*This is a pre-copyedited, author-produced version of an article accepted for publication in Journal Of Conflict And Security Law following peer review. The version of record [insert complete citation information here] is available online at: https://academic.oup.com/jcsl - DOI: https://doi.org/10.1093/jcsl/kraa017.*

# The psychological impact of military operations on civilians and the UN Human Rights Committee Japalali decision: Exploring mental anguish under a vida digna, right to life prism

***Solon Solomon**

## Abstract

Among international scholars much emphasis has been given on how in situations of warfare, international humanitarian law (IHL) can impact upon international human rights law (IHRL). The opposite scenario has been little explored. On this account, the article will explore how under the influence of IHRL in instances of wounded civilians feeling mental anguish as a result of their uncertainty whether or not they will remain alive, a State can be found as violating these civilians' right to life vida digna facet. At the same time, the article will proceed to analyse how such vida digna mental anguish parameter must be seen not just as general carte blanche for expanding the notion of psychological injury beyond cases of mental harm in all military operations, but as relevant only in instances, like 'kill or capture' operations where the State is seen in position to consider in advance the conditions under which a military engagement takes place.

**Keywords**: mental anguish; military operations; UN Human Rights Committee; right to life

## 1. Introduction

The psychological impact of military operations on civilians and the role it should play as part of the jus in bello proportionality principle, has been increasingly discussed the last few years by various scholars. [1] Emphasis has been given to such psychological impact amounting

*Lecturer in the Division of Public and International Law, Brunel University London. The article has been partly written during the author's tenure as a visiting scholar at the British Institute of International and Comparative Law. Along these lines, the author would like to thank Kristin Hausler for fruitful discussions.

to trauma and mental harm.[2] Less attention has been paid to the question of whether international humanitarian law (IHL) or international human rights law (IHRL) regulate situations where the affected civilians experience lesser forms xxx than harm, such as just mental anguish and distress. The assumption is that military operations are bound to beget fear[3] and thus the arousal of mere mental anguish or distress should not be considered a parameter grave enough in order to be juxtaposed under the jus in bello proportionality balance to the military advantage these operations are expected to yield.[4] This is all truer in the heat of the battlefield, where in real time, as an expedition evolves, soldiers and commanders cannot quantify the psychological impact their targeting operations will have on the affected civilians.

Yet, targeting decisions can equally take place beyond the heat of the battle. In these cases, States are put under extreme scrutiny to examine under an IHRL model every sustained death of enemy combatants and civilians.[5] The same IHRL approach is true also in 'kill or capture' operations where the assumption by European Court of Human Rights judgements like that of McCann as well as by scholars like Kretzmer, is that even a combatant cannot be

[1] Eliav Lieblich, Beyond Life and Limb: Exploring Incidental Mental Harm in International Humanitarian Law in APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES (Derek Jinks, Jackson Maogoto & Solon Solomon, TMC Asser Press,2014) 185; Emanuela-Chiara Gillard, Joint Symposium: Chatham House Report on Proportionality in the Conduct of Hostilities-Some Key Elements, EJIL!Talk, 28 Jan.2019 available at https://www.ejiltalk.org/joint-symposium-chatham-house-report-on-proportionality-in-the-conduct-of-hostilities-some-key-elements/comment-page-1/ ; Solon Solomon, Bringing Psychological Harm to the Forefront: Incidental Civilian Fear as Trauma in the case of Recurrent Attacks, EJIL!Talk, 25 April 2018 available at https://www.ejiltalk.org/bringing-psychological-civilian-harm-to-the-forefront-incidental-civilian-fear-as-trauma-in-the-case-of-recurrent-attacks/; ILA Study Group, The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare, 25 June 2017 at 28-29. For the fact that trauma relates also to civilians see Avi Bleich, Anat Dycian, Meni Koslowsky, Zahava Solomon & Michael Wiener, Psychiatric Implications of Missile Attacks on a Civilian Population: Israeli Lessons from the Persian Gulf War, *268 J. Am. Med. Assoc.* 613 (1992)

[2] See for example Eliav Lieblich, ibid; Michael Schmitt & Chad Highfill, Invisible Injuries: Concussive Effects and International Humanitarian Law, 9 Harvard National Security J. 72 (2018)

[3] Yoram Dinstein, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT, Cambridge University Press (2004) 119

[4] On this see art.51(5)(b) of Additional Protocol I to the Geneva Conventions which speaks of the need for civilian excessive injury to be juxtaposed to the concrete and direct anticipated military advantage.

[5] For the fact that this is the case with Israel and the shooting of demonstrators at the Gaza fence border see Solon Solomon, The Israeli Supreme Court Decision on the Gaza Riots: Factual and Legal Confusion, Just Security, 5 June 2018 available at https://www.justsecurity.org/57359/israeli-supreme-court-decision-gaza-riots-factual-legal-confusion/

shot dead if he can be captured alive.[6] Whereas the International Committee of the Red Cross (ICRC) has underlined in its Guidelines on Direct Participation in Hostilities that in the realms of warfare the fact that an individual has a protected status does not mean that he should be definitely be captured,[7] this is true from a laws of war point of view. Not by accident the ICRC highlights this point in the relevant paragraph of its analysis bearing the title 'Prohibitions and Restrictions Laid Down in Specific Provisions of IHL'. Nothing in this text precludes the conclusion that the capture element comes to be added as an extra layer by IHRL and as such it raises the question of how the IHRL layer can add to the IHL mental harm debate. Indeed, as noted by scholars like Droege, it is more logical to assume that in military operations involving law enforcement and some effective control over the situation, IHRL is to apply as lex specialis, whereas it is in the battlefield and in combat situations that IHL should be seen as the prevailing legal regime.[8]

The current article will discuss what a IHRL framework and in particular the vida digna notion accompanying the right to life, can fetch to the question of whether violations of the civilians' right to mental health during hostilities can be seen inside the right to life debate not only as comprising mental harm as scholars have contended, but also mental anguish. On this

[6] See infra section 5 For the IHRL origins of the 'kill or capture' paradigm see article 2 of the European Convention on Human Rights rendering clear that in order for the use of force to be lawful, it has to be absolutely necessary for the preservation of one of the aims article 2 proceeds to delineate, namely in cases of self-defense, in cases where such use of force is needed in order for a person to be ultimately arrested and in order to quell a rebellion. The European Court of Human Rights has equally held that if an individual can be arrested without the use of force, this should be done so. On this see McKerr v. United Kingdom, Judgment, 4 May 2001, paras.11,110-111. (referring to its jurisprudence in the McCann case on the shooting and killing by a U.K. elite unit of an IRA member). For discussion of the McCann case see Juliet Chevalier-Watts, Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State? 21 EJIL 701,703-05 (2010)

[7] Nils Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities (2009) at 77-78

[8] Cordula Droege, Elective Affinities? Human Rights and Humanitarian Law, 90 Int'l. Rev. Red Cross (2008) 536

account, the UN Human Rights Committee decision in the Japalali case will be taken as the factual canvas for such an analysis.[9]

The article will proceed as follows: the next section will discuss the Japalali case. Section 3 will examine the concept of mental anguish in the realms of the relation between IHRL and IHL, whereas section 4 will proceed to discuss mental anguish as a vida digna notion which by extension can be seen as related to the right to life. Finally, section 5 will focus on the application and the limits such mental anguish-vida digna right to life construction can have when it comes to military operations.

## 2. The UN Human Rights Committee Japalali case

In September 2004, in the realms of the non-international conflict between the Philippines and the Moro National Liberation Front (MNLF), the Philippine Special Forces conducted a strike operation. In particular, eight soldiers out of 32 who were altogether deployed in the operation- raided the house of Bakar Japalali during the night and started shooting continuously for ten minutes. The shooting led to the immediate death of Bakar Japalali, yet his wife was left to plead for her life, seriously wounded and hanging from the stairs. Her calls for help were answered by neighbors who once they came to her aid, got permission from a soldier and transferred her to the hospital. Yet, even then, soldiers continued to shoot her at the feet. She died shortly after she was brought to the hospital.[10] In the application before the UN Human Rights Committee it was argued that to the extent that the particular military operation led to the deaths of Barak Japalali and his wife, their right to life,

[9] Hadji Hamid Japalali v. The Philippines, CCPR/C/125/D/2536/2015, Communication No.2536/2015, 28 March 2019

[10] Ibid, para.2.1

enshrined in article 6 of the International Covenant of Civil and Political Rights (ICCPR), had been violated.[11]

The Committee indeed found that such an article 6 violation had occurred.[12] The Committee members did hold that the use of lethal force for law enforcement purposes should take place only in exceptional instances and that the extent of the applied force in the Japalali case could not be justified by the threat the raiding soldiers presumably faced. Yet the Committee members opted to look at the case only from an IHRL angle, despite the fact that the raid took place in the larger context of the armed conflict that for years soars in the Philippines between the State and MNLF.[13]

Someone could argue that the Committee's mandate is restricted to IHRL and not to other fields of international law, like IHL. Yet, such a view fails to capture the intertwined relationship between IHRL and IHL. In fact, the Japalali case is highly reminiscent of the Suarez de Guerrero v Colombia case that the UN Human Rights Committee decided back in the late 70s.[14] There, the epicenter of the case was a police raid in a house where alleged kidnappers were meant to reside. When the police stormed the house, nobody was found inside. Nevertheless, as the house's members gradually arrived at the house, the hidden police forces opened fire, shooting them on an indiscriminate basis as they were trying to flee from the unexpected attack.[15] Moreover, one of the victims, Mrs Suarez de Guerrero, was shot multiple times even though she had already died from a heart attack.[16]

The similarities with the Japalali case are obvious. In both cases the human rights violations occurred as a result of army or police raids. In both cases the forces fired

[11] Ibid, para.1
[12] Ibid, para.7.4
[13] Ibid, Individual opinion of Committee Member Gentian Zyberi (concurring), para.1
[14] Suarez de Guerrero v Colombia, Communication No 45/1979, 31 March 1982
[15] Ibid, para.11.5
[16] Ibid

indiscriminately against individuals who were found in a frantic state of trying to save their lives. In both cases, some of these individuals happened to be women related to the main targets of the operation. In both cases, the UN Human Rights Committee discussed the human rights violations only as far as the right to life was concerned. The question of the mental anguish these victims must have felt was never raised.

In the case of the Suarez de Guerrero, it could be argued that this is plausibly so. Nothing in the facts denotes that the victims were left to suffer a protracted death. They were shot once in panic and trying to run for their lives, but they were not left to slowly die in a tormenting way. This is not the case with Mrs Japalali who was left hanging from the stairs, heavily wounded, while still in life. Moreover, despite their similarities, the question of whether IHL should apply in the Suarez de Guerrero case is much more obscure compared to Japalali. In Suarez de Guerrero it was a police force that conducted the raid, not the army. The raid in Suarez Guerrero was meant officially to liberate the former ambassador of Colombia to France from the hands of a guerilla group[17] but it was not proven or alleged that the persons shot and killed were actual guerrilla fighters. Whereas the Suarez de Guerrero case took place in the context of a turmoil in Colombia resembling a situation of armed conflict,[18] but it was not definite at the time that such a non-international armed conflict existed. On the contrary, the raid in Japalali, was done by the army in the realms of a non-international armed conflict between the Philippines and the MNLF and focused on an alleged member of an armed group. Correctly thus, given that according to the Committee General Comment No.36 the right to life continues to apply in situations of armed conflict, the Committee member Gentian Zyberi, opted to bring into the discussion of the Japalali case also the IHL aspect by discussing how

[17] Ibid, para.1.2

[18] David Weissbrodt, The Role of the Human Rights Committee in Interpreting and Developing Humanitarian Law, 31 University of Pennsylvania J. Int'l. L. 1185,1203 (2010)

the Philippine army operation had violated also the principle of precautions in the laws of war as well as the principle of distinction.[19]

Yet, whereas Zyberi put IHL in the picture, he did not proceed to further articulate on how, apart from substantiating certain violations, the application of IHL can shed light also to how IHRL provisions should be interpreted. For example, the need of taking precautions under IHL, involves also the need to evacuate civilians or offer them a way to leave war zones once hostilities are underway.[20] The fact that in the particular case, the Philippine army did not seem to have drafted such a plan in advance for the possible scenario of any civilians caught in the cross fire, might be an additional reason for holding the Philippines accountable for the violation of Mrs. Japalali's right to life. Yet, more importantly, Zyberi's correct reference to IHL, opens the wider question of whether in situations involving military operations, not only IHRL can be nourished by IHL but also the opposite, namely whether the interpretation of IHL provisions can be guided by IHRL.

The Japalali case focused on the right to life, but the facts of the case called for the examination also of another perspective which was left untouched both by Zyberi as well as the other Committee members. Left hanging from the stairs and still alive, Mrs. Japalali was left to endure a suffering death. She was shot at the back while calling for help and although the Committee's decision does not specify on her state of consciousness after this original shooting, it is clear that she was still alive when she was evacuated by neighbors to the hospital and further shot at the feet by the Philippine soldiers. The description of the event in the

[19] Japalali case, Individual Opinion of Committee Member Gentian Zyberi (concurring), para.4
[20] For the fact that evacuation plans for civilians are included in the precautionary measures a belligerent party must take see Theo Boutruche, Expert Opinion on the Meaning and Scope of Feasible Precautions under International Humanitarian Law and Related Assessment of the Conduct of the Parties to the Gaza Conflict in the context of the Operation 'Protective Edge', 27 February 2015 available at https://www.diakonia.se/globalassets/blocks-ihl-site/ihl-file-list/ihl--expert-opionions/precautions-under-international-humanitarian-law-of-the-operation-protective-edge.pdf

Committee's decision renders clear that in the particular case what should be in the epicenter of the legal scrutiny is not just the forfeit of Mrs. Japalali's life as an instantaneous event but also the suffering and the mental anguish she endured till she expires.

Such suffering can be seen to be-at least to a considerable degree-unintentional from the army's side. The army claimed that the continuous firing did not permit Mrs. Japalali's prompt evacuation to a hospital.[21] Yet, even if conceded that such suffering occurred as a result of the fire exchange, and can be branded as 'incidental', the question is whether IHL has anything to say about it. The current article would like to argue that the notion of vida digna that the jurisprudence of IHRL bodies has come to foster the last decades, provides an opening for envisioning a wider interpretational IHRL role as far as incidental mental harm in IHL is concerned.

Along these lines, the article will proceed to discuss first mental anguish and the prospects of it being accommodated as part of the IHL-IHRL nexus and then how the vida digna notion in IHRL can contribute towards this direction.

### 3. Mental anguish in the realms of the wider IHL-IHRL relation

The question of whether the mental anguish of civilians can be acknowledged as a parameter to be considered in military operations is directly linked to how IHL and IHRL view the concept of mental harm in warfare and to the extent that they have different viewpoints, how and if these can be bridged. From its turn, this last element touches upon the relationship between the two fields, which has been traditionally seen as a lex specialis one; IHRL applies together with IHL, yet the latter prevails when this is required by the exigencies of warfare.[22] For example, whereas IHRL protects the right to life and forbids putting someone arbitrarily to

[21] See Japalali case, supra note 9 at para. 7.4
[22] ICJ, Legality on the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Rep. 1996 240, para.25. The Court reiterated the principle at the Legal Consequences of a Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Rep. 2004 136, para.106

death, in IHL the killing of combatants is permitted and this permission overrides as *lex specialis* the general IHRL stipulation.

The lex specialis construction has been criticized by scholars.[23] In the Hassan case, the ECtHR came to apply a special understanding of this lex specialis relationship. Being called to decide on whether the preventive detention of an Iraqi civilian by the British army in Iraq was in tandem with article 5 of the European Convention on Human Rights (ECHR),[24] the Court held that IHRL applied together with IHL. Such parallel application though did not mean that IHL must be automatically preferred, obliterating any IHRL application, but that the two fields must be harmonized. The Court accordingly proceeded to read the European Convention's article 5 requirements of judicial impartiality and independence under the lens of the IV Geneva Conventions' provisions. It thus held that although under article 5 administrative detention was not a detention ground, the ECHR provisions should be accommodated to the extent possible with the IHL provisions which enable the incarceration of civilians who pose a security threat.[25] It then further proceeded to interpret the requirements that article 5 entails when it comes to judicial review, to encompass not only courts of justice but any reviewing body abiding by impartiality and fairness standards.[26] In order to reach such a conclusion, the Court relied on article 31(3) of the Vienna Convention on the Law of Treaties which stresses that in case there is a question of interpretation of a legal provision, emphasis must be placed on subsequent practice and on other rules in international law. The absence of derogations and the existence of IHL as an additional framework, led the Court to interpret article 5 through the

[23] For criticism of the lex specialis relationship see indicatively 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 in GENERAL PRINCIPLES OF LAW: THE ROLE OF THE JUDICIARY (Laura Pineschi ed., Springer 2015) 265; Marko Milanovic, A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law, 14 J. Conflict & Security L. 459 (2010)
[24] Hassan v. UK, Grand Chamber, Judgment, 16 September 2014
[25] Ibid, paras.102-104
[26] Ibid, para.106

lens of the Geneva Conventions provisions, in a 'symbiotic' though way,[27] which not only subjugates IHRL to IHL but examines how the latter can be nourished also by the former's requirements. Thus, as noted by Hill-Cawthorne, 'by virtue of the continued operation of article 5(4) in the background, the Court required more from the competent body than the text of Article 43 or 78 of the IV Geneva Convention does.'[28]

This view that IHRL provisions can be read through the lens of IHL calls for exploring whether the opposite can be also true. Indeed, arguments around the kill or capture operations,[29] the killing of not or combatants which are not officially hors de combat, yet are targeted once they do not constitute an active threat,[30] the rejection of a continuous combat function for armed group members[31] and the general history of IHL as a field evolving from the rights of States to wage a just war to the rights of individual victims not to be targeted absent a combatant status,[32] underline how the reading of IHL provisions through IHRL can generate arguments with important legal repercussions and restructure the way IHL notions and provisions are to be read. Whereas *Hassan* clarified that IHRL provisions can be interpreted in the light of IHL, *Japalali* calls us to think whether an IHL notion can be equally construed under the lens of IHRL. Here lies the uniqueness of the case, namely in the fact that although the UN Human

[27] Lawrence Hill-Cawthorne, DETENTION IN NON-INTERNATIONAL ARMED CONFLICT, Oxford University Press (2016) 158
[28] Ibid; Lawrence Hill-Cawthorne, The Grand Chamber judgement in Hassan v UK, EJIL!Talk, September 16,2014 available at https://www.ejiltalk.org/the-grand-chamber-judgment-in-hassan-v-uk/. For the fact that article 31(3) calls for a systemic integration of different legal regimes see Vito Todeschini, The Impact of International Humanitarian Law on the Principle of Systemic Integration, 23 J. Conflict & Security L. 359 (2018)
[29] See above section 1
[30] See infra section 4
[31] For the fact that armed group members are subject to targeting see Nils Meltzer, ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law at 71-72. See also the Guidance's remark at 27 that 'organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function is to take a direct part in hostilities.' For criticism of the continuous combat function from a human rights law perspective see Philip Alston, Study on Targeted Killings, Human Rights Council, UN Doc A/HRC/14/24/Add.6 ,May 28 2010, para.65. For the fact that other scholars limit the targeting of armed group members for as long as they take a direct part in hostilities see Bill Boothby, 'And for such time as': The Time Dimension in the Direct Participation in Hostilities, 42 NYU J. Int'l. L. & Politics 741 (2010)
[32] Lawrence Hill-Cawthorne, Rights Under International Humanitarian Law, 28 EJIL (2017) 1187,1188

Rights Committee is like the ECtHR a human rights body and has IHRL as a starting point, the subjugation it calls us to address is not that of IHRL to IHL but the opposite. When it calls to civilian mental harm, such subjugation is noteworthy, given the role such harm has both in IHL as well as in IHRL. In IHL, the largely understated importance of civilian mental harm brings forth the question of whether it is a time for international law scholars to review the issue. In IHRL, the fact that mental harm includes a wide range of degradation, including also mental distress and anguish, brings forth the question of how this review can take place and whether the IHRL application in IHL should mean that the IHRL perception of mental harm is to be transposed in toto to IHL.

This should not be necessarily the case. Also in other instances, as illustrated in the 'kill or capture' debate and the ICRC Guidelines cited above, when it comes for example to the proportionality principle, the application of IHRL has not brought forth the substitution in general of the jus in bello proportionality principle requirements with these ordained by IHRL.[33] A possible impact of the IHRL notion of mental harm should not mean the automatic transposal to IHL of all the characteristics the notion undertakes in human rights law. As scholars have argued,[34] the relationship between IHRL and IHL can well mean that one field borrows elements from the other. On this account, the following subsections will first discuss how mental harm is viewed in IHL and IHRL respectively before going on to expound upon

[33] For the fact that under IHRL, the proportionality principle restricts the applied lethal force to the minimum amount possible, whereas under IHL the legality of the applied lethal force rests on the classification of the targeted individuals between combatants and civilians see Noam Lubell, Challenges in Applying Human Rights Law to Armed Conflict, 87 Int'l. Rev. Red Cross (2005) 745; W.Hays Parks, Part IX of the ICRC 'Direct Participation in Hostilities' Study: No Mandate, No Expertise and Legally Incorrect, 42 NYU J. Int'l. L. & Politics 799 (2010)

[34] Lawrence Hill-Cawthorne, Humanitarian Law, Human Rights Law and the Bifurcation of Armed Conflict, 64(2) ICLQ 293, 325 (2015)

how the vida digna notion can serve as a filter governing the application in IHL of the mental harm precept through the lens of the right to life.

### 4. Mental anguish in IHRL as a vida digna concept

The idea of vida digna, namely the concept that IHRL must ensure that everyone enjoys dignified life conditions, has its origins in the decisions of the Inter-American Court of Human Rights, but spans also beyond it, for example in the UN Human Rights Committee Comment No.36 on the right to life.[35] Moreover, it does not cover only the dignity and respect that must be shown to a person during his lifetime, but equally the dignity with which the dead must be treated. Yet, between this transition from life to death, there often lies a twilight zone which has to do with a dying person's last moments. On them, no vida digna pronouncement has been made, yet, as argued in this article, such a pronouncement could be deemed pertinent also there. This is further demonstrated by the evolution of the vida digna concept in IHRL.

In the Inter-American Court of Human Rights judgements, the vida digna precept has been linked with the fact that living conditions must satisfy a certain standard. [36] In this respect, the case of Villagran Morales v. Guatemala (the Street Children case), involving the abduction and murder of street children, has been hailed as 'paradigmatic'.[37] The Court underlined there that the 'right to life is a fundamental right,' the exercise of which is 'essential for the exercise of all other rights.'[38] Furthermore, the Court went on to stress how the fundamental character of the right involved not only the fact that an individual should not be arbitrarily deprived of

[35] Human Rights Committee, General Comment No.36, 30 October 2018, para.3
[36] Jo Pasqualucci, The Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System, 31 Hastings Int'l. & Comp. L. Rev. 1,2 (2008)
[37] Villagran Morales et als v. Guatemala, Inter-American Court of Human Rights, Judgment, 19 November 1999, IACtHR (Ser.C ),No.63 (1999); Antonio Augusto Cancado Trindade, The Right to Cultural Identity in the Evolving Jurisprudential Construction of the Inter-American Court of Human Rights in MULTICULTURALISM AND INTERNATIONAL LAW: ESSAYS IN HONOUR OF EDWARD MCWHINNEY, (Sienho Yee & Jacques-Yvan Morrin eds., Martinus Nijhoff Publishers, 2009) 479
[38] Ibid at para.144

his life, but that he should also not be prevented from having access to the conditions that guarantee a dignified existence.[39] Similarly, in the case of Sawhoyamaxa, the Inter-American Court held that the deaths of the Sawhoyamaxa indigenous people which should be attributed to their poor living conditions, were not adequately dealt by Paraguay, which should have taken all necessary measures in order to guarantee that this indigenous people enjoy a minimum standard of living in their ancestral land.[40]

In the case of Juvenile Reeducation Institute v. Paraguay, the Inter-American Court repeated this vida digna rationale.[41] The case referred to the death of juvenile prisoners held in a a state prison under unsuitable conditions such as lack of proper physical and psychological care, bad hygiene and nutrition as well as overcrowding and incidents of sexual abuse, clashes and violence.[42] The Court stressed how when it comes to prisoners, they are prevented due to their incarceration and the control that the State exercises over it, to satisfy themselves certain basic needs that the Court deemed to be essential if one is to live with dignity.[43] In this case, the satisfaction of these needs falls upon the State which in the particular case had not taken the adequate measures in order for these juvenile inmates to live in dignity.[44]

The ECtHR has reached similar conclusions regarding the dignified conditions of living that must exist in prison but interestingly enough, the ECtHR has never explicitly referred

[39] Ibid. See also the judgment of the Inter-American Court in Contreras et al. v. El Salvador, Judgment, 31 August 2011, IACtHR (Ser. C) No.232 (2011), para.90 (the Court stating that the right to life was violated when the development, including the psychological one, of children taken away from their families, was jeopardized.) See also Kristin Hausler, Collective Cultural Rights in the Inter-American Human Rights System in CULTURAL RIGHTS AS COLLECTIVE RIGHTS: AN INTERNATIONAL PERSPECTIVE (Andrzej Jakubowski ed., 2016, Brill/Nijhoff) 235

[40] Inter-American Court of Human Rights, Case of Sawhoyamaxa Indigenous Community v. Paraguay, Judgment, 29 March 2006 (Judge Trindade and Judge Ventura-Robles mentioning explicitly in their separate opinions how the right to life should be read along the vida digna precepts.)

[41] Juveline Reeducation Institute v. Paraguay, Preliminary Objections, Merits, Reparations and Costs, Judgment, 2 September 2004, IACtHR (ser. C) No.112 (2004)

[42] Ibid at paras.134.3-134.16

[43] Ibid at 152

[44] Ibid at para.176

formally to a vida digna concept attached specifically to the right to life.[45] In the case of Pretty v. United Kingdom, concerning a 43 year old woman who was suffering from a degenerative and incurable illness and asked courts to acknowledge that her husband could assist her in committing suicide without him being prosecuted.[46] The ECtHR refused to acknowledge a right to euthanasia and held that the right to life was 'unconcerned with the quality of living.'[47] At the same time, the Court did hold in the same case that questions relating to the 'quality of life', should be acknowledged under article 8 of the European Convention and the right to private life that each individual enjoys, entitled to make his/her decisions on how to secure a better living.[48]

The fact that the quality of life is recognized as a precept by the ECtHR, is something to be applauded. At the same time, it would be doctrinally more correct if this precept was attached to the right to life rather than any other right.[49] A life of poor quality can be in essence a life with no dignity and given that as recognized by the ECtHR in *Pretty,* dignity lies in the Convention's aims,[50] failure to assure that a person can live his life in dignity may be synonymous to the violation of the right to life per se. Along these lines, it is important that in Nencheva, in a case where children and young adults died under unspecified conditions while being hospitalized in a Bulgarian, State-dependent mental health facility, the ECtHR held that because the State proved unwilling to address the life quality of the inmates in that institution, their bad living conditions regarding insufficient heating, medical treatment and nutrition, to

[45] See for example ECtHR, Kudla v. Poland, Grand Chamber Judgment, 26 October 2000, para.94 (the Court noting that a person must be detained under conditions that respect his dignity and seeing failure to do so as a violation of article 3 of the European Convention, namely as torture or inhumane or degrading treatment)
[46] Douwe Korff, The Right to Life: A Guide to the Implementation of Article 2 of the European Convention on Human Rights, Council of Europe, 2006 at 18-19 available at https://rm.coe.int/168007ff4e. See also ECtHR, Pretty v. United Kingdom, Judgment, 29 April 2002
[47] ECtHR, ibid, para.39
[48] ECtHR, ibid, para.65
[49] On this see Bart van der Sloot, Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests might Prove Indispensable in the Age of 'Big Data', 31 Utrecht J. Int'l. & Eur. L. 25, 42 (2015) (noting that the notion of quality of life under article 8 of the ECHR is 'rather abstract'.)
[50] Ibid (the Court stressing that 'the very essence of the Convention is respect for human dignity and human freedom')

the extent that they ultimately turned out to be life-threatening, could give rise to a right to life violation. [51]

Touching upon this death-related connotation, in negation to *Pretty,* human rights bodies do currently tend to include in the realms of the right to life questions pertaining to how a person's life is terminated. In Comment No.36, echoing partly the conclusions of the Committee on Economic, Cultural and Social Rights, the UN Human Rights Committee broadened the vida digna notion to encompass not only the need to provide adequate living conditions but also the assurances that everything will be done to lessen the chances of individual deaths as well as that even in cases when such deaths are to take place, this will be done under dignified conditions. For example, the Committee noted that the right to life encompassed the duty of the States to take measures in order to address the general conditions in society that might threaten directly both the individuals' life span as well as the way they were meant to enjoy life with dignity. The Committee proceeded to enumerate some of these factors, mentioning high levels of criminal violence, life threatening diseases as well as the degradation of the environment.[52]

Similarly, the Committee held that 'acknowledging the central importance of human dignity of personal autonomy' States should take measures to prevent suicide and that even if euthanasia was allowed by some State parties, these States 'must ensure the existence of robust legal and institutional safeguards to verify that medical professionals are complying with the free, informed, explicit and unambiguous decision of their patients, with a view to protecting patients from pressure and abuse.'[53] On this, the Committee cited the conclusions of the

[51] ECtHR, Nencheva v. Bulgaria, Judgment, 18 June 2013, para.121 (in French)
[52] Human Rights Committee, General Comment No.36, 30 October 2018, para.62. On the issue of the degradation of the environment in particular and its connection with the vida digna concept see also UN Human Rights Committee, Norma Portillo Caceres v. Paraguay, 9 August 2019, para.7.3 (the Committee founding Paraguay accountable for human rights violations on account of massive agrochemical fumigations, impacting on the individuals' living conditions and their vida digna standards due to the incurred environmental pollution)
[53] UN Human Rights Committee, General Comment No.36, 30 October 2018, para.9

Committee on Economic, Social and Cultural Rights in General Comment No.14 that old people should be spared avoidable pain and should be entitled to die with dignity.[54] In that sense, the dignified existence perception and the basic standard of living it entails, entrenches the right to life to the extent that it heralds the improvement of the conditions under which one is meant to live his life.[55] More importantly, these conditions refer to an individual's whole life span, till his last moments.

The attachment between the concept of vida digna and mental health in IHRL has never been undertaken by IHRL bodies. For example, article 12.1 of the ICESCR stipulates that the State Parties recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The UN Committee on Economic, Social and Cultural Rights has stressed in General Comment No.14 how the right to health should be seen as comprising also mental health issues.[56] Cases where the experiencing of distress when it is so intense that its bearers require additional support, should be also included.[57]

In some cases, such level has been associated with the feelings of helplessness that State actions created to the individuals concerned. For example, in Quinteros v. Uruguay[58] the UN Human Rights Committee held that Uruguay's denial to present to the applicant any information on the whereabouts of her daughter who was detained by Uruguayan agents inside the Venezuelan embassy grounds in Montevideo, caused mental anguish and stress to the applicant mother. In that sense, the Committee found that by subjecting the applicant mother

[54] Ibid, p.17
[55] Elizabeth Wicks, THE RIGHT TO LIFE AND CONFLICTING INTERESTS, Oxford University Press (2010) 218,220
[56] Committee on Economic, Social and Cultural Rights, General Comment No.14 (2000), E/C.12/2000/4, 11 August 2000, paras.17,18 (referring to physical as well as mental disability), 22 (referring to access to mental health services), 26, 27
[57] Report of the Special Rapporteur, supra note 16 at para.4
[58] UN Human Rights Committee, Quinteros v. Uruguay, Communication No.107/1981

to such psychological situation, Uruguay should be deemed guilty of breaching the torture and inhumane treatment prohibition also regarding her.[59]

Similarly, both the European as well as the Inter-American Courts of Human Rights have held that the mental anguish caused to relatives and friends who are denied by the State credible information about their beloveds' whereabouts, constitutes inhumane and degrading treatment. The ECtHR ruled likewise in the case of Kurt v. Turkey on account of the latter's objection to give to the parents of a disappeared person information concerning his fate,[60] whereas the Inter-American Court of Human Rights ruled in the Villagran Morales case-a case where minors were abducted, tortured and murdered by Guatemalan State agents- that the fact that the bodies of the deceased have been left 'to the inclemency of the weather and the action of the animals' constituted cruel and inhumane treatment for the deceased's mothers for whom the bodies were sacred.[61]

Whereas mental anguish has been termed by human rights bodies as torture and inhumane treatment, it has never been described as a violation of the right to life

Yet, this junction between the right to mental health and the right to life has practical ramifications. The first relates to the dynamics among the international human rights bodies. The ICCPR which contains the right to life has been ratified by far more States than the ICESCR which contains the right to health. The same is true also about the respective protocols which give jurisdictions to the Committees to monitor these Covenants.[62] An individual has

[59] Ibid, para.14
[60] Kurt v. Turkey, Judgment, 25 May 1998, para.98
[61] Villagran Morales et al. v. Guatemala, Inter-American Court of Human Rights, para.174. For further discussion of the case see infra
[62] On this see the fact that whereas 116 States are State parties to the First Optional ICCPR Protocol permitting individual applications before the UN Human Rights Committee, only 24 States are State parties to the equivalent optional protocol of the ICESCR available at https://indicators.ohchr.org/

more chances that his State will have ratified the ICCPR Protocol, rendering it able for him to bring a right to life plea than the Optional Protocol to the ICESCR enabling such a complaint to be brought before the Committee on Economic, Social and Cultural Rights as a complaint involving infringement to the right to health. If the aims of human rights law and of international law is to promote accountability for human rights violations, then such a resort to the UN Human Rights Committee on a broader locus standi basis, serves this purpose.

The interests of justice are in the heart also of the second ramification. In cases an individual has suffered both physical and mental abuse, it goes against these interests to demand of him to devote time, energy and money in order to resort to two different international human rights law bodies and procedures for violations which stem out of the same factual background. Mutatis mutandis, on a de lege ferenda reasoning, the need for international human rights bodies to hear in these cases all human rights violations that stem from the same incident, resembles the joinder of claims in civil law or the joinder of charges in criminal law. Yet, an important caveat applies here. In civil cases, courts can proceed to this joinder of claims only if they have separately jurisdiction for each claim.[63] Similarly, in criminal law, the joinder of charges in criminal law means that they come from the same incident. Demonstrating that any infringement on the right to mental health can in essence constitute a violation of the right to life, seems to satisfy also the civil cases 'separate jurisdiction' model, apart from the fact that both the right to life as well as the right to mental health violations stem from the same incident, as criminal law would require.

Along these lines and returning to the military operation in the Japalali case, it is questionable whether the fact that Mrs. Japalali was left hanging from the stairs, in mental

[63] For the fact that this is true in U.S. Federal Law see Steven Harmon, THE U.S. JUSTICE SYSTEM: AN ENCYCLOPAEDIA, Vol.1 (2012) 247. For the fact that this is the case in English law see Donohue v. Armco Inc and Others [2001] UKHL 64 at para.45, per Lord Bingham. For the fact that this is the case also in continental law countries like Austria and Germany see INTERNATIONAL ENCYCLOPAEDIA OF COMPARATIVE LAW, Vol. XVI, Civil Procedure (1984) 111

anguish unsure for her life and pleading for it, should not spur a condemnation for the State as violating even before her ultimate death, Mrs. Japalali's right to life due to the fact that the state actions subjected her to conditions that negated her right to a vida digna.

Contrary to her husband, who according to the State was a MNLF active member and thus could potentially be seen as having a combatant status given the non- international armed conflict that exists between MNLF and the State of the Philippines,[64] for Mrs Japalali no such suspicions were raised by the State authorities in the submission before the UN Human Rights Committee. Mrs Japalali thus always retained a civilian, protected status.[65]. Although human rights in warfare apply also when it comes to combatant and thus the vida digna prohibition of lying a severely injured individual with no help, would apply also in the case of a combatant, once the whole question pertains to a civilian who should not be targeted in the first place, it acquires a different significance. Along these lines, the Japalali case brings the question of what can be the gravity of incidental mental injury in warfare, in situations where such injury can be largely anticipated and even controlled like in pre-planned targeting decisions which like in Japalali take place in the course of 'kill or capture' operations.

[64] For some who adhere to the formal approach, mere membership in an armed group automatically renders someone a combatant, whereas for adherents of the functional approach, what needs to be examined is whether the role of the individual in the armed group is such that contributes substantially to the conduct of the hostilities. On this see Kenneth Watkin, Opportunity Lost: Organized Armed Groups and the ICRC 'Direct Participation to Hostilities' Interpretive Guidance, 42 NYU J. Int'l. L. & Politics 641,690-93 (2010). For the fact that in its Interpretive Guidance on the Direct Participation in Hostilities, the ICRC blends in the notion of continuous combat function the formal with the functional requirement, see Geoffrey Corn and Chris Jenks, Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in non-international Armed Conflicts, 33 University of Pennsylvania J. Int'l. L. (2011) 332; Sabrina Henry, Exploring the 'Continuous Combat Function' concept in Armed Conflicts: Time for an Extended Application? 100 Int'l. Rev. Red Cross 267, 271 (2018) . For the question of under which circumstances merely membership in an armed group can result in direct participation in hostilities and to the acquirement of a combatant status see the dicta of the Israeli Supreme Court at the Targeted Killings case, HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel PD 62(1) 507 (2006), paras.34-37. For criticism of the Court's stance regarding the expansion of the 'direct participation in hostilities' notion see Kristen Eichensehr, On Target? The Israeli Supreme Court and the Expansion of Targeted Killings, 116(8) Yale L. J. 1873 (2007)

[65] For the fact that civilians enjoy a protected status as long as they do not take direct part in hostilities see Additional Protocol I, article 51(3), Additional Protocol II, article 13(3)

## 5. Mental anguish as a vida digna notion in the realms of military operations

It would be preposterous to apply the mental anguish vida digna construction in all cases of military operations where civilians are wounded and consequently die. This would be more the case in instances where States do not rule on the battleground and are encountered with the unexpected.[66] On the other hand, the enlargement of the civilian injury in warfare can be seen in more amenable terms in cases where armies do seem to be able to prepare in advance any targeting missions. This will be true particularly in 'kill or capture' operations.

The vida digna doctrine shares similarities with the 'kill or capture' dogma. As the UN Human Rights Committee has stressed, the vida digna incorporates inter alia the expectation that States will not to subdue individuals to unnatural or premature death.[67] It can be argued that the 'kill or capture' dogma displays the same idea. The need for individual's life to be preserved during military operations leads to voices that during military operations, individuals-even militants- should not be shot dead if they can be captured alive.[68]

For example, following the U.S. raid in Osama bin Laden's compound and his subsequent shooting and death, voices were raised arguing that in essence bin Laden could have been captured alive and that the U.S. forces violated IHRL by shooting him dead.[69]

---

[66] For the argument that in such cases, targeted killings should be considered instead of sending troops on the ground see Solon Solomon, Targeted Killings and the Soldiers' Right to Life, 14 ILSA J. Int'l. & Comp. L. 99 (2008)

[67] Ibid, para.3

[68] David Kretzmer, Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence? 16 Eur. J. Int'l. L. 171 (2005)

[69] Jens David Ohlin, The Duty to Capture, 97 Minnesota L. Rev. 1268, 1269 (2013). For adherents of the opinion that bin Laden could have been captured see Robert Fisk, Was he Betrayed? Of course. Pakistan knew Bin Laden's hiding place all along, The Independent, 3 May 2011; Geoffrey Robertson, Why it's Absurd to Claim that Justice has been Done, The Independent, 3 May 2011; APV Rogers & Dominic McGoldrick, Assassination and Targeted Killing-The Killing of Osama bin Laden, 60 Int'l. & Comp. L. Quarterly 778, 786 (2011); Cedric Ryngaert, 'Extraterritorial Use of Force against Non-State Actors by Noam Lubell-Book Review [2012], 13 Melbourne J. Int'l. L. 266 (referring to Lubell's view that IHL might not be pertinent in the case of the killing of Osama bin Laden and that the latter should be seen under IHRL. See also contra Marko Milanovic, Was the Killing of Osama bin Laden Lawful? EJIL:Talk!, 2 May 2011 available at https://www.ejiltalk.org/was-the-killing-of-osama-bin-laden-lawful/; Kevin Jon Heller, Quick Thoughts on UBL's Killing-and a Response to Lewis, Opinio Juris, 4 May 2011 available at http://opiniojuris.org/2011/05/04/quick-thoughts-on-ubls-killing-and-a-response-to-lewis/ (both holding that the killing of Osama bin Laden did not violate IHRL since there were no indications he tried to surrender, yet see also Marko Milanovic, When to Kill and when to Capture?

Criticism was so stark, that eventually U.S. legal officials like Harold Koh the then legal advisor to the U.S. State Department as well as John Bellinger III, had to explicitly explain why the bin Laden operation did not violate international law.[70] When it comes to the Israeli policy of targeted killings, it has been argued by scholars[71] and held by the Israeli Supreme Court[72] that the 'kill or capture' precept means that a State cannot proceed to kill a combatant through a targeted killing strike, if this State has effective control over the area where the combatant finds himself and can eventually capture him.[73]

Scholars have equally discussed scenarios where combatants find themselves targeting other enemy combatants who though do not pose a threat; in that case, the targeting of the latter is not the result of an instant decision arising out of a death threat perception but comes as a calculated choice.[74] Moreover, in recent years, armies have been called to also undertake functions usually reserved for the police, such as the capture of suspects, particularly in cases of military occupation,[75] in cases of prolonged low-threshold conflicts[76] or in instances where the army has been entrusted to instill security in a certain area or region in operations, like UN

---

EJIL!Talk, 6 May 2011(stating that indications were that bin Laden could have been captured alive and in that sense the U.S. had violated IHRL)

[70] Owen Bowcott, Osama bin Laden: US Responds to Questions about Killing's Legality, The Guardian, 3 May 2011 available at https://www.theguardian.com/world/2011/may/03/osama-bin-laden-killing-legality

[71] David Kretzmer, Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence? 16 EJIL 171 (2005)

[72] HCJ 769/02, Public Committee against Torture v. Government of Israel et als.,Judgment, 11 Dec.2005. See also Jessica Dorsey & Christophe Paulussen, The Boundaries of the Battlefield: A Critical Look at the Legal Paradigms and Rules in Countering Terrorism, ICCT Research Paper, April 2013 at 9

[73] APV Rogers & Dominic McGoldrick, Assassination and Targeted Killing-The Killing of Osama bin Laden, 60 Int'l. & Comp. L. Quarterly 778, 782 (2011). For the argument that such ground operations should be preferred to targeted killings only to the extent that they do not endanger disproportionately the soldiers' right to life see Solon Solomon, Targeted Killings and the Soldiers' Right to Life, 14 ILSA J. Int'l. L. 99 (2007)

[74] Ryan Goodman, The Power to Kill or Capture Enemy Combatants, 24 EJIL 819 (2013) (arguing that in combatants who do not pose a direct threat cannot be killed even if they pose lawful targets under IHL.) *contra* Michael Schmitt, Wound, Capture or Kill: A Reply to Ryan Goodman's 'The Power to Kill or Capture Enemy Combatants', 24 EJIL 855 (2013); Jens David Ohlin, The Duty to Capture, 97 Minnesota L. Rev. 1268, 1307, footnote 165 (2013); Geoffrey Corn, Laurie Blank, Christopher Jenks & Eric Talbot Jensen, Capture instead of Kill: A Dangerous Conflation of Law and Policy, Lawfare blog, 25 February 2013 available at https://www.lawfareblog.com/corn-blank-jenks-and-jensen-respond-goodman-capture-instead-kill

[75] Marco Sassoli, Legislation and Maintenance of Public Order and Civil Life by Occupying Powers, 16 EJIL 661,665 (2005)

[76] Cornelius Friesendorf, International Intervention and the Use of Force: Military and Police Roles, DCAF, SSR Paper 4 (2012) available at https://www.peacepalacelibrary.nl/ebooks/files/383260469.pdf

peacekeeping ones, where the factual contours accompanying the deployment of military forces is not the existence of an armed conflict but the imposition of law and order.[77] At the same time, given that under the discussions held in the realms of article IX of the Direct Participation in Hostilities, the majority of States were averse to the application of IHRL in kill or capture operations, the main point of the current article is not that incidental mental harm in warfare can fall in the jurisdiction of human rights bodies due to any IHRL application. Rather the vida digna discussion as a human rights notion embedded in situations of warfare stems from the cognizance that irrespectively of whether someone holds that IHRL applies in military operations, the latter end up in situations where lives are being taken and people suffer. Apart from the fact that forfeit of civilian life and unnecessary suffering constitute violations of the laws of war, to the extent that these actions constitute de facto violations of the right to life and of the right to mental health, there is no reason not to be seen as such violations also under IHRL. IHRL bodies are thus seized of relevant cases not because IHRL is transposed necessarily in globo to the laws of war but because the same real fact can be seen either as a laws of war or an IHRL violation.

This possibility for IHRL bodies to intervene and pass judgment on laws of war violations, broadens also the scope of laws of war provisions when it comes to the vida digna notion.

For example, whereas as noted,[78] scholars so far have tended to rely on the word 'injury' in article 51(5)(b) of API and interpret warfare's psychological impact on civilians on a restrictive mode, encompassing only cases of mental harm, the vida digna notion empowers the provision to be seen more broadly as including also mental anguish and distress. This mental anguish-vida digna nexus comes though with two important caveats. The first is that according to the

[77] Dale Stephens, Military Involvement in Law Enforcement, 92 Int'l. Rev. Red Cross 453,456 (2010)
[78] Supra note 1

model proposed in this article, not any civilian feelings of mental anguish would qualify as a form of injury for the purposes of the proportionality balance. The civilian would have to demonstrate that his/her anguish has been caused as a result of him/her being subject to a state of helplessness where his/her life is in direct peril due to the attack or attacks conducted by enemy forces. In that sense, not any feelings of helplessness would qualify for this description but only these that are escorted by concrete life-threatening situations.

The second thing that has to be underlined is the role of the military advantage. Even if a military operation is found to be causing such mental anguish, this does not mean it should be automatically halted. Rather, it must be put into scrutiny on whether the military advantage advocates its continuation and to the event this is the case, military commanders must ensure that any mental anguish incurred is not excessively greater than the operation's advantage. In that sense, civilian mental anguish is a parameter that must be considered in military operations but not an automatic red light calling for their immediate halt or postponement. Along these lines, the linkage between the right to life and mental anguish that this article proposes, has the advantage of turning the civilians' psychological suffering from a mental harm issue associated with the right to mental health and the socio-economic rights group whose value in litigation has tended to be less appreciated and understood, to a civil and political rights issue, associated with a jus cogens right, like the right to life.

## 6. Conclusion

The legal repercussions of warfare's psychological impact upon civilians absent any intentions from the attackers' part,[79] have been treated in the laws of war with considerable suspicion. Only recently scholars have started to argue for the legal significance of incidental mental harm incurred to civilians. The current note explored whether to the extent that IHRL

[79] For the fact that the intentional terrorization of civilians is a violation of the laws of war see art.51 par.2 of Additional Protocol I

applies in warfare, such application should trigger an interpretative broadening of the way scholars and States interpret so far the concept of civilian injury under article 51(5) of AP I as covering also cases of incidental civilian mental harm incurrence, but not cases involving mental anguish. On this account and referring to the importance that the vida digna concept plays to the right to life and the need for the latter to be seen- even during an individual's last moments- under the lens of dignity, I argued that military operations planners as well as soldiers in actual combat, should avoid creating situations where civilians are left to die helpless, begging for their lives.

Along these lines I argued that the fact that Mrs. Japalali was shot and left hanging from the staircase, pleading for her life, should constitute a case where the UN Human Rights Committee members should have held explicitly that her right to life was violated because of the mental anguish she had felt in her final moments. By not acknowledging the nexus that can be in place between the right to life and mental anguish, the Committee missed an opportunity to further lead the right to life to new interpretative venues that would be so much desired in light of the overall scholarly discussion of incidental mental harm in IHL. It is questionable whether the Committee will have a similar opportunity in the future.