A right to life in armed conflicts? : the contribution of the European Court of Human Rights

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A RIGHT TO LIFE IN ARMED CONFLICTS?
The Contribution of the European Court of Human Rights

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INTRODUCTION

The right to life during armed conflicts is an important testing field for the relationship between international human rights law [HRL] and international humanitarian law [IHL]. In most areas, both branches of the law are said to converge; but with regard to the right to life and in particular to the use of lethal force concerning persons not in the power or in the actual control of the State,1 they are often held to contradict each other. To be more precise, IHL is often considered hardly to grant any right to life in its part related to combat situations, where the law seems to be predicated upon the license to kill. On the other hand, HRL is presented as protecting in a quasi-absolute manner the life of persons under the jurisdiction of a State. Upon analysis, these clear-cut and binary positions seem excessive. HRL and IHL are both applicable and complementary in times of armed conflicts, generally and with respect to the right to life (I); moreover, in this area as in others they very much converge, leading most times to compatible results (II). The dense and dynamic case-law of the European Court of Human Rights [ECtHR] provides a proper illustration of these propositions and shows how HRL can contribute to developing IHL (III). It shows that HRL has a proper and effective contribution to the protection of life in situations of armed conflicts. It should be underlined that even if the case-law of the ECtHR is purely regional and could not, as such, give rise to universal HRL standards, it is particularly relevant due to the fact that most of the other HRL bodies

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We would like to thank Prof. M. Sassoli for his thoughtful comments.
1 Like persons killed in the conduct of hostilities. In fact, in this article, we will not look at the right to life of persons in the power of the State (e.g., a person under arrest) but we will rather concentrate on the right to life of persons killed while not in the power of the State (e.g., in armed clashes) because it is in these situations that HRL and IHL are often held to be contradictory.
are inspired by the European case-law. Moreover, the case-law of the ECtHR is particularly detailed and innovative and thus warrants some attention. In that sense, this case-law is interesting for assessing whether HRL is really different from IHL on the right to life in armed conflicts and for seeing how HRL could contribute to a better protection of that right.

I. LEGAL RÉGIMES APPLICABLE IN ARMED CONFLICTS

A. The Principle of Simultaneous Application of HRL and IHL

In times of armed conflict – international and non-international – the main body of applicable law is IHL. HRL was initially conceived as being applicable in peacetime. Its applicability to wartime was hardly considered. Since the 1960s, that position was reversed. It is today generally accepted that HRL applies also in situations of armed conflict. Nothing in the HRL treaties excludes their applicability to such situations. The derogation clauses contained in most of these instruments, allowing States to put aside
some of their HRL obligations in times of public emergency or of armed conflicts, implicitly attest to the fact that the HRL obligations continue to apply in these situations: otherwise, the derogation clauses would be superfluous. This argument certainly holds true for non-international armed conflicts [NIAC]. It is not necessarily decisive for international armed conflicts [IAC]. Indeed, in cases of warfare involving action beyond national borders, it could be held that the ordinary jurisdiction of the State over its territory or any equivalent control, which forms the basis for application of HRL, is generally lacking. However, international practice has acknowledged that HRL applies even in cases of IAC. The ICJ has recently had many opportunities to reaffirm this applicability, namely in the Legality of the Threat or Use of Nuclear Weapons or in the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinions. Moreover, almost all the HRL supervisory organs have explicitly or implicitly (by deciding cases) considered that HRL applies in situations of armed conflict, non-international or international. Finally, political organs such as the Security Council or the General Assembly of


9 In fact, most of the HRL treaties contain a jurisdictional limitation. See Art. 2(1) ICCPR; Art. 1 ECHR; Art. 1(1) ACHR. On that point, see the famous case Banković et al. v. Belgium and 16 other States, [2001] European Court of Human Rights [ECtHR] (decision as to the admissibility).


such as the Security Council\textsuperscript{12} or the General Assembly\textsuperscript{13} of the UN also took action on the basis of that understanding. Thus, the jurisdictional limitations contained in the HRL instruments have not been interpreted in a way contrary to an extraterritorial application of the rights they enshrine.\textsuperscript{14} On the contrary, it is generally accepted that HRL and IHL will apply simultaneously namely in situations of NIAC, of occupations in IAC and of individuals being in the hands of an adverse party to a conflict in IAC or NIAC.\textsuperscript{15}

\textbf{B. A Challenge to the Principle of Parallel Application: IHL as a Lex Specialis?}

In its Advisory Opinion on the \textit{Legality of the Threat or Use of Nuclear Weapons}, the ICJ crafted the current position on simultaneous applicability of HRL and IHL.\textsuperscript{16} Having to respond to the question if HRL in general, and the right to life in particular, could be said to prohibit the use of nuclear weapons in armed conflicts, the Court held that the correct reference was IHL as an expression of a \textit{lex specialis}.\textsuperscript{17} In its \textit{Wall Opinion} of 2004,\textsuperscript{18} the Court reproduced that reasoning in the context of the law applicable to occupied territories, adding the following:

As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights

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\textsuperscript{12} The Security Council often called upon States to respect HRL and IHL in times of armed conflicts. It did so in resolutions concerning conflicts (see e.g., S/RES/1565 (2004), para. 19 on the situation in the Democratic Republic of the Congo; S/RES/1297 (2000), para. 8 on the situation between Eritrea and Ethiopia), and also in thematic resolutions dedicated to the protection of civilians in armed conflicts (see e.g., S/RES/1265 (1999), para. 7 of the Preamble and para. 4).

\textsuperscript{13} See e.g., G.A. Res. 2675 (XXV), Basic Principles for the Protection of Civilian Populations in Armed Conflicts, 1970.


\textsuperscript{16} \textit{Supra} note 10.

\textsuperscript{17} Ibid., para. 25.

\textsuperscript{18} \textit{Supra} note 10.
may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet, others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law.19

This lex specialis-approach remains however shrouded in some ambiguity.20 The most obvious uncertainty pertains to the level at which the lex specialis rule operates: is it at the level of the branches as a whole (HRL versus IHL) or is it at the level of single (conflicting) norms on a case-by-case basis? If it is the latter, can one then speak at all of a general rule of lex specialis instead of saying that the point is one of contextual interpretation?

The advisory opinions of the Court have often been understood as implying that IHL as a whole is the more special law with respect to HRL.21 This construction is however difficult to accept. First, as Lindroos pointed out, “an abstract determination of an entire area of law as being more specific towards another area of law is not, in effect, realistic”.22 Indeed, the concrete relations between the branches are much more multifaceted and complex than such a simple formula can express. It is not proper to hold that IHL is always more specific than HRL simply because it is designed to

19 Ibid., para. 106.
22 See Lindroos, supra note 20, at 44.
address situations of armed conflict. The concept of “speciality” of the law certainly draws on a richer equation than just the original destination of its norms. Second, the point is not to apply the lex specialis maxim in order to operate a derogation of a legal régime by the other, as would be the case with the traditional maxim which entirely reads lex specialis “derogat” legi generali. Otherwise, the simultaneous application of both branches of the law would be negated, contrary to firmly established international practice, and the contribution of HRL in armed conflicts would be nullified. The objective is rather to co-ordinate the two levels of protection of HRL and of IHL. But this supposes a particular lex specialis maxim, situated on the level of interpretation rather than on that of conflict of norms, which could be better defined, if at all, as lex specialis “compleat” legi generali.

It seems that the Court did indeed not have in mind an operation of the lex specialis rule resulting in mutual exclusiveness, since it clearly accepted the simultaneous application of HRL and IHL. In its Legality Opinion, the Court applied Article 6 of the 1966 International Covenant on Civil and Political Rights [ICCPR] interpreted in light of IHL; both branches were applied, none derogated the other. Later, in the Wall Opinion, the Court

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24 See discussion above.
25 The contribution of HRL in armed conflicts is moreover already recognized by IHL treaties. See Art. 75(8) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3 [hereinafter: API]; and para. 2 of the Preamble of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609 [hereinafter: APII]. Furthermore, some IHL rules require HRL to be correctly interpreted. For example, IHL prohibits torture but does not define it. The definition must be sought in HRL. The same could be said for the right to a fair trial, which is guaranteed but not fully defined by IHL.
26 The ICJ rightly considered that “the test of what is an arbitrary deprivation of life, however, then (in French: “en pareil cas”) falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict” because it is “designed to regulate the conduct of hostilities” and because it includes specific prohibitions concerning “the use of a certain weapon in warfare”. See supra note 10, para. 25. This means that the Court used IHL in order to interpret what is an “arbitrary deprivation of life” under HRL (Art. 6 of the ICCPR) because IHL contains specific rules concerning the use of weapons in warfare which are complementary to HRL. See similarly Report of the Expert Meeting on the Right to Life, supra note 20, at 20:

A number of experts disagreed with the proposition that IHL displaces the applicability of HRL entirely with respect to the right to life. One of these experts pointed out that the ICJ’s holding in the Nuclear Weapons case was limited to the context of the use of nuclear weapons; the ICJ did not hold that the right to life in armed conflicts was always governed by reference to IHL as lex specialis.
held Israel responsible for a series of HRL violations in a situation of hostile occupation notwithstanding the _lex specialis_ approach.\(^{27}\) Thus, certain authors claimed that the Court never really put into operation the _lex specialis_-approach taken in the sense of derogation ("derogat").\(^{28}\) It rather seems that the Court used the maxim of _lex specialis_ in a somewhat larger and improper sense in order to designate the fact that IHL is a body of law specifically dealing with armed conflicts which may thus, in areas of common concern to both branches of the law, complement the general protection offered by HRL.\(^{29}\)

The traditional "_lex specialis derogat_" maxim has a proper place in this area only to the extent that two, or more than two, norms of IHL and/or of HRL bearing on the same subject-matter are in conflict in such a way that a simultaneous application of both is impossible under the principle of non-contradiction.\(^{30}\) The main scope of that rule has thus been spelled out correctly by Vierdag: it is relevant "if an attempted simultaneous application of two rules to one set of facts or actions leads to incompatible results".\(^{31}\) This incompatibility can be of three types: (1) either rule X and rule Y lead to a direct contradiction (e.g., a person must be prosecuted for a certain act and the same person may not be prosecuted for the same act); (2) or rule X and rule Y lead to different but still incompatible results (e.g., a detention

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27 Supra note 10, para. 123 et seq.


29 See Schabas, supra note 28, at 4: “In effect, then, the Court did not address a possible conflict between the two systems, or suggest that violations of international human rights law would be examined through the prism of international humanitarian law. Rather, it treated them as two complementary systems, parts of a whole”.


must be confirmed by a judgment, but in one case a judicial body is required whereas in the other an administrative body is sufficient); (3) there can also be a conflict of norms if one of the two branches of the law does not contain a norm on a subject matter whereas the other does, but only if the absence of regulation corresponds to an intentional omission, i.e., a "qualified silence". Finally, there is no incompatibility – but still a difference to be processed – when one norm X includes all the content of norm Y but goes further than the latter: for example, if one rule is that detention must be confirmed by a judgment and the other is that detention must be confirmed by a judgment within a time-span of 3 months.

If there is a conflict of norms, it must be solved by recourse to all the usual – and also some special – arguments of interpretation, in full context and on a case-by-case basis. It is not possible to affirm a priori that the IHL rule or that the HRL rule shall automatically prevail.32 In determining the "speciality" of a rule, many elements will concur: the precision/ clarity of the rule,33 its adaptation to the particular circumstances of the case34 and the degree of protection it offers.35 The Inter-American Commission on Human Rights often favored the criterion of the higher degree of protection.36 It is to some extent logical that if two provisions apply simultaneously and provide for protection of the individual in such a way that norm X contains all protection of norm Y but also goes beyond, the one that offers the greater degree of protection, namely norm X, should prevail.37 If both norms apply,
ex hypothesi, the fact of not offering the greater degree of protection would automatically mean that the State violates one of its legal commitments, that which is enshrined in norm X. By doing so, the State would violate norm X and therefore incur international responsibility. Thus, if a State grants more extensive rights to individuals by ratifying or acceding to different “humanitarian” treaties (or by virtue of customary law), it cannot flout them ex post by arguing that one of these treaties does not provide for them. Each treaty is autonomous and must be respected in itself; the reverse argument would be a non sequitur. It would purport to use one treaty obligation (or other) in order to defeat an obligation contained in another, autonomous, treaty.

This construction naturally supposes that both (or more) legal régimes apply simultaneously; otherwise, cadit quaestio. Thus, there remains a point for preliminary interpretation: whether these two norms truly apply to the particular set of facts at stake. Moreover, the “degree of protection” criterion is not absolute, insofar as the less protective rule may have been intended to derogate from the rule which is the most favorable to the individual.38

The result of the aforementioned is that in some cases the IHL rule will appear as being more “special” in the complex legal sense previously discussed. That means that it will be given priority, but not necessarily by derogation, since it could operate also by complementation, as the Legality Opinion of the ICJ has shown.39 In other cases, an HRL rule and the body of


38 Thus, a “less favorable” IHL rule could intend to derogate from a “more favorable” HRL norm. Prof. Sassoli underlines that one cannot automatically give priority to the most favorable rule because “cette approche néglige le fait que le DIH fait précisément un compromis entre exigences d’humanité et donc de protection de l’individu, d’une part, et nécessité militaire de l’autre”. See Sassoli, supra note 30.

For example, under the ECHR, States may not detain persons for other purposes than those listed in Article 5. These do not contain the possibility to detain prisoners of war (POW) during an IAC. Theoretically, this would imply that States could not detain POWs under the ECHR without derogating from Article 5. However, it is clear that IHL rules authorizing to detain POWs are here the lex specialis because the law of armed conflicts was intended to derogate from the usual regime of detention.

39 Supra note 10.
law obtained through its interpretation by the supervisory organs may appear to be the more “special” rule and may be given priority. In summary, the *lex specialis* maxim cannot offer a standard answer to solve conflicts of norms. It should rather be seen as an overall descriptive tool of contextual and teleological interpretation.

**C. The Ivory Tower Approach of the ECtHR**

The ECtHR has been far from applying IHL as a *lex specialis* in cases of an armed conflict. It has rather resisted any explicit reference to IHL and avoided applying provisions of this branch of the law in its case-law. One may understand that the Court eschews a *direct application* of a body of law, which is not, according to its constitutive instrument, the European Convention on Human Rights, in the material scope of its jurisdiction. The Court has only the competence to interpret and to apply the European Convention. What is more surprising is that the Court also avoids *taking account* of IHL provisions in order to interpret and apply the HRL guarantees of the European Convention in times of armed conflicts. There is a general rule of interpretation – and the ECtHR often refers to it – according to which account must be taken in terms of “any relevant rules of international law applicable in the relations between the parties”. Consequently, there seems to be no reason why the Court could not consider IHL rules in order to give more precise legal clothing to some of its

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40 See infra at 43 (concerning the obligation to investigate). See also Sassoli, *supra* note 30.
42 Sometimes the Court is implicitly inspired by IHL. See Ergi, *supra* note 11.
43 If the Court directly applied IHL, this would mean *stricto sensu* that it could declare that a State is internationally responsible for its IHL violations. See Bámaca Velásquez, *supra* note 11, para. 208.
arguments, to confirm its holdings or to bridge legal gaps, exactly as other HRL supervisory organs do. An “implied powers-approach” also sustains this conclusion. If it is “necessary” for the Court to refer to IHL to be able to correctly apply the European Convention, then it must be considered to possess the implied power to do so. The concept of “renvoi matériel” may also allow – and indeed force the Court – to incorporate an IHL notion into the European Convention in order to correctly apply the latter. The concept of material renvoi normally applies between legal orders (international law/municipal law). It means that one legal order avoids regulating a certain subject matter or avoids regulating it in detail. It rather makes reference to the normative formula of another legal order, which it takes over in case of need for a full or partial extent. Thus, the law of a federal State may avoid setting out rules on the delimitation of territory between its federated entities; in case of a dispute on that subject matter it may take over en bloc the rules international law has developed for the delimitation between States. Such a renvoi is normally implicit. It is thus to be gathered by interpretation. Applied to the regional (European: ECtHR) and the international (universal: IHL) legal orders, this idea of renvoi could be taken to mean that if the European Convention is today increasingly applied to situations of armed conflicts, and if the “special” law for such conflicts as it has developed since 1950 is to be found in IHL, then the proper interpretation of the European Convention is that some form of reference to IHL must be implied. Otherwise the proper application of the law would not be guaranteed. The results obtained would remain legally doubtful and consequently open to challenge. This would jeopardize the authority of the Court.

47 See General Comment No. 31, supra note 11, para. 11; Concluding Observations: United States of America, HRC, 2006, UN Doc. CCPR/C/USA/CO/3, para. 5 and 20. In the past, the IACtHR directly applied IHL. See Juan Carlos Abella, supra note 36, at paras. 157-71. But the IACtHR considered that this was going too far. However, the IACtHR admitted that the relevant provisions of IHL may be taken into consideration as elements for the interpretation of the American Convention. See Las Palmas v. Colombia, [2000] IACtHR, Preliminary Objections, Ser. C, No. 67, at paras. 32-34; Bámaca Velásquez, supra note 11, paras. 203-14; Amnesty International v. Sudan, AComHPR, No. 48/90, 13th Annual Activity Report 1999-2000, para. 50.


It can be added that the European Convention contains some indirect references to IHL. Thus, Article 15(1) requests the Court to control the compatibility of measures of derogation of a State with its other international law obligations.\(^{51}\) This includes IHL.\(^{52}\) Article 15(2), prohibits any derogation to the right to life “except in respect of deaths resulting from lawful acts of war”, a formula which seems an invitation to refer to IHL. These references however suppose that a State invokes the derogation clause contained in Article 15.\(^{53}\)

How may one explain this Ivory Tower practice of the ECtHR? Issues of legal policy seem to be crucial. By the course chosen, the Court avoids entanglement in the diplomatically sensitive question as to the existence and character of an armed conflict.\(^{54}\) It also avoids analyzing complex sets of IHL rules with which its judges may not have perfect confidence.\(^{55}\) Finally, the Court may seek to establish an autonomous régime\(^{56}\) more protective than IHL rules.\(^{57}\) For example, by applying HRL alone, the Court shielded from potential challenge a legal régime on the use of lethal force which is sometimes more protective than under IHL\(^{58}\) (but this could probably also have been secured through the approach of the “more protective rule”). This Ivory Tower approach also has its drawbacks. It precludes a global and coherent construction of the protective rules in times of armed conflict while favoring fragmentation.\(^{59}\) The Court could improve the protections and the progressive development of the law if it took account of IHL rules and attempted to clarify its multiple relationships to HRL. The result reached in

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\(^{51}\) See Art. 15(1) ECHR:
In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.


\(^{53}\) See Cyprus v. Turkey, 1976, supra note 11, para. 527.


\(^{55}\) In fact, IHL is a special and complex field of international law which does not follow the same logic as HRL and which, therefore, requires a very specific expertise.

\(^{56}\) See Tigoudja, supra note 2, at 76.

\(^{57}\) See Abresch, supra note 54, at 746-48; Hampson, supra note 44, at 127.

\(^{58}\) See below.

\(^{59}\) See Martin, supra note 48, at 1048.
single cases will be enriched and better tailored if the spectrum of applicable rules is diversified as a function of differing circumstances. In some situations, moreover, it is difficult to make abstraction from IHL rules, since they clearly constitute a “lex specialis” necessary to a proper application of the law in full context. This is the case, for example, in the field of the conduct of hostilities.60

II. THE PROTECTION OF THE RIGHT TO LIFE

A. International Human Rights Law

The right to life is often considered to be a sort of “primary right” or “supreme right”, placed at the apex of the hierarchy of HRL.61 The ECtHR once qualified it as “the supreme value in the hierarchy of human rights”.62 It is not only guaranteed by the main HRL treaties63 but also by general international law.64 However, notwithstanding its fundamental importance, the right to life is not absolutely protected. Capital punishment, where admitted, constitutes a first recognized exception.65 Moreover, most HRL instruments prohibit only “arbitrary” deprivations of life.66 The European Convention goes further by providing an exhaustive list – to be interpreted restrictively – of recognized reasons for lethal interventions.67 These are in

60 See below.
63 See Art. 6 ICCPR; Art. 2 ECHR; Art. 4 IACHR; Art. 4 ACHPR.
64 See Dinstein, supra note 61, at 115.
65 See Art. 6(2) ICCPR; Art. 4(2) IACHR; Art. 4 ACHPR. Art. 2(1) ECHR also contains an exception to the death penalty but the latter tends to disappear in Europe as it has been prohibited by Protocol 6 in times of peace and by Protocol 13 at all times. In the Öcalan case (Öcalan v. Turkey, [2003] ECtHR, para. 196), the Court let understand that the prohibition of the death penalty may be a European customary rule.
66 See Art. 6(1) ICCPR; Art. 4(1) ACHR; Art. 4 ACHPR.
67 See McCann, supra note 62, para. 146-48. It should be noted that the exceptions delineated in Art. 2(2) indicate that this provision extends to, but is not concerned exclusively with, intentional killing.
defence of any person from unlawful violence; in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; in action lawfully taken for the purpose of quelling a riot or insurrection. Furthermore, the recourse to lethal force must be considered a last resort (principle of necessity); and it must be strictly proportional to the aim to be achieved. According to the European Commission of Human Rights, “in assessing whether the use of force is strictly proportionate, regard must be had to the nature of the aim pursued, the dangers to life and limb inherent in the situation and the degree of the risk that the force employed might result in loss of life”. Contrary to other HRL instruments, the right to life in the European Convention is not only subject to exceptions, but also to derogation in time of armed conflicts. This aspect has not yet had any practical bearing, since no State ever used this power in the context of the right to life. Consequently, the ECtHR only had opportunity to control the exceptions under Article 2(2).

The supervisory organs under HRL instruments had recourse to the device of “positive obligations” in order to further strengthen the reach of the right to life. Thus, it has been held that the States must not only refrain from arbitrary killings but must also adopt positive action in order to safeguard the life of persons present or placed under their jurisdiction.

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68 In light of the case law of the ECtHR, it can be concluded that, in fact, each of these legitimate aims could be subsumed under the generic term of “self-defence” in a wide sense insofar as the Court admitted the recourse to lethal force in cases of lawful arrest or for quelling a riot only if the persons against whom the force was used represented a risk more or less immediate for the life of others. Concerning Art. 2(2)(b), see, e.g.: Makaratzis v. Greece, [2004] ECHR; Nachova et al. v. Bulgaria, [2005] ECHR; Kakoulli v. Turkey, [2005] ECHR. Concerning Art. 2(2)(c), see, e.g., Stewart v. United Kingdom, [1984] ECHR, DR 39; Güleç v. Turkey, [1998] ECHR.


70 See Stewart, supra note 68, para. 19.

71 Art. 4(2) ICCPR; Art. 27(2) ACHR. The ACHPR does not include a provision allowing derogations.

72 As underlined before, Art. 15(2) ECHR prohibits any derogation to the right to life “except in respect of deaths resulting from lawful acts of war”.

73 It should be underlined that the ECtHR had to deal with the right to life only in situations of NIAC.

74 See A. Mowbray, The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights (2004); Nowak, supra note 61, at 122. See also General Comment No. 31, supra note 11, para. 8.

75 See L.C.B. v. United Kingdom, [1998] ECHR, para. 36; General Comment No. 6, supra note 62, para. 5.
These positive obligations comprise several aspects; the most important are: (i) the duty to enact legislation to protect the right to life;\textsuperscript{76} (ii) the duty to take all feasible precautions and to control police action so that the eventuality of recourse to lethal force is minimized;\textsuperscript{77} (iii) the duty to prevent persons under the jurisdiction of a State to attack the physical integrity of others;\textsuperscript{78} (iv) and the duty to conduct a thorough and meaningful enquiry any time a person has been killed.\textsuperscript{79} These particular rules developed by the HRL case-law can be flexibly applied, adapted and developed for situations of armed conflicts.\textsuperscript{80}

\textsuperscript{76} This obligation is already stated in the treaty provisions. See Art. 6(1) ICCPR; Art. 2(1) ECHR; Art. 4(1) ACHR; Art. 1 ACHPR. See also, General Comment No. 6, \textit{supra} note 62, para. 3. See also \textit{Maharatzis, supra} note 68, paras 56-72; Suárez de Guerrero v. Colombia, [1982] HRC, No. 45/1979, para. 13.3.


\textsuperscript{80} The HRL bodies can always create new positive obligations incumbent to the State, also in the context of an armed conflict. For example, HRL bodies require the State to search for and collect the wounded and sick after an engagement, like IHL does (in NIAC: Art. 3 Common of the 1949 Four Geneva Conventions and Art. 7-8 of APII, \textit{supra} note 25). See Ahmet Özkan, [2004] \textit{ECHR}, paras. 307-308; \textit{Neira Alegria, supra} note 77, para. 74. Another example, in a recent case where a child lost his leg because of a landmine, the ECtHR held Turkey responsible for a violation of Art. 2 because it took insufficient security measures around the area mined by the military and used by villagers as pasture land. See Paşa and Erkan Erol v. Turkey, [2006] \textit{ECHR}.
B. International Humanitarian Law

It may be asked whether IHL can truly protect the right to life: is it not based on the very opposite idea of a license of combatants to kill?\(^{81}\) However, that license applies only to a particular segment of persons, situations and of moments during an armed conflict. Apart from it, there are many provisions protecting the life of combatants and civilians.\(^{82}\)

Article 48 of 1977 Additional Protocol I to the 1949 Geneva Conventions [API] – which is considered to reflect customary international law\(^{83}\) – enunciates the following fundamental rule for IAC: “[T]he Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”. This principle of distinction is crucial.

The extent of the right to life guaranteed in armed conflict thus depends on its reach: it will vary with respect to the status of the person (combatant / civilian).\(^{84}\)

The right to life of combatants is limited according to the moment and activity at stake (combat situations / combatants hors de combat).\(^{85}\) During hostilities in which they are engaged, they are legitimate targets; if hors de combat, their protection against killings is aligned to that of civilians.\(^{86}\) Even

\(^{81}\) See General Comment No. 6, supra note 62, para. 2: “The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life”. See also T. Hadden & C. Harvey, “The Law of Internal Crisis and Conflict”, 833 Int’l Rev. Red Cross 120 (1999).

\(^{82}\) Some authors already contended that the right to life exists in IHL. See A. Calogeropoulos-Stratis, Droit humanitaire et Droits de l’Homme: la Protection de la Personne en Période de Conflit Armé 141 (1980); M. El-Kouhene, Les Garanties Fondamentales de la Personne en droit Humanitaire et Droits de l’Homme, 113-16 (1986).


\(^{84}\) See J.-F. Quéguiner, Le Principe de Distinction Dans la Conduite des Hostilités 296 (Thèse Université de Genève/IUHEI, 2006).

\(^{85}\) See El Kouhene, supra note 82, at 113.

\(^{86}\) See Art. 41(1) API, supra note 25. This rule can be considered as a norm of customary international law. See Customary International Humanitarian Law, supra note 83, Rule 47 at 164 and Rule 89 at 311. Once combatants are hors de combat, their life must be protected. See Art. 12 and Art. 50 of the 1949 (First) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31 [GC I]; Art. 12 and 51 of the 1949 (Second) Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85 (GC II); Art. 13 and 130 of the 1949 (Third) Geneva Convention Relative to the Treatment of Prisoners of War 75 U.N.T.S. 135 (GC
A RIGHT TO LIFE IN ARMED CONFLICTS?

During hostilities, it should however be recalled that "the only legitimate object which States should endeavor to accomplish [...] is to weaken the military forces of the enemy".\(^{87}\) Thus, if it were possible to injure (putting thus *hors de combat*) rather than to kill, the principle of necessity would legally impose the first to the detriment of the second.\(^{88}\) There are moreover certain specific IHL limitations indirectly relevant to the right to life during combat situations.\(^{89}\) Thus, the taking of life will be qualified as illegal under IHL if it flows from refusal of quarter,\(^{90}\) recourse to perfidy\(^{91}\) or a use of weapons causing unnecessary suffering.\(^{92}\) The illegality of the means and methods of combat here entails the illegality of the result.

*Civilians* enjoy a greater degree of protection of their life than combatants. The parties to the conflict must not only abstain from killing civilians under their control,\(^{93}\) but also adopt some positive measures geared

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\(^{89}\) *Saint Petersburg Declaration, supra* note 87, Preamble para. 3; Art. 22 of the Hague Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention (IV) of 1907, repr. in *The laws of Armed Conflicts, supra* note 87, at 75; API, *supra* note 25, Art. 35: “In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited”.

\(^{90}\) Art. 23(c) of the 1907 Hague Regulations, *supra* note 89; Art. 12 GC I, *supra* note 86; Art. 12 GC II, *supra* note 86; Art. 40 API, *supra* note 25. This rule can be considered as a norm of customary international law. *See Customary International Humanitarian Law, supra* note 83, Rule 46, at 161.

\(^{91}\) Art. 23 (b)(c)(f) and 24 of the 1907 Hague Regulations, *supra* note 89; Art. 37 and 5(3)(f) API, *supra* note 25. This rule can be considered as a norm of customary international law. *See Customary International Humanitarian Law, supra* note 83, Rule 65, at 221.

\(^{92}\) *Saint Petersburg Declaration, supra* note 87, Preamble, para. 5; Art. 23(e) of the 1907 Hague Regulations, *supra* note 89; 35(2) API, *supra* note 25. This rule can be considered as a norm of customary international law. *See Customary International Humanitarian Law, supra* note 83, Rule 70, at 237.

\(^{93}\) Art. 32 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, *75 U.N.T.S. 287* [GC IV]; Art. 75(2)(a) API. This rule can be considered as a norm of customary international law. *See Customary International Humanitarian Law, supra* note 83, Rule 89, at 311.
at protecting the life of civilians under their jurisdiction. In the context of hostilities, the civilians are granted general immunity: they cannot be made the object of direct attacks (except if they participate in the hostilities and only during the time-span of this direct participation) and they are protected against indiscriminate attacks. Every collateral civilian death in an armed conflict does obviously not automatically entail a violation of IHL. Collateral civilian casualties are accepted by the rules of warfare to the extent the losses are not excessive in relation to the concrete and direct military advantage anticipated by a military operation. Furthermore, the principle of precaution – requiring that military operations always be conducted with an effort of sparing, to the extent feasible, civilian populations – contains several protective rules for civilians. One of them is the principle that the “least possible damage” should be inflicted implying that the States shall “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects”.

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94 E.g., the obligation to protect and to assist wounded, sick and shipwrecked: Art. 16 GC IV, supra note 93; Art. 10 API, supra note 25. This rule can be considered as a norm of customary international law. See *Customary International Humanitarian Law*, supra note 83, Rule 109-11, at 396 et seq. The prohibition to use starvation of civilians as a method of warfare can also be cited: Art. 23, Art. 55 and Art. 59 GC IV, supra note 93; Art. 54(1) API, supra note 25. This rule can be considered as a norm of customary international law. See *Customary International Humanitarian Law*, supra note 83, Rule 53, at 186.

95 Art. 51(1) API, supra note 25: “The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations”.

96 This derives from the principle of distinction (Art. 48 API, supra note 25). See also Art. 51(2) API, id.) This rule can be considered as a norm of customary international law. See *Customary International Humanitarian Law*, supra note 83, Rule 6, at 19.

97 Art. 51(3) API, supra note 25.

98 Art. 51(4) and Art. 51(5) API, supra note 25. This rule can be considered as a norm of customary international law. See *Customary International Humanitarian Law*, supra note 83, Rule 11-13, at 37 et seq.

99 This is the principle of proportionality. See Art. 51(5)(b) API, supra note 25. This rule can be considered as a norm of customary international law. See *Customary International Humanitarian Law*, supra note 83, Rule 14, at 46.

100 Art. 57 API, supra note 25. This rule can be considered as a norm of customary international law. See *Customary International Humanitarian Law*, supra note 83, Rules 15-21, at 51 et seq.

101 Art. 57(2)(a)(ii) API, supra note 25. This rule can be considered as a norm of customary international law. See *Customary International Humanitarian Law*, supra note 83, Rule 17, at 56.
The equivalent rules for NIAC are much less precise and developed, especially concerning the protection in combat. Common Article 3 to the 1949 Geneva Conventions does not deal with action during hostilities. APII, when it applies, only contains the general rule according to which “the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations”. Many weapons have been prohibited by instruments applying formally to IAC; but only few weapons have been prohibited by instruments applying formally also to NIAC. The right to life would thus seem to be protected more poorly in NIAC than it is in IAC. However, as the ICRC study on customary humanitarian law showed, the majority of rules relating to the conduct of hostilities applicable during an IAC are customarily also applicable to NIAC. This holds true, for example, of the principle of distinction and its derivatives, e.g., the immunity of the civilian population, the prohibition of indiscriminate attacks, the principles of proportionality and of necessity, the principle of precaution. The equation holds increasingly true also in the area of weapons law: legal writings and jurisprudence generally conclude that weapons prohibited in IAC are prohibited also in NIAC. Moreover, a

102 See Abresch, supra note 54, at 746-48; Hampson, supra note 44, at 127.
103 To be applicable APII (supra note 25) must have been ratified by the State on which the armed conflict is taking place and, contrary to the 1949 Geneva Conventions, APII is not universally ratified. Then, APII deals only with situations in which there is a NIAC between governmental: “armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”. See Art. 1 APII, supra note 25.
106 See Customary International Humanitarian Law, supra note 83, at xxix: “the gaps in the regulation of the conduct of hostilities in Additional Protocol II have largely been filled through State practice, which has led to the creation of rules parallel to those in Additional Protocol I, but applicable as customary law to non-international armed conflicts”.
107 Ibid., Rules 1, 11-14, 15-21.
108 See Prosecutor v. Dusko Tadić a/k/a “Dule”, ICTY, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 119; Declaration on
certain number of conventional and customary rules relating to the protection of the right to life of persons in the hands of the enemy have been developed for NIAC. Overall, the fundamental protections offered by IHL do not differ greatly in IAC and NIAC, albeit certain differences remain.

C. A Comparison

As could be seen in the passages above, the right to life is protected by different legal constructions in IHL and HRL. The reasoning adopted in order to determine if a killing (or a violation of physical integrity) is illegal follows different paths in both branches.

Simplifying, it can be said that in HRL four signposts will distinguish the path. First: does the use of force respect the conditions of municipal law protecting the life of persons? Second: if the death results from action of State agents, did the use of lethal force pursue a legitimate aim and was it absolutely necessary to achieve that aim? If the casualty was the result of private action, did the competent State agents take appropriate preventive action? Third: did the State, during the planning and control phase of the envisaged police action, take all the feasible measures to minimize the eventuality of the use of force and of civilian casualties? Fourth: did the State thoroughly and effectively inquire into the causes of the casualty?

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109 Common Art. 3 of the 1949 GC, supra note 86 and 93; Art. 4(2)(a) APII, supra note 25. This rule can be considered as a norm of customary international law. See Customary International Humanitarian Law, supra note 83, Rule 89, at 311. There are also some rules indirectly protecting the right to life of persons affected by a NIAC. E.g. Art. 7 and 8 APII, supra note 25: protection and care for wounded, sick and shipwrecked. This rule can be considered as a norm of customary international law. See Customary International Humanitarian Law, supra note 83, Rules 109-111, at 396 et seq. See also Art. 14 APII, supra note 25: protection of objects indispensable to the survival of the civilian population. This rule can be considered as a norm of customary international law. See Customary International Humanitarian Law, supra note 83, Rule 53, at 187.

110 The positive obligation to protect life implies that States should also abstain from actions capable of endangering life, even if the victim did not actually die. See Hampson, supra note 44, at 131. See also Berkty v. Turkey, [2001] ECtHR, para. 153; Chongwe v. Zambia, [2000] HRC, No. 821/1998, at 5.2.
In IHL, the signposts of the path are rather the following three. First: did the killing take place in the context of an IAC or in the context of a NIAC (the rules not being identical)? Second: what was the status of the person killed, a combatant or a civilian (or a civilian participating irregularly in hostilities)? Third: were the means and methods used in the military action lawful, in general (e.g., prohibited weapons) and in particular (e.g., necessity in context, excessive collateral damages with respect to a concrete military advantage, etc.). If the victim was a civilian, the issue will often concentrate on the questions as to whether the attack was indiscriminate or launched without proper precautions.\footnote{Some of these conceptual differences between the protections of IHL and HRL need further clarification. They will allow us to formulate a judgement on the degree of compatibility of both approaches.}

1. In IHL the protection of life varies according to the qualification of the conflict as an IAC or a NIAC.\footnote{In case of a NIAC, it should also be distinguished between those where only Common Art. 3 applies and those where APII is also applicable.} In HRL, the protection of life does not differ according to the situation on the ground. Hence, HRL seem at first sight more protective. However, the extent of the difference is not to be exaggerated. First, the distinction in the reach of IHL protections in IAC and NIAC is constantly reduced under the powerful and progressive influence of customary international law.\footnote{See above.} Second, under the European Convention, the right to life cannot be derogated from “except in respect of deaths resulting from lawful acts of war”.\footnote{Art. 15(2) ECHR.} This allowance means that a potentially different standard of protection is accepted for situations of armed conflict as compared with situations under ordinary peacetime. Moreover, the ECtHR may take account of the particular situation of warfare when interpreting the right to life in a particular context. Thus, in the Isayeva, Yusupova, Bazayeva v. Russia case, it presumed that the use of lethal force pursued a legitimate military aim because of the situation of conflict Russia had to face.\footnote{See Isayeva I, supra note 11, para.181.} The true extent of this first difference seems thus practically quite reduced.

2. In IHL (at least in IAC) the protection of life further depends on the status of the person, \textit{i.e.}, on the combatant or civilian status. If a combatant may be directly targeted and killed, a civilian cannot be directly targeted except if he participates in the hostilities and only during that participation.
In HRL, there is no distinction as to status.\textsuperscript{116} Every person equally enjoys the right to life. Recourse to lethal force is only allowed if there is an absolute necessity in order to essentially safeguard the lives of other persons.\textsuperscript{117} Here again, it would seem that HRL grants a greater degree of protection by failing to distinguish between categories of persons and by holding that nobody can be attacked just because of his status or even criminal activities. This distinction does, however, fade away if one compares HRL with IHL under NIAC. In internal conflicts, there is, at least explicitly, no combatant status.\textsuperscript{118} Even under IAC it could be argued that IHL is not attached to status in the first place, since even civilians may be killed in certain circumstances.\textsuperscript{119} The true question would rather be if a person participates in hostilities or if he must suffer a collateral injury measured in relation to a military advantage. Moreover, one can consider that even a combatant may not be killed if he could be captured or injured.\textsuperscript{120} This flows from the prohibitive aspect of the principle of military necessity which is inherent to IHL.\textsuperscript{121} The Preamble of the Saint Petersburg Declaration previously enounced is an illustration of this principle.\textsuperscript{122} The question of status would thus dissolve into one of context. Here again, the

\textsuperscript{116} See Report of the Expert meeting on the right to life in armed conflicts and situations of occupation, supra note 20, at 6: “this HRL legal regime addresses how a State can respond to the threat posed by rebels without creating categories of people who can be targeted and killed on sight as under the IHL of IAC”. See also Abresch, supra note 54, at 757; Hampson, supra note 44, at 135.

\textsuperscript{117} See McCann, supra note 62; Oğur v. Turkey, [1999] ECtHR; Gül v. Turkey, [2000] ECtHR.

\textsuperscript{118} Some authors contend that in NIAC, the status of combatant implicitly exists. See infra note 180.

\textsuperscript{119} See Calogeropoulos-Stratis, supra note 82, at 141:

\textit{...le droit à la vie est aussi un droit fondamental du droit humanitaire applicable dans les conflits armés en ce que tout acte de guerre contre des non-combattants ou des combattants mis hors de combat est interdit. Cette protection n’a rien à voir avec le statut de la personne intéressée, mais uniquement avec le point de savoir si elle prend part aux combats ou non. Cela vaut aussi bien pour les conflits armés internationaux ou non internationaux.}

\textsuperscript{120} See above.

\textsuperscript{121} On the prohibitive aspect of the principle of military necessity, see G. Venturini, \textit{Necessità e Proporzionalità Nell’uso Della Forza Militare in Diritto Internazionale} 127 (1988). On the relevance of military necessity concerning the targeting of combatants, see the expert meeting convened by the ICRC in 2005 on the Direct Participation in Hostilities under International Humanitarian Law, at 45. \textit{Available at:} http://www.icrc.org/web/eng/siteengO.nsf/html/participation-hostilities-ihl-311205(last accessed 02.04.07).

\textsuperscript{122} Supra note 87.
distinction between IHL and HRL may at the end of the day appear more formal than material.

3. The principles of necessity and proportionality are common to IHL and HRL, but they seem to operate in slightly different settings. In HRL, the principle of necessity implies that the use of lethal force must represent the *ultima ratio* (i.e., it must appear that non-, or less, violent means are inappropriate or have proved to be such) to attain a legitimate aim (most notably self-defence). In IHL, necessity is not applied to the lawfulness of the recourse to force (*jus ad bellum* issue).\(^{123}\) However, it remains applicable to the military actions taken as such. In this context, the principle of necessity operates at different levels, e.g., in the definition of the “military objective”, which supposes a “concrete and direct military advantage”,\(^ {124}\) or in the rule requiring that when a choice is possible between several military objectives offering the same military advantage, the objective to be selected shall be that which may be expected to cause the least danger to civilian lives and objects.\(^ {125}\) Actually, the only true difference between HRL and IHL with respect to the principle of necessity seems to be the criterion according to which it is measured. In HRL the measuring rod seems to be the legitimate aim; whereas in IHL it appears to be the “concrete and direct military advantage anticipated”. In times of armed conflict, both concepts may perfectly converge.

It has also been said that the principle of proportionality is stricter in HRL where it requires scrutiny into measures avoiding at a maximum any casualties, whereas in IHL only a manifest disproportion would be unlawful.\(^ {126}\) In fact, in IHL, an attack would be disproportionate only if it 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.\(^ {127}\) But once more this difference seems at once relative and rather of means than of result. Thus, strict HRL proportionality does not imply that “collateral damages” are not acceptable.\(^ {128}\) The case-law accepts

\(^{123}\) This does not mean that necessity under HRL includes *jus ad bellum* issues as has been contended. See Schabas, *supra* note 28, at 14. It only means that under HRL the recourse to lethal force must be necessary to attain a legitimate aim (not in the war in general but in a concrete attack). Instead, under IHL, the lawfulness of the recourse to lethal force against military objectives is presumed.

\(^{124}\) Art. 52(2) API, *supra* note 25.

\(^{125}\) Art. 57(3) API, *id.*

\(^{126}\) See Hampson, *supra* note 44, at 134.

\(^{127}\) Art. 51(5)(b) API, *supra* note 25.

\(^{128}\) It is sometimes erroneously contended that collateral damages are not accepted in HRL. See e.g., T. Meron, “The Humanization of Humanitarian Law”, 94 *A.J.I.L.* 240 (2000):
that innocent third persons could be lawfully killed incidentally to a legitimate recourse to lethal force.\textsuperscript{129} Moreover, the principle of proportionality under IHL is complemented by the principle of the "least possible damage" requiring explicitly that the belligerents shall "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects".\textsuperscript{130} Hence, at the end of the day, the concrete operation of the principle of proportionality seems broadly equivalent in both branches. There could be a second difference insofar as the IHL principle of proportionality – as set out in Article 51(5)(b) API – covers only incidental civilian damage, to the exclusion of combatant or military injuries. Conversely, HRL is based on an aggregate notion of proportionality, without any such distinction. However, as underlined above (point 2), necessity and proportionality are also general principles inherent to IHL and applying beyond the special situation of Article 51 API. In this broader area, they imply that one should take into consideration the possibility to injure or capture the target of the attack if this is realistically possible. In this perspective, the differences to HRL tend to be reduced.

The overall result is that the differences of tools and reasoning that exist between HRL and IHL do not lead to substantive divergences or even to incompatibilities. Affirming that IHL is based on the principle of freedom to kill whereas HRL is based on the principle of protection of life is at best a gross overstatement. Indeed, both branches of the law are predicated, in our area, on the principle of minimum use of force. Both thus protect the right to life and both do so realistically with some exceptions. If HRL tends to go further in protection (since it is based on the peacetime paradigm), the existing differences are only of degree. One may even say that the differences are fading progressively away as HRL bodies develop an increasing branch of wartime human rights, sensitive to the peculiar characteristics of that type of situation.

\textsuperscript{129} See e.g., Ahmet Özkan, supra note 80, para. 305. In time of peace also, the ECtHR accepted that the incidental death of a person who was not the target of the use of force may be lawful if the recourse to lethal force was absolutely necessary. See Andronicou and Constantinou v. Cyprus, [1997] \textit{ECtHR}.

\textsuperscript{130} Art. 57(2)(a)(ii) API, \textit{supra} note 25.
III. THE CONTRIBUTION OF THE EUROPEAN COURT OF HUMAN RIGHTS TO THE RIGHT TO LIFE IN SITUATIONS OF ARMED CONFLICT

A. The Interpretation and Development of IHL Rules

The Principle of Precaution

In the famous McCann v. United Kingdom case the ECtHR considered that a breach of the right to life could result not only from recourse to lethal force on the spot but also from previous planning deficiencies or failure of proper control over the action. The Court held that States were obliged to take all feasible precautions with a view to reducing at a minimum the risk of recourse to lethal force. The context of this case was not an armed conflict. However, it allowed the Court to enunciate the quoted principle of precaution, which was later exported towards the case-law dealing with warfare situations.

The Güleç case concerned the accidental death of a 15 years old young man caused by security forces involved in the suppression of a riot in the context of the NIAC in Turkey during the 1990’s. The Court considered that the right to life had been breached, in particular because the use of machine-guns in this context was held to be disproportionate.

The Court considered that Turkey should have put at the disposal of its armed forces

132 It was rather a fight against terrorism in peacetime. In fact the level of intensity required by Common Art. 3 (armed clash) was not reached. See Watkin, supra note 15, at 20. Contra: Abresch, supra note 54, at 756.
133 As underlined by Reidy: "(...) the test laid down by the Court in McCann and others v. UK – that the planning and control of an operation must be so as to minimize, to the greatest extent possible, recourse to lethal force (...) – provides a secure framework for assessing whether killings are illegal under the laws of armed conflict". See A. Reidy, "The Approach of the European Commission and Court of Human Rights to International Humanitarian Law", 32A Int’l Rev. Red Cross 526 (1998).
134 See Güleç, supra note 68, paras. 69-73.
135 No matter what the Government contended, in South-East Turkey, in the 1990’s, there was a NIAC to which Common Art. 3 was applicable. The armed clashes between Turkish forces and members of the Workers Party of Kurdistan (PKK) were frequent and the PKK was an organised armed group under responsible command. On the other hand, this armed conflict was not covered by APII because Turkey did not ratify this treaty and, in any case, the PKK probably did not have a sufficient territorial control. See Abresch, supra note 54, at 755. The ECtHR also admitted the presence of an armed conflict. See Güleç, supra note 68, para. 81.
136 Ibid., paras. 69-73.
non-lethal weapons (such as truncheons, riot shields, water cannons, rubber bullets or tear gas) in order to confront ordinary and expected disturbances in a region subjected to the state of emergency.\textsuperscript{137} One may notice that the principle of precaution was interpreted identically as in IHL, where the State is required to use weapons minimizing civilian casualties.\textsuperscript{138} This is all the more noticeable as the Güleç case does not concern the conduct of hostilities but rather a police action.\textsuperscript{139} It is sometimes suggested that, in this case, the ECtHR implicitly borrowed the principle of precaution from IHL.\textsuperscript{140} This is however speculative but one can safely affirm at least that this case shows that the principle of precaution is common to IHL and HRL and that it appears to be applicable in many different situations of violence.\textsuperscript{141}

The Ergi case is the high-water mark of a HRL principle of precaution aligned on its cousin in the realm of IHL.\textsuperscript{142} The facts of the case were that a civilian woman had been killed in her village of origin in an ambush of Turkish military forces against members of the Workers Party of Kurdistan (PKK).\textsuperscript{143} The Court held that the responsibility of the State could also be engaged if “agents of the State (...) fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of civilian life”.\textsuperscript{144} It becomes apparent that the Court draws on its case-law under the McCann case,\textsuperscript{145} but that it further develops the law by leaning heavily on the principle of the “least possible damage” as it exists in IHL.\textsuperscript{146} This reference to a principle of precaution currently used in IHL has not escaped the attention of legal writings.\textsuperscript{147} They insisted on an important evolution in the readiness of the Court to take account of IHL. The

\textsuperscript{137} Id. Similarly, see Şimşek et al. v. Turkey, [2005] ECtHR.
\textsuperscript{138} Art. 57(2)(a)(ii) API, supra note 25.
\textsuperscript{139} Thus, IHL rules regulating the conduct of hostilities are not as such applicable. See Reidy, supra note 133, at 528.
\textsuperscript{140} See Heintze, supra note 21, at 811; Martin, supra note 48, at 1059-60; Reidy, supra note 133, at 528.
\textsuperscript{141} See Abresch, supra note 54, at 746.
\textsuperscript{142} See Ergi, supra note 11. This case also takes place during the NIAC opposing the Turkish Government and the PKK. The Court admitted the existence of a conflict. See para. 85.
\textsuperscript{143} In this case, contrary to the Güleç case, we are in the conduct of hostilities because Ms. Ergi was incidentally killed during an armed clash. See Ergi, supra note 11, para. 77-78. Therefore, the IHL principle of precaution would be applicable.
\textsuperscript{144} Ibid., para. 79.
\textsuperscript{145} In fact, it is in the ambit of the planning of the operation that the Court finds a deficiency because the State did not avoid the confrontation from happening next to the village.
\textsuperscript{146} Art. 57(2)(a)(ii) API, supra note 25.
\textsuperscript{147} See Heintze, supra note 21, at 809-10; Martin, supra note 48, at 1059; Meron, supra note 128, at 272; Reidy, supra note 133, at 527; Watkin, supra note 15, at 24.
Court remained, however, quite prudent and continued to refer to IHL at best implicitly.\(^{148}\) The *Ergi* case remains to date the promontory of IHL influence on the Court’s case-law.

In 2005, the Court has again had opportunity to apply the principle of precaution in the context of the NIAC opposing Russia to the Chechen separatists.\(^{149}\) In the *Isayeva, Yusupova and Bazayeva* case [*Isayeva I*] the Court had to deal with a manifestly intentional bombardment of a civilian convoy by Russian armed forces.\(^{150}\) It held that even assuming that these armed forces were facing an attack or a risk of attack by the rebels, the numerous deficiencies in planning and execution, in particular with respect to the principle of precaution, resulted in a violation of the right to life.\(^{151}\) Thereafter, the *Isayeva* case [*Isayeva II*] proposed with even more clarity the same analysis.\(^{152}\) In this latter case, Russian military forces had indiscriminately bombarded a village in Chechnya where a considerable number of rebel combatants had searched for shelter. The Court held that the use of “indiscriminate weapons”\(^{153}\) in an inhabited area, without any attempt at previous evacuation of civilians, was incompatible with the principle of precaution.\(^{154}\)

By their jurisprudence, HRL bodies,\(^ {155}\) and in particular the ECtHR, can give more precision and develop the principle of precaution also under IHL.\(^ {156}\) The *Ergi* and *Isayeva* II cases show that States must avoid hostilities in proximity of inhabited areas, refrain from directing rebels towards villages

\(^{148}\) As underlined by Martin, *supra* note 48, at 1060: “[l]e droit humanitaire demeure une ‘ombre chinoise’”.

\(^{149}\) The Court did not qualify the situation as a NIAC but referred to “hostilities”. *See* *Isayeva I*, supra note 11, para. 13. On a purely factual basis it is clear that the situation amounted to a NIAC to which both Common Art. 3 and APII were applicable. In fact, Russia had ratified APII and the Chechen rebels, as required by Art. 1 of APII, belonged to an organised armed group (the Chechen Republic of Ichkeria) under responsible command (Aslan Maskhadov) and they exercised sufficient territorial control. *See* *Abresch*, *supra* note 54, at 754.

\(^{150}\) *See* *Isayeva I*, supra note 11, para. 168-200.

\(^{151}\) *Id.*

\(^{152}\) *See* *Isayeva II*, supra note 11.

\(^{153}\) *Ibid.*, para. 189. This is the term used by the Court. However, it was probably not the weapons in themselves which could be considered as indiscriminate but rather the way they were used.


\(^{155}\) Other HRL bodies also used the idea of precautionary measures, but in a much less detailed fashion than the ECtHR. *See* *supra* note 77.

to be attacked\textsuperscript{157} and alert the civilian population of the arrival of rebels if necessary.\textsuperscript{158} The \textit{Isayeva I and II} cases show, for example, that States must respect the principle of precaution by organizing an efficient system of information transmission so as to be able to brief at any moment its pilots or air controllers of the presence of civilians or of the existence of a humanitarian corridor.\textsuperscript{159} The Court also requires that forward air controllers be instructed to proceed to an independent evaluation of targets.\textsuperscript{160}

Some of these holdings can legally be analyzed as developments of customary IHL applicable in NIAC.\textsuperscript{161} Thus, in the \textit{Ergi} case the Court applied the principle of the “least possible damage” transferred from API to NIAC. This principle had not been inserted in APII in 1977.\textsuperscript{162} It was uncertain if at the date of the facts of the case (1993) it could undoubtedly be held to apply to a NIAC. Meanwhile, the principle is considered to apply in NIAC\textsuperscript{163} and the \textit{Ergi} case-law is sometimes quoted – among other sources – as support for this position.\textsuperscript{164} Not only did the Court extend the principle to NIAC, but it also developed its reach and contents. This process is part and parcel of progressive development of the law as is inherent in the jurisprudence of judicial organs. First, one may notice that the Court held the principle to be applicable in NIAC with most of its corollaries as formulated in Article 57 of AP I.\textsuperscript{165} Moreover, in the \textit{Ergi} and \textit{Isayeva I and II} cases, the

\begin{enumerate}
\item\textsuperscript{157} See \textit{Ergi}, supra note 11, para. 79-80; \textit{Isayeva II}, supra note 11, para. 187.
\item\textsuperscript{158} See \textit{Isayeva II}, supra note 11, para. 187.
\item\textsuperscript{159} See \textit{Isayeva I}, supra note 11, para. 187.
\item\textsuperscript{160} \textit{Ibid.}, para. 188.
\item\textsuperscript{161} As rightly underlined by Prof. Sassòli, supra note 30:
\begin{quote}
\textit{Par rapport au même problème, il ne peut pas y avoir une coutume "droits humains" et une coutume "droit humanitaire". On s'oriente toujours vers la pratique et l'opinion juris manifestées par rapport à des problèmes aussi similaires que possible à celui qu'on doit résoudre.}
\end{quote}
\item\textsuperscript{163} See Kupreskic, ICTY, Trial Chamber, Judgment, 2000, paras. 524-25. \textit{See also Customary International Humanitarian Law, supra note 83, at 58.}
\item\textsuperscript{164} \textit{Id.}
\item\textsuperscript{165} By applying the principle of precaution in the Chechen cases, the Court implicitly confirmed the existence of the obligations to: do everything feasible to verify that the objectives are military; choose means and methods of attacks with a view to avoiding
Court went beyond the traditional contents of the precautionary principle. Thus, in Ergi the Court considered that the Turkish government should have taken appropriate precautions in order to “avoid or minimise, to the greatest extent possible, any risk to the lives of the villagers, including from the firepower of the PKK members caught in the ambush”. This is tantamount to saying that the State has a positive duty to protect as much as possible its civilian population even against the attacks of the rebels. In IHL, such an obligation is hardly formulated as clearly. IHL seems to limit itself to require from States that they take, “to the maximum extent feasible” precautions against the effects of attacks, such as “endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives” or “avoid locating military objectives within or near densely populated areas”. These are duties related to the action of the State itself and not to the action of rebels. Another example of a development of the law is to be found in Isayeva II where the court affirmed that Russia should have warned the local population of the probable arrival of rebels in their village. In IHL an obligation of warning exists only with respect to military attacks. Moreover, this obligation is due only “unless circumstances do not permit”.

If these developments are transferred into IHL, the Court will have contributed to a strengthening of the protections for civilians in IHL in collateral damages; refrain from deciding to launch an attack which may be expected to be disproportionate; cancel or suspend an attack if it becomes apparent that the objective is not military or that the attack may be expected to be disproportionate; give an advance warning if the civilian population is endangered. See Isayeva I, supra note 11, paras. 182-200; Isayeva II, supra note 11, paras. 181-201. Moreover, the Chechen cases, Isayeva I (supra note 11, para. 195) and especially Isayeva II (supra note 11, para. 191), can be cited to confirm the customary character of the prohibition of indiscriminate attacks. However, the Court did not, regretfully, enounce these rules clearly. They must therefore be deduced from the facts described by the Court as State’s deficiencies.

See Ergi, supra note 11, para. 79. To reach this conclusion, the Court invoked Art. 2 combined with Art. 1 of the ECHR which requires States to secure to everyone within their jurisdiction the rights and freedoms defined by the ECHR.

Art. 58 API, supra note 25. Moreover, this rule does not exist in treaty-law for NIAC but it could be considered as implicitly included in the general protection against the dangers arising from military operations (Art. 13(1) APII, supra note 25) and in the customary principle of distinction. This rule can also be considered as customary and applicable to NIAC. See Kupreskic, supra note 163, at paras. 524-25. See also Customary International Humanitarian Law, supra note 83, at 69.

See Isayeva II, supra note 11, para. 187.

See Art. 57(2)(c) API, supra note 25. See also Sassoli, supra note 6, at 724.
general and in IHL applicable to NIAC in particular. HRL would not contradict IHL but reinforce its contents.

B. The Interpretation to be given to the Concept of “Direct Participation in Hostilities”

In IHL the term “direct participation in hostilities” is used in IAC as well as in NIAC.\(^\text{173}\) However, it remains controversial and uncertain.\(^\text{174}\) This lack of precision of the law is problematic. The result is that it remains often unclear in what circumstances irregular combatants\(^\text{175}\) (in IAC) or insurgents/fighters (in NIAC) are legitimate targets.\(^\text{176}\) In a nutshell, one can distinguish two (or even three) basic ways of approaching the question of “direct participation in hostilities”.

According to certain authors, as soon as a civilian participates in a group of irregular combatants (e.g., Al Qaeda) or of insurgency (e.g., PKK) he is liable to be attacked.\(^\text{177}\) In other words, the participation of a person in a

\(^\text{173}\) For NIAC, see Common Art. 3 of GC, \textit{supra} note 86 and 93; Art. 4(1) and 13(3) of APII, \textit{supra} note 25. For IAC, see Art. 51(3) of API, \textit{supra} note 25.


\(^\text{175}\) These are persons taking a direct part in hostilities without having the right to do so and who therefore will not be entitled to the rights and privileges of combatants. Baxter qualifies them as “unprivileged combatants”. See R. Baxter, “So-Called ‘Unprivileged Belligerency’: Spies, Guerrillas and Saboteurs”, 28 \textit{B.Y.B.I.L.} 323 (1951).

\(^\text{176}\) In fact, a person (not being a regular combatant) cannot be targeted unless and at such time as he takes direct part in hostilities. It is usually accepted that “hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces”. \textit{See Commentaire des Protocoles Additionnels}, \textit{supra} note 162, at 618. However the controversy remains concerning the words “direct” and “for such time”. \textit{See Customary International Humanitarian Law}, \textit{supra} note 83, at 23. Therefore, it is difficult to know exactly when these persons may be targeted.

\(^\text{177}\) See M. Schmitt, “State-Sponsored Assassination in International and Domestic Law”, 17 \textit{Yale J Int’l L}. 649 (1992); D. Statman, “Targeted Killing”, 5 \textit{Theoretical Inquiries in Law} 179, 195 (2004); Watkin, \textit{supra} note 15, at 16-17. The Supreme Court of Israel adopted this point of view in its recent judgment on the targeted killing practice of the State of Israel. See H.C. 769/02, The Public Committee Against Torture in Israel v. Government of Israel (2006). According to the Supreme Court “a civilian who has joined a terrorist organization and commits a chain of hostilities, with a short period of rest between them, loses his immunity from attack \textit{for the entire time of his activity} (italics added). For such a civilian, the rest between hostilities is nothing other than preparation for the next act of hostilities”. (Official Summary of Judgment, at 2.)
group suffices *eo ipso* to establish his "direct participation in hostilities". This is called the "membership approach". Some States and authors further refine this classification by holding that, what they call "unlawful combatants" in IAC, are no longer civilians but belong to a distinct category, or that in NIAC the insurgents are a class of combatants deprived of the ordinary combatant privileges (right to participate in hostilities, right to a prisoner of war status if captured). This could be called the "third category approach". Concerning targeting issues, these two approaches lead to very similar results, at least concerning irregular combatants belonging to an organized group. The *affiliation to such a group/belonging to such a category* labels that person as an individual susceptible to always be targeted and attacked. These approaches seem to have significant favors in the modern "war against terrorism". They have

178 *See* the summary report of the experts meetings organised by the ICRC in 2003 on the Direct Participation in Hostilities under International Humanitarian Law, *supra* note 174, at 6.

179 In *The Public Committee Against Torture in Israel* case (*supra* note 177, para. 11), the Respondent contended that "a third category of persons – the category of unlawful combatants – should be recognized. Persons in that category are combatants, and thus they constitute legitimate targets of attack". However, this point of view has been rejected by the Supreme Court of Israel (para. 28). In a slightly different manner, Prof. Dinstein considers that the term "combatant" should be understood in a wider sense as including both regular combatants and irregulars. *See* Y. Dinstein, "Unlawful Combatancy", 32 *Israel Y.B. Hum. Rts.*, 247, 249-52 (2002). Thus, "a person who engages in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a combatant. He is a combatant in the sense that he can be lawfully targeted by the enemy, but he cannot claim the privileges appertaining to lawful combatancy": Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflicts* 29 (2004).

180 *See* D. Kretzmer, "Targeted Killing of Suspected Terrorists : Extra-Judicial Executions or Legitimate Means of Defence?", 16(2) *E.J.I.L.* 197-198 (2005). The ICRC Commentary of Art. 13 of APII (*supra* note 25) seems also to admit that there is an implicit status of combatant for insurgents in NIAC. *See supra* note 162, para. 4789: "Those who belong to armed forces or armed groups may be attacked at any time". *See also* New Rules for Victims of Armed Conflicts, *supra* note 162, at 671-72.

181 Differences may remain concerning *unorganised civilians participating in hostilities*. A "membership approach" would not automatically imply that these persons can always be targeted insofar as they do not belong to a "terrorist" group. Thus, for unorganised civilians the "revolving door approach" could still be applied. *See* the summary report of the experts meetings organised by the ICRC in 2005 on the Direct Participation in Hostilities under International Humanitarian Law, *supra* note 174, at 49. Instead a "third category approach" leads to the conclusion that as soon as a person regularly participates in hostilities (with or without belonging to a "terrorist" group), this person is no longer a civilian but an "unlawful combatant" who can be targeted for the entire duration of his/her active involvement in the conflict.
been used to justify the practice of targeted killings to which certain States like Israel\textsuperscript{182} and the US have had recourse.\textsuperscript{183}

Other authors limit the “direct participation in hostilities” to situations where the civilian is by its conduct posing an immediate threat, usually during the preparation (on the spot), participation or return from combat action.\textsuperscript{184} During those phases, a civilian could be targeted. Once resuming civilian activities, the individual would enjoy civilian immunity against direct attacks (but he could obviously be arrested and tried for unlawful combat action). Moreover, a person participating only at the planning stage of combat actions could not be attacked but only arrested.\textsuperscript{185} This is the so-called “revolving door” approach.\textsuperscript{186}

The case-law of the HRL supervisory bodies seems to follow the revolving door approach. Under HRL, it is indeed clear that a person cannot be attacked simply for her participation in criminal activities. The ECtHR had opportunity to stress that point in the \textit{McCann} case where it held that the use of lethal force against terrorists (who were on a reconnaissance mission

\textsuperscript{182} Israel began this practice of targeted killings against Palestinians suspected of belonging to terrorist groups in 2000 with the attack on Hussein Abayat. See Kretzmer, \textit{supra} note 180, at 172.

\textsuperscript{183} See the famous Yemeni incident where a car carrying six suspected members of Al Qaeda was destroyed by a US missile fired from an unmanned drone. For an analysis of this incident, see A. Dworkin, “The Yemen Strike: The War On Terrorism Goes Global”, \textit{Crimes of War Project}, 14 Nov. 2002. Available at: http://www.crimesofwar.org/onnews/news-yemen.html (last accessed 2 Apr. 2007).


K. Dörmann, “The Legal Situation of ‘Unlawful/Unprivileged Combatants’”, 849 \textit{Int’l Rev. Red Cross} 72 (2003); Quéguiner, \textit{supra} note 84, at 336 and 338; S. Zachary, “Between the Geneva Conventions: Where Does the Unlawful Combatant belong?”, 38 \textit{Israel L. Rev.} 393 (2005). See also New Rules for Victims of Armed Conflicts, \textit{supra} note 162, at 301, which says that a civilian is directly participating in hostilities when posing an “immediate threat”; \textit{Commentaire des Protocoles Additionnels}, \textit{supra} note 162, Commentary of Art. 51(3) API, para. 1944 and of Art. 13(3) APII, at paras. 4787-4789. However, the \textit{Commentary} of Art. 13(3) APII suggests that a distinction should be made between “armed groups (which) may be attacked at any time” and civilians directly participating in hostilities, thus implying that the status of “combatants” is implicit for the insurgents’ group.

\textsuperscript{185} See Cassese, \textit{supra} note 184, at 8.

\textsuperscript{186} See the summary report of the experts meetings organised by the ICRC in 2003 on the Direct Participation in Hostilities under International Humanitarian Law, \textit{supra} note 174, at 6.
with the aim of perpetrating a bomb attack) was not “absolutely necessary” under the law since they could have been arrested beforehand. The Court since reiterated that reasoning in cases dealing with armed conflicts. In the Oğur case, for example, the applicant’s son, who worked at the mine as a night-watchman, was killed by the Turkish security forces who believed they were facing a terrorist. The Court held that the security agents should at least have attempted an arrest, given a prior warning and appropriate warning shots before using lethal force. Similarly, in the Gül case, the Court held that the use of lethal force by the Turkish agents against a presumptive terrorist sitting at home with his family was grossly disproportionate in view of the fact that he did not attack them.

Other HRL supervisory organs have followed the same line of reasoning. In the Suárez Guerrero case, concerning the killing of seven suspected members of a guerrilla organization in the context of the war waged by Colombia against the rebel M-19 Movement, a NIAC meeting the threshold set out in Common Article 3 of the Geneva Conventions, the UN Human Rights Committee held that the deprivation of life had been “arbitrary” in the sense of the ICCPR in view of the fact that the presumptive terrorists had been shot when they arrived at their house whereas they could have been arrested. The same Committee has moreover often condemned Israel for targeted extra-judicial killings in occupied territory stressing that “before resorting to the use of deadly force, all measures to arrest a person suspected

187 See McCann, supra note 62. See also Erdoğan et al. v. Turkey, [2006] ECHR (police raid on four buildings in Istanbul against members of Dev-Sol, an extreme left-wing armed movement classified as a terrorist organisation by the Turkish judicial authorities).

188 For the time being, the ECHR reiterated that reasoning only in the context of NIAC. However, if the Court had to deal with a similar situation in IAC (supposing that the Court would be competent and that the acts would have happened within the State’s jurisdiction) it would most probably adopt the same reasoning because, as underlined above, the Court does not change its reasoning according to the situation of peace or armed conflict, international or not. Moreover, in IHL, the terms employed are perfectly similar in the context of IAC and NIAC. In both situations, civilians may not be attacked “unless and for such time as they take a direct part in hostilities”. This seems to indicate that the meaning of those words is identical for IAC and NIAC.

189 See Oğur, supra note 117. This case takes place in the context of the NIAC between the Turkish Government and the PKK. See supra note 135.

190 Ibid., paras. 76-84.

191 See Gül, supra note 117, paras. 80-83. This case also takes place in the context of the NIAC between the Turkish Government and the PKK. See supra note 135. See also a similar case: Hamiyet Kaplan et al. v. Turkey, [2005] ECHR.


193 See Suárez Guerrero, supra note 76, para. 13.3.
of being in the process of committing acts of terror must be exhausted”.

The Inter-American Commission on Human Rights, which is more inspired by IHL, seems however more reluctant to fully adopt the revolving door approach.

As this case-law shows, under HRL an “irregular combatant”, a “terrorist” or an “insurgent” in an armed conflict cannot be attacked with lethal force if he does not pose any immediate threat rendering an arrest impossible. The revolving door interpretation (and not the membership approach) has thus been applied as the correct legal construction by the HRL case-law. By this course, the HRL bodies gave a definition to the terms “direct participation in hostilities”. If HRL and IHL apply simultaneously in times of armed conflict, it becomes clear that the term “direct participation in hostilities” cannot be interpreted in IHL without taking HRL into account. Some would say that HRL provides in this area a _lex specialis_, since its rule

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194 See Concluding Observations: Israel, supra note 11, para. 15. The Commission on Human Rights also criticized the Israeli targeted killings. See Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine, Report of the Human Rights Inquiry Commission, 2001, (E/CN.4/2001/121), at paras. 53-64. More generally, the Report of the Special Rapporteur, Philip Alston, on extrajudicial, summary or arbitrary executions to the Human Rights Commission condemned “shoot-to-kill policies” employed against alleged terrorists. See supra note 77, paras. 44-54. It should be noted that the recent decision of the Supreme Court of Israel on targeted killings (supra note 177) does not necessarily contradict the HRC conclusions because, even if the Supreme Court of Israel adopted the “membership approach”, it nevertheless added that, by virtue of HRL, a terrorist cannot be attacked (para. 40) “if a less harmful mean can be employed”. The Court continued by saying that “if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed”. Finally, its conclusion is similar to the one of the HRC, except that the reasoning is inverted. For the Supreme Court of Israel, one can have recourse to lethal force against so-called terrorists unless it is possible to arrest them. For the HRC, one cannot have recourse to lethal force, even against so-called terrorist, unless this is absolutely necessary.

195 The Commission admits that a civilian cannot be considered as directly participating in hostilities if he does not pose any immediate threat of harm to the adversary. However, it also notes that, at least in the context of NIAC, when direct participation in hostilities of irregular combatants becomes their principal daily activity, they thereby divest themselves of their civilian status and effectively become combatants subject to direct attack to the same extent as members of regular armed forces. See IACHR, Third Report on Human Rights in Colombia (Ch. IVa), paras. 43-66 (1999). See also IACHR, Report on Terrorism and Human Rights, para. 69 (2000): “(...) once a person qualifies as a combatant, whether regular or irregular, privileged or unprivileged, he or she cannot revert back to civilian status or otherwise alternate between combatant and civilian status”. Available at: http://www.cidh.oas.org/Terrorism/Eng/exe.htm (last accessed 2 Apr. 2007).
seems clearer and more precise. But the true point is to provide an interpretation that harmonizes the two sets of applicable rules rather than one opposing them. However, any harmonizing interpretation must perform be based on the principle of the revolving door (otherwise the applicable HRL standard would be violated), even if some room is left for appreciating in context what is feasible and what is not (principle of necessity). The HRL case-law could here prove an invaluable reference for IHL.

C. The Creation of Obligations Complementary to International Humanitarian Law

HRL not only allows interpreting and developing IHL rules. It also allows filling its gaps by creating entirely new obligations for States.

I) The Obligation to Submit the Military Operation's Reports and the Presumption of Responsibility

It is not uncommon that States are extremely reluctant, during armed conflict in particular, to submit to open scrutiny documents concerning military operations having led to civilian casualties. This fact considerably hampers the work of the ECtHR. Moreover, it is difficult for the plaintiffs to discharge in such circumstances their burden of proof by establishing to the satisfaction of the Court that the right to life has been violated beyond reasonable doubt. Most of the time, the Court in such situations deplores the lack of proper information on the part of the Government and engages its responsibility by the procedural device of Article 2, holding that the State did not live up to its duty of a thorough and effective inquiry.

In the Akkum v. Turkey case – dealing with the suspected death of three civilians during a military operation against the PKK – the Court decided to develop its jurisprudence. In order to establish the international

199 See, e.g., the Chechen cases: Isayeva I, supra note 11, at paras.175-76; Isayeva II, supra note 11, para. 182.
201 See Akkum et al. v. Turkey, [2005] ECHR. This case also takes place in the context of the NIAC between the Turkish Government and the PKK. See supra note 135.
responsibility of Turkey it adopted a new two-tier approach. First, it held that Turkey was under obligation to submit to the Court all necessary documents allowing it to discharge its judicial function. In the concrete case, this enclosed the internal reports on the incriminated military operations. Failing such cooperation, Turkey’s responsibility would, as the Court explains, be engaged on the basis of Article 38(1)(a) of the Convention and “give rise to the drawing of inferences as to the well-foundedness of the applicant’s allegations”. Faced with contradictory statements by the Government, the Court decided that the death of at least one of the civilians was imputable to the State according to the claim made by the plaintiffs as eyewitnesses. Second, the Court postulated a presumption of responsibility of the State when individuals are killed in an area within the exclusive control of the authorities of the State, as in the present case where two civilians had last been seen alive on a mountainside with a large number of soldiers. It relied on its older jurisprudence on detention cases. There it had repeatedly held that if detainees arrested in good state of health are later found dead or mistreated while in custody of the State, there arises a presumption of responsibility of the State. This presumption is tantamount to shift the burden of proof to the State by making it incumbent upon it to provide a plausible explanation for the events. The reason for this equitable reversal of the burden of proof flows from the fact that “the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities”. It should be noted that other HRL bodies sometimes adopted a similar reasoning.

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202 Art. 38(1)(a) ECHR reads as follows:

If the Court declares the application admissible, it shall: pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities.

203 See Akkum, supra note 201, at 185 et seq. See similarly Estamirov et al. v. Russia, [2006] ECHR, paras. 102-105.

204 Ibid., at paras. 191-204. See also paras. 234-40.

205 Ibid., at paras. 205-32. See also para. 243.


207 Ibid., para. 211. See similarly Estamirov, supra note 203, paras. 110-14.

208 In the Baboeram case (supra note 79, para. 14.2), for example, the HRC also held that:

In cases where the allegations are corroborated by evidence submitted by the authors and where further clarification of the cases depends on information exclusively in the hands of the State party, the Committee may consider the authors’ allegations as
This new case-law develops both indirectly and directly on the application of the right to life during armed conflicts. **First**, indirectly, it shows that the refusal to submit the reports of the military operations (or other crucial documents) does not entail directly a violation of Article 2 of the Convention, but is in breach of Article 38 and allows the Court to infer that the arguments of the applicants are well-founded. In any event, an insufficiently motivated refusal to submit documentation allows the Court to hold that the Convention has been violated. This jurisprudence creates a duty of the States to keep on record their military operations, a duty that does not exist in any clear terms in IHL. Such a record may obviously prove invaluable in order to assess, *ex post*, the lawfulness of a particular action. **Second**, directly, the Court affirms the equation whereby any casualties may be imputed to the State by way of presumption when they occurred in an area under its exclusive military control, at least if the State does not explain plausibly that the death was due to other causes than its own action. By this reasoning, the Court divests itself from the old “absolutely necessary” test for the use of lethal force: the violation of Article 2 is now presumed and hence the Court may not need to inquire into what truly happened. This bold substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party.

Moreover, in cases of enforced disappearances, where it was difficult to prove that the person concerned had been killed or even abducted by States’ organs, the HRC still held the State responsible on the basis that the burden of proof cannot rest alone on the author of the communication. See *e.g.*, Bleier v. Uruguay, [1982] *HRC*, No. 30/1978, paras. 13.3 and 13.4. In the *Neira Alegria* case (*supra* note 77, para. 65), the IACtHR also considered that the burden of proof rested on the defendant State because the events took place in a prison under the exclusive control of the Government. The AComHPR also considered that: “If the Government provides no evidence to contradict an allegation of human rights violation made against it, the Commission will take it as proven, or at least probable or plausible”. See *Amnesty International* case, *supra* note 47, para. 52. More generally, the AComHPR considers that, in cases of HRL violations, the burden of proof rests on the Government. See *e.g.*, the Commission’s decisions in communications 59/91, 60/91, 64/91, 87/93 and 101/93.

Certainly, security considerations can be taken into account and the State can refuse to submit some documents but it has to explain this refusal.


It seems that the Court has partly borrowed the ideas developed in the Dissenting Opinion of Bonello J. (followed by Tulkens) in the case *Şirin Yılmaz, supra* note 200. See also the Concurring Opinion of Bonello J. in the case *Taşsin Acar v. Turkey*, [2004] *ECHR*. 
presumption may arouse some doubts under three angles. In the first place, although it is known how difficult the establishment of the facts can be for events taking place in the troubled circumstances of warfare, one may question whether it represents an elegant and yet too easy way for the Court to get out of the duty to establish properly and meticulously the facts. In the second place, it may be asked if the construction is not geared at least partially to the end of avoiding any closer analysis of the right to life in the context of armed conflicts, where some IHL could be needed. In the third place, it may appear that the Court is going too far by automatically holding States responsible for extremely grave charges, which at the end of the day may be insufficiently proved.

However, the obligation to submit reports and the presumption of responsibility allow strengthening the protections of the right to life by improving the accountability of the State. The lex specialis rule in its derogatory sense has no room in this context, since there is no true conflict between a rule of HRL and of IHL. There are simply no rules on these aspects in IHL. Nothing allows concluding that the silence of IHL is a qualified one, i.e., that there is an absence of rules voluntarily excluding any regulation. Thus, to the extent HRL imposes on States further obligations not contradicted by IHL, these obligations would apply.

2) The Obligation to Investigate

Article 2 of the European Convention on Human Rights does not dispose that a State is bound to investigate any time a person has been killed.212 However, the Court, in its case-law, has affirmed such an obligation as an inherent obligation of the right to life enshrined in that provision. In the McCann case it held that a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities.213 This obligation to investigate had been deduced by the Court from a joint reading of Articles 2 and 1 of the Convention, which imposes on States parties the duty to “secure” to all individuals under their jurisdiction the rights enshrined in the Convention.214 In later cases, the Court transposed that obligation to uses of lethal force in the context of armed conflicts. In the Kaya case215 – dealing again with the NIAC in Turkey216 and concerning the

212 By the same token, Art. 6 of the ICCPR, Art. 4 of the ACHR and Art. 4 of the ACHPR do not provide for a State obligation to investigate each time a person has been killed.
213 See McCann, supra note 62, para. 161.
214 Id.
215 See Kaya, supra note 79.
killing of a person accused of being a terrorist during a military operation – the Court pointed out that:

(...) loss of life is a tragic and frequent occurrence in view of the security situation in south-east Turkey. However, neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into deaths arising out of clashes involving the security forces, more so in cases such as the present where the circumstances are in many respects unclear. 217

It appears that the procedural duty to investigate is systematically analyzed by the Court, i.e., as much in times of peace as of armed conflict; in cases where the State is absolved from violations of substantive obligations; 218 or where the exhaustion of local remedies is not secured. 219 One may even regret that sometimes the Court avoids going into the substantive obligations, preferring to hold the State responsible for a breach of the procedural obligation under Article 2. 220

216 Supra note 135.

217 See Kaya, supra note 79, para. 91. This assertion will be repeated many times by the Court. See Güleç, supra note 68, para. 81; Ergi, supra note 11, para. 85; Ahmet Özkan, supra note 80, at para. 319; Şirin Yılmaz, supra note 200, para. 85; Menteşe, supra note 200, at para 56; Akpinar and Altun v. Turkey, [2007] ECHR, para. 59.

218 See, e.g., Halit Çelebi v. Turkey, [2006] ECHR. In this case, the Court admitted that the recourse of lethal force was absolutely necessary because the applicant’s son died while he was shooting at security forces. However the Court found a violation of Art. 2 because of the investigation’s deficiencies. See also Perk et al. v. Turkey, [2006] ECHR; Akpinar and Altun, supra note 217.

219 See, e.g., Kanlıbaş v. Turkey, [2005] ECHR. In this case, a PKK local leader died during an armed clash with the Turkish security forces. The Court did not analyze the substantive obligations of the right to life because the applicant did not exhaust local remedies. However, the Court underlined that “cela n’a guère d’incidence quant à l’appréciation du présent grief, qui porte sur des obligations positives, au titre desquelles les autorités sont tenues d’agir d’office, sans laisser aux proches du défunt l’initiative d’assumer la responsabilité d’une procédure d’enquête” (para. 42).

220 See Ağdaş, supra note 200; Şirin Yılmaz, supra note 200; Zengin case, supra note 200; Menteşe, supra note 200. For a critical analysis of this approach, see the partly dissenting opinions of judges Tulkens (para. 5) and Bonello (paras. 5–6) in the Şirin Yılmaz case. See also the partly Dissenting Opinion of Bratza J. (para. 5) in the Ağdaş case. Moreover in many cases occurring in Northern Ireland, the Court preferred to examine the investigation’s (in)efficiency rather than to proceed to the difficult task of analyzing the facts (action/planning) leading to the recourse to lethal force insofar as the domestic proceedings were not terminated. See Hugh Jordan v. United Kingdom, [2001] ECHR; McKerr v. United Kingdom, [2001] ECHR; Kelly et al. v. United Kingdom, [2001]
The duty of States to effectively investigate any use of lethal force is quite far-reaching. First, in times of armed conflict, the duty is not confined to police operations similar to those in the Kaya case. It extends to situations of open hostilities as those in Chechnya. Second, on the basis of the principle of due diligence, the Court imposes the duty of investigation also if lethal force was used by private actors (the insurgents, for example). Such a duty exists also if the person killed by State agents was a rebel or an armed terrorist. The duty is moreover not dependent on a complaint or action on the part of the family of the deceased: it is sufficient that the State authorities are put on notice of the casualty. The requirements for the investigation are also quite high. Many criteria will be taken into account by the Court to assess if the investigation can be considered as “effective”:

- Existence of an independent and public investigation capable of leading to a determination of whether the force used was or was not justified in a particular set of circumstances and capable of leading to the identification and punishment of those responsible.
- Independence and impartiality of the persons conducting the investigation.
- Need to collect evidence at the scene and to make a reconstruction of the events.

ECTHR; Shanaghan v. United Kingdom, [2001] ECTHR; McShane v. United Kingdom, [2002] ECTHR.

221 See Isayeva I, supra note 11, at paras. 208-25; Isayeva II, supra note 11, at paras. 209-24.
222 See Ergi, supra note 11, para. 82.
223 See e.g., Kanlibaş, supra note 219; Halit Çelebi, supra note 218; Akpinar and Altun, supra note 217.

224 See Ergi, supra note 11, para. 82; Hugh Jordan, supra note 220, para. 105 (see also the other cases concerning Northern Ireland, supra note 220) Ahmet Özkam, supra note 80, para. 310; Şirin Yılmaz, supra note 200, para. 77; Isayeva I, supra note 11, para. 209, 210.
225 Kaya, supra note 79, para. 87; Oğur, supra note 117, para. 88; Hugh Jordan, supra note 220, para. 107, 130 and 142 (see also the other cases concerning Northern Ireland, supra note 220); Ahmet Ökkan, supra note 80, para. 312; Şirin Yılmaz, supra note 200, para. 78; Isayeva I, supra note 11, para. 211; Isayeva II, supra note 11, para. 10; Zengin, supra note 200, para. 52.
226 See Güleç, supra note 68, para. 79-80; Ergi, supra note 11, para. 83; Kaya, supra note 79, para. 89; Oğur, supra note 117, para. 91; Gül, supra note 117, para. 91-94; Hugh Jordan, supra note 220, para. 106, 120 and 142 (see also the other cases concerning Northern Ireland, supra note 220); Isayeva I, supra note 11, para. 210; Isayeva II, supra note 11, para. 210; Kanlibaş, supra note 219, para. 46; Akpinar and Altun, supra note 217, para. 60.
227 See Kaya, supra note 79, para. 89; Güleç, supra note 68, para. 78; Gül, supra note 117, para. 89; Menteşe, supra note 200, para. 54; Hamiyet Kaplan, supra note 191, para. 61; Perk, supra note 218, para. 80.
- Need to take from the scene the weapons and ammunitions for ballistic and other examination.\(^{228}\)
- Need of a post-mortem and forensic examination/autopsy to find out the cause of death.\(^{229}\)
- Need to proceed to the hearing of witnesses including eyewitnesses.\(^{230}\)
- Accountability of the officers for the use of their weapons and ammunition (existence of procedures requiring that the State agents guns be checked and a record made of the amount of ammunition expended).\(^{231}\)
- There must be a sufficient element of public scrutiny of the investigation or its results and the victim's next-of-kin must be involved in the procedure.\(^{232}\)
- Requirement to act with reasonable expediency and diligence.\(^{233}\)

Overall, it may be asked if the sum of these requirements is not excessive and unrealistic in times of armed conflict. How could States discharge such a heavy lot of duties in situations where, due to the conflict, the number of casualties may be high and where the services of the State may be on the

\(^{228}\) See Kaya, supra note 79, para. 89; Gülç, supra note 68, para. 79; Oğur, supra note 117, para. 89; Gül, supra note 117, para. 89; Şirin Yılmaz, supra note 200, para. 83; Ağdaş, supra note 200, para. 101; Zengin, supra note 200, para. 51; Menteşe, supra note 200, para. 54; Kanlıbaş, supra note 219, para. 45; Halit Çelebi, supra note 218, para. 61; Hamiyet Kaplan, supra note 191, para. 62.

\(^{229}\) See Kaya, supra note 79, para. 89; Oğur, supra note 117, para. 89; Gül, supra note 117, para. 89; Ahmet Özkân, supra note 80, para. 312; Şirin Yılmaz, supra note 200, para. 83; Isayeva I, supra note 11, para. 211; Isayeva II, supra note 11, para. 212; Estamirov, supra note 203, para. 91.

\(^{230}\) See Kaya, supra note 79, para. 89; Gülç, supra note 68, para. 79; Oğur, supra note 117, para. 89; Gül, supra note 117, para. 90 and 93; Hugh Jordan, supra note 220, para. 127 and 142 (see also the other cases concerning Northern Ireland, supra note 220); Ahmet Özkân, supra note 80, para. 312 and 316-17; Şirin Yılmaz, supra note 200, para. 82; Isayeva II, supra note 11, para. 212 and 221-22; Zengin, supra note 200, para. 51; Kanlıbaş, supra note 219, para. 47; Halit Çelebi, supra note 218, para. 59 et seq.

\(^{231}\) See Gül, supra note 117, para. 90.

\(^{232}\) See Gülç, supra note 68, para. 82; Oğur, supra note 117, para. 92; Gül, supra note 117, para. 93; Hugh Jordan, supra note 220, para. 109, 124, 134 and 142 (see also the other cases concerning Northern Ireland, supra note 220); Ahmet Özkân, supra note 80, para. 314; Isayeva I, supra note 11, para. 213; Isayeva II, supra note 11, para. 214 and 222; Estamirov, supra note 203, para. 92.

\(^{233}\) See Hugh Jordan, supra note 220, paras. 108 and 136-40 (see also the other cases concerning Northern Ireland, supra note 220); Ahmet Özkân, supra note 80, para. 313; Şirin Yılmaz, supra note 200, paras. 84-85; Isayeva I, supra note 11, para. 212 and 218; Isayeva II, supra note 11, paras. 213 and 217; Ağdaş, supra note 200, para. 103 et seq.; Menteşe supra note 200, para. 56; Kanlıbaş supra note 219, para. 44 et seq.; Estamirov, supra note 203, para. 89.
verge of collapse? If it is indisputable that the situation of armed conflict imposes supplementary constraints on the State, it is difficult to do away altogether with the duty of investigation, lest the right to life be deprived of much of its practical substance.\textsuperscript{234} However, if the principle must be maintained and affirmed also in wartime, certain adaptations are possible.\textsuperscript{235} As the Court itself points out, the “effectiveness” requirements for the investigation vary according to the circumstances.\textsuperscript{236} The legal rule \textit{ad impossibile nemo tenetur} obviously applies. Moreover, the State cannot be expected to perform unreasonable efforts or go beyond the prescriptions of due diligence. Thus, the State cannot be required to proceed to an autopsy if the body of the deceased person is located in the area controlled by the rebels.\textsuperscript{237} Furthermore, the allowed time-span may be more relaxed in times of armed conflict than it is in times of peace. On the other hand, it cannot be said that requesting States to establish impartial and independent organs for \textit{bona fide} and efficacious investigations is \textit{a priori} impossible in times of armed conflict.\textsuperscript{238} Thus, adapted to the surrounding circumstances, the obligation of investigating is at once practical and necessary even in armed conflicts. It is moreover well established in the case-law of all the HRL supervisory organs.\textsuperscript{239}

There is no IHL equivalent to this HRL device. Under IHL, there exists a duty of investigation in specific contexts, i.e., when prisoners of war or

\textsuperscript{234} In a recent case (\textit{Kanlıbaş}, supra note 219) concerning the death of a PKK local leader in an armed clash with security forces, the Court underlined that “\textit{en égard notamment au climat d'alors, marqué par des actions terroristes qui faisaient rage dans le Sud-Est de la Turquie (…) la Cour comprend (…) que les autorités militaires puissent s'être laissées guider par des considérations d'ordre plus général en matière de lutte contre le terrorisme et qu'elles aient été quelque peu réticentes à collaborer avec la justice pénale aux fins de l'instruction d'un cas parmi tant d'autres. La Cour ne sous-estime donc pas les difficultés auxquelles les procureurs devaient autrefois faire face dans cette région de la Turquie” (para. 46). However the Court still considered that the investigation was not effective because the domestic authorities conducting the investigation were neither independent nor impartial.

\textsuperscript{235} See Alston, Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions, \textit{supra} note 77, para. 36.

\textsuperscript{236} See Hugh Jordan, \textit{supra} note 220, para. 105 (see also the similar cases concerning Northern Ireland, \textit{supra} note 220); Ahmet Özkan, \textit{supra} note 80, para. 310; Şirin Yılmaz, \textit{supra} note 200, para. 77; Isayeva I, \textit{supra} note 11, para. 209; Isayeva II, \textit{supra} note 11, para. 210; Perk, \textit{supra} note 218, para. 75.

\textsuperscript{237} See Alston, Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions, \textit{supra} note 77, para. 36.

\textsuperscript{238} \textit{Ibid.}, para. 36 et seq.

\textsuperscript{239} \textit{Supra} note 79.
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...lilians detained by an adverse party are found dead. 240 Moreover, the Geneva Conventions and Additional Protocol I institute certain general inquiry proceedings, but these are all subject to the consent of the concerned States. 241 One could deduce an obligation to investigate from the ligation of States to “search for persons alleged to have committed, or to have ordered to be committed” 242 grave breaches of the Conventions, such as willful killing of one of the protected persons. 243 Other deaths than willful killings are, however, not covered by this provision. Moreover, nothing at all investigations is to be found in the context of NIAC. Finally, there is no precise standard as to the “efficacy” of the investigation. As can be seen, the stem of IHL presents gaps on the aspect of investigation. 244 The question arises if the drafters of the IHL texts voluntarily accepted these gaps. Did the authors want to limit compulsory investigations to cases of suspect death of persons of war and civilians detained by the adverse party? If this was the case the “gap” in IHL would legally rather consist of a “qualified silence”. However, even assuming the existence of qualified silence it would be possible to hold that the HRL obligation of investigation prevails, simply because it represents the later law (lex posterior derogat legi priori) and the pre protective régime (lex specialis derogat legi generali). By ratifying or acceding to HRL instruments after the conclusion of the Geneva Conventions of 1949, States accepted being bound potentially beyond the time of 1949.

If the foregoing is accepted, HRL has a crucial impact on IHL in this area. It allows for great improvement of the protection of individuals under the right to life in periods of armed conflict. The accountability of the State is is increased. 245 Thereby, the application of IHL itself can be facilitated. States systematically investigate war casualties, this would allow for the termination of a breach of IHL. If this is the case, useful elements for minal prosecution of war crimes could be gathered and brought to light. It such aspects may also be a reason why States may fear to engage in such course.

Art. 121 GC III, supra note 86; Art. 131 GC IV, supra note 93. See also Sassoli, supra note 30.
Arts. 52/53/132/149 of the GC, supra notes 86 and 93; Art. 90 of API, supra note 25.
Arts. 49/50/129/146 of the GC, supra notes 86 and 93; Art. 86 of API, supra note 25.
Arts. 50/51/130/147 of the GC, supra notes 86 and 93; Art. 11 and Art. 85 of API, supra note 25.
See Alston, Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions, supra note 77, para. 34.
See Reidy, supra note 133, at 529; Watkin, supra note 15, at 2 and 34.
D. The Transposition of the “Law Enforcement Model” to Armed Conflicts

HRL developed a whole series of obligations in the context of the use of lethal force by State’s agents. That area of the law is often called the “law enforcement model”. Thus, it is said that State’s agents (i) must to all extent feasible arrest criminals by non-violent means; (ii) have recourse as much as possible to non-lethal arms and ammunitions; (iii) use lethal force only after having summoned the criminals if possible and eventually firing warning shots. These obligations are direct corollaries of the HRL principle of absolute necessity previously enounced. They can only be enforced if there is a legal and administrative framework clearly defining in which circumstances the agents of the State may use lethal force. Moreover, the State must put at the disposal of its police forces different types of arms, including non-lethal ones (such as water-canons). The aim is to allow “a differentiated use of force and firearms”. The State must also deliver self-defensive equipment minimizing potential necessities to use force. Finally, the State shall correctly train its police forces, especially in techniques of non-violent arrest. The ECtHR attaches increasing importance to these aspects in its recent case-law.

246 See Watkin, supra note 15, at 2.
247 The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (supra note 69) enounce very clearly the requirements of the law enforcement model. See in particular paras. 4, 5, 9 and 10; See also Art. 3 of the Code of Conduct for Law Enforcement Officials, supra note 69.
248 See above.
249 See Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, supra note 69, paras. 1 and 11. The treaty provisions ensuring the right to life always specify that this right shall be protected by law. Art. 6 ICCPR; Art. 2(1) ECHR; Art. 4(1) ACHR; Art. 4 combined with Art. 1 of the ACHPR.
250 See Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, supra note 69, paras. 2-3.
251 Ibid., para. 2.
252 Id.
253 Ibid., paras. 18-21.
254 The Court seems ready to find a violation of the right to life just because the Government did not establish an appropriate legal and administrative framework, because it did not provide its agents with non-lethal weapons or because it did not correctly train them, especially for techniques of non-violent arrest. The Court seems to give more and more importance to the general law enforcement framework. Thus, the Court analyses the general “implementation” of the right to life, or in other words it checks whether the State correctly “secured” or “ensured” this right. See Makaratzi, supra note 68; Şimşek, supra note 137; Hamiyet Kaplan, supra note 191; Kakoulli, supra note 68; Erdoğan, supra note 187; İhsan Bilgin, [2006] ECtHR.
The restrictions on the freedom to use lethal force and the amount of preventive measures of prevention required from governments explain that it be doubted whether such a model is applicable in times of armed conflicts. The "law enforcement model" of HRL, applicable in times of war, is thus opposed to the "conduct of hostilities" model in times of armed conflict, as regulated by IHL. The gist of the argument may be correct, but its absolute formulation seems excessively simplifying. The law enforcement model does not completely disappear in times of armed conflict. This is obviously true for the ordinary criminality continuing outside the armed conflict. But it is true to some extent also for the warring parties. In effect, the ECtHR tends to apply the law enforcement model to "warfare relationships" during an armed conflict, at least for NIAC. Thus, in the Oğur and in the Gül cases discussed above, the Court applied the law enforcement model when charging Turkey with not attempting to arrest the persons killed, not having summoned them to surrender and not having proceeded to firing warning shots. True, in both cases the presumptive "terrorists" did not directly participate in hostilities, but this aspect of the cases does not seem essential. Indeed, in the Hamiyet Kaplan et al. v. Turkey case, a number of civilian persons and PKK members were killed during an operation degenerating in hostilities. Yet, the Court held that the right to life had been violated since the police forces did not use non-lethal arms and had not been trained in non-violent methods of arrest – even if the insurgents shot at the police forces and did thus participate in the hostilities.

According to several experts, as long as the threshold of armed conflict was reached, there was no legal basis in IHL to claim that parties had (…) to operate against each other under a law enforcement paradigm". Third Expert Meeting on the Notion of Direct Participation in Hostilities (2005), supra note 174, at 46.

"See e.g., the petitioners' arguments (para. 4) and the respondents' response (para. 10) in The Public Committee against Torture in Israel, supra note 177.

"See Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, supra note 69, para. 8: "Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles".

"See Sassòli, supra note 30.

"See Watkin, supra note 15, at 1 et seq.

"See Oğur, supra note 117; Gül, supra note 117.

"They were not posing an immediate threat. See above.

"See Hamiyet Kaplan, supra note 191, paras. 51-55.

"It should be underlined that the violation of the right to life took place at the level of the planning and not at the level of the execution. Turkey did not violate Art. 2 because of the acts of its security forces but because it did not correctly train them to effect non-violent arrests and because it did not provide them with non-lethal weapons. Compare with Perk
Would the Court apply the same reasoning to an IAC? Nothing allows us to think that it would not. Thus, for example, if an Occupying Power proceeds to neutralize a resistant, it would first have to try to arrest him. It would not seem open to the Occupying Power to immediately have recourse to violent raids. By the same token, if a prisoner of war or an interned civilian attempts to escape from the camp, the detaining power will first have to try an arrest, a summoning and warning shots before using lethal force. The situation may however be different in combat situations on the battlefield. There may be no room in such situations for the refined “arrest rather than shooting” reasoning. The context will therefore determine whether the law enforcement model can reasonably be applied or not. The law enforcement model does thus not replace the conduct of hostilities model. Rather, it is aimed at accompanying the latter. Each will apply in the sets of circumstances where it is appropriate.

The question that remains to be elucidated is when there is a shift from the “law enforcement mode” to the “conduct of hostilities” model. It may be possible to consider the law enforcement model as the ordinary legal régime, applicable by default, whereas the conduct of hostilities model would be a lex specialis applicable if three conditions were fulfilled:

(supra note 218) where, in a similar situation, the Court considered that the use of deadly force was absolutely necessary because the suspects began shooting at security forces and because they were on the verge of committing a terrorist attack.

In that sense, see the concluding observations of the Human Rights Committee on the targeted killings practice of Israel, supra note 11, para. 15.

In IHL, there is a rule (Art. 42 GC III, supra note 86) concerning the use of lethal force against prisoners of war escaping or attempting to escape which is in conformity with the requirements of HRL. However, no similar provision exists for civilian internees. See Sassoli, supra note 30.

See Interplay in Situations of Violence, supra note 21:
The participants distinguished two models traditionally governing the use of force by the agents of the State. The first model, relating to activities of law enforcement, is capable of being used in time of peace as well as in time of war, depending on the circumstances. (...) The second model, which applies exclusively to conduct of hostilities in armed conflicts (international or non-international), is based on the premise that, at this stage, it is too late to prevent the use of armed violence between the various parties to the conflict. Thus, the aim of this model is to restrict the use of violence by the belligerents – to the extent possible – by maintaining a balance between military necessities on the one hand and humanitarian imperatives on the other.


One expert described the state of the law as one in which both IHL and HRL apply in parallel in situations of occupation. NIAC and with respect to targeted killings. Given
The use of lethal force is directed against combatants or civilians directly participating in hostilities. This criterion is however not sufficient, as the above mentioned case-law of the ECtHR shows: sometimes, the law enforcement model is applied even to civilians participating directly in hostilities. On the other hand, it is clear that the conduct of hostilities model cannot be applied to ordinary criminals even during an armed conflict.

The State is deprived of sufficient control over the person to enable an arrest. What is at stake is not territorial control. In an occupied territory, Occupying Power has by definition territorial control, but the conduct of hostilities model can still be applied if hostilities erupt. Conversely, may sometimes be possible to proceed to an arrest in a territory not controlled by a belligerent. The control at stake is thus rather a factual control over the individual, determining if it is materially feasible to proceed to an arrest.

The degree of violence involved is high, the State must be prepared to use an armed clash of certain intensity. This condition applies for both types of armed conflicts, IAC and NIAC. Even in an IAC, there are series of situations in which the “minimum force” paradigm should apply, for example in occupied territories in the context of keeping law and order.

NIAC, it is not essential that the State agents using lethal force are members of the armed forces to apply the conduct of hostilities model; they be “security forces”. In the same vein, the recourse to military law does not necessarily imply that the law enforcement model is not

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1. At 26: “In this respect, the experts all agreed with the suggestion of one expert that where the OP [i.e., Occupying Power] undertakes combat operations, the OP is clearly rating under IHL rather than HRL rules”.

2. E.g., the petitioners’ arguments in The Public Committee against Torture in Israel, supra note 177, para. 8:

Petitioners point out that the security forces made hundreds of arrests in ‘area A’ [not under Israeli control] in Judea, Samaria, and the Gaza Strip during the second intifada. Those figures show that the security forces have the operational ability to arrest suspects even in ‘area A’, and to bring them to detention and interrogation centers. In those circumstances, targeted killing is not to be done.

Reference could be made to the level of intensity required by Common Art. 3 of the

Note 86 and 93.

Art. 43 of the 1907 Hague Regulations, supra note 89.
applicable. However, the recourse to military personnel by the State may indicate the expected degree of violence.

If the aforementioned conditions are met, the law enforcement model as *lex generalis* gives way to the conduct of hostilities model as *lex specialis*. In these situations we consider that the HRL supervisory organs should refer to IHL norms and, if they cannot apply them directly, at least take account of them when interpreting HRL norms. In the Chechen cases previously discussed, the ECtHR had the opportunity to decide on a situation where the conduct of hostilities model applied. However, it did not refer to IHL, at least explicitly, whereas the pleadings of the parties and written observations of third parties drew greatly on that body of the law. Nor did the Court apply completely the law enforcement model, since it admitted that the situation of armed conflict in Chechnya allowed *eo ipso* the use of combat weapons. The Court seems thus to imply that some other legal régime applies, without going further in its analysis. The concrete results reached by the Court may be held to be satisfactory, even from the standpoint of IHL. Notwithstanding that fact, one cannot but be disappointed by its analysis which is somewhat poor and more factual than legal. The detailed rules of IHL concerning the conduct of hostilities, far

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273 See the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, supra note 69, which underline that:

... the term “law enforcement officials” includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest and detention. In countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement officials shall be regarded as including officers of such services.

274 Another way of analyzing this phenomenon would be to consider that, in time of armed conflict, when lethal force is used to fight against ordinary criminality or when the degree of violence is low and the State has sufficient control over the person to arrest him/her, HRL is the *lex specialis*. In that sense, see Sassoli, supra note 30.

275 On the question of whether HRL implementation bodies can apply IHL, see above.

276 See Isayeva I, supra note 11; Isayeva II, supra note 11.

277 In the Chechen cases, in particular in the Isayeva II case (supra note 11), one could wonder if the Court implicitly referred to IHL insofar as it used IHL vocabulary (e.g., “indiscriminate weapons”, para. 189).

278 See Isayeva I, supra note 11, paras. 102-104, 157 and 161-67; Isayeva II, supra note 11, paras. 113-15 and 167.

279 See Isayeva I, supra note 11, para. 181; Isayeva II, supra note 11, para. 180.

280 See Vierucci, supra note 156, at 725.

281 The Court mentions the relevant facts as, for example, that there were no forward-air controllers (Isayeva I, supra note 11, para. 188) or that the military used an “extremely powerful weapon” (Isayeva I, supra note 11, para. 195) but as the Court does not link these facts with specific rules, its conclusions do not seem to be grounded.
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contradicting the reasoning of the Court, would have helped to
then it and to eliminate certain imprecisions.282

IV. CONCLUSION

of armed conflict, HRL applies simultaneously to IHL. The latter
not be considered as a *lex specialis* derogating from HRL in its
ity. It should rather be considered as a complementary body of law
many cases the strengthening of the general protection offered
HRL. In cases of a conflict or unconformity between a HRL norm and an
orm, the maxim *lex specialis* requires deciding which rule is more
brate, protective or adapted to the circumstances of the case. Even in
such as the use of lethal force, HRL and IHL are closer to one another
may appear at first sight. Open contradictions between both branches
law are quite a rare occurrence. Conversely, there are many potential
ual mutual grants and transfers from one branch to the other.

e case-law of the ECtHR shows plastically how the protection of the
life during an armed conflict can be improved by HRL, thereby
zing some form of development in the corresponding rules of IHL. The
ence of HRL on IHL may be manifold: (i) it may bear on the
retation of the law; (ii) it may contribute to the development of new
establishing a greater degree of accountability of States; (iii) it may
to establish a general framework for the use of lethal force (law
ement model) which will be reversed only under certain narrowly
bed conditions. Conversely, however, the HRL supervisory organs,
e European Court in particular, should be aware of the fact that when
vides a more detailed or adapted rule, it is necessary at least to take
nt of it in order to give a convincing and realistic construction to HRL
A global and integrative outlook over both HRL and IHL is therefore
for to guarantee an adequate protection of individuals in times of

I remain perplexed when reading that, according to the Court, “using this kind of
upon [i.e., indiscriminate weapons] in a populated area, outside wartime and without
or evacuation of the civilians, is impossible to reconcile with the degree of caution
ected from a law enforcement body in a democratic society”. See *Isayeva II, supra*
te 11, para. 191. Actually, indiscriminate weapons (and indiscriminate methods of
are, to which the Court probably wanted to make reference) are prohibited in time of
ce as well as in time of armed conflict. Moreover, even if it is true that the situation in
chyna was not a “war” in the traditional sense of that word, it was nevertheless a
AC.