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Elective affinities? Human rights and humanitarian law

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Abstract

Complementarity and mutual influence inform the interaction between international humanitarian law and international human rights law in most cases. In some cases when there is contradiction between the two bodies of law, the more specific norm takes precedence (lex specialis). *The author analyses the question of in which situations either body of law is more specific. She also considers the procedural dimension of this interplay, in particular concerning the rules governing investigations into alleged violations, court access for alleged victims and reparations for wrongdoing.*

Traditionally, international human rights law (IHRL)[1] and international humanitarian law (IHL)[2] are two distinct bodies of law with different subject matters and different roots, and for a long time they evolved without much mutual influence. This has changed. A brief overview of historical developments and of recent cases shows that – whatever the understanding of governments in 1864, 1907 or 1949 – there is today no question that human rights law comes to complement humanitarian law in situations of armed conflict. In international jurisprudence, case law since the report of the European Commission of Human Rights on northern Cyprus after the Turkish invasion[3] and continuing through to later national and

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international jurisprudence on the Palestinian territories, Iraq, the Democratic Republic of the Congo or Chechnya leaves no doubt as to the applicability of human rights to situations of armed conflict.

In short, these regimes overlap, but as they were not necessarily meant to do so originally, one must ask how they can be reconciled and harmonized. As M. Bothe writes,

> [T]riggering events, opportunities and ideas are key factors in the development of international law. This fact accounts for the fragmentation of international law into a great number of issue-related treaty regimes established on particular occasions, addressing specific problems created by certain events. But as everything depends on everything, these regimes overlap. Then, it turns out that the rules are not necessarily consistent with each other, but that they can also reinforce each other. Thus, the question arises whether there is conflict and tension or synergy between various regimes.[4]

How human rights and humanitarian law can apply coherently in situations of armed conflict is still a matter of discussion. Jurisprudence over the last few years has changed the picture considerably and, to a certain extent, the law is constantly evolving. Jurisprudence on concrete cases will, hopefully, provide more clarity over time. So far, some areas are becoming clearer and in other areas patterns are emerging but are not consolidated.

This article seeks to provide some parameters which can inform the interplay between human rights and humanitarian law in a given situation. Indeed, two main concepts should govern their interaction: complementarity and mutual influence of the respective norms in most cases, and in some cases precedence of the more specific norm (*lex specialis*) when there is contradiction between the two bodies of law. The question is: in which situations is either body of law the more specific?

Lastly, the procedural dimension will be considered, for that is possibly where the interplay between human rights law and humanitarian law has its most practical effect: what are the rules governing investigations into alleged violations, court access for alleged victims and reparations for wrongdoing?

1 In the following, "international human rights law", "human rights law" and "human rights" are used interchangeably.

2 In the following "international humanitarian law", "humanitarian law" and "law of armed conflict" are used interchangeably.

3 See, e.g., Report of the European Commission of Human Rights, *Cyprus* v. *Turkey*, Appl. No. 6780/74 and 6950/75, Eur Comm HR Decisions and Reports (hereinafter DR) 125; European Court of Human Rights (hereinafter ECtHR), *Cyprus* v. *Turkey*, Judgment of 10 May 2001, Reports of Judgments and Decisions (hereinafter Reports) 2001-IV.

4 Michael Bothe, "The historical evolution of international humanitarian law, international human rights law, refugee law and international criminal law", in Horst Fischer, Ulrike Froissart, Wolff Heintschel von Heinegg and Christian Raap (eds.), *Crisis Management And Humanitarian Protection*, Berliner Wissenschafts-Verlag, Berlin, 2004, p. 37.

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INTERNATIONAL REVIEW of the Red Cross

The overlap of international human rights law and international humanitarian law in situations of armed conflict

The converging development of human rights law and humanitarian law

Beyond their common humanist ideal, international human rights law and international humanitarian law had little in common at their respective inception. The theoretical foundations and motivations of the two bodies of law differed.

The rationale for modern human rights is to find a just relationship between the state and its citizens, to curb the power of the state vis-à-vis the individual.[5] To begin with, human rights were a matter of constitutional law, an internal affair between the government and its citizens. International regulation would have been perceived as interference in the exclusive domain of the state. Except for the protection of minorities after the First World War, human rights remained a subject of national law until after the Second World War. They then became part of international law, starting with the adoption of the Universal Declaration of Human Rights in 1948.

Humanitarian law, for its part, was based first and foremost on the reciprocal expectations of two parties at war and on notions of chivalrous and civilized behaviour.[6] It did not emanate from a struggle of rights claimants, but from a principle of charity – "*inter arma caritas*".[7] The primary motivation was a principle of humanity, not a principle of rights, and its legal development was made possible by the idea of reciprocity between states in the treatment of one another's troops.[8] Considerations of military strategy and reciprocity have historically been central to its development.[9] Whereas human rights were an internal affair of states, international humanitarian law, by its very nature, took root in the relations between states, in international law (even if some of its precedents, such as the Lieber Code, were meant for civil war).

5 See, for a brief account, Louise Doswald-Beck and Sylvain Vité, "International Humanitarian Law and Human Rights Law", *International Review of the Red Cross*, No. 293 (March–April 1993), pp. 94–119.

6 See, e.g., the Lieber Code: United States War Department, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, 24 April 1863, reprinted in Dietrich Schindler and Jiri Toman (eds.), *The Laws of Armed Conflicts*, 3rd edn (1988).

7 First used as a motto on the title page of the "Mémorial des vingt-cinq premières années de la Croix-Rouge, 1863–1888," published by the International Committee of the Red Cross on the occasion of the 25th anniversary of the foundation of the Committee; the wording was adopted by the Committee on 18 September 1888 following a suggestion by Gustave Moynier. This is now the motto of the International Committee of the Red Cross: see Statutes of the International Committee of the Red Cross 1973, Article 3(2).

8 See Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 (hereinafter First Geneva Convention); Theodor Meron, "On the inadequate reach of humanitarian and human rights law and the need for a new instrument", *American Journal of International Law*, Vol. 77 (1983), p. 592.

9 Theodor Meron, "The humanization of humanitarian law", *American Journal of International Law*, Vol. 94 (2000), p. 243.

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After the Second World War the protection of civilians under the Fourth Geneva Convention, although largely destined only for those of the adversary or third parties, added a dimension to humanitarian law that brought it much closer to the idea of human rights law, especially with regard to civilians in detention. Here, humanitarian law started to apply to the traditional realm of human rights law, namely the relationship of the state to its citizens. The codification of Article 3 common to the four Geneva Conventions of 1949 likewise brought the two bodies of law closer, for it concerned the treatment of a state's own nationals. But although the Universal Declaration of Human Rights was adopted in 1948, just one year before the codification of the Geneva Conventions, the drafting histories show that the elaboration of the Declaration and that of the Geneva Conventions were not mutually inspired. While general political statements referred to the common ideal of both bodies of law, there was no understanding that they would have overlapping areas of application. It was probably not assumed, at the time, that human rights would apply to situations of armed conflict, at least not to situations of international armed conflict.[10] Yet there are clear reminiscences of the newly ended war in the debates on the Universal Declaration. It is probably fair to say that "for each of the rights, [the delegates] went back to the experience of the war as the epistemic foundation of the particular right in question".[11] Many of the worst abuses the delegates discussed took place in occupied territories. Even so, the Universal Declaration was meant for times of peace, since peace was what the United Nations sought to achieve.

As the four Geneva Conventions had been formulated at some speed in the late 1940s, there was still scope for development and improvement, especially for situations of non-international armed conflict. But the development of humanitarian law came to a standstill after the 19th International Conference of the Red Cross and Red Crescent in New Delhi in 1957. While the Conference adopted the "Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War"[12] drawn up by the International Committee of the Red Cross (ICRC), the initiative was not pursued.

At the United Nations, on the other hand, states slowly started to emphasize the relevance of human rights in armed conflict. As early as 1953, the General Assembly invoked human rights in connection with the Korean conflict.[13] After the invasion of Hungary by Soviet troops in 1956, the UN Security Council called upon the Soviet Union and the authorities of Hungary "to respect … the

10 Robert Kolb, "The relationship between international humanitarian law and human rights law: a brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Convention", *International Review of the Red Cross*, No. 324 (1998).

11 Johannes Morsink, "World War Two and the Universal Declaration", *Human Rights Quarterly*, Vol. 15 (1993), p. 358.

12 Reprinted in Dietrich Schindler and Jiri Toman (eds.), *Droit des Conflits Armés* (1996), p. 251.

13 Questions of atrocities committed by the North Korean and Chinese Communist forces against United Nations prisoners of war in Korea. GA Res. 804 (VIII), UN Doc. A/804/VIII, 3 December 1953 (on the treatment of captured soldiers and civilians in Korea by North Korean and Chinese forces).

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Hungarian people's enjoyment of fundamental human rights and freedoms".[14] The situation in the Middle East, especially, triggered the will to discuss human rights in situations of armed conflict.

In 1967 the Security Council, with regard to the territories occupied by Israel after the Six Day War, clearly made known its consideration that "essential and inalienable human rights should be respected even during the vicissitudes of war".[15] A year later the Tehran International Conference on Human Rights marked a decisive step by which the United Nations accepted, in principle, the application of human rights in armed conflict. The first resolution of the International Conference, entitled "Respect and enforcement of human rights in the occupied territories", called on Israel to apply both the Universal Declaration of Human Rights and the Geneva Conventions in the occupied Palestinian territories.[16] Then followed the resolution entitled "Respect for human rights in armed conflict", which stated that "even during the periods of armed conflicts, humanitarian principles must prevail". It was reaffirmed by General Assembly Resolution 2444 of 19 December 1968 with the same title, requesting the Secretary-General to draft a report on measures to be adopted for the protection of all individuals in times of armed conflict. His two reports concluded that human rights instruments, especially the International Covenant on Civil and Political Rights (ICCPR) – which had not even entered into force at that time – afforded a more comprehensive protection to persons in times of armed conflict than did the Geneva Conventions alone.[17] The Secretary-General even mentioned the state-reporting system under the Covenant – not yet in force – which he thought "may prove of value in regard to periods of armed conflict",[18] thus already anticipating the later practice of the Human Rights Committee.

Pursuant to the two reports of the Secretary-General, the UN General Assembly affirmed in its resolution on "Basic principles for the protection of civilian populations in armed conflict" that "[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict".[19] It was around this period that one observer wrote, "the two bodies of law have met, are fusing together at some speed and … in a number of practical instances the regime of human rights is setting the general direction and objectives for the revision of the law of war".[20]

14 GA Res. 1312 (XIII), UN Doc. A/38/49, 12 December 1958.
15 SC Res. 237, preambular para. 1(b), UN Doc. A/237/1967, 14 June 1967; see also GA Res. 2252 (ES-V), UN Doc. A/2252/ESV, 4 July 1967, which refers to this resolution.
16 *Final Act of the International Conference on Human Rights*, UN Doc. A/Conf.32/41, 22 April–13 May 1968.
17 Report on Respect for Human Rights in Armed Conflict, UN Doc. A/7720, 20 November 1969, esp. ch. 3; Report on Respect for Human Rights in Armed Conflict, paras. 20–29, annex 1, UN Doc. A/8052, 18 September 1970.
18 Ibid., para. 29.
19 GA Res. 2675 (XXV), Basic Principles for the Protection of Civilian Populations in Armed Conflict (9 December 1970).
20 G. I. A. D. Draper, "The relationship between the human rights regime and the laws of armed conflict", *Israel Yearbook on Human Rights*, Vol. 1 (1971), p. 191.

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The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, which met from 1974 to 1977, was in part a reaction to the UN process. The ICRC in particular could now relaunch the process of developing international humanitarian law to improve the protection of civilians not only in international but also in non-international armed conflict. The Diplomatic Conference and its outcome, the two Additional Protocols of 1977, owed an undeniable debt to human rights – some rights which are derogable under human rights law were notably made non-derogable as humanitarian law guarantees. Both Additional Protocols acknowledge the application of human rights in armed conflict.[21] While the ICRC did not follow this course in the early stages of the discussion,[22] it later accepted that "[h]uman rights continue to apply concurrently [with IHL] in time of armed conflict".[23] Ever since then the application of human rights in armed conflict has been recognized in international humanitarian law, even if the details of their interaction remain under discussion. Indeed, there have constantly been resolutions by the Security Council,[24] the General Assembly[25] and the Commission on Human Rights[26] reaffirming or implying the application of human rights in situations of armed conflict. The United Nations has also conducted investigations into violations of human rights, for example in connection with the conflicts in Liberia[27] and Sierra Leone,[28] Israel's military occupation of the

21 Article 72 of Protocol I Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts, 12 December 1977, 1125 UNTS 3 (hereinafter Additional Protocol I); Preamble of Protocol II Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977, 1125 UNTS 609 (hereinafter Protocol II).

22 ICRC, Draft Additional Protocols to The Geneva Conventions of August 12, 1949 – Commentary 131, 1973; see also Jean Pictet, *Humanitarian Law and the Protection of War Victims*, Sijthoff D. Henry Dunant Institute, Leyden/Geneva 1975, p. 15. One can assume that there was also an institutional motivation for the ICRC to keep its distance from human rights, which were associated with the "politicised" organs of the United Nations.

23 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva 1987, see esp. para. 4429.

24 SC Res. 1019, UN Doc. S/RES/1019 (9 November 1995) and SC Res. 1034, UN Doc. S/RES/1034 (21 December 1995) (in regard to Former Yugoslavia); SC Res. 1635, UN Doc. S/RES/1635 (28 October 2005) and SC Res. 1653, UN Doc. S/RES/1653 (27 January 2006) (Great Lakes region).

25 GA Res. 2546 (XXIV), UN Doc. A/RES/2546/XXIV (December 11, 1969)(territories occupied by Israel); GA Res. 3525 (XXX), UN Doc. A/RES/3525/XXX (December 15, 1975)(territories occupied by Israel); GA Res. 50/193, UN Doc. A/RES/50/193 (22 December 1995)(Former Yugoslavia); GA Res. 3525 (XXX), UN Doc. A/3525 (15 December 1975)(territories occupied by Israel); GA Res. 46/135, UN Doc. A/RES/46/135 (19 December 1991)(Kuwait under Iraqi occupation); GA Res. 52/145, UN Doc. A/RES/52/145 (12 December 1997)(Afghanistan).

26 Commission on Human Rights, Resolutions and Decisions see, e.g., UN Docs E/CN.4/1992/84 (3 March 1992)(Iraq); E/CN.4/2003/77 (25 April 2003)(Afghanistan), A/E/CN.4/RES/2003/16 (17 April 2003)(Burundi); E/CN.4/RES/2001/24 (20 April 2001)(Russian Federation); E/CN.4/RES/2003/15 (17 April 2003)(Congo); and reports to the Commission on Human Rights: OHCHR/STM/CHR/03/2 (2003)(Colombia); OHCHR/STM/CHR/03/3 (2003) (Timor-Leste); see also the Report of the Special Rapporteur of the UN Commission on Human Rights on the Situation of Human Rights in Kuwait under Iraqi Occupation, UN Doc. E/CN.4/1992/26 (16 January 1992).

27 The Secretary-General, Progress Report on UNOMIL, UN Doc. S/1996/47, 23 January 1996.

28 The Secretary-General, Progress Report on UNOMSIL, UN Doc. S/1998/750, 12 August 1998.

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Palestinian territories[29] and Iraq's military occupation of Kuwait.[30] The Security Council has also addressed human rights violations by "militias and foreign armed groups" in the Democratic Republic of the Congo.[31]

The applicability of human rights treaties to situations of armed conflict is also confirmed by the existence of derogation clauses allowing for, but also restricting, derogation from human rights in times of emergency, which either explicitly or implicitly include wartime situations.[32] Finally, some newer international treaties and instruments incorporate or draw from both human rights and international humanitarian law provisions. This is the case of the Convention on the Rights of the Child of 1989,[33] the Rome Statute of the International Criminal Court,[34] the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict,[35] the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,[36] and, most recently, the draft Convention on the Rights of Persons with Disabilities.[37]

Developments in international jurisprudence

A further important development leading to the recognition that human rights law applies to situations of armed conflict is the vast body of jurisprudence by universal and regional human rights bodies.

The UN Human Rights Committee has applied the ICCPR to both non-international and international armed conflict, including situations of occupation, in its concluding observations on country reports as well as its opinions on

29 Commission on Human Rights Resolution, UN Doc. E/CN.4/S5/1, 19 October 2000.

30 Commission on Human Rights Resolution, UN Doc. E/CN.4/1991/74, 6 March 1991.

31 SC Res. 1649, UN Doc. S/RES/1649, 21 December 2005 (The situation concerning the Democratic Republic of Congo), preambular paras. 4 and 5.

32 International Covenant on Civil and Political Rights, Article 4, 16 December 1966, 99 UNTS 171 (hereinafter ICCPR); European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 15, 213 UNTS 222, 3 September 1953 (hereinafter ECHR); and American Convention on Human Rights, Article 27, 1144 UNTS 123, 22 November 1969 (hereinafter ACHR). Article 27 of the ACHR has a virtually identical wording to Article 4 ICCPR; see also UN Doc. E/CN.4/SR.195, 1950, para. 23; UN Doc. E/CN.4/SR.196, 1950, para. 3; UN Doc. E/CN.4/SR.196, 1950, para. 5.

The omission of the term "war" in the ICCPR does not mean that derogations were not meant for situations of armed conflict, as the drafting history shows. Indeed, the drafters included a non-discrimination clause in Article 4, but deliberately left out discrimination on the ground of nationality in order to permit discrimination against enemy aliens, UN SCOR, 14th Sess, Supp No. 4, paras. 279–280; UN Doc. E/2256-E/CN.4/669, 1952. See also UN Doc. A/C.3/SR.1262, 1963, where the point was stressed that Article 4 could only apply within the territory of a state (Romania) para. 46, UN Doc. A/C.3/SR.1261, 1963.

33 Convention on the Rights of the Child of 1989, Article 38, 20 November 1989, 1577 UNTS 3 (hereinafter CROC).

34 Rome Statute of the International Criminal Court, 2187 UNTS 3, 1 July 2002.

35 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000, 1577 UNTS 3, 20 November 1989.

36 Adopted by GA Res. 60/147 of 16 December 2006, UN Doc. A/RES/60/147, 21 March 2006.

37 Adopted by GA Res. 61/106, UN Doc. A/RES/61/106, 13 December 2006, see esp. Article 11.

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individual cases.[38] The same is true of the concluding observations of the UN Committee on Economic and Social Rights,[39] the Committee on the Elimination of Racial Discrimination,[40] the Committee on the Elimination of Discrimination against Women[41] and the Committee on the Rights of the Child.[42] The European Court of Human Rights has recognized the application of the European Convention both in non-international armed conflict[43] and in situations of occupation in international armed conflict.[44] The Inter-American Commission and Court have recognized the applicability of the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights to armed conflict situations.[45]

The International Court of Justice has echoed the jurisprudence of human rights bodies. Its first statement on the application of human rights in situations of armed conflict can be found, with reference to the ICCPR, in the 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*:

> The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in

38 Concluding Observations: Democratic Republic of Congo, UN Doc. CCPR/C/COD/CO/3, 26 April 2006; Belgium, UN Doc. CCPR/CO/81/BEL, 12 August 2004; Colombia, UN Doc. CCPR/CO/80/COL, 26 May 2004; Sri Lanka, UN Doc. CCPR/CO/79/LKA, 1 December 2003; Israel, UN Doc. CCPR/CO/78/ISR, 21 August 2003; Guatemala, UN Doc. CCPR/CO/72/GTM, 27 August 2001; Netherlands, UN Doc. CCPR/CO/72/NET, 27 August 2001; Belgium, 14, UN Doc. CCPR/C/79/Add.99, 19 November 1998; Israel, UN Doc. CCPR/C/79/Add.93, 18 August 1998; United States of America, UN Doc. CCPR/C/USA/CO/3/Rev1, 18 December 2006; United Kingdom, UN Doc. CCPR/C/GBR/CO/6, 30 July 2008; *Sarma* v. *Sri Lanka*, UN Doc. CCPR/C/78/D/950/2000, 31 July 2003; *Bautista* v. *Colombia*, UN Doc. CCPR/C/55/D/563/1993, 13 November 1995; *Guerrero* v. *Colombia*, Communication No. R.11/45, UN Doc. Supp. No. 40(A/37/40), 31 March 1982.

39 Committee on Economic, Social and Cultural Rights, Concluding Observations: Colombia, UN Doc. E/C.12/1/Add.74, 30 November 2001; Guatemala, UN Doc. E/C.12/1/Add.93, 12 December 2003; Israel, UN Doc. E/C.12/1/Add.90, 23 May 2003.

40 Committee on the Elimination of Racial Discrimination: Concluding Observations: Israel, UN Doc. CERD/C/304/Add.45, 30 March 1998.

41 Committee on the Elimination of Discrimination against Women, Concluding Observations: Sri Lanka, paras. 256–302, UN Doc. A/57/38 (Part I), 7 May 2002; Democratic Republic of the Congo, paras. 194–238, UN Doc. A/55/381, February 2000; Colombia, paras. 337–401, UN Doc. A/54/38, 4 February 1999.

42 Committee on the Rights of the Child, Concluding Observations: Democratic Republic of Congo, UN Doc. CRC/C/15/Add.153, 9 July 2001; Sri Lanka, UN Doc. CRC/C/15/Add.207, 2 July 2003; Colombia, UN Doc. CRC/C/COL/CO/3, 8 June 2006.

43 See, e.g., ECtHR, *Isayeva, Yusupova and Bazayeva* v. *Russia*, Judgment of 24 February 2005; *Isayeva* v. *Russia*, Judgment of 24 February 2005; *Ergi* v. *Turkey*, Judgment of 28 July 1998, Reports 1998-IV; *Ahmet Özkan and others* v. *Turkey*, Judgment of April 6, 2004.

44 *Cyprus* v. *Turkey*, above note 3; for an overview see Aisling Reidy, "The approach of the European Commission and Court of Human Rights to international humanitarian law", *International Review of the Red Cross*, No. 324 (1998), pp. 513–29.

45 Inter-American Court of Human Rights (hereinafter I/A Ct HR), *Bámaca Velásquez* v. *Guatemala*, Judgment of 25 November 2000, Series C No. 70, para. 209; Inter-American Commission on Human Rights (hereinafter I/A Cm HR) *Coard* v. *the United States of America*, Case 10.951, OEA Doc. OEA/ser.L/V/II.106.doc.3rev, 1999, para. 37; *Alejandre* v. *Cuba*, Case 11.589, Report No. 86/99, OEA/Ser.L/V/II.106 Doc. 3 rev, 1999; *Victor Saldaño* v. *Argentina*, Report No. 38/99, OEA/Ser.L/V/II.95, Doc. 7 rev at 289, 1998, para. 18; *Rafael Ferrer-Matorra and others* v. *the United States*, Case No. 9903, Report No. 51/01, OEA/Ser.L/V/II111, Doc. 20 rev 289, 1980, para. 179; *Request for Precautionary Measures Concerning the Detainees at Guantánamo Bay, Cuba*, Decision of 12 March 2002, 41 ILM 532.

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> a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[46]

In the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*Wall* case) the Court expanded this argument to the general application of human rights in armed conflict:

> More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.[47]

It confirmed this statement in the case concerning the territory in eastern Congo occupied by Uganda (*DRC* v. *Uganda*). In this judgment, it repeated the holding of the advisory opinion in the *Wall* case that international human rights law applies in respect to acts done by a state in the exercise of its jurisdiction outside its own territory and particularly in occupied territories.[48] It thereby made it clear that its previous advisory opinion with regard to the occupied Palestinian territories cannot be explained by the long-term presence of Israel in those territories,[49] since Uganda did not have such a long-term and consolidated presence in the eastern Democratic Republic of the Congo. Rather there is a clear acceptance of the Court that human rights apply in time of belligerent occupation.

46 International Court of Justice (hereinafter ICJ) *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Reports, p. 226, para. 25 (hereinafter *Nuclear Weapons* case).

47 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Reports, p. 136, para. 106 (hereinafter *Wall* case).

48 ICJ, *Case Concerning Armed Activities on the Territory of the Congo* (*DRC* v. *Uganda*), Judgment of 19 December 2005, para. 216 (hereinafter *DRC* v. *Uganda*).

49 As argued by Michael J. Dennis, "Application of human rights treaties extraterritorially in times of armed conflict and military occupation", *American Journal of International Law*, Vol. 99 (2005), p. 122.

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Extraterritorial application of human rights

Like the International Court of Justice, human rights bodies have not only applied human rights to armed conflict situations within the territory of a country, but also to armed conflict situations abroad. The extraterritorial reach of human rights has, more recently, and in particular in connection with the armed conflicts in Iraq and Afghanistan, sparked some controversy.

While the International Court of Justice, as explained above, affirms the application of human rights extraterritorially as a general principle, arguments about this question focus on the wording of the different treaties and must be dealt with separately.

International Covenant on Civil and Political Rights

The ICCPR contains the most restrictive application clause of international human rights treaties, since its Article 2(1) confines the Covenant's application to the obligation of the state to respect and ensure human rights "within its territory and subject to its jurisdiction". The ordinary meaning of this clause implies that both criteria apply cumulatively. However, the Human Rights Committee has interpreted the clause to mean persons *either* within the jurisdiction *or* within the territory of the state, and understands persons "within the jurisdiction" to mean anyone "within the power or effective control of the state".[50]

The origins of this jurisprudence lie in cases that have no link to armed conflict. They concern the abduction, outside the state party, of dissidents by agents of the secret service. One of the first cases relating to violations of the ICCPR by state agents on foreign territory is *López Burgos* v. *Uruguay*.[51] Kidnapped in Buenos Aires by Uruguayan forces, the applicant had been secretly detained in Argentina before being clandestinely transported to Uruguay. Had the Committee applied the Covenant according to the literal meaning of Article 2, it could not have held Uruguay responsible. Instead it used a teleological argument and took the view that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a state party to perpetrate violations of the Covenant on the territory of another state, which violations it could not perpetrate on its own territory".[52]

The long-standing jurisprudence of the Human Rights Committee has confirmed this approach. In particular, the Committee has consistently applied the Covenant to situations of military occupation[53] and with regard to national troops

50 General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev1/Add.13, 26 May 2004, para. 10.

51 *López Burgos* v. *Uruguay*, UN Doc. CCPR/C/13/D/52/1979, 29 July 1981; see also *Celiberti* v. *Uruguay*, UN Doc. CCPR/C/13/D/56/1979, 29 July 1981.

52 *López Burgos* v. *Uruguay*, above note 51, para. 12.3; *Celiberti* v. *Uruguay*, above note 51, para. 10.3.

53 Human Rights Committee, Concluding Observations on Cyprus, UN Doc. CCPR/C/79/Add.39, 21 September 1994, para. 3; Concluding Observations on Israel, UN Doc. CCPR/C/79/Add.93,

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taking part in peacekeeping operations.[54] It has summed up this interpretation of Article 2 in its General Comment 31:

> States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone *within the power or effective control* of that State Party, even if not situated within the territory of the State Party. … This principle also applies to those within the *power or effective control of the forces of a State Party acting outside its territory*, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.[55]

On the basis of the requirement of *power or effective control*, the Human Rights Committee thus accepts the extraterritorial applicability of the Covenant in two types of situations: in the case of control over a territory, such as in the case of occupation, or over an individual, such as in the abduction cases.

The International Court of Justice has followed the Human Rights Committee's approach and furthermore relied on the *travaux préparatoires* of the Covenant:

> The *travaux préparatoires* of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their state of origin, rights that do not fall within the competence of that state, but of that of the state of residence.[56]

There is considerable controversy over the drafting history of the Covenant, especially between the Human Rights Committee and the United States, since the latter is of the opinion that the drafting history shows precisely that the Covenant was not meant to apply extraterritorially.[57] During the drafting, the United States proposed the addition of the requirement "within its territory" to

18 August 1998, para. 10; Concluding Observations on Israel, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para. 11.

54 Concluding Observations on Belgium, UN Doc. CCPR/C/79/Add.99, 19 November 1998, para. 14; Netherlands, UN Doc. CCPR/CO/72/NET, 27 August 2001, para. 8; Belgium, CCPR/CO/81/BEL, 12 August 2004, para. 6.

55 General Comment No. 31, above note 50, para. 10 (emphasis added).

56 *Wall* case, above note 47, paras. 108–111.

57 Annex I: Territorial Scope of the Application of the Covenant, 2nd and 3rd periodic reports of the United States of America, Consideration of reports submitted by States parties under Article 40 of the Covenant, UN Doc. CCPR/C/USA/3, 28 November 2005; Summary Record of the 2380th meeting, 18 July 2006, Second and third periodic reports of the United States of America, UN Doc. CCPR/C/SR.2380, 27 July 2006; Human Rights First, Submission to the Human Rights Committee, 18 January 2006, p. 7, available at http://www2.ohchr.org/english/bodies/hrc/docs/ngos/hrfirst.doc.

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Article 2, which only had the requirement "within its jurisdiction".[58] Eleanor Roosevelt, the US representative and the then chair of the Commission, emphasized that the United States was "particularly anxious" not to assume "an obligation to ensure the rights recognized in it to citizens of countries under United States occupation".[59] She explained that

> The purpose of the proposed addition [is] to make it clear that the draft Covenant would apply only to persons within the territory and subject to the jurisdiction of the contracting states. The United States [is] afraid that without such an addition the draft Covenant might be construed as obliging the contracting states to enact legislation concerning persons, who although outside its territory were technically within its jurisdiction for certain purposes. An illustration would be the occupied territories of Germany, Austria and Japan: persons within those countries were subject to the jurisdiction of the occupying states in certain respects, but were outside the scope of legislation of those states. Another illustration would be leased territories; some countries leased certain territories from others for limited purposes, and there might be question of conflicting authority between the lessor nation and the lessee nation.[60]

The United States took the view that the amendment was necessary "so as to make clear that a state was not bound to enact legislation in respect of its nationals outside its territory".[61] The United Kingdom followed the same line, and stated that "there were cases in which such nationals were for certain purposes under its jurisdiction, but the authorities of the foreign country concerned would intervene in the event of one of them committing an offence".[62]

However, with regard to *troops maintained by a state in foreign areas* Mrs Roosevelt stated that "such troops, although maintained abroad, remained under the jurisdiction of the State".[63]

Considering these exchanges, it becomes clear that reliance on the *travaux préparatoires* is of little help. Indeed, while it is clear that the amendment "within its territory" was added to the text in order to constitute a cumulative requirement together with the jurisdiction requirement, the reasons for the amendment relate to very precise situations. The fear was of a conflict between the jurisdictions of sovereign states; there was no reason for one state to intervene on the territory of

58 Compilation of the Comments of Governments on the Draft International Covenant on Human Rights and on the Proposed Additional Articles, UN ESCOR Hum Rts Comm, 6th Sess, UN Doc. E/CN.4/365, 1950, p. 14 (United States proposal).

59 Summary Record of the Hundred and Thirty-Eighth Meeting, UN ESCOR Hum Rts Comm, 6th Sess, 138th mtg, UN Doc. E/CN.4/SR.138, 1950, p. 10.

60 Summary Record of the Hundred and Thirty-Eighth Meeting, UN ECOSOC, Commission on Human Rights, UN Doc. E/CN.4/SR.138, 6 April 1950, p.10; see also Summary Record of the Hundred and Ninety-Third Meeting, E/CN.4/SR.193, 26 May 1950, para. 53, and Summary Record of the Hundred and Ninety-Fourth Meeting, E/CN.4/SR.194, 25 May 1950, paras. 14, 16, 25.

61 UN Doc. E/CN.4/SR.329, p. 10; see also Summary Record of the Hundred and Ninety-Fourth Meeting, UN Doc. E/CN.4/SR.194, 25 May 1950, para. 16.

62 UN Doc. E/CN.4/SR.329, p. 12.

63 Summary Record of the Hundred and Ninety-Fourth Meeting, E/CN.4/SR.194, 25 May 1950, para. 32.

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another if that other state had the means to uphold human rights. This is an altogether different scenario from the one envisaged in the *López Burgos* case or situations of occupation in which the authority of the occupied state has disappeared and been replaced by that of the occupying state.

The approach of the Human Rights Committee and the International Court of Justice can thus be justified in several ways. According to Article 31(1) of the Vienna Convention on the Law of Treaties, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The Human Rights Committee appears to have adopted this approach in its recent observations, as it held that in good faith the Covenant must apply extraterritorially.[64] Furthermore, the "preparatory work of the treaty and the circumstances of its conclusion" can be considered for purposes of interpretation not only if the meaning is ambiguous or obscure, but also if the interpretation according to the ordinary meaning "leads to a result which is manifestly absurd or unreasonable" (Article 32). In this sense, one member of the Human Rights Committee wrote in the *López Burgos* case,

> To construe the words "within its territory" pursuant to their strict literal meaning as excluding any responsibility for conduct occurring beyond the national boundaries would, however, *lead to utterly absurd results*. … Never was it envisaged, however, to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens living abroad.[65]

Thus, even relying on the *travaux préparatoires*, which at first glance indicate otherwise, the interpretations of the Human Rights Committee and the International Court of Justice are convincing and the Covenant must be understood to apply to persons abroad when they are under the effective control of a state party, at least when that control is exercised to the exclusion of control by the territorial state.

European Convention on Human Rights

The European Convention on Human Rights rests on broader terms of application than the ICCPR in that, according to Article 1 ECHR, the states parties "shall secure to everyone within their jurisdiction" the rights set forth in the Convention.[66] The drafting history of Article 1 thereof does not give much

64 "The State party should review its approach and interpret the Covenant in good faith in accordance with the ordinary meaning to be given to its terms in their context including subsequent practice, and in the light of its object and purpose". Concluding Observations on the United States of America, United States of America, UN Doc. CCPR/C/USA/CO/3/Rev1, 18 December 2006, para. 10.

65 *Lopez Burgos* v. *Uruguay*, above note 51. Individual opinion of Mr Tomuschat (emphasis added). Note that Tomuschat also excluded the situation of occupation from the scope of Article 2 – a conclusion that was not followed subsequently by the Human Rights Committee.

66 Article 1 ECHR.

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indication as to the meaning of this article. The first draft made reference to "all persons residing within the territory" and was replaced by a reference to persons "within their jurisdiction". The underlying consideration was that the word "residing" could be too restrictive and only encompass persons legally residing within the territory. It was consequently changed to "within their jurisdiction", based on Article 2 of the then Draft Covenant on Civil and Political Rights discussed by the UN Commission.[67]

The European Court of Human Rights has therefore more readily applied the Convention extraterritorially, as it merely had to interpret the meaning of the term "jurisdiction". The Court found in the *Loizidou* case that where a state exercises *effective overall control over a territory* – a condition that is particularly fulfilled in the case of military occupation – it exercises jurisdiction for the purposes of Article 1 of the Convention.[68] It justified the effective control argument by saying that "any other finding would result in a regrettable vacuum in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention's fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court".[69]

In the *Banković* case the European Court restricted its jurisprudence on extraterritorial application of the Convention. The case dealt with NATO's aerial bombardment of the Serbian Radio-Television station. The Court took the view that such bombardments did not mean that the attacking states had jurisdiction within the meaning of Article 1 ECHR; it stated that "[h]ad the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text the same as or similar to the contemporaneous Articles 1 of the four Geneva Conventions of 1949".[70] The Court clearly saw a difference between warfare in an international armed conflict, where one state has no control over the other at the time of the battle, and the situation of occupation. It further argued that

> In short, the Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing

67 *Collected Edition of the* Travaux Préparatoires *of the European Convention on Human Rights* (Vol. III, p. 260), cited in ECtHR, *Banković and others* v. *Belgium and others*, application No. 52207/99, Admissibility Decision [GC], 12 December 2001, para. 19.

68 ECtHR, *Loizidou* v. *Turkey* (Preliminary Objections), Judgment of 23 March 1995, Series A No. 310, para. 62; *Loizidou* v. *Turkey*, Judgment of 18 December 1996, Reports 1996-VI, para. 56; *Cyprus* v. *Turkey*, application No. 25781/99 above note 3, para. 77.

69 *Cyprus* v. *Turkey*, above note 3, para. 78.

70 ECtHR, *Banković and others* v. *Belgium and others*, above note 67, para. 75.

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> jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.[71]

This argumentation leads to the understanding that the Court would not find that a state is exercising jurisdiction if it exercises overall control over a territory outside the Council of Europe.[72]

However, subsequent judgments contradict this conclusion. In *Öcalan* v. *Turkey* the Court found Turkey responsible for the detention of the applicant by Turkish authorities in Kenya: it considered the applicant within the jurisdiction of Turkey by virtue of his being held by Turkish agents.[73] This broader extraterritorial application was confirmed in the case of *Issa and others* v. *Turkey*, in which the Court made it clear that control over an individual also engages the state's responsibility:

> [A] State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State. Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.[74]

In both the *Öcalan* and the *Issa* case, the Court recognized that states have "jurisdiction" over persons who are in the territory of another state but who are in the hands of their own state's agents. Interestingly, in its justification the Court relied on the case law of the Human Rights Committee in the *López Burgos* case and of the Inter-American Commission of Human Rights. It held that "[a]ccountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory".[75] This argument was not confined to the "European legal space".

It is difficult to reconcile the *Banković* decision with later jurisprudence of the Court. One way of understanding *Banković* is that the Court simply did not find that the state had effective control either over the territory or the persons, so that no "jurisdiction" was given under Article 2 of the European Convention on Human Rights. This does not, however, explain the argument about the European legal space. Another way of trying to find coherence in the jurisprudence is to

71 Ibid., para. 80.
72 See the severe criticism of the *Banković* judgment by Luigi Condorelli, "La protection des droits de l'Homme lors d'actions militaires menées à l'étranger", *Collegium* 32 (2005), p. 100.
73 ECtHR, *Öcalan* v. *Turkey*, Judgment of 12 March 2003, para. 93.
74 ECtHR, *Issa and others* v. *Turkey*, Judgment of 16 November 2004, para. 71; see also *Isaak and others* v. *Turkey*, Appl. No. 44587/98, Admissibility decision of 28 September 2008, p. 19.
75 *Issa and others* v. *Turkey*, above note 74, para. 71.

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follow the approach of the UK House of Lords in the *Al-Skeini* case. The House of Lords, after reviewing the case law of the European Court,[76] based its considerations on *Banković* as the authoritative case, excluding jurisdiction outside the area of the Council of Europe with the narrow exception of "activities of diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state"[77] and military prisons.[78] That approach, on the other hand, disregards the argument of the Court in the *Issa* case or in even in the *Öcalan* case, where it was uncontroversial that *Öcalan* came within the jurisdiction of Turkey from the moment he was handed over to Turkish agents, without fulfilling any of the conditions set out in the interpretation of the House of Lords. Future jurisprudence of the European Court of Human Rights will have to provide more clarity. An interesting case in this regard will be the decision in the interstate application from Georgia against Russia.[79]

In sum, the case law of the European Court of Human Rights on the meaning of "jurisdiction" in Article 1 is not entirely coherent. While it remains unclear to what extent the regional nature of the Convention will limit jurisdiction to territory within the geographical area of the Council of Europe in future cases, it appears that at least it will not take this limitation into account if people are in detention abroad. Another question that remains unclear is whether, if state agents committed an unlawful targeted killing abroad without controlling that area, this would mean that they exercised jurisdiction. The *Issa* case seems to indicate this, and it would indeed seem contradictory to hold a state accountable under the European Convention for killing a person in detention but not for a targeted shooting. But, again, the matter is not entirely settled.

It is submitted that the term "jurisdiction" in itself cannot support the contention that it means exercise of control abroad only when it is exercised in some states and not in others. A state may in practice, with or without the agreement of the host state, lawfully or unlawfully, exercise jurisdiction abroad. Thus "persons will come within the jurisdiction of a State in circumstances in which they can be said to be under the effective control of that State or are affected by those acting on behalf of the State more generally, wherever this occurs".[80] However, even if the Court in some cases cannot limit the application of the Convention because

76 Including cases such as Eur Comm HR, *Sánchez Ramirez* v. *France*, 86-A DR 155, 1996; *Freda* v. *Italy*, 21 DR 250, 1980; *Hess* v. *the United Kingdom*, 2 DR 72, 1975.

77 As described in *Banković and others* v. *Belgium and others*, above note 67, para. 73.

78 House of Lords, *Al-Skeini and others* v. *Secretary of State for Defence*, Judgment of 13 June 2007, [2007] UKHL 26, paras. 61–83, 91, 105–132; the Court of Appeals had interpreted the jurisprudence of the European Court of Human Rights to be broader and cover both overall control over a territory and control over a person: *R* v. *the Secretary of State for Defence, ex parte Al-Skeini and others*, Judgment of 21 December 2005, [2005] EWCA Civ 1609, paras. 62–112.

79 Press Release issued by the Registrar, "European Court of Human Rights grants requests for interim measures", No. 581, 12 August 2008.

80 Sir Elihu Lauterpacht and Daniel Bethlehem, "The scope and content of the principle of *non-refoulement*: opinion", in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations On International Protection* 87, 2003, para. 67.

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of lack of "jurisdiction", it may decide to do so on the basis of a more general argument that the Convention is a regional and not a universal treaty.

American Declaration on the Rights and Duties of Man

The Inter-American Commission on Human Rights has long asserted jurisdiction over acts committed outside the territory of a state.[81] It has based this approach on the American Declaration on the Rights and Duties of Man, which contains no application clause. The Commission's argument is teleological: since human rights are inherent to all human beings by virtue of their humanity, states have to guarantee those rights to any person under their jurisdiction, which the Commission understands to mean any person "subject to its authority and control".[82]

The Commission also took rather a broader view with respect to military operations than the European Court of Human Rights. While the European Court rejected jurisdiction in *Banković*, the Inter-American Commission, effectively using a "cause and effect" test, stated in the case of the invasion of Panama by the United States in 1989 that

> Where it is asserted that a use of military force has resulted in non-combatant deaths, personal injury, and property loss, the human rights of the non-combatants are implicated. In the context of the present case, the guarantees set forth in the American Declaration are implicated. This case sets forth allegations cognizable within the framework of the Declaration. Thus, the Commission is authorized to consider the subject matter of this case.[83]

However, this case has been pending since 1993 and no decision has been reached on its merits.

The Inter-American Commission has also had to decide on killings of persons by state agents acting abroad. Thus it condemned as a violation of the right to life the assassination of Orlando Letelier in Washington and Carlos Prats in Buenos Aires by Chilean agents.[84] Similarly, it condemned attacks on Surinamese citizens by Surinamese state agents in the Netherlands.[85]

To sum up, the Inter-American Commission holds states accountable for any acts subject to their authority and control and has understood these criteria in the widest possible manner, including situations of armed attack on foreign territory.

81 For an overview of its jurisprudence see Cristina Cerna, "Extraterritorial application of the human rights instruments of the Inter-American system", in Fons Coomans and Menno Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, 2004, pp. 141–74, and Douglas Cassel, ibid., pp. 175–81.

82 *Coard* v. *the United States*, above note 45, para. 37.

83 *Salas* v. *the United States*, Report No. 31/93, Case No. 10.573, 14 October 1993, Annual Report 1993, OEA/Ser.L/V85, Doc. 9 rev., 11 February 1994, para. 6.

84 Report on the Situation of Human Rights in Chile, OEA/Ser.L/V/II.66, Doc.17, 9 September 1985, Chapter III, paras. 81–91, 181.

85 Second Report on the Human Rights Situation in Suriname, OEA/Ser.L/V/II.66, doc.21 rev 1, 2 October 1985, Chapter V, E.

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Convention against Torture, Convention on the Rights of the Child, International Covenant on Economic, Social and Cultural Rights, International Convention on the Elimination of All Forms of Racial Discrimination

Article 2 of the Convention against Torture requires each state party to take effective measures to prevent torture "in any territory under its jurisdiction". The original proposal had only used the formulation "within its jurisdiction". It was stated that this could be understood to cover citizens of one state who are resident within the territory of another state. It was proposed to change the phrase to "any territory under its jurisdiction", which would "cover torture inflicted aboard ships or aircraft registered in the State concerned as well as occupied territories".[86] In line with this purpose, the Committee against Torture has understood this to include territories under the effective control of a state party to the Convention, but has done so against the protests of some states such as the United Kingdom[87] and the United States.[88]

The International Covenant on Economic, Social and Cultural Rights does not contain an application clause at all.[89] Both the UN Committee on Economic, Social and Cultural Rights and the International Court of Justice have nevertheless affirmed the applicability of this treaty to all persons within the control of a state, especially in occupied territory.[90]

The Convention on the Rights of the Child (Article 2(1)) guarantees the rights set forth in the Convention to each child within the jurisdiction of states party thereto; the Committee on the Rights of the Child and the International Court of Justice have understood this to include occupied territories.[91]

The International Court of Justice has found in its Order of 15 October 2008 in the case between Georgia and the Russian Federation that the International Convention on the Elimination of All Forms of Racial Discrimination applies to actions beyond a State's territory.[92]

86 Report of the Working Group on A Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. E/CN.4/L.1470, 12 March 1979, para. 32; France proposed that "within its jurisdiction" should be replaced by "in its territory" throughout the draft, E/CN.4/1314, para. 54.

87 Committee against Torture, Conclusions and Recommendations on the United Kingdom, UN Doc. CAT/C/CR/33/3, 10 December 2004, para. 4(b).

88 Committee against Torture, Summary Record of the 703rd meeting, UN Doc. CAT/C/SR.703, 12 May 2006, para. 14.

89 The same is true for the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on all Forms of Discrimination against Women.

90 *Wall* case, above note 47, para. 112.

91 Committee on the Rights of the Child, Concluding observations on Israel, UN Doc. CRC/C/15/Add.195, 9 October 2002; *Wall* case, above note 47, para. 113.

92 ICJ, *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v. Russian Federation*), *Request for the Indication of Provisional Measures*, Order of 15 October 2008, para No. 109.

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INTERNATIONAL REVIEW of the Red Cross

State practice

Member states of the Council of Europe have unanimously adopted resolutions in the Committee of Ministers, the Council's decision-making body, for the execution of judgments of the European Court of Human Rights which had applied the Convention extraterritorially, for example in the case of *Cyprus* v. *Turkey* for the violations committed by Turkey during its occupation[93] or for the violations committed by the Russian Federation in Transdniestria in Moldova.[94]

The positions and practice of states concerning the extraterritorial application of human rights, as expressed over a long period in General Assembly or Security Council resolutions, tend to confirm the application of human rights in international armed conflict. After the invasion of Hungary by Soviet troops in 1956, the Security Council called upon the Soviet Union and the authorities of Hungary "to respect … the Hungarian people's enjoyment of fundamental human rights and freedoms".[95] In 1967 it considered, with regard to the territories occupied by Israel, that "essential and inalienable human rights should be respected even during the vicissitudes of war".[96] More recently, it has condemned human rights violations by "militias and foreign armed groups" in the Democratic Republic of the Congo.[97] As mentioned above, resolutions of the UN General Assembly and the UN Commission on Human Rights have also sometimes invoked human rights in such situations.[98]

Few states have contested, vis-à-vis the human rights bodies, the application of the human rights treaties abroad.[99] Apart from Israel, it is doubtful whether any state has consistently objected to the extraterritorial application of human rights instruments. Also, it should be noted that some important

93 Interim Resolution ResDH(2005)44, concerning the judgment of the European Court of Human Rights of 10 May 2001 in the case of Cyprus against Turkey (adopted by the Committee of Ministers on 7 June 2005, at the 928th meeting of the Ministers' Deputies).

94 Interim Resolution ResDH(2006)26 concerning the judgment of the European Court of Human Rights of 8 July 2004 (Grand Chamber) in the case of Ilaşcu and others against Moldova and the Russian Federation (Adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies).

95 GA Resolution 1312 (XIII), 12 December 1958. See above note 14.

96 SC Resolution 237 (1967) of 14 June 1967, preambular paragraph 2. See above note 5.

97 UN Doc. S/RES/1649 of 21 December 2005.

98 See above notes 30 and 31.

99 See Replies of the Government of the Netherlands to the Concerns Expressed by the Human Rights Committee, UN Doc. CCPR/CO/72/NET/Add.1, 29 April 2003, para. 19; Second periodic report of Israel to the Human Rights Committee, UN Doc. CCPR/C/ISR/2001/2, 4 December 2001, para. 8; Second periodic report of Israel to the Committee on Economic, Social and Cultural Rights, UN Doc. E/1990/6/Add.32, 16 October 2001, para. 5; Committee against Torture, Conclusions and Recommendations on the United Kingdom, UN Doc. CAT/C/CR/33/3, 10 December 2004, para. 4 (b); Summary Record of the 703rd meeting, UN Doc. CAT/C/SR.703, 12 May 2006, para. 14; Annex I: Territorial Scope of the Application of the Covenant, 2nd and 3rd periodic reports of the United States of America, Consideration of reports submitted by States parties under Article 40 of the Covenant, UN Doc. CCPR/C/USA/3, 28 November 2005.

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national courts, for instance in Israel[100] and the United Kingdom,[101] have applied human rights extraterritorially. The objection of these governments therefore does not necessarily reflect internally coherent state practice, since such practice includes all branches of government (the executive, the legislature and the judiciary).[102]

It would go beyond the scope of this article to analyse which human rights are customary. But it is uncontroversial that core human rights such as the prohibition of arbitrary deprivation of life, the prohibition of torture and cruel, inhuman or degrading treatment, the prohibition of arbitrary deprivation of liberty or the right to a fair trial form part of customary international law. As for their territorial scope, it can be seen from the above-mentioned UN resolutions that extraterritorial application has not been called into question outside treaty law.[103] Human rights in customary international law are of a universal nature and therefore belong to every human being, wherever he or she may be. It can hence be argued that customary human rights apply in all territories of the world and that any state agent, whether acting in his or her own territory or abroad, is bound to respect them. In other words, respect for customary human rights is not a matter of extraterritorial application, because outside of treaty application clauses, respect for human rights has never been territorially confined.

Complementarity and *lex specialis*

The concurrent application of human rights and humanitarian law has the potential to offer strong protection to the individual, but it can also raise many problems. With the increasing specialization of different branches of international law, different regimes overlap, complement or contradict each other. Human rights and humanitarian law are but one example of this phenomenon.[104] It is therefore necessary to review the pertinent international rules and general principles of interpretation in order to analyse the relationship between human rights and humanitarian law.

100 See, e.g., *Marab* v. *IDF Commander in the West Bank*, HCJ 3239/02, Judgment of 18 April 2002.

101 *Al-Skeini and others* v. *Secretary of State for Defence*, [2004] EWHC 2911 (Admin), No. CO/2242/2004, 14 December 2004; see also *Al-Skeini and others* v. *Secretary of State for Defence*, [2005] EWCA Civ 1609, 21 December 2005, paras. 3–11, 48–53, 189–190; *Al-Jedda, R* v. *Secretary of State for Defence*, [2005] EWHC 1809 (Admin), 12 August 2005.

102 The importance of court decisions in forming customary law when conflicting with positions of the executive is subject to debate: see International Law Association, Final Report of the Committee on Formation of Customary International Law, Statement of principles applicable to the formation of general customary international law, pp. 17, 18.

103 See, e.g., the United States Army *Operational Handbook* of 2006, ch. 3, p. 47. For the extraterritorial scope of the customary right to life, see Nils Melzer, *Targeted Killing*, 2007, pp. 287 f.; David Kretzmer, "Targeted killing of suspected terrorists: extra-judicial executions or legitimate means of defence?", *European Journal of International Law*, Vol. 16 (2005), pp. 171, 185; Orna Ben Naftali and Yuval Shany, "Living in denial: the application of human rights in the occupied territories", *Israel Law Review*, Vol. 37 (2004), pp. 17, 87.

104 Bothe, above note 4, pp. 37.

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Distinguishing features of human rights law and humanitarian law

Before the possibilities of concurrent application are discussed, some fundamental distinctions between the two bodies of law should be recalled. First, humanitarian law only applies in times of armed conflict, whereas human rights law applies at all times. Second, human rights law and humanitarian law are traditionally binding on different parties. While it is clear that humanitarian law is binding for "parties to the conflict"[105] – that is, both state authorities and non-state parties – this question is far more controversial in human rights law. Traditionally, international human rights law is understood to be binding only for states, and it will have to be seen how the law evolves in this regard.[106] Third, while most international human rights are with few exceptions derogable,[107] humanitarian law is non-derogable (with the sole limited exception of Article 5 of the Fourth Geneva Convention). Lastly, there are considerable differences in procedural and secondary rights, such as the right to an individual remedy, as will be further discussed below.[108]

It is thus clear from the outset that a complete merging of the two bodies of law is impossible. It is natural, therefore, that the approach in jurisprudence and practice is rather that human rights and humanitarian law are not mutually exclusive, but complementary and mutually reinforcing. The concept of complementarity is, however, of a policy rather than a legal nature. To form a legal framework within which the interplay between human rights and humanitarian law can be applied, the principles of legal interpretation have to provide the tools. This leads to two main concepts: the concept of complementarity in its legal understanding in conformity with the Vienna Convention on the Law of Treaties, and the concept of *lex specialis*.

The meaning of "complementarity"

Complementarity means that human rights law and humanitarian law do not contradict each other but, being based on the same principles and values, can influence and reinforce each other mutually. In this sense, complementarity reflects a method of interpretation enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which stipulates that, in interpreting a norm, "any relevant rules of international law applicable in the relations between the parties" shall be taken into account. This principle, in a sense, enshrines the idea of international law understood as a coherent system.[109] It sees international law as a regime in

105 See Common Article 3 to the Fourth Geneva Convention.

106 Article 2 ICCPR; Article 1 ECHR; Article 1 ACHR; see Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006.

107 See Article 4 ICCPR; Article 15 ECHR; Article 27 ACHR.

108 See below. Investigation, remedies, reparation, pp. 540 *et seq.*

109 Campbell McLachlan, "The principle of systemic integration and Article 31(3)(c) of the Vienna Convention", *International and Comparative Law Quarterly*, Vol. 54 (2005), pp. 279–320; International Law Commission, Report of the Study Group on Fragmentation of International Law: Difficulties arising from Diversification and Expansion of International Law, UN Doc. A/CN.4/L.676, 29 July 2005,

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which different sets of rules cohabit in harmony. Thus human rights can be interpreted in the light of international humanitarian law and vice versa.

The meaning of the principle of *lex specialis*

Frequently, however, the relationship between human rights law and humanitarian law is described as a relationship between general and specialized law, in which humanitarian law is the *lex specialis*. This was the approach of the International Court of Justice in the *Nuclear Weapons* case cited above, in which the Court held that

> the test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.[110]

The Court repeated the reference to the *lex specialis* principle in the *Wall* case.[111] It did not do so in the *DRC* v. *Uganda* case.[112] Since the Court gave no explanation for the omission, it is not clear whether the omission was deliberate and shows a change in the approach of the Court.

Among international human rights bodies the Inter-American Commission has followed the jurisprudence of the International Court of Justice, citing the *lex specialis* principle,[113] but other human rights bodies have not. Neither the African Commission on Human and Peoples' Rights nor the European Court of Human Rights have yet made known their views on the subject. The Human Rights Committee has done so, but has avoided the use of the *lex specialis* formulation and instead found that "both spheres of law are complementary, not mutually exclusive".[114]

The principle of *lex specialis* is an accepted principle of interpretation in international law. It stems from a Roman principle of interpretation according to which, in situations especially regulated by a specific rule, this rule would displace the more general rule (*lex specialis derogat legi generali*). The *lex specialis* principle can be found in the writings of such early writers as Vattel[115] or Grotius. Grotius writes,

> What rules ought to be observed in such cases [i.e. where parts of a document are in conflict]? Among agreements which are equal … preference should be

para. 27; see also Philippe Sands, "Treaty, Custom and the Cross-fertilization of International Law", *Yale Human Rights and Development Law Journal*, Vol. 1 (1999), p. 95.

110 *Nuclear Weapons* case, above note 46, para. 25.

111 *Wall* case, above note 47, para. 106.

112 *DRC* v. *Uganda*, above note 48, para. 216.

113 *Coard* v. *the United States*, above note 45, para. 42.

114 Human Rights Committee, General Comment No. 31, above note 50, para. 11.

115 Emerich de Vattel, *Le Droit Des Gens ou Principes de la Loi Naturelle*, Book II, ch xvii, para. 316 (reproduction of Books I and II edn 1758, in: The Classics of International Law, Geneva, Slatkine Reprints, Henry Dunant Institute, 1983).

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given to that which is most specific and closest to the subject in hand, for special provisions are ordinarily more effective than those that are general.[116]

In legal literature a number of commentators criticize the lack of clarity of the principle of *lex specialis*. First, it has been said that international law, as opposed to national law, has no clear hierarchy of norms and no centralized legislator, but a "variety of fora, many of which are disconnected and independent from each other, creating a system different from the more coherent domestic legal order".[117] Second, it is stressed that the principle of *lex specialis* was originally conceived for domestic law and is not readily applicable to the highly fragmented system of international law.[118] Third, critics point out that nothing indicates, particularly between human rights law and humanitarian law, which of two norms is the *lex specialis* or the *lex generalis*;[119] some, for instance, argue that human rights law might well be the prevailing body of law for persons in the power of an authority.[120] It has even been criticized that "this broad principle allows manipulation of the law in a manner that supports diametrically opposed arguments from supporters that are both for and against the compartmentalization of IHL and IHRL".[121] Critics have therefore proposed alternative models to the *lex specialis* approach, calling them a "pragmatic theory of harmonization",[122] "cross-pollination",[123] "cross-fertilization"[124] or a "mixed model".[125] Without going into detail, these approaches have in common an emphasis on harmony between the two bodies of law rather than tension.

Lastly, there appears to be a lack of consensus in legal literature about the meaning of the *lex specialis* principle. The Report of the Study Group of the International Law Commission on Fragmentation of International Law has found that *lex specialis* is not necessarily a rule to solve conflicts of norms; that it has, in

116 Hugo Grotius, *De Jure Belli Ac Pacis*, Book II, section XXIX. Library Ires.
117 Anja Lindroos, "Addressing the norm conflicts in a fragmented system: the doctrine of *lex specialis*", *Nordic Journal of International Law*, Vol. 74 (2005), p. 28.
118 See, e.g., International Law Commission, Report of the Study Group, above note 108; Lindroos, above note 117, pp. 27–8.
119 Nancie Prud'homme, "*Lex specialis*: oversimplifying a more complex and multifaceted relationship?", *Israel Law Review*, Vol. 40 (2) (2007), pp. 356; Gloria Gaggioli and Robert Kolb, "A right to life in armed conflicts? The contribution of the European Court of Human Rights", *Israel Yearbook on Human Rights*, Vol. 37 (2007), pp. 115–69.
120 Louise Doswald-Beck, "International humanitarian law and the International Court of Justice on the legality of the threat or use of nuclear weapons", *International Review of the Red Cross*, No. 316 (January–February 1997), p. 35.
121 Prud'homme, above note 119, p. 14.
122 Ibid., p. 6.
123 Rene Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, Cambridge, 2005, p. 350.
124 Sands, above note 109, pp. 85–105.
125 Kretzmer, above note 103, p. 171.

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fact, two roles – either as a more specific interpretation of or as an exception to the general law. As Martti Koskenniemi explains,

> There are two ways in which law takes account of the relationship of a particular rule to a general rule (often termed a principle or a standard). A particular rule may be considered an application of the general rule in a given circumstance. That is to say, it may give instructions on what a general rule requires in the case at hand. Alternatively, a particular rule may be conceived as an exception to the general rule. In this case, the particular derogates from the general rule. The maxim *lex specialis derogat legi generali* is usually dealt with as a conflict rule. However, it need not be limited to conflict.[126]

Understood not as a principle to solve conflicts of norms but as a principle of more specific interpretation, the principle of *lex specialis* in itself incorporates the complementarity approach mentioned above. It comes very close to the principle of Article 31(3)(c) of the Vienna Convention on the Law of Treaties, according to which treaties must be interpreted in the light of each other.

There are thus two aspects to the *lex specialis* principle. One is its meaning as a principle of interpretation whereby a more general rule is interpreted in the light of a more specific rule. The other is its function as a rule governing conflicting norms.

In light of this understanding, the following conclusion can be drawn. While complementarity – that is, *lex specialis* in the sense of a rule of interpretation – can often provide solutions for harmonizing different norms, it has its limits. When there is a genuine conflict of norms, one of the norms must prevail.[127] In such situations the *lex specialis* principle, in the sense of a conflict-solving rule, gives precedence to the rule that is most adapted and tailored to the specific situation. There may be controversy as to which norm is the more specialized in a concrete situation, and indeed "an abstract determination of an entire area of law as being more specific towards another area of law is not, in effect, realistic".[128] But this should not call the application of the principle of *lex specialis* as such into question. While the respective rules of humanitarian law and human rights law can mostly be interpreted in the light of one another, some of them are contradictory, and it has to be decided which one prevails. In determining which rule is the more specialized one, the most important indicators are the precision and clarity of a rule and its adaptation to the particular circumstances of the case.

The application of *lex specialis* in its two different functions to the interplay between human rights and humanitarian law can be illustrated by the example of the use of force, especially in non-international armed conflict and in situations of occupation.

126 Martti Koskenniemi, Study on the Function and Scope of the Lex Specialis Rule and the Question of "Self Contained Regimes", UN Doc. ILC(LVI)/SG/FIL/CRD.1 and Add.1 (2004), p. 4.
127 See International Law Commission, Report of the Study Group, above note 109, para. 42.
128 Lindroos, above note 117, p. 44.

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INTERNATIONAL REVIEW of the Red Cross

The use of force

Different standards for the use of force in human rights law and humanitarian law

The rules governing the use of force in humanitarian law and in human rights law are based on different assumptions. Human rights law "seeks review of every use of lethal force by agents of the state, while [humanitarian law] is based on the premise that force will be used and humans intentionally killed".[129]

In human rights law, lethal force can be used only if there is an *imminent* danger of serious violence that cannot be averted save for such use of force. The danger cannot be merely hypothetical, it must be imminent.[130] This extremely narrow use of lethal force to protect the right to life is confirmed in the Principles on the Use of Force and Firearms by Law Enforcement Officials, which state that "intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life" and requires clear warning before the use of firearms, with sufficient time for the warning to be observed.[131] Under human rights law, the planning of an operation with the purpose of killing is unlikely ever to be lawful. Police officers are trained in de-escalation techniques or in the use of weapons in a manner completely different from that of soldiers. The European Court of Human Rights, for instance, has developed extensive case law on the requirements for planning and controlling the use of force in order to avoid the use of lethal force.[132]

In international humanitarian law, the main principles reining in the use of force are the principles of distinction, of precaution and of proportionality in order to avoid incidental loss of civilian life or damage to civilian objects.[133] The principle of proportionality in humanitarian law is different from proportionality in human rights law.[134] Whereas human rights law requires that the use of force be proportionate to the aim to protect life, humanitarian law requires that the incidental loss of civilian life, injury to civilians or damage to civilian objects caused by

129 Kenneth Watkin, "Controlling the use of force: a role for human rights norms in contemporary armed conflict", *American Journal of International Law*, Vol. 98 (2004), p. 32.

130 See Principles 9 and 10 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; see also Nigel Rodley, *The Treatment of Prisoners Under International Law*, Oxford University Press, Oxford, 1999, pp. 182–8; Kretzmer, above note 103, p. 179.

131 Principles 9 and 10 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

132 ECtHR, *McCann and Others* v. *United Kingdom*, 18984/91, 1995, paras. 202–213; *Andronicou and Constantinou* v. *Cyprus*, Judgment of 9 October 1997, Reports 1997-VI, paras. 181–186, 191–193; *Hugh Jordan* v. *the United Kingdom*, Judgment of 4 May 2001, paras. 103–104; *Ergi* v. *Turkey*, above note 43, para. 79; *Isayeva, Yusupova and Bazayeva* v. *Russia*, above note 43, paras. 169–171; *Isayeva* v. *Russia*, above note 43, para. 189.

133 Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, ICRC and Cambridge University Press, Cambridge, 2005, Rules 11–21.

134 See the discussion on the principle of proportionality in Noam Lubell, "Challenges in applying human rights law to armed conflict", *International Review of the Red Cross*, Vol. 87 No. 860 (December 2005), pp. 737, 745–46.

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an armed attack must not be excessive "in relation to the concrete and direct military advantage anticipated".[135] The two principles can lead to different results. On the other hand, some authors argue that the "differences are fading progressively away and as HRL bodies develop an increasing branch of wartime human rights, sensitive to the peculiar characteristics of that type of situation".[136]

There is a growing position that even under humanitarian law the ability to use lethal force is limited not only by a principle of proportionality protecting incidental loss of civilian life or damage to civilian objects, but also by other limitations inherent to humanitarian law, in particular the principle of military necessity and the principle of humanity.[137] One of the oldest norms cited in this respect is the preambular paragraph of the St. Petersburg Declaration of 1868, which states that "the only legitimate object which States should endeavour to accomplish … is to weaken the military forces of the enemy".[138] Other rules could be cited to support this approach, in particular the prohibition on refusing quarter[139] or on the use of weapons causing unnecessary suffering or superfluous injury.[140] In this sense, military necessity is understood not only as an underlying principle of international humanitarian law or even as an enabling principle subjecting other rules of humanitarian law to the military objective, but as a principle which imposes constraints on the means and methods of warfare. In terms of the use of force, it limits that use to the degree and kind of force necessary to achieve the enemy's submission. Hence, "the fact that [humanitarian law] does not prohibit direct attacks against combatants does not give rise to a legal entitlement to kill combatants at any time and any place so long as they are not *hors de combat* within the meaning of Article 41 [2] AP I".[141] However, this approach is not without controversy among scholars and practitioners of international humanitarian law.

In view of these distinct rules, it is interesting to look at recent developments in jurisprudence. Have they called the rules into question? Have they led to a convergence, as is sometimes contended? It must be borne in mind, however, that most of the existing jurisprudence is of human rights bodies and courts and, to

135 See the codification in Additional Protocol I, Article 51(5).

136 Gaggioli and Kolb, above note 119, p. 138.

137 For an in-depth analysis of the concept of military necessity and its use in modern military manuals see Melzer, above note 103, pp. 336–56; Gaggioli and Kolb, above note 119, p. 136.

138 Preamble of the Saint Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weights, 1868. Article 14 of the Lieber Code contains a similar clause: "Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war." See also Articles 15 and 16 of the Lieber Code, which define military necessity.

139 1907 Hague Regulations, Article 23(c); Geneva Convention II, Article 12; Additional Protocol I, Article 40.

140 Additional Protocol I, Article 35 (2).

141 Nils Melzer, above note 103, p. 347; in the words of Jean Pictet: "If we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil". *Development and Principles of International Humanitarian Law*, p. 75 f. (1985).

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some extent, national courts. The judgments of these bodies and courts have no universally binding effect. Also, they adjudicate cases within the framework of specific treaties or laws. In particular, human rights bodies can often simply ignore humanitarian law because states have not acknowledged that they are involved in an armed conflict. An attempt must therefore be made to discover in which respect their statements can or cannot be generalized and whether or how they influence the broader, dogmatic discussion on human rights and humanitarian law.

Non-international armed conflict

While it would be fairly uncontroversial to assume that for the conduct of hostilities – that is, put simply, battlefield situations – humanitarian law is generally the *lex specialis* in relation to human rights law, two situations are more problematic: the use of force in non-international armed conflict; and the use of force in situations of occupation, where human rights have an important role to play. Is humanitarian law always the *lex specialis* in those situations?

Humanitarian law

The treaty-based humanitarian law of non-international armed conflict contains very few rules on the conduct of hostilities. The most important one is the protection of civilians against attack, unless and for such time as they take a direct part in hostilities, enshrined in Article 13(3) of Additional Protocol II. However, it is relatively uncontroversial that the rules regulating the conduct of hostilities – for example, distinction, proportionality, precaution – are part of customary international humanitarian law applicable to non-international armed conflicts.[142]

The difficulty is that there is no combatant status in non-international armed conflict. This could lead to the conclusion that, apart from the government's armed forces, there are only civilians in such conflicts – meaning that members of armed groups could only be attacked when they are actually conducting hostilities, but not at any other time. From a military point of view, this is held to be unfeasible and not to reflect the reality of armed conflict. It moreover creates an imbalance between members of government armed forces, who could then be attacked at any time, and members of armed groups, who could not. During the drafting of Additional Protocol II there was no intention of precluding attacks at all times on members of armed groups who are fighting the government. On the contrary, the Commentary on 1977 Additional Protocol II states that "[t]hose belonging to armed forces or armed groups may be attacked at any time".[143] Indeed, the principle of distinction only makes sense if not everyone is a civilian – that is, if the government is required to distinguish between the civilian population

142 See Henckaerts and Doswald-Beck, above note 133, Rules 1, 2, 5–24.
143 Sandoz, Swinarski and Zimmerman, above note 23, para. 4789.

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and fighters of armed opposition groups. So who can be attacked and under what conditions?

There are, broadly speaking, three ways of approaching the targeting of members of armed groups in non-international armed conflict. The first is to hold that if a member of an armed group has a permanent fighting function, although he or she remains a civilian,[144] the mere fact of having the fighting function amounts to direct participation in hostilities and that person can therefore be attacked at all times (a sort of "continuous" direct participation in hostilities).[145] The second approach is to define those members of armed groups which have a permanent fighting function as "combatants for the purposes of the conduct of hostilities", but without conferring on them a combatant *status* and combatant immunity as in international armed conflict ("membership approach").[146] The third approach is to consider that anyone who is not formally a combatant – that is, not a member of the armed forces – is a civilian and can only be attacked during the actual times when he/she is directly participating in hostilities.

The consequence of the first two approaches is that members of armed groups who have a fighting function could be attacked at all times under international humanitarian law. The rules restricting the use of force against them would be the rules regulating the means and methods of war, for example rules on the use of weapons, the prohibition of perfidy, or denial of quarter.

Both in doctrine and in jurisprudence, however, many feel uncomfortable with at least one part of this solution, for while it is unproblematic to accept that "rebels who are organized, armed and assembled cannot be arrested",[147] it is far more controversial to maintain that a member of an armed group, even a member with a permanent fighting function, can at all times be targeted without

144 The Supreme Court of Israel has taken the approach that members of "terrorist" groups continue to be civilians that can be targeted if and for such time as they directly participate in hostilities. *The Public Committee against Torture in Israel and the Palestinian Society for the Protection of Human Rights and the Environment* v. *the Government of Israel, the Prime Minister of Israel, the Minister of Defence, the Israel Defense Forces, the Chief of General Staff of the Israel Defense Forces, and Surat HaDin – Israel Law Center and 24 Others*, the Supreme Court of Israel sitting as the High Court of Justice, Judgment of 14 December 2006, (hereinafter *Targeted Killings* case), para. 28. It has, however, avoided the question of what "for such time" means (para. 40).

145 See Third Expert Meeting on Direct Participation in Hostilities, Summary Report 2005, pp. 48–9, available at http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf (hereinafter DPH Report 2005). This seems to be the approach of the Supreme Court of Israel in the *Targeted Killings* case, above note 144, para. 39: "a civilian who has joined a terrorist organization which has become his 'home', and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack 'for such time' as he is committing the chain of acts." But the Supreme Court also recognizes that between this situation and a civilian who only once or sporadically participates in hostilities and can only be attacked at those times, there is a grey area "about which customary international law has not yet crystallized", para. 40.

146 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflicts*, Cambridge University Press, Cambridge, 2004, p. 29; Kretzmer, above note 103, pp. 197–8; Sandoz, Swinarski and Zimmermann, above note 23, para. 4789; I/A Commission HR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev 1 corr., 22 October 2002, para. 69.

147 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 (864) (December 2006), p. 885.

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the restrictions imposed by human rights law. Can a member of the Revolutionary Armed Forces of Colombia (FARC) be targeted when shopping in Bogotá, instead of the operation being so planned that he can be arrested? Can a suspected member of the Kurdistan Workers' Party (PKK) be targeted with lethal force in accordance with the principles of humanitarian law when taking part in a demonstration? Can lethal force be used without any warning against a Chechen rebel in Moscow while he is at home? The main practical question is whether such persons have to be arrested, if that is a possibility, rather than killed. Should the traditional rules of humanitarian law prevail in such a situation, should they be influenced by human rights law, or should human rights law as *lex specialis* displace humanitarian law?

Treaty-based international humanitarian law does not greatly clarify the question. As explained above, the principle of military necessity in its restrictive sense might stand in the way of shooting to kill a fighter in circumstances where there is no need to do so to achieve a concrete military aim, but this interpretation of military necessity remains, as yet, controversial.[148] On the other hand, such cases have increasingly been submitted to human rights bodies, which have addressed them from a human rights angle.

Human rights jurisprudence

One of the first cases was that of *Guerrero* v. *Colombia*,[149] which came before the UN Human Rights Committee. The authorities suspected that members of an armed opposition group had kidnapped a former ambassador and were holding him hostage in a house in Bogotá. While the hostage was not found, the police forces waited for the rebels to return and shot them. The UN Human Rights Committee held that

> [T]he police action was apparently without warning to the victims and without giving them any opportunity to surrender to the police patrol or to offer any explanation of their presence or intentions. There is no evidence that the action of the police was necessary in their own defence or that of others, or that it was necessary to effect the arrest or prevent the escape of the persons concerned … the action of the police resulting in the death of Mrs. Maria Fanny Suarez de Guerrero was disproportionate to the requirements of law enforcement.[150]

The Human Rights Committee has also criticized Israel's policy of targeted killings insofar as they are used, in part, as a deterrent or punishment, and has required that "before resorting to the use of deadly force, all measures to arrest a

148 See DPH Report 2005, above note 145, pp. 45–6.
149 Human Rights Committee, Communication No. R.11/45, UN Doc. Supp. No. 40(A/37/40), 31 March 1992.
150 Ibid., paras. 13.2, 13.3.

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person suspected of being in the process of committing acts of terror must be exhausted".[151]

The Inter-American Commission has generally held that members of armed groups who assume combatant functions cannot "revert back to civilian status or otherwise alternate between combatant and civilian status".

The most extensive case law is that of the European Court of Human Rights. Before relating it here, it should be noted that in none of the cases that have come before the Court have the respondent governments put forward the argument that an armed conflict prevailed in their country.

The European Court of Human Rights' seminal case on the use of force was *McCann and others* v. *the United Kingdom*, which concerned the killing of members of the Irish Republican Army (IRA) by UK special forces in Gibraltar. In this case, the Court held that the use of force must not only be proportionate in the moment that it is exercised, but that operations, even against suspected terrorists, must be planned so as to minimize to the greatest extent possible recourse to lethal force.[152] This fundamental tenet lies at the heart of all subsequent cases on the use of force, be they law-inforcement or military operations.[153]

In *Güleç* v. *Turkey*, in which police fired guns into a crowd to disperse demonstrators, the government argued that it had needed to use lethal force in a demonstration because of the suspected presence of PKK members.[154] The Court did not accept the argument and instead held that the authorities should have planned their operation so as to avoid lethal force, such as by using the necessary equipment such as truncheons, riot shields, water cannons, rubber bullets or tear gas, especially since the demonstration took place in a region in which a state of emergency had been declared and where at the time in question disorder could have been expected.[155] In *Gül* v. *Turkey*, the police fired at the door which Mehmet Gül was unlocking after they had knocked. The Court found the allegation by the police that Mehmet Gül had fired one pistol shot at them unsubstantiated. It held that opening fire with automatic weapons on an unseen target in a residential block inhabited by innocent civilians, including women and children, was grossly disproportionate.[156] In *Oğur* v. *Turkey*, the government asserted that the objective of the members of the security forces had been to apprehend the victim, who was thought to be a terrorist. On that occasion they had had to face a "major armed response", to which they had replied with warning shots, one of which had hit Musa Oğur, who had allegedly been running away. The Court did not accept that the security forces had come under attack and held that the use of force was

151 Concluding Observations: Israel, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para. 15.
152 *McCann and others* v. *the United Kingdom*, above note 132, para. 194; *Gül* v. *Turkey*, Appl. No. 22676/93, Judgment of 14 December 2000, para. 84.
153 See the latest case of *Akhmadov and others v. Russia*, Judgement of 14 November 2008, para. 100.
154 *Güleç* v. *Turkey*, Judgment of 27 July 1998, Reports 1998-IV, para. 67.
155 Ibid., paras. 71–73.
156 *Gül* v. *Turkey*, above note 152, para. 82.

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disproportionate, since no warning had been given and the warning shot had been badly executed.[157]

In the case of *Hamiyet Kaplan* v. *Turkey*, the Court accepted that there was serious fighting between the government forces and the PKK. Four persons, including two children, died during a police raid on suspected members of the PKK, in the course of which a senior police officer was also killed by gunfire from the suspects' home. The Court accepted that there had been an armed confrontation between the police and the persons in the house and thus discarded the hypothesis that there had been an extrajudicial killing on the part of the police officers.[158] It nonetheless noted that during the organization of the operation, no distinction had been made between lethal and non-lethal force: the police officers had used only firearms, not tear gas or stun grenades. The uncontrolled violence of the assault on the house had inevitably put the suspects' lives in great danger. It criticized that there had been no sufficient legal framework and instruction to avoid the use of lethal force by the police officers and that therefore there had been a violation of the right to life.[159] Here again, although the Court did not contest the armed response of the suspect PKK members, it applied the strict requirements of law enforcement to the situation.

The common feature of these cases is that, even though the persons were alleged terrorists or suspected terrorists, the Court applies the full panoply of human rights safeguards for the right to life, including the necessity to avoid force, to use weapons which will avoid lethal injuries and to give warning.

In a number of recent cases, concerning security operations against Kurdish rebels in Turkey and Chechen rebels in Russia, the European Court of Human Rights has used language that is much closer to humanitarian law than to human rights law. In several cases since *Ergi* v. *Turkey* the Court, in assessing the proportionality of the use of force under Article 2 of the ECHR, has found that the state was responsible for "tak[ing] all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding, and, in any event, minimising incidental loss to civilian life"[160] – a standard found textually not in human rights law but in the obligation in Article 57(2)(a)(ii) of Additional Protocol I to take such precautions in attacks. The Court has accepted that injury to civilians might be a result of the use of force against members of organized armed groups, without qualifying that use of force as disproportionate.[161] As said above, this test differs somewhat from that in human rights law in that it neither requires that force may only be used as a last resort or

157 *Oğur* v. *Turkey*, Judgment of 20 May 1999, Reports 1999-III, paras. 82–84.
158 *Hamiyet Kaplan* v. *Turkey*, Judgment of 13 September 2005, para. 50.
159 Ibid., paras. 51–55. See also *Akhmadov and others v. Russia*, Judgement of 14 November 2008, para. 99.
160 *Ergi* v. *Turkey*, above note 43, para. 79; *Ahmed Özkan and others* v. *Turkey*, above note 43, para. 297. In *Ergi* the Court went very far in its requirement of precautionary measures, which included protection against firepower against civilians by PKK member caught in the ambush: *Ergi*, paras. 79, 80.
161 *Ahmed Özkan and others* v. *Turkey*, above note 43, para. 305; however, the Court found that the security forces should have verified after the combat operations whether any civilians were injured, para. 307.

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that force must be avoided, to the extent possible, to spare not only innocent civilians but also the targeted person.

In the *Isayeva, Yusupova and Bazayeva* case, civilians were killed in a missile attack on a civilian convoy. While the Court made a general statement as to the need to avoid lethal force,[162] its test was, in effect, whether harm to civilians could be avoided "in the vicinity of what the military could have perceived as military targets".[163] On the other hand, in *Isayeva* v. *Russia*, in which the applicant and her relatives were attacked by missiles when trying to leave a village through what they had perceived as safe exits from heavy fighting, the Court took a slightly different approach. While accepting the need for exceptional measures in the context of the Chechen conflict,[164] the Court nonetheless recalled that Russia had not declared a state of emergency or made a derogation within the terms of Article 15 of the ECHR, so that the situation had to be "judged against a normal legal background".[165] It then held that

> [e]ven when faced with a situation where, as the Government submit, the population of the village had been held hostage by a large group of well-equipped and well-trained fighters … the massive use of indiscriminate weapons … cannot be considered compatible with the standard of care pre-requisite to an operation of this kind involving the use of lethal force by state agents.[166]

It further held that the villagers should have been warned earlier of the attacks and should have been able to leave the village earlier.[167] Thus the Court used the human rights model based on a law enforcement situation, but then also took into account the insurgency and focused more on the indiscriminate nature of the weapons and the lack of warning and safe passage for the civilians. It did not question that the rebels could be attacked, even if they posed no immediate threat.[168]

From its case law it can be concluded that the European Court of Human Rights – albeit never explicitly and not always entirely consistently – appears broadly to distinguish between two kinds of situations: on the one hand, situations like *McCann*, *Gül*, *Oğur* or *Kaplan*, in which individual members of armed groups or alleged members of such groups are killed and insufficient precautions are taken to avoid the use of lethal force altogether, including against those persons; on the other hand, situations like *Ergi*, *Özkan* or *Isayeva, Yusupova and Bazayeva* and *Isayeva*, in which the government forces are engaged in military counter-insurgency operations or fully fledged combat against an armed group. In the latter

162 *Isayeva, Yusupova and Bazayeva* v. *Russia*, above note 43, para. 171; in *Isayeva* v. *Russia*, above note 43, paras. 175–176, the Court cites both standards.
163 *Isayeva, Yusupova and Bazayeva* v. *Russia*, above note 43, para. 175.
164 *Isayeva v. Russia*, above note 43, para. 180.
165 Ibid., para. 191.
166 Ibid., para. 191.
167 Ibid., paras. 193–200.
168 It appears, however, to require that illegal fighters posed a danger to the military in *Akhmadov and others v. Russia*, Judgement of 14 November 2008, para. 101.

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cases the Court appears to use standards that are, if not explicitly then implicitly, inspired by humanitarian law, especially the criterion of whether incidental civilian loss was avoided to the greatest extent possible. It does not question the right of government forces to attack opposition forces, or require that lethal force be avoided even in the absence of an immediate threat. The Court does, however, appear to go a little further than traditional humanitarian law, in particular when it requires that the local population be warned of the probable arrival of rebels in their village,[169] or that the fire from the opposition group which could endanger the villagers' lives be taken into account.[170]

Lastly, mention should be made of a recent case decided by the Supreme Court of Israel. The Supreme Court had to decide on the targeted killing of members of armed groups – not in the context of a non-international armed conflict, but of occupation. Its findings are nonetheless instructive for our analysis, because the Supreme Court in effect combined the standards of humanitarian law and human rights law. While considering that "terrorists" were "civilians who are unlawful combatants"[171] and that at least those civilians who have joined a "terrorist organisation" and commit a chain of hostilities lose their immunity from attack for such time as they commit the chain of acts – that is, also between the single acts constituting the chain – it ruled as follows:[172]

> [A] civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest … Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated and tried, those are the means which should be employed … A rule-of-law state employs, to the extent possible, procedures of law and not procedures of force … Arrest, investigation and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers that it is not required … However, it is a possibility which should always be considered. It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation and trial are at times realisable possibilities … Of course, given the circumstances of a certain case, that possibility might not exist. At times, its harm to nearby innocent civilians might be greater than that caused by refraining from it. In that state of affairs it should not be used … [A]fter an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack

169 Ibid., para. 187.
170 *Ergi* v. *Turkey*, above note 43, para. 79.
171 *Targeted Killings* case, above note 144, para. 28.
172 Ibid., para. 39.

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upon him is to be performed (retroactively). That investigation must be independent …[173]

While the basis for its findings was national law, the Supreme Court quoted extensively from doctrine and from the case law of the European Court of Human Rights. In other words, the Supreme Court did take human rights into account, as its formulation ("the means whose harm to the human rights of the harmed person is smallest") shows. The Supreme Court required arrest wherever possible, and an investigation after the use of force. While it did not require an arrest in every situation, it required an investigation after every killing.

The possible interplay between humanitarian law and human rights law

What emerges from all the decisions discussed above (with the caveat that most of the decision are those of the European Court of Human Rights) is that presumed members of armed groups, "insurgents" or "terrorists" cannot be shot with intention to kill when there is a possibility of arresting them. This is typically the case when they are found in or around their homes[174] or far from any combat situation.[175] The case law of the European Court of Human Rights indicates that this is not the case when government forces are engaged in combat with armed groups.

As many emphasize, humanitarian and human rights law frequently lead to the same result. The outcome of most cases brought before human rights bodies would probably have been the same if decided by virtue of humanitarian law, for if the restrictive principles of military necessity and humanity are accepted, fighting members of armed groups not taking a direct part in hostilities must, if feasible in the actual circumstances, be arrested rather than killed.

However, unless an extremely expansive view is taken of the interpretation of humanitarian law in the light of human rights law,[176] the restrictions on the use of force do still appear to go further in human rights law than in humanitarian law. The first is that any operation including military operations in non-international armed conflict[177] involving the use of force must be planned in advance so as to avoid, to the greatest extent possible, the use of lethal force. Second, weapons must be chosen to avoid lethal force as far as possible. Third, any suspected violation of the right to life must entail an independent and impartial investigation; the relatives of the person killed have a right to a remedy if they can reasonably claim that

173 Ibid., para. 40, citations omitted.

174 Such as in *Guerrero* v. *Colombia*, above note 38; *Gül* v. *Turkey*, above note 152, *Oğur* v. *Turkey*, above note 157.

175 Such as in *Gülec* v. *Turkey*, above note 154.

176 Such as Gaggioli and Kolb, above note 119, pp. 148–9; Francisco Forrest Martin, "The united use of force rule: amplifications in light of the comments of Professors Green and Paust", *Saskatchewan Law Review*, Vo. 65 (2002), p. 405; Francisco Forrest Martin, "The united use of force rule revisited: the penetration of the law of armed conflict by international human rights law", *Saskatchewan Law Review*, Vol. 65 (2002), p. 451.

177 See *Akhmadov and others v. Russia*, above note 153, para. 100.

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the right to life has been violated, and to individual reparation if such violation has occurred. In view of these differences, the question of which law applies to a particular use of force remains of practical importance. There are several ways of approaching the question of interplay.

With regard to the use of force in non-international armed conflict, the first would be to confine the application of humanitarian law to the geographical area where the fighting is taking place. Some arguments for this approach could possibly be found in the *Tadić* case:

> Although the Geneva Conventions are silent as to the geographical scope of international "armed conflicts", the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited. Others, particularly those relating to the protection of prisoners of war and civilians, are not so limited.[178]

This passage of *Tadić* could be understood to restrict certain rules of humanitarian law to combat situations, thereby giving way to human rights law in all other situations. However, subsequent jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) has not confirmed this approach, in which some parts of humanitarian law would be applied to the entire conflict and not others. In the *Kunarac* case, the Appeals Chamber made it clear that the decisive criterion for the application of humanitarian law is whether there is an armed conflict and whether the act in question occurs in relation to the armed conflict.[179] To explain the relationship between humanitarian law and the laws applicable in peacetime, the Chamber held that "[t]he laws of war do not necessarily displace the laws regulating a peacetime situation; the former may add elements requisite to the protection which needs to be afforded to victims in a wartime situation."[180] Transposed to the relationship between humanitarian law and human rights law, this means that while humanitarian law applies throughout the territory of the country in a situation of armed conflict, it is not the only relevant body of law, and human rights law may come to add requirements to be observed by the state authorities. This is a convincing approach: indeed, if there is a nexus to the conflict, for instance if the security forces are pursuing a member of an armed group, it would be contrary to the object and purpose of humanitarian law to discard it entirely. It would lead to a splitting of humanitarian law whereby some rules (e.g. on detention) always apply and others (on the conduct of hostilities) do not.

Retaining the undivided application of humanitarian law and human rights law to the entire territory, the better approach is therefore to apply the *lex specialis* rule. As regards the substantive right to life – that is whether a killing is

178 *Prosecutor* v. *Dusko Tadić*, Case IT-94-1 (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 68.
179 *Prosecutor* v. *Kunarac et al*, IT-96-23&23/1, Appeals Chamber, 12 June 2002, paras. 55–60.
180 *Prosecutor* v. *Kunarac et al.*, IT-96-23&23/1, Appeals Chamber, 12 June 2002, para. 60.

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lawful or not –the question of which body of law constitutes the *lex specialis* must be resolved by reference to their underlying object and purpose: human rights law is premised on the use of law-enforcement powers, whereas humanitarian law, in general, is centred on the battlefield (with the exception of occupation, which will be dealt with below). To apply human rights law is therefore only realistic if it is feasible to use the means of law enforcement, thus only in operations conducted by security forces (whether military or police) with some effective control over the situation. In those cases, human rights law constitutes the *lex specialis*. In combat situations, on the other hand, humanitarian law constitutes the *lex specialis*.[181]

For the conduct of hostilities, human rights law is generally flexible enough to accommodate the *lex specialis* of humanitarian law. This is where the statement of the International Court of Justice comes into play: "The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities".[182] The only exception to this would be in Article 2 of the European Convention on Human Rights, which does not speak of "arbitrary deprivation of life" but, while containing much stricter requirements, is derogable under Article 15 of the ECHR "in respect of deaths resulting from lawful acts of war". In the absence of derogations, the Court has nonetheless tacitly resorted to the rules of humanitarian law in situations which were characterized as battlefield situations, and indeed humanitarian law does constitute the *lex specialis* there.

Outside conduct of hostility situations, humanitarian law can usually either be interpreted in the light of[183] or be complemented by human rights law. Only where the two are incompatible will human rights law prevail.

What is effective control? It will not be possible to answer this question in an entirely satisfactory manner, but guidance can be found in some useful criteria. The geographical criterion, although not the exclusive one, is the main one. Areas are characterized as being under greater or less control of the government forces. If the latter go out to apprehend a rebel in areas far away from the combat zone, they can do so by law-enforcement means. In other words, the closer the situation is to the battlefield, the more humanitarian law will prevail, and vice versa. Other

181 In this sense see also Marco Sassòli, "La Cour Européenne des Droits de L'homme et les Conflits Armés", in Stephan Breitenmoser, Bernhard Ehrenzeller, Marco Sassòli, Walter Stoffel and Beatrice Wagner Pfeifer (eds.), *Droits de L'homme, Democratie et Etat De Droit, Liber Amicorum Luzius Wilhaber*, Dike, Zürich, 2007, pp. 709, 721; Marco Sassòli, "Le Droit International Humanitaire, une Lex Specialis par Rapport aux Droits Humains?", in Andreas Auer, Alexandre Flückiger and Michel Hottelier (eds.), *Etudes en l'honneur du Professeur Giorgio Malinverni: Les Droits Humains et la Constitution*, 2007, p. 394.

182 *Nuclear Weapons* case, above note 46, para. 25; however, the dictum of the International Court of Justice does not make any differentiation between situations or types of armed conflict and was probably meant, without further thought, to imply that humanitarian law is always the *lex specialis* in armed conflict; see, e.g., Leslie Green, "The 'unified use of force rule' and the law of armed conflict: a reply to Professor Martin", *Saskatchewan Law Review*, Vol. 65 (2002), p. 427.

183 Gaggioli and Kolb, above note 119, pp. 141, 148f. These authors consider, for instance, that the jurisprudence of the ECtHR provides interpretation for the principle of precaution.

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relevant criteria can be, for instance, the amount of armed resistance met by the security forces, the duration of combats as opposed to isolated or sporadic acts, or the type of weaponry used. In practice, the lines will not always be easy to define. But a coherent interpretation of these existing bodies of law must attempt to provide a framework which gives some direction while at the same time remaining flexible in order to accommodate a large number of possible situations.

One objection to applying human rights law to situations of conflict between the government and armed groups is that it restricts the government without restricting armed opposition groups. Indeed, human rights law traditionally only applies to state authorities. While this is controversial in doctrine, the fact remains that even if armed opposition groups were held to be bound by human rights, only actions by governments will be controlled by international human rights bodies, such as the Human Rights Committee, the European Court of Human Rights or the Inter-American Court and Commission of Human Rights. Is the state then "being required to fight with one hand tied behind its back"?[184] Arguably, no such imbalance between government forces and armed opposition groups is created by the additional restrictions of human rights law. This would be the case only if there were an equality of permissible use of force in place, which the additional requirement for the government would upset. But this is not the case, since any non-governmental group that attacks the government remains criminal under domestic law, and humanitarian law in non-international armed conflict does not shield members of the group from criminalization under domestic law as it shields combatants in international armed conflict.[185]

Occupation

Unlike non-international armed conflict, the use of force in international armed conflict is generally characterized by more battlefield-like operations, especially military operations from the air, as in the conflicts between the United States and Afghanistan in 2001, between the Coalition and Iraq in spring 2003, or between Israel and Lebanon in summer 2006. In such situations human rights law would generally not be applicable for lack of effective control.[186] Occupation is different. It raises the question of the relationship between human rights and humanitarian law in a manner much more similar to that of non-international armed conflict.

One of the main obligations of the occupying power according to Article 43 of the 1907 Hague Regulations is to "take all the measures in his power to restore, and ensure, as far as possible, public order and safety". This provision

184 Françoise Hampson, "Human rights and humanitarian law in internal conflicts", in Michael Meyer (ed.) *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention*, British Institute of International and Comparative Law, London, 1989, p. 60.

185 Doswald-Beck, above note 147, p. 890.

186 As was the case in ECtHR, *Banković and others* v. *Belgium and others*, above note 67.

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imposes a law enforcement obligation on the occupying authorities: public order is generally restored through police, not military, operations.[187] The particular feature of humanitarian law applicable to situations of occupation is that it presupposes effective authority and control,[188] which are not usually found on the battlefield. The 1907 Hague Regulations also clearly separate the sections on "Hostilities" (Section II) and on "Military authority over the territory of the hostile state" (Section III). In the same spirit, the Fourth Geneva Convention clearly indicates that the normal procedure to ensure public order and safety is through penal legislation, not through combat.[189]

Which situations, then, require the occupying power to respect human rights law because it is performing its law-enforcement obligations, and in which situations do ongoing hostilities call for the use of force under humanitarian law? In abstract legal terms, the answer must be the same as proposed above: where the occupying power has effective control, is in a law-enforcement situation and capable of making arrests, it should act in compliance with the requirements of human rights law.[190]

The concrete question facing the occupying power will be whether members of the enemy forces or of organized resistance movements can be targeted to be killed (in accordance with the rules governing the conduct of hostilities in international armed conflict) or whether the occupying power's forces must arrest them because they have sufficient effective control over the situation to do so.

In practice it is therefore necessary to differentiate between various situations of occupation, for while the very definition of "occupation" in humanitarian law presupposes control, there are in reality situations of occupation where control of the territory is only partial. Where hostilities continue or break out anew, humanitarian law on the conduct of hostilities must prevail over human rights law, which presupposes control for its enforcement. The question is, of course, when can hostilities be said to have broken out anew? Not all criminal activity, even if violent, can be treated like an armed attack. What about military resistance by groups that are not formal members of the occupied state's armed forces? As was suggested at a meeting on the right to life in armed conflict, held by the University Centre for International Humanitarian Law in Geneva in 2005,[191] the test for assuming a situation of hostilities could be based on the test used by the ICTY to establish the existence of a non-international armed conflict – that is, a certain

187 Marco Sassòli, "Legislation and maintenance of public order and civil life by occupying powers", *European Journal of International Law*, Vol. 16 (2005), p. 665.

188 1907 Hague Regulations, Article 42.

189 Fourth Geneva Convention, Articles 64 and 65.

190 In this sense, see Lubell, above note 134, pp. 52–3; see also Melzer, above note 103, pp. 224–30 on the basis that humanitarian law itself leads to this result.

191 University Centre for International Humanitarian Law, Expert Meeting on the Right to Life in Armed Conflict and Situations of Occupation, 1–2 September 2005 (hereinafter UCIHL Meeting Report), available at www.adh-geneva.ch/events/expert meetings.php (last visited 23 July 2008).

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minimum intensity and duration of the violence.[192] Such situations would require a military response, whereas isolated or sporadic attacks[193] by resistance movements could be met by law-enforcement means.[194]

The *Al-Skeini* case, although it was not decided in this particular respect, illustrates how complicated the choice between the application of human rights or humanitarian law can become in a situation of occupation – or rather how difficult it is to apply the theory in practice. One of the questions was whether the killing of five persons in security operations by British troops during the occupation of the city of Basra in Iraq in 2003 was lawful under the European Convention on Human Rights. It was undisputed that while there was occupation by British troops in the Al Basra and Maysan provinces of Iraq at the time in question,[195] the United Kingdom possessed no executive, legislative or judicial authority in Basra city. It was there to maintain order in a situation verging on anarchy. The majority in the Court of Appeals found that there was no effective control for the purpose of application of the European Convention on Human Rights.[196]

The decision shows that there can be two approaches to the application of human rights in situations of occupation. The majority found that there was not enough effective control even to *apply* the European Convention on Human Rights extraterritorially. Another way of arriving at the same result would be to hold that even though human rights law applies, the question of whether there is a violation of the right to life must be assessed by resort to the rules of international humanitarian law, which prevail as the *lex specialis*.

It is clear that this problem and shift in applicable rules on the use of force is not only of critical importance for the protection of civilians on the ground, but also has major impacts on the soldiers. To avoid violations, soldiers must be given clear rules of engagement and trained accordingly. In practice, this can best be achieved by separating police and military functions.[197] Even then, the distinction between a common criminal and a combatant will sometimes be extremely difficult to make, as has been acknowledged, for instance, in an After Action Report of American forces in Iraq.[198]

192 *Prosecutor* v. *Dusko Tadić*, Case IT-94-1 (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70: "protracted violence between governmental authorities and organized armed groups or between such groups within a State".

193 See also Additional Protocol II, Article 1(2), according to which "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence" do not amount to an armed conflict.

194 UCIHL Meeting Report, Section D4.

195 *Al-Skeini* case (CA), above note 78, para. 119.

196 Ibid., para. 124. The House of Lords arrived at the same result as the majority in the Court of Appeals, but on the basis that the Human Rights Act had no extraterritorial application. *Al-Skeini* case [UKHL], above note 78, esp. paras. 26 and 109–132.

197 See also Watkin, above note 129, p. 24; Sassòli, above note 187, p. 668.

198 "Transitioning from combat to SASO requires a substantial and fundamental shift in attitude. The soldiers have been asked to go from killing the enemy to protecting and interacting, and back to killing again. The constant shift in mental posture greatly complicates things for the average soldier. The soldiers are blurred and confused about the rules of engagement, which continues to raise questions, and issues about force protection while at checkpoints and conducting patrols." After Action Report, "SUBJECT: Operatio n Iraqi Freedom After Action Review Comments," 24 April 2003, conducted by

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Investigations, remedies, reparation

Human rights law and humanitarian law differ fundamentally in a number of procedural aspects which have to do with the right to a remedy and to individual standing in human rights law. They also differ, originally, in terms of an individual right to reparation. While humanitarian law does not know such individual standing at international level, the main human rights treaties have a form of individual complaint mechanism that has led to case law on the right to a remedy, the right to an investigation and the right to reparation. Such case law has already started to influence the understanding of humanitarian law and could continue to do so in the future.

Investigations

Humanitarian law has a number of requirements for investigations, primarily for war crimes[199] but also, for instance, for deaths of prisoners of war[200] or civilian internees.[201] Investigatory obligations have also been developed in treaty law, soft law and jurisprudence in human rights law and are now rather more detailed than in international humanitarian law.[202] In human rights law, allegations of serious human rights violations, especially allegations of ill-treatment or unlawful killing, must be subject to a prompt, impartial, thorough and independent official investigation. The persons responsible for and carrying out the investigation must be independent from those implicated in the events. The investigation must be capable of leading to a determination not only of the facts, but also of the lawfulness of the acts and the persons responsible. The authorities must have taken reasonable steps available to them to secure evidence concerning the incident, including, *inter*

TCM C/3-15 Infantry, Task Force 1-64 (declassified), cited in Human Rights Watch, *Hearts and Minds*, Annex II, available at www.hrw.org/reports/2003/iraq1003/10.htm (last visited 23 August 2007).

199 This is implicit in the obligation to search for persons alleged to have committed grave breaches and to bring them to justice. Articles 49/50/129/146 respectively of the four Geneva Conventions; Additional Protocol I, Article 85.

200 Third Geneva Convention, Article 121.

201 Fourth Geneva Convention, Article 131.

202 See the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by Economic and Social Council resolution 1989/65 of 24 May 1989; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; among the vast body of jurisprudence, see Human Rights Committee: Concluding Observations: Serbia and Montenegro, para. 9, UN Doc. CCPR/CO/81/SEMO, 12 August 2004; Concluding Observations: Brazil, para. 20, UN Doc. CCPR/C/79/Add.66, 24 July 1996; Concluding Observations: Colombia, para. 32 and 34, UN Doc. CCPR/C/79/Add. 76, 5 May 1997; Committee against Torture: Conclusions and Recommendations: Colombia, para. 10(f), UN Doc. CAT/C/CR/31/1, 4 February 1997; I/A Court H R, *Myrna Mack-Chang* v. *Guatemala*, Judgment of 25 November 2003, Series C No. 101; *Caracazo* v. *Venezuela* (*Reparation*), Judgment of 29 August 2002, Series C No. 95; *Juan Humberto Sánchez* v. *Honduras*, Judgment of 26 November 2003, Series C No. 99, para. 186; African Commission on Human and Peoples' Rights, *Amnesty International et al.* v. *Sudan*, 26th and 27th Ordinary Sessions, May 2000, para. 51; Eur Court HR, *Isayeva, Yusupova and Bazayeva* v. *Russia*, above note 43, paras. 208–213 (summary of constant jurisprudence of the Court).

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alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings. In order to ensure public confidence in the investigation, there must be a sufficient element of public scrutiny of it. While the degree of public scrutiny may vary from case to case, the victim's relatives must in all cases be involved in the procedure to the extent necessary to safeguard their legitimate interests, and must be protected from any form of intimidation. The result of the investigation must be made public. The European Court has even gone so far as to establish a presumption of responsibility of the state where individuals are killed in an area within the exclusive control of the authorities,[203] since the events lie within the exclusive knowledge of the authorities.[204]

Human rights bodies have not hesitated to apply these requirements to investigations in situations of armed conflict.[205] Recently, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions lamented the fact that investigations are less frequent and often more lenient in armed conflict situations than in times of peace.[206]

In this area there is scope for human rights to complement humanitarian law, especially with regard to the use of force or allegations of ill-treatment. Indeed, it is important to distinguish between the substantive law justifying the use of force, which differs in human rights law from that in humanitarian law, and the question of investigation, which in the first place requires a gathering of facts. In the latter respect, there is no contradiction between human rights and humanitarian law. Humanitarian law does not provide for a duty to investigate in such detail, but there is no reason to understand this as a qualified silence in the sense that it would preclude application of the duty under human rights law.

Evidently, it would not be realistic to require an investigation after every single use of force in a combat operation.[207] But there is a middle way between reviewing every single shot in an armed conflict and not reviewing any alleged violation at all of the right to life. The reality, in particular of counter-insurgency contexts, is that often the facts are not clear. If there are no investigations, security personnel can all too easily allege that they were acting on the assumption that lethal force was necessary because they were facing imminent attack[208] or that the rebels died in crossfire.[209] In many such circumstances the only way to achieve

203 *Akkum* v. *Turkey*, Judgment of 24 March 2005, paras. 208–211.

204 Ibid., para. 211.

205 ECtHR, *Isayeva, Yusupova and Bazayeva* v. *Russia*, above note 43, paras. 208–213; I/A Court H R, *Myrna Mack-Chang* v. *Guatemala*, above note 202; Human Rights Committee: Concluding Observations: Colombia, UN Doc. CCPR/C/79/Add. 76, 5 May 1997, para. 32.

206 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN.4/2006/53m, 8 March 2006, paras. 33–38.

207 Melzer, above note 103, pp. 526 f.

208 As happened in *Gül* v. *Turkey*, above note 152, paras. 81, 89, or in *Oğur* v. *Turkey*, above note 157, para. 80.

209 As happened in I/A Court H R, *Escué-Zapata* v. *Colombia*, Merits, Reparations and Costs, Judgment of July 4, 2007, Series C No. 165, para. 39.

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a result is through an independent investigation in which not only the security personnel can be heard but also witnesses supporting the victims' or their families' view.

There are elements in human rights jurisprudence that are certainly new to situations of armed conflict. Not all requirements of an investigation in peacetime may be directly transposable to situations of armed conflict. Also, investigations can only be conducted if practicable in the prevailing security situation and will have to take the reality of armed conflict into account,[210] such as problems in gathering evidence in some combat situations, lack of access for the investigating personnel, or the witnesses' need for security. On the other hand, it cannot be said that investigations are per se impossible to conduct in times of armed conflict.[211] In circumstances giving rise to concern as to the legality of the act, especially in cases of targeted killing of individuals, an investigation should at least be conducted when there is reasonable doubt whether the killing was lawful.[212] While the procedures for investigations in situations of armed conflict will have to be developed further, it is clear that they must comply with the requirements of independence and impartiality. In this respect, military investigations have been found to pose particular challenges in terms of independence.[213] Military investigations would have to be particularly analysed to assess their independence and impartiality and the role they allow for victims and their families.

Court scrutiny

Whereas humanitarian law focuses on "the parties to a conflict", human rights are entirely built around the individual and are formulated as individual entitlements.[214] This does not imply that there are no rights in humanitarian law. On the contrary, the Geneva Conventions were deliberately formulated to enshrine personal and intangible rights.[215] But at the international level, human rights law, at least for civil and political rights,[216] recognizes a right to a remedy – that is, a right

210 Watkin, above note 129, p. 34.
211 Gaggioli and Kolb, above note 119, p. 126.
212 Kretzmer, above note 103, pp. 201, 204.
213 Report of the Special Rapporteur, above note 206, para. 37; see more generally, Federico Andreu, *Fuero military y derecho internacional, International Commission of Jurists*, 2003, pp. 112–26; I/A Commission H R, Third Report on the Human Rights Situation in Colombia, OEA/Ser.L/V/II.102, Doc. 9 rev 1, 26 February 1999, Ch. V, paras. 17–60; Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux, on the Issue of the administration of justice through military tribunals, UN Doc. E/CN.4/2006/58, 13 January 2006, paras. 32–35.
214 Ben Naftali and Shany, above note 103, pp. 17, 31.
215 Jean Pictet (ed.), *Commentary to the First Geneva Convention*,1960, pp. 82, 83; see in particular the discussion on Common Article 6/6/6/7 to the four Geneva Conventions; Yoram Dinstein, "The international law of inter-state wars and human rights", *Israel Yearbook of Human Rights*, Vol. 1 (1971), pp. 139, 147.
216 And see now the newly adopted Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc. A/HRC/8/L.2, 9 June 2008.

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to lodge an individual complaint against alleged violations.[217] Such a right does not exist in humanitarian law.[218] Most of the case law involving the interplay between human rights and humanitarian law has been decided on the basis of human rights law, because victims could only bring cases to human rights bodies. This is why, seemingly, one of the most dramatic effects of the application of human rights law to situations of armed conflict is that it leads to court scrutiny. Never before have situations of international armed conflict or of military operations abroad been scrutinized as much as in the cases concerning Kosovo, Iraq or Afghanistan. It is sometimes contended that such court scrutiny is inappropriate for military action, but is this really the case?[219]

The necessity to have not only an international criminal court, but also a better supervisory mechanism for humanitarian law or even "a body or tribunal whose function it would be to receive complaints against Governments that flout the provisions of the [Hague and Geneva] Conventions",[220] has been discussed for many decades.[221] At international level such a court or tribunal has never met with the approval of states. Could there be a reason, then, for restricting access to courts, at least at national level? Is it that humanitarian law is not justiciable because of the exceptional nature of military action? Practice shows that this argument does not hold sway, for there is a long history of interpretation of humanitarian law in courts.

Indeed, international courts such as the International Court of Justice, international and hybrid criminal tribunals, and national courts have interpreted international humanitarian law. As indeed have national courts, be they in Israel, Colombia or elsewhere, often with human rights or domestic fundamental rights as the basis for the victim's complaint and standing. The Supreme Court of

217 See ICCPR, Article 2(3); ECHR, Article 13; ACHR, Article 25; African Charter on Human and Peoples' Rights, Article 7(1)(a); UN Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Human Rights Law, adopted by GA Res. 60/147 of 16 December 2005, UN Doc. A/RES/60/147, 21 March 2006.

218 Liesbeth Zegveld, "Remedies for victims of violations of international humanitarian law", *International Review of the Red Cross*, Vol. 84 (851) (September 2003), pp. 497–528.

219 This was, for instance, the argument by the State Attorney's Office in the *Targeted Killings* case, above note 144, para. 47.

220 Sean MacBride, "Human rights in armed conflict, the inter-relationship between the humanitarian law and the law of human rights", *IX Revue de Droit Pénal Militaire et de Droit de la Guerre*, 1970, p. 388.

221 See A. H. Robertson, "Humanitarian Law and Human Rights", in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles, in Honour of Jean Pictet*, 1984, pp. 793, 799; Sandoz, Swinarski and Zimmermann, above note 23, paras. 3600–3602; Report of the Secretary General on Respect for Human Rights in Armed Conflict, UN Doc. A/7720, 20 November 1969, para. 230; Hampson, above note 184, p. 71; Dietrich Schindler, "Human rights and humanitarian law: interrelationship of the laws", *American University Law Review*, Vol. 31 (1982), p. 941. At the 1949 Geneva Conference, not quite with the same idea but in the same direction, France proposed the establishment of a "High International Committee" to "supervise the application of and ensure respect for the Convention[s]". *Final Record of the Diplomatic Conference of Geneva of 1949*, 1963, vol. 3 annex No. 21 and vol. 2, sec. B, p. 61.

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Israel has often had to address the question of justiciability and has stated in this respect:

> The Court does not refrain from judicial review merely because the military commander acts outside of Israel, or because his actions have political and military ramifications. When the decisions or acts of the military commander impinge upon human rights, they are justiciable. The door of the Court is open. The argument that the impingement upon human rights is due to security considerations does not rule out judicial review. "Security considerations" or "military necessity" are not magic words …[222]

Thus there is no reason why actions in armed conflict should not be justiciable. But in the absence of other avenues, most cases have come before criminal courts or human rights bodies.

Clearly courts must take into account the specific nature of war. They have, in practice, referred the discretion of the military commander or the soldier in the midst of an operation. One example of court supervision which leaves discretion to the military commander, taking into account his or her position and point of view, is provided by the cases of the International Military Tribunal at Nuremberg:

> We are not called upon to determine whether urgent military necessity for the devastation and destruction of Finmark actually existed. We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time … It is our considered opinion that the conditions as they appeared to the defendant at the time were sufficient, upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgment, but he was guilty of no criminal act.[223]

It is sometimes criticized that human rights bodies and courts do not have the required expertise to deal with armed conflict situations.[224] But from the point of view of victims of violations it is difficult to argue that, in the absence of any independent international remedy specifically foreseen for international humanitarian law, recourse to the regional human rights courts and other human rights bodies is not a valid path. Rather, "[t]he fact that an individual has a remedy under

222 *Mara'abe* v. *The Prime Minister of Israel*, HCJ 7957/04, The Supreme Court Sitting as the High Court of Justice, 15 September 2005, para. 31; See also *Beit Sourik Village Council* v. *The Government of Israel and the Commander of the IDF Forces in the West Bank*, HCJ 2056/04, The Supreme Court Sitting as the High Court of Justice, 30 June 2004, para. 46f.

223 *Wilhelm List case* (*Hostages Trial*), United Nations War Crimes Commission. Law Reports of Trials of War Criminals, Volume VIII, 1949, p. 69, available at www.ess.uwe.ac.uk/WCC/List4.htm (last visited 4 August 2008).

224 UN Sub-Commission on the Promotion and Protection of Human Rights, Working paper by Ms. Hampson and Mr. Salama on the Relationship between Human Rights Law and International Humanitarian Law, UN Doc. E/CN.4/Sub.2/2005/14, 21 June 2005, paras. 9–37.

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human rights law gives additional strength to the rules of international humanitarian law corresponding to the human rights norm alleged to be violated".[225] Such independent scrutiny can provide greater protection for the victims or reinforce the protection by other mechanisms and institutions.[226]

Another criticism is that persons protected by humanitarian law are usually not in a position to resort to any legal process, and that it is better to have an impartial body which acts on its own initiative rather than judicial mechanisms.[227] It is true that people will often not have access to any judicial protection. The plethora of existing cases, however, is proof in itself that the argument is too short-sighted. It proposes a choice between either a judicial protection mechanism or legal protection, but these are not exclusive alternatives. There are many ways to provide protection to persons in armed conflict, be it through the activities of humanitarian organizations such as the ICRC, political mechanisms such as certain UN fora, legal proceedings, pressure exerted through advocacy groups or decisions by international criminal bodies.[228] Court scrutiny, including through human rights courts or domestic courts giving standing to victims of fundamental rights violations can be a forceful method of protection.

In fact human rights law is not necessarily more protective in terms of substantive rights.[229] One only has to bear in mind two critical restrictions on human rights law: its dependence on some jurisdiction or effective control by the state; and the fact that it is not binding on non-state parties.[230]

Also, if human rights bodies completely disregard humanitarian law, especially in a situation where it is the *lex specialis*, or distort human rights by implicitly but not openly employing humanitarian law language, this could lead to a weakening of both bodies of law. It also "precludes a coherent construction of the protective rules in times of armed conflict while favouring fragmentation".[231] Clarity as to which norms are being applied to a certain situation would be a preferable manner of protecting victims of armed conflict in the long term. While most international human rights bodies have not applied international humanitarian law directly, as their mandate only encompassed the respective applicable

225 Bothe, above note 4, p. 45; see also Meron, above note 9, p. 247, who writes that "their very idealism and naïveté are their greatest strength"; Reidy, above note 44, p. 529.

226 William Abresch, "A human rights law of internal armed conflict: The European Court of Human Rights in Chechnya", *European Journal of International Law*, Vol. 16 (2005), p. 741; see also Bothe, above note 4, p. 90.

227 Schindler, above note 221, p. 941.

228 An interesting assessment of different mechanisms can be found in Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, pp. 232–77.

229 Aeyal M. Gross, "Human proportions: are human rights the emperor's new clothes of the international law of occupation?", *European Journal of International Law*, Vol. 18 (2007), p. 35. On the more protective aspect of some humanitarian law provisions see Cordula Droege, "The interplay between international humanitarian law and international human rights law in situations of armed conflict", *Israel Law Review*, Vol. 40 (2007), p. 350.

230 Even if one takes the view that human rights bind non-state armed groups, cases can only be brought to international bodies and courts against states.

231 Gaggioli and Kolb, above note 119, p. 126 (2007).

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human rights treaties[232], the Inter-American Court has applied humanitarian law by interpreting the American Convention on Human Rights in the light of the Geneva Conventions because of their overlapping content.[233] The Inter-American Commission is the only body that has expressly assigned to itself the competence to apply humanitarian law.[234]

In sum, there is no conflict between human rights law and humanitarian law in respect of legal remedies. Humanitarian law is simply silent on the question of an individual right to a remedy; it does not preclude individual remedies where they exist under other international law or domestic law. Human rights law has reinforced the possibility of alleged victims of violations of human rights and humanitarian law bringing cases before courts and other human rights bodies. This is not in conflict with humanitarian law, but can indeed strengthen compliance with it, albeit through the lens of human rights law.

Reparations

While human rights violations entail an individual right to reparation,[235] the equivalent norms on reparation in the law of international armed conflict only recognise this right, or at least the right to claim it, to the state.[236] The humanitarian law of non-international armed conflict is silent on reparation.

Nothing in international humanitarian law, however, precludes the right to reparation.[237] Many serious violations of humanitarian law simultaneously constitute serious violations of human rights. For the same act – for example, torture – a person can have a right to full reparation because it constitutes a human rights violation, even if no such right exists under humanitarian law. There is an increasing tendency to recognize that states should afford full reparation for violations of humanitarian law as well. The Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law, adopted by the General

232 In two recent cases, the European Court of Human Rights has had to grapple with quite complex questions of international criminal law and IHL but seems to have sought to avoid venturing too much on IHL territory: *Korbely v. Hungary*, Judgment of 19 September 2008, *Koronov v. Latvia*, Judgment of 24 July 2008, para. 122.

233 *Bámaca Velázquez* v. *Guatemala*, above note 45, paras. 207–209. The Human Rights Committee has stated that it can take other branches of law into account to consider the lawfulness of derogations. Human Rights Committee, General Comment No. 29: States of Emergency (article 4), UN Doc. CCPR/C/21/Rev1/Add.11, 24 July 2001, para. 10.

234 *Abella* v. *Argentina*, Case 11.137, I/A Cm HR Report No. 55/97, OEA/Ser.L/V/II.98, doc 6 rev, 1997, paras. 157–171.

235 See the UN Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law. In different treaties, this right is derived from norms with varying wordings but essentially the same content; see, e.g., ICCPR, Article 2(3); ECHR, Article 41; CAT, Article 14; ACHR, Article 63.

236 1907 Hague Regulations, Article 3; Additional Protocol I, Article 91; see Emanuela- Chiara Gillard, "Reparation for violations of international humanitarian law", *International Review of the Red Cross*, Vol. 85 (851) (September 2003), pp. 529–54.

237 Hampson/Salama, above note 224, paras. 20, 49.

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Assembly in 2005,[238] are a step in this direction. Similarly, in its Advisory Opinion on the *Wall*, the International Court of Justice held that Israel was under an obligation to make reparation for the damage caused to all natural or legal persons affected by the wall's construction.[239] Also, there is some practice of reparation mechanisms, such as the UN Claims Commission or the Eritrea–Ethiopia Claims Commission, in which individuals can file claims directly, participate to varying degrees in the claims review process and receive compensation directly.[240] There is furthermore a wealth of practice in national law concerning reparation after armed conflict.[241] Article 75 of the Rome Statute of the International Criminal Court marks an important development in that it recognizes the right of victims of international crimes to reparation (but with a margin of discretion for the Court).

Without going into the details of this complex discussion, the main argument against an individual right to reparation is that in times of armed conflict violations can be so massive and widespread and the damage done so overwhelming that it defies the capacity of states, both financial and logistical, to ensure adequate reparation to all victims.[242] From the point of view of justice this argument is flawed, because its consequence is that the more widespread and massive the violation, the less right there is to reparation for the victims. On the other hand, admitting an individual claim to reparation for victims of violations of humanitarian law committed on a large scale does bring with it real problems of implementation and the risk of false promises to victims. It will be interesting to follow the case law of the International Criminal Court in this regard, which can rely on an explicit provision on reparation in the Rome Statute (Article 75) and is currently developing an approach to victims' rights. It will probably have to take some more lump-sum-type compensation measures or community-based reparation measures to reach the widest possible number of victims. In any event, it is clear that while the simple statement that there is no individual right to reparation for violations of international humanitarian law is no longer adequate in the light of evolving law and practice, there remain many uncertainties as to the way in which widespread reparations resulting from armed conflict can be adequately ensured.

238 GA Res. 60/147 of 16 December 2005.

239 *Wall* case, above note 47, para. 106. One can speculate whether it held so in the absence of another state to which Israel could have paid compensation. See Pierre d'Argent, "Compliance, cessation, reparation and restitution in the *Wall* Advisory Opinion", in Pierre-Marie Dupuy et al. (eds.), *Völkerrecht Als Wertordnung – Common Values In International Law, Festschrift For Christian Tomuschat*, 2006, pp. 463, 475.

240 See Gillard, above note 236, p. 540.

241 On Germany, see Roland Bank, "The new programs for payments to victims of National Socialist injustice", *German Yearbook of International Law*, Vol. 44 (2001), pp. 307–52; the most comprehensive description of national reparations programmes can be found in Pablo de Greiff (ed.), *The Handbook on Reparations*, Oxford University Press, Oxford, 2006.

242 On this discussion see Elke Schwager and Roland Bank, "An individual right to compensation for victims of armed conflicts?", paper submitted to the ILA Committee on Compensation for Victims of War, pp. 45–8; Pierre d'Argent, "Wrongs of the past, history of the future", *European Journal of International Law*, Vol. 17 (2006), pp. 279, 286.

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Conclusion

To sum up, the nature of international humanitarian law, which is not conceived around individual rights, makes it difficult to imagine that it could incorporate all procedural rights that have developed in human rights law. However, increasing awareness of the application of human rights in armed conflict, and also an increasing call for transparency and accountability in military operations, can promote stronger protection of certain rights under international humanitarian law.

How these two bodies of law, which were not originally meant to come into such close contact, will live in harmony in the broader framework of international law remains to be seen over time. But one thing is clear: there is no going back to a complete separation of the two realms. Potentially, a coherent approach to the interpretation of human rights and humanitarian law – maintaining their distinct features – can only contribute to greater protection of individuals in armed conflict.

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