentioned above, it had been agreed that use of military force by the *armed forces* of the occupied state would entitle the occupying state to attack them. Would such an entitlement allow the occupying power to conduct military operations in accordance with IHL throughout the entire territory? The

45 Report of the expert meeting, above note 4, Section D.3(a).

46 Article 51(3) of Additional Protocol I, 1977.

47 Issue discussed in Report of the expert meeting, above note 4, Section D.4.

majority view was that if most of the territory was “calm”, then the conduct of hostilities under IHL rules would apply only to the incident concerned.

The most common situation, however, is military resistance activity within the occupied territory by groups not officially members of the occupied state’s armed forces. The experts agreed that the threshold for determining the “resumption” or “outbreak” of hostilities by such a group, of a nature to reintroduce the IHL rules relating to the conduct of hostilities, is not specified in IHL treaties. A view was put forward that if such groups do not belong to one of the parties to the original armed conflict, then such hostilities should be seen as a non-international conflict. The majority disagreed with this characterization, however, since an occupation is by definition part of an international armed conflict. The only possible exception, entitling such a situation to be seen as a non-international conflict, is when the displaced sovereign clearly does not support the resistance movement.

Although the majority thought that such resistance activity, where sufficiently serious, would amount to an international conflict, all the experts were of the view that, given the lack of guidance in IHL treaties, the test used to establish the existence of a non-international conflict would be a useful one for this context also. The test requires a certain intensity and duration of violence of the sort that requires the state to use military measures<sup>48</sup> – that is, law-enforcement operations would be inadequate to restore order. Isolated, sporadic attacks by resistance movements would not meet the required threshold.<sup>49</sup> The experts recognized that this test for the use of IHL conduct of hostilities rules relating to international conflicts in occupied territory is an invention, but given that the law so far gives no guidance, they thought that it was the most reasonable threshold available.

As the applicable law to situations of violence – IHL or human rights law – depends on the analysis outlined above, the experts stressed the need for clear rules of engagement and effective training, so that soldiers are able to distinguish the war-fighting situation from the law-enforcement situation.

## Targeted killings

A targeted killing is a lethal attack on a person that is not undertaken on the basis that the person concerned is a “combatant”, but rather where a state considers a particular individual to pose a serious threat as a result of his or her activities and decides to kill that person, even at a time when the individual is not engaging in hostile activities.<sup>50</sup>

48 The test used by the International Tribunal for the former Yugoslavia is “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”, *Prosecutor v. Dusko Tadic*, ICTY Appeals Chamber, IT-94-1-AR72, § 70.

49 As specified in Article 1(2) of Additional Protocol II, “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence” do not amount to armed conflict.

50 Definition used by the experts of the UCIHL’s meeting, Report of the expert meeting, above note 4, Section E.

The issue of targeted killings was considered by the United Nations Human Rights Committee in the context of its review of the report submitted by Israel. The Committee stated that

The State Party should not use “targeted killings” as a deterrent or punishment. The State party should ensure that the utmost consideration is given to the principle of proportionality in all its responses to terrorist threats and activities. State policy in this respect should be spelled out clearly in guidelines to regional military commanders, and complaints about disproportionate use of force should be investigated promptly by an independent body. Before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted.<sup>51</sup>

More recently the Israeli Supreme Court considered whether targeted killings carried out by the Israeli government are lawful.<sup>52</sup> It held that hostilities were taking place in the context of an international armed conflict but that the “terrorists”<sup>53</sup> are not combatants.<sup>54</sup> Therefore they were to be considered as “civilians”. It then went on to analyse whether they were taking a “direct part in hostilities”. The Court was of the view that if a person belongs to an armed group and “in the framework of his role in that organization he commits a chain of hostilities” he loses his immunity from attack.<sup>55</sup> The Court went on to say, however, that

a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed ... Thus, if a terrorist

51 Concluding Observations of the Human Rights Committee: Israel, 21 August 2003, UN Doc. CCPR/CO/78/ISR, § 15.

52 *The Public Committee against Torture in Israel and the Palestinian Society for the Protection of Human Rights and the Environment v. The Government of Israel, the Prime Minister of Israel, the Minister of Defense, the Israel Defense Forces, the Chief of the General Staff of the Israel Armed Forces, and Shurat HaDin – Israel Law Center and 24 others*, Israeli Supreme Court Sitting as the High Court of Justice, Judgment of 11 December 2005.

53 This is the term used by the Court, although this author would prefer referring to the persons concerned as resistance fighters, since this reflects the situation more accurately whilst not condoning in any way their attacks on civilians, such attacks being war crimes.

54 Because according to the Court they do not belong to armed forces, neither can they be militias with such status, because they do not wear a fixed distinctive sign recognizable at a distance nor respect the laws and customs of war, Judgment, above note 52 at § 24.

55 *Ibid.*, at § 39. The Court quotes passages from the ICRC Commentary to the Additional Protocols to support its view that to restrict the notion of “hostilities” to combat and active military operations would be too narrow. The relevant part of the ICRC Commentary states that: “It seems that the word “hostilities” covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon”, above note 34, at § 1943. On this basis the Israeli Supreme Court rather expansively concluded that “hostilities” included a civilian bearing arms who is one his way to the place where he will use them against the army or on his way back from it as well as a person who collects intelligence on the army, a person who transports fighters to or from the place where hostilities are taking place, a person who operates weapons which fighters use, or supervises their operation or provides service to them. This is wider than the ICRC suggestion for the understanding of “fighters” within a group as mentioned on p. 891 of this article.

taking a direct part in hostilities can be arrested, interrogated and tried, those are the means which should be employed ... A rule-of-law state employs, to the extent possible, procedures of law and not procedures of force ... Arrest, investigation and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers that it is not required ... However, it is a possibility which should always be considered. It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation and trial are at times realisable possibilities ... Of course, given the circumstances of a certain case, that possibility might not exist. At times, its harm to nearby innocent civilians might be greater than that caused by refraining from it. In that state of affairs it should not be used ... [A]fter an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively). That investigation must be independent ...<sup>56</sup>

The Court supported these conclusions by referring to the principle of proportionality under its internal law and the European Court of Human Rights judgment in the *McCann* case. In effect it therefore used human rights law, although it did not refer to the UN Human Rights Committee.

The expert group convened by the UCIHL considered whether targeted killings could ever be lawful in the context of occupation where there has not been a resumption of hostilities – that is, where the law-enforcement model applies. It was generally agreed that in most situations, it would not be lawful. This is because in “calm” occupations, the occupying state exercises sufficient control to arrest the person concerned. In such situations lethal force can only be used if there is an imminent threat of death or injury to the arresting officer or to a third person or if it is the only way to stop the escape of a dangerous person.

A possible exception to this conclusion could be where the person concerned is in an area in which either the occupying state has given up jurisdiction under an agreement,<sup>57</sup> or in which the occupying state has lost physical control. The experts recalled that Principle 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials includes, as one possible basis for the use of lethal force, “prevent[ing] the perpetration of a particularly serious crime involving grave threat to life”.

Given that a state is under an obligation of due diligence to protect the life of its citizens against the potentially lethal actions of non-governmental persons,<sup>58</sup>

<sup>56</sup> Ibid., at § 40.

<sup>57</sup> For example, “Area A” in the Israeli-occupied territory under the Oslo accords.

<sup>58</sup> Human rights treaty bodies have found states to have violated the right to life where governmental authorities knew, or should have known, that individuals are in real danger of being killed by non-governmental persons. See, for example, *Kiliç v. United Kingdom*, European Court of Human Rights, Judgment of 28 March 2000, § 63. In the case of *Velasquez Rodriguez v. Honduras*, the Inter-American

the experts thought that Principle 9 would not consider a targeted killing to be illegal in the following exceptional situation:

1. It is carried out in an area where the state does not exercise effective control so that it cannot reasonably effect an arrest; and
2. the state authorities have sought to transfer the individual from whatever authority is in control of the area, assuming that there is such an authority; and
3. the individual has engaged in serious, life-threatening, hostile acts and the state has reliable intelligence that the individual will continue to commit such acts against the lives of persons the state is under an obligation to protect; and
4. other measures would be insufficient to address this threat.<sup>59</sup>

Although the experts only considered this question in the context of occupation, there is no obvious reason why it should not apply to persons in non-international armed conflicts who are not fighting members of rebel armed groups and are not at that moment engaging in violent acts. Of course in both this situation, and any other, the quality of intelligence and procedural requirements are of extreme importance, since any rule that might exceptionally allow targeted killings is subject to considerable potential for abuse.

## Procedural requirements

Any use of lethal force against a person depends on the proper identification of the victim. This is the origin, of course, of the rule requiring, in international armed conflicts, that combatants (who may be attacked on sight) distinguish themselves visually from the civilian population either through the wearing of a uniform and/or the carrying of arms openly.<sup>60</sup>

In the context of occupation or of non-international armed conflict, the proper identification of persons suspected of belonging to rebel armed groups is often both difficult and of crucial importance. One expert noted that an important rationale behind the rule that civilians may only be targeted for such time as they participate in hostilities is to avoid mistakes in identification.<sup>61</sup>

Court of Human Rights stated that “The State has a legal duty to take reasonable steps to prevent human rights violations” and “The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention”, Judgment of 29 July 1988, §§ 174 and 176; the UN Human Rights Committee has stated that “the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations ... by its agents, but also against acts committed by private persons or entities”. It went on to list measures required to exercise due diligence which included preventive ones, General Comment 31, UN Doc.CCPR/C/21/Rev.1/Add.13(2004), § 8.

59 Report of the expert meeting, above note 4, Section E.2.

60 The extent to which the wearing of a uniform is still required for POW status is different from the issue of combatant status (i.e. such persons can be attacked on sight) which is automatically accorded to members of the armed forces.

61 Report of the expert meeting, above note 4, Section D.3(c). This comment was actually made in the context of targeting foreign fighters entering occupied territory, but is perfectly relevant to the use of force against armed groups not wearing uniform and other persons not at that moment using violence.

Any use of force against a civilian not at that moment using violence has the potential of being a mistake and such a mistake would be particularly serious in the case of a targeted killing. For this reason, the experts at the UCIHL meeting stressed the need for procedural requirements both before and after any such killing. A procedure would be needed beforehand to consider (i) whether the individual the state wants to target is indeed someone who has committed and will probably continue to commit serious hostile acts;<sup>62</sup> and (ii) whether there exists a necessity to kill this person in order to protect the lives of others. The experts were concerned that this procedure, although crucial, could not help but resemble something of a trial *in absentia*, and therefore such a procedure in no way relieves the state of its obligation to try to arrest individuals if possible.<sup>63</sup> The second part of the required procedure is the human rights requirement for a credible investigation into whether the state's use of force was lawful.<sup>64</sup> Knowledge that an independent investigation will automatically have to take place, the results of which will be made public, should have the effect of deterring such targeted killings except in the most exceptional of situations.

As we have already seen, the requirement to plan and to conduct investigations are not limited under human rights law to targeted killings but to any use of lethal force by state authorities where there is a possibility that such force was illegal. Although states do not generally believe that they are required to conduct such an investigation whenever they use force, and indeed during hostilities in an international armed conflict this would hardly be feasible, if there is a suspicion of possible illegality, then a *bona fide* interpretation of IHL would require an investigation in order to ensure that its forces respect the law.

## Are human rights rules incompatible with international humanitarian law?

### The *lex specialis* nature of international humanitarian law<sup>65</sup>

It is well known that IHL has had a different origin and development from human rights law, and only recently has there been an intentional overlapping of the two.<sup>66</sup> It makes sense to recognize that specific rules created for armed conflict

62 The majority of experts did not accept that incitement could be included in the definition of such acts, especially in the case of general incitement, as this would be subject to tremendous abuse. *Ibid.*, Section E.6.

63 *Ibid.*, Section E.5.

64 See pp. 887–889 above of this paper.

65 The term *lex specialis* has been used primarily to state that more detailed rules in a particular branch of law are to be used by way of interpretation when applying a more general rule in the same branch of law. In this section, we are speaking of two branches of law, IHL and human rights law, but for the sake of ease, the discussion below will use the term *lex specialis* as the International Court of Justice did, i.e. IHL as the branch of law specially created for armed conflict.

66 For example, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, 2000; Articles 75 and 6 of Additional Protocols I and II respectively.

continue to be of importance and cannot be simply brushed aside if the same rules do not appear in human rights law. This was recognized by the International Court of Justice in the *Palestinian Wall* case which confirmed the concurrent applicability of human rights law and IHL to armed conflicts in the following manner:

As regards the relationship between international humanitarian law and human rights law, there are thus three possible solutions: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.<sup>67</sup>

All the experts at the UCIHL meeting were of the view that the Court's understanding of the term *lex specialis* in this context is not clear. That is why it went on to discuss how the concurrent application to both areas of law should work in practice as regards the use of lethal force in both non-international conflicts and situations of occupation.

The meeting did not have on its agenda the use of force during hostilities in international conflicts, since the relationship between IHL and human rights law is not such a pressing issue in such conflicts. In a situation that is not one of occupation, a human rights treaty may not apply since the attacking state may not have jurisdiction due to lack of actual control of the territory,<sup>68</sup> although the Inter-American Commission has applied the American Declaration of the Rights and Duties of Man to the lethal use of force against persons outside the attacking state's jurisdiction.<sup>69</sup>

Since, in principle, human rights law does apply to all situations, including international conflicts where the attacking state has jurisdiction, then it is worth considering whether the ICJ's third category – that is, both human rights and IHL as *lex specialis* – could be meaningful.

The rules relating to combatant status in international conflicts are not only relatively clear, but also have a long history. As already mentioned, human rights law does not categorize people and does not concern itself as to whether there is an armed conflict or not.<sup>70</sup> It would make sense to recognize the categories of persons under IHL – that is, combatants vs. civilians – as *lex specialis* and therefore accept that an attack on a combatant in an international armed conflict

67 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, above note 40, § 106.

68 European Court of Human Rights: *Issa v. Turkey*, Judgment of 16 November 2004, §§ 68–74.

69 *Brothers to the rescue*, above note 21, at § 23; this case concerned the attack on a civilian plane in international air space; *Disabled Peoples International v. United States*, Application No. 9213, Admissibility Decision of 22 September 1987: this case concerned the bombing by US aircraft of a mental health hospital in Grenada before ground troops arrived. The case was declared admissible although a friendly settlement was subsequently reached.

70 The only “category” with which human rights law concerns itself is a situation in which a State has made a valid derogation.

is lawful. In the case of the European Convention on Human Rights, and provided that the state concerned made a statement of derogation,<sup>71</sup> then the exception of “lawful acts of war” would come into play in an international armed conflict. In the case of the other human rights treaties, attacks on combatants would not be regarded as “arbitrary”.

The specific IHL rules on when a combatant may not be attacked because he or she is *hors de combat* also reflect, in this author’s view, a straightforward instance of *lex specialis* for both international and non-international conflicts.<sup>72</sup> The important issue is whether human rights law adds extra conditions to the IHL prohibitions on attack, that is, in addition to the prohibition of attacking combatants *hors de combat* as now defined in IHL. As we have already seen, in the case of occupation and non-international armed conflicts, the answer is clearly in the affirmative in cases where such persons may be arrested. Could this apply to international armed conflicts? Theoretically, from the point of view of human rights law, there is no reason why not, provided that there is jurisdiction. It would make most sense in the case of civilians taking “a direct part in hostilities”, since it is unclear under IHL what this encompasses exactly. It would be more difficult, however, in the case of combatants. IHL treaties do not provide a rule that, in addition to the recognized cases of combatants *hors de combat*, a combatant may not be attacked if he or she may be arrested. However, in this author’s opinion, the reason for this absence should be looked at more carefully, in particular in the light of the old rule concerning the prohibition of assassination, in order to see whether the human rights rule is so very different from the original rules and philosophy of IHL.

## The prohibition of assassination

The recognized categories of *hors de combat*, in particular surrender, wounds, shipwreck and bailing out of aircraft in distress, presuppose that such a condition occurs during hostilities. In addition, Article 41 of Additional Protocol I refers to a person being *hors de combat* if he is in the power of the adverse party, provided that he abstains from a hostile act. This is normally understood as meaning someone who is detained or captured, but not a combatant still with his unit whilst hostilities are still occurring between the belligerents (i.e. whilst the armed conflict still exists).

These rules reflect the traditional concept of IHL, as developed by professional armies, that there was a code of honour between opposing professional soldiers. This principle prohibited “treachery”.<sup>73</sup> It is important to

71 A state would not want to be limited to the situations in which force can be used set forth in para. 2 of Article 2 of the ECHR (see p. 883 above of this paper). In practice, European states have not made such derogations in relation to the use of force against combatants in international conflicts abroad.

72 This is codified in Article 23(c)–(d) of the Hague Regulations 1907, Articles 41 and 42 Additional Protocol I 1977, Article 12 of Geneva Convention II (for armed conflicts at sea) and Common Article 3 for non-international conflicts.

73 Article 23 (b) of the Hague Regulations states that “it is especially forbidden ... to kill or wound treacherously individuals belonging to the hostile nation or army”.

note that “treachery” was not limited to the modern concept of “perfidy” as defined in Article 37 of Additional Protocol I, but included also the prohibition of assassination.

Several sources make this clear.

The Oxford Manual of 1880 states that it is forbidden

to make treacherous attempts upon the life of an enemy; as, for example, by keeping assassins in pay or by feigning to surrender.<sup>74</sup>

Oppenheim states that Article 23 (b) of the Hague Regulations prohibits any treacherous way of killing and wounding combatants. Accordingly: no assassin must be hired, and no assassination of combatants be committed; a price may not be put on the head of an enemy individual; proscription and outlawing are prohibited; no treacherous request for quarter must be made; no treacherous simulation of sickness or wounds is permitted.<sup>75</sup>

The seriousness with which assassination was viewed is reflected in the Lieber Code:

The law of war does not allow proclaiming either an individual belonging to a hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such intentional outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow murder committed in consequence of such proclamation, made by whatever authority. Civilised nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.<sup>76</sup>

This statement is not linked to perfidy. Although the statement refers to proclamations and murder by a captor, it should be remembered that in 1863 assassination by missiles and bombs from aircraft was not a technical possibility. Therefore it is the underlying reason, namely a lack of honour, that motivated the rule.

This is made clear by Westlake on his treatise on war published in 1907: killing individuals, outside the cases of fighting or military punishment to which they have made themselves liable, is killing persons who have had no reason to put themselves on their guard, and is therefore treacherous killing.<sup>77</sup>

The old British *Manual of Military Law*, which included the prohibition of assassination, defined it as

74 *Oxford Manual*, adopted by the Institute of International Law on 9 September 1880, Article 8 (b).

75 L. Oppenheim, *International Law, Vol. II, Disputes, War and Neutrality*, ed. H. Lauterpacht, 7th edn, Longman's, Green & Co., London, 1952, p.341, § 110.

76 *Instructions for the Government of Armies of the United States in the Field*, 1863, Article 148.

77 John Westlake, *International Law, Part II, War*, Cambridge University Press, Cambridge, 1907, p.75.

the killing or wounding of a selected individual behind the line of battle by enemy agents or partisans.<sup>78</sup>

If one looks at these old rules against the background of methods of warfare in those days, hostilities occurred primarily through direct close fighting and the use of sieges. It is obvious that arrest was not an option in such situations: capture was only possible if the person surrendered or was wounded in a way that he could not continue fighting. If one wished to kill combatants outside such situations, one would have to resort to assassination; but this was forbidden for the reason explained by Westlake above.

Let us now try to use this notion in modern conditions: hostilities now occur not only during battles on the ground but also from a distance by aircraft and missiles. Thus the prohibition of assassination under the old law, which was based on the fact that the normal mode of hostilities was to attack combatants during a ground battle, is no longer meaningful today. It is therefore doubtful that the rule prohibiting assassination of combatants still survives in modern IHL. The new British manual departs from the old one by stating that there is “no rule dealing specifically with assassination”.<sup>79</sup> The situation now, therefore, appears to be that unless a combatant has not yet been called up (i.e. is still a reservist), he or she can technically be attacked in any place at any time during an international armed conflict.<sup>80</sup>

In the context of non-international conflict and occupation, where the IHL rules are not so clear, we have seen that a person in territory under the control of government forces must, under human rights law, be arrested if this can be done without more risk for such forces than normal arrest procedures for dangerous persons. This can only occur in situations outside combat and only where the person concerned is close enough to be arrested. As we have seen, under the traditional law of war, killing combatants in such situations would have been considered an assassination. Is human rights law therefore so incompatible, at least with the original rules and philosophy of the law of war? In the view of this author, the specific rules of human rights law as they apply to the right to life, and as these have been interpreted in practice, are not incompatible.

During the fourth expert meeting on the meaning of “direct participation in hostilities” held by the ICRC and the Asser Institute, the ICRC proposed a rule that would mirror the human rights rule, but by reference to the fact that killing persons when they could be arrested does not fall within military necessity.<sup>81</sup> There is a difficulty with relying on a reference to military necessity, since this notion is usually an underlying principle rather than a rule, unless it is specifically referred

78 *The Law of War on Land, Part III of the Manual of Military Law*, War Office, 1958, § 115.

79 *The Manual of the Law of Armed Conflict*, UK Ministry of Defence, Oxford University Press, Oxford, 2004, § 5.13.

80 This author persists in her minority view that a combatant on leave in a different country and well outside the theatre of war should expect to be left alone. However, probably due to the demise of notions of honour and chivalry, this is, it seems, no longer accepted by the majority, since modern manuals do not mention such an exception to the ability to attack.

81 Above note 38, commentary to section D.IX.

to in a rule. The provisions under IHL that state that a civilian loses immunity from attack when taking a direct part in hostilities do not mention such an exception. However, it is clear that attacking a person when he can be arrested is indeed not necessary from a military point of view. Therefore, in this author's view, either such a rule should be proposed, or the definition of taking "a direct part in hostilities" be very narrowly defined to include only persons (whether belonging to an armed group or not) who are in the very process of shooting, firing a missile or similar, or by reference to the parallel application of human rights law. It is submitted that the last option makes most sense as it reflects existing law.

## Conclusion

The concurrent applicability of human rights law and IHL to hostilities in armed conflict does not mean that the right to life must, in all situations, be interpreted in accordance with the provisions of IHL. As has already been shown, IHL is not always clear and a simple reference to IHL provisions will not suffice. It is this author's view that any law needs to be interpreted in the light of the aim and purpose of that law. Such a teleological interpretation is not the same as relying on a dogma associated with a particular branch of law. Thus although it is true that the aim and purpose of IHL is to regulate armed conflicts, it is dogma to state that only IHL can be relevant. It would also be dogma to state that human rights law was only made for peacetime – the very provisions of the human rights treaties show that this is not accurate. On the other hand, what is true is that both branches of law try to protect people from unnecessary violence to the degree possible whilst respecting the perceived needs of society. In the case of IHL, it is the need to ensure that the armed forces are not frustrated in their attempt to control a situation of rebellion or to win an international conflict. In the case of human rights law, it is the need to keep order and harmony within society. Both bodies of law are aimed at preventing unnecessary or disproportionate deaths, thus prohibiting acts motivated by vengeance, megalomania or cruelty.

As long as any sort of dogma is avoided, then the concurrent application of both branches of law should not create difficulty. A simplistic attribution to non-international conflicts and occupation of rules that only make sense in international conflicts would be such a dogma. Clearly, notions of formal combatant status and equality between the parties in every respect are inappropriate for non-international conflicts, since states have simply refused to accept these. A pragmatic and legally accurate approach is therefore to see how human rights law applies. Specific, clear and well-established rules of IHL can be considered to be *lex specialis*. However, where there is any kind of doubt, or where the rules are too general to provide all the answers, then human rights law will fill the gap, provided that this law is not incompatible with the overall fundamental aim and purpose of IHL. It is submitted that the human rights law relating to the right to life is suitable to supplement and interpret IHL rules relating to the use of

force for non-international conflicts and occupation, as well as the law relating to civilians taking a “direct part in hostilities”. The restrictions imposed, as described earlier in this article, are not at all incompatible with the original fundamental spirit of IHL, namely the desire to prevent unnecessary deaths. Let us hope that this spirit survives.