

**MIND THE GAP:
RIGHT TO LIFE OF STATES' OWN MILITARY PERSONNEL IN
CONDUCT OF HOSTILITIES**

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INTRODUCTION

The right to life is without any doubt a truly unique and cardinal human right for every human being. It is both “the supreme right”¹ and “fulcrum of all other rights”.² Although its application in armed conflict is nowadays considered as *fait établi*,³ there is one specific area where its applicability and impact remains controversial: the lives State’s own military personnel during the conduct of hostilities.

This area represents the conundrum of the right to life in armed conflict. On the one hand, under both universal⁴ and regional⁵ human rights instruments, everyone’s life has to be protected and no one can be arbitrarily deprived of this right. As a result of its broad and inclusive scope, it applies to all individuals in armed conflicts without regard to any further specific requirements related to their status. On the other hand, it is frequently asserted that the human rights of military personnel and their right to life “appear to be a concept out of place”.⁶ Soldiers are seen as State agents violating of human rights, rather than rights beholders or victims of violations.⁷

¹ HRC, General Comment No 36, CCPR/C/GC/36, 2018, para. 2. [GC 36]

² AComHPR , General Comment No 3, 57th Ordinary Session, 2015, para. 1.

³ ICJ, Legality of The Threat or Use of Nuclear Weapons, AO (1996) ICJ Rep 226, para. 25. [Nuclear Weapons]

⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art. 6. [ICCPR]

⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953), art. 2 [ECHR]; American Convention on Human Rights (adopted 22 November 1969 entered into force 18 July 1978), art. 4; African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58, art. 4

⁶ Rowe, P., ‘Members of Armed Forces and Human Rights Law’ in A. Clapham and P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014), 520 [Rowe in Handbook]

⁷ See generally: Livoja, R., Dubury, A., ‘Human Rights of Service Personnel’ (2019) 28:2 Human Rights Defender 13, 13; Rowe, P., ‘Military Misconduct during International Armed Operations: ‘Bad Apples’ or Systemic Failure?’ (2008) Journal of Conflict and Security Law Vol. 13 No. 2, 165-189. Usually the rights of soldiers are not addressed: See for example: Doswald-Beck, L. ‘The right to life in armed conflict: does international humanitarian law provide all the answers?’ (2006) IRRIC Vol. 88 No. 864, 881 – 904; [Doswald-Beck]; Gowlland-Debbas, V., ‘The Right to Life and the Relationship between Human Rights and Humanitarian Law’ in C. Tomuschat, E. Lagrange, S.

Yet, little attention has been paid on the right to life of military personnel in the literature. No international jurisprudence has provided clear-cut guidance about the potential and limits of their right to life in the conduct of hostilities.

This paper accordingly will focus on the “butterfly effect” of the evolution of human rights law may have in the International Humanitarian Law (IHL) norms, specifically in the regulation of the conduct of hostilities. It will provide critical analyses of existing trends in International Human Rights Law (IHRL) aimed at ensuring the members of the armed forces are not left behind when it comes to the protection of their right to life and potential pitfalls that may surface when it comes to its practical application.

This paper will address the “blind zone” of the right to life of States’ own members of armed forces in the conduct of hostilities. It will first analyze the existing human rights framework and demonstrate that soldiers indeed benefit from the right to life, including in the context of military operations. The main focus of the research is the jurisprudence of the European Court of Human Rights (ECtHR) and the application of the European Convention on Human Rights (ECHR) since the limited scope of case law and soft law sources outside the Council of Europe (CoE). The second part is dedicated to the intermingling between IHRL and IHL in the sphere of the protection of life of soldiers in the conduct of hostilities. This part will address how IHL is favourable for providing guarantees to the right to life of combatants and how IHRL can fill in the existing gap of protection in the regime of the conduct of hostilities. Finally, a critical analysis of the practical implications, existing challenges of the IHRL influence on IHL, and possible solutions thereto will be provided.

1. RIGHT TO LIFE OF STATE’S OWN MILITARY PERSONNEL UNDER IHRL

Although the threat to life and risk of death is part and parcel of the military service, it seems unclear why the issue of the right to life of the military

Oeter (eds.), *The Right to Life* (Brill 2010), 123 – 150. The differential treatment of soldiers from the legal perspective is deeply rooted into social perception of a soldier as a “dangerous man”, who put his life at risk for the mere fact of being a fighter and the issue of violating his(her) rights does not arise. Walzer, M., *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Basic Books 2015), 145. [Walzer]

personnel was for a long time dormant and received very little attention in theory and in practice. None of the UN treaty bodies and regional courts of human rights has ever dealt with the right to life of soldiers during the conduct of hostilities.

The ECtHR had an opportunity to address this issue in the *Pritchard v. UK*,⁸ where the applicant's son was shot dead by an unknown man in Iraq in 2003 while performing his military duties. This case could have been a turning point in the issue of the over right to life of soldiers and influenced all 47 member States to the ECHR.⁹ It was, however, never meant to happen as the UK went for a friendly settlement with the applicant.¹⁰

In the absence of international jurisprudence, one can turn to domestic law to find legal answers. The present analyses will be built based on the UK Supreme Court (UKSC) Judgement in *Smith case*,¹¹ where it was recognized for the first time that the State has obligations under Article 2 of the ECHR towards members of its armed forces in armed conflict.¹²

The *Smith case* has unveiled some serious controversies regarding the applicability of the ECHR in armed conflicts conducted abroad, and the scope of the obligations owed by the State to its military under the right to life. It has also demonstrated how human rights jurisprudence could resonate with the policy and decision-makers in the field.¹³

The following part will address the recognition of the right to life of soldiers and the variety of State's obligations in peacetime and wartime. It will pay special attention to the extraterritorial application of the ECHR as well as the possibility to derogate from the right to life in armed conflicts conducted abroad. Finally, this paper will analyze the scope of the State's obligations *vis-à-vis*

⁸ *Pritchard v. UK*, App no. 1573/11, (ECHR, 20 December 2010).

⁹ Milanovic, M., 'UK Supreme Court Decides *Smith (No. 2) v. The Ministry of Defence*' (2013) <<https://www.ejiltalk.org/uk-supreme-court-decides-smith-no-2-v-the-ministry-of-defence/>> (accessed 16.08.2020)

¹⁰ *Pritchard v. UK*, App no. 1573/11 (ECHR, 18 March 2014).

¹¹ *R (Smith and others) v The Ministry of Defence*, [2013] UKSC 41 [Smith case]

¹² The Supreme Court acknowledged the right to life of the British soldiers killed in Iraq in 2003 – 2006 in relation to the friendly fire incident and the death of the members of the armed forces caused by the explosion of the improvised explosive devices (IED) under the lightly-armoured Snatch Land Rover.

¹³ See UK Armed Forces Personnel and the Legal Framework for Future Operations, 20th Report of Session 2013–14, HC 931(26 March 2013); Ekins, R., Morgan, J., Tugendhat, T., *Clearing the Fog of Law: Saving our armed forces from defeat by judicial diktat* (Policy Exchange 2015).

soldiers' right to life in armed conflict that have implications for the conduct of hostilities.

A. Recognition of the right to life of the military personnel

According to the general rule of treaty interpretation,¹⁴ the right to life is guaranteed to everyone and it would be false to exclude from its scope certain categories of individuals based on military status. The Convention applies to the soldiers as well as to the civilians; however, the Court has always paid attention to the particularities of the military services.¹⁵

Upon ratification of ECHR, many states made reservations to the rights of military personnel,¹⁶ however, none of them made a reservation to the right to life, *i.e.* there has never been an intent to exclude soldiers from the scope of the right.

This calls for further analysis to clarify the scope of the right to life both in peacetime and wartime.

i. In peacetime

Si vis pacem, para bellum

Protecting the right to life of military personnel in wartime is traced back to peacetime. As a matter of fact, the lives of members of armed forces may be already exposed to certain risks at peacetime.¹⁷ State's obligations may be triggered in peacetime in several circumstances, including the death penalty by military courts¹⁸ and suicides of soldiers.¹⁹

¹⁴ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art.31.

¹⁵ Engel and Others v. the Netherlands, App. no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECHR, 8 June 1976), para. 54; [Engel case] Grigoriades v. Greece, App. no 121/1996/740/939 (ECHR, 25 November 1997), para. 45. Also at the universal level: HRC, Vuolanne v Finland, Communication No. 265/1987 (2 May 1989), para 9.5.

¹⁶ ECHR: Armenia – art.5; Azerbaijan – art.5,6; Check Republic – art.5,6; France –art. 5,6; Moldova – art.5; Portugal – art.5; Russia – art.5,6; Slovakia – art.5,6; Spain – art.11; Ukraine – art.5.

¹⁷ Anwar, T. 'International Human Rights Law and Military Personnel: A Look Behind the Barrack Walls' (1998) American University International Law Review, Vol. 14(2), 538; Human rights of members of the armed forces, Recommendation CM/Rec (2010) 4 of the Committee of Ministers and explanatory memorandum, 24; [Recommendation CM/Rec] See generally Handbook on Human Rights and Fundamental Freedoms of Armed Forces (OSCE/ ODIHR, 2008) [OSCE Handbook].

¹⁸ This topic will not be specifically analyzed in this paper. At the European level, death penalty in peace time is no longer admissible under Article 2 of the ECHR and there is a tendency for the abolishment thereof also in wartime. See Recommendation CM/Rec, 29; Protocol 6 to the ECHR

Another pertinent example is murder by fellow soldiers or superiors since military personnel are exposed to the use of force and lethal weapons more than other individuals in peacetime. In *Esat Bayram v. Turkey*, the Court found a violation of the procedural obligations of the State under the right to life (effective investigation).²⁰ When analyzing this positive obligation of the State, the Court did not refer to the specificity of the military service but insisted on the application of the general principle. It confirmed that the obligation of effective investigation is an obligation of both means and results which implies that the investigation is capable of “ascertaining the circumstances in which the incident took place [and] of leading to the identification and punishment of those responsible”.²¹

As exemplified above, the general application of the human rights obligations towards military personnel cannot be discarded under the pretext of the special nature of their services. “[M]embers of the armed forces do not surrender their human rights and fundamental freedoms upon joining the armed forces”,²² neither the obligations of the State are always different when they are owed to the members of armed forces.

The obligations of the State in the context of military training are the most relevant ones for the present analyses.²³ In *Stoyanovi v. Bulgaria*, the applicant’s son died in an accident during parachute training. The Court made a few pertinent observations that will also be relevant for the further analyses of the substantive obligations. It recognized that military services even in peacetime are considered

(ratified by all States except Russia but it applies moratorium) and Protocol No. 13 to the ECHR concerning the abolition of the death penalty in all circumstances 2002 (44 ratifications); at all times (also prohibiting in wartime).

¹⁹ *Kilinc and Others v. Turkey*, App. no. 40145/98 (ECHR, 7 June 2005); *Ataman v. Turkey*, App. no. 74552/01 (ECHR, 27 April 2006); *Perevedentsev v. Russia*, App. no. 39583/05 (ECHR 24 April 2014).

²⁰ *Esat Bayram v. Turkey*, App. no. 75535/01 (ECHR, 29 May 2009). [*Esat Bayram case*] In the present case, the investigation was flawed and it was presented that the death occurred because of suicide, while in reality the applicants brother was killed by his superior.

²¹ *Esat Bayram case*, para. 47.

²² Recommendation CM/Rec, 21.

²³ OSCE Handbook, 163. Few examples: Morris, S., ‘Soldier who died on army exercise was one of 18 who dropped out’ *The Guardian* (1 October 2019) <<https://www.theguardian.com/uk-news/2019/oct/01/soldier-who-died-during-exercise-was-one-of-18-who-dropped-out>> (accessed 16.08.2020); Dearden, L., ‘British soldier shot comrade dead ‘after mistaking him for target’ during training exercise, inquiry finds’ *The Guardian* (15 May 2018) <<https://www.theguardian.com/uk-news/2018/may/15/set-up-of-machine-gun-exercise-led-to-soldiers-death-court-hears-michael-maguire-wales>> (accessed 16.08.2020).

hazardous; and potentially harmful activities are the “part of their essential functioning.” Yet, this does not mean that the State’s obligations are non-existent. The core duty of the State that organizes or authorizes these activities is to “ensure through a system of rules and through sufficient control that the risk is reduced to a reasonable minimum”.²⁴ The Court specified the *Osman v UK* legal test²⁵ in the context of military service and pointed out the double requirement. Firstly, the activity has to be organized or authorized by the State (the element of control). Secondly, there is an obligation of means to minimize the risk, which is essential for the future discussion on the obligation to duly equip the soldiers.

Additionally, the Court reiterated the obligation of effective investigation. It went further on establishing the necessary criteria for internal investigation; *i.e.* necessary expertise, impartiality, promptness, ability to provide plausible and convincing explanations.²⁶ Concerning external investigation it concluded that it has to be meaningful but should not necessarily lead to a conviction.²⁷

Thus, the right to life of soldiers in peacetime imposes on the State several positive obligations which are not always subject to contextual interpretation in the light of the “particular characteristics of military life”.

ii. In armed conflicts

The biggest drama of the human rights of soldiers is that the starting point of discussion is never a legal argument but rather moral considerations.²⁸ However, this approach is counterproductive and does not serve any purpose but the fragmentation of the legal framework and creation of grey zones in legal protection.

²⁴ *Stoyanovi v. Bulgaria*, App no. 42980/04 (ECHR, 09 February 2011), para 59. [*Stoyanovi case*]

²⁵ *Osman v. the United Kingdom*, App. no. 23452/94 (ECHR, 28 October 1998), para. 116. [*Osman case*]

²⁶ *Stoyanovi case*, para 64-65.

²⁷ *Stoyanovi case*, para 66. But see Separate Opinion of Judge Kalaydjieva: “Unlike in cases of willful deprivation of life and use of lethal force, in cases of negligence the positive obligations of State authorities do not necessarily involve a duty to institute criminal proceedings or to prosecute those responsible for negligent omissions leading to tragic incidents. [T]he availability of civil proceedings will [...] be sufficient.” But See GC 36, para 56: “failure to provide relatives with information on the circumstances of the death of an individual may violate their rights under article 7 [of the ICCPR]”.

²⁸ Walzer, 41-42.

It is recognized that the right to life does not cease to exist during armed conflicts,²⁹ which also implies the conduct of hostilities.³⁰ Nothing in this general rule seems to exclude certain categories of individuals, like soldiers.³¹ The main challenges that could arise are linked to the extraterritorial application of human rights and possible derogations or limitations.

a. Operations overseas: extraterritorial application or legal vacuum?

The general approach of all treaty bodies is that the human rights instruments are applicable extra-territorially.³² The widest interpretation of the term “jurisdiction” was provided by the Human Rights Committee (HRC) that included “all persons over whose enjoyment of the right to life it exercises power or effective control”.³³ This category is not precisely defined by the HRC, instead, the Committee provided an example of individuals being affected by the State’s activities in “a direct and reasonably foreseeable manner”. Nothing in this wording would exclude the members of the armed forces deployed abroad. On the contrary, military operations organized and authorized by the State have a direct and reasonable impact on their lives.

At the regional European level, the notion of jurisdiction has been subjected to more scrutiny. The Council of Europe recognizes that human rights of the military personnel are protected abroad, “provided that the State exercises sufficient authority and control over them”.³⁴ The position of the ECtHR regarding the extraterritorial application of the Convention has been significantly changing from a very restrictive interpretation of “*espace juridique*” in *Bankovic case*³⁵ to the effective control test in *Al-Skeini case*.³⁶ The problem however is that

²⁹ Nuclear Weapons, para. 25.

³⁰ GC 36, para 64.

³¹ May, L., ‘Human Rights, Proportionality, and the Lives of Soldiers’ in S. Bazargan and S. C. Rickless (eds.), *The Ethics of War: Essays* (OUP, 2017), p. 47

³² Joseph, S., Dipnall, S., ‘Scope of Application’ in D. Moeckli, et al (eds), *International Human Rights Law*, 3rd ed, (OUP, 2018), 120-128.

³³ GC 36, para 63.

³⁴ Recommendation CM/Rec, 24.

³⁵ *Banković and others v. Belgium and other*, App. no. 52207/99 (12 December 2001), para 80.

³⁶ *Al-Skeini and others v. UK*, App. no. 55721/07 (ECHR, 7 July 2011), para 142. [Al-Skeini]

the Court has never addressed the rights of the soldiers, but only considered them as State agents exercising the jurisdiction of the State abroad.³⁷

The question is whether the same “personal model” could apply to the human rights of soldiers? Is it enough to be deployed by the State to fall within its jurisdiction? These questions arose before the UKSC in the *Smith case*. The Court correctly states that nothing precludes the Convention to apply to the events that are taking place outside of the Member State territory and that the conditions for that may vary on a case-by-case basis.³⁸ The Supreme Court reversed the reasoning of the ECtHR in the *Al-Skeini* and concluded that acting as State agents abroad members of armed forces “relinquish almost total control over their lives to the [S]tate”³⁹ and, therefore, rest within its jurisdiction.

It will be, nevertheless, just to distinguish between the different types of military operations: where the State is exercising effective control over the territory (military occupation) and where “troops are in face to face combat with the enemy” in the active conduct of hostilities.⁴⁰ In any case, it is reasonable to say that different types of operations would potentially influence the scope of the State’s obligations but will not exclude *in toto* the applicability of the Convention. This is not, on the other hand, to claim that soldiers are permanently within the State’s jurisdiction which would be inconsistent with the logic of any human rights instrument.⁴¹ Still, it will be valid to presume that such jurisdiction exists as long as the soldier is performing his or her duties within the operation authorized and organized by the State.

b. Can the right to life of soldiers be limited or derogated from?

Besides the contextual interpretation of human rights in the military context, another key issue relates to the question of whether the very fact of being a soldier may be viewed as an implicit limitation or derogation to the right to life.

³⁷ *Al-Skeini*, para 133-137; See also *Issa and Others v. Turkey*, App. no. 31821/96 (ECHR, 16 November 2004), para 74; *Al-Saadoon and Mufdhi v. the UK*, App. no 61498/08 (ECHR, 4 October 2010), para 140.

³⁸ *Smith case*, para 30, 42.

³⁹ *Smith case*, para 30, 52.

⁴⁰ *Smith case*, para 28.

⁴¹ *Milanovic, M. UK Supreme Court Decides R (Smith) v SSD* (30 June 2010) <<https://www.ejiltalk.org/uk-supreme-court-decides-r-smith-v-ssd/>> (accessed 16.08.2020)

It cannot be claimed, that there are implicit limitations on the right to life of military personnel.⁴² Even though the right to life is not absolute, the interpretation of the limitations is restrictive and shall not reverse the order between principle and exception. The existing limitations to the right to life, *i.e.* death penalty⁴³ and use of force,⁴⁴ are objective in nature. Nothing in the existing legal regime would imply that limitations could be “subjective” in nature, *i.e.* excluding particular groups of individuals. This is reinforced by the very purpose of IHRL which is “to avert the risks of war [...] among the most important safeguards for the right to life”.⁴⁵ Thus, the idea that the right to life of soldiers is inherently limited or even forfeited to conduct wars is in direct contradiction with the rationale of human rights.

The other argument that could be made against the application of the right to life to the members of armed forces is derogations. It is important to note that the only human rights instrument that allows derogation from the right to life is the ECHR where there is a possibility to derogate “in respect of deaths resulting from lawful acts of war”.⁴⁶ The exception is narrowly formulated and excludes “unlawful acts of war”.⁴⁷ At the universal level, the right to life is considered to be non-derogable and “continue[s] to apply in all circumstances, including in situations of armed conflict and other public emergencies”.⁴⁸

Interestingly enough, States have not used this mechanism to derogate from the right to life in armed conflicts. In October 2016 the UK government made a statement about future derogations to ECHR in the military operations abroad to “protect [British] Armed Forces from persistent legal claims”,⁴⁹

⁴² But see Liivoja, R., Duxbury, A., ‘Human Rights of Service Personnel’, (2019) 28:2 Human Rights Defender 13, 15-16: limitations can be introduced to other rights.

⁴³ See *Supra* note 21.

⁴⁴ See UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, basic principle 9, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1990); GC 36, para 12, McCann and others v. UK, App. no. 18984/91 (ECHR, 27 September 1995), para 146-150. [McCann case]

⁴⁵ GC 36, para 69; See also Schabas, W. A., ‘Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum’ (2007) Israel Law Review, Vol. 40, No. 2, 592, 607.

⁴⁶ ECHR, art. 15.

⁴⁷ Wallace, S., *The Application of the European Convention on Human Rights to Military Operations* (CUP 2019), 116

⁴⁸ GC 36, para 67.

⁴⁹ Government to protect Armed Forces from persistent legal claims in future overseas operations. (04 October 2016) <<https://www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations>> (accessed 16.08.2020)

however, they have never specified the scope of rights at issue.⁵⁰ There is no unanimity in judicial reasoning when it comes to the validity of derogations in the conflicts abroad, because of the controversial interpretation of “threatening the life of the nation” element when the military operation is conducted far away from the borders of the State.⁵¹ The experts, nevertheless, tend to agree that excluding such a possibility is counterproductive.⁵²

At the same time, implicit derogation from the right to life of the military in armed conflict was rejected by the UKSC. The Court expressed its concerns that “finding that in all circumstances deaths or injuries in combat that result from the conduct of operations by the armed forces are outside the scope of article 2... would amount... to a derogation”⁵³ which *prima facie* would be contrary to the Convention. Coming to a different conclusion would inevitably lead to the violation of the prohibition of discrimination, as individuals would lose protection based on their military status.

States are reluctant to derogate because they want to have space for maneuver until the ECtHR actively considers how IHL impacts the ECHR, as derogations need to be in coherence with other international obligations of the State.⁵⁴ As Marko Milanovic fairly concludes, States are under no obligation to derogate, however “they must also suffer the consequences of their choice and the application of more stringent human rights scrutiny”.⁵⁵ At the European level, there is a presumption that States cannot resort to derogation to deprive the members of the armed forces of the right to life.⁵⁶

⁵⁰ Milanovic, M., UK to Derogate from the ECHR in Armed Conflict (5 October 2016) <<https://www.ejiltalk.org/uk-to-derogate-from-the-echr-in-armed-conflict/>> (accessed 16.08.2020)

⁵¹ See R (Al-Jedda) v. Secretary of State for Defence [2007] UKHL 58, [2008] 1 AC 332, para 38; R (Smith) v Secretary of State for Defence, [2010] UKSC 29, para. 57; Smith case, para. 59-60; But see Serdar Mohammed v. Ministry of Defence [2014] EWHC 1369 (QB), para. 155-156

⁵² Milanovic, M., ‘Extraterritorial Derogations from Human Rights Treaties in Armed Conflict’ in N. Bhuta (ed.), *The Frontiers of Human Rights: Extraterritoriality and Its Challenges* (OUP, 2016), 71; [Milanovic, Extraterritorial Derogations] Sassòli, M., ‘The Role of Human Rights and International Humanitarian Law in New Types of Armed conflicts,’ in O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (OUP, 2011), 66

⁵³ Smith case, para 58

⁵⁴ Lubell, N., ‘Challenges in Applying Human Rights Law to Armed Conflict’ (2005) 87 IRRC 737, 742-4.

⁵⁵ Milanovic, Extraterritorial Derogations, 90.

⁵⁶ Human rights of members of the armed forces, Report by Alexander Arabadjiev, Committee on Legal Affairs and Human Rights, Doc. 10861, 24 March 2006, para 54. [CoE Report]

B. Scope of human rights obligations of the State towards its military personnel

Even if there is little doubt that the right to life of military personnel exists also in armed conflict, the scope of the State's obligations towards its soldiers needs further clarification. From this angle, the interpretation of both the ECtHR and the Committee of Ministers of the CoE converges in acknowledging a common set of four legal duties for states parties:

- Avoiding putting at risk the lives of soldiers with clear and legitimate military purpose or in circumstances where the threat is disregarded;
- Independent and effective investigation into suspicious death or alleged violation of the right to life;
- Encouragement of reporting of the acts inconsistent with the right to life;
- Prohibition of the death penalty.⁵⁷

For the purposes of this paper, the first two obligations will be analyzed more closely as their performance has a direct impact on the regime of the conduct of hostilities.

i. Obligation not to expose to unnecessary risk

The Recommendation of the Committee of Ministers of the CoE introduces an obligation upon the States not to expose their soldiers to situations that could be avoided and where their lives would be put at risk without a clear and legitimate military purpose or in circumstances where the threat to life has been disregarded.⁵⁸ *Prima facie* negative obligation implies, in fact, a number of positive commitments from the State and inherently linked to the right to life of military in peacetime. Such duties are subject to extended interpretation, including not only planning, training, and equipment but also proper healthcare at the place of deployment.⁵⁹

The duty of care at the level of training and procurement was also a matter of consideration in the *Smith case*. The main problem faced by the Court was to find the balance between the obligation to protect and the reality of war that is

⁵⁷ Recommendation CM/Rec, 7.

⁵⁸ Recommendation CM/Rec, 7.

⁵⁹ Recommendation CM/Rec, 27.

“inherently unpredictable”⁶⁰ and a “dangerous business”.⁶¹ The Supreme Court tried its best to distinguish between the conduct happening under the control of the State and that happening at the battlefield. The ECtHR had affirmed before that “the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources [should not] impose an impossible or disproportionate burden on the authorities”.⁶² This standard alone could be a perfect way out for the State to avoid any responsibility for the loss of life at the battlefield, however, in the same decision the Court also clarified that a duty to prevent exists when the State “knew or ought to have known at the time of the existence of a real and immediate risk to the life [...] and [...] failed to take measures within the scope of their powers [...] to avoid that risk.”⁶³

It has to be noted that the Court was dealing with the criminal conduct in peacetime where, indeed, the unpredictability of human behaviour is generally higher than in the battlefield, where no doubt regarding the constant threat to life exists. In a different case, the UKSCs expressly confirmed awareness of the State that soldiers are deployed in the environment where they are at permanent risk to be killed or injured.⁶⁴ The notion of an impossible or disproportionate burden in this context would also sound hypocritical based on common sense. If the State is in a position to conduct a sophisticated military operation overseas, would it consider sufficient training and military planning as a disproportionate burden? The good-faith answer would be negative.

The Supreme Court specified that systemic or operational failures leading to multiple casualties should be subject to scrutiny.⁶⁵ The problem of this approach is that it puts an extra burden on the victim to demonstrate the systematic character of the breach, thus making an individual right dependent on the violation of the individual right of others.

The other important issue is to define the scope of States powers. The ECtHR in *Stoyanovi case* put a rather high threshold for the State responsibility,

⁶⁰ Smith case, para 63.

⁶¹ Rowe in Handbook, 539.

⁶² Osman case, para 116.

⁶³ Osman case, para 116.

⁶⁴ (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening) [2010] UKSC 29, [2011] 1 AC 1, para 122.

⁶⁵ Smith case, para. 63

excluding the omnipotence of the State. The UK Court entered into a dialogue with their European colleagues and even seemed to agree, but then created an extra entry point for human rights by identifying the gap between policy, procurement, and operational planning.⁶⁶

Even though the ECtHR has never dealt with the right to life of soldiers in combat operations, it upholds the twofold obligation of the State in the military context: “put[ting] in place rules geared to the level of risk [...] that may result not only from the nature of military activities and operations but also from the human element” and “adoption of practical measures aimed at the effective protection [...] against the dangers inherent in military life”.⁶⁷

Therefore, the State may be expected to be responsible for the deaths of members of its armed forces occurring outside of the military base subject to the lack of proper safety equipment, like in the *Pritchard case*, or adequate training of the military personnel in cases of friendly fire. This would not impose impossible duties on the State but a reasonable standard to avoid expectable risk.⁶⁸

ii. The obligation of independent and effective inquiry

The obligation to investigate suspicious death or alleged violation of the right to life is a part and parcel of the right to life.⁶⁹ As was confirmed in the *Stoyanovi case*, this obligation does not depend on the status of the victim and the military affiliation of the deceased does not decrease the threshold of corresponding obligations.⁷⁰ There is no indication that this obligation would cease to apply neither in armed conflict in general nor conduct of hostilities in particular.⁷¹ On the contrary, this obligation represents an example of a more protective regime under IHRL that complements the lack of the corresponding duty in IHL.⁷²

⁶⁶ Smith case, para 77; Wright, J., ‘The Operational Obligation under Article 2 of the European Convention on Human Rights and Challenges for Coherence – Views from the English Supreme Court and Strasbourg’ (2016) JETL 7(1), 58, 76.

⁶⁷ Mosendz v. Ukraine, App. no 52013/08 (ECHR, 17 January 2013), para 91.

⁶⁸ Rowe in Handbook, 539.

⁶⁹ McCann, para.161; Recommendation CM/Rec, 28.

⁷⁰ Salgin v Turkey, App. no 46748/99 (ECHR, 20 May 2007), para 86-87. [Salgin]

⁷¹ Kaya v Turkey, App. no 158/1996/777/978 (ECHR, 19 February 1998), para 91. [Kaya case]

⁷² Gaggioli Gasteyger, G., Kolb, R., ‘A right to life in armed conflicts?: the contribution of the European Court of Human Rights’ (2007) Israel Yearbook on Human Rights, vol. 37, 115, 157. [Gaggioli, Kolb]

The ECtHR through its jurisprudence has defined the criteria to be met for an effective and independent investigation. Firstly, the inquiry has to be conducted by persons independent of the events.⁷³ Secondly, even though it is an obligation of means, the investigation has to be capable of determining the relevant circumstances and identify those responsible.⁷⁴ Thirdly, there is a requirement of promptness and reasonable expedition.⁷⁵ Fourthly, the evidence needs to be collected and preserved.⁷⁶ Finally, public scrutiny and the involvement of the relatives of the victim in the investigation is an indispensable condition.⁷⁷

What implications does it create for the cases related to the deaths of soldiers in the conduct of hostilities? To begin with, the duty to investigate could theoretically apply to the vast majority of deaths. As the UKSC pertinently noted, even in *prima facie* cases of deaths occurring in military operations, “new information might be uncovered as the investigation proceeds which does point to a possible violation of the [right to life]”.⁷⁸ The other crucial point is related to the organs responsible for the investigation, because of its structure internal military investigation, can hardly be impartial, while this requirement can more likely to be met if the inquiry is conducted by the civilian authorities.⁷⁹ This requirement is connected with the public scrutiny and involvement of the family, which are nearly impossible in the cases of military inquiry as it is seen from the facts of the *Pritchard case*.

In the *Stoyanovi case*, the ECtHR also noted that in cases where the death is caused unintentionally the provision of a criminal-law remedy is not indispensable; it may well be substituted by the appropriate civil redress.⁸⁰ Indeed, many States have compensation mechanisms at the national level for the deaths of soldiers on duty;⁸¹ however, this cannot absolve the State from the duty to

⁷³ McKerr v UK, App. no. 28883/95 (ECHR, 4 August 2001), para. 112. [McKerr]

⁷⁴ McKerr, para. 113.

⁷⁵ McKerr, para. 114; Kelly and Others v. UK, App no. 30054/96 (ECHR, 4 August 2001), para. 97.

⁷⁶ Kaya case, para. 89.

⁷⁷ McKerr, para. 115; Salgin, para 89.

⁷⁸ Smith case, para 63.

⁷⁹ Rowe, P., *Human Rights and Members of Armed Forces* (CUP 2006), 36. [Rowe]

⁸⁰ Stoyanovi case, para 60.

⁸¹ For the examples of national policies see OSCE Handbook, 183.

investigate the circumstances of the death as these are two separate elements of the obligation.

It is in the interests of the State to comply with the abovementioned requirements for an efficient investigation and not to hide behind the shield of military operations and refusal to provide the relevant data. In the ECtHR jurisprudence, such a refusal may be equated to the well-founded arguments of the applicant and lead to the presumption responsibility, especially if death is occurring under the exclusive military control of the State.⁸² The case of Occupied Iraq in 2003 where the events of the *Pritchard case* took place would be an illustrative example of this.

2. IMPLICATIONS OF THE HUMAN RIGHT TO LIFE OF COMBATANTS IN IHL

IHL is often misunderstood as a legal regime protecting the exclusively civilian population and those not taking an active part in hostilities in armed conflicts or *hors de combats*. Combatants would accordingly fall outside the scope of protection and bear mainly obligations of compliance with the rules of war. However, such an approach does not stand up to the core of IHL and evolution of the humanitarian protection. This section will argue that protection of the life of combatants, including at the time of conduct of hostilities, is inherited from the very origins of IHL. The interpenetration of IHRL and IHL can contribute significantly to the respect of the rule of law. Nonetheless, while the two branches of international law are mutually reinforcing, this increased protection should not undermine IHL and it accordingly calls for a sound and coherent articulation with IHRL.

A. Protection of combatants under IHL

i. Principle of humanity: from The Martens Clause to the protection of State's own armed forces

Formulated at the end of the 19th century, the Martens Clause guaranteed the protection for civilian population and belligerents (combatants) of the

⁸² Gaggioli, Kolb, 151.

principles of international law, derived from the principles of humanity and from the dictates of public conscience even in absence of the binding treaty provision. It was introduced by the Russian delegate, Friedrich Martens, at the 1899 Hague Peace Conference “to cover the treatment of ‘*franc-tireurs*’ (unlawful combatants)”.⁸³ Under contemporary IHL, the Clause is reflected in the four Geneva Conventions and the Additional Protocols thereto.⁸⁴ The role of Martens Clause is to serve as “guidelines in the interpretation of [IHL]” applicable to the new developments, which may fall outside of the scope of existing treaty law, *e.g.* new technologies or tactics.⁸⁵ The rationale behind it is to prevent the assumption that anything that is not prohibited in IHL is automatically permitted.⁸⁶

The Martens Clause can be equally regarded as an entry point for human rights in armed conflict. The concept of humanity is interconnected with the very notion of human rights,⁸⁷ as “[t]he enormous developments in the field of human rights [...] must necessarily make their impact on assessments of such concepts as ‘considerations of humanity’”.⁸⁸ Therefore, it is still a “powerful vehicle” to introduce human rights concerns into the law of armed conflict.⁸⁹ Another compelling contribution of the Martens Clause is that it equates the importance of protection of civilians with the one of the combatants. Being formulated in the widest possible way, it also allows avoiding possible grey areas in the law and provides for the room for a more protective interpretation of existing norms.

Traditionally IHL is seen as regulating the conduct of hostilities between the belligerents and treatment of persons in the power of the enemy. The leading narrative in IHL is, therefore, that it mainly protects the enemy nationals.⁹⁰ It can also be reiterated as protecting from the actions of the enemy but not from violence by own forces.⁹¹ The protection of the State’s own members of armed

⁸³ Sassòli, M., *International Humanitarian Law: Rules, Controversies and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019), 54. [Sassòli, IHL]

⁸⁴ Four Geneva Conventions, common art.63, 62, 142, 158. The Additional Protocol I explicitly refers to the protection of both civilians and combatants in the Martens Clause codified in art. 1(2). Additional Protocol II, Preamble.

⁸⁵ Updated ICRC Commentaries to GC I, para.3294, 3298.

⁸⁶ ICRC Commentaries to AP I, para 55.

⁸⁷ ICJ, Requests for Advisory Opinions on the Legality of Nuclear Weapons – Australian Statement, (1996) Austl. Y.B. Int’l L. 685, 699.

⁸⁸ Nuclear Weapons, 490.

⁸⁹ Meron, T., *The Humanization of International Law* (Martinus Nijhoff Publishers 2006), 28.

⁹⁰ Sassòli, IHL, 1.

⁹¹ SCSL, *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, TC Judgment, SCSL-04-15-T, 2 March 2009, para 1451.

forces is foreseen at the level of treatment of wounded and sick. Under Article 12 of the First Geneva Convention, the State is obliged to ensure protection and care of the wounded and sick irrespective of whether they belong to its own or enemy forces.⁹²

A similar approach is also traceable in the IHL provisions providing general protection. Common Article 3 as a “minimum yardstick” reflects the “elementary considerations of humanity” that are applicable both in international and non-international armed conflicts.⁹³ It offers protection to all “persons taking no active part in hostilities, including members of the armed forces” without any adverse distinction. There is no requirement that such a person has to be in power of the enemy to benefit from protection;⁹⁴ neither any limitation on the scope of protected persons.⁹⁵ To conclude otherwise and “distinguish between persons based on their membership in a party [...] would go against the cardinal principle of non-discrimination”.⁹⁶ Therefore, a combatant as long as he/she is not taking active part in hostilities, either having laid down the arms or being placed *hors de combat* automatically benefits from protection. The International Criminal Law jurisprudence has further developed this argument by asserting that the obligations under IHL are not only owed towards the enemy but also prohibits intra-Party violence.⁹⁷ Yet, one should not be overly optimistic, as the protection of State own forces will not be found in all the norms, and analyses of relevant provisions will always be required.⁹⁸ This will be, however, the case with the general protection

⁹² ICRC Commentary on GC I (1952), 138. The same approach is applicable to GC II, art.12; AP I, art.10; AP II, art.7.

⁹³ ICJ, Military and Paramilitary Activities in and against Nicaragua case (US v. Nicaragua), Merits, Judgment (1986) ICJ Rep 14, para 218–219.

⁹⁴ Updated ICRC Commentaries to GC I, para 545.

⁹⁵ Kleffner, J. K., ‘The Beneficiaries of the Rights Stemming from Common Article 3’, in A. Clapham, P. Gaeta, M. Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary* (OUP 2015), 436.

⁹⁶ Rodenhäuser, T., ‘Squaring the Circle? Prosecuting Sexual Violence against Child Soldiers by their ‘Own Forces’’, (2016) JICJ 14, 171, 190. [Rodenhaeuser]

⁹⁷ ICC, Ntaganda Decision on the Confirmation of Charges, 2014, para 76–82; *Katanga* Decision on the Confirmation of Charges, 2008, para 248; Separate and Dissenting Opinion of Judge Odio Benito, Judgment, Lubanga Dyilo (ICC-01/04-01/06), Trial Chamber, 14 March 2012, para 17. The Ntaganda decision was subject to significant criticism for misinterpreting the IHL: See Heller, K.J., ‘ICC Appeals Chamber Says A War Crime Does Not Have to Violate IHL’ (15 June 2017) <<http://opiniojuris.org/2017/06/15/icc-appeals-chamber-holds-a-war-crime-does-not-have-to-violate-ihl/>> (accessed 16.08.2020).

⁹⁸ Rodenhäuser, 189.

under Common Article 3, which enshrines as well obligations upon the State towards its own members of armed forces who are placed *hors de combat*.⁹⁹

The same logic does apply to the fundamental guarantees provided under Article 75 of Additional Protocol I. The provision is there to fill in the gap in protection to the persons “who are in the power of a Party to the conflict and do not benefit from more favourable treatment” under the existing treaties. The wording itself does not prevent the inclusion of combatants in the category of protected persons.¹⁰⁰ Moreover, it does not specify in the power of which Party to the conflict the person is supposed to be, which gives good reasons to believe that the Party, in this case, is not only the adversary but also the State of which the individual is a national.¹⁰¹ Furthermore, the open-ended list of grounds for unlawful discrimination “mitigates against exclusion from the protective reach [...] of Party’s own nationals or [persons] otherwise...‘belonging to’ that Party”.¹⁰²

Protecting members of the State’s own armed forces is not foreign to IHL: it is deeply rooted in the principle of humanity and this cardinal principle cannot be interpreted in a discriminatory manner by excluding persons from its scope based on their nationality or status in the conflict. Nonetheless, all the examples provided are falling short to address the conduct of hostilities and impose obligations on the State to its combatants who are *hors de combats*.

ii. Is the life of combatants protected under IHL?

The idea that IHL is supposed to protect the life and dignity of persons affected by armed conflict would at the same authorize unconditional killing of individuals based on their status, seems to defeat the humanitarian purpose. On the contrary, as Gloria Gaggioli has rightly underlined, IHL is “far from giving the right to kill”.¹⁰³ If it was the case, the conflict between the IHL and IHRL with respect to the right to life would have been insurmountable. However, the truth is

⁹⁹ Rodenhäuser, 190; Sassòli, IHL, 200.

¹⁰⁰ ICRC Commentaries to AP I, para 3020; Crawford, E., *The treatment of combatants and insurgents under the law of armed conflict* (OUP 2010), 54, 61.

¹⁰¹ ICRC Commentaries to AP I, para 3021.

¹⁰² Kleffner, J.K., ‘Friend or Foe? On the Protective Reach of the Law of Armed Conflict’, in M. Matthee, M. Toebes, and M. Brus (eds), *Armed Conflict and International Law, in Search of the Human Face—Liber Amicorum in Memory of Avril McDonald* (The Hague: T.M.C. Asser Press, 2013), 296

¹⁰³ Gaggioli, G., *L’influence mutuelle entre les droits de l’homme et le droit international humanitaire à la lumière du droit à la vie* (Editions A. Pedone 2013), 252.

that both branches of law are “are aimed at preventing unnecessary or disproportionate deaths”.¹⁰⁴ Following this stance, the prohibition of assassination is part and parcel of IHL from the very beginning of its formation.¹⁰⁵ The explicit prohibition of the violence to life and in particular murder is codified in a number of provisions and also represents a customary rule of IHL.¹⁰⁶

Combatants can indeed be lawfully killed under IHL as a legitimate military objective under Article 52 of the Additional Protocol I. Yet, this does not amount to a denial of the right to life but rather to its lawful restriction. Even though one could argue that a combatant may be killed at any time despite the circumstances, the principles of military necessity and humanity preclude this dogmatic approach.¹⁰⁷ The principle of military necessity was introduced in the Preamble of the Saint-Petersburg Declaration of 1868 and is read as follows: “That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy. That for this purpose it is sufficient to disable the greatest possible number of men.”¹⁰⁸ It is important to notice that in the authentic French text the phrase “to disable the greatest possible number of men” is read “de mettre *hors de combat* le plus grand nombre d’hommes possible”.

Therefore, the legitimate target is not to kill but to neutralize the enemy. Even though there is no unconditional obligation to “capture rather than kill”,¹⁰⁹ the concept of *hors de combat*, as well as *the one of military necessity*, lead to the conclusion that it is contrary to the principle of humanity to kill the enemy when there is “manifestly no necessity for the use of lethal force”.¹¹⁰ Indeed, “if it was not the case, it is unclear why it would be prohibited to kill the combatants hors de combat”.¹¹¹ Thus, it is even argued that the rules governing *hors de combat* introduce “the legal boundaries set by restraints on the use of force”.¹¹²

¹⁰⁴ Doswald-Beck, 903.

¹⁰⁵ Doswald-Beck, 900 – 903.

¹⁰⁶ GC III, art.3(1)(a), AP I, art.75(2)(a)(i); AP II, art.2(a); Customary IHL, Rule 89.

¹⁰⁷ Gaggioli, 253-254.

¹⁰⁸ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November (11 December 1868), Preamble.

¹⁰⁹ Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, 90 IRRC 872 2008, 991-1047, 1041. [DPH Guidance]

¹¹⁰ DPH Guidance, 1043 – 1044.

¹¹¹ Gaggioli, 255.

¹¹² Goodman, R., The Power to Kill or Capture Enemy Combatants, (2013) EJIL 24, 819, 830.

Another important indication of the protection of combatant's life is the norm on limiting the choice of belligerents in means and methods of warfare.¹¹³ The prohibition of causing "harm greater than that unavoidable to achieve legitimate military objectives" is an "intransgressible principle of international customary law"¹¹⁴ that is also aimed at protecting the lives of combatants. Although this prohibition is wider than just a rule on the choice of means, nowadays it amounts to "a basic rule underlying and informing the entire body of IHL governing the conduct of hostilities".¹¹⁵ And it is directly connected to restraints on the use of force in attacks against legitimate targets, thus, protecting the lives of combatants.

Finally, the prohibition of certain methods, such as perfidy¹¹⁶ or orders or threats of no quarter¹¹⁷ also indicates that the life of combatants is protected during the conduct of hostilities.

Therefore, the idea of protecting life or even the right to life of combatants does not contradict the *raison d'être* of IHL. Indeed, it can be traced back to the basic principles governing the conduct of hostilities. Nevertheless, it is equally important to mention that, in the conduct of hostilities rules, the IHL is silent about the State's obligations towards its own armed forces. Even if the right to life is protected, all the duties of restraint are directed at protecting the enemy combatants.

As the result, there appears to be a gap in IHL with respect to the protection of the lives of combatants by its own Party in the conduct of hostilities. One could say that such a protection would be counter-intuitive; however if one branch of law falls short to provide protection, the legal vacuum shall not arise. This is where the obligations under IHRL come into play and inevitably bring changes in understanding of various challenges.

¹¹³ AP I, art. 35(2).

¹¹⁴ Nuclear weapons, para 78-79.

¹¹⁵ Melzer, N., 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) International Law and Politics, Vol. 42:831, 906.

¹¹⁶ AP I, art.37; CIHL, Rule 65

¹¹⁷ AP I, art. 40; CIHL, Rule 46.

B. PRACTICAL IMPLICATIONS OF THE INTERMINGLING OF IHL AND IHRL

i. Human rights of military personnel as means to ensure respect for IHL

Protection of the right to life of military personnel shall not be seen in isolation as a purely IHRL related matter that is unrealistic or hypocritical in armed conflict. In fact, it has direct implications to soldiers' behaviour on the battlefield and for the respect of the rules governing the conduct of hostilities.

Unfortunately, there is a common belief that the notion of inhumane acts perpetrated against soldiers does not exist, because acts of violence and death are allegedly part of military routine corresponding to the "ethics of soldiering *i.e.* no pain, no gain".¹¹⁸ Nevertheless, at the international level, there is a growing understanding of the need for a change of narrative. The Recommendation of the CoE on the human rights of members of the armed forces, that was also cited by the UKSC in the *Smith case*, recognized that armed forces cannot be expected to respect IHL and IHRL "unless respect for human rights is guaranteed within the army ranks", as "respect for human rights by and of military personnel are two sides of the same coin, to be promoted simultaneously".¹¹⁹

Recently, the International Committee of the Red Cross (ICRC) has conducted research on the "Roots of Restraint in War" to identify the factors influencing behaviour of soldiers and fighters. Though this study did not look into the IHRL aspect, some of the conclusions may still be illustrative for the present analyses. The data from the US military in Afghanistan and Iraq, as well as from Australia and the Philippines has demonstrated that a higher level of IHL training results in better compliance and restraint from a violation.¹²⁰ However, it was also found out that IHL training is only one component of the overall outcome, the other one was ethical compliance. The research provides an example of an experiment where the deprivation of sleep and food for a certain period had direct impact on soldier's unethical and unlawful behaviour.¹²¹ The researchers use this

¹¹⁸ Maringira, G. 'Soldiers as victims: behind military barracks in the post-colonial African army' (2017) *African Security Review*, 26:1, 77, 83.

¹¹⁹ CoE Report, para 3,12; *Smith case*, para 54.

¹²⁰ *Roots of restraint in War*, ICRC (2018), 29 [Roots of restraint]

¹²¹ *Roots of restraint*, 29

example to demonstrate the role of ethics training in the preparation of military personnel. Likewise, it can equally be used to illustrate how the deprivation and denial of basic human rights to soldiers has an immediate impact on their compliance with IHL.

Paraphrasing the ICRC Commentaries to Article 47 to the First Geneva Convention: “in order to be effective and to induce behaviour compliant with the law, [IHL] must not be taught as an abstract and separate set of legal norms”,¹²² it has to be complemented by the fundamental principles of IHRL. Indeed, few countries have military manuals that explicitly address the IHRL and its applicability to military operations.¹²³ However, the integration of human rights into the internal military structure is particularly important.¹²⁴

To provide a more practical example where due compliance with human rights of military personnel, in particular with the right to life, may play a mutually beneficial role for both soldiers and civilian population, let’s consider the situation of riots in armed conflict, as was analyzed by the ICRC.¹²⁵ The example is chosen due to its complexity and the simultaneous application of both law enforcement and conduct of hostilities paradigms,¹²⁶ which in practice implies a high level of preparation for the military. If the State is in due compliance with its human rights obligations, it has to ensure the right to life of its soldiers deployed to maintain the riots. If there is indeed a duty to properly equip and train the soldiers, the outcome should be twofold. On the one hand, a properly equipped soldier is sufficiently protected from the risk to his life. Thus, there is no need for him/her to apply excessive use of force against protesters and even fighters in the crowd, which means better protection of the civilian population. On the other hand, proper training, especially if it diligently incorporates both IHL and IHRL knowledge, would facilitate the decision-making at the moment of use of force.

¹²² Updated ICRC Commentaries to GC I, para.2776.

¹²³ Colombia, Indonesia, Peru, Philippines adopted instruments related to IHRL obligations of the armed forces. See more <https://ihl-databases.icrc.org/applic/ihl/ihlweb_ara_2.nsf/docindexeng-print/src_iimima>

¹²⁴ OSCE Handbook, 205 citing the example of German military ethics code; Lambert, A., *Democratic Civilian Control of Armed Forces in the Post-Cold War Era* (LIT 2009), 60.

¹²⁵ Gaggioli, G., *Use of Force in Armed Conflicts, The Interplay between the Conduct of Hostilities and Law Enforcement Paradigms*, ICRC Outcome Report, Geneva, ICRC, 2013 [Use of Force in Armed Conflicts]

¹²⁶ *Use of Force in Armed Conflicts*, 24-29.

Thus, there is a straightforward link between the protection of the right to life of the military personnel and compliance with IHL. Due performance of State's obligations *vis-à-vis* its own military has direct impact on protection of civilian population and general respect of the rule of law.

ii. Using and abusing human rights arguments: Pandora box for the proportionality assessment

One should, nevertheless, be realistic about the opposite side of the coin when advocating for the human rights of the military personnel in the conduct of hostilities. When engaging in armed conflicts, States obviously want to enhance their military potential and efficiency of the conducted operations. IHL introduces many limitations on the State's actions in the conduct of hostilities, including the principle of proportionality and restrictions of certain types of means and methods of warfare. This part of the analyses will address possible argument where the right to life of military personnel may undermine the principle of proportionality in IHL.

Thomas M. Frank once noted there is the perception that “the principle of proportionality that, like beauty, it exists only in the eye of the beholder”.¹²⁷ This conclusion might be plausible in the context of IHL only to a certain extent. Customary rule on proportionality as enshrined in Article 51(5)(b) establishes certain standards and guidelines for the attack to be proportionate. Namely, the civilian loss shall not be “excessive in relation to the concrete and direct military advantage anticipated”.

As it follows from this wording, the analysis of the possible loss is conducted *ex-ante*. But what is more intriguing for the present discussion is the notion of the military advantage that has to outbalance the civilian loss. The ICRC Commentaries to Article 51 do not specify what “military advantage” exactly means. Can the protection of the State's own army be one? State practice demonstrates that such an approach is indeed possible for the security of the attacking forces is explicitly mentioned as an example of military advantage for

¹²⁷ Frank, T. M., ‘On Proportionality of Countermeasures in International Law’ (2008) AJIL, Oct., Vol. 102, No. 4, 715, 716.

proportionality assessment.¹²⁸ Following the same rationale, Israel, for example, claimed on many occasions during the 2014 conflict in Gaza that its actions were justified by the military necessity to protect its own armed forces from the threats posed by Hamas.¹²⁹ Accordingly, the security of the Israeli Defence Forces was among the elements of the military advantage sought when conducting devastating attacks on Gaza.

Would not the imposition of positive obligation upon the State related to the right to life under IHRL reinforce this type of argumentation? If the State is under the legal duty to protect its own military, the military advantage in guarantying security of its own forces becomes concrete and direct. Furthermore, the protection of the lives of soldiers turns from the ethical and pragmatic category to a legal obligation. Therefore, the civilian loss anticipated might be much higher than if there was no such a legal obligation but still proportionate to the anticipated military advantage.

Indeed, this argument might be suggested by the belligerents. However, such a position can be balanced via the obligation to take precautionary measures.¹³⁰ The State would still need to take all feasible precautions to minimize civilian loss. Moreover, as ICRC clarifies, the disproportion between the civilian damages and the anticipated military advantage is a delicate problem and it is not always clear whether one outweighs the other. “In such situations, the interests of the civilian population should prevail”.¹³¹ The obligation to minimize collateral damage precedes the proportionality assessment¹³² and, thus, adds an extra level of protection for the civilian population.

Therefore, a good faith interpretation of the State’s obligations in the conduct of hostilities shall not lead to an absurd result that combatants gain more protection than civilians through the applicable IHRL norms.

¹²⁸ The Manual of the Law of Armed Conflict, Australian Defence Doctrine Publication 06.4, Australian Defence Headquarters, 11 May 2006, para. 5.11; Law of Armed Conflict. At the operational and tactical levels, Office of the Judge Advocate General, B-GJ-005-104/FP-021 (Canada, 2001), para 415; The Department of Defense Law of War Manual (The US 2016), 216.

¹²⁹ State of Israel, The 2014 Gaza Conflict (7 July – 26 August 2014): Factual and Legal Aspects, Report, May 2015, para. 92.

¹³⁰ AP I, art.57.

¹³¹ ICRC Commentary to AP I, para 1979.

¹³² Wright, J. D. ‘Excessive’ ambiguity: analysing and refining the proportionality standard, (2012) 94 IRRC 886, 827.

CONCLUSION

The right to life of States' own military personnel is an archetypical illustration of the role and impact of IHRL to fill in the protection gap under IHL. While supplementing the silence of IHL, the right to life of military personnel under IHRL creates corresponding obligations to the State both in peacetime and in armed conflict. Indeed, most of the human rights of military personnel, including the right to life, are subject to contextual interpretation due to military life characteristics.

The right to life of combatants is not incompatible with the *raison d'être* of IHL. The main pillars of IHL, the principle of humanity and military necessity, provide a sound basis of protection to combatants. However, a significant gap was identified, *i.e.* the lack of protection of States' own soldiers in the conduct of hostilities, which can be filled in via the existing obligations under right to life in IHRL.

Protecting right to life of military personnel serves not only the IHRL purpose but also general compliance with IHL. It would even be recommended to include compulsory human rights component in the military training and military manuals, for soldiers to better understand their own rights and obligations.¹³³

Finally, "human rights rhetoric" does not pose threat to the existing IHL framework. Protection of human life and human dignity is a common goal of IHL and IHRL. Excluding military personnel from protection and labelling them as perpetrators defeats this common goal. Soldiers remain human beings despite wearing uniform and carrying arms; guaranteeing them protection would not probably stop the war but will most certainly bring it one step closer to the peace.

Word count: 9991

¹³³ Currently this component is frequently replaced by ethics and moral education. See Kaun P.M., *The Warrior, Military Ethics and Contemporary Warfare: Achilles Goes Asymmetrical* (Ashgate 2014), 97 – 108.

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