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THE INTERPLAY BETWEEN INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW IN SITUATIONS OF ARMED CONFLICT

*Cordula Droege**

International human rights law and international humanitarian law are traditionally two distinct branches of law, one dealing with the protection of persons from abusive power, the other with the conduct of parties to an armed conflict. Yet, developments in international and national jurisprudence and practice have led to the recognition that these two bodies of law not only share a common humanist ideal of dignity and integrity but overlap substantially in practice. The most frequent examples are situations of occupation or non-international armed conflicts where human rights law complements the protection provided by humanitarian law.

*This article provides an overview of the historical developments that led to the increasing overlap between human rights law and humanitarian law. It then seeks to analyse the ways in which the interplay between human rights law and humanitarian law can work in practice. It argues that two main concepts inform their interaction: The first is complementarity between their norms in the sense that in most cases, especially for the protection of persons in the power of a party to the conflict, they mutually reinforce each other. The second is the principle of *lex specialis* in the cases of conflict between the norms.*

I. Introduction

International human rights law and international humanitarian law are traditionally two distinct bodies of law. While the first deals with the inherent rights of the person to be protected at all times against abusive power, the other regulates the conduct of parties to an armed conflict. And yet, there are an infinite number of points of contact between the two bodies of law, raising increasingly complicated and detailed

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questions. There is no lack of examples of situations triggering questions about their concurrent application and the relationship between them. Issues keep arising in situations of occupation, be it in Northern Cyprus,¹ the Palestinian territories² or Iraq.³ Also, situations of non-international armed conflict pose a number of problems, as is illustrated, for instance, by the judgments of the European Court of Human Rights on the conflict in Chechnya.⁴

In short, these regimes overlap, but as they were not necessarily meant to do so originally, it is necessary to apply them concurrently and to reconcile them. As M. Bothe writes:

[Thus,] triggering 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.⁵

¹ See, e.g., Report of the European Commission of Human Rights, *Cyprus v. Turkey*, Appl. No. 6780/74 & 6950/75, Eur. Comm'n H.R.Dec. & Rep. 125; European Court of Human Rights: *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R.

² See, e.g., Final Act of the International Conference on Human Rights, 22 April-13 May 1968, UN Doc. A/Conf.32/41 (1968); HCJ 3239/02 *Marab v. the IDF Commander in the West Bank* [2002] IsrSC 52(2) 349.

³ *Al-Skeini v. Sec. of State for Defence* [2005] EWCA (Civ) 1609, para. 48 [hereinafter *Al-Skeini* (CA)].

⁴ *Isayeva, Yusupova and Basayeva v. Russia*, Eur. Ct. H.R. Judgement of Feb. 24, 2005, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Isayeva%2C%20%7C%20Yusupova&sessionId=1751995&skin=hudoc-en> (last visited August 12, 2007); *Isayeva v. Russia*, Eur. Ct. H.R. Judgement of Oct. 14, 2005, at paras. 172-178, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Isayeva%2C%20%7C%20Yusupova&sessionId=1751995&skin=hudoc-en> (last visited August 12, 2007).

⁵ Michael Bothe, *The Historical Evolution of International Humanitarian Law, International Human Rights Law, Refugee Law and International Criminal Law*, in CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION 37 (H. Fischer, Ulrike Froissart, Wolff Heintschel von Heinegg, & Christian Raap eds., 2004).

This article provides a brief overview of the historical developments that led to the increasing overlap between human rights law and humanitarian law. In general, one can say that the expansion of the scope of application of human rights law, combined with the monitoring machinery and individual complaints procedures existing in the human rights system have led to the recognition that human rights, by their nature, protect that person at all times and are therefore relevant to and apply in situations of armed conflict. Further, human rights and humanitarian law share a common ideal, protection of the dignity and integrity of the person, and many of their guarantees are identical, such as the protection of the right to life, freedom from torture and ill-treatment, the protection of family rights, economic, and/or social rights.

The article then seeks to analyse the possible ways in which the interplay between human rights law and humanitarian law can work in practice. Two main concepts inform their interaction: complementarity between their norms in most cases and prevailing of the more specific norm when there is contradiction between the two. The question is in which situations either body of law is the more specific. Lastly, the article reviews a number of procedural rights such as the right to a remedy and to reparation, which are more strongly enshrined in human rights law but have an increasing influence on international humanitarian law.

II. Overlap of International Human Rights Law and International Humanitarian Law in Situations of Armed Conflict

A. 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 origin. However, the theoretical foundations and motivations of the two bodies of law differ.

Modern human rights can be traced back to the visionaries of the Enlightenment who sought a more just relationship between the state and its citizens.⁶ Human rights

⁶ See for a brief account Louise Doswald-Beck & Sylvain Vité, *International Humanitarian Law and Human Rights Law*, 293 INT'L REV. RED CROSS 94-119 (1993).

were, in their beginning, a matter of constitutional law, an internal affair between the government and its citizens. International regulation would have been perceived as interference in the *domaine réservé* of the state. It remained, with the exception of minority protection following the First World War, a subject of national law until after the Second World War. With the conclusion of the Second World War human rights became part of international law, starting with the adoption of the Universal Declaration of Human Rights in 1948.

Humanitarian law, for its part, was primarily based on the reciprocal expectations of two parties at war and notions of chivalrous and civilized behavior.⁷ It did not emanate from a struggle of rights-claimants, but from a principle of charity—“*inter arma caritas*.”⁸ 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 the other states’ troops.⁹ Considerations of military strategy and reciprocity have historically been central to its development.¹⁰ And while human rights were an internal affair of states, humanitarian law, by its very nature, took its roots in the relation between states, in international law.

After the Second World War, the protection of civilians in the Fourth Geneva Convention, albeit for a large part only those of the adverse or third parties, added a dimension to humanitarian law that drew it much closer to the idea of human rights law, especially with regard to civilians in detention. Also, the revolutionary codification of Common Article 3 to the Geneva Conventions for situations of non-international armed conflict brought humanitarian law closer to human rights law, because it concerned the treatment of a state’s own nationals. The drafting histories,

⁷ See, e.g., the Lieber Code: U.S. War Department, Instructions for the Government of Armies of the United States in the Field, General Orders No 100, 24 April 1863, reprinted in THE LAWS OF ARMED CONFLICTS 3 (Dietrich Schindler & Jiri Toman eds., 1988).

⁸ 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 suggestions 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, at para. 2; Dietrich Schindler, *Human Rights and Humanitarian Law: Interrelationship of the Laws*, 31 AM. UNIV. L. REV. 935, 941 (1982).

⁹ See Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]. Theodor Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AM. J. INT’L L. 554, 592 (1983).

¹⁰ Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 243 (2000).

however, appear to show that the process of elaboration of the Universal Declaration of Human Rights and 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 in situations of armed conflict, at least not in situations of international armed conflict.¹¹ Yet, there is a clear reminiscence of 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.”¹² Many of the worst abuses the delegates discussed took place in occupied territories. Still, the Universal Declaration was meant for times of peace, since peace was what the United Nations sought to achieve.

The four Geneva Conventions having been elaborated 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 XIX 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*¹³ elaborated by the International Committee of the Red Cross, to the initiative was not pursued.

At the United Nations, on the other hand, states slowly acknowledged that human rights were relevant in armed conflict. In 1953 already, the General Assembly invoked human rights in the context of the Korean conflict.¹⁴ 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.”¹⁵ The situation in the Middle-East, especially, triggered the will to discuss human rights in situations of armed conflict.

¹¹ 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*, 324 INT’L REV. RED CROSS 409-419 (1998).

¹² Johannes Morsink, *World War Two and the Universal Declaration*, 15 HUM. RTS. Q 357, 358 (1993).

¹³ *Droit des conflits armés*, reprinted in DROIT DES CONFLICTS ARMÉS 251 (Dietrich Schindler & Jiri Toman eds., 1996).

¹⁴ GA Res. 804 (VIII), UN Doc. A804/VIII (Dec. 3, 1953)(on the treatment of captured soldiers and civilians in Korea by North Korean and Chinese forces).

¹⁵ GA Res. 1312 (XIII), UN Doc. A38/49 (Dec. 12, 1958).

In 1967, the United Nations Security Council in regard to the territories occupied by Israel after the Six Day War had already considered that “essential and inalienable human rights should be respected even during the vicissitudes of war.”¹⁶ A year later, the Tehran International Conference on Human Rights marked the definite step by which the United Nations accepted 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.¹⁷ Then followed the Resolution entitled *Respect for Human Rights in Armed Conflict* which affirmed 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. That resolution requested the Secretary General draft a report on measures to be adopted for the protection of all individuals in times of armed conflict. The two reports of the Secretary-General conclude that human rights instruments, particularly the International Covenant on Civil and Political Rights (which had not even entered into force at that time) afforded a more comprehensive protection to persons in times of armed conflict than the Geneva Conventions only.¹⁸ The Secretary-General even mentioned the state reporting system under the Covenant which he thought “may prove of value in regard to periods of armed conflict,”¹⁹ 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 “[b]asic 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.”²⁰ 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

¹⁶ GA Res. 237, ¶ 2, preamble ¶ 2, UN Doc. A237/1967, (June 14, 1967); *see also* GA Res. 2252 (ES-V), UN Doc. A2252/ESV, (July 4, 1967), which refers to this resolution.

¹⁷ Final Act of the International Conference on Human Rights, UN Doc. A/Conf.32/41 (Apr. 22-May 13, 1968).

¹⁸ Report on Respect for Human Rights in Armed Conflict, UN Doc. A/7729 (Nov. 20, 1969) *see especially* ch. 3; Report on Respect for Human Rights in Armed Conflict, ¶ 20-29, annex 1, UN Doc. A/8052 (Sept. 18, 1970).

¹⁹ *Id.* at ¶ 29.

²⁰ GA Res. 2675 (XXV), Principles for the Protection of Civilian Populations in Armed Conflict UN Doc. A/8028Basic (Dec. 9, 1970).

instances the regime of human rights is setting the general direction and objectives for the revision of the law of war.”²¹

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law from 1974 to 1977 was a reaction to the United Nations process. The International Committee of the Red Cross (ICRC), in particular, could now re-launch the process of development of international humanitarian law for a better protection of civilians not only in international, but also in non-international armed conflict. The Diplomatic Conference and the two Additional Protocols of 1977 owed an undeniable debt to human rights, in particular by making some rights which are derogable under human rights law non-derogable as humanitarian law guarantees. Both Additional Protocols acknowledge the application of human rights in armed conflict. While the ICRC did not follow this route 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 Since then, the application of human rights in armed conflict is recognized in international humanitarian law, even if the detail of their interaction remains a matter of discussion.

Indeed, there have constantly been resolutions by the Security Council, the General Assembly, and the Commission on Human Rights reaffirming or implying the application of human rights in situations amounting to armed conflict.²⁴ The

²¹ G.I.A.D. Draper, *The Relationship between the Human Rights Regime and the Laws of Armed Conflict*, 1 *ISR. Y.B. HUM. RTS.* 191 (1971).

²² ICRC, *DRAFT ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949—COMMENTARY* 131 (1973) *see also* JEAN S. PICTET, *HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS* 15 (1975).

²³ *COMMENTARY ON THE ADDITIONAL PROTOCOLS* (Y. Sandoz, C. Swinarski, & B. Zimmermann eds., 1987) *see especially* para. 4429.

²⁴ S.C. Res. 1019, UN Doc. S/RES/1019 (Nov. 9, 1995) and S.C. Res. 1034, UN Doc. S/RES/1034 (Dec. 21, 1995) (in regard to Former Yugoslavia); S.C. Res. UN Doc. S/RES/1635 (Oct. 28, 2005) and S.C. Res. 1653, UN Doc. S/RES/1653 (Jan. 27, 2006) (Great Lakes region); G.A. Res. 50/193, UN Doc. A/RES/50/193 (Dec. 22, 1995) (Former Yugoslavia); G.A. Res. 3525 (XXX), UN Doc. A/3525 (Dec. 15, 1975) (territories occupied by Israel); G.A. Res. 46/135, UN Doc. A/RES/46/135 (Dec. 19, 1991) (Kuwait under Iraqi occupation); G.A. Res. 52/145, UN Doc. A/RES/52/145 (Dec. 12, 1997) (Afghanistan); Commission on Human Rights Resolutions and decisions *see, e.g.*, Resolutions and: UN Docs. E/CN.4/1992/84 (Mar. 3, 1992) (Iraq); E/CN.4/2003/77 (April 25, 2003) (Afghanistan), A/E/CN.4/RES/2003/16 (Apr. 17, 2003) (Burundi); E/CN.4/RES/2001/24 (Apr. 20, 2001) (Russian Federation); E/CN.4/RES/2003/15 (Apr. 17, 2003) (Congo); 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 (Jan. 16, 1992).

United Nations has also conducted investigations into violations of human rights, for example, in connection with the conflicts in Liberia,²⁵ and Sierra Leone,²⁶ Israel's military occupation of the Palestinian territories,²⁷ and Iraq's military occupation of Kuwait.²⁸ More recently, the Security Council has condemned human rights violations by "militias and foreign armed groups" in the Great Lakes region, implying human rights violations by troops abroad.²⁹ Resolutions of the United Nations General Assembly and the UN Commission on Human Rights have also sometimes referred to human rights with regard to international armed conflict³⁰ and situations of occupation.³¹

Finally, some newer international treaties and instruments incorporate or draw from both human rights and international humanitarian law provisions. This is the case for: the Convention on the Rights of the Child of 1989³², the Rome Statute of the International Criminal Court³³ the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000,³⁴ 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 Law³⁵ and most recently the draft Convention on the Rights of Persons with Disabilities.³⁶

²⁵ The Secretary-General, Progress Report on UNOMIL, UN Doc. S/1996/47 (Jan. 23, 1996).

²⁶ The Secretary-General, Progress Report on UNOMSIL, UN Doc. S/1998/750 (Aug. 12, 1998).

²⁷ Commission on Human Rights Resolution, UN Doc. E/CN.4/S/5/1 (Oct. 19, 2000).

²⁸ Commission on Human Right Resolution, UN Doc. E/CN.4/1991/67 (Mar. 6, 1991).

²⁹ SC Res. 1635, UN Doc. S/RES/1635 (Oct. 28, 2005)(The situation concerning the Democratic Republic of Congo) and 1653, UN Doc. S/RES/1653 (Jan. 27, 2006)(Great Lakes Region).

³⁰ GA Res. 804 (VIII), *supra* note 14.

³¹ GA Res. 2546 (XXIV), UN Doc. A/RES/2546/XXIV (Dec. 11, 1969); GA Res. 3525 (XXX), UN Doc. A/RES/3525/XXX (Dec. 15, 1975)(territories occupied by Israel); GA Res. 46/135, UN Doc. A/RES/46/135 (Dec. 19, 1991)(Kuwait under Iraqi occupation); *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 (Jan. 16, 1992).

³² Convention on the Rights of the Child of 1989, art. 38, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CROC].

³³ Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 3.

³⁴ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000, Nov. 20, 1989, 1577 U.N.T.S. 3.

³⁵ G.A. Res. 60/147, UN Doc. A/RES/60/147 (Dec. 16, 2005).

³⁶ Adopted by G.A. Res 61/106, UN Doc. A/RES/61/106 (Dec. 13, 2006), *see especially* Article 11.

B. Derogations from Human Rights in Armed Conflict and their Limits

More specifically, what conclusions can be drawn from the texts of international human rights treaties with regard to their application in situations of armed conflict? As stated above, the Universal Declaration of Human Rights is silent in regard to armed conflict. The question of the application of human rights in armed conflict only later arose with the drafting of human rights treaties.

As is well-known, most human rights can be derogated from in time of public emergency, which includes situations of armed conflict. It is a common misconception, however, to dismiss the application of human rights in time of armed conflict, because derogability is understood as entirely suspending the right. However, this is not what international law says; derogation clauses all limit the possibility for derogation. Derogations are only permissible to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with states' other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion, or social origin.³⁷

Moreover Article 15 of the European Convention on Human Rights, Article 27 of the American Convention on Human Rights, and Article 2 of the Convention against Torture expressly mention that the state of "war" allows derogation for certain rights and prohibit it for others. On the basis of this wording, it is clear that the treaties with an explicit mention of war must apply to situations of war. Otherwise, states would not have to comply with any of the requirements for derogations (declaration, notification, non-discrimination, proportionality) and the derogation clauses would become superfluous.

The International Covenant on Civil and Political Rights (ICCPR), on the contrary, does not mention the situation of war explicitly in its derogation clause in Article 4. But in the course of the drafting it recognized that one of the most important public emergencies in the sense of Article 4 ICCPR was the outbreak of war. However, in line with the dogmatic denial of the possibility of war after the adoption of the UN

³⁷ International Covenant on Civil and Political Rights, art. 4, March 23, 1976, 99 U.N.T.S. 171 [hereinafter ICCPR] (emphasis added C.D.); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15, Sept. 3, 1953, 213 U.N.T.S. 222 [hereinafter ECHR]; and American Convention on Human Rights, art 27 Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR]. Article 27 of the ACHR has a virtually identical wording to Article 4 ICCPR.

Charter, it was felt that the Covenant should not envisage, even by implication, the situation of war, so the explicit mention was withdrawn from the text.³⁸ The silence of Article 4 cannot be understood, however, as a decision not to apply the Covenant to situations of armed conflict. For instance, there was a conscious decision not to include the prohibition of non-discrimination on the ground of nationality into Article 4 because some states insisted that it was impossible to treat enemy aliens on the same basis as citizens during periods of armed conflict.³⁹

There are two formal requirements for the lawfulness of derogations: they must be officially proclaimed and other states party to the treaty must be notified of them. A question that remains open until now is whether the procedural requirements apply to armed conflicts and if so, whether a state that does not comply with them will be held to the full range of human rights.⁴⁰ State practice, however, does not confirm this understanding with respect to international armed conflict. In such situations, states have not derogated from the European Convention (e.g. Former Yugoslavia, Kosovo, Afghanistan, and Iraq). With respect to non-international armed conflict, the practice is mixed,⁴¹ but even when a state has derogated, it is necessary to verify whether it was done so on the grounds that there was a non-international armed conflict. Quite frequently, states deny the existence of conflicts on their territory.

The majority of international human rights treaties contain no derogation clauses at all. However, this does not mean that none of their provisions are derogable, nor that all of their provisions are derogable. Indeed, it would be inconsistent, for instance, if freedom of expression, which is a derogable right in the ICCPR would be non-derogable with regard to children in the Convention on the Rights of the Child.⁴²

³⁸ Official Records of the Economic and Social Council, Eleventh Session, Supplement No. 5, UN Doc. E/1681, Annex I, Article 2.

³⁹ ¶ 23, UN Doc. E/CN.4/SR.195 (1950); ¶ 3, UN Doc. E/CN.4/SR.196 (1950); ¶ 5, UN Doc. E/CN.4/SR.196 (1950). The drafters included a non-discrimination clause without the factor of nationality in order to permit discrimination against enemy aliens, UN SCOR, 14th Sess., Supp. No. 4, at ¶¶ 279-80; UN Doc. E/2256-E/CN.4/669 (1952). See also UN Doc. A/C.3/SR.1262, (1963), the point was stressed that Article 4 could only apply within the territory of a state (Romania) ¶ 46, UN Doc. A/C.3/SR.1261(1963).

⁴⁰ This appears to be the position adopted by the European Court of Human Rights: *Isayeva v. Russia*, *supra* note 4, at para. 191; and of the UN Working Group on Arbitrary Detention, ¶ 71 (Dec. 12, 2005). See also Human Rights First Submission to the Human Rights Committee, (Jan. 18, 2006) at 5, available at <http://www.ohchr.org/english/bodies/hrc/docs/ngos/hfirst.doc> (last visited June 20, 2007).

⁴¹ Thus, Turkey has derogated from the European Convention on Human Rights with respect to the conflict in the south-eastern part of the country, whereas Russia has not derogated.

⁴² CROC, *supra* note 32, at Article 13.

Thus, with respect to armed conflict, it is not possible to draw the conclusion from the absence of derogation clauses that the respective treaty does not apply.⁴³ Further, it may be noted that since almost all international human rights are subject to limitation, one may reach by way of interpretation of limitation clauses outcomes similar to those reached through resort to derogation clauses.

In sum, derogations clauses, where they exist, not only permit the suspension of rights, but also limit this suspension and prohibit the suspension of other rights. They ensure that in times of armed conflict, human rights continue to apply and be respected, albeit in a modified manner.

C. 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 in non-international armed conflict as well as international armed conflict, including situations of occupation, both in its concluding observations on country reports as well as in its opinions on individual cases.⁴⁴ The same is true for the concluding observations of the UN Committee on Economic and Social Rights, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against

⁴³ On the application of the Covenant on Economic, Social and Cultural Rights to situations of armed conflict *see* Report of the Special Rapporteur on the Situation of Human Rights in Occupied Kuwait, ¶ 50-54, UN Doc. E/CN.4/1992/26 (Jan. 16, 1992).

⁴⁴ Concluding Observations on: Democratic Republic of Congo, UN Doc. CCPR/C/COD/CO/3 (Apr. 26, 2006); Belgium, 6, UN Doc. CCPR/CO/81/BEL, (Aug. 12, 2004); Colombia, UN Doc. CCPR/CO/80/COL, (May 26, 2004); Sri Lanka, UN Doc. CCPR/CO/79/LKA (Dec. 1, 2003); Israel, 11, UN Doc. CCPR/CO/78/ISR (Aug. 21, 2003); Guatemala, UN Doc. CCPR/CO/72/GTM (Aug. 27, 2001); Netherlands, 8, UN Doc. CCPR/CO/72/NET (Aug. 27, 2001); Belgium, 14, UN Doc. CCPR/C/79/Add.99 (Nov. 19, 1998); Israel, 10, UN Doc. CCPR/C/79/Add.93 (Aug. 18, 1998); UN Doc. CCPR A/46/40 (1991); UN Doc. CCPR A/46/740 (1991); United States of America, UN Doc. CCPR/C/USA/CO/NON ENCORE PUBLIÉ; *Sarma v. Sri Lanka*, UN Doc. CCPR/C/78/D/950/2000 (July 31, 2003); *Bautista v. Colombia*, UN Doc. CCPR/C/55/D/563/1993 (Nov. 13, 1995); *Guerrero v. Colombia*, UN Doc. CCPR/C/157D/45/1979 (Mar. 31, 1982).

Women⁴⁵ and the Committee on the Rights of the Child.⁴⁶ The European Court of Human Rights has recognized the application of the European Convention both in situations of non-international armed conflict⁴⁷ and in situations of occupation in international armed conflict.⁴⁸ The Inter-American Commission and Court have done the same with regard to the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights.⁴⁹ While most of these bodies have refused to apply international humanitarian law directly, because their mandate only encompassed the respective applicable human rights treaties, 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.⁵⁰

⁴⁵ Concluding Observations on: Sri Lanka, ¶¶ 256-302, UN Doc. A/57/38 (Part I)(May 7, 2002); Democratic Republic of the Congo, ¶¶ 194-238, UN Doc. A/55/381 (Feb. 2000); Colombia, ¶¶ 337-401 UN Doc. A/54/38 (Feb. 4, 1999).

⁴⁶ Committee on Economic, Social and Cultural Rights, Concluding Observations on Colombia, UN Doc. E/C.12/1/Add.74 (Nov. 30, 2001); Concluding Observations on Guatemala, UN Doc. E/C.12/1/Add.93 (Dec. 12, 2003); Concluding Observations on Israel, ¶¶ 14-15, UN Doc. E/C.12/1/Add.90 (May 23, 2003); Committee on the Elimination of Racial Discrimination: Concluding Observations on Israel, UN Doc. CERD/C/304/Add.45 (March 30, 1998); Committee on the Rights of the Child: Concluding Observations on the Democratic Republic of Congo, UN Doc. CRC/C/15/Add.153 (July 9, 2001); Concluding Observations on Sri Lanka, UN Doc. CRC/C/15/Add.207 (July 2, 2003); Concluding Observations on Colombia, UN Doc. CRC/C/COL/CO/3 (June 8, 2006).

⁴⁷ See, e.g., *Isayeva, Yusupova and Basayeva v. Russia*, *supra* note 4; *Isayeva v. Russia*, *supra* note 4, at paras. 172-178; *Ergi v. Turkey*, 1998-IV, Eur. Ct. H.R., at paras. 79-81; *Özkan v. Turkey*, Eur. Ct. H.R. Judgment of April 6, 2004, at para. 297, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=%D6zkan&sessionid=1751995&skin=hudo-c-en> (last visited August 12, 2007).

⁴⁸ *Cyprus v. Turkey*, *supra* note 1; for an overview see Aisling Reidy, *The Approach of the European Commission and Court of Human Rights to International Humanitarian Law*, 324 INT'L REV. RED CROSS 513- 529 (1998).

⁴⁹ *Bámaca Velásquez v. Guatemala*, Case No. 11/129, Inter-Am. C.H.R., para. 209; *Coard v. the United States of America*, Case 10.951, Inter-Am. Commission.H.R., OEA/ser.L/V/II.106.doc.3rev (1999), at para. 37; *Alejandro v. Cuba*, Case 11.589, Inter-Am. Commission.H.R., Report No. 86/99, OEA/Ser.L/V/II.106 Doc. 3 rev (1999); *Victor Saldaño v. Argentina*, Petition Inter-Am. Commission H.R., Report No. 38/99, OEA/Ser.L/V/II.95, doc. 7 rev. at 289 (1998), at para. 18; *Rafael Ferrer-Matorra and others v. the United States*, Case No. 9903, Inter-Am. Commission. H.R., Report No. 51/01, OEA/Ser.L/V/II.111, doc. 20 rev. 289 (19980), at para. 179; *Request for Precautionary Measures Concerning the Detainees at Guantánamo Bay, Cuba*, Inter-Am. Commission.H.R. decision of March 12, 2002, 41 ILM 532 (2002).

⁵⁰ *Bámaca Velásquez v. Guatemala*, *supra* note 49, at 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), ¶ 10, UN Doc. CCPR/C/21/Rev.1/Add.11 (July 24, 2001).

The Inter-American Commission is the only body that has expressly assigned itself the competence to apply humanitarian law.⁵¹

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

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 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.⁵²

In the advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory 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

⁵¹ *Abella v. Argentina*, Case 11.137, Inter-Am. Commission H.R. Report No. 55/97, OEA/Ser.L/V/II.98, doc 6 rev, (1997), at paras. 157-171.

⁵² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226-593 (July 8), at para. 25 [hereinafter *Nuclear Weapons* case].

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.⁵³

It confirmed this statement in the *Case Concerning the Territory in Eastern Congo Occupied by Uganda*. In this judgment, it also repeated the holding of the advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory that international human rights law applies in respect of acts done by a state in the exercise of its jurisdiction outside its own territory and particularly in occupied territories,⁵⁴ making 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,⁵⁵ 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.

By and large, states have not objected to the interpretation of international bodies, with the exception of some states who contest the application of human rights in times of armed conflict.⁵⁶ These latter states could be *persistent objectors* to the application of human rights law to armed conflict in terms of customary law. This would, however, require a consistent practice of objection. Moreover, it is questionable whether there could be persistent objection to the application of certain rights that are non-derogable

⁵³ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. (July 9), at para. 106 [hereinafter *Wall case*].

⁵⁴ Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. 116, (Dec. 19), at para. 119 [hereinafter *DRC v. Uganda*].

⁵⁵ As argued by Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119, 122 (2005).

⁵⁶ Summary Legal Position of the Government of Israel, Annex I to the Report of the Secretary-General Prepared Pursuant to GA Res., ES-10713, ¶ 4, UN Doc. A/ES-10/248 (Nov. 24, 2003)(relating to the construction of a wall in the occupied Palestinian territory); 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 (Nov. 28, 2005); Summary Record of the 2380th Meeting: United States of America, at 2, UN Doc. CCPR/C/SR.2380 (July 27, 2006).

or even *jus cogens* rights, such as the prohibition of torture or the right to life. Also, if seen as a reservation to the application of a given treaty to situations of armed conflict, it would be doubtful whether such an objection would be compatible with the object and purpose of human rights treaties, especially if the objection is not formulated as a formal reservation.⁵⁷

D. *Summary*

It can be concluded from the above that international jurisprudence and state practice—through the development of treaties, resolutions, acceptance of jurisprudence, decisions of national courts—has now accepted the application of human rights in times of armed conflict, both international and non-international.

The argument that human rights are entirely ill-suited for the context of armed conflicts is misleading. It would be too simple to say that while humanitarian has an underlying realistic philosophy based on military necessity, human rights law is idealistic and inappropriate for situations of strife. We will see below how the interaction between the two bodies of law can work and when humanitarian law is the more appropriate body of law. But the application of human rights in principle to situations of armed conflict is compatible with the drafting and wording of human rights treaties and of the two Additional Protocols to the Geneva Conventions.⁵⁸ It also flows from the very nature of human rights: if they are inherent to the human being, they cannot be dependent on a situation.

III. *Extraterritorial Application of Human Rights*

Jurisprudence and state practice have recognized the application of human rights not only in non-international armed conflict, but also in international armed conflict,

⁵⁷ See Article 19 (c) of the Vienna Convention on the Law of Treaties; on the non-applicability of the reservation to human rights treaties see Sub-Commission, Reservations to Human Rights Treaties, UN Doc. E/CN.4/Sub.2/RES/2000/26 (Aug. 18, 2000).

⁵⁸ Protocol I Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts, arts. 77(2) and 4(3)(d), Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol II Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts, art. 4(3)(d), Dec. 12, 1977, 1125 U.N.T.S. 609.

including situations of occupation. This means that human rights have been applied outside of the territory of the parties to the respective treaties. The following chapter analyses in greater detail the development of jurisprudence in this regard and discusses the requirements and limits for extraterritorial application of human rights.

It is difficult to discuss the question of extraterritorial application outside the specific wording of each international human rights treaty. Indeed, many of the treaties have specific application clauses⁵⁹ which form the basis for the discussion on their reach while others have no application clauses at all. Nonetheless, one can find in the jurisprudence of the Human Rights Committee, the European Court of Human Rights and the American Commission of Human Rights agreement on the basic requirement for extraterritorial application. This requirement is effective control, either over a territory or over a person.

A. Effective Control over a Territory

1. Jurisprudence

According to the UN Human Rights Committee:

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 operations.⁶⁰

⁵⁹ See Article 2(1) ICCPR, *supra* note 37; Article 1 ECHR, *supra* note 37; Article 1 ACHR, *supra* note 37; Convention Against Torture, art. 2(1), Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter (CAT)].

⁶⁰ Human Rights Committee, General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10, UN Doc. CCPR/C/74/CRP.4/Rev.6 (2004) [hereinafter General Comment No. 31] (emphasis added C.D.).

The constant jurisprudence of the UN Human Rights Committee has confirmed this approach. In particular, the Committee has consistently applied the Covenant to situations of military occupation⁶¹ and with regard to troops taking part in peacekeeping operations.⁶² The International Court of Justice has adopted the Human Rights Committee's position with regard to the ICCPR.⁶³

It should be noted that while most states accept the jurisprudence of the Human Rights Committee, a small number of states have contested it.⁶⁴ In some of these states, however, such as in Israel⁶⁵ and the United Kingdom,⁶⁶ national courts have applied human rights extraterritorially (since the ICCPR and the ECHR are incorporated as domestic law into the respective national systems), so that the objection of these governments does not necessarily reflect internally coherent state practice, state practice including all state organs (the executive, the legislative and the judiciary).⁶⁷

Recently, a controversy has been triggered over the drafting history of the ICCPR, especially between the United States and the Human Rights Committee.⁶⁸ The United

⁶¹ Concluding Observations on: Cyprus, ¶ 3, UN Doc. CCPR/C/79/Add.39 (Sept. 21, 1994); Israel, ¶ 10, CCPR/C/79/Add.93 (Aug. 18 1998); Concluding Observations on Israel, *supra* note 44.

⁶² Concluding Observations on: Belgium, ¶ 17, CCPR/C/79/Add.99, (Nov. 19, 1998); Netherlands, ¶ 8, CCPR/CO/72/NET, (Aug. 27, 2001); Belgium, ¶ 6, CCPR/CO/81/BEL, (Aug. 12, 2004).

⁶³ *Wall* case, *supra* note 53, at paras. 108-111.

⁶⁴ Replies of the Government of the Netherlands to the Concerns Expressed by the Human Rights Committee, ¶ 19, UN Doc. CCPR/CO/72/NET/Add.1 (Apr. 29, 2003); Second Periodic Report of Israel to the Human Rights Committee, ¶ 8, UN Doc. CCPR/C/ISR/2001/2 (Dec. 4, 2001); Second periodic report of Israel to the Committee on Economic, Social and Cultural Rights, ¶ 5, UN Doc. E/1990/6/Add.32, (Oct. 16, 2001); Conclusions and Recommendations on the United Kingdom, ¶ 4(b), UN Doc. CAT/C/CR/33/3 (Dec. 10, 2004); CAT, Summary Record of the 703rd meeting, ¶ 14, UN Doc. CAT/C/SR.703 (May 12, 2006); 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 (Nov. 28, 2005).

⁶⁵ *See, e.g., Marab v. IDF Commander in the West Bank, supra* note 2.

⁶⁶ *Al-Skeini v. Sec. of State for Defence* [2004] EWHC 2911 (Admin) [hereinafter *Al-Skeini* (HC)]; *Al-Skeini* (CA), *supra* note 3, at paras. 3-11, 48-53, 189-190; *Al Jedda v. Sec. of State for Defense* [2006] EWCA (Civ) 327.

⁶⁷ 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, at 17, 18.

⁶⁸ 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 (Nov. 28, 2005); Summary Record of the 2380th meeting, 18 July 2006, Second and third periodic reports of the United States of America, UN

States argues that the *travaux préparatoires* show that the Covenant was not meant to be applied extraterritorially. Since it has been widely discussed, the discussion will not be related in detail here.⁶⁹ Suffice it to say that the drafting history provides a number of contradictory conclusions as to the meaning of the application clause in Article 2 (1) of the Covenant. Moreover, the *travaux préparatoires* are but one among several methods of interpretation. 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 adopted this approach in its recent observations and held that in good faith the Covenant must apply extraterritorially.⁷⁰

The European Court of Human Rights has had an easier task to apply the Convention extraterritorially, as it merely had to interpret the meaning of the term “jurisdiction” in Article 1 of the ECHR. In terms of extraterritorial application, the European Court requires *effective control over a territory*, which is particularly fulfilled in the case of military occupation:

Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful—it exercises *effective control of an area* outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.⁷¹

Doc. CCPR/C/SR.2380 (July 27,2006); Human Rights First, Submission to the Human Rights Committee, Jan. 18, 2006, at 7, *available at* http://www.ohchr.org/english/bodies/hrc/87ngo_info.htm (last visited Sept. 10, 2006).

⁶⁹ The disputed passages of the *travaux préparatoires* are the following: Compilation of the Comments of Governments on the Draft International Covenant on Human Rights and on the Proposed Additional Articles, U.N. ESCOR Hum. Rts. Comm., 6th Sess. at 14, UN Doc. E/CN.4/365 (1950)(U.S. proposal); Summary Record of the Hundred and Thirty-Eighth Meeting U.N. ESCOR Hum. Rts. Comm., 6th Sess., 138th mtg at 10, UN Doc. E/CN.4/SR.138 (1950).

⁷⁰ 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, Advance Unedited Version, ¶ 10, UN Doc. CCPR/C/USA/Q/3/CRP.4 (2006).

⁷¹ *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) at paras. 62-64 (1995)(GC)(Preliminary Objections) [hereinafter *Loizidou* (Preliminary Objections)].

The Court later made clear in the cases such as *Loizidou v. Turkey*,⁷² *Cyprus v. Turkey*⁷³ or *Ilaşcu and Others v. Moldova and Russia*⁷⁴ that effective control did not mean control over every act or part of the territory, but ‘*effective overall control*’ over a territory. 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.⁷⁵

Member states of the Council of Europe have unanimously accepted this jurisprudence through their resolutions on execution of judgments in the Committee of Ministers.⁷⁶

In the *Banković* case,⁷⁷ the European Court appeared to restrict its jurisprudence on extraterritorial application of the Convention. The case dealt with NATO’s bombardment of the Serbian Radio-Television station, a typical example of conduct of hostilities—as opposed to an occupation or detention situation. The Court took the view that such bombardments did not mean that the attacking states had jurisdiction within the meaning of Article 1 of the ECHR. The Court 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.”⁷⁸ It 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 used

⁷² *Loizidou v. Turkey*, 1996–VI Eur. Ct. H.R. 2216, 2234–2235, para. 52 (GC)(Merits) [hereinafter *Loizidou* (Merits)].

⁷³ *Cyprus v. Turkey*, *supra* note 1, para. 77.

⁷⁴ *Ilaşcu v. Moldova and Russia*, 2004–VII Eur. Ct. of H.R., paras. 434, 442, 453, 464, 481 (GC).

⁷⁵ *Cyprus v. Turkey*, *supra* note 1, at para. 78.

⁷⁶ 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); Interim Resolution ResDH(2006)26 concerning the judgment of the European Court of Human Rights of 8 July 2004 (Grand Chamber) *Ilaşcu v. Moldova and Russia*, (adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers’ Deputies).

⁷⁷ *Banković v. Belgium*, 2001–XII Eur. Ct. H.R. 333 (GC).

⁷⁸ *Id.* at para. 75.

a rather obscure geographical argument, arguing that the Former Yugoslavia did not fall in the “European legal space.”⁷⁹

This argumentation led to some speculation as to whether any act committed by a state party outside the geographic area covered by the Convention would fall outside the jurisdiction of the state.⁸⁰ However, the subsequent judgment in *Öcalan v. Turkey* contradicted such a conclusion. In that case, the European Court of Human Rights 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.⁸¹ This approach was confirmed later in the *Issa and other v. Turkey* case.⁸² Reconsidering the *Bankovic* decisions in the light of these later cases, it would appear that in *Bankovic* the Court simply did not find that the states had effective control over the territory they were bombarding, nor had any persons in their power, so that no “jurisdiction” was given under Article 2 of the European Convention on Human Rights. The decisive argument was not whether the territory was within European geographic territory.

Lastly, the Inter-American Commission of Human Rights has long asserted jurisdiction over acts committed outside the territory of a state.⁸³ The Commission’s argument is teleological: Since human rights are inherent to all human beings by virtue of their humanity, states have to guarantee it to any person under their jurisdiction, which the Commission understands to mean any person “subject to its authority and control.”⁸⁴ The Commission took rather a broader view with respect to military operations than the European Court of Human Rights. While the European Court rejected jurisdiction in the *Banković* case, the Inter-American Commission, in the case of the invasion of Panama by the United States in 1989 stated:

⁷⁹ *Id.* at para. 80.

⁸⁰ See P. Leach, *The British Military in Iraq—the Applicability of the Espace Juridique Doctrine under the European Convention on Human Rights*, PUB. L. 448 (2005) with further references; L. Condorelli, *La protection des droits de l’Homme lors d’actions militaires menées à l’étranger*, 32 COLLEGIUM 89, 100 (2005).

⁸¹ *Öcalan v. Turkey*, Eur. Ct. H.R. (GC) Judgment of May 12, 2005, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=%D6%20calan&sessionId=1751995&skin=hudoc-en> (last visited August 12, 2007); confirmed in *Issa v. Turkey*, 41 Eur. Ct. H.R. 27 (2004), at para. 71.

⁸² *Issa v. Turkey*, *id.* at para. 71.

⁸³ For an overview of its jurisprudence see C. Cerna, *Extraterritorial Application of the Human Rights Instruments of the Inter-American System*, in EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 141-174 (F. Coomans & M.T. Kamminga eds., 2004) and Douglas Cassel, *id.* at 175-181.

⁸⁴ *Coard v. the United States*, *supra* note 49, at para. 37.

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 noncombatants 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.⁸⁵

However, this case has been pending since 1993 and not been decided on its merits.

2. Meaning of Effective Control in IHL and for Human Rights Application.

The conclusion to be drawn from the above-cited jurisprudence is one situation where human rights law applies extraterritorially is the situation where the authorities have “effective control” over a territory, so that they can effectively and practically ensure respect for human rights. The notion of effective control comes very near the notion of “established and exercised” authority in Article 42 of the Hague Regulations of 1907 that stipulates that “territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.” Both the regime of occupation and the human rights regime are based on the idea that to ensure law enforcement and the well-being of the persons in a territory, a state must wield the necessary amount of control.⁸⁶

Effective control for the purposes of human rights, however, appears to be broader and more flexible than for the purpose of occupation in humanitarian law. On the one hand, the threshold can be lower for human rights. Indeed, human rights obligations are flexible: with varying degrees of control, the state has varying obligations, going from the duty to respect to the duties to protect and fulfil human rights.⁸⁷ The obligation to

⁸⁵ *Salas v. the United States*, Case 10.573, Inter-Am. C.H.R., Report No. 31/93, OEA/Ser.L/V/85, Doc. 9 rev. (1994), at para. 6.

⁸⁶ See also Articles 64 & 65 of the Fourth Geneva Convention; M. Sassòli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, 16 EUR. J. INT'L L. 661, 663-667 (2005).

⁸⁷ Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 ISR. L. REV. 17, 64 (2003).

protect persons from harm resulting from third parties, for instance, requires a higher threshold of control over the environment of the person than the duty to respect the prohibition of ill-treatment. This is different in the law of occupation, which is premised on a degree of control sufficient to impose quite precise—and absolute—obligations on the state, including obligations of protection and welfare (tax collection; education; food; medical care; etc).⁸⁸

The *Ilaşcu and Others v. Moldova and Russia* case⁸⁹ is an example of effective control short of occupation triggering the application of human rights law. The European Court of Human Rights found Russia to be responsible for human rights violations on the basis of the presence of a relatively small number of troops—not enough to amount to occupation in the sense of Article 42 of the Fourth Hague Regulation. Indeed, it found that the separatist regime had been:

set up in 1991-92 with the support of the Russian Federation, vested with organs of power and its own administration, remain[ed] under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survive[d] by virtue of the military, economic, financial and political support given to it by the Russian Federation.⁹⁰

This was enough for the Court to find the Russian Federation responsible.

Conversely, while most situations of occupation will also entail effective control over the territory to trigger the application of human rights, there situations which are extremely volatile. Such a situation was given in the *Al-Skeini* case, in which one of the questions was whether the killing of five persons in security operations of British troops during the occupation of the city of Basrah in Iraq in 2003 was lawful under the European Convention on Human Rights. It was undisputed that while there was

⁸⁸ See, e.g., Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land. Art. 43, Oct. 18, 1907, U.S.T.S. 539 [hereinafter the Hague Regulations]; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, arts. 40, 55, & 56, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

⁸⁹ *Ilaşcu v. Moldova and Russia*, *supra* note 74, at para. 392.

⁹⁰ *Id.* Note that the Court *also* found that Moldova had violated its positive obligations to protect the rights of persons within that territory, a majority decision from which a number of judges dissented (see the dissenting opinion of Judge Sir Nicolas Bratza and others, at 127 of the judgment)

occupation of British troops in the Al Basrah and Maysan provinces of Iraq at the material time,⁹¹ the United Kingdom possessed no executive, legislative, or judicial authority in Basrah city. It was simply there to maintain security in a situation on the verge of anarchy. The majority of the Court of Appeals therefore found that there was no effective control for the purpose of application of the European Convention on Human Rights.⁹² Sedley LJ, on the contrary, found that while the United Kingdom might not have had enough control to ensure all Convention rights, it had at least control over its own use of force when it killed the five civilians.⁹³

It is difficult to see, considering the rather high threshold of authority that Article 42 of the Hague Regulations requires, how this could be less control than for the purpose of the extraterritorial application of human rights. It would be more convincing to accept that a territory under occupation presupposes enough effective control to trigger the application of human rights in principle, but to apply the *lex specialis* of humanitarian law concerning the conduct of hostilities, when a concrete situation within the territory is not a situation of law enforcement but of hostility. Of course, it will be difficult to assess in concrete situations whether it was law enforcement or conduct of hostilities, but this is a matter of fact and not of the applicable law.

In conclusion, in humanitarian law control over a territory is a notion pertaining to the law of occupation and triggers a number of absolute obligations of the occupying power. In international human rights law the notion of “effective control” has a broader meaning since human rights obligations are more flexible and vary with varying degrees of control. Effective control for the application of human rights, albeit it not all human rights in all their aspects, can be given in a situation below the threshold of occupation.

B. *Power over a Person*

1. *Jurisprudence*

Furthermore, human rights bodies have also recognized that human rights apply extraterritorially when a person is in the power, “in the hands,” of the authorities.

⁹¹ *Al-Skeini* (CA) *supra* note 3, at para. 119.

⁹² *Id.* at para. 124.

⁹³ *Id.* at paras. 195-197.

The origins of this jurisprudence lie in cases that are not related to armed conflict. They concern the abduction of dissidents by agents of the secret service outside the state party. One of the first such cases, *López Burgos v. Uruguay*,⁹⁴ concerned violations of the ICCPR by state agents on foreign territory. Kidnapped in Buenos Aires by Uruguayan forces, the applicant was secretly detained in Argentina before being clandestinely transported to Uruguay. Had the UN Human Rights 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.”⁹⁵

The European Court of Human Rights followed exactly the same argument in the case of *Öcalan v. Turkey*, mentioned above, and the case of *Issa and others v. Turkey*. The Court made 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.⁹⁶

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 found in the hands of state agents.

⁹⁴ *López Burgos v. Uruguay*, Comm. No. 52/1979, UN Doc. CCPR/C/13/D/52/1979 (1981); see also *de Casariego v. Uruguay*, Comm. No. 56/1979, UN Doc. CCPR/C/13/D/56/1979 (1981).

⁹⁵ *López Burgos v. Uruguay*, *supra* note 94, para. 12.3; *de Casariego v. Uruguay*, *supra* note 94, at para. 10.3.

⁹⁶ *Issa v. Turkey*, *supra* note 81, at para. 71 (emphasis added C.D.).

As mentioned above, the Inter-American Commission on Human Rights applies the American Declaration to any person subject to a state's authority and control,⁹⁷ so that evidently, any person in the hands of the authorities falls under this requirement. While the "authority and control" test is rather similar to that used by the European Court of Human Rights or the Human Rights Committee, the Inter-American Commission has also had to decide on killings of persons without their being "in the hands of the authorities." Thus, it condemned the assassination of Orlando Letelier in Washington and Carlos Prats in Buenos Aires by Chilean agents as a violation of the right to life.⁹⁸ Similarly, it condemned attacks of Surinamese citizens by Surinamese state agents in the Netherlands.⁹⁹

2. *Meaning of Control over a Person*

International human rights bodies agree that where a state has effective control over a territory or over a person, their respective human rights treaties apply. Typical cases would be abduction, detention, or ill-treatment. What is open, however, is whether the European Court of Human Rights or the Human Rights Committee would also hold states responsible for extraterritorial killings. Indeed, such killings do not presuppose power over a person in the same narrow meaning as detention. These cases fall neither into the category of effective control over a territory nor into the category of power over an individual.

Sedley LJ addressed this question in the *Al-Skeini* case and argued that "the one thing British troops did have control over, even in the labile situation described in the evidence, was their own use of lethal force."¹⁰⁰ This argument is not entirely convincing, since the question is one of control over the affected person, not over the state agents' own acts. One could argue, of course, that the killing of a person must necessarily mean ultimate control over him or her. As said, the question, so far, has not been addressed by all international bodies. Nonetheless, it could be argued that it would be inconsistent to extend the concept of jurisdiction to situations where a state

⁹⁷ *Coard v. the United States*, *supra* note 49, at para. 37.

⁹⁸ Report on the Situation of Human Rights in Chile, OEA/Ser.L/V/II.66, Doc.17 (Sept. 9, 1985), ch. III, at paras. 81-91, 181.

⁹⁹ Second Report on the Human Rights Situation in Suriname, OEA/Ser.L/V/II.66, doc.21 rev. 1, (Oct. 2, 1985), at ch. V, E.

¹⁰⁰ *Al-Skeini (CA)*, *supra* note 3, at paras. 197.

has power over an individual and abducts him or her, but not to accept jurisdiction if the person is killed. Also, it would lead to the conclusion that in some instances, in the absence of an armed conflict, a state could act extraterritorially without being in any way bound by either human rights law or humanitarian law, a conclusion that seems indeed untenable.¹⁰¹

C. Summary

The nature of human rights is universal, and their object and purpose is the protection of the individual from abuse by states. As recognized in jurisprudence, potential abuse by states cannot only occur on the state's own territory, but also outside. On the other hand, it limits the application of international human rights law to situations where the state authorities have either effective control over a territory or power over the person. This is a reasonable limitation, since otherwise states would be held accountable for violations over which they have no command, or there could be clashes of jurisdiction between several states.

IV. Complementarity and Lex Specialis

Once it is established that human rights are applicable to all situations of armed conflict, how can their relationship with international humanitarian law be described? The concurrent application of both bodies of law has the potential to offer greater 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.¹⁰²

How does a useful framework for analysis look like? The International Court of Justice has found three situations relevant to the relationship between humanitarian and human rights law: "some rights may be exclusively matters of international

¹⁰¹ David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171, 185 (2005).

¹⁰² Bothe, *supra* note 5, at 37.

humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”¹⁰³ Indeed, rights that are exclusively matters of humanitarian law, for instance, are those of prisoners of war. Rights which are typically a matter of human rights law are such rights as freedom of expression or the right to assembly. Rights that are matters of both bodies of law are such rights as freedom from torture and other cruel, inhuman, or degrading treatment or punishment, the right to life, a number of economic and social rights, and rights of persons deprived of liberty.

The following chapter discusses situations that overlap, when both branches of law have something to say about a situation.

A. Distinguishing Features of Human Rights Law and Humanitarian Law

Before the possibilities of concurrent application are discussed, some fundamental features that distinguish the two bodies of law should be recalled. Firstly, humanitarian law only applies in times of armed conflict, whereas human rights law applies at all times. Secondly, human rights law and humanitarian law traditionally bind different entities. While it is clear that humanitarian law binds “parties to the conflict,”¹⁰⁴ i.e., both state authorities and non-state actors, this question is far more controversial in human rights law. Traditionally, international human rights law has been understood to bind only states and it will have to be seen how the law evolves in this regard.¹⁰⁵ Thirdly, while most international human rights are derogable with few exceptions,¹⁰⁶ humanitarian law is non-derogable (with the only 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.¹⁰⁷

Considering these differences, one can take a static approach and assume the fundamental incompatibility of both bodies of law. The tendency in jurisprudence and

¹⁰³ *Wall case*, *supra* note 53, at para. 106.

¹⁰⁴ *See* Common Article 3 to the Geneva Convention IV, *supra* note 88.

¹⁰⁵ Article 2 ICCPR, *supra* note 37; Article 1 ECHR, *supra* note 37; Article 1 ACHR, *supra* note 37; *see* A. CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006).

¹⁰⁶ *See* Article 4 ICCPR, *supra* note 37; Article 15 ECHR, *supra* note 37; Article 27 ACHR, *supra* note 37.

¹⁰⁷ *See* Part IV.

practice, however, calls for a more dynamic approach. In this vein, it is often said that human rights and humanitarian law are not mutually exclusive, but complementary and mutually reinforcing. This approach is meant to affirm the possibility of simultaneous application of both bodies of law. The concept of complementarity is, however, of a policy rather than a legal nature. To form a legal framework in which the interplay between human rights and humanitarian law can be applied, legal methods of interpretation can provide some helpful 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*.

B. *The Concepts of Complementarity and Lex Specialis*

1. *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 allows, in interpreting a norm, to take into account "relevant rule of international law applicable in the relations between the parties." This principle, in a sense, enshrines the idea of international law understood as a coherent system.¹⁰⁸ It sees international law as a regime in which different sets of rules cohabit in harmony. Thus, human rights can be interpreted in the light of international humanitarian law and *vice versa*.

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*.

¹⁰⁸ Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 ICLQ 279-320 (2005); International Law Commission, *Report of the Study Group on Fragmentation of International Law: Difficulties arising from Diversification and Expansion of International Law*, ¶ 27, UN Doc. A/CN.4/L.676, (July 29, 2005); see also Philippe Sands, *Treaty, Custom and the Cross-fertilization of International Law*, 1 YALE HUM. RTS. DEV. L.J. 85, 95 (1999).

2. Meaning of the Principle of *Lex Specialis*

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 rule, this rule would displace the more general rule (*lex specialis derogat leges generalis*). One can find the *lex specialis* principle in the writings of such early writers as *Vattel*¹⁰⁹ 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 ... that should be given preference which is most specific and approaches most nearly to the subject in hand, for special provisions are ordinarily more effective than those that are general.¹¹⁰

As the highest international judicial tribunal, the International Court of Justice has used the principle of *lex specialis* to describe the relationship between the right to life in human rights and in international humanitarian law in its first two decisions on the matter, the advisory opinions on the *Nuclear Weapons* and on the.¹¹¹ Among international human rights bodies, the Inter-American Commission has followed the jurisprudence of the International Court of Justice¹¹² 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 expressed a position on the matter. The Human Rights Committee has pronounced itself on the relationship, but clearly avoided the use of the *lex specialis* formulation and instead found that "both spheres of law are complementary, not mutually exclusive."¹¹³ The International Court of Justice itself has not repeated the passages on *lex specialis* in its judgment on *Congo v. Uganda*), which begs the question whether to I maintain the *lex specialis* approach.¹¹⁴

¹⁰⁹ EMERICH DE VATTEL, *LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE* Bk. II, ch. xvii, at para. 316 (reproduction of Books I and II ed. 1758, Geneva, Slatkine Reprints, Henry Dunant Institute, 1983).

¹¹⁰ HUGO GROTIUS, *DE JURE BELLI AC PACIS*, bk II, sect. XXIX.

¹¹¹ *Wall* case, *supra* note 53, at para. 106; reiterated in the *DRC v. Uganda* case, *supra* note 54, at para. 216.

¹¹² *Coard v. the United States*, *supra* note 49, at para. 42.

¹¹³ General Comment No. 31, *supra* note 60, at para. 11.

¹¹⁴ *DRC v. Uganda*, *supra* note 54, at para. 216.

In legal literature, a number of commentators criticize the lack of clarity of the principle of *lex specialis*. Most importantly and generally, 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”;¹¹⁵ 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.¹¹⁶ Secondly, critics note that nothing indicates which of two norms is the *lex specialis* or the *lex generalis*, particularly between human rights law and humanitarian law.¹¹⁷ For instance, it has been said that human rights law might well be the prevailing body of law for persons in the power of an authority.¹¹⁸ It has even been criticised 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.”¹¹⁹ Thus, critics have proposed alternative models to the *lex specialis* approach that they have called a “pragmatic theory of harmonization,”¹²⁰ “cross-pollination,”¹²¹ or “cross-fertilization,”¹²² or a “mixed model.”¹²³ Without going into detail, these approaches have in common that they emphasize 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 fact, two roles—either as a *more specific interpretation of* or as an *exception to* the general law. As M. Koskenniemi explains:

¹¹⁵ A. Lindroos, *Addressing the Norm Conflicts in a Fragmented System: The Doctrine of Lex Specialis*, 74 *Nordic J. INT'L L.* 24, 28 (2005).

¹¹⁶ See, e.g., International Law Commission's Study Group, *supra* note 108; Lindroos, *supra* note 115, at 27-28.

¹¹⁷ Nancie Prud'homme, *Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?*, 40(2) *ISR. L. REV.* 356 (2007).

¹¹⁸ Louise Doswald-Beck, *International Humanitarian Law and the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, 316 *INT'L REV RED CROSS* 35 (1997).

¹¹⁹ Prud'homme, *supra* note 117, at 14.

¹²⁰ *Id.* at 6.

¹²¹ RENE PROVOST, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* 350 (2005).

¹²² Sands, *supra* note 108, at 85-105.

¹²³ Kretzmer, *supra* note 101, at 171.

There are two ways in which law takes account of the relationship of a particular rule to 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 derogate lex generalis* is usually dealt with as a conflict rule. However, it need not be limited to conflict.¹²⁴

If one understood the principle of *lex specialis* not as a principle to solve conflicts of norms, but as a principle of more specific interpretation, it would in itself incorporate the complementarity approach mentioned above as 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 light of one another.

In light of the just related general discussion on the meaning and use of the *lex specialis* principle, the following conclusion can be drawn. While complementarity 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.¹²⁵ In such situations, the *lex specialis* principle, in its narrow sense, i.e. as a means to solve conflict of norms, is useful to provide answers. It is easier to use *lex specialis* as a conflict solving method and use “complementarity” for the situation where norms can be brought into harmony, including when one norm is the more specific interpretation of the general norm. While there may be controversy as to which norm is the more specialized in a concrete situation, this should not put into question the value of the principle of *lex specialis* as such. As will be seen, there are some norms in international human rights law and humanitarian law that are contradictory, and a complementarity approach cannot solve the conflict.

C. Complementarity: Mutual Reinforcement

On many occasions, both human rights law and international humanitarian law are relevant to a situation and there is scope for mutual reinforcement. There are several

¹²⁴ Martti Koskeniemi, *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), at 4.

¹²⁵ See International Law Commission’s Study Group, *supra* note 108, at para. 42.

ways in which this might occur. In general terms, human rights law enshrines the more general rules, but is broader in its scope of application. It can often benefit from the more narrowly applicable, but often more precise rules of humanitarian law. On the other hand, human rights law has become increasingly specific and refined through a vast body of jurisprudence and the details of interpretation can influence the interpretation of humanitarian law, which has less interpretative jurisprudence at its disposal.

In which situations does complementarity work? In general terms, one can say that human rights law and humanitarian law have in common that they seek to protect people from abusive behaviour by those in whose power they are—state authorities in the case of human rights law, a party to the conflict in the case of humanitarian law. Thus, the protection of persons in the power of the authorities constitutes an area of considerable overlap between human rights and humanitarian law—judicial guarantees, treatment of persons, economic and social rights. In these situations, there is considerable scope for mutual reinforcement.

1. *Mutual Influence in Interpretation*

An often cited example of the influence of human rights law on humanitarian law is Article 75(4) of Additional Protocol I, which was drafted on the basis of Article 14 of the ICCPR,¹²⁶ and whose interpretation can therefore draw on the right to fair trial in human rights law. Conversely, humanitarian law has provided a threshold for minimum rights below which no derogation of human rights can reach. Derogations must be consistent with states' other obligations under international law,¹²⁷ which includes humanitarian law. Thus, humanitarian law can provide minimum obligations. The right to a fair trial, for instance, is derogable under human rights law, but its core has been considered to be non-derogable, based on Article 75 of Additional Protocol I.¹²⁸

The example of torture is an example where human rights law has influenced humanitarian law, but the definition needs to be adapted to suit the normative

¹²⁶ Sandoz, Swinarski, & Zimmermann *supra* note 23, at para. 3092.

¹²⁷ Article 4 ICCPR, *supra* note 37; Article 15 ECHR, *supra* note 37; Article 27 ACHR, *supra* note 37.

¹²⁸ General Comment 29, *supra* note 50, at para. 16.

specificities of humanitarian law. Torture is absolutely prohibited both in human rights law¹²⁹ and in international humanitarian law.¹³⁰ The only written international definition of torture is found in Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)¹³¹. Applying Article 31(3)(c) of the Vienna Convention on the Law of Treaties to the norms of humanitarian prohibiting torture allows interpretative recourse to the definition of Article 1 CAT. There is, however, an important difference with humanitarian law. Indeed, human rights law, based on Article 1 of the CAT, defines torture as an act committed “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Under international humanitarian law, torture can also be committed by armed opposition groups, so that the definition must be adapted to fit the humanitarian law rationale.¹³² Similar cross-fertilization can exist between the two bodies of law with regard to cruel, inhuman or degrading treatment or punishment and conditions of detention.

Economic, social, and cultural rights are another potential area of mutual reinforcement, especially in situations of occupation, but debates on the relationship between human rights and international humanitarian law have tended to focus on civil and political rights rather than economic, social, and cultural life.¹³³ Yet, situations of armed conflict deeply affect the enjoyment of economic, social, and cultural rights, especially because of security concerns which can severely disrupt functioning institutions, lead to shortages, and restrict mobility and thus access to work, land, health care, education, and food and water.¹³⁴ When economic and social rights and obligations have been addressed, there has been more focus on their

¹²⁹ Article 7 ICCPR, *supra* note 37; Article 2 CAT, *supra* note 59; Article 3 ECHR, *supra* note 37; Article 5 ACHR, *supra* note 37; Article 5 of the African Charter on Human and Peoples’ Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986 [hereinafter ACHPR].

¹³⁰ Common Article 3, *supra* note 104. Article 147 of the Geneva Convention (IV), *supra* note 88.

¹³¹ Article 2, CAT, *supra* note 59.

¹³² See ICTY Prosecutor v. Kunarac and Others, Case Nos. IT-96-23 & IT-96-23/1, Trial Chamber, (Feb. 22, 2001) at para. 491; confirmed by the Appeals Chamber judgment, (June 12, 2000), at para. 148; Prosecutor v. Kvočka and Others, Case No. IT-98-30/1-A, Appeals Chamber, (Feb. 28, 2005), at para. 284; ICTR: The Prosecutor v. Laurent Semanza, ICTR-97-20, (May 15, 2003), at para. 32-343; Rome Statute, *supra* note 32, at arts. 7(1)(f) (Crimes against Humanity) and 8(2)(c)(i) and (ii) (War Crime).

¹³³ *But see* the discussion in Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 860 INT’L REV. RED CROSS 737, 751 (2005).

¹³⁴ *See, e.g.*, CESCR, Concluding Observations on Israel, ¶ 11 & 19, UN Doc. E/C.12/1/Add.90, (May 23, 2003); CRC, Concluding Observations on Israel, ¶ 44 & 55, UN Doc. CRC/C/15/Add.195, (Oct. 9, 2002).

humanitarian aspects. This might have been because humanitarian law gives rather detailed guidance on these issues, such as obligations with regard to education,¹³⁵ health care,¹³⁶ the supply of relief and food.¹³⁷ On the other hand, as with other human rights, additional detailed guidance can be found in jurisprudence and other more practical principles that have been elaborated, for instance in the general comments of the Committee on Economic, Social and Cultural Rights or in such texts as the Guidelines on the Right to Food.¹³⁸ Further, a number of welfare provisions of the fourth Geneva Convention do not apply beyond one year after the general close of military operations¹³⁹ and in such cases human rights law may fill a gap in protection when the occupying power continues to exercise government functions.

2. *Mutual Influence in the Development of the Law*

Another possibility of mutual influence relates to the development of international law. As mentioned, Article 75 of Additional Protocol I was drafted on the basis of the right to a fair trial in Article 14 ICCPR and many of the basic protections in Additional Protocol II were influenced—but further refined—by the non-derogable rights of the Covenants.¹⁴⁰ A more recent example is the influence of humanitarian law on the Convention for the Protection of All Persons from Enforced Disappearance.¹⁴¹ The right to know, enshrined in Article 32 of Additional Protocol I, has influenced jurisprudence of human rights bodies with regard to enforced disappearances and been included in this new Convention (Article 24 (2)). Similarly, communication and information rights of families enshrined in the fourth Geneva Convention have influenced similar rights in the Convention (Article 18).

In summary there are many instances in which human rights law and humanitarian law do not contradict each other, but rather regulate different aspects of a situation or

¹³⁵ Article 50 of the Geneva Convention (IV), *supra* note 88.

¹³⁶ *Id.* Articles 56 & 57.

¹³⁷ *Id.* Articles 59 *et seq.*

¹³⁸ Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security, adopted by the Council of the Food and Agriculture Organisation (FAO) on 23 November 2004.

¹³⁹ Article 6 of the Geneva Convention (IV), *supra* note 88.

¹⁴⁰ M. Bothe, K. Ipsen, & K.J. Partsch, *Die Genfer Konferenz über humanitäres Völkerrecht*, 38 ZaöRV 1, 72 (1978).

¹⁴¹ Adopted by General Assembly Resolution 61/177 (Dec. 20, 2006).

regulate a situation in more or less detail, and can therefore mutually reinforce each other. This is frequently the case where both bodies of law seek to limit the exercise of abusive power over the individual or where they are concerned with the welfare of the population. In other words, for the protection of persons in the power of a party to the conflict, human rights law (within its application limits) can reinforce the applicable provisions of humanitarian law, especially where there is detailed soft law or jurisprudence to flesh out the obligations. Conversely, humanitarian law can reinforce human rights law through the absolute nature of its obligations and its greater detail.

D. *Lex Specialis: Solving Conflicts of Norms*

There are some few instances where human rights and humanitarian law are incompatible. In such situations, the object and purpose of both bodies of law give guidance on which body would provide the prevailing rule, the *lex specialis*. Indeed, humanitarian law was especially conceived for the conduct of hostilities and for the protection of persons in the power of the enemy. Human rights law was conceived to protect persons in the power of the state from abuse and does not rest, in principle, on the idea of conduct of hostilities, but on law enforcement. Thus, it is fair to say that for the conduct of hostilities, humanitarian is the more refined body of law¹⁴² whereas for law enforcement human rights law is the more refined version. For persons in the power of an authority, there will be far more overlap. Thus, the closer a situation is to the battlefield, the more humanitarian law will prevail over human rights law, whereas for law enforcement, human rights law prevails.

1. *Example: the Right to Life*

A case in point is the right to life. International humanitarian law accepts the use of lethal force and tolerates the incidental killing and wounding of civilians not directly participating in hostilities, subject to proportionality requirements. In human rights law, on the contrary, lethal force can only be resorted to if there is an *imminent* danger of serious violence that can only be averted by such use of force. The danger cannot

¹⁴² See Meron, *supra* note 10, at 241.

be merely hypothetical, it must be imminent.¹⁴³ This extremely narrow use of lethal force to protect the right to life is illustrated by 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.¹⁴⁴ 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 (not, as in humanitarian law, in order to avoid the killing of civilians not participating in hostilities).¹⁴⁵ Under human rights law, the planning of an operation with the purpose of killing is never lawful. This is not to say that intentional killing is never allowed: it is when strictly unavoidable to protect life; even a warning will not be required in a situation of imminence such as in self-defense. But this standard is very different from a planned operation in an armed conflict. Also, the principle of proportionality in humanitarian law is different from proportionality in human rights law.¹⁴⁶ Indeed, 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, damage to civilian objects, or a combination thereof caused by an armed attack must not be excessive in relation to

¹⁴³ See Articles 9 and 10 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990, Report prepared by the Secretariat (United Nations publication, Sales No. E.91.IV.2), Chap. I, sect. B.2, annex [hereinafter UN Basic Principles]; see also NIGEL RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW*, 182-188 (2000); Kretzmer, *supra* note 101, at 179.

¹⁴⁴ Principle 10 of the UN Basic Principles, *supra* note 143.

¹⁴⁵ *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) para. 202-213 (1995); *Andronicou and Constantinou v. Cyprus*, 1997-VI Eur. H.R. Rep. (1997); Eur. Ct. H.R. *Jordan v. United Kingdom*, App. No. 24726/94, (given May 4, 2001), at paras. 103-104, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Jordan%20%7C%20v.%20%7C%20United%20%7C%20Kingdom&sessionid=1751995&skin=hudoc-en> (last visited August 12, 2007); *McKerr v. the United Kingdom*, app. no. 28883/95, (given May 4, 2001) at paras. 109-110; *Kelly v. the United Kingdom*, app. no. 30054/96, (given May 4, 2001) at paras. 91-92, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=6&portal=hbkm&action=html&highlight=Jordan%20%7C%20v.%20%7C%20United%20%7C%20Kingdom&sessionid=1751995&skin=hudoc-en> (last visited August 12, 2007); *Shanaghan v. the United Kingdom*, appl. no. 37715/97, (given May 4, 2001), at paras. 85-86, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=7&portal=hbkm&action=html&highlight=Jordan%20%7C%20v.%20%7C%20United%20%7C%20Kingdom&sessionid=1751995&skin=hudoc-en> (last visited August 12, 2007); *Ergi v. Turkey*, *supra* note 47, at para. 79; *Isayeva, Yusupova and Basayeva v. Russia*, *supra* note 4, at paras. 169-171; *Isayeva Russia*, *supra* note 4, at para. 189.

¹⁴⁶ *Id.*

the *concrete and direct military advantage* anticipated.¹⁴⁷ The two principles can lead to different results.

One therefore has to decide whether in a situation of armed conflict, humanitarian law or human rights law applies, because certain killings that are justified under humanitarian law are not justified under human rights law. In other words, even in armed conflict, a killing can be governed by human rights law if in the concrete situation is one of law enforcement. The difficulty to decide which body of law applies is a factual one, not a legal one. While the applicable principles of either humanitarian law or human rights law are clear, it can be a matter of dispute whether a situation was in fact one of law enforcement or conduct of hostilities. For instance, in a situation of occupation, which by definition presupposes effective authority and control, most use of force will be a function of law enforcement. However, in practice one has to differentiate between different situations of occupation: there are in reality situations of occupation where the territory is not entirely under control.¹⁴⁸ This is the scenario mentioned above in the *Al-Skeini* case.¹⁴⁹ While and where hostilities are ongoing or where hostilities break out anew, humanitarian law on the conduct of hostilities must prevail over the application of human rights, which presuppose control for their respect and enforcement. The question is, of course, when hostilities can factually be said to have broken out again. Not all criminal activity, even if extremely violent, can be treated like an armed attack.

The divide in the approaches between the protection of the right to life in humanitarian law and in human rights law is sometimes avoided. For instance, in a number of cases concerning the conduct of hostilities and the right to life, the European Court of Human Rights clearly relied on principles close to humanitarian law, but outwardly only applying the European Convention on Human Rights in cases concerning non-international armed conflict. It held that the right to life would be violated in security operations involving the use of force if the state agents omitted “to take 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

¹⁴⁷ See the codification in Article 51 5(b) of Additional Protocol I, *supra* note 58.

¹⁴⁸ See also the discussion in Michael Bothe, *Humanitäres Völkerrecht und Schutz der Menschenrechte: Auf der Suche nach Synergien und Schutzlücken*, in *ESSAYS IN HONOUR OF C. TOMUSCHAT*, 63, 82 (P.M. Dupuy et al. eds., 2006).

¹⁴⁹ See *supra* note 91 and corresponding text.

event, to minimising incidental loss of civilian life.”¹⁵⁰ This clearly corresponds to the wording of Article 57 (2)(a)(ii) of Protocol I,¹⁵¹ even if decided under the right to life provision of the European Convention. The Court further relied on the prohibition of indiscriminate weapons, again a concept of humanitarian law.¹⁵² It is rather likely from the facts related in the cases that the situations where situations of conduct of hostilities, where the government forces had no real control over the scene and were not conducting a law enforcement operation. In such situations, humanitarian law would provide the appropriate framework, rather than human rights law. There are, of course, many reasons why the European Court of Human Rights did not openly apply humanitarian law in these cases, one of them being the fact that the countries in question did not acknowledge the existence of an armed conflict on their territory and had not derogated from the right to life as they could have done under Article 15 (2) of the ECHR. But it is likely that the application of humanitarian law would have led to the same result with a more convincing argument and without watering down the strict standard of necessity imposed on the use of force by the right to life. Indeed, the standard in human rights law is much stricter than merely “minimizing incidental loss of civilian life.”

2. Law Enforcement/Conduct of Hostilities

In sum, the *lex specialis* principle does play a role when there is a conflict between human rights and humanitarian law, as it does in other conflicts of norms in international law. As a general rule, humanitarian law is the law most appropriate for the conduct of hostilities, because its norms on the use of force are based on the assumption that military operations are ongoing and that the armed forces have no definite control over the situation. Conversely, where the situation is remote from the battlefield and the state authorities have enough control over a situation to be able to carry out law enforcement operations, human rights law provides the most appropriate framework.

¹⁵⁰ *Özkan v. Turkey*, *supra* note 47, at para. 297; *Ergi v. Turkey*, *supra* note 47, at para. 79; *Isayeva v. Russia*, *supra* note 4, at para. 176. The Court uses a similar, but not identical formulation, in *Isayeva, Yusupova and Bazayeva v. Russia*, *supra* note 4, at paras. 177.

¹⁵¹ Applicable in international armed conflict but considered customary law for non-international armed conflict too.

¹⁵² *Isayeva v. Russia*, *supra* note 4, at paras. 190, 191. The Court uses a similar, but not identical formulation, in *Isayeva, Yusupova and Bazayeva v. Russia*, *supra* note 4, at para. 192.

E. *Conclusion*

It follows from the above that the principle of *lex specialis* in a narrow sense (specific law displacing the more general law) as well as the principle of complementarity both inform the relationship between human rights law and humanitarian law.

Generally speaking, for the protection of persons in the hands of the authorities, there is usually no contradiction between the norms, subject to the fundamental differences mentioned above, especially with regard to non-state actors. Where the use of force is at stake, the focus of the use of force on conduct of hostilities or law enforcement can give some guidance as to which body of law prevails. For the conduct of hostilities, humanitarian law will allow for the use of lethal force in a manner that human rights law will not, and will be the *lex specialis*.

V. *Complementarity and Its Limits Regarding Procedural Aspects*

Human rights law and humanitarian law differ fundamentally in a number of procedural aspects which all have to do with the right to a remedy and to individual standing in human rights law. While humanitarian law does not know such individual standing at international level, all major human rights treaties have a form of individual complaint mechanism which 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.

A. *Remedies*

Human rights are the result of a struggle for individual rights. The acceptance of human rights was the result of a struggle of oppressed classes, first the bourgeois classes in the Eighteenth, later the working classes in the Nineteenth Century. This history has influenced the formulation and development of human rights law and procedures. While humanitarian law focuses on “the parties to a conflict,” human rights are entirely built around the individual and are formulated as individual entitlements

(including economic, social and cultural rights, even if they are not necessarily enforceable through an individual procedural remedy).¹⁵³ 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.¹⁵⁴ But the enforcement mechanisms for civil and political rights have evolved on the basis of an understanding of individual entitlements and of private standing both in national courts and before international bodies. It follows naturally that most case-law has focussed on such human rights rather than international humanitarian law. Again, this does not mean that there are no international courts to interpret international humanitarian law, as indeed the International Court of Justice and international and hybrid criminal tribunals have interpreted international humanitarian law. But neither the International Court of Justice nor the criminal tribunals give the possibility of individual complaint—though the necessity to have not only an international criminal court, but a better mechanism of supervision 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”¹⁵⁵ has been discussed for many decades.¹⁵⁶

As far as individual remedies at international level are concerned, we have seen that courts do not hesitate to pronounce themselves on the lawfulness of acts committed in armed conflict—whether in purely human rights terms or in humanitarian law terms depends on the jurisdiction.

¹⁵³ Ben-Naftali & Shany, *supra* note 87, at 17, 31.

¹⁵⁴ COMMENTARY TO THE FIRST GENEVA CONVENTION 82, 83 (Jean Pictet ed., 1960); *see in particular* the discussion on Common Article 6/6/6/7.

¹⁵⁵ 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* 373, 388 (1970).

¹⁵⁶ *See* A.H. Robertson, *Humanitarian Law and Human Rights*, in *STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES, IN HONOUR OF JEAN PICTET* 793, 799 (Christophe Swinarski ed., 1984); Sandoz, Swinarski, & Zimmermann, *supra* note 23, at paras. 3600- 3602. Report of the Secretary General on Respect for Human Rights in Armed Conflict, ¶ 230, UN Doc. A/7720 (Nov. 20, 1969); F. Hampson, *Human Rights and Humanitarian Law in Internal Armed Conflict*, in *ARMED CONFLICT AND THE NEW LAW* 55, 71 (M. Meyer ed., 1993); D. Schindler, *Human Rights and Humanitarian Law: Interrelationship of the Laws*, 31 *AM. UNIVERSITY L. REV.* 935, 941 (1982). 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) *see* vol. 3 annex No. 21 and vol. 2, sec. B, at 61.

It is sometimes criticized that these bodies might not have the required expertise to deal with armed conflict situations.¹⁵⁷ However, from the point of view of victims of human rights violations, it is difficult to argue that in the absence of any independent international remedy specifically foreseen for international humanitarian law recourse to tribunals and other human rights bodies is not a valid path. Rather, “[t]he fact that an individual has a remedy under human rights law gives additional strength to the rules of international humanitarian law corresponding to the human rights norm alleged to be violated.”¹⁵⁸ In some cases the jurisprudence can even provide greater protection for the victims or reinforce the protection by other mechanisms and institutions.¹⁵⁹

It would not be correct, however, to think that human rights law always affords higher protection to victims or even that courts will always be more protective. Human rights have to be balanced against the rights of others and can (with few exceptions) always be limited for security reasons, while humanitarian law often does not allow for any limitation of its rights, since security considerations are already taken into account: This can lead to restrictions being accepted under human rights law but not under humanitarian law.¹⁶⁰ Also many very precise rules of the Geneva Conventions exceed the protection afforded by human rights. The provisions on notification of detention and information of the family no later than a week after internment in the Fourth Geneva Convention,¹⁶¹ for instance, are such precise rules that they are more protective than the general prohibition of arbitrary detention or the right to family life in human rights law. Another example is the right of families to know the fate of their missing relatives in Article 32 of Protocol I, a rule that is only now finding its way into a binding human rights treaty.¹⁶²

Also, if human rights bodies completely disregard humanitarian law, especially where it is the *lex specialis* for a situation, or where they distort human rights by implicitly but not openly employing humanitarian law language, this could lead to a

¹⁵⁷ 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, ¶ 9-37, UN Doc. E/CN.4/Sub.2/2005/14 (June 21, 2005).

¹⁵⁸ Bothe, *supra* note 5, at 45; *see also* Meron, *supra* note 10, at 247 who writes that “their very idealism and naïveté are their greatest strength”; Reidy, *supra* note 48, at 529.

¹⁵⁹ William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT’L L. 741 (2005); *see also* Bothe *supra* note 148, at 90.

¹⁶⁰ Aeyal M. Gross, *Human Proportions: Are Human Rights the Emperor’s New Clothes of the International Law of Occupation?*, 18 EUR. J. INT’L L. 35.

¹⁶¹ Article 106 of the Geneva Convention (IV), *supra* note 88.

¹⁶² *See* Article 24 (2) of the Convention for the Protection of All Persons from Enforced Disappearance, art. 24(2), UN Doc. A/RES/61/177 (Dec. 20, 2006) [not yet in force].

weakening of both bodies of law. Clarity as to which law is being applied to a certain situation would be a preferable manner to protect victims of armed conflict in the long term.

B. *Investigations*

In both human rights law and international humanitarian law, there are secondary obligations to protect the right to life. The most important are the obligations to investigate, prosecute, and punish violations of the right to life. However, international human rights law and jurisprudence with regard to the obligation to investigate is far more advanced than in international humanitarian law.¹⁶³ In human rights law all serious human rights violations 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 of the lawfulness of the acts and the persons responsible. The authorities must have taken the reasonable steps available to them to secure evidence concerning the incident, including *inter alia* eye witness 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 the investigation. 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

¹⁶³ See the UN *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 on Serbia and Montenegro, ¶ 9, UN Doc. CCPR/CO/81/SEMO, (Aug. 12, 2004); Concluding Observations on Brazil, ¶ 20, UN Doc. CCPR/C/79/Add.66 (July 24, 1996); Concluding Observations on Colombia, ¶ 32 & 34, UVN Doc. CCPR/C/79/Add. 76, (May 5, 1997); Committee against Torture: Conclusions and Recommendations on Colombia, ¶ 10 (f), UN Doc. CAT/C/CR/31/1, (Feb. 4, 1997); *Finucane v. the United Kingdom*, 2003-VIII Eur. Ct. H.R. (2003) at para. 69 (summary of its constant jurisprudence); *Myrna Mack-Chang v. Guatemala Case*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101; *Caracazo Case v. Venezuela Case 2002 (Reparation)*, Inter-Am. Ct. H.R. (ser. C) No. 95 ; *Juan Humberto Sánchez v. Honduras Case 2003 Inter-Am. Ct. H.R. (ser. C) No. 99*, at para. 186; *ACHPR: Amnesty International et al v. Sudan*, (26th and 27th Ordinary Sessions, May 2000), at para. 51.

their legitimate interests and be protected against any form of intimidation. The result of the investigation must be made public.

Human rights bodies have not hesitated to apply these requirements to investigations in situations of armed conflict.¹⁶⁴ Recently, the UN Special Rapporteur on extrajudicial, summary, or arbitrary executions has lamented the fact that investigations are less frequent and often more lenient in armed conflict situations than in times of peace.¹⁶⁵ Following this practice, there is scope for influence of human rights and humanitarian law in this respect, especially with regard to the use of force. It is important to distinguish between the substantive law justifying the use of force and killing, which differs between human rights and humanitarian law, and the question of investigation, which constitutes in the first place a gathering of facts.

There are elements in human rights jurisprudence that are certainly new to situations of armed conflict—especially the publicity of the inquiry and the requirements for the effective participation of victims. However, in suspicious circumstances, especially in cases of targeted killing of individuals, an investigation should at least be conducted when there is reasonable doubt as to whether the killing was lawful.¹⁶⁶ While the modalities for investigations in situations of armed conflict will have to be further developed, it is clear that they must comply with the requirements of independence and impartiality. In this respect, military investigations have empirically shown to pose particular challenges as far as independence is concerned.¹⁶⁷ Also, investigations can only be conducted if practically possible under the prevailing security situation and will have to take into account the reality of armed conflict, but all this does not preclude the investigation as such.¹⁶⁸

C. *Reparations*

While for all violations of civil and political rights the individual has a right to an effective procedural remedy before an independent body, no such individual right

¹⁶⁴ *Isayeva, Yusupova and Bazayeva v. Russia*, *supra* note 4, at paras. 208-213; *Myrna Mack-Chang v. Guatemala*, *supra* note 163; Human Rights Committee: Concluding Observations on Colombia, ¶ 32, UN Doc. CCPR/C/79/Add. 76 (May 5, 1997).

¹⁶⁵ Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ¶ 33-38, UN Doc. E/CN.4/2006/53m (March 8, 2006).

¹⁶⁶ Kretzmer, *supra* note 101, at 201, 204.

¹⁶⁷ *Report of the Special Rapporteur*, *supra* note 165, at para. 37.

¹⁶⁸ Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L. L. 1, 34 (2004).

exists in international humanitarian law.¹⁶⁹ Similarly, while every violation of a human right entails a right to reparation,¹⁷⁰ the equivalent norms on reparation in the law of international armed conflict award this right, or at least the possibility to claim it, to the state.¹⁷¹ The law on non-international armed conflict is silent on reparation.

Nothing in international humanitarian law, however, precludes the right to a remedy and to reparation.¹⁷² Many serious violations of humanitarian law constitute serious violations of human rights at the same time. For the same act a person can have a right to full reparation because it constitutes a human rights violation but no right to reparation under humanitarian law. This contradiction is well known and 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 Human Rights Law*, adopted by the General Assembly in 2005,¹⁷³ are a step in this direction. Similarly, in the 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 construction of the wall.¹⁷⁴ Also, there is some practice of reparation mechanisms, such as the United Nations 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.¹⁷⁵ There is also a wealth of practice in national law.¹⁷⁶ Article 75 of the Rome Statute of the

¹⁶⁹ Liesbeth Zegveld, *Remedies for Victims of Violations of International Humanitarian Law*, 851 INT'L REV. RED CROSS 497-528 (2003).

¹⁷⁰ 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 Human Rights Law*.

¹⁷¹ Hague Regulations of 1907, *supra* note 88, art. 3; Additional Protocol I, *supra* note 58, art. 91; see Emanuela-Chiara Gillard, *Reparation for Violations of International Humanitarian Law*, 851 INT'L REV. RED CROSS 529-554 (2003).

¹⁷² UN Sub-Commission on the Promotion and Protection of Human Rights, *supra* note 157, at paras. 20, 49.

¹⁷³ GA Res. 60/147 of 16 December 2005.

¹⁷⁴ *Wall* case, *supra* note 53, at para. 106. One can speculate whether it held so in the absence of another state to whom Israel could have paid compensation, see P. d'Argent, *Compliance, Cessation, Reparation and Restitution in the Wall Advisory Opinion*, in VÖLKERRECHT ALS WERTORDNUNG—COMMON VALUES IN INTERNATIONAL LAW, Festschrift for Christian Tomuschat 463, 475 (P.-M. Dupuy et al. eds., 2006).

¹⁷⁵ See Gillard, *supra* note 171, at 540.

¹⁷⁶ On Germany see Roland Bank, *The New Programs for Payments to Victims of National Socialist Injustice*, 44 GERMAN Y.B. INT'L L. 307-352 (2001); the most comprehensive description of

International Criminal 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.¹⁷⁷ 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 to reparation for the victims. One 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 in the process of developing an approach to victims' rights. It is likely that it will 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 on international humanitarian law is not adequate any more 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.

D. Summary

In sum, the nature of international humanitarian law, which is not, or at least not exclusively, conceived around individual rights, makes it difficult to imagine that it could integrate all procedural rights that have developed in human rights law. However, increasing awareness of the application of human rights in armed conflict,

national reparations programmes can be found in, *THE HANDBOOK ON REPARATIONS* (Pablo de Greiff ed., 2006).

¹⁷⁷ On this discussion see Elke Schwager & Roland Bank, *An Individual Right to Compensation for Victims of Armed Conflicts?*, Paper submitted to the ILA Committee on Compensation for Victims of War, see 45-48; P. d'Argent, *Wrongs of the Past, History of the Future*, 17 *EUR. J. INT'L L.* 279, 286 (2006).

and also an increasing call for transparency and accountability in military operations can influence the understanding of certain rights under international humanitarian law.

VI. Conclusion

In conclusion, it would be impossible today to completely compartmentalize humanitarian law on the one side and human rights law on the other side. While their origins and developments were quite distinct, recent international instruments have increasingly taken both into account. In times of armed conflict both bodies apply concurrently. Their interplay, however, is only slowly being tested in practice, mainly in national and international courts and only the accumulation of decisions and reports will give an overview of the situations that might create tension or synergy.

A framework for their interplay is the complementarity approach, limited where necessary by the *lex specialis* principle. Mostly, human rights law and humanitarian law complement each other mutually as more specific expressions of general legal rules. Sometimes, one body of law will be the *lex specialis* to the other. In general humanitarian law will be the *lex specialis* in situations of conduct of hostilities. The protection of persons in the power of a party to the conflict, on the other hand, will show far more synergy between the two bodies of law, humanitarian law provisions frequently providing more detailed and higher protection but human rights law sometimes being more protective because of its further development in case-law and practice.

Lastly, it should be noted that human rights law has more advanced procedural safeguards for the protection of individual rights than humanitarian law, particularly in respect of the right to an individual remedy, to an independent and impartial investigation and to individual reparation. While not entirely transferable due to the nature of each body of law, this could in the future have an influence on humanitarian law.