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# The Alchemy of the Right to Life during the Conduct of Hostilities: A Normative Approach to Operationalizing the ‘Supreme Right’

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## Abstract

*The prevailing approach to the application of the right to life during the conduct of hostilities holds that the arbitrariness of loss of life in terms of international human rights law (IHRL) is determined by compliance with international humanitarian law (IHL). Through application of the interpretive principle of systemic integration, an alternative ‘normative approach’ is advanced. The normative approach is premised on a contextual consideration of the normative content and underlying values of the right to life rather than on the more mechanical approaches to its interpretation. The outcome reached that is based on this approach has two profound distinctions to that of the prevailing approach: (i) not all loss of life where IHL was not strictly complied with is ipso jure arbitrary and, conversely, (ii) at times, compelling factors necessitate a recalibration of arbitrariness along a spectrum between IHRL and IHL, with the result that loss of life may amount to arbitrary deprivation of life even when IHL is fully complied with. In the context of quintessential military operations, a two-pronged normative test is advanced to determine the circumstances in which non-compliance with IHL will result in arbitrary deprivation of life.*

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The operationalization of the right to life during the conduct of hostilities is a question that Christof Heyns and I frequently debated, starting in August 2010, soon after his appointment as United Nations special rapporteur on extrajudicial, summary or arbitrary executions. At the time, neither of us knew that he would return to this issue multiple times in various capacities (as we shall see). Christof generally endorsed what I term the prevailing view, of which I am highly critical. However, based on our frequent discussions, I am aware that he did so with a fair amount of circumspection. I value the opportunity to present my analysis to a broader audience and sincerely hope that, while my conclusions may not necessarily have swayed Christof, he would have found value in the rigour of the analysis. This contribution is dedicated in his memory and illustrative of his lasting contribution to our understanding of the right to life.

# 1 Introduction

The right to life, as articulated in the International Covenant on Civil and Political Rights (ICCPR) provides: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'<sup>1</sup> This right has both negative and positive dimensions, requiring states, on the one hand, to refrain from causing arbitrary loss of life and, on the other, to adopt a robust regulatory framework and take positive action to protect life.<sup>2</sup> In contrast to the right to life, international humanitarian law (IHL) includes a well-established and more permissive framework for the lawful use of lethal force during armed conflict. The tension that exists between the scope for lawful use of lethal force in the law enforcement and armed conflict paradigms is the source of numerous challenges. This article focuses squarely on one such challenge: how to assess whether loss of life during the conduct of hostilities amounts to arbitrary deprivation of life. This is an issue of immense practical importance. The right to life 'is a foundational and universally recognised right, applicable at all times and in all circumstances. It has been called the "supreme right".'<sup>3</sup> Yet we have very little critical debate on the operation of the right to life during the conduct of hostilities – the space within which life is cheapest.<sup>4</sup>

When considering the legality of the use of lethal force by state agents, it is the negative obligation of the right to life that is at play.<sup>5</sup> The Human Rights Committee has affirmed that deprivation of life 'involves intentional or otherwise foreseeable and preventable life-terminating harm or injury, caused by an act or omission'.<sup>6</sup> Moreover, the scope of the negative obligations extends to reasonably foreseeable threats to life

<sup>1</sup> International Covenant on Civil and Political Rights (ICCPR) 1966, 999 UNTS 171, Article 6(1).

<sup>2</sup> ECtHR, *Osman Centre for Legal Resources on Behalf of Valentin Câmpeanu v. Romania*, Appl. no. 47848/08, Judgment of 17 July 2014, para. 130; ECtHR, *Giuliani and Gaggio v. Italy*, Appl. no. 23458/02, Judgment of 25 August 2009, para. 208 (all ECtHR decisions are available at <http://hudoc.echr.coe.int/>); IACtHR, *Myrna Mack-Chang v. Guatemala*, Judgment (Merits, Reparations and Costs), 25 November 2003, para. 92 (decision available at [www.corteidh.or.cr/index.php/en/jurisprudencia](http://www.corteidh.or.cr/index.php/en/jurisprudencia)); see further generally Harpur, 'The Evolving Nature of the Right to Life: The Impact of Positive Human Rights Obligations', 9 *University of Notre Dame Australia Law Review* (2007) 95; Linos-Alexander Sicilianos, 'Preventing Violations of the Right to Life: Positive Obligations under Article 2 of the ECHR', 3 *Cyprus Human Rights Law Review* (2014) 117.

<sup>3</sup> UN General Assembly, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. A/71/372, 2 September 2016, para. 18, quoting Human Rights Committee, General Comment no. 6, 30 April 1982, para. 1.

<sup>4</sup> A notable exception is Doswald-Beck 'The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?', 864 *International Review of the Red Cross (IRRC)* (2006) 881. Louise Doswald-Beck identifies what I term in this article the 'prevailing approach': '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' (at 882).

<sup>5</sup> The cumulative criteria as reflected below are provided for in Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, UN Doc. A/HRC/26/36, 1 April 2014, paras 55–74. Christof Heyns lists the requirement that lethal force may only be used for a 'legitimate objective' separately. However, this requirement is adequately captured by the notion of proportionality.

<sup>6</sup> Human Rights Committee, General Comment no. 36, Doc. CCPR/C/GC/36, 3 September 2019, para. 6.

and life-threatening situations that can result in loss of life.<sup>7</sup> This contribution focuses more narrowly on determining whether actual loss of life is arbitrary in the context of the conduct of hostilities during armed conflict. Much of the reasoning can be extended to instances of threats to life where there is no resulting loss of life. However, the narrower focus is justified, as in the context of the conduct of hostilities where the application of the right to life is particularly acute in relation to actual loss of life. The formulation of the right to life under the ICCPR is used as the basis for discussion. However, the extent to which the proposed normative approach can be transposed to other articulations of the right to life, as well as to other areas of concern in the co-application of international human rights law (IHRL) and IHL in the context of armed conflict, is also addressed.

The article consists of three substantive sections. The first section introduces the use-of-lethal-force frameworks in IHRL and IHL, whereafter contesting approaches to the interpretation of the International Court of Justice's (ICJ) advisory opinion in *Threat or Use of Nuclear Weapons*, as they relate to the application of the right to life during the conduct of hostilities, are canvassed.<sup>8</sup> This section culminates in an expression and critique of the prevailing approach to determining whether loss of life during the conduct of hostilities is arbitrary. The second section endorses the 'systemic integration school' as the appropriate approach to operationalizing the prohibition of arbitrary deprivation of life during the conduct of hostilities. The emphasis in this section is on the application of the interpretive principle of systemic integration and is premised on a reinterpretation of the *Nuclear Weapons* advisory opinion. The final section addresses the interpretation of arbitrary deprivation of life during the conduct of hostilities through the proper application of the principle of systemic integration. While it is acknowledged that generally loss of life as a result of IHL-compliant operations will not be arbitrary, and loss of life as a result of operations that violate IHL will be arbitrary, it is argued that this will not always be the case. This section concludes by advancing a novel 'normative approach' to operationalizing the right to life during the conduct of hostilities and proposes a two-pronged test to assess whether a violation of IHL with resulting loss of life amounts to arbitrary deprivation of life. A normative approach is one in terms of which the application of the right to life is significantly determined through contextual consideration of the normative content and underlying values of the right itself rather than through the more mechanical approaches to its interpretation.

There is a range of contested issues regarding the application of IHRL *ratione loci* as well as *ratione personae*, and key examples include the extent of extraterritorial application of human rights obligations and the nature and extent of human rights obligations incumbent upon non-state actors. While these debates have bearing on many of the practical examples relied upon in this article, to maintain focus on the core issues under consideration, it is assumed throughout that the scenarios under discussion are

<sup>7</sup> *Ibid.*, para. 7.

<sup>8</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226, para. 25.

regulated in terms of IHL and IHRL, which apply to the relevant context and parties. In a further effort to maintain sharp focus on the core issues under discussion, the emphasis is on the right to life during the conduct of hostilities as opposed to the broader context of armed conflict.

## 2 Situating the Debate

In the law enforcement paradigm, the use of lethal force will only be non-arbitrary where several cumulative criteria are met: (i) a sufficient legal basis for such use of force must be provided in domestic law that is published and accessible;<sup>9</sup> (ii) the use of force must be absolutely necessary to achieve a legitimate objective – this has two implications: use of force is a last resort and, where in fact it is needed, graduated force must be applied;<sup>10</sup> (iii) precautions must be taken at all times to prevent a situation from materializing in which the use of force becomes absolutely necessary;<sup>11</sup> and (iv) the level of force must be proportionate to the interest being protected.<sup>12</sup> In the law enforcement paradigm, the lawful use of lethal force is a last resort, justifiable only in the most extraordinary circumstances where all other measures and safeguards have broken down – it can only be used when lesser forms of force are insufficient to protect life.<sup>13</sup>

During the conduct of hostilities, the use of lethal force is a primary objective and a key indicator of success or failure. To this end, IHL provides a considerably more

<sup>9</sup> *Giuliani and Gaggio*, *supra* note 2, para. 209; ECtHR, *Makaratzis v. Greece*, Appl. no. 50385/99, Judgment of 20 December 2004, paras 57–59; African Commission on Human and Peoples' Rights, General Comment no. 3, para. 27, adopted during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights, 4 to 18 November 2015 in Banjul, The Gambia.

<sup>10</sup> ECtHR, *Nachova and Others v. Bulgaria*, Appl. nos. 43577/98 and 43579/98, Judgment of 6 July 2005, para. 102; African Commission General Comment no. 3, *supra* note 9, para. 27; General Comment no. 36, *supra* note 6, para. 12. There is some debate whether the criteria for lawful use of lethal force differs between the European Convention on Human Rights (ECHR) and that established by the ICCPR as well as other regional human rights instruments. The issue arises because the ECHR's definition of the right to life does not turn on the notion of 'arbitrary deprivation of life' but instead provides for a more absolutely defined right, which is subject to listed exceptions and limited derogation (see Arts 2 and 15). These exceptions, as opposed to limited derogations, are limited to instances where the measure of force 'is no more than absolutely necessary'. Jordan Paust has commented, for example, that 'the "absolutely necessary" standard used in *McCann* is clearly different from the "arbitrarily deprived" standard used in the International Covenant'. See Paust, 'The Right to Life in Human Rights Law and the Law of War', 65 *Saskatchewan Law Review* (2002) 411, at 417. However, the preponderance of authority suggests that the application of the ECHR does not result in a materially different approach to the use of lethal force. Moreover, as Heyns' report illustrates, authority from the European Court of Human Rights (ECtHR) bolsters the framework for the use of lethal force that exists within the universal system. See Human Rights Council, *supra* note 5, paras 55–74.

<sup>11</sup> ECtHR, *McCann and Others v. United Kingdom*, Appl. no. 18984/91, Judgment of 27 September 1995, para. 150; *Nachova*, *supra* note 10, para. 102; ECtHR, *Ergi v. Turkey*, Appl. no. 23818/94, Judgment of 28 July 1998, para. 79.

<sup>12</sup> Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 7 September 1990, Principles 5 and 9; *Giuliani and Gaggio*, *supra* note 2, para. 209; *Nachova*, *supra* note 10, para. 102; General Comment no. 36, *supra* note 6, para. 12.

<sup>13</sup> General Comment no. 36, *supra* note 6, para. 12.

permissive framework for the use of lethal force, which is largely defined inversely – that which is not prohibited is permissible.<sup>14</sup> This framework is reinforced by three discrete sets of norms: (i) those that establish who may be targeted, by whom, when, how and where, which includes the core principles of distinction and proportionality as well as many norms that flow from these;<sup>15</sup> (ii) those that define which instances of the use of lethal force are unlawful – for example, ‘wilful killing’ is a grave breach of the Geneva Conventions, and murder amounts to a violation of the fundamental guarantees of Additional Protocol I; in contrast to the first category, this category of norms actively defines instances of unlawful use of lethal force;<sup>16</sup> and (iii) those that provide for combatant immunity: those who are deemed ‘combatants’ (in the technical sense) during an international armed conflict may engage in licit acts of war, including intentionally killing enemy forces, for which they are not liable for prosecution.<sup>17</sup>

In *Nuclear Weapons*, the ICJ addressed the interpretation of arbitrary deprivation of life, as per the right-to-life provision of the ICCPR, during the conduct of hostilities:

In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.<sup>18</sup>

Three distinct points can be extrapolated from the Court’s statement: (i) both IHL and IHRL apply during armed conflict; (ii) in these circumstances, IHL, which the Court

<sup>14</sup> A. Quintin, *The Nature of International Humanitarian Law: A Permissive or Restrictive Regime?* (2020), at 253–288.

<sup>15</sup> International humanitarian law (IHL) is often envisioned as consisting of two components, one dealing with humanitarian principles, which are aimed at shielding the innocent from the effects of armed conflict, and the other dealing with the conduct of hostilities, which is aimed precisely at determining who may be targeted, by whom, when, how and where. A systematic overview of the operational law is beyond the scope of this discussion. For comprehensive treatment of the topic, see Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2016).

<sup>16</sup> Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 1977, 1125 UNTS 3, Arts 11, 75, 85; Additional Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts 1977, 1125 UNTS 609; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I) 1949, 75 UNTS 31, Art. 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II) 1949, 75 UNTS 85, Art. 51; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III) 1949, 75 UNTS 135, Art. 130; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) 1949, 75 UNTS 287, Art. 147.

<sup>17</sup> This proposition is widely supported, see, e.g., M. Sassòli, A.A. Bouvier and A. Quintin, *How Does Law Protect in War?* (3rd edn, 2011), at 177; Thorburn, ‘Soldiers as Public Officials: A Moral Justification for Combatant Immunity’, 32 *Ratio Juris* (2019) 395, at 395–396. There is, however, some debate as to the scope of combatant immunity as it relates to licit acts of war, see, e.g., A. Clapham, *War* (2021), at 265–279.

<sup>18</sup> *Nuclear Weapons*, *supra* note 8, para. 25.

deemed the *lex specialis*, is the dominant framework to regulate at least parts of the conduct of hostilities; and (iii) right-to-life violations may occur during armed conflict, but the normative assessment is to be conducted with reference to IHL. While the first point has, in the words of David Kretzmer, Rotem Giladi and Yuval Shany, become part of the ‘legal orthodoxy in international law’,<sup>19</sup> the second point has led to relentless debate.<sup>20</sup> Finally, the normative assessment of the right to life during the conduct of hostilities, which is the focus of this article and is premised on contextual consideration of the normative content and underlying values of the right itself, has largely escaped meticulous scholarly attention.

The ICJ has since touched upon the issue of the relationship between IHL and IHRL on two subsequent occasions: in the advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and in *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*.<sup>21</sup> There is a tendency among commentators to read into these latter two pronouncements a change of approach by the Court – specifically, a disavowal of the *lex specialis* approach.<sup>22</sup> However, Daniel Bethlehem is correct in his assertion that the ‘high level of generality of the Court’s statement on the relationship between IHL and HRL’ in the *Construction of a Wall* opinion, together with its failure to provide clarity on this relationship at the operational level, renders this decision less useful.<sup>23</sup> The salient point being that in *Nuclear Weapons* the Court discussed, though in little detail, the operation of an identified right, the right to life in the ICCPR, in the context of the conduct of hostilities and the use of a specific weapon, not IHL in the broad sense. In the *Construction of a Wall* opinion, the Court’s discussion is more abstract as it focuses on ‘the relationship between international humanitarian law and human rights law’ in the broad sense.<sup>24</sup> In *Armed Activities*, the Court quotes and adopts the approach taken in the *Construction of a Wall* opinion without adding any further clarity.<sup>25</sup> No departure from *Nuclear Weapons* is discernible, particularly as the Court in the *Construction of a Wall*

<sup>19</sup> Kretzmer *et al.*, ‘Introduction: International Humanitarian Law and International Human Rights Law: Exploring Parallel Application’, 40 *Israel Law Review (ILR)* (2007) 306, at 306.

<sup>20</sup> In 2005, Noam Lubell had already concluded: ‘While there might still be pockets of resistance to this notion, it is suggested here that the resisters are fighting a losing battle and should lay down their arms and accept the applicability of human rights law in times of armed conflict.’ Lubell, ‘Challenges in Applying Human Rights Law to Armed Conflict’ (2005) 87 *IRRC* 737, at 738. Similarly, Louise Doswald-Beck commented during 2006 that ‘[i]t 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’. Doswald-Beck, *supra* note 4, at 881.

<sup>21</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004) 136; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Reports (2005) 168.

<sup>22</sup> See, e.g., D.P. Murray, *Practitioners’ Guide to Human Rights Law in Armed Conflict* (2016), 4.1.2; Schabas, ‘Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum’, 40 *ILR* (2007) 593, at 596.

<sup>23</sup> Bethlehem, ‘The Relationship between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict’, 2 *Cambridge Journal of International and Comparative Law* (2013) 180, at 185–186, 193.

<sup>24</sup> *Construction of a Wall*, *supra* note 21, para. 106.

<sup>25</sup> *Armed Activities*, *supra* note 21, para. 216.

opinion quoted the relevant passage from *Nuclear Weapons* with implicit endorsement, and, as mentioned, the Court in *Armed Activities* quoted back to the *Construction of a Wall* opinion.<sup>26</sup> The absence of the *lex specialis* terminology in the *Construction of a Wall* opinion and in *Armed Activities* can be better explained by the level of abstraction in the Court's discussion; as several commentators have pointed out, *lex specialis* is not a useful tool through which to determine priority between regimes of law as opposed to norms belonging to different regimes.<sup>27</sup> Only in *Nuclear Weapons* did the Court discuss norms rather than regimes.

### A Contesting Approaches to the ICJ's Interpretation of the Right to Life during the Conduct of Hostilities

Two main schools of thought emerged on the position of the ICJ regarding the right to life during the conduct of hostilities expressed in *Nuclear Weapons*: (i) the norm conflict school and (ii) the systemic integration school.<sup>28</sup> The norm conflict school is premised on the existence of a norm conflict between the right to life and the IHL lethal-force framework applicable during the conduct of hostilities. Such a norm conflict arises if 'one norm constitutes, has led to, or may lead to, a breach of the other'.<sup>29</sup> This school reads the finding as one that relies on the *lex specialis* designation of IHL as a technique to solve the apparent norm conflict. Contributions from this school tend to focus on the appropriateness or inappropriateness of *lex specialis* to solve such norm conflicts as well as debating the merits of alternative techniques including *lex posterior* and *lex superior*.<sup>30</sup> Iain Scobbie has identified a 'disappointment' among many commentators in the inability of *lex specialis* 'to provide a general solution [to the relationship between IHL and IHRL] because its application is dependent on context rather than axiological principle'.<sup>31</sup>

The systemic integration school, on the other hand, suggests that rules of treaty interpretation provide the tools necessary to interpret and apply the right to life during armed conflict in a manner that gives effect to the IHL use-of-lethal-force framework, while ensuring the continued operation of the right to life. The crux of this approach is that the notion of arbitrariness imports sufficient flexibility into the right to life to

<sup>26</sup> *Construction of a Wall*, *supra* note 21, para. 105.

<sup>27</sup> See, e.g., Schabas, *supra* note 22, at 597.

<sup>28</sup> A range of additional approaches have been advocated for in relation to the abstract relationship between international human rights law (IHRL) and IHL. However, these are the dominant approaches in regard to the application of the right to life during the conduct of hostilities. For an excellent and current overview of the *Nuclear Weapons* opinion's reliance in *lex specialis*, see Shany, 'Co-application and Harmonization of IHL and IHRL: Are Rumours about the Death of *lex specialis* Premature?', in R. Kolb, G. Gaggioli and P. Kilibarda, *Research Handbook on Human Rights and Humanitarian Law: Further Reflections and Perspectives* (2022) 9.

<sup>29</sup> J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003), at 175–176.

<sup>30</sup> International Law Commission (ILC), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, 13 April 2006, at 410 (finalized by Martti Koskenniemi).

<sup>31</sup> Scobbie, 'Principle or Pragmatics? The Relationship between Human Rights Law and the Law of Armed Conflict', 14(3) *Journal of Conflict and Security Law (JCSL)* (2009) 449, at 456.

accommodate exceptions to the right to life, including armed conflict.<sup>32</sup> In terms of this approach, there is no norm conflict. The principle at play is that of systemic integration, which compels an interpreter to take other norms of international law into account in the interpretation of a given norm.<sup>33</sup> In its study entitled *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, the International Law Commission appears to support the systemic integration school:

*Lex specialis* did hardly more than indicate that though it might have been desirable to apply only human rights, such a solution would have been too idealistic, bearing in mind the speciality and persistence of armed conflict. So the Court created a systemic view of the law in which the two sets of rules related to each other as today's reality and tomorrow's promise, with a view to the overriding need to ensure 'the survival of a State'.<sup>34</sup>

The norm conflict school tends to emphasize the Court's reliance on *lex specialis* and largely ignores the Court's integration of IHL in the interpretation of the right to life. In contrast, the systemic integration school emphasizes the Court's integration of IHL but identifies very little relevance to the explicit designation of IHL as *lex specialis*. In practical terms, these approaches are not mutually exclusive but can be applied sequentially – where attempts at harmonization fail, the interpreter may shift to conflict resolution. The question whether indeed a norm conflict exists between the right to life as expressed in the ICCPR and the IHL lethal-force framework depends significantly on the framing of the right and its proper interpretation, a matter that is illuminated by the drafting history.

The first formal proposal for the formulation of the right to life in the ICCPR was made during 1948: 'No one shall be deprived of his life save in the execution of the sentence of a court following on his conviction of a crime for which this penalty is provided by law.'<sup>35</sup> This formulation was accompanied by a list of 12 possible limitations, including 'killing by a member of the military in time of war' and 'suppression of rebellion or riots'.<sup>36</sup> As this was prior to the adoption of common Article 3 to the Geneva Conventions, the first mentioned exception applied to international armed conflicts, whereas the second mentioned exception covered non-international armed conflicts. Between 1948 and 1952, various proposals were made that specifically carved out an exception for loss of life during armed conflict.<sup>37</sup> However, by 1952, the USA's proposal

<sup>32</sup> D'Aspremont and Tranchez, 'The Quest for a Non-Conflictual Coexistence of International Human Rights Law and Humanitarian Law: Which Role for the *Lex Specialis* Principle?', in R. Kolb and G. Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (2014) 223, at 238; Todeschini, 'The Impact of International Humanitarian Law on the Principle of Systemic Integration', 23(3) *JCSL* (2018) 359; Todeschini, 'The ICCPR in Armed Conflict: An Appraisal of the Human Rights Committee's Engagement with International Humanitarian Law', 35(3) *Nordic Journal of Human Rights* (2017) 203.

<sup>33</sup> Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331, Art. 31(3)(c).

<sup>34</sup> ILC, *supra* note 30, at 404.

<sup>35</sup> United Nations Commission on Human Rights, Report of the Third Session of the Commission of Human Rights, 3rd Session, Doc. E/800 (1948), Art. 5(6); see M.J. Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (1987), at 115.

<sup>36</sup> Commission of Human Rights, *supra* note 35; Bossuyt, *supra* note 35, at 116.

<sup>37</sup> Bossuyt, *supra* note 35, at 115–119.



of the 'arbitrary' standard was adopted in committee, and there was a clear break away from the original approach of including listed exceptions.<sup>38</sup> Considering that it was also the USA that was originally responsible for the suggestion of an armed conflict exception, it seems self-evident that, in proposing the arbitrary standard instead, they considered it to adequately encapsulate an implicit armed conflict exception.<sup>39</sup> Moreover, the suggested armed conflict exception was widely supported. In fact, it was patently the function of the arbitrary standard to allow the flexibility to accommodate killings in the context of armed conflict, amongst other exceptional contexts. This compels a conclusion that 'arbitrary deprivation' of life is sufficiently flexible to accommodate IHL-compliant use of lethal force during the conduct of hostilities. No norm conflict exists between the right to life as formulated in the ICCPR and the IHL lethal-force framework. Accordingly, the principle of systemic integration provides the appropriate means by which the IHL use-of-lethal-force framework is to be taken into account in the determination whether a particular loss of life is arbitrary.<sup>40</sup>

## B The Prevailing 'If-Then' Approach to Determining Arbitrary Deprivation of Life during the Conduct of Hostilities

Bethlehem distils the proposition from the previously quoted dicta in *Nuclear Weapons*, that 'a violation of the relevant IHL rule will *ipso jure* also constitute a violation of the relevant Covenant' (Article 6 of the ICCPR).<sup>41</sup> Following the same reasoning, Christof Heyns has argued that, 'to the extent that any of these rules of IHL are not followed when autonomous weapons deploy lethal force, the right to life is violated'.<sup>42</sup> Commenting on the implications of the *Nuclear Weapons* opinion for the right to life in the context of drone strikes during armed conflict, Heyns and colleagues suggest, 'where a state targets an individual in a drone strike that falls within an armed conflict, whether that state has violated its obligation not to arbitrarily deprive that individual

<sup>38</sup> The USA, in fact, first proposed this approach during 1949, but it did not gain traction until 1952. United Nations Commission on Human Rights, United States: Proposal as a substitute for Article 5, 5th Session, Doc. E/ON.4/170/Add.5, (1949). See Bossuyt, *supra* note 35, at 116. The initial approach proposed for the ICCPR is reflected in Article 2 of the ECHR.

<sup>39</sup> David Weissbrodt and Beth Andrus' reflection on the scope of the American Declaration's right-to-life provision in armed conflict sketches the issue bluntly: 'It seems difficult to imagine that the American Declaration forbids the taking of soldiers' lives in combat. It seems equally implausible, however, that the American Declaration sets no limits to the killing of innocent people during armed conflict.' See Weissbrodt and Andrus, 'The Right to Life during Armed Conflict: *Disabled Peoples' International v. United States*', 29 *Harvard International Law Journal* (1988) 59, at 69.

<sup>40</sup> VCLT, *supra* note 33, Art. 31(3)(c).

Bethlehem, *supra* note 23, at 186.

<sup>41</sup> *Ibid.*; see also Jackson and Akande, 'The Right to Life and the *Jus Ad Bellum*: Belligerent Equality and the Duty to Prosecute Acts of Aggression', 71 *International and Comparative Law Quarterly (ICLQ)* (2022) 453, at 454 (where these authors state: 'Indeed, it had been accepted that, in certain cases, whether or not a violation of human rights law had occurred in situations of armed conflict was to be determined by reference to whether the act in question constituted a violation of IHL'). This view is also endorsed by Elizabeth Wicks. See E. Wicks, *The Right to Life and Conflicting Interests* (2010), at 81.

<sup>42</sup> Heyns, 'Autonomous Weapons in Armed Conflict and the Right to a Dignified Life: An African Perspective', 33(1) *South African Journal on Human Rights* (2017) 52, at 52.

of their life depends on whether the state has acted consistently with ... IHL rules'.<sup>43</sup> Finally, the African Commission on Human and Peoples' Rights General Comment no. 3 provides that '*any violation of international humanitarian law resulting in death, including war crimes, will be an arbitrary deprivation of life*'.<sup>44</sup> These views are reflective of the prevailing approach to the operation of the right to life to situations primarily regulated by IHL. It amounts to an axiomatic 'if-then' approach – if IHL is violated during the use of lethal force, then the killing is arbitrary. Conversely, if IHL is strictly complied with, resulting loss of life is not arbitrary. This approach is premised on an understanding of arbitrariness in terms of which illegality of actions causally linked to loss of life is arbitrary.

The if-then approach is widely held to be justified as the approach endorsed by the ICJ in *Nuclear Weapons*.<sup>45</sup> The supposed suitability of the approach is often illustrated through confirmatory examples such as the indiscriminate use of lethal force during armed conflict resulting in loss of civilian life – a clear violation of the right to life. The unsuitability of this approach is grounded both in the absence of a strong legal basis for it as well as the unwarranted practical consequences to which it leads, including that (i) it sacrifices the normative value of the right to life and the IHL framework in favour of formulaic simplicity predicated upon a jigsaw puzzle understanding of the integration of IHRL and IHL,<sup>46</sup> (ii) in a very real sense, this approach renders soldiers the agents of states responsible for violations of the 'supreme right' when in fact they are guilty of more technical violations of IHL, which have their own sanctions and consequences;<sup>47</sup> and (iii) this approach leaves no room for the determination that a particular loss of life during hostilities is arbitrary notwithstanding strict compliance with applicable IHL, nor the determination that a particular loss of life during hostilities is not arbitrary even though IHL was not fully complied with.<sup>48</sup> The if-then approach appears to be motivated primarily by the dual aims of adopting a mechanical approach with reproducible results, while ensuring the maximum feasible role and

<sup>43</sup> Heyns *et al.*, 'The Right to Life and the International Law Framework Regulating the Use of Armed Drones', in D. Akande *et al.* (eds), *Human Rights and 21st Century Challenges: Poverty, Conflict, and the Environment* (2020) 153, at 183.

<sup>44</sup> African Commission General Comment no. 3, *supra* note 9, para. 32 (emphasis added).

<sup>45</sup> Bethlehem makes this point explicitly. See Bethlehem, *supra* note 23, at 186. However, this reasoning underpins the if-then approach that is widely endorsed. See, e.g., Heyns, *supra* note 43, at 52; Jackson and Akande, *supra* note 41, at 454; Wicks, *supra* note 41, at 81.

<sup>46</sup> As Martti Koskeniemi has commented, '*Legality of Nuclear Weapons* was a "hard case" to the extent that a choice had to be made by the Court between different sets of rules none of which could fully extinguish the others'. ILC, *supra* note 30, para. 104; see also paras 413–414.

<sup>47</sup> While the breach of the right to life is attributed to the state, the individual responsible for such a breach may be subjected to far-reaching consequences. Indeed, the positive obligations to the right to life of the state in question will often necessitate investigation and prosecution of the individual.

<sup>48</sup> Another area in which more recent developments point to the opposite of this conclusion is the suggestion that violations *jus ad bellum* can render loss of life arbitrary notwithstanding full compliance with the *jus in bello*. See General Comment no. 36, *supra* note 6, para. 70; Shany and Heyns, 'Human Rights, Deprivation of Life and National Security: Q&A with Christof Heyns and Yuval Shany on General Comment 36', *Just Security* (4 February 2019), available at [www.justsecurity.org/62467/human-life-national-security-qa-christof-heyns-yuval-shany-general-comment-36/](http://www.justsecurity.org/62467/human-life-national-security-qa-christof-heyns-yuval-shany-general-comment-36/); Jackson and Akande, *supra* note 41.

impact for the right to life. This builds on the widely held yet contested claim that ‘the primacy of human rights law over all other regimes of international law is a basic and fundamental principle’.<sup>49</sup> Paradoxically, by prioritizing mechanical function over normative value, the if-then approach is counterproductive to these aims. It implies that strict compliance with IHL renders loss of life *ipso jure* non-arbitrary, thus diminishing the asserted primacy of IHRL.

### 3 Systemic Integration and the Right to Life during the Conduct of Hostilities

The principle of systemic integration is reflected in the Vienna Convention on the Law of Treaties (VCLT): ‘There shall be taken into account, together with the context: ... any relevant rules of international law applicable in the relations between the parties.’<sup>50</sup> Where the question for determination is compliance with the right to life during the conduct of hostilities, the right to life is the source under interpretation, and the IHL framework amounts to additional ‘relevant rules’. In principle, Article 31(3) (c) of the VCLT applies in both directions such that, where any of the norms that comprise the IHL use-of-lethal-force framework are the norms under interpretation, the right to life may, theoretically, amount to additional ‘relevant rules’. However, there is a subtle but important distinction between these instances. The arbitrariness of loss of life during armed conflict as per the right to life cannot be determined without reference to IHL. On the other hand, compliance with the IHL use-of-lethal-force framework is not dependent on IHRL. Accordingly, the present analysis focuses on instances in which the right to life is the source under interpretation.

Only once it has been determined that the rules in question – the IHL lethal-force framework – are both ‘applicable’ and ‘relevant’ can consideration be given to how the principle is applied.<sup>51</sup> Applicability requires that these rules, which may emanate from any classical source of international law, be binding upon the parties in question.<sup>52</sup> To satisfy the requirement of relevance, Philippe Sands suggests the rules must ‘relate in

<sup>49</sup> J. Oloka-Onyango and D. Udagama, Globalization and Its Impact on the Full Enjoyment of Human Rights, UN Doc. E/CN.4/Sub.2/2000/13, 15 June 2000, para. 63. The claim is contested, as in international law, outside of peremptory norms, no rights or obligations has any ‘intrinsic priority’ over other rights or obligations. See ILC, *supra* note 30, para. 414. Rosalyn Higgins has commented, in response to the notion that some norms of international law bear a ‘higher normativity’ than ordinary norms, ‘[t]o assert an immutable core or norms which remain constant regardless of the attitudes of states is at once to insist upon one’s own personal values (rather than internationally shared values) and to rely essentially on natural law in doing so. This is a perfectly possible position, but it is not one I take’. R. Higgins, *Problems and Process: International Law and How We Use It* (2000), at 21; As Dinah Shelton states, ‘[t]he asserted primacy of all human rights law has not been reflected in state practice’. Shelton, ‘Normative Hierarchy in International Law’, 100(2) *American Journal of International Law* (2006) 294, at 294.

<sup>50</sup> Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331, Art. 31(3)(c).

<sup>51</sup> Sands, ‘Treaty, Custom and the Cross-fertilization of International Law’, 1 *Yale Human Rights and Development Law Journal* (1998) 85, at 102.

<sup>52</sup> Sands, *supra* note 51, at 102; M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2008), at 433.

some way to the treaty norm being interpreted'.<sup>53</sup> The relative laxness of the threshold of this relationship is justified by the fact that, in the context of other treaties, had the relationship been such that the treaties related 'to the same subject matter', the principle of *lex posterior derogat legi priori* would instead have applied.<sup>54</sup> Moreover, the extent to which a source is relevant influences the extent to which it will be taken into account.

As IHRL continues to apply during armed conflict, norms belonging to the IHL use-of-force framework are clearly relevant to the right to life in the context of armed conflict. Indeed, the European Court of Human Rights (ECtHR) endorsed this in the *Hassan* case, referring to its preceding decision in *Varnava and Others v. Turkey*, wherein it implied that, in *Varnava*, it gave expression to the principle of systemic integration, per Article 31(3)(c) of the VCLT, in holding that Article 2 of the European Convention on Human Rights (ECHR) should 'be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict'.<sup>55</sup> In practice, the requirement that the rules constituting the IHL use-of-force framework be binding upon the parties is unlikely to pose any problems. These rules are applicable as a matter of conventional law to a great majority of states.<sup>56</sup> Moreover, these rules are widely recognized as having the status of customary international law.<sup>57</sup> There are thus no obstacles to reliance on systemic integration in taking the IHL use-of-force framework into account when interpreting the right to life during the conduct of hostilities. Indeed, interpreters are mandated by this principle to do so.<sup>58</sup> The operation of the principle of systemic integration is to be assessed both by the terms of the principle itself as well as by locating the principle within the broader interpretation framework confirmed in Article 31 of the VCLT, of which the principle forms a part.

### ***A Locating the Imperative to 'Take into Account' within the Broader Interpretation Framework***

The extent to which other sources can impact on the meaning of a treaty term by way of systemic integration is governed by the broader interpretation framework. The primary rule of treaty interpretation requires that the interpreter 'shall' interpret the treaty 'in good faith in accordance with the ordinary meaning to be given to the terms

<sup>53</sup> Sands, *supra* note 51, at 102.

<sup>54</sup> VCLT, *supra* note 33, Art. 30(3) and 30(4)(a).

<sup>55</sup> *Hassan*, *supra* note 55, para. 102, citing ECtHR, *Varnava and Others v. Turkey*, Appl. nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment of 18 September 2009, para. 185.

<sup>56</sup> Geneva Convention I–IV are universally ratified; Additional Protocol I has been ratified by 174 states; and Additional Protocol II has been ratified by 169 states.

<sup>57</sup> See, e.g., International Committee of the Red Cross (ICRC), Customary IHL Database, Rules 1–24, available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>.

<sup>58</sup> Crawford, 'A Consensualist Interpretation of Article 31(3) of the Vienna Convention on the Law of Treaties', in G. Nolte (ed.), *Treaties and Subsequent Practice* (2013) 29, at 29–30.

of the treaty in their context and in the light of its object and purpose'.<sup>59</sup> Like in a game of rock, paper, scissors, the prescript of how 'a treaty shall be interpreted' in treaty interpretation beats additional rules that 'shall be taken into account'. Systemic integration can thus augment but cannot defeat the first rule of treaty interpretation.<sup>60</sup> The extent to which additional rules can impact on treaty interpretation consistent with the primary rule of treaty interpretation significantly depends on the formulation of the norm in question. The *travaux préparatoires* of Article 6 of the ICCPR suggest that an interpretation that engages the IHL use-of-lethal-force framework to determine whether loss of life during armed conflict amounts to an 'arbitrary' deprivation of life is consistent with an interpretation of the right to life done 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. In contrast, the if-then approach to interpreting the right to life in the conduct of hostilities is not consistent with the primary rule of treaty interpretation as, indeed, this approach significantly replaces the applicable law.

### **B Operationalizing the Imperative to 'Take into Account' Other Rules in the Interpretation of Arbitrary Deprivation of Life**

The imperative that such other rules 'shall be taken into account' by the interpreter has a dual function: it determines the standard of obligation on the part of the interpreter – they shall do so – and it determines what the interpreter is to do – take into account.<sup>61</sup> Sands suggests that the meaning of 'taking into account' is vague but lies somewhere between 'take into consideration' and 'apply'.<sup>62</sup> Illustrating the vagueness of the term, James Crawford remarks: 'But of course lawyers can take things into account in a variety of ways. They can take things into account by giving them effect, such as you might take a statute into account. Alternatively, things might be taken into account in the sense of "we take this into account, but do not give it much attention". There is a spectrum of cases.'<sup>63</sup> The spectrum to which Crawford refers provides necessary flexibility. The extent to which other rules should impact upon the interpretation of a given norm of international law is dependent on a range of factors, including the context, the closeness of the relationship between the norm under interpretation and the other 'relevant rules' and the degree of relevance of these other rules to the regulation of the matter at hand. It is indeed desirable that, in some cases, interpreters give effect to other rules, whereas, in others, they do not give much attention to such rules. What is important is that the question as to where on the spectrum a rule lies in each context is to be addressed systematically. In this regard, the

<sup>59</sup> VCLT, *supra* note 33, Art. 3.

<sup>60</sup> Sands, *supra* note 51, at 102 (where he states that 'a customary norm is to be interpreted into a conventional norm, not applied instead of it, as is the case for Article 30 and successive treaties. In other words, under 31(3)(c), the treaty being interpreted retains a primary role'). While these comments were made in relation to the integration of customary norms, the same holds true regarding treaty norms.

<sup>61</sup> Sands, *supra* note 51, at 102.

<sup>62</sup> *Ibid.*, at 103.

<sup>63</sup> Crawford, *supra* note 58, at 29–30.

scholarship on the systemic integration of the IHL use-of-lethal-force framework in the interpretation of the right to life is unsatisfactory. The systemic integration school to the interpretation of the *Nuclear Weapons* opinion tends to suggest that the designation of IHL as *lex specialis* has amounted to the Court saying one thing but doing and meaning an altogether different thing. For example, Jean d'Aspremont and Elodie Tranchez argue that 'under the guise of the principle *lex specialis derogat generali*, most judges and experts apply a principle of interpretation of international law, that is the principle of systemic integration of international law'.<sup>64</sup>

This approach fails to appreciate that, notwithstanding the Court's application of the principle of systemic integration, it did, in the circumstances under consideration, expressly identify IHL norms regulating the conduct of hostilities as *lex specialis vis-à-vis* the right to life. The circumstances under consideration were specifically the lawfulness of a 'certain weapon in warfare' (that is, nuclear weapons) during the regulation of the 'conduct of hostilities' and not the right to life in the context of armed conflict abstractly. The suggestion that the Court in fact applied the principle of systemic integration 'under the guise of the principle *lex specialis*' is misleading and has the effect of ignoring an important aspect to the Court's opinion. The ICJ's implicit application of the principle of systemic integration does not expunge its explicit determination that, in the circumstances, the relevant IHL norms are the *lex specialis vis-à-vis* the right to life.<sup>65</sup> *Lex specialis* was not used as a technique to resolve norm conflict or as a cloak under which the Court applied systemic integration but, instead, as a device to determine the extent to which the IHL framework was to be taken into account in the circumstances, as per systemic integration. It thus served a vital function.

The principle is to be given effect to by way of *de novo* analysis in each instance of treaty interpretation – indeed, as a principle of interpretation, it only has value in the act of interpretation; it cannot serve to establish general rules to be applied to future cases. This is so because the extent to which other rules are to be taken into account depends on factors including both the normative features of the rules in question as well as the factual situation in which they are given effect to. However, this is not to say that the contextual application of the principle cannot result in predictable outcomes. The question whether an IHL violation results in a right-to-life violation is one that inherently must be answered contextually and based on normative interpretation, not

<sup>64</sup> D'Aspremont and Tranchez, *supra* note 32, at 238 (emphasis added). Marko Milanovic likewise argues that the International Court of Justice (ICJ) in effect applied the principle of systemic integration in *Nuclear Weapons*, which he labels as 'norm conflict avoidance'. Milanovic, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law', 14(3) *JCSL* (2009) 459, at 468–469. This label is misleading as the interpretation that arbitrary deprivation of life is to be interpreted in light of IHL during armed conflict is not motivated to avoid norm conflict but, instead, to give proper contextual meaning and effect to the right to life. This distinction is important because as Campbell McLachlan has observed, 'no principle which relies on techniques of interpretation alone can' resolve true conflicts of norms in international law. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', 54 *ICLQ* (2005) 279, at 318. It is for this reason that Art. 30(3) and 30(4)(a) of the VCLT confines the application of *lex posterior derogat legi priori* to 'treaties relating to the same subject matter'.

<sup>65</sup> *Nuclear Weapons*, *supra* note 8, para. 25.

on formulaic reasoning as the if-then approach does. The interpreter's task is not to determine which body of law takes contextual precedence but, instead, to determine, in the context, to what extent the IHL use-of-lethal-force framework should be taken into account in determining whether the loss of life at hand is arbitrary.

### ***C Systemic Integration as the Master Key for Unlocking the Contextual Co-application of IHRL and IHL***

The interplay between IHL and IHRL creates challenges beyond the application of the right to life in the context of the conduct of hostilities. For example, the application of the right to liberty and security in the context of security detention during international armed conflicts, and the interplay between economic, social and cultural rights, such as the right to education and the law of occupation, creates a multitude of challenges. Moreover, not all articulations of the right to life allow for such synchronous integration of IHL, as does the ICCPR.<sup>66</sup> This raises the question whether the normative approach proposed in this article is transposable to other rights and contexts.

The interpreter's duty to 'take into account' other rules of international law persists, regardless of which right is subject to interpretation or, indeed, within which sub-regime of international law the norm is located. However, the architecture of the rule under interpretation has an impact on the latitude available to an interpreter in taking into account such other rules, without falling foul of the primary rule of treaty interpretation. In the *Hassan* case, the ECtHR was tasked with applying Article 5 of the ECHR on the right to liberty and security, within the context of security detention authorized by the Geneva Conventions during an international armed conflict.<sup>67</sup> Article 5 provides an exhaustive list of the exceptions to the general rule that no one shall be deprived of their liberty. These exceptions do not include security detention. In contrast, Geneva Conventions III and IV provide both authority and a framework for such security detention. The Court applied Article 5 of the ECHR expressly referencing Article 31 of the VCLT, and, strikingly, the Court discussed the ICJ jurisprudence on the co-application of IHL and IHRL as part of its discussion of systemic integration under Article 31(3)(c) of the VCLT.<sup>68</sup> It concluded this point by suggesting that the principle of systemic integration is the vehicle through which '[t]he Court must endeavour to interpret and apply the Convention in a manner which is consistent with the framework under international law delineated by the International Court of Justice'.<sup>69</sup>

Unfortunately, the Court did not provide any guidance on its approach to applying Article 31(3)(c). For example, how does it determine to what extent to 'take into account' other 'relevant rules of international law'? The Court held that Article 5 of

<sup>66</sup> The right to life is reflected in Art. 4 of the American Convention on Human Rights 1969, 1144 UNTS 123, as well as Art. 4 of the African Charter on Human and Peoples' Rights 1981, 1520 UNTS 217. Both of these articulations adopt the ICCPR's formula that turns on the 'arbitrary deprivation of life'.

<sup>67</sup> See generally ECtHR, *Hassan v. United Kingdom*, Appl. no. 29750/09, Judgment of 16 September 2014.

<sup>68</sup> *Ibid.*, para. 102.

<sup>69</sup> *Ibid.*

the ECHR ‘should be accommodated, as far as possible’ with the taking of detainees consistent with the Geneva Conventions.<sup>70</sup> In a strong dissent, Judge Róbert Spanó, joined by Judges George Nicolaou, Ledi Bianku and Zdravka Kalaydjieva, rejected the majority’s reasoning. In essence, they convincingly argued that the rigidity of the language of Article 5, within the context of the derogation scheme under Article 15 of the ECHR, does not make possible such accommodation of the Geneva Conventions.<sup>71</sup> Implicitly, they found that the majority’s construction defeats the primary rule of treaty interpretation. They concluded:

The Court does not have any legitimate tools at its disposal, as a court of law, to remedy this clash of norms. It must therefore give priority to the Convention, as its role is limited under Article 19 to ‘[ensuring] the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto’. By attempting to reconcile the irreconcilable, the majority’s finding today does not, with respect, reflect an accurate understanding of the scope and substance of the fundamental right to liberty under the Convention, as reflected in its purpose and its historical origins in the atrocities of the international armed conflicts of the Second World War.<sup>72</sup>

The basis of Judge Spanó’s dissent is well illustrated by comparing the language of the right to life under the ICCPR with the corresponding provision under the ECHR. The ICCPR provides: ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.’<sup>73</sup> In contrast, the ECHR provides: ‘Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.’<sup>74</sup> The right to life under the ICCPR is non-derogable, whereas the ECHR provides explicitly for limited derogation in respect of ‘deaths resulting from lawful acts of war’.<sup>75</sup> The extent to which an interpreter can take into account the lethal-force framework under IHL, while interpreting the right to life under the ICCPR, is partially determined by the language of the provision – particularly, the prohibition of ‘arbitrary’ deprivation of life. It is the inherent flexibility of this standard that provides for a wider gamut of interpretation consistent with the primary rule of treaty interpretation. That is because the primary rule places some emphasis on ‘ordinary meaning to be given to the terms of the treaty’.<sup>76</sup> The ‘ordinary meaning to be given to the terms’ of the more rigid formulation of the right to life under the ECHR provides for a more limited gamut of interpretation.

The right to liberty and security of the person under the ICCPR and ECHR shares design features with their sister right-to-life provisions. The ECHR provides rigidly that ‘everyone has the right to liberty and security of person’,<sup>77</sup> whereas the ICCPR

<sup>70</sup> *Ibid.*, para. 104.

<sup>71</sup> *Ibid.*, para. 16, Dissenting Opinion of Judges Nicolaou, Bianku and Kalaydjieva.

<sup>72</sup> *Ibid.*, para. 19, Dissenting Opinion of Judges Nicolaou, Bianku and Kalaydjieva.

<sup>73</sup> ICCPR, *supra* note 1, Art. 6(1).

<sup>74</sup> Art. 2(1) ECHR.

<sup>75</sup> Art. 15(1)–(2) ECHR.

<sup>76</sup> VCLT, *supra* note 33, Art. 31(1).

<sup>77</sup> Art. 5(1) ECHR.



provides that '[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention'.<sup>78</sup> As with the right to life, the use of the arbitrary standard allows for greater flexibility in taking into account IHL. The fact remains that an interpreter is obliged to take other rules of international law into account whenever such other rules are relevant to the rule under interpretation. Interpreters will disagree as to the extent to which the norm under interpretation allows for the taking into account of other rules, as indeed this is what separates the majority in the *Hassan* case from those who aligned themselves with Judge Spanó's dissent. Yet the principle of systemic integration always applies to the interpretation of all human rights norms where the interplay with IHL is a cause of complexity.

#### 4 Systemic Integration of the IHL Lethal-Force Framework in the Interpretation of Arbitrary Deprivation of Life

The applicability of the use-of-lethal-force framework in IHL operates along binary lines; the existence of an armed conflict flips the on switch, so to speak. The if-then approach operates on the false premise that the interpretation of 'arbitrary' follows the same contours: either there is no armed conflict – in which case, 'arbitrary' bears definition A (a purely IHRL definition) – or there is an armed conflict – in which case, it bears definition B (arbitrariness through the lens of IHL). This approach invariably suggests that loss of life during hostilities will *ipso jure* not be arbitrary where IHL is complied with, and, conversely, loss of life during hostilities will *ipso jure* be arbitrary where IHL is not complied with. Commenting on the debate regarding the relationship between IHL and IHRL, Scobbie observes:

[L]aw operates topically rather than being axiomatically oriented around axiological principles. Law has a rhetorical rather than a strictly logical structure. Although there are principles embedded in law that structure the substantive rules, principles conflict and law develops at these points of conflict. The relationship between human rights and the law of armed conflict will essentially be decided in relation to specific issues as and when they arise rather than through the abstract application of broad determinative principles.... In short, in deciding the relationship between human rights and the law of armed conflict, we might well be more reliant on pragmatics, the refinement of concepts and relationships in practice, rather than on determination through the application of axiological principle.<sup>79</sup>

The if-then approach is premised on the application of axiological principle. The reasons why IHL compliance does not always render loss of life non-arbitrary are substantively different to the reasons why IHL non-compliance does not always render loss of life arbitrary. Indeed, there is a distinction between 'if illegal under IHL then also illegal under IHRL' and 'if legal under IHL then also legal under IHRL'. In the first instance, the two norms reinforce one another, whereas, in the second instance, they substitute one another.

<sup>78</sup> ICCPR, *supra* note 1, Art. 9(1).

<sup>79</sup> Scobbie, *supra* note 31, at 457.

The ambiguity of the notion of arbitrariness was contentious even at the time of the drafting of the ICCPR. Three approaches had emerged that ‘arbitrarily’ meant: (i) illegally; (ii) unjustly; or (iii) illegally and unjustly.<sup>80</sup> The most recent authoritative definition of this illusive concept is provided by the Human Rights Committee’s General Comment no. 36: ‘The notion of “arbitrariness” is not to be fully equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.’<sup>81</sup> The if-then approach does indeed equate arbitrariness with illegality. While the eight factors mentioned by the Human Rights Committee are cumulative, the list is not necessarily exhaustive. Moreover, none of these eight factors are decisive in determining arbitrariness in every instance. Even legality/illegality is not always determinant of arbitrariness. This is acknowledged in General Comment no. 36: ‘[U]se of lethal force consistent with international humanitarian law and other applicable international law norms is, in general, not arbitrary.’<sup>82</sup> In this regard, Eliav Lieblich notes, ‘careful readers will surely notice ... by inserting the qualification “in general”, the Human Rights Committee leaves the door open to the possibility that killings consistent with IHL might still be considered arbitrary under IHRL.’<sup>83</sup> The definition of the word ‘arbitrary’ does not change depending on whether there is or is not an armed conflict. This would be inconsistent with ‘the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’ and thus falls outside of the parameters of the principle of systemic integration. The question whether something is, for example, inappropriate or unreasonable is context dependent – that which is inappropriate during a law enforcement operation is not necessarily inappropriate during the conduct of hostilities in an international armed conflict.

### ***A Interpreting Arbitrary Deprivation of Life Where IHL Is Strictly Complied With***

Following loss of life during the conduct of hostilities, the interpreter is tasked with interpreting the right to life, taking into account the context, as well as IHL, as other relevant rules. Most of the time, in such circumstances, if IHL was fully complied with, the loss of life will be deemed not to be arbitrary. But not always. Thus, where IHL was complied with, the if-then approach will usually result in the correct conclusion but for the wrong reasons, and the conclusion will be wrong in many important cases. Consider the example of the lethal targeting of child soldiers where the use of lethal force was not necessary. Five children aged between 13 and 15 are used to guard a strategically important military facility in a context that renders them direct participants in hostilities (DPH). The territorial state launches an operation to take

<sup>80</sup> Bossuyt, *supra* note 35, at 123.

<sup>81</sup> General Comment no. 36, *supra* note 6, para. 12.

<sup>82</sup> *Ibid.*, para. 64 (emphasis added).

<sup>83</sup> Lieblich, ‘The Humanization of *Jus ad bellum*: Prospects and Perils’, 32 *European Journal of International Law (EJIL)* (2021) 588.

the facility. Their intelligence is clear that they can capture rather than kill the child guards without significant risk to their own forces. Nevertheless, the determination is made that these children are lawful targets, and the operation proceeds without including a capture-rather-than-kill plan (that is not to say that no quarters were given). All five child guards are killed in battle in full compliance with applicable IHL.

As it is not controversial that children who directly participate in hostilities are subject to the same targeting as adults in terms of IHL,<sup>84</sup> to a majority of IHL practitioners and commentators, this scenario, while tragic, does not present significant legal challenges. However, if we progressively increase the number of children and decrease their mean age while maintaining their status as DPH, as well as the viability of capture rather than kill, a tipping point will be reached, feasibly, at which point the extent to which positivistic compliance with the law of targeting in terms of IHL will no longer sufficiently shield the actions of the territorial state from liability in terms of the right to life. The loss of life will be arbitrary.

There is increasing debate regarding the circumstances in which the IHL framework does in fact authorize the use of lethal force in different contexts. There is disagreement on the question whether IHL restricts the use of lethal force against legitimate targets to such force that is 'actually necessary to accomplish a legitimate military purpose in the prevailing circumstances', which is the position advanced by the International Committee of the Red Cross (ICRC) in its Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (DPH Guidance).<sup>85</sup> Significantly, the position adopted by the ICRC is that such a restriction exists within the normative framework of IHL and does not come as a result of a mitigating influence of IHRL. Recently, Andrew Clapham proposed that the necessity of the targeting of each and every adversary be reconsidered.<sup>86</sup> David Kretzmer, Aviad Ben-Yehuda and Meirav Furth argue that, during non-international armed conflict, the authority to use lethal force is restricted to the actual conduct of hostilities.<sup>87</sup> The legality of lethal force under IHL may well be more nuanced and contextual than the conventional approach suggests. However, the question whether IHRL generally, and the right to life specifically, tempers the IHL use-of-lethal-force framework as an external influence and the question whether IHL internally restricts lethal force in a given context are not merely two sides to the same coin. There are circumstances in which there is little debate in IHL that lethal force is lawful, yet, to many, the resulting loss of life

<sup>84</sup> However, operational orders sometimes restrict the use of lethal force, where feasible, in the case of children. See D. Mandsager (ed.), *Sanremo Handbook on Rules of Engagement* (2009), at 26.

<sup>85</sup> The proposition is reflected in ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, May 2009, Principle IX, available at <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf>. More recently, the issue was extensively debated by Ryan Goodman and Michael N. Schmidt. See Goodman, 'The Power to Kill or Capture Enemy Combatants', 24 *EJIL* (2013) 819; Schmitt, 'Wound, Capture, or Kill: A Reply to Ryan Goodman's "The Power to Kill or Capture Enemy Combatants"', 24 *EJIL* (2013) 855; Goodman, 'The Power to Kill or Capture Enemy Combatants: A Rejoinder to Michael N Schmidt', 24 *EJIL* (2013) 863.

<sup>86</sup> Clapham, *supra* note 17, at 315–317.

<sup>87</sup> Kretzmer, Ben-Yehuda and Furth, "'Thou Shall Not Kill": The Use of Lethal Force in Non-International Armed Conflicts', 47(2) *ILR* (2014) 191.

may still be untenable or, rather, arbitrary.<sup>88</sup> Thus, for the purposes of the scenario under discussion, and in keeping with the subject of this article, the focus is on the question whether, in terms of systemic integration, the extent to which the IHL use-of-force framework is to be taken into account diminishes contextually, such that the resulting deprivation of life is deemed arbitrary notwithstanding full compliance with the law of targeting. To this end, theoretically, one must calibrate appropriately the constituent elements of arbitrariness, as per General Comment no. 36, on the spectrum that exists between the law-enforcement and armed-conflict paradigms. The challenge is determining how best to go about this.

To calibrate arbitrariness, one must establish the scope of the spectrum as it applies to the context. The one extreme of the spectrum will always be the pure IHRL conceptualization of arbitrariness – intentional killing can only be non-arbitrary where the cumulative criteria are complied with (see the discussion above).<sup>89</sup> The other end of the spectrum is to be determined with reference to the specific IHL rules that regulate the lawful use of lethal force in the circumstances. The most permissive of such rules are those that apply to the conduct of hostilities during international armed conflicts. In the context of our child guard scenario, the relevant IHL rules are those that apply to the conduct of hostilities during non-international armed conflicts. While I agree substantially with Kretzmer, Ben-Yehuda and Furth regarding the more restrictive scope for the use of lethal force during non-international armed conflicts, for present purposes one can assume that the targeting of the children in our scenario is IHL compliant.

Once the spectrum is defined, one must plot arbitrariness. Theoretically, each practical example will yield a precise and unique plot on the spectrum. However, practically, there is a rebuttable presumption that loss of life sustained in an IHL-compliant manner during the conduct of hostilities is not arbitrary. This presumption will be rebutted where, cumulatively, sufficiently compelling factors are present to conclude that loss of life is arbitrary notwithstanding IHL compliance. This can be conceived of as a light switch. In its default position, IHL compliance dictates that loss of life is not arbitrary. However, additional factors, such as the age of the targets in our example and the feasibility of a less than lethal operation, add pressure to the switch. Once sufficient pressure is exerted on the switch, it flips to a position that, notwithstanding IHL compliance, loss of life is arbitrary.

The age of a victim is a factor that is relevant to the determination of arbitrariness in the right to life itself. For example, the imposition of the death penalty is *ipso facto* arbitrary in respect of a person younger than the age of 18.<sup>90</sup> More significant though,

<sup>88</sup> Shany and Heyns have acknowledged that ‘there may be circumstances where an act would be lawful under IHL and yet internationally unlawful, and thus arbitrary’. However, these comments were made in the context of the example of violations of the *jus ad bellum* that result in loss of life. See Shany and Heyns, *supra* note 48.

<sup>89</sup> The other exception is the death penalty, in terms of which intentional killing is also not deemed to be arbitrary.

<sup>90</sup> Art. 37(a) of the Convention on the Rights of the Child (CRC) 1989, 1577 UNTS 3, and Art. 77(5) of Additional Protocol I, *supra* note 16, provide for the same restriction in the IHL context.

in matters regarding the potential deprivation of the life of a child, is the co-application of children's rights. The Convention on the Rights of Child, which is ratified by all states bar the USA, provides that 'every child has the inherent right to life' and that state parties are obliged to 'ensure to the maximum extent possible the survival and development of the child'.<sup>91</sup> Moreover, 'in all actions concerning children ... the best interests of the child shall be a primary consideration'.<sup>92</sup> This is specifically relevant to the context of non-international armed conflict, where the state, as Kretzmer, Ben-Yehuda and Furth argue, has a 'dual capacity': it is at once obliged to respect and ensure the human rights of all persons within its jurisdiction and yet is engaged in armed conflict with some of those persons.<sup>93</sup>

As a point of departure, it is evident that the relative impact of IHRL in regulating this operation cannot be the same as would be the case in an operation where the intended targets are not children but, rather, a special forces unit. In our scenario, the factors that add pressure to the switch include the age of the targets, the number of targets that are children, the state's associated human rights obligations, the fact that these children are used in armed conflict in violation of IHL as well as their individual rights and, crucially, the fact that the intelligence and mission planning confirmed the feasibility of capture rather than kill.<sup>94</sup> Cumulatively, these factors compel a conclusion that a lethal operation would amount to an arbitrary deprivation of life, notwithstanding IHL compliance. A key factor is the feasibility of capture rather than kill. Undoubtedly, had that feature not been present, the IHL-compliant use of lethal force would not amount to an arbitrary deprivation of life. This conclusion comes as a consequence of contextual interpretation by way of systemic integration – as was emphasized previously, it does not and cannot result in the development of doctrine.

It is vital to emphasize that sufficiently compelling factors to conclude that loss of life is arbitrary notwithstanding IHL compliance will be exceptional in practice. The right to life cannot be used to facilitate a general shift along the lines of the ICRC's position in its DPH Guidance that the use of lethal force against legitimate targets be limited to such force that is 'actually necessary to accomplish a legitimate military purpose in the prevailing circumstances'.<sup>95</sup> Doing so would stretch the principle of systemic integration beyond its point of elasticity and thus be inconsistent with the primary rule of treaty interpretation. Further examples where such factors may be present include the case where a party to a conflict has laid down its arms but has a unit remaining in the field who has lost communications. Depending on the circumstances, the right to life may well compel the opposing force to capture rather than kill the members of this unit or, indeed, to disengage. Compelling factors in this instance

<sup>91</sup> CRC, *supra* note 90, Art. 6(1), 6(2).

<sup>92</sup> *Ibid.*, Art. 3(1).

<sup>93</sup> Kretzmer, Ben-Yehuda and Furth, *supra* note 87, at 191.

<sup>94</sup> The outcome significantly hinges on this factor. Benvenisti has, for example, concluded that '[i]n general there is no requirement to risk combatants to reduce the risk to enemy civilians, but some of the specific rules entail the assumption of such risks'. See Benvenisti, 'Human Dignity in Combat: The Duty to Spare Enemy Civilians', 39 *ILR* (2006) 81, at 108.

<sup>95</sup> ICRC, *supra* note 85, Principle IX.

would include knowledge by the attacking force that its target is not aware of the cessation of hostilities as well as the operational capability to capture rather than kill members of the opposing force.

### **B Interpreting Arbitrary Deprivation of Life Where IHL Is Not Strictly Complied With**

The crux of the ICJ's finding in *Nuclear Weapons*, regardless of which of the schools of thought to which one subscribes, is that in most contexts compliance with specific norms of IHL renders loss of life that would be arbitrary in terms of a pure IHRL conceptualization non-arbitrary.<sup>96</sup> The Court did not say that compliance with IHL will in all circumstances render every loss of life non-arbitrary. Logic suggests that it is only the failure to comply with those same IHL norms that can undo the alchemy that, in the first instance, rendered an arbitrary deprivation of life non-arbitrary. The question as to which norms of IHL render loss of life non-arbitrary is intrinsically normative – that is to say, it cannot be addressed through the application of a mechanical principle but must be grounded in normative content interpreted contextually. The principle of distinction is certainly one such norm. Violation of this principle that results in loss of life will amount to a right-to-life violation. But that is not true of all IHL norms that regulate the conduct of hostilities.

In IHL, 'the anti-personnel use of bullets which explode within the human body is prohibited'.<sup>97</sup> Several armed forces employ armaments that fall within this category (notably, the 12.7 millimetre [mm] round) for anti-material purposes.<sup>98</sup> Consider a scenario in which soldier A mans a 12.7 mm light weapon, firing explosive rounds, and is deployed operationally in an anti-material function. The operation anticipates limited civilian casualties, but these are deemed proportionate to the concrete military advantage anticipated. Under the pressure of heavy battle, soldier A begins to intentionally target members of the opposing forces with 12.7 mm exploding rounds. The operation is ultimately a success. A post-op battle damage assessment confirms that the overall incidental loss of civilian life was less than anticipated and compliant with the principle of proportionality, but it also confirms several fatalities, both civilian and enemy, who were targeted with explosive rounds. This poses the question whether the loss of life amounts to a right-to-life violation.

The rationale for the prohibition of anti-personnel use of exploding bullets is that they inflict suffering that exceeds that needed to render the opposing combatant *hors*

<sup>96</sup> Collateral damage that is not disproportionate to the direct military advantage anticipated serves as an excellent example. Undoubtedly, a pure IHRL analysis will conclude that the death of a civilian who was at the wrong place at the wrong time is arbitrary.

<sup>97</sup> Customary IHL Database, *supra* note 57, Rule 78.

<sup>98</sup> See, e.g., L. Moosberg, 'Does the Swedish Use of the 12.7mm Multipurpose Projectile Undermine the St Petersburg Declaration?' (2003) (Master's thesis on file at Uppsala University, Sweden), available at <https://web.archive.org/web/20060519021942/http://www.teol.uu.se/noha/masters/moosberg.pdf>.

*de combat*.<sup>99</sup> This norm does not serve to protect life. In fact, in law enforcement operations, the use of such projectiles for direct human targeting is lawful (provided that the IHRL criteria for use of lethal force is complied with).<sup>100</sup> Making non-compliance with this rule the stimulus of a right-to-life violation, as the if-then approach does, amounts to a failure to give substantive effect to values protected by the right to life and effectively results in a devaluation of the right to life.<sup>101</sup> Soldier A is responsible for a violation of IHL, a mature regime of international law that possesses its own framework and consequences. This framework is better suited to regulating the means and methods of armed conflict than IHRL. Moreover, the consequences for soldier A personally, as well as for his state, of him being the agent of a right-to-life violation are dire and not legally justifiable.

The normative approach to determine whether non-compliance with an IHL norm resulting in loss of life amounts to arbitrary deprivation of life has two prongs: (i) the values of the violated IHL norms must include as a core consideration the safeguarding of human life and (ii) there must be a sufficient nexus between the conduct in question and the death of a person or persons whose life was protected by the applicable IHL norm(s) that were violated, as per the first prong.

### 1 The First Prong of the Normative Approach: The Values Requirement

General Comment no. 36 provides:

Use of lethal force consistent with international humanitarian law and other applicable international law norms is, in general, not arbitrary. By contrast, practices inconsistent with international humanitarian law, *entailing a risk to the lives of civilians and other persons protected by international humanitarian law*, including 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, would also violate article 6 of the Covenant.<sup>102</sup>

The inclusion of the words ‘entailing a risk to the lives of civilians and other persons protected by international humanitarian law’ presents a more nuanced understanding than the if-then approach and supports a normative approach. The implicit reasoning that this element adds is precisely that the value of the IHL rule under consideration must at least have a nexus to protecting the lives of civilians and others protected by IHL. However, a mere nexus is insufficient, and ‘other persons protected by international humanitarian law’ lacks precision. It is a misconception that IHL

<sup>99</sup> See, e.g., Customary IHL Database, *supra* note 57, Commentary to Rule 78 (which states that the prohibition is ‘motivated by the desire to avoid inflicting suffering which exceeded that needed to render a combatant *hors de combat*’).

<sup>100</sup> There are no specific IHRL prohibitions of means that may be used in law enforcement operations; the criteria are simply contextual. See Heyns, *supra* note 5, paras 55–74.

<sup>101</sup> Milanovic has warned that the joint application of IHL and IHRL runs the risk of ‘watering down’ IHRL. While he did not specifically speak to the devaluation of the right to life through the application of the if-then approach, this is a particularly acute example of such a devaluation. See Milanovic, *supra* note 64, at 461.

<sup>102</sup> General Comment no. 36, *supra* note 6, para. 64 (emphasis added).

protects only some or specific categories of persons. IHL protects all persons to whom it applies all the time; however, the scope and nature of protection differs among categories of persons.<sup>103</sup> For example, IHL absolutely prohibits torture, regardless of the status or function of the victim. The only real restriction to the prohibition against torture in IHL is the question whether a victim is entitled to protection as against the perpetrator – for example, does IHL protect individuals on an intra-party basis?<sup>104</sup>

It is not simply positivistic compliance with IHL that renders an otherwise arbitrary deprivation of life non-arbitrary. Instead, this result is a consequence of the operation of specific IHL norms, which are aimed at balancing competing interests, including the value and protection of life. A normative understanding of the right to life in armed conflict proceeds from the basis that it is only non-compliance with those norms of IHL that, if complied with, cure the arbitrariness of loss of life that can reverse this process. That is to say, the core values being protected by the norms in question must overlap with the core value protected by the right to life. The two sets of values are not the same – clearly, the values that underpin the law of targeting in IHL place less emphasis on safeguarding human life than the right to life does. Nevertheless, those norms fundamentally do place emphasis on safeguarding human life – even where someone may be lawfully targeted, restrictions are in place as to the methods that may be employed.<sup>105</sup>

## 2 *The Second Prong of the Normative Approach: The Results Requirement*

The operation of the law of targeting is, by and large, oriented towards directing actions and behaviour. For instance, the principle of proportionality operates based on ‘anticipated’ incidental civilian loss. Thus, the very launching of an attack that is expected to result in disproportionate civilian loss is a violation of IHL, regardless of actual civilian loss or the extent to which civilian lives are threatened. In contrast, the operation of the negative obligations of the right to life, which is at play in determining whether loss of life is arbitrary during the conduct of hostilities, is generally results based.<sup>106</sup> For instance, the negative obligation of the right to life can only be violated where factually a person has arbitrarily lost their life or a reasonably foreseeable threat to life and life-threatening situation that can result in loss of life has occurred. The launching of an attack that is expected to result in disproportionate civilian loss of life, but which does not in fact result in such loss or put civilian lives at risk sufficiently to meet the right-to-life threshold, is an IHL violation but not a violation of the right

<sup>103</sup> IHL provides different kinds and levels of protection to different categories of persons during armed conflict. Nevertheless, conceptually, all people in armed conflict are the beneficiaries of some norms of IHL.

<sup>104</sup> On this issue, the International Criminal Court recently held that IHL does not recognize a ‘general rule excluding members of armed forces from protection against violations by members of the same armed force’. Judgment on the appeal of Mr Ntaganda against the Second Decision on the Defence’s Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9, *Prosecutor v. Bosco Ntaganda* (ICC-01/04-02/06 OA5), Appeals Chamber, 15 June 2017, paras 63–64.

<sup>105</sup> For example, perfidy is prohibited. Customary IHL Database, *supra* note 57, Rule 65. See further discussion below.

<sup>106</sup> See Scobbie, *supra* note 31, at 456.



to life. There is thus a functional incompatibility between the general operation of IHL and IHRL. A shortcoming of the debate on the relationship between these regimes is that it focuses disproportionately on substantive norms when, in fact, relative incompatibility in design elements of the two regimes may hamper effective co-application.

The first prong of the normative approach is insufficient to indicate a right-to-life violation. In the context of actual loss of life during armed conflict, to be compatible with the results-oriented nature of the IHRL, there must be a sufficient nexus between the conduct in question and the death of a person or persons whose life was protected by the applicable IHL norm(s) that were violated. Additionally, a violation of the negative dimension of the right to life may occur where a reasonably foreseeable threat to life and life-threatening situation that can result in loss of life has occurred, which bears a sufficient nexus to the IHL norm violated. This is the second prong of the interest-based approach. For example, the principle of distinction is an IHL norm in which the values protected very significantly overlap with the value of human life, and a violation of this principle in armed conflict may very likely lead to a right-to-life violation. This, however, is not a given. The principle of distinction provides: 'The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.'<sup>107</sup> Should lethal force be used indiscriminately, a clear violation of IHL occurs, even where the actual fatalities only include combatants. The fact that the principle of distinction was violated, and the use of lethal force resulted in fatalities, does not by itself meet the threshold of a right-to-life violation, even though the first prong of the normative approach has been met. To do so, the second prong must also be met – the fatalities must factually include persons the lives of whom are protected in terms of the values of the IHL norm(s) violated, or an actual threat to life meeting the threshold of the right to life must have occurred.

### ***C Operationalizing the Normative Approach***

It goes beyond the scope of this article to address each norm of IHL that may feasibly be violated in the context of the use of lethal force during armed conflict. For practical purposes, several categories of relevant IHL norms are identified, and, within each category, illustrative norms are assessed in terms of the normative approach, with a view to gain a practical insight into the operationalization of this approach. The relevant categories are the principle of distinction, the principle of proportionality, the rules on special protection and the restricted and prohibited means and methods of armed conflict.

#### ***1 The Principles of Distinction and Proportionality***

The principle of proportionality is effectively an exception, and, indeed, the only exception, to the principle of distinction. The principle of distinction provides: 'The parties to the conflict must at all times distinguish between civilians and combatants. Attacks

<sup>107</sup> Customary IHL Database, *supra* note 57, Rule 1.

may only be directed against combatants. Attacks must not be directed against civilians.<sup>108</sup> And the principle of proportionality provides: 'Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.'<sup>109</sup> The principle of distinction safeguards the legitimacy of IHL by excluding civilians and other protected persons from the permissive rules on the use of lethal force; as such, the underlying values of the principle of distinction squarely include the protection of the life of those included in the scope of the norm. The principle of proportionality aims to balance two primary underlying values that are at tension with one another: the protection of civilians, including the lives of civilians, on the one hand, and military necessity, on the other. Notwithstanding the weight attached to military necessity, a core value that underpins this principle is the protection of the life of civilians. As such, normatively, both these principles meet the requirement of the first prong of the interest-based approach. Whenever a violation of either of these principles factually results in the killing of a person included in the scope of protection of the norm, the second prong of the test will be met. However, this is a question of fact that is to be assessed in each case individually.

The intentional killing of a person who is not deemed a legitimate target in terms of the principle of distinction will always result in a right-to-life violation, except where that killing is lawful in terms of the principle of proportionality or occurs in an actual instance of self-defence. Likewise, any incidental civilian loss of life that factually results from an action where the anticipated civilian loss of life was not proportionate to the concrete and direct military advantage anticipated, will always amount to a right-to-life violation. Moreover, parties to armed conflict are under an obligation to take precautions in attack and against the effects of attack, with the view of sparing and protecting the civilian population.<sup>110</sup> This obligation is one that serves to give greater clarity on how the principle of distinction is to be complied with. As such, it shares the protection of life as an important underpinning value with the principle of distinction, and, accordingly, where the obligation to take feasible precautions is not complied with and this failure results in the actual death of a protected person or an actual threat to life meeting the threshold of the right to life, a right-to-life violation will have occurred.

## 2 Rules on Specific Protection

IHL includes a range of norms that are aimed at providing specific protection to categories of persons and objects. Examples of specifically protected persons include children, journalists and medical personnel. Examples of specially protected objects

<sup>108</sup> *Ibid.*: Additional Protocol I, *supra* note 16, Arts 48, 51(2), 52(2); Additional Protocol II, *supra* note 16, Art. 13(2). A discrete principle of IHL also specifically prohibits indiscriminate attacks, as this principle exists to give effect to the principle of distinction; for present purposes, there is no need to discuss it separately. See Customary IHL Database, *supra* note 57, Rule 11.

<sup>109</sup> *Ibid.*, Rule 14.

<sup>110</sup> *Ibid.*, Rules 15, 22.

include cultural property, humanitarian relief objects, the natural environment and works and installations containing dangerous forces.

(a) Specifically protected persons

The rationale for specific protection differs among the range of persons so protected. For example, the motivation for specific protection of some categories of persons rests more in safeguarding the function they perform than their individual lives – the commentary to the rule protecting humanitarian relief personnel provides: ‘[T]he safety and security of humanitarian relief personnel is an indispensable condition for the delivery of humanitarian relief to civilian populations.’<sup>111</sup> Yet, in other instances, specific protection is afforded precisely to protect the lives of persons who would otherwise have been targetable – for example, those who are *hors de combat*. Nevertheless, even those persons who are protected by virtue of the safeguarding of their function are in fact the direct beneficiaries of protection of life in terms of IHL. In any event, in most instances, persons specifically protected in terms of IHL, regardless of the rationale or protection, are also protected by the operation of the principles of distinction and proportionality.

(b) Specifically protected objects

Objects are specifically protected due to one of three primary considerations: (i) to ensure the continued delivery of services for which the object is necessary, such as a hospital; (ii) to protect the object itself from damage or destruction, due to the intrinsic value of the object, such as cultural property or religious sites; or (iii) because the object itself presents risks to surrounding communities, such as works and installations containing dangerous forces. Often specifically protected objects house persons who themselves are the beneficiaries of IHL protection. The protection of the object does not operate to protect the lives of the individuals present in the object, such as patients in a hospital. The relevant individuals are protected by discrete principles of IHL, including distinction and proportionality. On the face of it, this suggests that rules providing for specific protection of objects do not sufficiently include the value of the protection of life to meet the standard of the first prong of the interest-based approach. However, there may be exceptions.

Objects protected to ensure continued service delivery, such as hospitals and those buildings used for humanitarian relief operations, are protected because of their importance for safeguarding human well-being and life. However, these underlying values are not sufficiently proximate to the direct protection of life to meet the first prong of the interest-based approach. The killing of protected persons present at such a site will likely amount to a violation of the right to life but not based on the specific protection to the object. Consider an example in which a protected object is unlawfully destroyed in an attack that also results in the death of several enemy combatants, who themselves were lawful targets. The loss of life associated with the attack, which

<sup>111</sup> *Ibid.*, Commentary to Rule 31.

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

Whilst they safeguard immensely important values, those objects that are specifically protected due to their intrinsic value, such as cultural property and the natural environment, do not meet the first prong of the interest-based approach.<sup>112</sup> The specific protection of works and installations containing dangerous forces, such as dams, dykes and nuclear electrical generating stations, is motivated by mitigating the risk to life and safety of the civilian population associated with attacking such objects.<sup>113</sup> Where such a site is attacked in violation of this prohibition, and the consequential release of dangerous forces results in the death of civilians or amounts to an actual threat to life meeting the threshold of the right to life, the threshold of the first prong of the interest-based approach may well be met. This is true even where these deaths do not constitute violations of the principles of distinction or proportionality or any discrete principle protecting the person in question, such as those protecting children. This principle does include as an underlying value the direct protection of life.

### 3 *Restricted and Prohibited Means and Methods of Warfare*

The means and methods that may be employed during armed conflict are not unrestricted. Parties are under a general obligation to ‘take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects’.<sup>114</sup> Moreover, a range of means and methods are specifically prohibited or restricted. ‘Means’ speak to weapons and equipment, whereas ‘methods’ speak to tactics and strategies. Some means and methods are prohibited, whereas others are restricted.<sup>115</sup>

#### (a) Prohibited means

Means are prohibited or restricted for one of two primary reasons – in the circumstances, the means in question: (i) causes ‘superfluous injury or unnecessary suffering’ (SIrUS)<sup>116</sup> or (ii) causes injury to military objectives, civilians or civilian objectives

<sup>112</sup> See, e.g., Judgment and Sentence, *Prosecutor v. Ahmad Al Faqi Al Mahdi* (ICC-01/12-01/15-171), Trial Chamber VIII, 27 September 2016.

<sup>113</sup> Customary IHL Database, *supra* note 57, Rule 42.

<sup>114</sup> *Ibid.*, Rule 17.

<sup>115</sup> For example, chemical weapons are altogether prohibited, whereas the use of exploding bullets is restricted in that they may not be used for anti-personnel targeting but may be used for anti-material targeting. See *Ibid.*, Rules 74, 78.

<sup>116</sup> *Ibid.*, Rule 74.

without distinction – for example, anti-personnel landmines.<sup>117</sup> There is both a general prohibition on the use of weapons, which, in the given context, would either cause S<sub>I</sub>rUS or be indiscriminate,<sup>118</sup> as well as an extensive range of prohibitions and restrictions that apply to identified means,<sup>119</sup> including the specific prohibition of chemical weapons, which are deemed to cause S<sub>I</sub>rUS,<sup>120</sup> and the Ottawa Convention prohibiting anti-personnel landmines, which are deemed to be indiscriminate.<sup>121</sup> Where the underlying values reflected in the prohibition or restriction of a weapon include the protection of life, then the first prong of the interest-based approach is met. This will indeed be the case where the weapon in question is deemed to be indiscriminate. In contrast, weapons that are deemed to cause S<sub>I</sub>rUS will fall short of the threshold, as protection of life does not form part of the rationale for the prohibition. One may argue that the unlawful use of prohibited or restricted weapons increases the relative ability of the violating party to inflict harm on its enemies and will thus likely result in a higher overall number of deaths than had these weapons not been used. This argument is one that will be persuasive within the IHRL analysis; however, in the context of IHL, the unlawful use of such weapons amounts to serious violations and, indeed, is criminalized as a war crime.<sup>122</sup> The deciding factor will remain whether the violated IHL norm includes in its underlying values protection of life; as such, where all actual fatalities are subject to the lawful use of lethal force under IHL, the first prong of the interest-based approach will not have been met.

#### (b) Prohibited methods

An extensive range of battlefield tactics and strategies are prohibited, including orders that no quarters will be given,<sup>123</sup> perfidious acts,<sup>124</sup> starvation as a method of warfare,<sup>125</sup> pillage and so on.<sup>126</sup> A range of these prohibitions clearly does not include an element of protection of life, such as pillage. However, many of these prohibitions do contain such an element, which serves to illustrate that protection of life need only be one element or value that underpins a given norm to comply with the first prong of the normative approach; it need not be the primary value. However, in the context of prohibited methods, the second prong of the test performs an important function – to ensure that the results-based nature of IHRL is adequately catered to: ‘Killing, injuring or capturing an adversary by resort to perfidy is prohibited.’<sup>127</sup> Perfidy is defined as

<sup>117</sup> *Ibid.*, Rule 81.

<sup>118</sup> *Ibid.*, Rules 70, 71.

<sup>119</sup> *Ibid.*, Rules 72–86.

<sup>120</sup> *Ibid.*, Rule 74.

<sup>121</sup> Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Convention) 1997, 2056 UNTS 211; see also Customary IHL Database, *supra* note 57, Rules 81–83.

<sup>122</sup> Rome Statute of the International Criminal Court 1998, 2187 UNTS 90, Art. 8(2)(b)(xx).

<sup>123</sup> Customary IHL Database, *supra* note 57, Rule 46.

<sup>124</sup> *Ibid.*, Rule 65.

<sup>125</sup> *Ibid.*, Rule 53.

<sup>126</sup> *Ibid.*, Rule 52.

<sup>127</sup> *Ibid.*, Rule 65.

'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'.<sup>128</sup> This is an example where the victim of the killing can be an otherwise lawful target, yet the killing may in the circumstances amount to a violation of the right to life. While not the dominant consideration, one of the values that underpin the prohibition against perfidy is the protection of the life of the victim – the norm itself states that the killing of an adversary under such circumstances is prohibited. For a perfidious act to amount to arbitrary deprivation of life, violation of the prohibition must result in the unlawful death of one or more persons – this will satisfy the second prong of the test.

## 5 Conclusion

The prevailing if-then approach will result in the correct conclusion most of the time but, crucially, not always and sometimes for the wrong reasons. This is perhaps why this approach has largely gone unchallenged for almost three decades. Even during the exceptional circumstances of armed conflict, the interpreter must stay true to their function – interpreting the right to life. However, the internal flexibility of the right, together with the duty of the interpreter to take IHL into account, as per systemic integration, provides all the tools necessary to give normative effect to the right to life and not simply to defer to the IHL framework. IHL compliance or non-compliance is not a zero-sum game in determining the arbitrariness of resulting loss of life for the purposes of the right to life. Nor does the conclusion as to the arbitrariness of loss of life in IHL-compliant operations determine inversely the conclusion in IHL non-compliant operations and *vice versa*.

Practically, in the context of quintessential military operations not involving further complexity, IHL compliance is suggestive, but not conclusive, of loss of life not being arbitrary. On the other hand, non-compliance with IHL is considerably less predictive of the arbitrariness of associated loss of life. Indeed, the crux of the proposed normative approach is that the rationale as to why loss of life in hostilities in compliance with IHL may still be arbitrary is altogether different to the rationale as to why loss of life in non-compliance with IHL may nevertheless not be arbitrary. In the context of the conduct of hostilities, the IHL end of the spectrum of arbitrariness has an enhanced gravitational pull to that of the IHRL end of the spectrum. As such, only where truly compelling factors are present may loss of life amount to a right-to-life violation, notwithstanding IHL compliance. On the other hand, in the context of loss of life during the conduct of hostilities, the assessment of arbitrariness of loss of life in IHL non-compliance is purely normative and turns on two conjunctive criteria: (i) the values of the violated IHL norms must include as a core consideration the safeguarding of human life and (ii) there must be a sufficient nexus between the conduct

<sup>128</sup> Additional Protocol I, *supra* note 16, Art. 37(1).

in question and the death of a person or persons whose life was protected by the applicable IHL norm(s).

When interpreting any norm of IHRL for application in the context of armed conflict, the interpreter must take any IHL norms that are relevant into account. However, the articulation of the norm under interpretation may limit the extent to which such other rules can influence the application of the IHRL norm. For example, the flexibility inherent in the notion of arbitrary deprivation of life under the ICCPR facilitates the integration of applicable norms of IHL in the application of the right to life. In contrast, the formulation of the equivalent norm under the ECHR does not make for such seamless integration. Nevertheless, the application of the interpretive principle of systemic integration should be the starting point for the co-application of norms belonging to IHL and IHRL across the board.