

Normative demarcations of the right to life in a globalized world: Conflicts between Humanitarian Law and Human Rights Law as markers*

Summary

The relationship between international humanitarian law (IHL) and international human rights law (IHRL) has occupied legal scholarship extensively over the last decades. It is undisputed today that IHRL also applies in situations of armed conflict, and that norms of the two regimes are regularly intertwined. At the same time, the regimes are characterized by different logics, which become most apparent with regard to the protection of the right to life, or the permissibility to kill a person. In this paper, I will argue that the concrete lines of conflict between IHL and IHRL in that regard can be viewed as markers for fundamental normative questions arising in a changing global political framework. IHL draws on the order of states as decisive entities of rights and liabilities, whereas IHRL takes humanity as reference point. On that basis, their relationship does not appear as straightforward convergence but rather as a dialectical process that highlights their respective limitations. The conflicts regarding the protection of a right to life in that sense are indicative of a more general uncertainty about the appropriate normative grammar today: They point to instances, in which the state-centric framework has become inadequate. But they equally underline dangers of the language of universal human rights, the scope and content of which will depend on particular conceptions about the boundaries of political community.

Zusammenfassung

Das Verhältnis von humanitärem Völkerrecht (IHL) und internationalen Menschenrechten (IHRL) hat die Rechtswissenschaften in den letzten Jahrzehnten ausführlich beschäftigt. Unbestritten ist heute, dass IHRL grundsätzlich auch in Situationen bewaffneter Konflikte Anwendung findet und dass die normativen Vorgaben der beiden Regime sich regelmäßig ergänzen und überschneiden. Zugleich sind die Regime durch unterschiedliche Logiken geprägt, die besonders in Bezug auf den Schutz eines Rechts auf Leben, beziehungsweise die Zulässigkeit einen Menschen zu töten, sichtbar werden. Diese dieses Beitrags ist es, dass konkrete Konfliktfälle zwischen IHL und IHRL in

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dieser Hinsicht auf grundsätzliche normative Fragen verweisen, die sich in einer verändernden globalen politischen Ordnung stellen. IHL bezieht sich wesentlich auf Staaten als Rahmen von Rechten und Verbindlichkeiten, während IHRL die Menschheit zum gedanklichen Ausgangspunkt hat. In diesem Sinne erscheint das Verhältnis der beiden Regime weniger als geradliniges Zusammenfließen, denn als ein dialektischer Prozess, in welchem die jeweiligen Grenzen beider Ansätze deutlich werden. Die Konflikte im Bezug auf den Schutz des Rechts auf Leben zeigen in diesem Sinne eine grundlegendere Unsicherheit über die geeignete normative Grammatik an: Sie verdeutlichen Konstellationen, in denen der staatszentrierte Rahmen nicht mehr überzeugend erscheint. Aber sie unterstreichen auch Tücken der Grammatik universeller Menschenrechte, deren tatsächliche Reichweite und deren konkreter Inhalt von bestimmten Vorstellungen über die Grenzen der politischen Gemeinschaft abhängen.

Résumé

La relation entre le droit international humanitaire (DIH) et le droit international des droits de l'homme (DIDH) a occupé la science juridique intensément au cours des années dernières. Il est incontestable aujourd'hui que le DIDH applique également dans les situations de conflits armés, et que les normes des deux régimes sont régulièrement liées. En même temps, les régimes sont caractérisés par des logiques différentes eu égard d'une part à la protection du droit à la vie, d'autre part au droit de tuer une personne. Dans cet article, je propose que les conflits entre le DIH et le DIDH à cet égard soient considérés comme des marqueurs pour les questions normatives fondamentales qui se posent dans un cadre politique mondial en mutation. Le DIH est fondé sur l'ordre des Etats comme entités décisives de droits et d'obligations, alors que le DIDH considère l'humanité comme point de référence. Ainsi, leur relation n'apparaît pas comme simple convergence, mais plutôt comme un processus dialectique, montrant les limites des deux régimes en question. Les conflits relatifs à la protection d'un droit à la vie, en ce sens, sont significatifs d'une incertitude plus générale sur la grammaire normative appropriée aujourd'hui: ils soulignent des cas dans lesquels le cadre étatique est devenu insuffisant. Mais ces conflits soulignent également les dangers inhérents au langage des droits de l'homme universels. Leur portée et leur contenu dépendent des conceptions particulières concernant les limites de la communauté politique.

Prince Andrei merely shrugged his shoulders at Pierre's childish talk. [...] "If everyone made war only to his own convictions, there would be no war," he said. "And that would be excellent," said Pierre. *Prince Andrei* smiled. "It might very well be excellent, but it will never happen..." "Well, what makes you go to war?" asked Pierre. (*Leo Tolstoy, War and Peace*)¹

1 *Tolstoy, War and Peace*, 1869 (here English edition from 2007, translation by Richard Pevear and Larissa Volokhonsky), 25.

I. Introduction

In *Tolstoy's* novel “*War and Peace*”, the reader is taken through contrasting sequences of domestic and urban life on the one hand, and the waiting and fighting of soldiers in battlegrounds on the other. In a paradigmatic manner, these alternating scenes convey the picture of war and peace as separate realms of human interaction. Widely different concerns guide persons in the respective surroundings: Soldiers at the front lines are coping with deprivations and their anxiety, struggling to appear brave in face of death. Storylines in *Saint Petersburg* and *Moscow*, by contrast, deal with love affairs, jealousy and family life. As dissimilar as the atmosphere in those contrasting sequences of the book is our general perception of war and peace, and of the respective rules governing these spheres. Most importantly, this involves a contrasting judgment on the permissibility to kill a person.

Generally, the perception of war and peace as opposite conditions of life persists although it has long been conceded that a clear line can hardly be drawn, and that boundaries are becoming ever more blurred in the so-called “*new types of armed conflicts*”.² The main theoretical site for discussing the relationship between the different legal paradigms of war and peace is the respective applicability of (norms of) international humanitarian law (IHL) and international human rights law (IHRL). Humanitarian law has a long history with certain rules of war dating back to ancient times, and with modern IHL being considered to have its starting point with the initial 1864 *Geneva Convention*.³ IHRL, by contrast, is a much younger body of law, generally conceived to begin with the 1948 *Universal Declaration of Human Rights* (UDHR).⁴ With seminal court decisions such as the *International Court of Justice's* (ICJ) *Wall Opinion*,⁵ it is now undisputed that IHRL also applies in situations of armed conflict, and it has been explored extensively how IHL is today complemented and influenced by IHRL.⁶

The concrete applicability and interrelation of the two regimes comes, however, with complex questions. As a general tendency, analyses have focused on their common

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- 2 *Sassòli*, The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts, in: Ben-Naftali (Ed.), *International Humanitarian Law and International Human Rights Law: Pas de Deux*, 2011, 34; *Wippman*, Introduction: Do New Wars Call for New Laws?, in *Wippmann/ Evangelista* (Eds.), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, 2005, 1.
 - 3 *Sassòli et al.*, How does law protect in war? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law, Volume I, Third Edition 2011, Chapter 3, 1.
 - 4 *Universal Declaration of Human Rights* (UDHR), as proclaimed by the UN General Assembly in Resolution 217 A on 10 December 1948.
 - 5 *International Court of Justice*, *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, 9 July 2004, I.C.J. *Advisory Opinion*, 2004 I.C.J. 136.
 - 6 E.g. *Provost*, *International Human Rights and Humanitarian Law*, 2002; *Droeg*, The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict, *Israel Law Review* Vol. 40, 2/2007, 310; Ben-Naftali (Ed.), *International Humanitarian Law and International Human Rights Law: Pas de Deux*, 2011; *Quenivet/ Arnold* (Eds.), *International Humanitarian Law and Human Rights Law. Towards a New Merger in International Law*, 2008.

features and their converging development.⁷ At the same time, the regimes are characterized not only by singular divergence in rules but by fundamentally different logics: IHL starts out from the situation of armed conflict, setting up rules for that situation of hostilities and thereby aiming to mitigate the negative consequences. IHRL, by contrast, proceeds from a perspective of peace, envisaging a number of rights to be safeguarded for all persons, including civil and political rights on the one hand,⁸ and economic, social, and cultural rights on the other.⁹

In this paper, I will examine how international law deals with the distinction between and the distinguishability of war and peace with a focus on the position of a right to life. In particular, the notion of a “*right to life*” calls for interpretation: What such right can mean, for mortal human beings whose survival is always dependent on others,¹⁰ must be sought in the relationship between the individual and the community. It encompasses the prohibition to be arbitrarily deprived of one’s life, but also relates to social and economic rights as life’s structural preconditions.¹¹ With respect to conflicting rules of IHL and IHRL, the protection of a right to life represents foremost the normative protection of the individual physical integrity vis-à-vis security concerns of states. To which extent this individual inviolability prevails over collective concerns will depend on the qualifications, both in a rhetorical and a technical sense, of situations as war or armed conflict, of persons as enemies or combatants, and of acts as falling within the jurisdiction of a state.

The proposition of this paper is that we can read the concrete lines of conflict between IHL and IHRL as markers of fundamental normative questions of a changing global political framework. The respective normative principles do not only relate to different paradigmatic situations of war and peace, but also embody different perspectives on the foundation of rights. IHL builds on the order of states as decisive entities of rights and liabilities. The assumptions thereby made are challenged by the increasing role of non-state actors, but more generally by the fact that the nation state no longer appears as the only framework of law and legitimacy. It is the aim of this paper to link the debate about the relationship of IHL and IHRL to reflections about the changing landscape of political order, in the sense of a demise of the Westphalian framework as exclusive or self-evident.¹²

The critique that can be drawn from that linkage is not one-sidedly one of the laws of armed conflict, but equally points to the limitations in the assumptions of IHRL. Over the last decades, the universalism of human rights has been subjected to a rigorous critique, which demonstrates how exclusions are present in every account of the uni-

7 *Ben-Naftali*, Introduction: International Humanitarian Law and International Human Rights Law – Pas de Deux, in: Ben-Naftali (note 6), 5.

8 International Covenant on Civil and Political Rights (ICCPR), as adopted by UN GA Res 2200A (XXI) on 16 December 1966.

9 International Covenant on Economic, Social, and Cultural Rights (ICESCR), as adopted by UN GA Res 2200A (XXI) on 16 December 1966.

10 *Butler*, Notes Toward a Performative Theory of Assembly, 2015, 23, 196.

11 *Wicks*, The Meaning of ‘Life’: Dignity and the Right to Life in International Human Rights Treaties, *Human Rights Law Review* Vol. 12, 1/2012, 199 (2012). Cf. also *Butler* (note 10), 199.

12 Cf. *Fraser*, Scales of Justice, 2009, 14.

versal.¹³ At the same time, propositions of a “*critical universalism*” have defended the importance of human rights and reformulated an understanding in awareness of those pitfalls.¹⁴ I will argue that the limits of IHRL regarding the effective protection of a right to life and its relationship with IHL reflect the importance of a critical theoretical conception of human rights. In that sense, the lines of conflict between the two regimes can be read as illustrating the dialectical relationship of both perspectives, in which their contradictions as well as their merits become visible.

II. The relationship between IHL and IHRL: Convergence or contradiction?

Thinking about the relationship between IHL and IHRL, we might first of all look at the respective intellectual roots and histories of codification. Historical roots and developments of IHL are in themselves object of opposing narratives.¹⁵ Traditionally, it is held that laws of war have for a long time and throughout all cultures existed to limit the destructive effects of hostilities.¹⁶ In a different narrative, however, laws of war have often failed to actually improve the situation of the populations affected by war, or even went hand in hand with domination.¹⁷ As *Amanda Alexander* points out, both these descriptions adopt the view of a certain continuity between rules in previous centuries and the current framework of IHL. Advancing a description distinct from both, Alexander starts out from the observation that the term “*international humanitarian law*” as synonymous to “*laws of armed conflict*” only emerged in the 1960s.¹⁸ She suggests, the interpretation of rules of law took a genuinely new emphasis in those decades, increasingly including counter-hegemonic concerns, and shifting the balance between the principle of military necessity and the principle of humanity.¹⁹

This perspective on international humanitarian law replacing earlier traditions of laws of war goes hand in hand with the perspective of an increasing convergence between IHL and IHRL. Human rights, in turn, have two main historical points of anchorage: Firstly, the idea of inalienable rights as product of Enlightenment philosophy was legally codified in the *French* and the *American Constitution*.²⁰ In 1948, more than 150 years later and following the experiences of two World Wars and the Holocaust, the international community then aimed to “*reaffirm [...] their faith in fundamental human*

13 E.g. *Butler*, Sovereign Performatives in the Contemporary Scene of Utterance, *Critical Inquiry* Vol. 23, 2/1997, 350 (367); *Mouffe*, On the political, 2005, 11.

14 E.g. *Ingram*, Cosmopolitanism from Below: Universalism as Contestation, *Critical Horizons* Vol. 17, 1/2016, 66; *Benhabib*, Another Cosmopolitanism, 2006.

15 *Alexander*, A Short History of International Humanitarian Law, *European Journal of International Law* Vol. 26, 1/2015, 109 (111).

16 *Ibid.*, 111, 112.

17 *Ibid.*, 113.

18 *Ibid.*, 114.

19 *Ibid.*, 125.

20 Notably the 1776 Virginia Declaration of Rights, available at www.archives.gov/exhibits/charters/virginia_declaration_of_rights.html; and the 1789 Déclaration des Droits de l'Homme et du Citoyen, available at www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789.

rights”,²¹ which marks the beginning of the current regime of IHRL.²² Since then, it has developed from the 1948 *Universal Declaration* and the subsequent two international covenants,²³ encompassing various specific human rights treaties,²⁴ regional conventions,²⁵ and involving judicial bodies that interpret and develop human rights provisions.²⁶ This differentiation of IHRL went hand in hand with a growing influence it had for all areas of international law.²⁷

Since the beginnings of IHRL, its relationship with IHL has been an important topic in legal scholarship and practice.²⁸ Classically, it is emphasized how the two regimes are distinct in nature and evolution.²⁹ Law of armed conflict developed as law between states, and much through customary law. As such, it builds on a view of formal equality between rivaling parties, having roots for instance in the medieval norms of chivalry, which aim to guarantee a minimum of “*fair play*”.³⁰ Human rights law, by contrast, evolved first as domestic law and proceeds from the perspective of a hierarchical relationship between states and individuals. The respective demands of the two regimes will often differ considerably, raising the question, which regime or which norms are applicable. On a first level, it has been discussed whether IHRL can be applicable in situations of armed conflict at all. In the late 1960s and early 1970s, the perspective of two distinct legal fields became challenged and the application of human rights norms in situations of armed conflict was intensely debated in the framework of the *United Nations*.³¹ In opposition to the view that both regimes were so fundamentally different that one could not speak about a confluence, it is thereby pointed out how the underlying considerations of IHL relate to the idea of human rights,³² and that a complementing application of human rights can fill voids arising in the law of armed conflict.

Today, the general applicability of IHRL also in situations of armed conflict is widely accepted.³³ It is being viewed as *lex generalis* whereas IHL forms the *lex specialis* for circumstances of armed conflict.³⁴ The view of a confluence of the two regimes has come to enjoy, as *Orna Ben-Naftali* formulates pertinently, “*the status of the new or-*

21 Cf. the Preamble to the 1948 Universal Declaration of Human Rights (note 4).

22 *Alston/Goodman*, International Human Rights, 2013, 139.

23 Cf. above note 8 and 9.

24 E.g. the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), as adopted by the UN General Assembly on 19 December 1979.

25 E.g. the American Convention on Human Rights (ACHR), the European Convention on Human Rights (ECHR), and the African Charter on Human and People’s Rights (ACHPR).

26 On the far-reaching authority and the question of democratic legitimacy *von Bogdandy/ Venzke*, In Whose Name? A Public Law Theory of International Adjudication, 2014, in particular 63, 132.

27 Cf. e.g. for the case of refugee law *Hathaway*, Reconciving Refugee Law as Human Rights Protection, Journal of Refugee Studies Vol. 4, 2/1991, 113.

28 *Provost*, (note 6), 2. Cf. also *Draper*, Human Rights and the Law of War, Virginia Journal of International Law Vol. 12, 3/1972, 326.

29 *Quenivet*, Introduction, in: *Quenivet/Arnold* (Eds.) (note 6), 1 (2).

30 *Meron*, The Humanization of Humanitarian Law, American Journal of International Law Vol. 94, 2/2000, 239 (240).

31 *Quenivet* (note 29), 4, 5.

32 *Draper* (note 28), 327, 328, who speaks of “parentage”. *Provost* (note 6), 26.

33 See above note 5.

34 *Provost* (note 6), 277.

thodoxy”.³⁵ Many questions remain, most importantly as to the qualification of a situation as armed conflict, and as to which extent the applicability of rules of IHL exclude normative demands of IHRL. The *lex specialis* principle can thereby delimitate the direction, but hard cases will always require political choices about the prevailing rules.³⁶ In this regard, the distinct histories and paradigms of IHL and IHRL become visible again. This holds particularly true for cases involving the protection of a right to life the next section will discuss. While the view of a convergence between IHL and IHRL is thus reflective of the development in practice, it should not conceal that at the same time conflicting logics persist, and that questions of applicability for some bordering cases are not simply questions of gradual adjustment but can involve glaringly opposite results.

III. The right to life as conflict between the two regimes

IHL and IHRL evolved in different historical phases and have a different focus: While IHL introduces some rules to the situation of war and aims to limit suffering under those conditions, IHRL generally proceeds from the perspective of peace and contains much more far-reaching requirements for the protection of individual rights. But it is also clear that the normative considerations overlap in many instances: The development of IHRL has influenced the interpretation of IHL in various ways, and new types of armed conflict make the concurrent applicability ever more relevant. Under these conditions, the protection of the right to life can serve as a lens for tracing the underlying assumptions in the two regimes. After describing central principles for the protection of a right to life in IHRL (1) and in IHL (2), I will examine a few contentious aspects (3).

1. The right to life in IHRL

The right to life figures as key provision in all major international human rights conventions: The *Universal Declaration of Human Rights* (UDHR) states that “[e]veryone has the right to life, liberty and security of person”.³⁷ The *International Covenant on Civil and Political Rights* (ICCPR) holds that “[e]very human being has the inherent right to life[, which] shall be protected by law.”³⁸ In a similar way, the *American Convention on Human Rights* (ACHR), the *European Convention on Human Rights* (ECHR), and the *African Charter on Human and Peoples’ Rights* (ACHPR) all guarantee the right to life.³⁹ It belongs to the non-derogable provisions of those conventions, meaning that derogation clauses, which allow limiting right guarantees in times of emergency, do not extent to it. The right to life is thus counted among those most fun-

35 Ben-Naftali (note 7), 5.

36 Sassòli (note 2), 71; Shany, Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror, in: Ben-Naftali (ed.) (note 6), 13.

37 Art. 3 UDHR, (note 4).

38 Art. 6 ICCPR, note 8.

39 Cf. with detailed references Doswald-Beck, The right to life in armed conflict: does international humanitarian law provide all the answers?, *International Review of the Red Cross* Vol. 88, 2006, 864 (883).

damental guarantees, which the respective treaties exclude from a possible limitation even in conditions of public emergency. At the same time, the deprivation of life in situations of armed conflict is not considered a violation of the human rights provisions *per se*.

Under the ICCPR, the application of IHL as *lex specialis* is read into the question whether a deprivation of life is “arbitrary”.⁴⁰ As the ICJ held in its *Advisory Opinion* on the use of nuclear weapons, determining whether a deprivation of life was in violation of Article 6 ICCPR can in those cases

“only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself”.⁴¹

Along that vein, the ECHR explicitly excludes “lawful acts of war” from the non-derogability of the right to life.⁴² The case lies parallel for the ACHR, for which the *Inter-American Commission of Human Rights* has held that in lack of specific rules on the situation of armed conflict, whether the respective guarantee of the right to life was violated must be determined by reference to IHL.⁴³ For the ACHPR, the non-derogability of the right to life guarantee is as such less explicit,⁴⁴ but in parallel to the mentioned conventions deprivation of life in situations of armed conflict is not considered a violation insofar as it respects the rules of IHL.⁴⁵

In general, the right to life in IHRL constitutes both, a negative and a positive obligation, for the state towards individuals. Beside the prohibition to arbitrarily deprive a person of her life, the right to life also refers to the obligation of a state to safeguard the lives of persons under its jurisdiction and in that context to investigate the killing of a person.⁴⁶ For the killing of a person by state authorities in order not to violate the guarantee, there are very strict requirements as to the necessity and proportionality. The direct killing of a person can only be justified as measure of self-defense. A “collateral damage” as in IHL is not justified under international human rights law;⁴⁷ when occurring as side effect of the state’s legitimate use of force, all appropriate measures of precaution must have been taken.⁴⁸

40 Otto, Targeted Killings and International Law, 2012, 106.

41 International Court of Justice, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 8 July 1996, I.C.J. Advisory Opinion 1996, 225 (240).

42 Cf. Art. 15 para. 2 of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

43 Otto (note 40), 128. With reference to the La Tablada Case, IACoMHR, Report No. 55/97, Case No. 11.137: Argentina, OEA/Ser/L/V/II.98, 1997, para. 158.

44 Otto (note 40), 141, 143.

45 Ibid.

46 Wicks (note 11), 201.

47 Otto (note 40), 103.

48 Quenivet, The Right to Life in International Humanitarian Law and Human Rights Law, in: Quenivet/ Arnold (Eds.) (note 6), 331 (347).

2. The right to life in IHL

The boundaries for the killing of a person to be legitimate are much wider in the law of armed conflict. In fact, speaking about a right to life in situations of armed conflict might sound like a contradiction in terms: Armed conflict is characterized by the occurrence of violent and often fatal acts of force,⁴⁹ and a right to life is certainly hard to maintain in absolute terms.⁵⁰ Nonetheless, in order to examine cases of conflict between IHL and IHRL in that respect, it makes sense to describe the rules of IHL with view to the protection of a right to life. Three points thereby appear central: firstly, the rules pertaining to combatancy and the containment of warfare, secondly, those regarding the protection of civilians and the notion of collateral damage, and lastly, the prohibition of human shields.

a. Rules of combatancy and the containment of warfare

It has been called the “*basic axiom*” of IHL that acts to weaken the military potential of the enemy are in general not punishable under domestic law.⁵¹ This excludes war crimes, thus grave breaches of IHL,⁵² which can be adjudicated in every state according to the concept of universal jurisdiction.⁵³ Apart from those cases of grave breaches, IHL constitutes the *lex specialis* for situations of armed conflict, in which the killing of a person is permissible under wider conditions than under domestic laws and IHRL. This wider permission is framed as “*privilege of belligerency*”, referring to the exclusion from criminal liability. With this privilege not to be punished for killing in war corresponds the weaker protection of a right to life, in particular for combatants themselves.

Yet, the law of armed conflict is not without limitation regarding the killing of enemy combatants.⁵⁴ Already the 1868 *St. Petersburg Declaration* forbids the “*employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable*”, expressing that whenever possible, combatants should avoid causing the deaths of adversary combatants.⁵⁵ Under the prohibition of perfidy, the treacherous killing of adversary combatants is interdicted.⁵⁶ Moreover, persons *hors de combat* cease to be legitimate targets.⁵⁷ Central to the privilege of belligerency is thus the delimitation

49 I here and in the following refer to armed conflict both as international and as non-international armed conflict. When speaking about “war”, this equally includes both forms, as suggested in Steven P. Lee’s definition of war as “the use of force for political purposes by one side in a large-scale armed conflict where both (or all) sides are states or other large organized groups”, Lee, *Ethics and War: An Introduction*, 2012, 9.

50 Cf. also Wicks, *The Right to Life and Conflicting Interests*, 2010, 79.

51 Sassoli *et al.* (note 3), Chapter 5, 1.

52 Cf. for a definition Art. 8 para. 2 of the Rome Statute of the International Criminal Court.

53 O’Keefe, *Universal Jurisdiction. Clarifying the Basic Concept*, *Journal of International Criminal Justice* Vol. 2, 2004, 735.

54 Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2004, 198.

55 Shue, *Laws of war*, in: Besson/Tasioulas (Eds.), *The Philosophy of International Law*, 2010, 551.

56 Art. 23 lit. b of the 1907 Hague Convention; see also Otto (note 40), 255.

57 Art. 41 para. 1 of the Additional Protocol I (1977).

of who counts as a combatant.⁵⁸ This concerns the side of being excluded from criminal liability, but also the side of being considered a permissible target in the conduct of hostilities. Regarding the privilege of belligerency, the qualification as combatant works as delimitation towards civilians on the one hand, and towards unlawful fighters on the other.⁵⁹ The position of forming a legitimate target of acts of force by contrast extends to all persons who are members of enemy armed forces as well as persons who are not members of enemy armed forces but who directly take part in hostilities. Whereas the proposition that such “*unlawful fighters*” would not benefit from any protection under IHL is not convincing,⁶⁰ they constitute a potential source of attack and, accordingly, their targeting is considered as useful and necessary for military purposes.

b. The protection of civilians and the notion of collateral damage

Since the concession to kill in the conduct of hostilities builds on the aim to weaken the enemy, it is limited by what is useful and necessary for that purpose. This is reflected in all fundamental principles of IHL but finds most far-reaching expression in the principle of distinction *ratione personae*, requiring to distinguish at all times between military personnel and civilian population.⁶¹ The distinction *ratione personae* in IHL proceeds from the presumption that a person is civilian unless she falls under the definition of a combatant.⁶² Yet, as outlined in the last section, a person neither benefits from the protection as civilian if and when taking part in hostilities, whether momentarily or as an “*unlawful fighter*”.

Generally, civilians who do not take part in hostilities are no legitimate targets of violent acts. Yet even with regard to those, the framework of IHL allows a broader discretion of potentially fatal acts. Under the notion of “*collateral damage*”, the privilege of belligerency extends to the killing of civilians as long as the “*incidental loss of civilian life*” is not “*excessive in relation to the concrete and direct military advantage anticipated*”.⁶³ The death of civilians is thus accepted as “*collateral damage*” if it occurs as a side effect to permissible acts of war and is within the bounds of proportionality,⁶⁴ requiring a balancing of all relevant circumstances in each individual case.

58 IHL defines a combatant as any member of the armed forces of a party to the conflict other than medical personnel and chaplains, cf. Art. 43 para. 2 of the Additional Protocol I (1977); the rule is moreover considered part of customary international law, *Otto* (note 40), 221. Armed forces in turn are marked by four criteria: A commander being responsible for his subordinates, a fixed distinctive emblem recognizable at a distance, the carrying of arms openly, and the conduct of operations in accordance with the laws and customs of war, cf. Art. 1 of the 1907 Hague Convention as well as Art. 4 A of the 1949 Geneva Convention III.

59 Cf. Art. 4 A of the 1949 Geneva Convention III, which relates to the Prisoner of War Status. For further discussion *Otto* (note 40), 22.

60 *Otto* (note 40), 339.

61 Art. 48 of the Additional Protocol I (1977). See also *Thürer*, *International Humanitarian Law: Theory, Practice, Context*, 2011, 86.

62 Art. 50 of the Additional Protocol I (1977).

63 Cf. Art. 51 para. 5 b of the Additional Protocol I (1977).

64 For a general outline cf. *Lefkowitz*, *Collateral Damage*, in: Larry May (Ed.), *War. Essays in Political Philosophy*, 2008, 145.

c. *The prohibition of human shields*

As the principle of distinction allows the killing of civilians only under strict considerations of proportionality, the danger arises that a party to a conflict uses this prohibition for its military strategies, by deliberately “*shielding*” military objectives with civilian population. The Fourth Geneva Convention explicitly prohibits such use of “*human shields*”.⁶⁵ The prohibition is moreover considered a rule of customary IHL,⁶⁶ and falls under the war crimes enlisted by the Statute of the International Criminal Court (ICC).⁶⁷ Moreover, customary international humanitarian law contains a broader general rule that

“to the extent feasible, [...] civilian persons and objects [must be removed] from the vicinity of military objectives”.⁶⁸

The principle of distinction thus yields effects not only for a party’s conduct towards individuals belonging to the opposing party in hostilities. Important limitations to the conduct of a party towards its own population flow from the general purpose to protect civilians from the hostilities to the largest extent possible.

3. Lines of conflict

The far-reaching differences between IHL and IHRL regarding the protection of a right to life mean that the decision on which rule is considered applicable will correspond with extremely opposing results as to whether a person’s killing is permissible or justifiable. Rules of interpretation do not conclusively answer this question of applicability: Whereas the principle of *lex specialis* can guide situations of rule conflict, it does not produce “*one right answer*” for every case.⁶⁹ Rather, the delimitation will by necessity involve political decisions. As *Martti Koskenniemi’s* formulates,

“the most important political conflicts in the international world are often legally articulated as conflicts of jurisdiction and applicable law”.⁷⁰

The lines of conflict between IHL and IHRL thereby involve three main points: the boundaries of state jurisdiction, the qualification of a person as taking part in hostilities, and the qualification of a situation as armed conflict.

65 Art. 28 of the Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (1949).

66 Rule 97 of the ICRC Study on Customary International Law, see *Henckaerts/Doswald-Beck*, Customary International Humanitarian Law, Volume I: Rules, 2005, 337.

67 Art. 8 para. 2 b (xxiii) of the Rome Statute of the International Criminal Court.

68 Rule 24 of the ICRC Study on Customary International Law, see *Henckaerts/Doswald-Beck* (note 66), 74.

69 *Sassòli* (note 2), 85.

70 *Koskenniemi*, The Politics of International Law – 20 Years Later, *European Journal of International Law* Vol. 20, 1/2009, 7 (10).

a. *Boundaries of state jurisdiction*

Whether a conflict of rules arises will depend on the applicability of human rights laws. Human rights conventions slightly differ in their wording regarding applicability, with the ICCPR referring to the territory and the jurisdiction of a state,⁷¹ whereas the ECHR and the ACHR only refer to the jurisdiction.⁷² Generally, whether IHLR is applicable will depend on whether jurisdiction is established, which is always the case for acts on a state's own territory, but can also be the case extra-territorially.⁷³ The decisive question is then the “*existence of a factual connection*”,⁷⁴ or the “*effective control*” of a state over persons. For cases of armed conflict, this threshold of factual connection in the sense of effective control has seminaly been discussed in and with regard to the *Bankovic* case before the *European Court of Human Rights* (ECtHR).⁷⁵ In its decision on admissibility, the ECtHR gave the criterion of “*effective control*” a narrow interpretation, holding that the applicability of the ECHR explicitly differs from the applicability of IHL under the Geneva Conventions, and that jurisdiction of the respective states had not been established in that case.⁷⁶ Foremost, it remains contentious whether the question of applicability of human rights would – for the ECHR and in general – have to be answered categorically for one situation, or whether a sliding scale conception of applicability of human rights provisions is conceivable.⁷⁷

b. *The qualification of persons as taking part in hostilities*

Moreover, we have seen above that the extent of the protection of a right to life within IHL depends on the qualification of a person as civilian or participant in hostilities. Those boundaries of who is effectively engaged in hostilities and may therefore be killed under the privilege of belligerency are difficult to draw,⁷⁸ particularly given the “*civilianization of armed conflicts*”:⁷⁹ Most armed conflicts today being of non-international nature, at least one side will often not consist in combatants carrying formal signs of demarcation. Moreover, the asymmetrical nature of conflicts makes also the distinction between acts of taking part in hostilities, and a conduct, which is still considered an

71 This has led to the debate whether these two criteria should be read cumulatively or alternatively, with the majority opinion opting for the latter. Cf. *Otto* (note 40), 371.

72 Cf. e.g. Art. 1 European Convention on Human Rights (ECHR); Art. 1 para. 1 American Convention on Human Rights (ACHR).

73 *Wilde*, Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties, in: Quenivet/Arnold (Eds.) (note 6), 133 (137).

74 *Ibid.*

75 *Bankovic and Others v. Belgium and Others* European Court of Human Rights, Grand Chamber Decision as to the admissibility of Application No. 52207/99, 12 December 2001. The case concerned the bombing of a Radio Station in Serbia, then Yugoslavia, and the question whether the European member states of the North Atlantic Treaty Organization could be held accountable for the death of persons caused by the bombing.

76 *Ibid.*, para. 75.

77 *Wilde* (note 73), 151, 152.

78 *Doswald-Beck* (note 39), 882.

79 *Sassòli et al.* (note 3), Chapter 5, 1.

everyday activity although directly or indirectly benefitting a party to the armed conflict, increasingly intricate.

c. *The qualification of a situation as armed conflict*

Finally, the delimitation of IHL and IHRL will often depend on the overall qualification of a situation as armed conflict. This is regularly discussed in the context of a state's response to terrorist acts and the fight against terrorist structures. How acts of killing a person suspected a terrorist or member of a terrorist group should be understood in legal terms has been described as the conflict between a law-and-order-paradigm and an armed-conflict-paradigm.⁸⁰ *Yuval Shany* suggests that, given the huge differences between the two regimes, each appearing imperfectly suited for covering the situation, a mixed paradigm emerged under which IHRL and IHL are co-applied.⁸¹ Under such mixed paradigm, for instance, the IHL-principle of proportionality is interpreted to require opting for the “*least harmful measure even in relation to enemy combatants*”.⁸² It remains that rules of IHL allow targeting a person based on its group affiliation and without any further criminal procedure or requirements of self-defense. If a situation is not qualified as an armed conflict, by contrast, the targeting of a person falls under strict pre-conditions, either of immediate self-defense or of criminal procedure and punishment.

IV. Lines of conflict between IHL and IHRL in broader perspective

These lines of conflict between IHL and IHRL with regard to a right to life concern concrete questions of rule applicability. But the two regimes also correspond with different normative grammars – one that grounded in a state-centric framework, and one oriented at a rights universalism. The increasing difficulty to separate their areas of application in that sense appears indicative of a more general uncertainty about the appropriate normative grammar today: We find ourselves in a condition, in which the boundaries of the nation state are no longer accepted as natural or primary boundaries of rights and duties, and where at the same time a disillusion with ideas of boundless universalism has taken place. In that vein, the lines of conflict might serve as markers for where the need for normative demarcations about a right to life in a globalized world arises.

To situate the questions about the applicability of IHL and IHRL in more general analyses, I will first look at how they correspond with conceptions of war and peace in the age of globalization (1). This refers to established considerations about the relationship between war and peace, and their contemporary and possibly changing significance. Most notably, the situation of two states as parties to a conflict that underlies IHL as paradigmatic case no longer constitutes the rule but the exception. Not only do most armed conflicts today involve at least one side that is not a state. More generally, the

80 *Shany* (note 36), 14.

81 *Shany* (note 36), 24.

82 *Ibid.*, 26, with reference to the case before the Israeli Supreme Court *Public Committee against Torture in Israel vs. Israel*, HCJ 769/02, ILDC 597 (IL 2006), para. 21.

boundaries of an inside and outside of political communities have become blurred, as many cases in which the applicability of IHL is debated suggest (2).

The overall evolution appears, however, not simply as one of a vanishing significance of territorial borders, but a more complex process in which territorial delimitations are partly replaced by other axes of separation and exclusion. Several critiques of human rights universalism in the last decades have pointed out in that regard, how the language of universal rights can work to conceal rather than remedy exclusions. Accounts of a critical universalism, in turn, have sought to defend the importance of human rights, and to conceptualize them in a way that recognizes the complex preconditions of rights and their dependence on political membership (3). In that respect, the discussed conflicts also illustrate dangers arising from an exclusion of persons from the language of human rights.

1. War and peace in a globalized world

IHL and IHRL represent, as advanced in the beginning of this article, not only two legal regimes but also two normative frameworks corresponding to perceptions of war and peace as conditions of human coexistence. The qualification of situations as “war” or, more technically, “armed conflict” in many cases not only works as a legal qualification, but concurrently as rhetoric justification in a general discourse about the permissibility of limiting individual rights, and of making exceptions from otherwise persisting demands of (human rights) law.⁸³ In that sense, a general public discourse regarding notions of “war” and “peace” often parallels the legal discourse about the applicability of rules from IHL and from IHRL.⁸⁴

Analyzing the contemporary conditions of armed conflict, authors have suggested in various ways that the basic premises have become challenged and that the distinction between war and peace as such is increasingly difficult. The increasing overlap between IHL and IHRL, and the challenge of deciding between competing normative demands then appears not only as a conflict between legal regimes, but as a disarray in the social conditions they presuppose. One phenomenon that raises questions in several mentioned respects is transnational terrorism: Posing threats on the territory of a state while often not clearly locatable in the same or in another state, it profoundly challenges perceptions of territorial sovereignty. And while respective acts of individuals also fall under criminal law, it typically induces the question where to draw the line between criminal acts and hostilities in the sense of armed conflict.⁸⁵ At the same time, practices of targeted killing and the use of drones, typically employed as responses to terrorism, equally put into question the distinguishability of spheres of war and peace. Targeted killings are defined as the intentional, premediated, and deliberate use of lethal force against an

83 For a critique of the far-reaching employment of the term “war” in the US-American context see *Henkin*, War and Terrorism: Law or Metaphor, Santa Clara Law Review Vol. 45, 2004/2005, 817 (819).

84 Cf. the attention that the terminology of “war” received in the context of France after the terrorist attacks in November 2015, e.g. www.cnn.com/2015/11/16/world/paris-attacks/.

85 *Shany* (note 36), 13.

individual person.⁸⁶ They constitute acts that fall under the law of armed conflict (rather than criminal law), yet without a generally perceivable situation of armed conflict.⁸⁷ Frequently operated from distance, they especially interrupt presumptions of co-presence of combatants, and more generally a territorially based vision of armed conflict.⁸⁸

Yet, it would be overly simplistic to deduce that the role of territorial sovereignty is diminishing in the course of globalization.⁸⁹ The increasing global interdependencies certainly shape the nature and appearance of armed conflict in many ways: Zygmunt Bauman in that regard distinguishes between “*globalising wars*” and “*globalisation-induced wars*”.⁹⁰ At the same time, globalization itself constitutes a highly complex phenomenon. The ways, in which the framework of the nation state is challenged and complemented, are ambivalent and multi-faceted, including vehement reaffirmations of territorial borders and national belonging, re-emerging racial exclusions, and differentiated openness along criteria of class.⁹¹ These complexities regarding the position of the nation state are central also when analyzing how boundaries between the rules of IHL and IHRL with respect to a right to life are drawn, and whose lives are endangered to which extent.⁹²

Nick Mansfield suggests in that vein that we are not so much dealing with a new development of “*disappearing difference*” between war and peace,⁹³ but that the two sides always inherently relate to each other.⁹⁴ Indeed, the juxtaposition of war and peace can hardly appear as a stable one, since the notions do not refer to empirically definable conditions. We can distinguish two main conceptions of the relationship between war and peace, or war and “*its other*”:⁹⁵ a view of opposition on the one hand, and one of continuum on the other. Mansfield describes the positions of *Thomas Hobbes* for the former, and *Carl von Clausewitz* for the other as the two poles that demarcate the field.⁹⁶ Whereas *Hobbes* regarded war as the state of human interaction that must be overcome and opposes it to “*civil society*”, *Clausewitz* viewed war in continuity with politics in general, coining the phrase that “*war is merely the continuation of policy by other means*”.⁹⁷ These perspectives on the relationship between war and its other are central when thinking about the way law can contribute to establishing or securing peace: Viewing war and civil society as strictly opposed, law is traditionally seen as an instrument for installing peace. From a perspective of a more entangled relationship between war and peace, the position of law is equally more ambivalent: As much as an element

86 *Melzer*, Targeted Killing in International Law, 2008, 3, 4.

87 For the restrictions in IHL on the practice of targeted killings cf. *Otto* (note 40), 347.

88 Cf. *Otto* (note 40), 8.

89 *Elden*, Terror and Territory. The Spatial Extent of Sovereignty, 2009, 177.

90 Cf. *Mansfield*, Theorizing War. From Hobbes to Badiou, 2008, 142, with reference to *Bauman*, Wars of the Globalisation Era, *European Journal of Social Theory* Vol. 4, 1/2001, 11.

91 *Balibar*, Equaliberty, 2014, 205, 295.

92 *Butler*, Frames of War, 2009, 25.

93 Or as Mansfield frames it, “war and its other”, *Mansfield* (note 90), 39.

94 *Ibid.*, 6.

95 *Mansfield* (note 90), 39.

96 *Mansfield* (note 90), 9.

97 Cf. *von Clausewitz*, On War, 1832 (transl. Howard and Paret, 1984), 85.

of opposition forms part of social relations even outside armed conflict, law irreducibly involves an element of violence.⁹⁸

We can relate back these two perspectives to the relationship between IHLR and IHL, taking for instance the description of the influence of IHRL on the law of armed conflict as a “*humanization of humanitarian law*”.⁹⁹ While this proposition points to some undeniably positive effects that human rights law has had on the law of armed conflict, its more far-reaching interpretation will hinge on the respective conception: Viewing war in opposition to peace, the latter being upheld by law, the influence of IHRL on IHL by introducing a higher level of regulation also tends to be seen to automatically work towards a more peaceful condition. Regarding the conditions of war and peace as more entangled, however, the evolving relationship between IHL and IHRL equally appears less straightforward. Human rights law contains, as has been discussed, more far-reaching requirements for the protection of a right to life. At the same time, it finds its limits in the boundaries of state jurisdiction. The concrete contents of human rights are indeterminate as a result of being subject to differing interpretations depending on political interests and opinions. IHL in that sense is less concealing regarding the role of political interests and opinions, but has partly lost in adequacy insofar as it relies on the picture of states as only decisive entities of law and politics.

2. Boundaries of the territorial nation state

War has generally been conceived as prerogative of states.¹⁰⁰ This again holds true on the level of law, where *inter-national* law essentially builds on the sovereign equality of states.¹⁰¹ But more generally, the relationship between states constitutes the paradigmatic case of our thinking about war and peace. It were peace treaties that stand at the origin of the common terminology for our contemporary political order of states: *The Westphalian Peace* in 1648 marks the beginning transition from a religiously ordered world to an order of territorial states in *Europe*. Whereas religion had been the determining factor of identity but also of opposition in the previous ages, the idea of the nation started to be the ordering principle and the reference point of both membership and conflict.

This relationship of the territorial order of states with normative assumptions about war and peace points to several ensuing reflections: What does the particular origins of the nation state framework mean for the impartiality of international laws of armed conflict regarding different parts of the world?¹⁰² To which extent has the ubiquity of territorial states as reference points of rules of law always been a fiction? And how do the current changes in the framework of legitimacy thinking, whether framed as “*the*

98 Derrida, *Force of Law: The Mystical Foundation of Authority*, *Cardozo Law Review* Vol. 11, 1990, 920. For a reflective discussion together with other authors see *Mansfield* (note 96), 98.

99 *Meron*, (note 30), 239.

100 *Mansfield* (note 96), 1.

101 Cf. Art. 2 para. 1 of the Charter of the United Nations.

102 For references to postcolonial critiques of IHL see *Alexander* (note 15), 113.

post-national constellation”,¹⁰³ as emerging global constitution,¹⁰⁴ as “*global polity*”,¹⁰⁵ or “*global condominium*”,¹⁰⁶ impact on the perception of IHL?

Processes of globalization certainly put into question the “*Westphalian political imaginary*”,¹⁰⁷ and thereby also challenge the role of the state as framework for rights and obligations. The challenging of states as being “*the monopolist of war*”¹⁰⁸ raises questions about the underlying conception of opposing parties to an armed conflict. This can also be related to the moral justification of the privilege of belligerency: In that vein, it has been suggested understanding the killing of a person in armed conflict as act of self-defense, though in a broader sense with combatants being considered as aggressors for reason of their group affiliation, regardless of any individual moral responsibility.¹⁰⁹ In structure, the moral justification for killing a person in armed conflict is thus build in parallel to the justification outside armed conflict. This construction of forming a legitimate target due to national membership obviously looses in persuasiveness the less states are seen as only or paramount frameworks of rights. In light of these considerations, the exposure to military service itself can be reassessed. This does certainly not mean a simple critique of obligatory conscription.¹¹⁰ Yet, it might point to the role of a right to life for the issue of conscientious objection to military service,¹¹¹ and the obligations that states hold in that respect towards nationals of other states.¹¹²

3. Limitations of human rights universalism

We thus see how the state framework as paradigm underlying IHL is no longer taken for granted and how specific rules can be challenged with reference to a more universalist perspective. Human rights claims play a crucial role in contrasting the state-bounded conception. More generally, over the last decades, human rights law forms part of the process in which the individual has gained importance as a subject of international law.¹¹³ At the same time, the idea of human rights and the underlying universalism have also been subject to important criticisms: In the context of stateless persons and refugees, Hannah Arendt has famously maintained that the idea of unalienable rights was part of the problem rather than the solution, and that “[t]he very phrase ‘human rights’”

103 *Habermas*, *The Postnational Constellation: Political Essays*, 2001.

104 *Fischer-Lescano*, *Globalverfassung*, 2005.

105 *Cassese*, *The Global Polity*, 2012.

106 *Benvenisti*, *Sovereigns as Trustees of Humanity*, *American Journal of International Law* Vol. 107, 2/2013, 295 (298).

107 *Fraser* (note 12), 4.

108 *Mansfield*, (note 90), 153, with reference to *Münkler*, *The New Wars*, 2005, 2.

109 *Lee*, *Ethics and War: An Introduction*, 2012, 169.

110 Cf. already *Walter Benjamin*, *Critique of Violence*, 1921, Demetz (Ed.) 1986, 284, linking the question of conscription to the place of violence in the law in general.

111 *Takemura*, *International Human Right to Conscientious Objection to Military Service and Individual Duties to Disobey Manifestly Illegal Orders*, 2009, 37.

112 *Takemura* (note 111), 40, with reference to UN GA Res 33/165, 154, UN Doc A/33/45 [1].

113 *Clapham*, *The Role of the Individual in International Law*, *European Journal of International Law* Vol. 21, 1/2010, 25.

was “*the evidence of hopeless idealism or fumbling feeble-minded hypocrisy*”.¹¹⁴ Arendt’s critique of human rights points out that rights by nature relate to their mutual recognition within a community, and are thus necessarily dependent on some form of political membership.¹¹⁵ Neglecting this dependence of rights on political membership is disposed to contribute to an even greater condition of rightlessness.¹¹⁶

In addition to this line of critique, it has been emphasized that the universalist language of human rights tends to conceal the particular nature of any dominant interpretation.¹¹⁷ The concrete content and demands of human rights norms are not conclusively determinate but subject to conflicting political claims.¹¹⁸ At the same time, human rights tend to be viewed as universally valid and to be accepted by all,¹¹⁹ and for that reason are susceptible of becoming part of an imperialist “*epistemic violence*” through law.¹²⁰ In awareness of these dangers, several scholars in recent years have aimed to reconceptualize the understanding of human rights, shifting the focus to the political processes of founding human rights.¹²¹ Rather than rights with a stable, determinate content, human rights are then viewed as positions, the content of which is contested and shaped through every invocation.¹²² As such, human rights are not rejected as *per se* subject to dominant interpretations, but regarded as an important vocabulary in emancipatory processes.

These lines of critique appear central when considering conflicts between IHL and IHRL regarding a right to life. Whereas the protection of a right to life is far-reaching in the provision of IHRL, we have seen that its applicability hinges on the conception of state jurisdiction, and that this conception will rely on background assumptions about the boundaries of political community and obligations of solidarity. For whom and under which conditions the protection of a right to life can be limited, also within the territorial boundaries of the state, is vice versa subject to political conceptions of the demarcation of citizens and foreigners, of fellow and enemy.¹²³ The conflicts with IHL thus mark the limits that, despite the universalist language, legal provisions of human rights will necessarily have, and call for a stronger awareness about the political decisions underlying those delimitations.

114 *Arendt*, *The Origins of Totalitarianism*, 1951, 269.

115 *Arendt* (note 114), 291, 295.

116 Cf. also for a contemporary account *Gündoğdu*, *Rightlessness in an Age of Rights*. Hannah Arendt and the Contemporary Struggles of Migrants, 2015.

117 *Tully*, *On Global Citizenship*, 2014, 324, 325.

118 *Koskeniemi*, *The Politics of International Law*, 2011, 131.

119 *Mouffe*, Which world order: cosmopolitan or multipolar?, *Ethical Perspectives* Vol. 15, 4/2008, 453 (454).

120 *Spivak*, “Can the subaltern speak?” revised edition, in: Morris (Ed.), *Can the Subaltern Speak?: Reflections on the History of an Idea*, 2010, 21 (37, 39).

121 *Gündoğdu* (note 116), 209; *Ingram*, *Radical Cosmopolitics. The Ethics and Politics of Democratic Universalism*, 2013, 147.

122 Cf. with the notions of “democratic iterations” and “jurisgenerative politics” *Benhabib*, *The Rights of Others*, 2004, 179; *Benhabib*, *The new sovereigntism and transnational law: Legal utopianism, democratic scepticism and statist realism*, *Global Constitutionalism* Vol. 5, 1/2016, 109 (122).

123 *Balibar* (note 91), 189.

V. Conclusion

The political idea of the nation that has made it possible, as *Benedict Anderson* writes,

“over the past two centuries, for so many millions of people, not so much to kill, as willingly to die for such limited imaginings”.¹²⁴

How the demise of the order of nation states might impact on our thinking about a right to life in relation to armed conflict has been a central concern of this article. I have tried to sketch how the legal debate about the relationship between IHL and IHRL parallels considerations in political philosophy about the distinguishability of war and peace under contemporary conditions. The right to life, although in itself an ambivalent notion,¹²⁵ can serve as a lens for describing conflicting logics of the two legal regimes and to understand these logics as engaged in a dialectical process, in which limitations of both become thematized.

The territorial order of states has its – at least symbolic – point of origin in the endeavors of installing peace:¹²⁶ The Westphalian peace treaties ending the *Thirty Years’ War* embody the creation of an order that worked to appease religious oppositions and became the framework, in which the core values of modernity, equality and freedom,¹²⁷ have become concretized in legal institutions. At the same time, this framework of the nation state stood at the basis of the most violent wars and persecutions in 20th century.¹²⁸ Today, it appears that we have by far not moved beyond the framework of the nation, yet that, to borrow *Étienne Balibar’s* words, the

“separation between inside and outside [...], even if necessary to the very definition of the nation, is becoming increasingly virtual”.¹²⁹

On the one hand, national boundaries are increasingly contested, processes of globalization and internationalization can in some regards be reconstructed as working to move beyond the exclusions inherent in the nation state order. On the other hand, privileges of “*global existence*” being distributed highly unequally, we find in many cases a “*fusion of racial and class exclusions*”.¹³⁰

This analysis of changing lines of exclusions not only concerns the antinomies present in laws of armed conflict as representative of the state-centric framework. It equally

124 *Anderson*, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, 1983, 7.

125 Cf. for a “critique of the right to life” and the postulation to retrieve thinking about “life” for the Left *Butler* (note 92), 15.

126 In the modern understanding, this arguably begins far before the Westphalian treaties. See *Roth-Isigkeit*, *Niccolò Machiavelli’s International Legal Thought – Culture, Contingency and Construction*, in: *Kadelbach/Kleinlein/Roth-Isigkeit* (Eds.), *System, Order and International Law – The Early History of International Legal Thought* (forthcoming).

127 *Honneth*, *Freedom’s Right: The Social Foundations of Democratic Life*, 2014, 15.

128 *Sassen*, *Guests and Aliens*, 1999, 79; *Arendt* (note 114), in particular 161, 267. Cf. also for an analysis of Arendt in that regard *Volk*, *Arendtian Constitutionalism. Law, Politics and the Order of Freedom*, 2015, 17.

129 *Balibar*, (note 91), 271.

130 *Ibid.*, 253.

concerns human rights law, which embodies a more individualistic logic with a universalist horizon, but must constantly be reconsidered as to the effect that structures of power have on its dominant interpretations. The medium of law is central in constructing the differential exposure to death and violence,¹³¹ in creating the practical conditions for the “*right to kill, to allow to live, or to expose to death*”.¹³² Thinking about the protection of a right to life between these poles, we are confronted with fundamental normative questions about the place of the individual in the world.

131 *Butler* (note 92), 25.

132 *Mbembe*, *Necropolitics*, *Public Culture* Vol. 15, 1/2003, 11 (12).