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PART V

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**KEY RIGHTS IN
TIMES OF ARMED
CONFLICT**

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CHAPTER 15

THE RIGHT TO LIFE

WILLIAM A. SCHABAS^{*}

It is estimated that the two great wars of the twentieth century were responsible for the deaths of somewhere between 65 and 90 million persons. That is an average of between 17,599 and 24,200 deaths on every single day of the two conflicts. It should be borne in mind that the total population of the world at the time was about 2 billion; it is 3.5 times that number today. A conflict of similar scale today would bring deaths of about 60,000 to 75,000 people each day. If nothing else, these staggering numbers show how much more civilized a place the world has become in recent decades, despite appearances and popular impressions. Several factors may explain this progress, including the emergence of international legal standards on human rights and the use of force and international mechanisms for their enforcement and implementation.¹

In modern times, certainly, armed conflict has posed one of the greatest threats to human life. The purpose of war may not be mass killing, but it is almost inevitably its consequence. Armed conflict is therefore one of our era's greatest challenges to the right to life.

^{*} OC MRJA, Professor of International Law, Middlesex University (London); Professor of International Criminal Law and Human Rights, Leiden University; *emeritus* Professor of Human Rights Law, National University of Ireland Galway; and Honourary Chairman, Irish Centre for Human Rights.

¹ For the analysis of a social scientist, see Steven Pinker, *The Better Angels of Our Nature: The Decline of Violence in History and Its Causes* (London: Allen Lane, 2011).

1 ORIGINS AND SCOPE OF THE RIGHT TO LIFE

The ‘right to life’ has been described as ‘the supreme right’,² ‘one of the most important rights’,³ ‘the foundation and cornerstone of all the other rights’,⁴ the ‘prerequisite for all other rights’,⁵ ‘one of the rights which constitute the irreducible core of human rights’,⁶ and a right which is ‘basic to all human rights’.⁷ Yet basic as it appears, it is at the same time intangible in scope and vexingly difficult to define with precision. Perhaps more than any other, it is a right whose content is continuously evolving, in step with the hegemony of ever more progressive attitudes to capital punishment, nuclear arms, abortion, and euthanasia, to mention only a few of the many issues that interpreters of the right to life have addressed.

In positive law, probably the earliest recognition of this protection appears in the *Magna Carta*:

No freedman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed, nor will we pass upon him, nor condemn him, but by the lawful judgment of his peers, or by the law of the land.⁸

Declarations of the right to life are also found in a number of pre-revolutionary American documents, authored by Puritans who had fled religious persecution in England. For example, the Massachusetts Body of Liberties, which is prophetically dated 10 December 1641, proclaims: ‘No mans life shall be taken away [...] unlesse it be by bertue or equitie of some expresse law of the country narrating the same, established by a generall Cort and sufficiently published [...]’.⁹ The Virginia Bill of Rights, drafted by George Mason at the dawn of the American revolution, referred to ‘inherent rights’ to ‘the enjoyment of life’.¹⁰ The Declaration of Independence

² *General Comment 6(16)*, UN Doc CCPR/C/21/Add.1, also published as UN Doc A/37/40, Annex V, UN Doc CCPR/3/Add.1, 382–3. See also, *de Guerrero v Columbia* (No 45/1979), UN Doc C/CCPR/OP/1, 112 at 117.

³ ECtHR, *Stewart v United Kingdom* (App No 10044/82), (1985) 7 EHRR 453.

⁴ Inter-American Commission of Human Rights, *Diez Años de Actividades, 1971–1981*, Washington, DC: Organization of American States, 1982, 339; *Annual Report of the Inter-American Commission on Human Rights, 1986–1987*, OAS Doc OEA/Ser.L/V/II.71 doc 9 rev 1, 271.

⁵ ‘Initial Report of Uruguay’, UN Doc CCPR/C/1/Add.57.

⁶ ICJ, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, 226, Dissenting Opinion of Judge Weeramantry, 506.

⁷ *General Comment 14(23)*, UN Doc A/40/40, Annex XX, UN Doc CCPR/C/SR.563, §1.

⁸ 6 Halsbury’s Statutes (3rd edn) 401.

⁹ R. Perry and J. Cooper, *Sources of Our Liberties* (Washington: American Bar Association, 1952), 148.

¹⁰ Perry and Cooper (n 9), 311. See also: Perry and Cooper (n 9), ‘Constitution of Pennsylvania’, 329; Perry and Cooper (n 9), ‘Constitution of Massachusetts’, 374; Perry and Cooper (n 9), ‘Constitution of New Hampshire’, 382.

followed by a few weeks: ‘We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.’ Article 5 of the American Bill of Rights states that no person shall ‘be deprived of life, liberty, or property, without due process of law’.

The post- World War I period was seminal for the development of international law, including the international law of human rights. It provides what appears to be the first recognition in treaty law of the right to life. Article 2 of the agreement establishing Poland declares: ‘Poland undertakes to assure full and complete protection of life and liberty to all inhabitants of Poland without distinction of birth, nationality, language, race or religion.’¹¹ A similar provision is found in the treaty establishing Yugoslavia.¹² These texts appear to have inspired the Institut de droit international, which adopted an international declaration of human rights at its meeting held at Briarcliff Manor, New York in 1929. Article I of that declaration recognizes the right to life: ‘It is the duty of every State to recognize the equal right of every individual to life, liberty and property, and to accord to all within its territory the full and entire protection of this right, without distinction as to nationality, sex, language, or religion.’¹³ René Cassin credited the Institut de droit international with playing an important role in the history of the Universal Declaration of Human Rights, noting in particular that the right to life was included as part of the 1929 Declaration.¹⁴

Inexorably, then, the right to life took a prominent position in the first proposals of the Universal Declaration of Human Rights that were considered by the United Nations Commission on Human Rights in 1947 and 1948. A study of national constitutions conducted by John Humphrey for the Commission found 26 provisions in various national constitutions that recognized a right to life.¹⁵ Based on these materials, Humphrey proposed the following in his 48-article initial draft: ‘Everyone has the right to life. This right can be denied only to persons who have been convicted under general law of some crime to which the death penalty is attached.’¹⁶ When the provision was first discussed in the Drafting Committee, Eleanor

¹¹ Treaty of Peace Between the United States of America, the British Empire, France, Italy and Japan, and Poland [1919] TS 8.

¹² Treaty of Peace between the Principal Allied and Associated Powers and the Serb-Croat-Slovene State [1919] TS 17, Art 2. Also: Treaty between the Principal Allied and Associated Powers and Roumania (1921) 5 LNTS 336, Art 1; Treaty between the Principal Allied and Associated Powers and Czechoslovakia [1919] TS 20, Art 1. Article 63 of the Treaty of Saint-Germain-en-Laye [1919] TS 11, protects ‘life and liberty, without distinction of birth, nationality, language, race or religion’.

¹³ *Annuaire de l’Institut de droit international*, vol II (Brussels: Goemaere, 1929), 118–20; the original is in French, but an English version was published many years later: Institut de droit international, ‘Declaration of International Rights of Man’ (1941) 35 *American Journal of International Law* 663.

¹⁴ René Cassin, ‘La déclaration universelle et la mise en oeuvre des droits de l’homme’, (1951) 79 *Receuil des cours* 241 at 272.

¹⁵ UN Doc E/CN.4/AC.1/3/Add.1, 14–19.

¹⁶ UN Doc E/CN.4/AC.1/3/Add.1, 14; E/CN.4/AC.1/3, 2; UN Doc E/CN.4/21, Annex A.

Roosevelt remarked ‘that she understood that there is a movement underway in some States to wipe out the death penalty completely. She suggested that it might be better not to use the phrase death penalty.’¹⁷ Other members joined in the view that the Declaration should not appear to sanction capital punishment.¹⁸ René Cassin reworked the text and, after further discussion in the Drafting Committee, agreement on the following text was reached: ‘Every human being has the right to life, to personal liberty and to personal security.’¹⁹ The provision underwent only minor subsequent changes. Article 3 of the Universal Declaration, adopted on 10 December 1948, reads: ‘Everyone has the right to life, liberty and security of person.’²⁰

The treaty formulations of the right to life are more complex. In the European Convention on Human Rights there is an enumeration of specific exceptions, such as self-defence and quelling a riot or insurrection.²¹ The drafters of the European Convention specifically contemplated the issue of the right to life in armed conflict by allowing its derogation ‘in respect of deaths resulting from lawful acts of war.’²² The International Covenant on Civil and Political Rights,²³ the American Convention on Human Rights,²⁴ and the African Charter on Human and Peoples’ Rights²⁵ eschew attempts to enumerate exceptions to the right to life other than the death penalty. Instead, they declare that no one shall be ‘arbitrarily’ deprived of the right to life. Even the European Court of Human Rights has in effect interpreted the right to life as ensuring that life is not deprived ‘arbitrarily’.

The right to life has many dimensions. Some of them, such as the question of when the right to life begins (abortion) and whether the right can be waived (suicide) seem to have little or no connection with issues of armed conflict. On the other hand, three issues are relevant in this context: (i) the relationship between the right to life as set out in international human rights law and international humanitarian law; (ii) the interplay between the norms on capital punishment as they appear in both the international humanitarian law treaties and the human rights treaties;²⁶ (iii) the impact on the right to life of the rules of international law on the recourse to armed force. Each of these issues is examined in turn.

¹⁷ UN Doc E/CN.4/AC.1/SR.2, 10.

¹⁸ UN Doc E/CN.4/AC.1/SR.2, 10–11.

¹⁹ UN Doc E/CN.4/AC.1/W.2/Rev.2; UN Doc E/CN.4/AC.1/SR.12; Annex F of UN Doc E/CN.4/21.

²⁰ GA Res 217 A (III), UN Doc A/810.

²¹ *Convention for the Protection of Human Rights and Fundamental Freedoms* (1955) 213 UNTS 221, Art 2(2).

²² *Convention for the Protection of Human Rights and Fundamental Freedoms* (1955) 213 UNTS 221, Art 15(2).

²³ *International Covenant on Civil and Political Rights* (1976) 999 UNTS 171, Art 6.

²⁴ *American Convention on Human Rights* (1979) 1144 UNTS 123.

²⁵ *African Charter on Human and Peoples’ Rights* (1986) 520 UNTS 217, Art 4.

²⁶ Several protocols to the right to life provisions have been adopted with the aim of abolishing capital punishment. Generally, they acknowledge the special circumstances of armed conflict by contemplating the possibility of capital punishment in time of war. See *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death*

2 THE HR PROVISIONS ON THE RIGHT TO LIFE AND IHL

In its 1996 Advisory Opinion on Nuclear Weapons, the International Court of Justice confirmed the application of Article 6 of the International Covenant on Civil and Political Rights—and, by implication, other relevant provisions, such as Article 3 of the Universal Declaration of Human Rights and equivalent texts in regional human rights treaties—in wartime. According to the Advisory Opinion, the protection of the International Covenant on Civil and Political Rights (ICCPR) does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.¹ Respect for the right to life is not, however, such a provision. In principle, the right not to be arbitrarily deprived of one's life applies also in hostilities.²⁷ Logically, then, other instruments that do not contemplate derogation at all, such as the Universal Declaration of Human Rights, must be applicable during armed conflict as well as in peacetime.

If intentional deprivation of life is very much the exception in peacetime, it would seem to be the rule during wartime. Yet the law of armed conflict is also largely concerned with the protection of human life at a time when it is most in peril. For example, the Hague Regulations prohibit the random and arbitrary execution of prisoners of war²⁸ and, when military authority is exercised over the territory of the hostile state, 'the lives of persons [...] must be respected'.²⁹ The 1949 Geneva Conventions set out similar norms. Explaining the absence of a reference to protection of life similar to that found in the Hague Regulations, the authoritative *Commentary* to the Geneva Conventions states:

What about the right to life itself? Unlike Article 46 of the Hague Regulations the present Article does not mention it specifically. It is nevertheless obvious that this right is implied, for without it there would be no reason for the other rights mentioned. This is a simple conclusion *a majori ad minus*, and is confirmed by the existence of clauses prohibiting murder, reprisals and the taking of hostages, in Articles 32, 33 and 34 of the Convention.

Penalty, ETS no 114, Art 2; *Second Optional Protocol to the International Covenant on Civil and Political Rights Aimed at Abolition of the Death Penalty* (1991) 1642 UNTS 414, Art 2(1); *Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, OASTS 73, Art 2(1). Only one of these instruments prohibits the death penalty at all times: *Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances*, ETS no 187, Art 2.

²⁷ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, § 25.

²⁸ *Convention Regulating the Laws and Customs of Land Warfare (Hague Convention No IV), Regulations Concerning the Laws and Customs of Land War*, 3 Martens (3rd) 461, 2 AJIL Supp 2 [1910] TS 9, Art 23.

²⁹ [1910] TS 9, Art 46.

Furthermore, the death penalty may only be applied to protected persons under the circumstances strictly laid down in Article 68.³⁰

As the *Commentary* explains, the Geneva Conventions contain explicit guarantees for the lives of protected persons. Article 12 common to the first two Conventions, which concerns wounded, sick, and shipwrecked combatants, states: ‘Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments; they shall not wilfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created.’³¹ All of the Conventions treat the wilful killing of protected persons as grave breaches.³² The application of these principles has been upheld in an important ruling of the European Court of Human Rights.³³ More than half of a recent study on the right to life is devoted to situations of armed conflict. The specific issues addressed include collateral damage, the status of prisoners, so-called unlawful combatants during military occupation, and targeted killings.³⁴

In addition to non-combatants and combatants who are *hors de combat*, the law of armed conflict also protects the right to life of those who directly participate in hostilities. The International Committee of the Red Cross has reinforced the view that even combatants benefit from a right to life, to the extent that ‘the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.’³⁵ Its position finds support in the work of Jean Pictet, who wrote: ‘If we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil.’³⁶ Along similar lines, Hersch Lauterpacht wrote that the law on conduct of hostilities ‘must be shaped—so far as it can be shaped at all—by reference not to existing law but to more compelling considerations of humanity, of the survival of civilization, and of the sanctity of the individual human being.’³⁷ Such conclusions flow inexorably

³⁰ O.M. Uhler et al, *Commentary IV* (Geneva: International Committee of the Red Cross, 1958), 201 (hereinafter: ‘*Commentary*’).

³¹ Article 12 of GC I; Art 12 of GC II.

³² Article 49 of GC I; Art 50 of GC II; Art 129 of GC III; Art 146 of GC IV.

³³ ECtHR, *Kononov v Latvia* [GC], no 36376/04, Judgment, 17 May 2010, §§ 202–204.

³⁴ C. Tomuschat, E. Lagrange, and S. Oeter (eds), *The Right to Life* (Leiden/Boston: Martinus Nijhoff, 2010).

³⁵ ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’ (2008) 90 *International Review of the Red Cross* 991 at 1040–4.

³⁶ Jean Pictet, *Development and Principles of International Humanitarian Law* (Dordrecht: Martinus Nijhoff, 1985), 75 ff.

³⁷ Hersch Lauterpacht, ‘The Problem of the Revision of the Law of War’ (1952) 29 *British Yearbook of International Law* 360 at 379.

from the earliest codifications of the law of armed conflict, the 1868 Declaration of St Petersburg and the 1899 Martens Clause.³⁸

The broader issue of the rapport between human rights law and the law of armed conflict cannot be avoided here. In its celebrated decision on jurisdiction, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia set out ‘the more recent and comprehensive notion of “international humanitarian law”, which has emerged as a result of the influence of human rights doctrines on the law of armed conflict.’³⁹ There is in fact a mild degree of reciprocity because the law of armed conflict has contributed to the development of certain human rights norms, notably in the field of capital punishment. Vera Gowlland-Debbas has written of the ‘humanisation’ of international humanitarian law and the ‘humanitarisation’ of international human rights law.⁴⁰ Some modern legal instruments bridge the divide, incorporating elements from both bodies of law; for example, the Convention on the Rights of the Child⁴¹ and the Rome Statute of the International Criminal Court.⁴²

Nevertheless, as Dietrich Schindler has explained, ‘[h]uman rights and the law of war evolved along entirely different and totally separate lines, but their spiritual roots may be traced in part to the same origin and, from the nineteenth century, a certain degree of similarity may be observed in the development of each.’⁴³ There was initial reluctance to address issues relating to the legal regulation of armed conflict within the United Nations, a fact that helps to explain why the relationship between the two bodies of law was sometimes not explicitly considered in early human rights instruments. In 1949, the International Law Commission declined to study the laws of war. Several of its members considered the subject to be incompatible with the principles and purposes of the United Nations.⁴⁴ For example, James L. Brierly said that the Commission should ‘refrain from taking up the question

³⁸ See Nils Melzer, ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ (2010) 42 *International Law and Politics* 831; Ryan Goodman, ‘The Power to Kill or Capture Enemy Combatants’ (2013) *European Journal of International Law* (forthcoming).

³⁹ ICTY, *Tadić* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, § 87.

⁴⁰ V. Gowlland-Debbas, ‘The Right to Life and the Relationship between Human Rights and Humanitarian Law’, in C. Tomuschat, E. Lagrange, and S. Oeter (eds), *The Right to Life* (Leiden/Boston: Martinus Nijhoff, 2010), 123–50 at 126–8.

⁴¹ (1990) 1577 UNTS 3. ⁴² (2002) 2187 UNTS 90.

⁴³ D. Schindler, ‘The International Committee of the Red Cross and Human Rights’, 203 *International Review of the Red Cross* (1979) 3. Also L. Doswald-Beck and S. Vité, ‘International Humanitarian Law and Human Rights Law’, 293 *International Review of the Red Cross* (1993) 94; Robert Kolb, ‘Aspects historiques de la relation entre le droit international humanitaire et les droits de l’homme’, 37 *Canadian Yearbook of International Law* (1999) 57; ‘Working paper on the relationship between human rights law and international humanitarian law by F. Hampson and I. Salama’, UN Doc E/CN.4/Sub.2/2005/14, §§ 41–4.

⁴⁴ UN Doc A/CN.4/SR.6, §§ 45–67.

of the laws of war because if it did so its action might be interpreted as a lack of confidence in the United Nations and the work of peace which the latter was called upon to carry out.⁴⁵

This began to change with the 1968 Tehran Conference on Human Rights. Anti-colonial and liberation struggles, as well as the Vietnam war and the civil conflict in Nigeria, had placed war at the centre of the agenda for civil society. The Conference adopted a celebrated resolution on human rights in armed conflict. It began by affirming that ‘peace is the underlying condition for the full observance of human rights and war is their negation’, noting that ‘nevertheless armed conflicts continue to plague humanity’. The Resolution called for observance of humanitarian norms during armed conflict, a view that was affirmed in a General Assembly resolution later the same year.⁴⁶

But as successive generations of scholars, experts, and activists began to peel this onion, layers of complexity and difficulty that had not previously been contemplated began to emerge. There have been attempts to merge the two bodies of law, or at least to ensure that they are viewed as consistent components of a larger whole. This rather holistic view was taken by the International Court of Justice in its Advisory Opinion on Nuclear Weapons. It declared that for the purposes of determining the scope of the right to life in armed conflict, the law of armed conflict was the *lex specialis*. Thus, the right to protection of life from arbitrary deprivation applies also in hostilities. However, according to the Court, the test of what is an arbitrary deprivation of the right to life then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Whether a particular loss of life, through the use of a certain weapon in warfare, for example, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.⁴⁷ From this perspective, the law of armed conflict may appear to constitute a limit to the application of human rights norms.

The *lex specialis* formulation used by the ICJ in the *Nuclear Weapons* case to describe the relationship between the right to life as set out in human rights law and the law of armed conflict was clumsy at best. In the Advisory Opinion in *The Wall* case, the ICJ proposed a more nuanced gloss on its earlier pronouncement. It described the relationship between international human rights law and international humanitarian law as follows:

More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation

⁴⁵ UN Doc A/CN.4/SR.6, § 55.

⁴⁶ Respect for Human Rights in Armed Conflicts. Resolution 2444 (XXIII) of the United Nations General Assembly, 19 December 1968.

⁴⁷ ICJ, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, 226, § 25.

of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.⁴⁸

This statement is not incompatible with the dictum in *Nuclear Weapons*, but it is not identical to it either. In *Nuclear Weapons*, the ICJ stated that international humanitarian law is the window through which arbitrary deprivation of life in armed conflict is to be examined, but it did not develop the discussion with respect to other human rights that may be at issue during armed conflict. In the *Wall* case, the Court seemed to withdraw from what appears to be as a rather too absolute statement. According to Professor Hampson, the above citation from the the *Wall* case makes it 'clear that *lex specialis* is not being used to displace [human rights law]. It is rather an indication that human rights bodies should interpret a human rights norm in the light of [the law of armed conflict/international humanitarian law]'.⁴⁹

In the case of *Democratic Republic of the Congo v Uganda*, the Court again considered the concrete application of these principles. It repeated the paragraph cited above from the advisory opinion on the *Wall*.⁵⁰ Determining that Uganda was an Occupying Power in Ituri during the relevant period, it said that Article 43 of the Hague Regulations of 1907 imposed an obligation 'to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party'.⁵¹ It said that Uganda's international responsibility was engaged 'for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account'.⁵² In addition, 'Uganda at all times has responsibility for all actions and omissions of its own military forces in the territory of the DRC in breach of its obligations under the rules of international human rights law and international humanitarian law which are relevant and applicable in the specific situation'.⁵³ In effect, then, the Court did not address a possible conflict between the two systems, or suggest that violations of

⁴⁸ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 9 July 2004, § 106.

⁴⁹ 'Working paper on the relationship between human rights law and international humanitarian law by F. Hampson and I. Salama', UN Doc E/CN.4/Sub.2/2005/14, § 57.

⁵⁰ ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, 19 December 2005, § 216.

⁵¹ *Democratic Republic of the Congo v Uganda* (n 50), § 178.

⁵² *Democratic Republic of the Congo v Uganda* (n 50), § 179.

⁵³ *Democratic Republic of the Congo v Uganda* (n 50), § 180.

international human rights law would be examined through the lens of international humanitarian law. Rather, it treated them as two complementary systems, as parts of a whole.

When the right to life is concerned, in many cases the result will be the same whether it is the law of armed conflict or human rights law that governs. In other words, the *lex specialis* issue need not arise at all. For example, to the extent that it is deemed impermissible to kill a combatant when lesser means of rendering that person *hors de combat* may be employed, there is probably no tension whatsoever between the two bodies of law. However, as will be discussed later in this chapter, to the extent that human rights law may condemn any unlawful resort to armed force, there will be a conflict with international humanitarian law which espouses an indifference as to the responsibility of one or another party for the war itself.

3 CAPITAL PUNISHMENT

The progressive restriction and abolition of capital punishment has been one of the central themes of modern human rights law. Arguably, it is one of the great success stories of the modern human rights movement. When the Universal Declaration of Human Rights was adopted in 1948, only a handful of states had abandoned capital punishment. The international community sentenced several men to death after they were condemned by the first international criminal tribunals, in Nuremberg and Tokyo. Six decades later, more than three-quarters of United Nations member states are considered abolitionist, according to the quinquennial studies produced by the Secretary-General.⁵⁴ More than 80 states have confirmed their abolitionist stance by ratifying one of the treaties or protocols, thereby binding themselves on this issue as a matter of international obligation.⁵⁵

The 1929 Prisoner of War Convention was the first multilateral international instrument to deal with the imposition of capital punishment.⁵⁶ It set out two principles with respect to the death penalty: notification of the sentence to the prisoner's government (via the protecting power) and a moratorium on execution of the sentence for the three months following sentencing, in order to permit political and

⁵⁴ 'Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty', UN Doc E/2010/10, 7.

⁵⁵ UN Doc E/2010/10 (n 54), 30–2.

⁵⁶ *International Convention Relative to the Treatment of Prisoners of War* (1932–33) 118 LNTS 343.

diplomatic efforts at obtaining commutation or reprieve.⁵⁷ One of the military tribunals that sat in Nuremberg following World War II held that ‘most of the provisions’ of the 1929 Geneva Convention were ‘an expression of the accepted views of civilized nations’ and therefore norms of customary international law.⁵⁸

The treaty was substantially revised and made more stringent in the 1949 Convention with respect to the imposition of the death penalty on prisoners of war.⁵⁹ But probably of more consequence were the provisions adopted in the civilian convention, for which there was no predecessor or precedent. According to Claude Pilloud of the International Committee of the Red Cross, ‘[a]fter the second world war a very strong feeling arose against the numerous death sentences inflicted on inhabitants of occupied territories and there was a general desire that the possibility of inflicting capital punishment should be as restricted as possible.’⁶⁰ In this debate, the International Committee of the Red Cross made no secret of its real intention and ultimate objective: abolition of the death penalty.⁶¹

The fourth Geneva Convention (GC IV) contains important innovations: a severe restriction on the crimes for which the death penalty may be imposed and a total prohibition on the execution of juvenile offenders.⁶² The latter measure resulted from a proposal at the Seventeenth International Conference of the Red Cross by the International Union for the Protection of Children and recognizes the principle that children are not fully responsible for their actions, either because of immaturity or because of coercion.⁶³ According to the authoritative *Commentary*, ‘[t]he clause corresponds to similar provisions in the penal codes of many countries, and is based on the idea that a person who has not reached the age of eighteen years is not fully capable of sound judgment, does not always realize the significance of his actions and often acts under the influence of others, if not under constraint.’⁶⁴

In addition, Article 75 of GC IV grants a right to petition for pardon or reprieve to all persons condemned to death. The death sentence may not be carried out before expiration of a period of at least six months from the date the protecting power

⁵⁷ *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims (Geneva, 14–26 April 1947)*, Series I, no 5b (Geneva: International Committee of the Red Cross, 1947), 231.

⁵⁸ *The High Command Case (US v Von Leeb)*, (1950) 11 TWC 462, 535.

⁵⁹ Articles 87, 100, 101, 107 of GC III.

⁶⁰ C. Pilloud, ‘Reservations to the Geneva Conventions of 1949’ [1976] *International Review of the Red Cross* 163 at 184–5.

⁶¹ *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims (Geneva, 14–26 April 1947)*, Series I, no 5b (Geneva: International Committee of the Red Cross, 1947), 231; *Remarks and Proposals Submitted by the International Committee of the Red Cross, Document for the Consideration of Governments Invited by the Swiss Federal Council to Attend the Diplomatic Conference at Geneva (April 21, 1949)* (Geneva: International Committee of the Red Cross, 1949), 75.

⁶² Articles 68 and 75 of GC IV.

⁶³ O. Uhler et al, *Commentary IV* (Geneva: International Committee of the Red Cross, 1958), 371–2.

⁶⁴ Uhler et al (n 63), 371–2.

receives notification of the final judgment confirming the sentence or an order denying pardon or reprieve. The Diplomatic Conference modified the Stockholm draft somewhat, providing for a reduction of the six-month moratorium in individual cases, under circumstances of grave emergency involving the security of the occupying power or its forces.⁶⁵ However, even in such cases, the protecting power must receive prior notification and be given reasonable time and opportunity to make representations on the subject.⁶⁶

Besides the specific provisions concerning capital punishment in GC III and GC IV, Common Article 3 prohibits ‘the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.’⁶⁷ Although ostensibly applicable to non-international armed conflicts not otherwise governed by the Conventions themselves, these provisions are now held to be applicable to international armed conflicts as well.⁶⁸ According to the ICJ, Common Article 3 is a ‘minimum yardstick’ expressing ‘elementary considerations of humanity.’⁶⁹ Although the judicial guarantees cited in Common Article 3 are not elaborated upon, such instruments as Article 14 of the International Covenant on Civil and Political Rights,⁷⁰ the ‘Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty’,⁷¹ and Article 75(4) of Additional Protocol I (AP I)⁷² provide an indication of what is ‘recognized as indispensable by civilized peoples.’

The 1977 Additional Protocols go somewhat further in the limitation of capital punishment than the 1949 Geneva Conventions, reflecting an evolution within the human rights sphere. They extend the prohibition on execution of juvenile offenders to all persons ‘in the power of a party to the conflict’ and not only to ‘protected persons’, as is the case with the fourth Convention.⁷³ According to the Commentary on Article 77(5) of AP I, ‘it can be said that the death penalty for persons under

⁶⁵ *Final Record of the Diplomatic Conference of Geneva of 1949*, vol IIA (Bern: Federal Political Department, 1949) (Summary record of eighteenth meeting of Committee III), 675; Summary record of forty-third meeting of Committee III, 771; Report of Committee III, 835; *Final Record of the Diplomatic Conference of Geneva of 1949*, vol III (Bern: Federal Political Department 1949), 144–5 (Annex 310); *Final Record of the Diplomatic Conference of Geneva of 1949*, vol IIB (Bern: Federal Political Department, 1949) (Minutes of the twenty-eighth plenary meeting), 439.

⁶⁶ Article 75 of GC IV.

⁶⁷ Article 3 of GC IV. See R. Sapienza, ‘International Legal Standards on Capital Punishment’, in Bertrand G. Ramcharan (ed), *The Right to Life in International Law* (Boston: Martinus Nijhoff, 1985), 284–96 at 293.

⁶⁸ ICTY, *Delalic et al* (IT-96-21-A), Judgment, 20 February 2001, § 150.

⁶⁹ ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* [1986] ICJ Reports 14, § 218.

⁷⁰ (1976) 999 UNTS 171.

⁷¹ ESC Res 1984/50. Subsequently endorsed by GA Res 39/118.

⁷² Article 75(4) of AP I.

⁷³ Article 77(5) of AP I. For non-international armed conflict, the same norm applies: see Art 6(5) of AP II.

eighteen years of age is ruled out completely.⁷⁴ Probably inspired by evolving norms in human rights treaties, to which reference is made in the *travaux préparatoires*,⁷⁵ the Additional Protocols also prohibit capital punishment for pregnant women. They actually improve upon human rights norms in force at the time, to an extent, by also banning executions of mothers following childbirth. AP I prohibits execution of ‘mothers having dependent infants.’⁷⁶ Curiously, Additional Protocol II (AP II), which applies to non-international armed conflict, appears to go further than AP I by prohibiting execution of ‘mothers of young children.’ There is no real explanation for the inconsistency, aside from the occasional incoherence that inevitably occurs from time to time in complex treaty negotiations, where different working groups operate in parallel, with a shortage of time at the end of the process so as to ensure consistency.

It is in the area of juvenile executions where the synergy between human rights law and the law of armed conflict may be most visible. The provision in GC IV prohibiting the death penalty for protected persons who were under 18 at the time of the offence⁷⁷ evidently inspired human rights lawmakers in the United Nations system. They agreed to incorporate the norm in a draft of the ICCPR during the 1957 session of the Third Committee of the General Assembly.⁷⁷ It became Article 6(5) in the final version of the Covenant, adopted in 1966: ‘Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age [...]’. An essentially identical provision is found in Article 4(5) of the American Convention on Human Rights, which was adopted in 1969.

In 1987, two petitioners before the Inter-American Commission on Human Rights invoked Article 68(4) of GC IV, arguing that it informed the right to life article of the American Declaration of the Rights and Duties of Man. The American Declaration was adopted in 1948, several months prior to the Universal Declaration, and contains a very general formulation of the right to life without reference to the death penalty (‘Every human being has the right to life, liberty and the security of his person’). The issue was whether the prohibition of juvenile executions was implied within the text of Article I of the Declaration. In accordance with the law of the Inter-American human

⁷⁴ Claude Pilloud and Jean Pictet, ‘Article 77—Protection of Children’, in Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff, 1987), 897–905 at 904.

⁷⁵ ICRC Doc CDDH/I/SR.64, § 42. Similar views were expressed by Japan: ICRC Doc CDDH/I/SR.64, § 82. See also A. Eide, ‘The New Humanitarian Law in Non-International Armed Conflict’, in A. Cassese (ed), *The New Humanitarian Law of Armed Conflict, I* (Naples: Editoriale Scientifica, 1979), 276–309, 286. The *Commentary on Protocol Additional II* suggests some guidance in construing the term can be obtained from the fourth Convention, Art 14 §1, which refers to mothers of children under seven years old, and *Protocol Additional I*, Art 8, which uses the narrower term ‘new-born babies’: Sylvie-Stoyanka Junod, ‘Article 6—Fundamental guarantees’, in Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff, 1987), 1395–1402 at 1402.

⁷⁶ Article 76(3) of AP I. ⁷⁷ UN Doc A/C.3/SR.820, § 25.

rights system, petitions based upon compliance with the American Declaration may be lodged against states that have not ratified the American Convention on Human Rights, where the prohibition on such executions is explicit.

The two petitioners made the following submission:

As of January 1, 1986 there are 162 states parties to [the Geneva Conventions], including the United States. This Convention applies to periods of international armed conflict and Article 68 forbids the execution of civilians and military personnel no longer in combat, who committed offenses prior to the age of 18. If nearly all the nations of the world, including the United States, have agreed to such a norm for periods of international armed conflict, the norm protecting juvenile offenders from execution ought to apply with even greater force for periods of peace.⁷⁸

The United States responded that GC IV applies only in international armed conflicts, and therefore cannot be applied for the execution of juveniles in the United States in normal times and in the absence of an international conflict.⁷⁹ The Commission did not expressly respond to the Geneva Convention argument, but it said it was ‘convinced by the U.S. Government’s argument that there does not now exist a norm of customary international law establishing 18 to be the minimum age for imposition of the death penalty’.⁸⁰ Apparently, the Commission was influenced by the argument that the norms in GC IV concerning the human rights of protected persons in occupied territories could not automatically be transposed to a more general context. Certainly there is some merit to this position. State practice in 1949, when GC IV was adopted, and at a time when many states still conducted executions for juvenile crimes, must be borne in mind. Surely the drafters of GC IV did not consider that the norms they were adopting would also apply to their own territories in peacetime. If that had been the issue, they would probably never have accepted Article 68 of the Geneva Convention.

By 2002, the views of the Inter-American Commission on Human Rights had evolved. Reconsidering the issue it had contemplated 15 years earlier, the Commission said it could ‘identify no appropriate justification for applying a more restrictive standard for the application of the death penalty to juveniles in times of occupation than in times of peace, relating as this protection does to the most basic and non-derogable protections for human life and dignity of adolescents that are common to both regimes of international law’.⁸¹ The Inter-American Commission’s finding was premised upon the idea that if a norm is important enough in wartime, it ought also to apply in peacetime. The opposite proposition, namely that standards of humane treatment in wartime will be lower than those in peacetime, seems

⁷⁸ *Roach and Pinkerton v United States*, Resolution No 3/87, Case No 9647, 22 September 1987, § 36(g).

⁷⁹ See *Roach and Pinkerton v United States*, Dissenting Opinion of Dr Marco Garado Monroy Cabra, 22 September 1987.

⁸⁰ *Roach and Pinkerton v United States*, Resolution No 3/87, Case No 9647, 22 September 1987, § 60.

⁸¹ *Domingues v United States*, Report No 62/02, Merits, Case 12.285, 22 October 2002, § 67.

almost intuitive. Perhaps for that reason, the Inter-American Commission thought it made sense to take the logic in the other direction.

4 *JUS AD BELLUM* AND THE RIGHT TO LIFE

Unlike torture, where the prohibition by international law has been held to be absolute,⁸² the right to life is not envisaged in the same uncompromised manner. In addition to capital punishment, under certain circumstances, other examples of widely-recognized exceptions to or limitations upon the right to life can be found. Examples include killing in self-defence and the lethal use of force by the authorities in order to prevent crime. These are either set out explicitly, as is the case in Article 2 of the European Convention on Human Rights, or are subsumed within the concept of ‘arbitrary deprivation’, leaving the court to clarify their scope. General principles dictate that these exceptions or limitations follow the same general approach as in the case of other human rights norms, as clarified in the case law of bodies like the European Court of Human Rights and the UN Human Rights Committee. They must be established by law, serve a legitimate purpose and have a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. Where lethal force is employed, it must be ‘no more than absolutely necessary in defence of persons from unlawful violence’.⁸³

The legal situation may be different in the case of armed conflict, or so it is contended. When the International Court of Justice declared that the determination of arbitrary deprivation of life during wartime should be assessed with reference to the *lex specialis*, namely international humanitarian law, it seemed to be implying that the rules of *jus ad bellum*—that is, the rules of international law regulating the legality of recourse to armed force in international relations—were irrelevant to the assessment. It is beyond real debate that international humanitarian law does not concern itself with *jus ad bellum*. It attempts to confront both sides in a conflict as equals, without regard to whether one or the other party has a just cause or is acting unlawfully. There is considerable wisdom in the approach taken by international humanitarian law, because this neutrality facilitates the effectiveness of bodies that intervene in order to mitigate violations, such as the International Committee of the Red Cross. It is conceivable that an aggressor, acting unlawfully and in breach of *jus*

⁸² *Gäffen v Germany* [GC] (no 22978/05), Judgment, 1 June 2010, § 87.

⁸³ ECtHR, *McCann et al v United Kingdom* [GC], Series A, vol 324, § 213.

ad bellum, may scrupulously respect the *jus in bello*. Likewise, it is also possible that a combatant force fighting a just war may commit atrocities.⁸⁴

The anti-war dimension of international humanitarian law is sometimes forgotten. Yet the preamble of the 1907 Hague Convention begins with these words: 'Seeing that, while seeking means to preserve peace and prevent armed conflicts between nations, it is likewise necessary to bear in mind the case where the appeal to arms has been brought about by events which their care was unable to avert [...]'. It may therefore be overstating things slightly to suggest that international humanitarian law is purely and exclusively focused on *jus in bello*. Article 1 of AP I admits a special regime applicable to 'armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'.⁸⁵ In addition, it has been held, by the International Court of Justice, that norms of humanitarian law relative to the use of weapons that cause unnecessary suffering or superfluous harm, or are indiscriminate, do not apply strictly in the case of a country placed in an extreme situation of self-defence.⁸⁶ But these are really the exceptions that confirm the general rule of the neutrality of international humanitarian law with respect to the responsibility of one or other of the combatant parties for a breach of the law on the use of force.

The view that international human rights should also profess indifference to *jus ad bellum* has been adopted by important non-governmental organizations. During the negotiations proceeding the adoption of amendments to the Rome Statute of the International Criminal Court enabling the exercise of jurisdiction over the crime of aggression, Human Rights Watch said that its

institutional mandate includes a position of strict neutrality on issues of *jus ad bellum*, because we find it the best way to focus on the conduct of war, or *jus in bello*, and thereby to promote our primary goal of encouraging all parties to a conflict to respect international humanitarian law. Consistent with this approach, we take no position on the substance of a definition of the crime of aggression.⁸⁷

In a footnote, Human Rights Watch added:

The only exceptions that Human Rights Watch has made to this policy is to call for military intervention where massive loss of human life, on the order of genocide, can be halted through no other means, as was the case in Bosnia and Rwanda in the 1990s.⁸⁸

Amnesty International came to a similar conclusion, although without explicitly adopting the *jus ad bellum/jus in bello* philosophy derived from the law of armed conflict. According to Amnesty International, the organization

⁸⁴ ECtHR, *Kononov v Latvia* [GC], no 36376/04, Judgment, 17 May 2010.

⁸⁵ Article 1(4) of AP I.

⁸⁶ ICJ, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, 226, § 97.

⁸⁷ Human Rights Watch, 'Memorandum for the Sixth Session of the Assembly of States Parties of the International Criminal Court'.

⁸⁸ Human Rights Watch (n 87).

has not taken a position on the definition of the crime of aggression because its mandate—to campaign for every person to enjoy all of the human rights (civil and political and economic, social and cultural rights) enshrined in the Universal Declaration of Human Rights and other international human rights standards—does not extend to the lawfulness of the use of force.⁸⁹

Despite these pronouncements by influential organizations, it is not apparent that the approach to *jus ad bellum* that features in the law of armed conflict should be transposed into the analysis undertaken pursuant to international human rights law when violations of the right to life are concerned.

The first stumbling block is represented by the Universal Declaration of Human Rights itself, which constitutes the authoritative statement of human rights norms within an organization, the United Nations, premised on the illegality of the resort to force. The Universal Declaration cannot be dissociated from the Charter of the United Nations; rather it must be interpreted in such a manner as to reconcile its provisions with those of the Charter, and the purposes and principles of the United Nations. Surely this explains the first sentence of the preamble to the Universal Declaration with its reference to ‘peace in the world’ and the allusion, in the second sentence, to Franklin D. Roosevelt’s concept of ‘freedom from fear’ (the reference also appears in the preambles to the two International Covenants). In his January 1941 speech, Roosevelt explained the notion’s content: ‘The fourth is freedom from fear—which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbour—anywhere in the world.’ Article 28 of the Universal Declaration of Human Rights affirms: ‘Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.’ In his commentary on Article 28 of the Universal Declaration, Asbjørn Eide wrote: ‘It does not take much reflection to recognize that violence and war negatively affect the enjoyment of human rights. A social and political order in which all the rights in the Universal Declaration could be enjoyed would be possible only if there were peace on both the international and the national levels.’⁹⁰

The relevance of peace to the application of human rights treaties was affirmed by the Human Rights Committee in its first General Comment on the right to life:

The Committee observes that war and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year. Under the Charter of the United Nations the threat or use of force by any State against another State, except in exercise of the inherent right of self-defence, is already prohibited. The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts

⁸⁹ Amnesty International, ‘International Criminal Court, Concerns at the Seventh Session of the Assembly of States Parties’, October 2008, Index: IOR 40/022/2008, 22.

⁹⁰ A. Eide, ‘Article 28’, in A. Gudmundur and A. Eide (eds), *Universal Declaration of Human Rights* (Dordrecht: Kluwer Academic Publishers, 1999), 620.

of mass violence causing arbitrary loss of life. Every effort they make to avert the danger of war, especially thermonuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life. In this respect, the Committee notes, in particular, a connection between article 6 and article 20, which states that the law shall prohibit any propaganda for war (para. 1) or incitement to violence (para. 2) as therein described.⁹¹

The ‘right to peace’ is expressly recognized in the African Charter on Human and Peoples’ Rights: ‘All peoples shall have the right to national and international peace and security’.⁹² The UN Human Rights Council has adopted several resolutions on the promotion of ‘the peoples’ right to peace’.⁹³ Most recently, it has spoken of the ‘right to peace’ without qualifying this as a ‘peoples’ right’.⁹⁴ The Council was divided, with countries of the global south by and large voting in favour, while those of the north were opposed. On both sides, there seems to be no great clarity about what this right entails. Moreover, the entire concept of ‘peoples’ rights’ is contested by some experts.⁹⁵

If human rights law enshrines a right to peace, even implicitly, then it is logical to consider that a threat to peace could result in an ‘arbitrary’ deprivation of the right to life. If the conflict itself is unlawful, resulting from an act of aggression, then the deaths of those who are attacked that result are arbitrary. The problem is perhaps more acute with civilian victims, for whom there is little solace in suggesting that human rights law takes no position on the legality of the use of force. In the law of armed conflict it is rather common to speak of ‘collateral damage’ in describing the loss of life (and property) of non-combatants who unfortunately happen to be in the line of fire. Modern treaty law proscribes ‘an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’.⁹⁶ The collateral death of those who do not participate in the conflict is tolerated by the law of armed conflict, as long as it is actually the military objectives that are targeted, and to the extent that limitations imposed by proportionality are respected. Human rights law may provide a different answer, one that better addresses the rights of victims, precisely because it does not stand indifferent to the arbitrariness that lies behind the use of force. It should be said that while the victimization of non-combatants may be at the centre of concerns

⁹¹ ‘General Comment 6’, UN Doc CCPR/C/21/Add.1, § 2. See also ‘General Comment 14’, § 2.

⁹² African Charter on Human and Peoples’ Rights (1986) 1520 UNTS 217, art 23(1).

⁹³ ‘Promotion of the right of peoples to peace’, UN Doc A/HRC/RES/8/9; ‘Promotion of the right of peoples to peace’, UN Doc A/HRC/RES/11/4; ‘Promotion of the right of peoples to peace’, UN Doc A/HRC/RES/14/3; ‘Promotion of the right of peoples to peace’, UN Doc A/HRC/RES/17/16.

⁹⁴ ‘Promotion of the right to peace’, UN Doc A/HRC/20/15.

⁹⁵ P. Alston, ‘Introduction’, in P. Alston (ed), *Peoples’ Rights* (Oxford: Oxford University Press, 2001), 1–6 at 1.

⁹⁶ Article 51(5)(b) of AP I.

in this respect, members of the armed forces who are victims of an unlawful attack may also suffer breaches of the right to life.

Although the law of armed conflict addresses the proportionality of the measures employed in an attack in assessing whether the levels of collateral damage are tolerable, human rights law has also confronted the issue. The European Court of Human Rights has considered the problem of incidental loss of civilian life in cases dealing with the civil war in the Russian territory of Chechnya. It has steered clear of any attempt to apply international humanitarian law, or to articulate the principles governing the relationship it may have with human rights law. The European Court seems to have found an entirely adequate legal framework within human rights law, without the need to resort to a *lex specialis* theory, in contrast with the approach taken by the International Court of Justice. In one case before the European Court, a bomb dropped by a Russian plane had exploded near the mini-van of the applicant and her relatives as they were fleeing the village of Katyr-Yurt through what they had perceived as a safe exit from heavy fighting.⁹⁷ In another, bombs were dropped on a civilian convoy at the border between Chechnya and Ingushetia. Russian authorities had issued a press statement denying civilian damage, claiming that a column of trucks with fighters and ammunition had provoked the encounter by firing upon a government aircraft.⁹⁸ According to the Court, Article 2 of the European Convention on Human Rights ‘covers not only intentional killing but also the situations in which it is permitted to “use force” which may result, as an unintended outcome, in the deprivation of life.’⁹⁹ The test to be applied in considering the exceptions to the right to life in time of conflict, said the Court, was one of ‘absolute necessity’; the force used must be strictly proportionate to the achievement of the permitted aims.¹⁰⁰ Nevertheless, in a situation of armed conflict ‘the obligation to protect the right to life must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.’¹⁰¹

In the Katyr-Yurt case, the Court said

the State’s responsibility was not confined to circumstances where there was significant evidence that misdirected fire from agents of the state has killed a civilian. It may also be engaged where they fail to take all feasible precautions in the choice of means and methods

⁹⁷ ECtHR, *Isayeva v Russia*, no 57950/00, Judgment, 24 February 2005.

⁹⁸ ECtHR, *Isayeva, Yusopova and Bazayeva v Russia*, nos 57947/00, 57948/00, and 57949/00, Judgment, 24 February 2005, § 32.

⁹⁹ ECtHR, *Isayeva v Russia*, no 57950/00, Judgment, 24 February 2005, § 173; ECtHR, *Isayeva, Yusopova and Bazayeva v Russia*, nos 57947/00, 57948/00, and 57949/00, Judgment, 24 February 2005, § 169.

¹⁰⁰ See cases at n 99. Also, ECtHR, *Akhmadov et al v Russia*, no 21586/02, Judgment, 14 November 2008, §§ 92, 94.

¹⁰¹ ECtHR, *Akhmadov et al v Russia*, no 21586/02, Judgment, 14 November 2008, § 97; *Albekov et al v Russia*, no 68216/01, Judgment, 9 October 2008, § 79; *Arzu Akhmadova et al v Russia*, no 13670/03, Judgment, 8 January 2009, § 163.

of a security operation mounted against an opposing group with a view to avoiding and, in any event, minimising, incidental loss of civilian life.¹⁰²

In the case of the bombing of the convoy on the Chechnya-Ingushetia border, the Court said:

The situation that existed in Chechnya at the relevant time called for exceptional measures on behalf of the State in order to regain control over the Republic and to suppress the illegal armed insurgency. These measures could presumably include employment of military aviation equipped with heavy combat weapons. The Court is also prepared to accept that if the planes were attacked by illegal armed groups, that could have justified use of lethal force, thus falling within paragraph 2 of Article 2.¹⁰³

The Court has also held that Article 2 of the Convention—the right to life—imposes a positive duty on the state to locate and deactivate mines, to mark and seal off mined areas so as to prevent anyone from freely entering them, and to provide comprehensive warnings concerning mines laid in the vicinity of non-combatants.¹⁰⁴

The European Court of Human Rights pointed out in the *Katyr-Yurt* case that Russia had not declared martial law or a state of emergency in Chechnya, and that no derogation had been formulated in accordance with Article 15 of the European Convention. As a result, the situation had to be judged ‘against a normal legal background’.¹⁰⁵ According to the Court, ‘the use of aviation bombs in a populated area, outside wartime and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society’.¹⁰⁶ Thus, although the Court accepted that the military operation in *Katyr-Yurt* was pursuing a ‘legitimate aim’, it could not accept that it was planned and executed with the requisite care for the lives of the civilian population.¹⁰⁷

In the border convoy case, the Court did not repeat the same caveat about ‘normal legal background’ and the absence of a declaration of martial law. It said that ‘even assuming that the military were pursuing a legitimate aim in launching 12 S-24 non-guided air-to-ground missiles on 29 October 1999, the Court does not accept that the operation near the village of Shaami-Yurt was planned and executed with the requisite care for the lives of the civilian population’.¹⁰⁸ In another case involving an attack on civilians fleeing Grozny by way of what they had been led to believe was a safe humanitarian corridor, the Court rapidly concluded there had been a violation of the right to life, absent any attempt by Russia to justify the military action.¹⁰⁹

¹⁰² ECtHR, *Isayeva v Russia*, no 57950/00, Judgment, 24 February 2005, § 176.

¹⁰³ ECtHR, *Isayeva, Yusopova and Bazayeva v Russia*, nos 57947/00, 57948/00, and 57949/00, Judgment, 24 February 2005, § 178.

¹⁰⁴ ECtHR, *Albekov et al v Russia*, no 68216/01, Judgment, 9 October 2008, § 90.

¹⁰⁵ ECtHR, *Isayeva v Russia*, no 57950/00, Judgment, 24 February 2005, § 191.

¹⁰⁶ ECtHR, *Isayeva v Russia*, no 57950/00, Judgment, 24 February 2005, § 191.

¹⁰⁷ ECtHR, *Isayeva v Russia*, no 57950/00, Judgment, 24 February 2005, § 200.

¹⁰⁸ ECtHR, *Isayeva, Yusopova and Bazayeva v Russia*, nos 57947/00, 57948/00, and 57949/00, Judgment, 24 February 2005, § 199.

¹⁰⁹ ECtHR, *Umayeva v Russia*, no 1200/03, Judgment, 4 December 2008, §§ 82–3.

None of the European Court cases concerning armed conflict have found that the respondent state failed to demonstrate a 'legitimate aim'. In the Chechen jurisprudence, the Court accepted that Russia was entitled to repress a secessionist movement. Thus, its findings were confined to the rules of *jus in bello*. The argument that killing of non-combatants in a conflict conducted in violation of international law, that is, contrary to *jus ad bellum*, would be per se contrary to the European Convention, regardless of issues of necessity and proportionality, remains to be considered by the Court. If it is, the *lex specialis* approach of the International Court of Justice will likely be invoked by the respondent state to suggest the issue is irrelevant. But, as explained above, there is much to support the view that human rights law differs in one fundamental aspect from the law of armed conflict: killing that results from resort to illegal war and acts of aggression is *prima facie* a violation of the human right to life.

5 CONCLUSION

'[P]eace is the underlying condition for the full observance of human rights and war is their negation.'¹¹⁰ These words begin the Resolution adopted at the 1968 Tehran Conference on human rights that is regularly cited as the point of departure of efforts to reconcile the law of armed conflict with human rights law. The UN Secretary-General, in his first report on human rights and armed conflict, said: 'The Second World War gave conclusive proof of the close relationship which exists between outrageous behaviour of a Government towards its own citizens and aggression against other nations, thus, between respect for human rights and the maintenance of peace.'¹¹¹ Somehow, over time, the primacy of peace within the overall philosophy of human rights law has become blurred. Perhaps this is due to a certain infatuation with the use of armed force to prevent human rights violations. This often appears in the guise of fine slogans like 'humanitarian intervention' and the 'responsibility to protect', but in practice seems to degenerate inexorably into the atrocities of Abu Ghraib and Guantanamo. That resort to armed force may be necessary to prevent human rights violations cannot be ruled out, but nor should its benefits be exaggerated. As a general rule, it is a case of killing the patient to cure the illness, as we have seen in Iraq and Afghanistan. Another explanation for the

¹¹⁰ Resolution XXIII 'Human Rights in Armed Conflicts' adopted by the International Conference on Human Rights, Tehran, 12 May 1968.

¹¹¹ Respect for human rights in armed conflicts, UN Doc A/7720, § 16,

marginalization of peace within the overall vision of human rights may be a consequence of the growing insistence upon international justice. Peace is often held up as a counterweight to justice. Some enthusiasts for justice take an absolute view, where there is no room to balance peace with individual accountability.

The conclusion of the June 2010 Kampala Review Conference provides a helpful correction, repositioning the ultimate atrocity, aggressive war, within the realm of international criminality. The Conference adopted, by consensus, a definition of the crime of aggression and modalities for prosecution that allow the Court to proceed even in the absence of a determination or authorization from the UN Security Council.¹¹² The message of the Nuremberg trial is revived: war is the ‘supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.’¹¹³ The International Military Tribunal did not use the language of human rights law, which only really emerged in the months and years following its judgment of the Nazi criminals. The judges might well have said that ‘war is the supreme violation of the right to life’. Protection of the right to life requires the prohibition of aggressive war, and of the resort to force for the settlement of international disputes. That the law of armed conflict does not speak directly to the prohibition of war is a consequence of its unique mission which involves the regulation of behaviour on the battlefield. Human rights law need observe no such limitation.

¹¹² ‘The Crime of Aggression’, RC/Res.6.

¹¹³ *France et al v Göring et al* (1948) 22 IMT 427.