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Data: 13, 14 e 15 de Março de 2023
Organização: NELB — Núcleo de Estudo Luso-Brasileiro

Programação:

Dia 13 de Março de 2023

17h15 (Brasília) | 20h15 (Lisboa)
Evento: Cerimônia de abertura e Conferência Inaugural (aberto ao público geral)
Apresentação: Presidente do NELB - Sr. André Brito
Convidada: Prof.ª Doutora Paula Vaz Freire (Diretora da Faculdade de Direito da Universidade de Lisboa)
Conferência de Abertura: "Um mundo em Guerras. Os desafios e futuro do Direito Internacional Público." por Prof. Doutor Francisco Pereira Coutinho (NOVA School of Law-PT)
Dia 14 de Março de 2023

15h00 (Brasília) | 18h00 (Lisboa) - Painel 1: "Direito Internacional e Saúde Mundial."

Conferência: "Impacto das crises sanitárias internacionais sobre os direitos dos migrantes" por Dra. Emmelin de Oliveira (Nova School of Law | PT)
Conferência: "O papel da ONU na prevenção de futuras pandemias" por Prof. Doutora Marina Sanches Wünsch (UNIVERSIDADE DO PAMPA | BR)
Moderadora: Dra. Jamila Campanaro
17h15 (Brasília) | 20h15 (Lisboa) - Painel 2: "Direito Internacional e Regulação do Ciberespaço."

Conferência: "Os desafios da regulação do ciberespaço pelo Direito Internacional" por Prof. Catedrático Jorge Bacelar Gouveia (Faculdade de Direito Nova de Lisboa | PT)
Conferência: "Guerra Cibernética: Os novos desafios do Direito internacional" por Prof.ª Doutora Renata Furtado de Barros (PUC/MG | BR)
Moderador: Dra. Nathaly V. Lehnen
Dia 15 de Março de 2023

15h00 (Brasília) | 18h00 (Lisboa) - Painel 3: "Direito Internacional, Energia, Gás e Petróleo"

Conferência: "A internacionalização do Direito do Gás, Petróleo e Energia" por Prof.ª Doutora Maria João C. P. Rolim (CEDIN/BR)
Conferência: "Perspectivas e tendências do futuro do Direito Internacional da Energia pós agenda 2030" por Prof. Doutor Francisco Paes Silva Marques (FDUL/PT)
Mediador: Dr. Filipe Novaes (FDL/ PT)
17h15 (Brasília) | 20h15 (Lisboa) - Conferência de Encerramento

Apresentação: Dr. Alysson Bezerra (Diretor Científico do NELB)
Conferência: "O combate à fake news em escala internacional" por Prof. Doutor Daniel Freire e Almeida (UNISANTOS | BR)
Moderador: Dr. Frederico Gonçalves Junkert (FDUL)

THE INTERACTION BETWEEN INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW REGARDING THE PROTECTION OF THE RIGHT TO LIFE DURING ARMED CONFLICTS[1]

A interação entre o Direito Internacional Humanitário e o Direito Internacional dos Direitos Humanos relativamente à proteção do direito à vida durante conflitos armados

João Pedro Quintela*

Keywords: Developments in international and regional jurisprudence have recognized the overlap between International Humanitarian Law and International Human Rights Law in multiple domains. However, the different logic on which the branches were based may offer contrasting solutions when it comes to the protection of the right to life. There are still challenges to be addressed in comprehending the interaction between the two branches, even when taking into consideration the suggestions provided by the International Court of Justice and the key human rights treaty bodies. This article analyzes these challenges and considers how complementarity and the lex specialis principle should be employed toward the maximum protection of individuals and the systemic coherence of international law.

Keywords: International Humanitarian law; human rights; armed conflict; complementarity; lex specialis.

Resumo: Desenvolvimentos na jurisprudência internacional e regional reconheceram a sobreposição do Direito Internacional Humanitário e do Direito Internacional dos Direitos

[1] List of acronyms: ACHPR (African Charter of Human and Peoples' Rights); ACHR (American Convention on Human Rights); API (Additional Protocol I to the Geneva Conventions of 1949); APII (Additional Protocol II to the Geneva Conventions); ECHR (European Convention on Human Rights); ECtHR (European Court of Human Rights); ICJ (International Court of Justice); ICCPR (International Covenant on Civil and Political Rights); ICRC (International Committee of the Red Cross); IACHR (Inter American Commission of Human Rights); IHL (International Humanitarian Law); IHRL (International Human Rights Law); UDHR (Universal Declaration of Human Rights); VCLT (Vienna Convention on the Law of Treaties).

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Humanos em diferentes domínios. No entanto, a distinta lógica sobre a qual os ramos foram construídos pode oferecer soluções distintas no que tange à proteção do direito à vida. Tendo-se em consideração as indicações do Tribunal Internacional de Justiça e dos principais organismos de direitos humanos, há ainda obstáculos a serem superados no entendimento da interação entre os dois ramos. O presente trabalho visa analisar esses desafios e responder à questão de saber como efetivamente a complementaridade e o princípio da lex specialis devem ser aplicados com vista à máxima proteção dos indivíduos e à coerência sistemática jurídico-internacional.

Palavras-chave: Direito Internacional Humanitário; direitos humanos; conflitos armados; complementaridade; lex specialis.

1. Introduction

IHL was created to regulate the conduct of the parties while providing minimal protection and limiting the impacts of armed conflicts. IHRL, on the other hand, deals with the inherent rights of the person to be protected at all times against abusive power[3]. Therefore, IHRL relies on humanity as the reference point insofar as IHL leans on the order of states as determining entities of rights and obligations[4].

Thus, it appears that the interplay between IHL and IHRL is a dialectical process that draws attention to their respective limitations. However, they share a

[3] CORDULA DROEGE, The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict, *Israel Law Review*, vol. 40, n.º 2, 2007, p. 310.
[4] DANA SCHMALZ, Normative demarcations of the right to life in a globalized world: Conflicts between Humanitarian Law and Human Rights Law as markers, *KritV, Crit Q, RCrit. Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft / Critical Quarterly for Legislation and Law / Revue critique trimestrielle de jurisprudence et de législation*, vol. 99, n.º 3, 2006, p. 234.

common idea of human dignity as well as they have a range of aspects in common that make them substantially overlap in practice. The protection of the right to life is one of these points of contact. Even if it was never meant for the branches to intersect, because different degrees of protection to the right to life are put out it is crucial to reconcile them[5].

When it comes to theoretical approaches to their interaction, the complementarity idea has the upper hand in the discussions, whereas separatist and integrationist theories have been overtaken[6]. It is claimed from a separatist perspective that, as the branches do not overlap, there is no co-application between them. When an armed conflict breaks out, it is as though a curtain would come down for IHRL's application because IHL completely controls the new situation[7]. In this sense, the branches would be irreconcilable and have an opposed nature[8].

The authors of the integrationist school, on the other side of the spectrum, favored a merger between the two branches, as though the two sets of norms could

[5] CORDULA DROEGE, The Interplay Between…, p. 310.

[6] Nevertheless, there are new trends regarding the separatist conception that IHL can "do it all" in efforts to secure the protection of the human person in times of armed conflict. Cf. KATHARINE FORTIN, The relationship between international human rights law and international humanitarian law: Taking stock at the end of 2022?, *Netherlands Quarterly of Human Rights*, vol. 40, n.º 4, 2022, pp. 350-351, "An obvious example of policy-dictated separatism can be found in the example of Russia deciding to denounce the ECHR entirely when it found itself receiving criticism for its invasion of Ukraine. A tendency towards separatism can also be found in the various arguments by States seeking to restrict any application of the treaty when States are acting extraterritorially outside the ECHR's '*espace juridique*'".

[7] KATHARINE FORTIN, The relationship between international human rights law and international humanitarian law: Taking stock at the end of 2022?, *Netherlands Quarterly of Human Rights*, vol. 40, n.º 4, 2022, p. 345.

[8] CARMEN MÁRQUEZ CARRASCO *et al*, Applicable regulatory frameworks regarding human rights violations in conflicts, *Frame*, n.º 10.2, 2015, p. 49.

coexist as one 'integrated legal regime'[9]. However, such a merger is unacceptable as it disregards structural differences between the two branches[10]. Also, it is now generally recognized that IHRL also applies during armed conflicts, so separatist approaches can be considered surpassed.

It is now undisputed that IHL and IHRL are two different systems, but because they are founded on the same principles and values they can influence and reinforce each other mutually. The ICJ supported this approach in the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons of 1996, which merits emphasizing two aspects. First, the Court held that the IHRL, specifically the ICCPR, does not cease to apply in times of war. Also, it accepted employing IHL as a *lex specialis*.

Even though the second aspect could suggest a separatist approach, doing so would mean ignoring the utility of the first. Besides, the *lex specialis* principle does not necessarily imply a total separation between the two branches as it can be interpreted in different ways. The court stated that IHL rules must be considered when interpreting Article 6 of the ICCPR during armed conflicts. In any case, the reference to the *lex specialis* principle raises some questions, including when and how to employ the principle as well as whether IHRL could qualify as *lex specialis*[11].

Later, in 2004, the ICJ broadened the argument to include the general applicability of human rights in armed conflicts in the Advisory Opinion on the

[9] KATHARINE FORTIN, The relationship between…, p. 345.
[10] CARMEN MÁRQUEZ CARRASCO *et al*, Applicable regulatory frameworks…, p. 58.
[11] KATHARINE FORTIN, The relationship between…, p. 347.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. In addition, it outlined situations surrounding the relationship between IHL and IHRL: some rights may fall under either IHL or IHRL solely, while others may fall under both. The last scenario is the one where the protection of the right to life belongs to. Nonetheless, the contours and consequences of this development remain unclear.

In that regard, this article analyzes the interaction between IHL and IHRL concerning the protection of the right to life. The interplay is founded on the complementarity concept and the *lex specialis* principle. Simply put, when the latter is properly employed, it can increase the overall protection of individuals and be entirely consistent with the former. In other words, the *lex specialis* should be considered as a principle of specific interpretation so it can be in accordance with the concept of complementarity. Furthermore, the employment of the *lex specialis* principle differs by context based on a teleological interpretation of the rules of international law. Thus, IHRL might not always be the *lex generalis*.

To provide a framework for the analysis of the interaction between IHL and IHRL, the various degrees of the protection of the right to life under the branches are briefly examined. With the ultimate goal of advancing both the systemic coherence of international law and the overall protection of individuals, their interaction is then effectively explored.

2. The right to life under IHRL

Since all other human rights would be meaningless in the absence of effective guarantees for the right to life, it is possible to consider it as a supreme

human right[12]. Accordingly, the protection of the right to life emerges as a primordial provision in all major international human rights conventions[13]. The scope of human rights, as is well known, extended greatly beyond the bounds of merely 'negative' freedom to impose on States a number of duties to ensure their effectiveness[14]. In this sense, the obligations of States have three dimensions: to respect, to safeguard, and to fulfill human rights[15].

Moreover, there are some rights protected by IHRL that are considered to be a part of the so-called 'hard core', which means that they are non-derogable[16]. Except for the African Charter and the silence of UDHR on armed conflict, the provisions protecting the right to life are part of the 'hard core'. Therefore, even in times of public emergency, the protection of the right to life is not subject to potential limitations under the human rights conventions[17].

Nevertheless, the deprivation of life during armed conflict is not considered a violation of the human rights provisions *per se*. Otherwise, intransigent protection of the right to life during armed conflicts would lead to the very uselessness of IHRL as a practical necessity. Not only have legal frameworks been established,

[12] CEES DE ROVER, *To Serve and to Protect: Human Rights and Humanitarian Law for Police and Security Forces*, ed. 2, Geneva, International Committee of the Red Cross, 2013, p. 246.
[13] See Article 3 of the UDHR and Article 6(1) of the ICCPR, but also in the ACHR, ECHR, and ACHPR. While the ICCPR (Article 6 (1)), the ACHR (Article 4(1)), and the ACHPR (Article 4) specify that no one may be "arbitrarily" deprived of life, the ECHR provides more guidance on Articles 2(2) and 15(2).
[14] CHRISTIAN TOMUSCHAT, Human Rights and International Humanitarian Law, *The European Journal of International Law*, vol. 21, n.º 1, 2010, p. 16.
[15] CARMEN MÁRQUEZ CARRASCO *et al*, Applicable regulatory frameworks…, p. 9.
[16] CARMEN MÁRQUEZ CARRASCO *et al*, Applicable regulatory frameworks…, p. 37.
[17] Regarding the derogation clauses, Article 4(2) of the ICCPR, Article 15(2) of the ECHR and Article 27(2) of the ACHR.

but also human rights protection systems with individual petitions, including courts, have been created. Accordingly, one cannot surrender to the idealistic promise of human rights as they were objectively necessary with no reference to another end which is the effective protection of individuals.

Indeed, it was never intended for the non-derogation clauses to completely prohibit killings during armed conflicts. Instead, because there was a clear distinction between the law of war and the law of peace, these conventions were thought to be inapplicable during armed conflicts[18]. However, the separatist doctrine has been repeatedly called into doubt by the ICJ and the human rights treaty bodies[19]. Moreover, a clear distinction between the two branches is further muddled by the phenomenon of 'civilianization of conflicts.'

Along that vein, the ECHR expressly states that 'lawful acts of war' do not result in violations of the right to life (Article 15(2)). In non-international armed conflicts, the use of force to lawfully quell an 'insurrection' is likewise justifiable (Article 2(2)(c))[20]. Also, the IACHR has ruled that in times of armed conflicts, the question of whether the right to life was violated must be determined in light of IHL and has expressly assigned itself the competence to apply IHL[21].

[18] CHRISTIAN TOMUSCHAT, Human Rights and…, p. 16.

[19] Concerning the statements of human rights treaty bodies, *e.g.*, Bámaca v. Guatemala, Case No. 11/129, Inter-Am. C.H.R., para. 209; S.C. Res. 1019, UN Doc. S/RES/1010 (Nov. 9, 1995) and S.C. Res. 1034, UN Doc. S/RES/1034 (Dec. 21, 1995); Isayeva, Yusupova and Basayea v. Russia, Eur. Ct. H.R. Judgment of Feb. 24, 2005. Regarding the statements of the ICJ, the aforementioned Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226-593 (July 8), at para. 25; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. (July 9), at para. 106.

[20] DANA SCHMALZ, Normative demarcations of…, p. 241.

[21] See, *e.g.*, Abella v. Argentina, Case 11.137, Inter-Am. Commission H.R. Report No. 55/97, OEA/Ser.L/V/II.98, doc 6 rev, (1997), at paras. 157-171.

IHRL was created to defend those under the authority of a State, hence it is based on the idea of law enforcement rather than the conduct of hostilities[22]. First and foremost, there must be an appropriate balance between the use of force threatening the right to life and the discretionary powers exercised by law enforcement officials. Also, it is crucial to ensure that the law enforcement organization as a whole is held to the fundamental requirements of legal and political accountability[23].

During their practices, law enforcement officials are required to use non-violent means as far as possible before resorting to the use of force. The response of the officer must be appropriate for the circumstances and the behavior of the individual. Thus, it is not appropriate to respond to passive resistance with lethal force, for instance. In other words, the lawfulness of the use of force depends on full compliance with the principles of legality, necessity, and proportionality.[24]

Human rights treaty bodies have examined whether enough measures were taken to prevent civilian casualties in cases related to armed conflict between rebels and governmental forces[25]. The common thread in the decisions is that the use of

[22] CORDULA DROEGE, The Interplay Between…, p. 344.
[23] CEES DE ROVER, *To Serve and…,* p. 245.
[24] CEES DE ROVER, *To Serve and…,* pp. 247-252.
[25] See, *e.g.*, Ergi v. Turkey, Application no. 66/1997/850/1057, Judgment, European Court of Human Rights (28 July 1998), para. 79; Ozkan v. Turkey, Application no. 21689/93, Judgment, European Court of Human Rights (6 April 2004), para. 297.

lethal force would be unnecessary if an arrest could be made with ease[26]. In other words, the use of force must be proportionate to the aim of protecting life[27].

Overall, the right to life in IHRL provides positive and negative obligations for the State towards individuals. To not violate that guarantee, the killing of a person by State authorities must meet strict requirements of necessity and proportionality, as well as being a measure of self-defense. In this sense, 'collateral damage' could not be justified under IHRL[28]. Likewise, as the use of force must be the last resort, the planning of an operation with the purpose of killing is never lawful under IHRL[29].

3. The right to life under IHL

Under IHL, the boundaries for a killing to be justified are substantially wider. In addition to the fact that violent acts of force characterize armed conflicts, IHL was constructed based on considerations of military strategy and reciprocity. Therefore, the right to life is certainly hard to maintain in absolute terms[30].

However, as the entire system of modern international law, the IHL is based on the dignity of the human person[31]. Thus, it is not even necessary to address the

[26] LOUISE 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, n.º 864, 2006, pp. 881-904, p. 884.
[27] CORDULA DROEGE, The Interplay Between…, p. 345.
[28] DANA SCHMALZ, Normative demarcations of…, p. 241.
[29] CORDULA DROEGE, The Interplay Between…, p. 345.
[30] CORDULA DROEGE, The Interplay Between…, p. 313; DANA SCHMALZ, Normative demarcations of…, p. 242.
[31] CHRISTIAN TOMUSCHAT, Human Rights and…, p. 16.

aforementioned jurisprudence developments to conclude that the right to life cannot be protected only within the limits of military necessity.

Regarding combatants, serious violations of IHL, such as war crimes, are the exception to the general rule that actions to impair the military potential of the enemy are not punishable under domestic law. Moreover, the prohibition on perfidy in Article 37 of API forbids the treacherous killing of adversary combatants. Likewise, persons *hors de combat* cease to be legitimate targets (Article 41 of API)[32].

Aside from these limits, a 'privilege of belligerency' might be invoked to describe the broader permission for the killing of combatants in armed conflicts. In conjunction with the 'privilege of belligerency', criminal liability is excluded, and it is possible to identify permissible combatant targets in the conduct of hostilities. This is the ultimate expression of the principle of distinction *ratione personae* which requires the distinction between military personnel and civilian population[33].

Under Article 51 of the API and Article 13 of the APII, civilians who do not take part in hostilities are no legitimate targets of violent acts. However, they do not benefit from broader protection such as the one provided by the right to life under IHRL. Indeed, one could argue that it is not possible to balance human life against 'military necessity' because of the dignity of the human person[34]. Nonetheless, if the requirements of proportionality of Article 51 are met, the privilege of belligerency extends to the death of civilians as 'collateral damage'.

[32] DANA SCHMALZ, Normative demarcations of…, p. 242.
[33] DANA SCHMALZ, Normative demarcations of…, pp. 242-243.
[34] CHRISTIAN TOMUSCHAT, Human Rights and…, pp. 20-21.

Moreover, the principle of proportionality in IHL differs from the standard in IHRL. On the one hand, IHRL requires that the use of lethal force is proportionate to the aim of protecting life. On the other hand, API requires that the incidental loss of civilian life caused by an armed attack shall not be excessive in relation to the 'concrete and direct military advantage anticipated'[35].

4. The interplay between IHL and IHRL

Therefore, contrasting conclusions may be reached depending on whether the rules of IHL or IHRL are applied to determine the lawfulness of a killing of a person. IHL accepts the use of lethal force and tolerates incidental killing of persons not directly participating in hostilities, subject to proportionality requirements. Conversely, lethal force can only be justified under IHRL if there is an imminent danger of serious violence that can only be averted by such use of force. Besides, the proportionality standards vary amongst the branches.

On this basis, even though it is commonly agreed that IHRL applies to armed conflicts, it is still unclear how they interact and what the outcomes of their interaction will be. Certainly, determining if IHL applies, as well as at what level IHRL applies, depends on the characterization of the situation as either conduct of hostilities or law enforcement. Nonetheless, the line separating a situation of law enforcement and conduct of hostilities is further blurred by the 'civilianization' of armed conflicts.

[35] CORDULA DROEGE, The Interplay Between…, p. 346.

For instance, when the State responds to terrorist acts it may be controversial whether the overall context qualifies as a 'war' or as law enforcement. Furthermore, because the majority of modern armed conflicts are non-international, it might be challenging to identify a person as a participant in hostilities as one side is frequently not carrying formal signs[36]. As a result, it becomes more intricate to distinguish between situations of law enforcement and conduct of hostilities, which also depends on political choices.

Besides, this question will only arise depending on whether IHRL is applicable. The human rights conventions will apply if the jurisdiction of a State is established, which may occur extra-territorially if the State has 'effective control' over individuals to exercise authority and thus have jurisdiction[37].

Despite what first seemed to be always the case for acts committed on its territory, a State may not be able to exercise its authority during active hostilities, according to the ECtHR[38]. Thus, ECtHR has seemingly placed all instances of active hostilities outside its competence, casting doubt on the need for a State to uphold human rights responsibilities in armed conflict[39]. Despite the European human rights system's tendency toward a separatist approach, the *lex specialis* principle should not be interpreted through an exclusivist lens. Instead, it might, if properly employed, be fully consistent with a complementarity approach.

[36] DANA SCHMALZ, Normative demarcations of…, pp. 244-246.
[37] DANA SCHMALZ, Normative demarcations of…, pp. 244-246.
[38] *Shavlokhova v Georgia* Application No. 45431/08 (ECtHR (dec), 5 October 2021); also, *Georgia v Russia (II)* Application No. 38253/08 (ECtHR [Grand Chamber] 21 January 2021).
[39] KATHARINE FORTIN, The relationship between…, p. 351.

4.1.Complementarity/lex specialis

Although many employ the *lex specialis* principle to analyze the interplay between IHL and IHRL, there is certainly a terminological issue. The *lex specialis* principle is commonly understood differently by different academics. As with other concepts in international law, it is often misunderstood and abused. Nonetheless, a concept should not be abandoned because different people have different understandings of it. Instead, the focus should be on defining the scope of the *lex specialis* principle.

Likewise, complementarity also has an unclear and inconsistent definition and is more of a policy than a legal concept. However, a complementarity-based relationship must be at least perceived as an active interaction where the norms mutually influence each other. As with the *lex specialis* principle, complementarity is pursued to achieve greater normative coverage, fill up any gaps, and ensure consistency[40].

Furthermore, to serve as a legal basis for the interaction between IHL and IHRL complementarity must be conceptualized in its legal understanding as the interpretation method enshrined in Article 31(3)(c) of the VCLT[41]. In other words, it is especially on the principle of systemic integration that the concept of complementarity as a legal foundation for the interaction between the branches may be tracked down. As a result, the broader system of international legal obligations should be considered while interpreting IHL or IHRL[42].

[40] CARMEN MÁRQUEZ CARRASCO *et al*, Applicable regulatory frameworks…, p. 56.
[41] CORDULA DROEGE, The Interplay Between…, p. 337.
[42] KATHARINE FORTIN, The relationship between…, p. 348.

One could therefore claim that the *lex specialis* principle is in tension with the idea of complementarity because it refers to a conflict rule that alters, overrules, or set aside a general rule in a specific situation[43]. To put it another way, the particular rule may be thought of as an exception to the general rule, in which case the former derogates the latter[44]. Indeed, this perspective cannot be consistent with conceiving the *lex specialis* principle through the lens of complementarity.

The outcome of the *lex specialis* principle should instead be the application of a particular rule of a general standard in a specific circumstance. During armed conflicts most of the time IHL may give instructions on what IHRL requires in the case at hand[45]. Therefore, as a principle of specific interpretation, the *lex specialis* does not suggest a conflict between the norms. Rather, it is entirely consistent with the complementarity concept based on the systemic integration principle as stated in Article 31(3)(c) of the VCLT.

Moreover, the textual elasticity of the provisions protecting the right to life is what justifies employing the *lex specialis* principle as a principle of specific interpretation. The terms 'arbitrarily' or 'arbitrary' are used to legitimize the recourse to IHL rules[46].

Besides the critics related to the terminological issue, it has been also argued that the employment of the *lex specialis* principle is hindered by the lack of

[43] SILVIA BORELLI, The (Mis)-Use of General principles of Law: Lex specialis and the relationship between International Human Rights Law and the Laws of Armed Conflict, *General Principles of Law – the Role of the Judiciary*, Springer, 2015, p. 6.
[44] CORDULA DROEGE, The Interplay Between…, pp. 339-340.
[45] Cf. CORDULA DROEGE, The Interplay Between…, p. 340; SILVIA BORELLI, The (Mis)-Use of…, p. 6.
[46] KATHARINE FORTIN, The relationship between…, p. 349.

a clear hierarchy of norms in international law. To put it in another way, as the *lex specialis* principle was conceived for domestic law, it is not readily applicable to the highly fragmented system of international law[47].

The controversy between the horizontality and hierarchy of the sources of international law need not be addressed, though. In short, the *lex specialis* principle does not require that the norms are hierarchically different. They must relate instead in terms of general/special regimes. Otherwise, *lex superior cerogat legi inferior* would apply instead which is not suggested.

4.2. Teleological/systemic interpretation

The convergence problems can only be resolved on a case-by-case basis[48]. The employment of the *lex specialis* principle is contingent upon how the rules must be regarded in the context in which they are applied, including their object and purpose[49]. Naturally, simply because the controversy pertains to the realm of international law, there is no compelling reason to disregard classical solutions. Even though the *lex specialis* principle is not addressed on the VCLT, what it is ultimately sought for is the systemic coherence of international law.

Moreover, the strict opposition between a teleological interpretation and a systemic-dogmatic interpretation, which is enshrined by the norm contained in Article 31(3)(c) of the VCLT, has been overcome. On the one hand, the systemic

[47] CORDULA DROEGE, The Interplay Between…, p. 339.
[48] FERNANDO JOSÉ BRONZE, *Lições de Introdução ao Direito*, ed. 2, Coimbra, Coimbra Editora, 2005, pp. 78-82.
[49] SILVIA BORELLI, The (Mis)-Use of…, p. 6.

interpretation method extended to its ultimate limits could draw out the substance of the law. On the other hand, a teleological interpretation taken as far as possible would functionalize or instrumentalize law. In this regard, each of these methods of interpretation discovers in the other the other side of itself when properly comprehended[50].

The dialect between the system and the problem permeates both teleological and systemic interpretation, as this is what distinguishes a methodologically committed legal discourse[51]. In other words, the semantics and prescriptiveness of rules cannot exhaust the debate over how IHL and IHRL interact. Instead, the level of protection provided to the right to life during armed conflicts may only result from practical-normative grounds[52].

Needless to say, the aforementioned does not equate to adhering to a dogma associated with a particular branch of law. It is a dogma to claim that only IHL can be relevant during armed conflicts, even though the aim and purpose of IHL is to regulate armed conflicts. Stating that IHRL is only intended to be employed during peaceful times would likewise be a dogma[53]. Instead, the context of armed conflicts does not always offer a sufficient basis for applying IHL as a *lex specialis*. IHRL may also serve as *lex specialis* in specific circumstances[54].

[50] FERNANDO JOSÉ BRONZE, *Lições de Introdução…,* pp. 900-902.
[51] FERNANDO JOSÉ BRONZE, *Lições de Introdução…,* p. 902.
[52] *See,* FERNANDO JOSÉ BRONZE, *Lições de Introdução…,* p. 894.
[53] LOUISE DOSWALD-BECK, The right to…, p. 903.
[54] One could argue that the *lex generalis* (IHRL) applies rather than the *lex specialis* (IHL), which again consists in a terminological divergence that leads to the same results.

Overall, the framework provided by the *lex specialis* principle and the complementarity approach based on the systemic integration principle is sufficient to offer adequate predictability for the interplay between IHL and IHRL. However, as the convergence problems should only be dealt from a case-by-case basis, a teleological interpretation of rules might not be disregarded. In this sense, all the solutions could never be foreseen, in part due to evolving forms of armed conflicts and the 'civilianization of conflicts.'

As a last resort, it is possible to try certain solutions to contentious issues in armed conflicts. Consider the archetypal scenario of occupation, which although related to international armed conflicts, has specific rules under IHL[55]. In principle, the occupying State has effective control over the occupied territory to trigger the application of IHRL. Thus, IHL may be employed as *lex specialis* when a concrete circumstance within the territory involves hostilities rather than law enforcement[56].

The legal framework for the interaction between IHL and IHRL is well-established: complementarity and the *lex specialis* principle. However, it is a matter of fact and not of the applicable law to assess whether a situation qualifies as law enforcement or as the conduct of hostilities. Therefore, it is necessary to distinguish between various situations of occupation[57].

In 'calm' occupations, the use of potentially lethal force is governed by the law enforcement model and the IHRL requests that a State effect an arrest whenever

[55] LOUISE DOSWALD-BECK, The right to…, p. 892.
[56] CORDULA DROEGE, The Interplay Between…, p. 332.
[57] Nevertheless, Israel manifested its adherence to a separatist approach concerning the occupation of the Palestinian territory. See, *inter alia*, Israeli Report to the Human Rights Committee, UN Doc CCPR/C/ISR/2001/2, 4 Dec. 2001, at para. 8.

practical[58]. That would also apply to the State's response to a riot or violent demonstration. However, it can be argued that because it involves an international armed conflict rather than just maintaining order in the occupied territory, IHL requirements apply when an occupying power needs to take measures to safeguard its security[59].

Foreign fighters may also be targeted in conformity with IHL rules if they engage in combat against the occupying State and meet the requirements for being 'combatants.' On the other hand, if they do not meet these requirements, they are considered civilians and can only be attacked while they are 'directly participating in hostilities[60].'

Therefore, during relatively calm occupations, the mere use of military force by the occupying State cannot itself invoke IHL rules. Instead, hostilities must result from combat activity initiated by those challenging the occupation. The IHL rules governing the conduct of hostilities apply when there is a resumption or outbreak of military hostilities. The law-enforcement model, however, is in charge of dealing with ordinary criminal activity and situations that resemble riots[61].

This analysis could extend to a wide range of circumstances, including to other contexts such as to the use of force in non-international armed conflicts and the law relating to civilians taking a 'direct part in hostilities.' Nevertheless, the watchword has been given: the application of IHL or IHRL rules must be in

[58] LOUISE DOSWALD-BECK, The right to…, p. 892.
[59] LOUISE DOSWALD-BECK, The right to…, p. 893.
[60] LOUISE DOSWALD-BECK, The right to…, p. 893.
[61] LOUISE DOSWALD-BECK, The right to…, p. 893-894.

accordance with the specific circumstances while taking into consideration the framework provided.

5. Conclusion

IHL and IHRL offer various levels of protection for the right to life, including during armed conflicts. The *lex specialis* principle and the concept of complementarity are the foundations of their interaction. Nevertheless, both concepts are affected by terminological difficulties. To prevent one from adhering to the use of *lex specialis* in a separatist-like approach, it is crucial to define the scope of these concepts. The notion of complementarity embodies the systemic integration principle outlined by Article 31(3)(c) of the VCLT. Meanwhile, the *lex specialis* principle determines a specific interpretation in a given circumstance taking into consideration the aims and purposes of international law.

Although it can be observed that IHL will generally be *lex specialis* during the conduct of hostilities, IHRL may also be in specific circumstances. To be methodologically committed, the analysis must be conducted from a practical-normative angle. Considering a teleological and systemic interpretation of international law, it is possible to increase the overall protection of individuals during armed conflicts. Besides, the framework proposed offers sufficient predictability for the interaction and the coherence of international law as a whole.

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