

The Soldier's Human Right to Life in Combat

Analytical Framework based on International Human Rights Law*

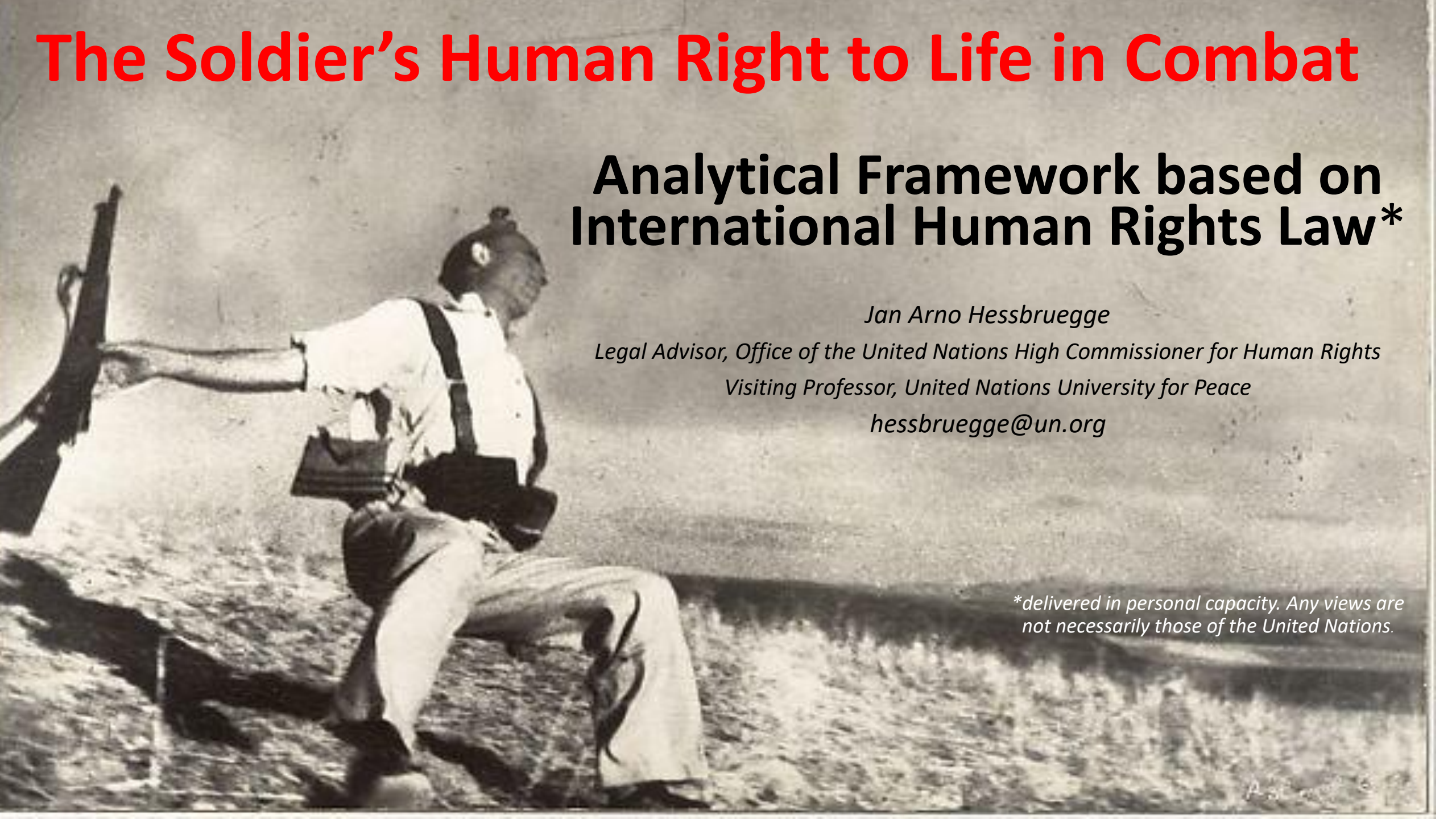
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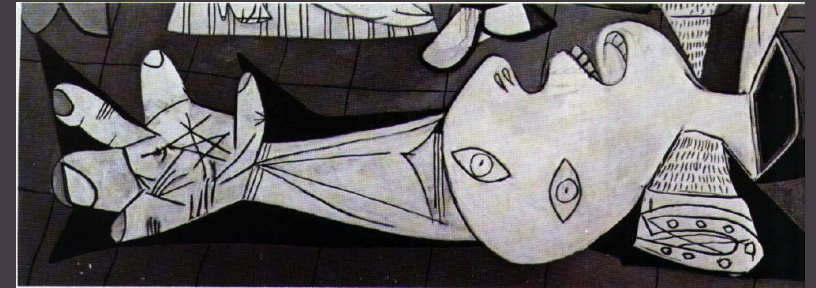
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soldiers & their right to life: international human rights law jurisprudence



Scope of Application - Right to Life:

Contracted & conscripted soldiers enjoy, and did not waive, right to life

Fully applies in **armed conflict** (ICCPR: no derogation)

Applies wherever state exercises **effective control or power** over territory or persons

State treatment of own soldiers **primarily regulated by international human rights law**. IHL adds medical care

Right to life covers actual deprivation & mere **risks to life**

State duty not to arbitrarily risk life:

Duty to **respect life** by not creating unlawful, discriminatory, unnecessary or disproportional risks

Duty to **protect life with due diligence** against risks emanating from others

Violations can be wilful or **negligent**

Subject to **absolutely necessary limitations**, including those inherent to military life

Duty to **investigate** reasonably alleged violations of the right to life. Duty to provide **effective remedies**

Assignment of risk to soldier's life lacks legal basis

- No assignment of risk involving **unlawful punishment**
 - Example: Punitive frontline deployment of those who criticized treatment, or war itself
 - Example: Enforcement of no retreat order through summary execution, or death penalty
- No assignment of risk **without, or contrary to national legislation**
 - Example: Assignments have no sufficiently clear legal basis in national law
 - Example: Deployment of conscripts abroad, contrary to national law
- No assignment of risk to conduct **war of aggression**
 - UN Human Rights Committee: *States engaged in aggression ipso facto violate right to life*



Discriminatory assignment of risk

Examples:

- Assigning politically expendable minorities to riskier missions
- Assigning only men, but not women to risky missions
- Assignment decisions based on bribery or extortion
- Discriminatory distribution of equipment
- Significantly divergent mission risk approaches within armed forces without military reason



Unnecessary assignment of risk



- Risk assigned has **no military purpose**
 - Example: Order not to surrender to “die heroically”
 - Counterexample: No retreat order for crucial delay of enemy advance
- **Alternative** that is less risky (including to civilians) to effectively achieve purpose
- Risks could be mitigated with **reasonable precaution** (organisational duties)
 - Adequate **equipment and training** (in line with state’s own standards & overall reasonable)
 - No unduly restrictive **rules of engagement**
 - Example: Undue restrictions of soldier’s right to self-defence, e.g. against very violent civilians
 - Counterexample: order to retreat and not exercise unit self-defence to avoid border escalation
 - Grossly negligent **operational planning or command** (“heat of battle” standard)
 - Failure to organize **casualty evacuations or medical care** (cf. also IHL duty)

Disproportional assignment of risks to life

Factors to consider:

- Level of risk to soldiers (intensity, scale, probability and irreparability of harm)
- Criticality of the mission & its protective impact
 - Protective impact on lives of civilians or other soldiers
 - “Survival of the State at stake” (cf. ICJ Nuclear Weapons)
- Level of self-assumed risk:
 - Volunteer or compelled for specific mission
 - Contracted v. conscripted soldiers
 - Special forces v. regular forces
- Available alternatives, their effectiveness and risks for civilians or own soldiers
- Indicative value of IHL norms (e.g., duty to accept surrender → right to surrender?)



Effective remedies for right to life violations

- Duty to **investigate** potentially unlawful deaths in combat [cf. Minnesota Protocol]
 - Post operation assessments (casualty tracking, after action reviews etc.)
 - If reasonable grounds to suspect violation, further inquiry
 - Full investigation if prima facie evidence of unlawful conduct
- Duty to provide **effective remedies** in case of violations
 - Access to justice (no active duty/combat immunity in IHRL but political & military margin of discretion)
 - Compensation
 - Satisfaction (including criminal/disciplinary accountability in extreme cases)
 - Guarantees of non-recurrence (systemic corrections)
- Right to **disobey manifestly unlawful orders** if risk grave & irreparable [?]
 - As defence in disciplinary or criminal proceedings
 - Potential basis for asylum claims
 - Corollary to international criminal law duty to disobey manifestly unlawful orders

