Injecting Human Rights into International Humanitarian Law: Least Harmful Means as a principle governing armed conflicts

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Recibido / Received: 25/02/2018
Aceptado / Accepted: 25/03/2018
DOI: doi.org/10.18272/lr.v5i1.1226

Citación

Flores Villacís, G. M. «Una Nueva Perspectiva De interacción Entre Los Derechos Humanos Y El Derecho Internacional Humanitario: El Uso De Medios Menos Nocivos Como Un Principio Que Gobierna Los Conflictos Armados». USFQ Law Review, Vol. 5, n.º 1, agosto de 2018, p. 28, doi:10.18272/lr.v5i1.1226.

Abstract

During times of war, the relationship between International Humanitarian Law and International Human Rights Law has always been controversial, and has generally been solved by prioritizing the rules of the former and minimizing the application of the latter's. In practice, this has translated into insufficient standards of protection for individuals and, more specifically, into the endorsement of an unrestrained right to kill enemy combatants. This paper suggests a novel approach to this regime interaction: the application of International Human Rights Law during wartime should serve as an interpretative tool of International Humanitarian Law rules, strengthening the safeguards offered by the latter and, thus, better respecting the rights of individuals during hostilities. Regarding the right to life, this interpretation would require to abandon the idea of a right to kill opponents and, instead, demand that least harmful means be employed during military operations, when possible. Lethal force should be allowed only in cases where military necessity justifies it, henceforth avoiding causing individuals more harm than that strictly required. The purpose of this article is not to advocate for a prohibition of killing combatants -as the nature of armed conflicts would render that rule unattainable-; it is, however, to establish a principle capable of guiding combatants' behaviour towards a more humane conduct of hostilities.

Keywords

Human Rights Law, Humanitarian Law, regime interaction, least harmful means, right to life, combatants.

Una nueva perspectiva de interacción entre los Derechos Humanos y el Derecho Internacional Humanitario: el uso de medios menos nocivos como un principio que gobierna los conflictos armados

Resumen

Durante un conflicto armado, la interacción entre el Derecho Internacional Humanitario y el Derecho Internacional de los Derechos Humanos ha sido siempre controversial y, por lo general, ha sido resuelto priorizando las reglas derivadas del primero y minimizando la aplicación de las del segundo. En la práctica, esto se ha traducido en estándares insuficientes de protección a los individuos y, más específicamente, en la aceptación de un irrestricto derecho a matar de los combatientes hacia sus enemigos. No obstante, este artículo sugiere un enfoque novedoso de interacción entre estos dos regímenes: el Derecho Internacional de los Derechos Humanos debería servir como una herramienta de interpretación de las normas del Derecho Internacional Humanitario, con el fin de fortalecer el nivel de protección disponible en las normas de este último y lograr así la garantía efectiva de los derechos de los individuos durante las hostilidades. Con respecto al derecho a la vida, esta interpretación requeriría el abandono de la idea del derecho a matar y, en su lugar, requerir el uso de medios menos nocivos durante las operaciones militares, cuando sea posible. El recurrir a fuerza letal debería ser permitido únicamente

en aquellos casos en que la necesidad militar lo justifique, de manera que se evite causar a los individuos más daño del estrictamente requerido. El propósito de este artículo no es propugnar una prohibición absoluta de matar a los combatientes enemigos –pues la naturaleza de los conflictos armados tornaría inalcanzable una regla de esas características–; sin embargo, sí es establecer un principio capaz de guiar la conducta de los combatientes hacia una conducción de hostilidades más humana.

Palabras clave
Derechos Humanos, Derecho Humanitario, interacción de los regímenes, medios menos nocivos, derecho a la vida, combatientes.

1. Introduction

International Humanitarian Law (onwards IHL) emerged in the 19th century, constituting one of the oldest manifestations of International Law, formulated to have the exclusive governance of armed conflicts[1]. During the aftermath of the Second World War in the late 50's, however, another branch of International Law emerged as a response to the horrifying violations perpetrated during that period, with the intention to protect individuals' dignity: International Human Rights Law (onwards IHRL)[2]. The emergence of IHRL marked a turning point for the rule of law governing armed conflicts, since IHL's exclusive dominance was displaced by the simultaneous application of the two regimes. Since then, the controversy has revolved around determining which is the model best suited to deal with the interaction of the two bodies of law and to accommodate both the humanitarian and military interests at stake. In the traditional models, military interests represented in IHL have prevailed at the expense of IHRL and have given way to interpretations of the rules that allow for scarce protections in favour of individuals[3], particularly combatants.

During the last few decades, however, the growing expansion of IHRL in many fields within the international community has been undeniable[4]. The evidence is on the widespread ratification of existing treaties and the emergence of new ones, the creation of international bodies and procedures, among others[5]. Therefore, IHRL has turned into a guiding element of the conduct of states[6]. The consequence is that it demands the introduction of an IHL-IHRL interaction model that affords the latter a more substantive role in the regulation of hostilities, contrary to the prevailing view derived from the 1996 ICJ Nuclear Weapons judgment[7] which is limited, in practice, to the displacement of the IHRL rules by IHL's, arguing *lex specialis*[8]. Twenty years later, the interpretation presented in this judgement is no longer compliant with the IHRL obligations currently in place.

Under the current scheme, individuals who act as combatants during an armed conflict have been partially divested of the rights to which they are inherently entitled[9]. What is more, the notion of an unconstrained right to kill enemy combatants

1 *Cfr.* Fleck, Dieter. *Handbook of IHL.* OUP, 2013. Ch 1.
2 *Cfr.*Chevalier-Watts, Juliet. "Has human rights law become *lex specialis* for the European Court of Human Rights in right to life cases arising from internal armed conflicts?" (2010) IJHR 584 p. 3.
3 *Cfr.* Doswald-Beck, Louise. "The right to life in armed conflict: does international humanitarian law provide all the answers?" (2006) 88 IRRC 881 p. 2-3.
4 Lauren, Paul. *The evolution of International Human Rights: Visions Seen.* UPP, 2011; Pease, Kelly Kate and Forsythe, David. *Human Rights, Humanitarian Intervention, and World Politics*, Human Rights Quarterly, 1993. p. 6-9.
5 *Ibid.*
6 *Ibid.*
7 ICJ. *Legality of the Threat or Use of Nuclear Weapons.* (Advisory Opinion), 1996. ICJ Rep 226.
8 *Cfr.* Doswald-Beck, Louise. "The right to life…" *Óp cit.*, p. 2.
9 *Cfr.* May, Larry. "Humanity, Necessity and the Rights of soldiers" https://www.law.upenn.edu/live/files/3026-larry-mayhumanity-necessity-and-the-rights-of (accessed: august 2016).

has governed the conduct of hostilities[10]. In this paper, however, I will present a novel model of IHL-IHRL interaction that endorses a Least Harmful Means (onwards LHM) approach to be adopted during wartime, imposing on belligerents the obligation to rigorously adhere to the one legitimate aim of war: weakening the military forces of the enemy, which can be sufficiently fulfilled by "disabling the greatest possible number of men"[11], without necessarily resorting to lethal force.

For this purpose, the first section of this article will explain the model of interaction proposed, the *Integrative model*, which places IHL as *lex specialis,* but uses IHRL protective principles to shine through IHL rules, in search of the most humanitarian interpretation of the latter. This exercise gives IHRL a central role in the regulation of hostilities, amending one of the most criticised flaws of the classic model and better reflecting the prominent status of this regime. The second section will focus on the protection of the right to life of combatants afforded by IHRL and by IHL, and will analyse the regime interaction models that have been employed by the different courts on this matter. The purpose of this section is to suggest a more appropriate and protective way of reading the right to life during armed conflicts. Finally, the last section will detail how, under the light of the Integrative model, a LHM approach can be construed to govern the conduct of hostilities, by using the protective principles of IHRL to boost the humanitarian rules[12] already found in IHL -but often disregarded-, and result in restrictions on the use of force against combatants.

2. Interaction between IHL and IHRL: the Integrative Model

IHRL and IHL were created under distinct rationales, especially regarding origin, nature and specific purpose[13], but there is broad evidence of the important overlaps between the two regimes that demand their simultaneous application during wartime and, moreover, that deem it convenient[14]. First, there are substantive conceptual similarities shared by the two bodies of law, especially regarding their protective drive and the field of application[15]. They both pursue a similar humanitarian aim and this provokes, in the words of the Inter-American Commission on Human Rights (onwards IACHR), "an integral linkage" between the two, based on the "common purpose of protecting human life and dignity'"[16]. Fur-

10 *Cfr.* Parks, Hays. "Part IX of the ICRC 'Direct Participation in Hostilities' Study: No Mandate, No Expertise, and Legally Incorrect", (2010) *42 NYU J Int'l L & Politics 794*.; Watkin, Kenneth. "Humans in the Cross- Hairs: Targeting, Assassination and Extra-Legal Killing in Contemporary Armed Conflict", in Wippman, David and Evangelista, Matthew. *New Wars, New Laws? applying the laws of war in the 21st century conflicts*. Brill, 2005 p. 137-179.

11 St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight LXIV UKPP (1869) 659.

12 High Court of Justice Israel, *The Public Committee against Torture in Israel et al v The Government of Israel et al (Targeted Killings),* 46 ILM 375, (11 December 2006) para. 40.

13 *Cfr.* Gasser, Hans Peter. "International Humanitarian Law and Human Rights Law in Non-International Armed Conflicts: Joint Venture or Mutual Exclusion?" (2002) 45 GYIL p. 160-161.

14 *Cfr.* Heintze, Hans-Joachim. "On the relationship between human rights law protection and international humanitarian law" (2004) 86 IRRC 789 p. 1-5.

15 *Ibid*.

16 IACHR, *Coard v US,* Report no 109/99 (29 September 1999) para. 39.

thermore, while it is true that IHL operates only during wartime, IHRL's core idea is that rights are permanently protected because they are inherent to human condition and not dependant on states' willingness/capacity to recognize them[17]; hence, during an armed conflict when rights are specially at risk, its protection cannot vanish[18]. Thus, IHRL pertains to both times of peace and times of war and this deems the IHL-IHRL interaction unavoidable.

Stipulations in IHRL treaties also further this view through the text of the derogation-clauses, which endorses the applicability of certain rights during times of emergency -including situations of armed conflict[19]. In this regard, although there are some rights that may be derogated by states during these times, the rights considered part of the "common nucleus of Human Rights"[20] such as life, integrity or freedom of belief, remain binding even during hostilities. The non-derogable character of these rights has been ratified by vast jurisprudence of international judicial bodies[21], concluding that they continue to be enforceable at all times without exception and, thus, rejecting allegations of exclusive applicability of IHL during wartime.

Furthermore, more recent developments in IHL regulations have themselves endorsed, tacitly and expressly, the applicability of IHRL to hostilities. First, Common Art. 3 of the 1949 Geneva Conventions (onwards GCs)[22] provides a list of rights that ought to be protected at all times which coincides with the list of non-derogable rights specified in IHRL instruments, mirroring the similar drive of the two bodies of law[23]. Second, the 1977 Additional Protocols (onwards APs) acknowledge the application of IHRL more directly by stating that their provisions "are additional to […] other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict"[24]. Moreover, the Martens Clause contained in the APs expressly states that in cases not covered by IHL, individuals "remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience"[25]. As stated by Heintze,

17 *Cfr.* Griffin, James. *On Human Rights.* OUP, 2009. Ch 2.

18 *Cfr.* Milanovic, Marco. "Norm Conflicts, International Humanitarian Law, and Human Rights Law" p. 7 in Ben-Naftali, Orna, *International Humanitarian Law and International Human Rights Law*. Oxford University Press, 2011.

19 International Covenant on Civil and Political Rights 999 UNTS 171 (ICCPR) Art. 4; American Convention on Human Rights 1144 UNTS 123 (ACHR) Art. 27; Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222 (ECHR) Art. 15.

20 IACHR, *Coard v US… Óp. cit.*, para. 38.

21 ICJ, *Nuclear Weapons… Óp. cit.*, para. 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 para. 106; ECtHR, *Hassan v United Kingdom* App no 29750/09 (16 September 2014) para 77.

22 Geneva Conventions (adopted 12 August 1949) 75 UNTS (GCs).

23 *Cfr.* Heintze, Hans-Joachim. "On the relationship…" *Óp. cit.*, p. 2.

24 Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1125 UNTS 3 (API) Art. 72; Sandoz, Yves et al. *Commentary on the Additional Protocols.* ICRC, 1987. para. 4429.

25 Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts Art. 1; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts 1125 UNTS 609 (APII), Preamble.

these clauses confirm the openness of IHL by recognizing that its rules "cannot be regarded as the final regulation of the protection of human beings [during armed conflicts]", but are meant to be complemented with others, such as IHRL's[26].

Consequently, there can be no doubt that International Law in its current form endorses the joint applicability of IHRL during armed conflicts, hence why this view has been progressively endorsed by states within the UN. Initially, specific declarations were made regarding the application of IHRL during determined wars, including the URSS invasion of Hungary in 1956[27] and the Six Day War in 1967[28]. This trend led later to the elaboration of general documents confirming the application of IHRL during armed conflicts overall, such as the resolution on "Basic principles for the protection of civilian populations in armed conflict"[29]; view that has been maintained onwards in UN resolutions issued by the Security Council[30] and the General Assembly[31].

IHRL applicability changes significantly the approach employed by the rule of law to address armed conflicts, injecting a more humanitarian outlook. While IHL consists of a series of state-centred agreements between states who, on the basis of sovereignty and reciprocity, accepted to restrain their actions and minimize damage, the humanity-driven rationale behind IHRL gives priority to human needs and conceptualizes individuals as right-holders who need reinforced safeguards during wartime[32]. Accordingly, IHRL effectively expands the humanitarian purposes established in IHL and lifts the standards of available protection.

2.1. The Integrative Model

Although today there is general agreement on the simultaneous application of IHL and IHRL, the dynamic of the interrelation between the two is still subject to much debate. At times, rules from both bodies of law will be compatible and the solution will simply be to apply each in its own terms[33]. Often, however, applicable IHL and IHRL rules can be contradictory and this adds complexity to the interaction. The issue of how to reconcile opposing standards of protection, therefore, needs to be addressed through a carefully tailored mechanism.

The starting point to construct an appropriate model is the assumption that International Law, along with all of its branches, are part of one coherent and unified

26 Heintze, Hans-Joachim. "On the relationship…" *Óp. cit*., p. 9.
27 GA Res. 1312 (XIII) (12 December 1958) UN Doc. A/38/49.
28 SC Res. 237 (14 June 1967) UN Doc. A/237/1967.
29 GA Res. 2675 (XXV) (9 December 1970).
30 SC Res. 1019 (9 November 1995) UN Doc. S/RES/1019; SC Res. 1635 (28 October 2005) UN Doc. S/RES/1635 and SC Res. 1653 (27 January 2006) UN Doc. S/RES/1653.
31 GA Res. 46/135 (19 December 1991) UN Doc. A/RES/ 46/135; GA Res. 50/193 (22 December 1995) UN Doc. A/RES/50/193; GA Res. 52/145 (12 December 1997) UN Doc. A/RES/52/145.
32 *Cfr*. Milanovic, Marco. "Norm Conflicts…" *Óp. cit*., p. 1-2.
33 ICJ, *Palestinian Wall… Óp. cit*., para. 106.

system and not an aggregate of unconnected norms that operate independently[34]. This systemic approach is endorsed by Art. 31 of the Vienna Convention on the Law of Treaties, which states that "any relevant rules of international law applicable in the relations between the parties" shall be taken into account in the interpretation of any international treaty[35]. Hence, all bodies of law applicable in a determined situation are expected to be interpreted against the background of one another in a harmonic manner, resulting in a "single set of compatible obligations" that states are bound to observe[36]. Harmonization between IHL and IHRL should be feasible, considering their partial convergence and, thus, their potential to reinforce one another[37].

Nevertheless, finding a mechanism capable of reconciling these rules has proven to be a challenge. The general trend has been to solve these difficulties through interpretative means and, more specifically, by interpreting IHRL in light of IHL[38]. This model is built upon the idea that, due to the extraordinary circumstances surrounding war, IHRL obligations can be attenuated and read through the lenses of IHL norms, by expanding the former only to the extent of matching the requirements of the latter. This model frames IHL as *lex specialis* and, moreover, as an authoritative interpretation of IHRL[39]. For instance, in the Coard v US case, the IACHR had to analyse whether a detention within an armed conflict had been arbitrary under IHRL and it resolved that the standard of what should be understood as arbitrary ought to be deduced by reference to IHL[40]. Under this approach, only when a deprivation of a right is illegal under IHL, it is also assumed to be an IHRL violation.

This model, however, presents both theoretical and practical problems. First, even though it is supposed to be based on the idea of IHRL applicability, in reality it contradicts it, since it prevents this regime from actually influencing the regulation of hostilities. In practice, the relevant IHL norm is applied exclusively and displaces the IHRL one, by disregarding any higher standard that the latter may impose. As was explained previously, IHL-IHRL interaction should give way to a single set of compatible obligations shaped by both applicable regimes; instead, this model endorses IHL as the only rule in force and condemns IHRL to be a silent bystander, only permitted to reinforce its counterpart's standards.

Consequently, this paper advocates for an alternative model: the Integrative one. Its aim is to further the role played by IHRL, encouraging active interaction between

34 ILC, Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law (2006) UN Doc A/61/10.
35 Vienna Convention on the Law of Treaties 11 UNTS 331 (VCLT) Art. 31.3.c.
36 ILC, Conclusions of the work of… *Óp. cit.*, p. 1.
37 *Cfr.* Doswald-Beck, Louise. "The right to life…" *Óp. cit.*, p.1.
38 ICJ, *Nuclear Weapons… Óp. cit.*, para. 25; ECtHR, *Hassan v UK… op. cit.* paras. 100-106; IACHR, *Coard v US... Óp. cit.*, para. 42.
39 IACHR, Coard v US… *Óp. cit.*, para. 42.
40 *Ibid.*

the two bodies of law and acknowledging the contribution that IHRL can make to the regulation of war. More specifically, this model intends to inject a more humane perspective, by allowing IHRL to lift the standards available in IHL. Just as in the current model, here IHL rules are considered *lex specialis* due to their specificity, but the difference is that IHRL is meant to play an interpretative function and "remain in the background to inform the application and interpretation of the relevant humanitarian law rule[s]"[41]. Even though IHRL norms will not apply directly, its protective values will inspire the way in which IHL is read, so as to bear the most humanitarian result possible within the latter's own framework.

2.1.1. Historical justification of the Integrative Model

Since its emergence, IHRL was intended to apply during armed conflicts subject to the restrictions contained in the derogation clauses. However, because of the immaturity and limited scope of IHRL in its early stages, initially there was reluctance to endorse its application during wartime[42]. Through time, IHRL obligations expanded and, thusly, this older view became unsustainable. As a result, in the following decades IHRL application started to be recognized and the first steps towards IHL-IHRL interaction were made. Today, however, IHRL has developed even more and is seen by many as one of the pillars upon which the international community is built[43], which requires its role during war to be further strengthened.

IHLR's importance grew significantly in the first period following its emergence. This can be evidenced, for example, through the wide spread ratification of treaties, such as the International Covenant on Civil and Political Rights (onwards ICCPR) (1966) and the International Covenant on Economic, Social and Cultural Rights (onwards ICESCR) (1966); and later of other more specific instruments focused on women (1979), children (1989), torture(1984), migration (1990), etc[44]. Additionally, in this same stage, states agreed to the creation of monitoring bodies both with jurisdictional[45] and non-jurisdictional powers[46], in order to ensure compliance with IHRL obligations. The large support given to all these new agreements within the international community progressively placed IHRL as a priority subject matter, compelling states to shape their conduct in accordance with the latter's requirements[47]. As expected,

41 Report of the un Fact-Finding Mission on the Gaza Conflict (25 September 2009) UN Doc A/HCR/12/48 para. 296.

42 *Cfr.* Meyrowitz, Henri. "Le droit de la guerre et les droit de l'homme" (1972) 88 Revue du droit public et de la science politique en France et à l'étranger 1059.

43 *Cfr.* UN World Summit Outcome Report (24 October 2005) UN Doc. A/RES/60/1.

44 Convention on the Elimination of all Forms of Discrimination Against Women (adopted 18 December 1979) 1249 UNTS 13 (CEDAW); Convention on the Rights of the Child (adopted 20 November 1989) 1577 UNTS 3 (CRC); Convention Against Torture (adopted 10 December 1984); 1465 UNTS 85 (CAT); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (18 December 1990) 2220 UNTS 3.

45 ECHR; ACHR.

46 Human Rights Committee (1966); Committee on Economic, Social and Cultural Rights (1966); Committee on the Elimination of Discrimination against Women (1979); Committee against Torture (1984).

47 *Cfr.* Pease, Kelly Kate and Forsythe, David. "Human Rights, Humanitarian…" *Óp. cit.*, p. 6-9.

this development made inevitable acknowledging its application during armed conflicts and the classic model of interpreting IHRL in the light of IHL emerged. The latter has been consistently employed since the 90s to address the interaction between these two regimes. Admittedly, this model probably allowed as much IHRL intervention in the regulation of hostilities as was feasible within the context prevailing at the time.

IHRL obligations, nonetheless, have furthered even more during the last couple of decades and the protagonist function that it has acquired within the international community, requires a new model of IHL-IHRL interaction that mirrors this advancement[48]. The most significant IHRL developments include: emergence of new regional treaties and monitoring bodies in Asia and Africa[49]; creation of new universal bodies within the structure of the UN, such as the Human Rights Council[50]; acquiescence of states to the implementation of the Universal Periodic Review as a mandatory monitoring mechanism[51]; creation of the International Criminal Court to punish the most heinous violations of IHRL[52]; and proliferation of new treaties and protocols to further the protection offered to individuals[53]. IHRL's progress has even challenged some of the traditional conceptions prevailing in International Law, including jurisdiction and sovereignty. Regarding the first one, it was traditionally assumed that a state was bound to safeguard individuals' rights only when it had jurisdiction over them, and this concept was intrinsically linked to a territorial element. In the last few years, however, extraterritoriality has turned into a feature of IHRL obligations, expanding its scope to the actions undertaken by states abroad[54]. In the same way, the classic state-centred definition of sovereignty has been challenged by IHRL and has developed into a more humanity-driven notion that requires states to respect individual rights as a primary condition for their legitimacy[55].

48 *Cfr.* Chevalier-Watts, Juliet. "Has human rights law…" *Óp. cit*., p. 3-5.

49 ASEAN Intergovernmental commission on Human Rights (2009) and ASEAN Human Rights Declaration (adopted 18 november 2012) Association of Southeast Asian Nations; Arab Human Rights Committee and Court and Arab Charter on Human Rights (adopted 15 september 1994) League of Arab States; African Court of Human and People's Rights and Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (13 September 2000) African Union CAB/LEG/66.6.

50 GA Resol. 265 (15 March 2006) UN Doc A/RES/60/251.

51 *Ibid.*

52 Rome Statue of the International Criminal Court (adopted 17 July 1998) 2187 UNTS 3.

53 Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (adopted 25 May 2000) 2173 UNTS 222; Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (adopted 25 May 2000) 2173 UNTS 222; Optional Protocol to the Convention Against Torture (adopted 18 December 2002) 2375 UNTS 273; International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006) 2716 UNTS 3; Convention on the Rights of Persons with Disabilities (adopted on 13 December 2006) 2515 UNTS 3 (CRPD); Optional Protocol to the Convention on the Rights of Persons with Disabilities (adopted 13 December 2006) 2518 UNTS 283; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008); Optional Protocol to the Convention on the Rights of the Child on a communications procedure (adopted 19 December 2011).

54 ICJ, *Palestinian Wall… Óp. cit*., paras. 103-113; ECtHR, *Al-Skeini and others v UK,* App no 55721/07 (ECtHR, 7 July 2011) paras. 109 –150; *Jaloud v. Netherlands*, App no. 47708/08 (ECtHR, 20 November 2014) paras. 139-156; *Cfr.* King, Hugh "The extraterritorial Human Rights Obligations of States" (2009) 9 Human Rights Law Review 521.

55 *Cfr.* 2005 World Summit... *Óp. cit*.

All these changes were caused by the undeniable growth of IHRL and consequently, the model employed for the IHL-IHRL interaction should progress at the same pace. In my view, the Integrative model is a progressive one that better achieves this aim.

2.1.2. Elements of the model

2.1.2.1. *Lex specialis*

In order to build a solid interpretative solution to resolve the issue of conflicting rules, it is first necessary to determine which one of the regimes shall be given the primary role. For this purpose, the maxim *lex specialis derogat legi generali* established by International Law provides the best mechanism. This principle is a Roman rule of interpretation according to which the norm that is more specific to the situation at stake is given priority, since it is assumed is better suited to address the circumstance and create a more appropriate result[56]. As Milanovic has explained, however, *lex specialis* in this case should not be understood as a principle of conflict-resolution aiming to apply solely the special rule and displace the general one; instead, this maxim should operate as a conflict-avoidance norm, which pursues a joint interpretation of the two rules, in application of the systemic principle mentioned above[57]. The primary regime, thus, applies directly to the scenario, but the secondary one guides the latter's interpretation.

In the case at stake, IHL is the primary body of law since it was specifically formulated to regulate the conduct of hostilities and tailored to address its particularities. Considering that an armed conflict constitutes an extraordinary circumstance with unique features, it requires context-sensitive solutions that can be better generated by IHL. This view has been consistently maintained by the ICJ[58], and has been followed by other international bodies, such as the IACHR[59] and the HRC[60]. IHRL, thus, should be afforded the secondary interpretative function.

2.1.2.2. The role of IHRL: Interpretation of IHL rules

IHL norms constitute a minimum threshold of protection below which the rule of law cannot be set[61]. When applying IHL rules, however, several interpretative possibilities may arise. Under the model proposed, the possibility that is most protective and that best complies with an IHRL's approach should be selected.

56 *Cfr.* ILC, Conclusions of the work… *Óp. cit*., p. 2.
57 Milanovic, Marco. "Norm Conflicts…" *Óp. cit*., p. 10-11.
58 ICJ, *Nuclear Weapons… Óp. cit*., para. 25; ICJ, *Palestinian Wall… Óp. cit*., para. 106.
59 IACHR, *Coard v US.. Óp. cit*., para. 42.
60 HRC General Comment No. 31 on The nature of the general legal obligation imposed on States Parties to the Covenant (26 May 2004) UN Doc. CCPR/C/21/Rev.1/Add.13 para. 11.
61 *Cfr.* Rusinova, Vera. "The right to life in light of the integration between the norms of International Humanitarian and Human Rights Law" http://www.hse.ru/data/2014/05/12/1321656524/38LAW2014.pdf (accessed: July 2016).

This way IHRL principles will still be present by inspiring the interpretation of the rules that do apply, so as to achieve an outcome that respects the rights of individuals to the highest attainable standard.

This model proposes a balanced solution that weighs all the interests at stake, by avoiding illusory Human-Rightist approaches that ignore the realities of armed conflicts. Certainly the intention of applying IHRL is to raise the standards of protection in favour of individuals[62], but it should be observed that the circumstances surrounding war differ significantly from those governing peace-time, and include high degrees of violence, politically-sensitive contexts and military-focused decision-making processes. These complexities limit the protection that can realistically be afforded to individuals and will inevitably result in "watered down" IHRL standards[63]. That is why the integrative approach proves to be a suitable one: unlike other new models proposed[64], it does not intend to directly apply IHRL rules in the battlefield but, instead, allow IHL rules to govern, as was initially intended.

On the other hand, this model is mindful that IHRL standards should not be attenuated excessively, to the point of annulling the values that it stands for. If this happened, IHRL would be at the risk of simply being diluted and replicate the problems identified in the current model. Furthermore, unduly watering down IHRL obligations, could potentially open the door for claims in support of attenuated duties during peace time, which could debilitate the IHRL regime overall[65]. Consequently, through the approach proposed, the IHL-IHRL interaction would be addressed through a well-balanced interpretation. States will not have unattainable duties to pursue, but will be forced to modify its conduct in ways that are respectful of human dignity, even in the battlefield.

3. The right to life under the Integrative Model

Today, it is assumed as one of IHRL's basic premises that every individual is entitled to human rights on the basis of the universality principle[66] and they remain valid for all, with or without an armed conflict[67]. This principle becomes even more relevant when dealing with the right to life, due to its inherent importance. Life is the most precious asset that an individual has, because his entire existence is dependent on it and it is a necessary condition for every other aspect of human

62 *Cfr.* Milanovic, Marco. "Norm Conflicts…" *Óp. cit.*, p. 3.
63 *Ibíd.*
64 *Cfr.* Doswald-Beck, Louise. "The right to life…" *Óp. cit.*; Droege, Cordula. "Elective affinities? Human rights and humanitarian law" (2008) 90 IRRC 501; Sassoli, Marco and Olson, Laura "The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts" (2008) 90 IRRC 599.
65 *Cfr.* Milanovic, Marco. "Norm Conflicts…" *Óp. cit.*, p. 4.
66 Universal Declaration of Human Rights (1948) UNGA Res 217 A(III), UN Doc A/810 91 (UDHR) Preamble.
67 *Cfr.* Milanovic, Marco. "Norm Conflicts…" *Óp. cit.*, p. 7

development[68]. Likewise, the right to life is the foundation upon which all other rights are construed and, accordingly, its violation constitutes an especially heinous breach of IHRL[69].

Because of its transcendence, the contrasts between the standards of protection of life under IHRL and under IHL become especially relevant. From a broad perspective, the standard set in IHL is significantly lower and more flexible than that of IHRL, legitimizing deprivations of life that during peacetime would be unacceptable[70]. This chapter will compare the standards of protection offered by both regimes, will analyse how other models have dealt with the issue, and will propose an alternative solution in light of the integrative model.

3.1. IHRL: The protection of the right to life

In IHRL, the right to life is protected extensively by all major instruments. In the ICCPR, the American Convention on Human Rights (onwards ACHR) and the African Charter on Human and People's Rights (onwards ACHPR), the right to life is framed as an entitlement of every individual and is also characterized as a non-derogable right[71]. The only qualifier available within the wording of the relevant provisions is that arbitrary deprivations of life are prohibited. Hence, *non-arbitrary* acts that result in the death of an individual are allowed. The term arbitrary, however, is generally understood in a far-reaching manner and has been defined as an unlawful act that has no legal basis to be undertaken or one that, even if lawful, is unnecessary/disproportionate[72].

The European Convention on Human Rights (onwards ECHR), meanwhile, gives more detail on the matter and, while ensuring the right overall, it expressly establishes the exceptions when deprivations of life can be acceptable. Art. 15 of the ECHR establishes that those that result from "the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection" do not constitute a breach[73]. Consequently, here there is no space for discretion since the convention itself states what the acceptable deprivations of life are, and it tacitly excludes any other possibility not mentioned. When dealing with times of emergency, on the other hand, the ECHR considers the right to life as a non-derogable one, "except in respect of deaths resulting from lawful

68 *Cfr.* Wicks, Elizabeth. *The Right to Life and Conflicting Interests.* Oxford Scholarship, 2010. Ch1.
69 *Ibid*; IACtHR, Santo Domingo Massacre v Colombia No. N. 12.416 (30 November 2012) para. 190.
70 *Cfr.* Doswald-Beck, Louise. "The right to life…" *Óp. cit*., p. 2.
71 International Covenant on Civil and Political Rights. Arts. 4, 6; American Convention on Human Rights Art. 27; African Charter on Human's and People's Rights. 1520 UNTS 217 (ACHPR) does not have a derogation clause.
72 *Cfr.* Wicks, Elizabeth. *The Right to Life and… Óp. cit*., Ch1.
73 European Convention on Human Rights. Art. 2.

acts of war"[74]. The definition of what a lawful act is, however, should include both IHRL and IHL relevant rules.

In sum, all IHRL treaties offer a high-standard protection of the right to life, seeking to safeguard it as a supreme value and based on the presumption that every individual's right is deserving of permanent protection, regardless of personal circumstances like the function he performs[75]. What is more, this protection does not cease in times of war[76]. In the specific case of the use of force, all IHRL instruments address it expressly or tacitly as a possible exception to the protection of the right to life. However, in order for it to be deemed legal, the amount of force used cannot exceed what is strictly necessary and proportionate to obtain a legitimate objective, like self-defence or the defence of others against an imminent threat, to prevent a serious crime with potential lethal results, or to arrest a person or prevent his escape[77]. Additionally, IHRL requires that other preventive measures are undertaken to protect life such as giving a warning in advance, granting the opportunity to surrender and exhausting non-violent means previously[78]. Thus, a LHM approach can be identified, requiring that lethal force is employed as a last-resort measure whilst other alternatives are exhausted first[79].

3.1.1. Extraterritoriality of Human Rights

Although the protection of IHRL and, more specifically the right to life, remain in force during an armed conflict, there is one element of this regime's structure that could inhibit its application overall: jurisdiction. All IHRL treaties establish that a state is bound to ensure rights only to individuals that are subject to its jurisdiction[80] and, traditionally, the latter has been linked mainly to the territory of the state[81]. Under this scheme, a state was bound to protect the rights of individuals within their borders and, only exceptionally, the rights of persons abroad if it had the consent, invitation or acquiescence of the territorial state[82]. This understanding was rooted in the classic definition of jurisdiction of International Law but, as Milanovic has explained, they constitute two different concepts[83]. International Law's Jurisdiction is a complex notion dealing with prescriptive, adjudicative and enforcement elements which require total sovereign control over a territory, whilst IHRL's simply refers to the *de facto* relationship between

74 European Convention on Human Rights. Art. 15.

75 *Cfr.* May, Larry. "Humanity, Necessity and the Rights…" *Óp. cit.*

76 ICJ, *Nuclear Weapons… Óp. cit.*, para. 25; ICJ, *Palestinian Wall… Óp. cit.*, para. 106; ECHR, *Hassan v UK… Óp. cit.,* para. 77.

77 *Cfr.* Kleffner, Jann. "Section IX of the ICRC Interpretative Guidance on Direct Participation on hostilities: The end of Jus in Bello proportionality as we know it?" (2012) 45 ILR 35 p. 14

78 *Ibid*; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, GA Res. 45/121 (14 December 1990), Principles 4, 5, 9.

79 *Cfr.* Doswald-Beck, Louise. "The right to life…" *Óp. cit.*, p. 2-5; Kleffner, Jann. "Section IX of the ICRC…" *Óp. cit.*, p. 15; Melzer, Nils.'Targeted Killing or Less Harmful Means? – Israel's High Court Judgment on Targeted Killing and the Restrictive Function of Military Necessity', 9 YIHL 87 (2006) p. 3-6.

80 International Covenant on Civil and Political Rights. Art. 2; ACHR. Art. 1; European Convention on Human Rights. Art. 1.

81 ECtHR, *Bankovic and others v Belgium* App 52207/99 (12 December 2001) paras. 59-61.

82 *Ibidem*.

83 *Cfr.* Milanovic, Marco. *Extraterritorial Application of HR Treaties: Law, principles and Policy* OUP, 2011. Ch 1.

an individual and the state, and the consequent humanitarian obligations that are triggered as a result[84].

The issue of IHRL's jurisdiction started to be clarified by the ICJ as early as 1971 in the South Africa v Namibia Advisory Opinion[85] and was later furthered by the 2004 Palestinian Wall judgement[86], when the court affirmed that a *legitimate title* over a territory abroad was not necessary to trigger IHRL obligations and that, although this kind of jurisdiction was primarily found within state's boarders, it would be mistaken to interpret rules in a manner that allow states to escape their IHRL's responsibilities when acting abroad. In these judgements, the ICJ endorsed the extraterritorial character of IHRL's jurisdiction while distinguishing it from that of International Law.

In the early stages, courts only accepted effective overall control over foreign territory as a valid source of extraterritorial jurisdiction[87], which is known as the territorial model. In time, nonetheless, they progressively came to accept state's factual power over an individual also as a valid source of jurisdiction, the personal model[88]. When extraterritoriality is configured on the basis of the former, it is triggered by the effective control of a territory overall or control over some of the relevant public powers of that territory, through military occupation or through the consent of the state[89]. This kind of model generates not only negative obligations but also positive ones[90]. In the case of the right to life, the first type of obligations involves refraining from any deprivations of this right through the state's own agents, whist positive obligations imply the duty to prevent violations perpetrated by third parties.

In respect of the personal model, however, the requirements for obligations to be triggered are more complex. There are two ways of configuring this model and bringing victims under the jurisdiction of the state: first, through acts perpetrated by diplomatic authorities and, second, through the use of force by states' agents in foreign soil[91]. In respect of the latter which is the one that concerns this paper, jurisdiction is triggered by the factual power that a state acting abroad has over an individual through its agents. Although it is still very debated within the legal doctrine, this understanding of the personal model is what King calls the cause-and-effect notion[92]. In the case of the right to life, if a state agent has the power

84 *Cfr.* King, Hugh "The extraterritorial Human Rights…" *Óp. cit*., p. 32-36.

85 ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16 para. 118.

86 ICJ, *Palestinian Wall… Óp. cit*., para. 109.

87 *Ibid*; ICJ, *South West Africa… Óp. cit*., para. 118, ECtHR, *Loizidou v Turkey*, App no 15318/89 (1996) para. 56; ECtHR, *Cyprus v Turkey* App no 25781/94 (EctHR, 2001) paras. 75, 77; ECtHR, *Bankovic and others v Belgium Óp. cit*., paras. 67, 71, 80; IACHR, *Coard v US.. Óp. cit*., para. 37.

88 ECtHR, *Al-Skeini and others... Óp. cit.*, para. 135, 142.

89 *Ibid*.; ECtHR, *Bankovic and others… Óp. cit*., paras. 60, 71.

90 *Cfr.* Milanovic, Marco. *Extraterritorial Application… Óp. cit*. Ch 1.

91 ECtHR, *Al-Skeini and others... Óp. cit.*, para. 134

92 *Cfr.* King, Hugh "The extraterritorial Human Rights Obligations… *Óp. cit*., p. 36.

to kill an individual or uses a weapon against him, that should suffice to bring the target within the jurisdiction of that state[93]. It would be excessive to establish additional requirements like physical apprehension or custody of the individual before the obligations regarding this right can be triggered. The right to life is the basis of human existence but is very fragile and can be irreversibly affected from afar; thus, the fact that the victim is in custody of a state or not is irrelevant when assessing a breach of this sort and, setting that as a requirement, would only hinder the access of the victims to a remedy, contradicting the protective nature of IHRL[94].

The right to life under the IHRL regime, thus, remains as a binding obligation for states acting abroad in the context of an armed conflict because of the extraterritorial character of IHRL jurisdiction. Whether it is through the territorial or through the personal model depending on the case, states shall refrain from depriving individuals of their right to life through the actions of their agents. Evidently this obligation needs to be harmonized with IHL relevant rules as was explained in the previous chapter but, overall, IHRL protective principles remain valid and they do not make distinctions between individuals.

3.2. IHL: The protection of the right to life

IHL regime is a status-based system that categorizes individuals either as combatants or as civilians[95]. In general terms, combatants are those who belong to the armed forces of a state[96] or those who belong to any other armed groups which fulfil the four requirements given by Art. 4.2 of the III GC: responsible command, fixed distinctive sign, carrying arms openly and complying with IHL[97]. Civilians, on the other hand, are defined in the negative as any person who is not a combatant[98] and who are entitled to protection from attacks, unless they directly participate in hostilities[99].

There are important differences between the protection of the right to life offered by IHL to each of the categories of individuals, but this paper will focus on the safeguards established in favour of combatants. Pursuant to Art. 43 of the API, combatants have the right to directly participate in hostilities, which should be understood as performing acts specifically aimed at affecting the enemy's military capacity, with a direct casual link and with a belligerent intent[100]. Therefore, the role that a combatant performs is dangerous and is characterized by armed attacks and high levels of violence. That is probably why IHL does not establish many provisions regarding

93 *Cfr.* Milanovic, Marco. *Extraterritorial Application… Óp. cit.*, Ch 1.
94 *Cfr.* King, Hugh "The extraterritorial Human Rights Obligations… *Óp. cit.*, p. 35.
95 High Court of Justice Israel, *Targeted killings… Óp. cit.*, paras. 27-28.
96 III Geneva Convention. Art. 4.1.
97 III Geneva Convention. Art. 4.2.
98 Additional Protocol I. Art. 50.
99 Additional Protocol I. Art. 51.
100 ICRC, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*. ICRC, 2009. p. 47-58.

protections of the right to life in favour of combatants and the safeguards available operate mostly under extraordinary circumstances, for instance, when they have been captured and acquired the status of Prisoners of War[101] or when they are found *hors de combat*[102]. However, combatants who are not under any of these circumstances, do not have express provisions protecting their right to life and, therefore, it has been traditionally assumed that lethal force can be used against them unrestrictedly.

Nonetheless, IHL provisions do not prescribe a combatant's right to kill enemy fighters nor do they set the grounds for when such killing could be deemed lawful[103]. Although it has been long assumed that this right is implicit in the combatant status[104], IHL only contains provisions *implying* that killings may be lawful at times, but there is no express legal support for that assumption. Considering that IHL is a regime mostly delimited by prohibitions, those who support the right to kill argue that there is no rule prohibiting an enemy combatant from being targeted[105] and that the silence should be interpreted as an authorization, resulting in a minimum protection -if any- of their right to life. Even the most fervent supporters of this assumption, however, should acknowledge that the extent to which this right should be watered down cannot be determined clearly from the text of the IHL rules, because of the lack thereof. This, in my view, opens the door for other possible readings of these norms.

3.3. Existing interpretations of the right to life during armed conflict

While IHRL offers permanent and mostly unrestricted protection of the right to life to all individuals, IHL makes remarkable distinctions between individuals and offers a lower degree of protection that varies among the different categories. These contrasts result also in differences regarding the principles governing the use of force. Under IHRL, the use of lethal force is lawful only on an exceptional basis to deter an imminent danger[106], must be aligned to a LHM approach[107] and followed by an investigation[108]. Conversely, IHL assumes that the high levels of violence in armed conflicts require force to be used on a sustained basis and, hence, it is more willing to deem it legal on the basis of military necessity, often without even requiring investigation[109]. All these divergences need to be addressed through an appropriate model of IHL-IHRL interaction, to create an adequate and coherent standard of protection regarding the right to life.

101 III Geneva Convention. Arts. 13,14,42,52,121.
102 Additional Protocol I. Art. 41.
103 *Cfr.* Melzer, Nils. "Targeted Killing or Less Harmful..." *Óp. cit.*, p. 10
104 *Cfr.* Parks, Hays. "Part IX of the ICRC ..." *Óp. cit.*, ; Watkin, Kenneth. "Humans in the Cross- Hairs: Targeting, Assassination..." *Óp. cit*.
105 *Ibíd*.
106 ECtHR, *McCann and Others v UK* App. 18984/91 (1995) paras. 202-213; ECtHR, *Ergi v. Turkey* App. 850/1057 (1998) para. 79; ECtHR, *Isayeva v Russia* App. 57950/00 (2005) para. 189; Principles of Firearms… *Óp. cit.*, Principles 9 and 10.
107 *Cfr.* Droege, Cordula. "Elective affinities? Human rights and humanitarian..." *Óp. cit.*, p. 32.
108 *Ibíd*.
109 *Ibíd*. p. 25.

3.3.1. Traditional approach: Nuclear weapons judgement

The traditional approach to the right to life in armed conflicts was built employing the model of reading IHRL in the light of IHL, which was discussed in the first chapter. Under this model, the notion of arbitrariness regarding a deprivation of life in IHRL is defined by the relevant IHL norms. This approach was used first by the ICJ in the 1996 Advisory Opinion on Nuclear Weapons, when the court stated: "In principle, the right not to be arbitrarily deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict [IHL]"[110]. Since then, this has been the interpretation *par excellence* of the right to life during wartime, which was later ratified by the 2004 Palestinian Wall judgement[111], by the 2004 General Comment 31 of the Human Rights Committee (onwards HRC)[112] and by other international bodies.

However, the difficulty presented by this approach is that the IHL protection regarding the right to life would stay unchanged by IHRL, leaving the latter excluded from the regulation of hostilities in practice[113]. Moreover, putting IHL in the position of defining IHRL rules, would undoubtedly require the former's rules to be straight forward about its own standards and, as was analysed in previous sections, IHL is far from crystal clear on the matter[114]. This approach is, thus, inadequate.

3.3.2. More recent approaches: The Integrative Model

The alternative approach here proposed is in application of the integrative model discussed in chapter 1, reading IHL under the light of IHRL principles. It aims at understanding the protective IHRL values of the right to life as spreading into armed conflicts, strengthening the protection offered by IHL and, thus, toughening the requirements established for the use of force[115]. This would not be in complete contradiction with the solution adopted by the Nuclear Weapons Judgement because the suggested approach would still derive from IHL rules as *lex specialis* and not from IHRL standards. The only variation would be that the IHRL rules would affect the structure of the reasoning employed for interpretation. Instead of reading the IHL rules in the same mechanical way they have been interpreted traditionally, this approach intends to read the relevant norms in a way that offers the lives of combatants a certain degree of protection if their killings are not pursuant to necessary military objectives.

110 ICJ, *Nuclear weapons… Óp. cit*., para. 24.
111 ICJ, *Palestinian wall… Óp. cit*., para. 106.
112 HRC General Comment 31… *Óp. cit*. para. 11.
113 *Cfr.* Rusinova, Vera "The right to life in light of the integration..." *Óp. cit*., p. 8.
114 *Cfr.* Doswald-Beck, Louise. "The right to life…" *Óp. cit*., p. 2.
115 *Cfr.* Rusinova, Vera "The right to life in light of the integration..." *Óp. cit*., p. 8-9.

This will translate mainly into limitations of the legal use of force in the conduct of hostilities that, without conceptually deeming every killing of a combatant illegal, will aim at lessening the lethal risks that combatants are exposed to and hopefully reducing the number of casualties. In other words, a LHM approach would be injected to the IHL regime. This would better match the trend established towards an international legal framework that is increasingly more respectful of IHRL and, even if it would impose heavier obligations on states, the latter have proven through their acquiescence to the emergence of new treaties and their willingness to establish and be abided by new IHRL bodies and procedures in the recent years, that this would be a suitable next step in IHL interpretation.

Academics have suggested various other ways to achieve this same protective goal, generally through the insertion of IHRL normative elements in the regulation of war. For instance, Droege[116] and Sassoli[117] have suggested that some areas within an armed conflict that may more likely resemble a situation of peace due to the physical distance with the battlefield or to its disconnection with the military objectives, should have IHRL as the *lex specialis* and, hence, all operations undertaken there should abide by the more strict rules of Law Enforcement Operations[118]. According to Droege, this would offer a higher standard of protection to individuals affected by the armed conflict, which is the same goal pursued with the model here proposed[119]. However, the problem with this solution is that, conceptually, it would depart from the systemic approach that guides International Law and, instead, would give way to parallel isolated regimes expected to apply alternatively and open the door for discretionary -and even arbitrary- determinations of applicability[120]. Furthermore, this solution entrusts IHRL with the task of governing areas affected by armed conflict with its own rules, which may often not accommodate to the needs of war and impose impracticable duties. These norms could eventually lapse into disuse and, ultimately, weaken the rule of law overall.

The benefit of using the integrative model here suggested, is that it provides a more consistent theory that aims to regulate the entirety of the conduct of hostilities through the one regime that was created for that purpose, namely IHL, while allowing the influence of IHRL to humanize the standards of protection. Because of the convenience of this approach specially regarding LHM, there are already two judgements that have applied similar rationales at the national level. The first one refers to the 2006 Judgement of the Supreme Court of Israel on the Targeted Killings case, which was concerned with the anti-terrorist policy of targeted killings undertaken by the Israeli government in places like

116 *Cfr.* Droege, Cordula. "Elective affinities? Human rights and humanitarian..." *Óp. cit.*
117 *Cfr.* Sassoli, Marco and Olson, Laura "The relationship between international humanitarian..." *Óp. cit.*
118 *Ibid* p. 15, *Cfr.* Droege, Cordula. "Elective affinities? Human rights and humanitarian..." *Óp. cit.*, p. 30-35.
119 *Cfr.* Droege, Cordula. "Elective affinities? Human rights and humanitarian..." *Óp. cit.*, p. 39.
120 *Cfr.* Kleffner, Jann. "Section IX of the ICRC Interpretative Guidance…" *Óp. cit.*, p. 18.

Judea, Samaria and the Gaza Strip in the context of an armed conflict[121]. Here the Supreme Court established that, because of the lack of clarity in the IHL norms, there were a few additional conditions that needed to be fulfilled for the policy to be deemed legal, including that the individuals targeted could not be attacked if "less harmful means can be employed"[122]. The court furthered this argument by stating that "among the military means, one must use the means whose harm to the human rights of the harmed person is smallest"; thus if an individual "can be arrested, interrogated and tried, those are the means which should be employed"[123]. In this judgement, the Supreme Court derived this standard from the principle of proportionality found in Israeli national legislation but, as was stated before, the notion of LHM is one that resembles IHRL standards[124]. Hence, even though here the court employed national law in its rationale, the remarkable aspect of it is that it used a more protective rule to shine through the IHL norm and guide its interpretation, so as to increase the standards of protection even in favour of belligerents[125].

The second example is a resolution of the National Human Rights Commission of Nepal[126] which dealt with an armed attack perpetrated by the national security forces against a group of Maoists, who had been forcing students and professors at a school to be indoctrinated through their "cultural programme". In this incident, when the security forces arrived to the place, they surrounded the five insurgents and opened fire, causing six of them and five children to be killed. The Commission determined that the state agents should have given a warning and attempted to arrest the Maoists first, especially since the latter did not fire back at the security forces nor they were even significantly armed[127]. Hence, the Commission determined that there had been a violation of IHL[128]. Although it did not mention expressly where the LHM approach derived from, it did make several references to human rights and, ultimately, endorsed a flexible interpretation of IHL that contrasted with the classic one[129].

These two judgments endorse a LHM approach in the context of armed conflicts. Of course, these are not means that can always be used but they should always be considered as a first option. If the conditions allow and they do not presuppose significant additional danger to soldiers or civilians, non-lethal means should be employed[130]. This idea was also endorsed by the HRC in the Concluding

121 High Court of Justice Israel, *Targeted Killings… Óp. cit*., para. 2.
122 *Ibíd* para. 40.
123 *Ibíd*.
124 *Cfr.* Ben-Naftali, Orna. 'A Judgment in the Shadow of International Criminal Law', 5 J ICL (2007) 322.
125 *Cfr.* Melzer, Nils. "Targeted Killing or Less Harmful..." *Óp. cit*., p. 6.
126 *Cfr.* Poudyal, Kedar Prasad. *The role of national human rights institutions in armed conflict situations, with special reference to NHRC–Nepal*. Danish Institute for Human Rights, 2006. p. 87-88.
127 *Ibíd*.
128 *Ibíd*.
129 *Ibíd*.
130 High Court of Justice Israel, *Targeted killings… Óp. cit*., para. 40.

Observations on the Reports of Israel in 2003 and 2010[131]. Similarly, here the Committee noted that "before resorting to the use of deadly force, all measures to arrest a person […] must be exhausted"[132].

Although the situations addressed in these resolutions involved civilians participating in hostilities and not combatants specifically, the same rationale can be applied to the latter[133]. The reason behind a LHM approach is to protect the lives of the individuals that are being targeted pursuant to respecting their human dignity, but irrespective of the function they perform. Consequently, this rationale makes even more sense when dealing with combatants because they are individuals who have not forfeited their rights and who are definitely the most directly affected by the dangers of war; this increased vulnerability, thus, should make them receive at least the same protection as other participants[134]. Moreover, IHL's intrinsic intention has always been to afford protections for all individuals affected by armed conflicts -including combatants- and prevent avoidable suffering[135]. Accordingly, the protective rationale presented by these resolutions should also be extended to combatants in the form explained in the next chapter.

4. Least Harmful Means as a principle guiding armed conflicts

In order to understand this proposal, one needs to renounce to preconceptions that have governed classic IHL interpretation and, instead, be willing to analyse IHL *lex lata* with an IHRL-lead approach, in search for the most protective rules upon which to construe a human-centred interpretation of the entire regime. In this regard, first it is important to highlight that the starting point of IHL ever since its emergence, is that within an armed conflict "the only legitimate object which states should endeavour to accomplish […] is to weaken the military forces of the enemy"[136], as stated in the 1868 St. Petersburg Declaration. This same norm was later embodied in rules of the Hague Regulations (onwards HR) and the APs, stating that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited"[137]. This principle is inherently incompatible with the traditional notion of an unfettered right to kill combatants, because it suggests that even persons not expressly entitled to protection against direct attack, na-

131 HRC, Concluding Observations, Israel, CCPR/C/ISR/CO/3, 29/07/2010, 10, www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.ISR.CO.3.doc (accessed: august 2016).

132 HRC, Concluding Observations, Israel, CCPR/CO/78/ISR 21-08-2003, 15, http://www.adalah.org/uploads/oldfiles/upfiles/ConcludingObservations/HRC-Concluding%20Observations%20(2003).pdf (accessed: august 2016).

133 *Cfr.* Melzer, Nils. "Targeted Killing or Less Harmful..." *Óp. cit.*, p. 6.

134 *Cfr.* May, Larry. "Humanity, Necessity and the..." *Óp. cit.*, p. 25.

135 *Cfr.* Forsythe, David. *The Humanitarians: The International Committee of the Red Cross*. Cambridge University Press, 2005.

136 St Petersburg Declaration Preamble.

137 Hague Convention (IV) Respecting the Las and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907) 36 STAT 2277 (HR-IV). Art. 22; API Art. 35.

mely enemy combatants, have some safeguards foreseen by IHL[138]. Today, the latter is still a guiding principle of this body of law and, because of its powerful protective outlook, it should be the basis of this analysis[139].

In this sense, it is perfectly legitimate to use force against the enemy within the context of an armed conflict, but only to the extent necessary to defeat him and achieve the military objective sought, because the acts that exceed this standard would be considered inhumane[140]. The amount of force used and the extent of damage inflicted against enemy soldiers should be restrained by those objectives, which cannot include the extermination of enemy combatants as one of them[141]. At times, killing may be an unavoidable result of the use of force within hostilities, especially in cases of actual combat, self-defence or defence of fellow soldiers; but it should be evaded when LHM are feasible and would suffice to weaken the enemy. Killing should only be employed when it is essential to accomplish military purposes, and not merely to avoid military inconveniences[142].

The ICRC in its 2009 Interpretative Guidance clearly established this rule: "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"[143]. This statement encompasses the interpretation that this paper endorses. Nevertheless, it should be noted that it has been heavily criticized by states and by a part of the legal doctrine because, it is submitted, it lacks foundation within IHL[144]. The intention of this article, however, is to support this understanding not based on IHL rules alone, but in IHL norms interpreted in light of IHRL. The novel element of this proposal is that, through the intervention of the latter, IHL rules are read in a human-centred and not in a military-convenient way, through the highlighting of the protective norms contained already in IHL, namely the prohibition of superfluous injury or unnecessary suffering, the principle of military necessity and the prohibition of assassination. These rules deny the possibility of an unfettered right to kill and, instead, suggest a LHM approach for the conduct of hostilities. In the next sections, I will analyse each one of these rules in more detail.

4.1. Prohibition of superfluous injury or unnecessary suffering

138 *Cfr.* ICRC, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, ii (1974) CE/COM I1I/C 3; ICRC, 'Weapons that May Cause Unnecessary Suffering or Have Indiscriminate Effects: Report on the Work of Experts' (1973) cited in Goodman, Ryan. 'The Power to Kill or Capture Enemy Combatants' (2013) 24 EJIL 819 p. 23-30.

139 *Cfr.* Goodman, Ryan. 'The Power to Kill or Capture Enemy..." *Óp. cit.*, p. 18.

140 *Ibíd* p. 19.

141 *Ibíd* p. 20.

142 *Ibíd* p. 5.

143 ICRC, *Interpretative Guidance on the Notion of Direct… Óp. cit.*, p. 81.

144 *Cfr.* Parks, Hays. "Part IX of the ICRC 'Direct Participation in..." *Óp. cit.*; Ohlin, Jens David. 'The Duty to Capture', 97 Minnesota Law Review (2013) 1268.

This is a principle first found in the St. Petersburg Declaration and in the HR, initially aimed at excluding the use of *weapons* that "uselessly aggravate the suffering of disabled men or render their death inevitable"[145]. Recently, however, it was expanded and incorporated in API, not only directed to limit the *means* of warfare but also the *methods*[146]. In 1996, this principle was qualified by the ICJ as an intransgressible one, aimed at preventing "greater harm than that unavoidable to achieve legitimate military objectives"[147]. The goal is to offer protection from excessive pain to all individuals, without regard for the status they hold.

As Melzer has explained, the value of this principle is that it evidences the protective values that are incorporated into IHL norms and that are often disregarded[148]. This rule hints that a LHM principle could also be present as part of the IHL rules and that operations should be directed at rendering belligerents *hors de combat* and not at killing them, because the latter would constitute unnecessary suffering.

4.2. Principle of military necessity

If we apply the ideas derived from the previous principle, the question remains as to how could the LHM notion operate within a context of wartime, without forfeiting military objectives in favour of protective goals. In IHL there are two principles that represent these interests: on the one hand, that of military necessity and, on the other, the principle of humanity[149]. Traditionally, it has been assumed that the first one is the "justifying factor inherent in all rules of IHL" which excuses the resort to violent measures during an armed conflict that would not be acceptable during peacetime[150]. The second one operates as a counterpart of the latter and is founded on the value of human dignity and in the need to respect others -including enemies-, injecting a common sense of humaneness into the battlefield. Finding a consensus on the balance between these interests, however, has proven to be very complex and the solutions offered by the classic approaches, often involved the principle of humanity being sacrificed[151]. Under this scheme, a LHM idea would seem unfit.

However, there is an emerging trend of understanding military necessity not only as a permissive principle, but also as a restrictive one with elements of humanity within it[152]. Military necessity was first defined by the 1863 Lieber Code as "the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war"[153] and

145 St Petersburg Declaration.
146 Hague Convention (IV) Art. 23; Additional Protocol I Art. 35.2.
147 ICJ, *Nuclear Weapons... Óp. cit.*, para. 78.
148 *Cfr.* Melzer, Nills. "Targeted Killing or Less Harmful..." *Óp. cit.*, p.12.
149 St. Petersburg Declaration.
150 *Cfr.* Melzer, Nils. "Targeted Killing or Less Harmful..." *Óp. cit.*, p. 19.
151 *Ibíd* p. 15.
152 *Ibíd* p. 23.
153 Lieber Code (1863).

this definition is accepted even today. This two-sided concept conditions operations in two ways: first, they must be crucial for the achievement of a military purpose and, second, they cannot be prohibited by IHL. Thus, military necessity does not justify every conduct, but only the ones that fulfil the requirements mentioned[154]. Since those are two cumulative requirements, killings contrary to IHL's positive norms can never be justified by considerations of military necessity, but more importantly, those without manifest military necessity cannot be justified, even if they are not proscribed under IHL[155]. This principle, therefore, also advocates for the LHM approach here presented[156].

4.3. Prohibition of assassination

This rule is founded on a traditional IHL concept that was established in the HR, reflecting a code of honour between combatants: treachery[157]. This included not only perfidy as defined today in Art. 37 of API, but also an express prohibition of assassination in the following terms: "it is especially forbidden... to kill or wound treacherously individuals belonging to the hostile nation or army"[158].

This prohibition, according to Oppenheim, has the following implications: "no assassin must be hired, and no assassination of combatants be committed; a price may not be put on the head of an enemy individual; proscription and outlawing are prohibited; no treacherous request for quarter must be made"[159]. Thus, the intention of this prohibition was to outlaw the possibility of setting assassination as one of the goals to be achieved within an armed conflict, because of the barbaric implications that this idea entails[160]. Evidently this norm is not an absolute prohibition because that would be incompatible with the realities of war, but it does suggest that assassination should not be a legitimate military objective and that it should be avoided to a certain extent. Consequently, this rule excludes killing as the default military strategy and provides support for a LHM approach.

Some authors, nevertheless, have argued that this rule is not applicable in today's conduct of hostilities because of the different type of tactics and warfare employed[161]. They claim that a century ago when the HR were elaborated, the usual strategy involved close fighting between combatants in the front line, whereas today a significant number of attacks are undertaken at a distance, especially through drone warfare[162]. Following this rationale, some states have departed

154 *Cfr.* Melzer, Nils. "Targeted Killing or Less Harmful..." *Óp. cit*., p. 28.
155 *Ibíd.*
156 *Ibíd* p. 22.
157 Hague Convention (IV) Art. 23b.
158 *Ibíd.*
159 Oppenheim, Lassa. *International Law, Vol. II, Disputes, War and Neutrality.* Longman's, Green & Co. 1952. p. 341.

160 *Cfr.* Westlake, John. *International Law, Part II, War*. CUP, 1907. p. 75.

161 *Cfr.* Doswald-Beck, Louise. "The right to life…" *Óp. cit*., p 21-22.
162 *Ibíd.*

from the Hague rule and have removed the assassination prohibitions from their military manuals asserting that it doesn't adapt to modern conditions[163]. Nevertheless, this prohibition represents one of the most human-centred norms of IHL and should not be disregarded out of military convenience. More importantly, from a legal perspective, this posture is adopted in breach of the mentioned Hague rule, which is still binding on all states in virtue of its customary nature[164].

4.4. LHM applied in armed conflict

By understanding that war's only legitimate goal is defeating the enemy and by applying the prohibition of superfluous injury or unnecessary suffering, the prohibition of assassination and the principle of military necessity in its restrictive form, IHL acquires a different approach to the conduct of hostilities. If these norms are allowed a leading role in the determination of protections in favour of the life of combatants and in the reading of more operative rules, IHL is capable of affording a balanced solution regarding the use of force.

Accordingly, under the scheme proposed, the fact that IHL is silent regarding combatant's protections from attacks, can no longer be interpreted as giving way to an unconstrained right to kill. Moreover, according to the Martens Clause, in the cases not envisaged by the treaties, "civilians and combatants remain under the protection and authority of the principles of humanity and from the dictates of public conscience"[165]. This notion was furthered by the ICTY, stating that "anytime a rule of IHL is not sufficiently rigorous or precise […] the scope and purport of the rule must be defined with reference to those principles and dictates"[166]. Consequently, the lack of either a prohibition or an authorization of attacks on combatants, cannot be understood as an endorsement of the right to kill but, at most, it can be read as permitting the use of force that is reasonably necessary to achieve legitimate military objectives[167]. Furthermore, Art. 57 of API manifestly authorizes attacks on military objectives only in the cases where they offer a "definite military advantage"[168]. In this respect, it would be nonsensical to interpret that IHL meant to set a higher standard of protection for objects than for individuals. Hence, the use of force used against combatants will also need to be subject -at least- to an equivalent rule.

This approach is not intended to impose unrealistic restrictions or to put excessive risks on the armed forces. It simply compels parties not to cause more damage to the enemy than is strictly required. This translates into the armed

163 *Cfr.* The Manual of the Law of Armed Conflict, UK Ministry of Defence. OUP, 2004.
164 Nüremberg International Military Tribunal, *Judgment on the Trial of German Major War Criminals* (1946) reprinted in AJIL, Vol. 41, 1947, p. 248-249.
165 Additionaln Protocol I. Art. 1.2.
166 ICTY, *Prosecutor v Kupreskic* Case No. IT-95-16-T-14, (January 2000) para. 525.
167 *Cfr.* Melzer, Nils. "Targeted Killing or Less Harmful..." *Óp. cit.*, p. 24.
168 Additionaln Protocol I. Art. 57.

forces' obligation to always consider LHM options first, when planning military operations. This is an assessment that needs to be done in the circumstances of each operation in concrete, based on the conditions prevailing at the time and with enough flexibility for error when judging a military commander's judgement on the matter[169].

4.4.1. When is the LHM approach to be applied?

This interpretation of IHL rules is undertaken under the light of IHRL principles and, therefore, it has to be aligned with the rules of application of the latter. In other words, only when IHRL is applicable to a determined situation, the proposed approach will be available. As was established in the previous chapter, IHRL obligations emerge whenever a state has jurisdiction, within state boarders as well as outside of them. In this regard, the territorial model of jurisdiction will mostly operate during NIACs and military occupations, and the personal model will operate during other kinds of IACs. Negative obligations regarding the right to life, namely the prohibition of deprivations of life, are triggered under both models[170].

Whenever a state has territorial control over the entirety or a part of the territory of another state during an armed conflict, this interpretation of IHL should operate. Similarly, when a state is perpetrating military operations abroad but without territorial control, and its agents have de facto power over an individual, the interpretation here proposed should apply. To exemplify how the personal model of extraterritoriality operates, I will use Ryan Goodman's interpretation[171] of a soldier *hors de combat.* According to Art. 41.1 of AP1, a combatant who has been put *hors de combat* "shall not be made the object of attack"[172]. In this respect, Goodman sustains that when Art. 41.2.a includes any person "in the power of the enemy" as part of this category, this should be interpreted to include also the moment prior to capture when the individual is already *de facto* in the power of the adversary[173]. He suggests that this was the intention of the wording of Art. 41.2.a, which departed from the text of similar provisions in previous IHL treaties[174]. He uses this approach to justify LHM from an IHL perspective, arguing that enemy combatants against whom a military operation is perpetrated are "in the power" of the offensive armed forces, also the moments prior to the attack and thus, if possible, should be captured and not forcefully attacked or killed in light of Art. 41. Goodman's interpretation of "in the power of the enemy" matches the cause-effect approach presented earlier regarding the personal model

169 *Cfr.* Melzer, Nils. "Targeted Killing or Less Harmful..." *Óp. cit.*, p. 27-28.
170 *Cfr.* King, Hugh "The extraterritorial Human Rights Obligations…" *Óp. cit.*, p. 32-36.
171 *Cfr.* Goodman, Ryan. 'The Power to Kill or Capture Enemy..." *Óp. cit.,* p. 13.
172 API. Art. 41.1.
173 *Cfr.* Goodman, Ryan. 'The Power to Kill or Capture Enemy..." *Óp. cit.*, p. 14; ICRC, Commentary on Additional Protocols... *Óp. cit.*, para. 1602.
174 *Ibíd.*

of extraterritoriality, which only requires a de facto power or authority over an individual to trigger IHRL obligations[175]. Using this same scheme, then, it can be said that the LHM approach proposed would operate every time a combatant is "in the power of the enemy".

In modern wars today, however, hostilities take place not only in the form of close fighting on the ground but also from a distance by drone warfare[176]. In this regard, IHRL obligations would also be binding under the notion of extraterritorial IHRL jurisdiction presented earlier. In these cases, it is undeniable that the state party perpetrating the attacks from a distance would have de facto power over the adversary, namely the power to kill, irrespective of the lack of physical apprehension[177]. Accordingly, uses of force would also need to be guided by a LHM principle. This does not mean that distant attacks could not take place, but that they should be undertaken in a way that causes the least harm possible to the enemy fighters and only employed when there is a concrete military advantage at stake.

5. Conclusion

The proposal contained on this paper, intends to offer an alternative way of understanding the IHL-IHRL relation, which results in a LHM approach that limits the use of force legally accepted in the conduct of hostilities. The motivation for the change proposed is found in the recent configuration of IHRL as an essential element within the international community which, procedurally, demands a reconsideration of the classic model of interaction of these two regimes that privileged IHL and, substantially, requires the incorporation of higher standards of protection of the rights of the individuals participating in the armed conflict, namely combatants. The biggest advantage of this proposal is that it derives not from the insertion of rules alien to the conduct of hostilities, but from IHL norms themselves, specifically the prohibition of superfluous injury or unnecessary suffering, the principle of military necessity and the prohibition of assassination. This novel reading of IHL dissolves what Melzer calls the "outdated juridical myth"[178] of an unconstrained right to kill enemy fighters and, instead, allows uses of lethal force only when they are required to achieve a definite military advantage.

Admittedly, the proposed application of the LHM principle will present complications for states in the conduct of hostilities at every level. These difficulties will range from determining what the required standard of military necessity is in the context of a specific operation, to the additional precautions that commanders

175 *Cfr.* King, Hugh "The extraterritorial Human Rights Obligations…" *Óp. cit.*, p. 35-36.
176 *Cfr.* Doswald-Beck, Louise. "The right to life…" *Óp. cit.*, p. 24.
177 *Cfr.* King, Hugh "The extraterritorial Human Rights Obligations…" *Óp. cit.*, p. 32.
178 Melzer, Nils. "Targeted Killing or Less Harmful..." *Óp. cit.*, p. 28.