

**The Interaction between Human Rights and Humanitarian Law:
A Case of Fragmentation?**

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I. Introduction

The interaction between international human rights law and international humanitarian law raises multiple problems.¹ However, the recent developments produced by events such as the conflicts in different parts of the world, for instance in Iraq, Palestine and Afghanistan, and the consequent jurisprudence of national and international tribunals, require addressing the conceptual and normative framework of the interaction of these two fields of international law. Last decade especially brought about the range of developments which testify that this issue will not only be part of the academic exercise but will frequently if not regularly facing those who will be dealing with the legal aspects of the relevant situation in practice.

Thus, the principal question this contribution asks is: what is the relationship between these two fields of law – are they developing in a way of fragmenting the otherwise existing common legal framework that protects the individual; are they operating in parallel to each other offering mutually compatible solutions; do their requirements conflict with each other; or do they develop towards forming the common legal ground, if not common legal regime, which can provide the uniform standards for the protection of individuals in the context of an armed conflict? Needless to say, these issues do not just raise the issues of human rights and humanitarian law. They rather, and in the first place, relate to the general theory of norms in international law.

This raises the general issue of fragmentation of international legal regimes. The Report on Fragmentation of International Law, prepared by the ILC Study Group,² treats the issue of fragmentation mainly as the issue of normative conflict. As the Report explains, “On the one hand, fragmentation does create the danger of conflicting and incompatible rules, principles, rule-systems and institutional practices. On the other hand, it reflects the rapid expansion of international legal activity into various new fields and the diversification of its objects and techniques.”³ The problem, according to the Report, “is that such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law.”⁴ Furthermore, the problem arises in terms of “the splitting up of the law into

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¹ See, in particular, T Meron, *Human Rights and Humanitarian Norms as Customary Law* (OUP 1989); *Id.*, *Human Rights in Internal Strife: Their International Protection* (CUP 1987)

² *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006

³ *Id.*, 14

⁴ *Id.*, 11

highly specialized “boxes” that claim relative autonomy from each other and from the general law.” Therefore, the question is being asked, “What are the substantive effects of such specialization? How should the relationship between such “boxes” be conceived?”⁵ Fragmentation can take place through the conflicting interpretation of general law, the emergence of special law diverging from the general law, or the existence of two different bodies of special law.⁶

The Report correctly identifies the essence of normative conflicts: they deal not with the nature or designation of the relevant institutes and instruments, and states that “If conflict were to exist only between rules that deal with the “same” subject-matter, then the way a treaty is applied would become crucially dependent on how it would classify under some (presumably) pre-existing classification scheme of different subjects. But there are no such classification schemes.”⁷

Therefore, it is right to affirm that the normative conflict relates not to the subject-matter of regulation of the relevant field of law or legal instrument, but in their applicability to the subject-matter which may be regulated under more than one fields of international law. There is normative conflict if two or more norms or instruments relate to the same subject-matter, yet require different outcomes in relation to it. As the NAFTA Arbitral Tribunal has most pertinently emphasised in the *Loewen* case, the normative conflict can arise in situations where, for instance, express “are at variance with the continued operation of the relevant rules of international law.”⁸

Fragmentation thus refers to the diversification of legal regulation related to a certain subject-matter governed by international law. It is a valid question to ask, in relation to the issued focused upon here, whether fragmentation results from the parallel regulation of the rights and duties of the occupying powers both under human rights law and humanitarian law; or whether the same applies to the aspects of procedural due process guarantees under the two bodies of law; or whether human rights law and humanitarian law contain different regulations of the right to life. In broader terms, the question is whether the standards of one field of law can justify curtailing the standards related to the same subject-matter in the other field of law.

In general, there are both similarities and differences between international human rights law and international humanitarian law. Differences mainly pertain to the development of the two bodies of law, and their scope of application; similarities relate to their common humanitarian goals and the applicability in the same situations, thus complementing each other.⁹ Most importantly, both bodies of law are dedicated to the overarching goal of the protection of the individual.

While this is the general picture, the practical analysis of the interaction of these two bodies of international law requires examining their practical interaction in specific situations to find out how individual norms of human rights law interact with those of international humanitarian law: whether they exclude each other, or complement each other; or whether they represent the norms of similar content applicable in parallel in same situations.

⁵ Id., 13-14

⁶ Id., 31-34

⁷ Id., 18

⁸ NAFTA Arbitration, *The Loewen Group, Inc. and Raymond L. Loewen and United States of America* (Award, Case No ARB(AF)/98/3), 26 June 2003, reported in: International Legal Materials (ILM) 42 (2003), 811, 837, paras. 159 and 162.

⁹ See H-P Gasser, International Humanitarian Law and Human Rights Law in Non-international Armed Conflict: Joint Venture of Mutual Exclusion? 45 *German Yearbook of International Law* (2002), 149

The answer to this question can only be obtained after the relevant fields of interaction are examined. This contribution will do this in three stages. Section II, the general part so to speak, will deal with the general normative character of human rights law and humanitarian law, by analysing the sources of these norms, their normative status, applicable methods of interpretation and other related problems. Section III will examine the interaction between the two bodies by reference to certain individual rights, such as the freedom from arbitrary deprivation of life, freedom from torture, freedom from arbitrary detention and the right to fair trial and due process. Section IV will examine some special problems of interaction of the two bodies of law: the law of occupation; prosecution of breaches; and the limitations on the powers of the UN Security Council. Finally, Section V will elaborate upon conclusions.

II. The Aspects of the Emergence and Operation of Norms

1. Sources of International Law

Sources of international law are normally based on the consent of States: they embody norms that have been agreed and accepted by States. The acceptance of human rights and humanitarian norms is on the one hand demonstrated by the number of treaties on this subject, such as UN Human Rights Covenants, regional human rights treaties or the 1949 Geneva Conventions and its Additional Protocols. But the question is what would be the case if one or more States that breach certain human rights and humanitarian norms were not the party to the relevant treaty and against which standard could its conduct be judge. The normal academic follow-up to this question is pointing to the relevance of customary law in this field. The fact that fundamental human rights are embodied in the 1948 Universal Declaration of Human Rights, a number of universal and regional treaties, and bind international persons who are not parties to it,¹⁰ provides for a good starting-point basis to claim their customary status.

That human rights law and humanitarian law are part of customary law is not the thesis that is straightforwardly and uniformly accepted in the doctrinal opinion, even as in practice this thesis has found a greater recognition. The principal factor motivating doctrinal objections is that customary law is based on the practice of States accepted as law by States (*opinio juris*). This is affirmed in Article 38 of the International Court's Statute, as well as in the International Court's Judgment on *North Sea Continental Shelf*. In this case, the Court held that the conventional norm can translate into custom only if supported by the practice and acceptance of States and "only a very definite, very consistent course of conduct on the part of a State" could perform this task.¹¹

The *North Sea* case is one of the classical pronouncements on this subject and therefore it has had some influence on the thinking regarding the customary status of human rights and humanitarian law norms. For instance, Meron states that the actual practice of non-compliance can weaken the customary status of a norm, even in case of humanitarian instruments. "To illustrate, the fact that, in most cases, States fail either to prosecute or to extradite perpetrators of grave breaches of the Geneva Conventions weakens the claim of the obligations to prosecute or to extradite perpetrators of grave breaches to customary law status. Cumulatively, frequent evasions of the Conventions' norms by States through reliance on the specific

¹⁰ See *infra* the section IV.3

¹¹ *North Sea Continental Shelf* (Netherlands and Denmark v Federal Republic of Germany), *ICJ Reports*, 1969, 3

circumstances of particular situations (*sui generis* claims) may erode the position of the Conventions as crucial instruments of humanitarian law, and *a fortiori* to *jus cogens*, status.“ According to Meron, “concordant practice is, of course, the best indicator of expectations about binding prescriptions on State behaviour.” In conclusion, “the decisive factor is whether or not States observe Geneva Conventions.”¹² Hathaway, on the other hand, refers to the widespread abusive practice of States, such as the commission of genocide, widespread practice of torture and slavery, and thus contends that no customary status of the relevant norms can be sensibly claimed.¹³

Actual non-compliance with human rights and humanitarian law instruments necessarily involves, however, acts affronting laws of humanity and public conscience. Such acts cannot presumably express any *opinio juris* of a State or considered on balance in ascertaining whether *opinio juris* exists. A State which asserts its entitlement, as a matter of customary law, to torture a suspected terrorist, or burn civilian homes as a belligerent reprisal, could technically express what it believes to be the law but such view cannot be a valid *opinio juris* because it would contradict the community attitude outlawing such conduct. The jurisprudence of various tribunals dedicated to the assessment of customary status of human rights and humanitarian law norms seems to take this concern into account.

In assessing the customary law status of certain humanitarian law norms, the International Court of Justice and the International Criminal Tribunal for the Former Yugoslavia resolve these questions without affording to actual State practice any crucial significance. Both tribunals affirmed that Common Article 3 of the 1949 Geneva Conventions, which lays down the minimum guarantees of treatment for the protected persons, is part of customary law because it embodies elementary considerations of humanity.¹⁴ In terms of human rights, the ICTY Judgment in *Furundzija* suggests that “a general prohibition against torture has evolved in customary international law.” The Tribunal supported this statement by analysing provisions of certain humanitarian treaties and referred to the wide participation in them, emphasising that the wide participation of States in such treaties is indicative of the attitudes of States towards the prohibition of torture. It was therefore incontrovertible that torture in time of armed conflict is prohibited by a general rule of international law.¹⁵ The same approach was categorically reiterated in *Delalic* and *Kunarac*. In *Delalic*, the Tribunal supported its view by reference to the relevant treaty provisions and the attitude of the UN Special Rapporteur for Torture.¹⁶ *Kunarac* affirmed the customary character of the prohibition of enslavement by “the almost universal acceptance” of the 1926 Slavery Convention and other anti-slavery treaties.¹⁷ The ICTY also affirmed the customary character of the Martens clause even without the support of State practice.¹⁸ This reasoning would hardly satisfy traditional

¹² Meron (1989), 61-62; Meron, *The Geneva Conventions as Customary Law*, *AJIL* (1987), 348 at 363-370

¹³ J Hathaway, *The Rights of Refugees under International Law* (CUP 2005), 37-39

¹⁴ *ICJ Reports*, 1986, 113-114; *Furundzija*, IT-95-17/I-T, para. 138

¹⁵ *Furundzija*, IT-95-17/I-T, para. 137-139. The Tribunal used absolutely the same approach in considering the customary character of the definition of torture. It found the customary international law reflecting the definition of torture just by analysing treaty provisions, para. 160, and the right to physical integrity, para. 170.

¹⁶ *Delalic*, Judgment of 16 November 1998, case no. IT-96-2-T, paras 452-453, 459; *Kunarac*, Judgment of 22 February 2001, case no. IT-96-23-T, para. 466

¹⁷ *Kunarac*, para. 520

¹⁸ *Kuprsekic*, IT-95-16-T, Judgment of 14 January 2000, para. 525

requirements of custom-creation, from the viewpoint of which it would seem rather odd to refer to the undisputed acceptance of a rule in conventional law in order to demonstrate that it is also part of customary law.

This problem arose most interestingly in terms of the customary law status of the prohibition of belligerent reprisals against civilians. Kwakwa asserts, in view of traditional custom-generation criteria such as State practice *stricto sensu*, that the prohibition of reprisals against civilians under Article 52 I Additional Protocol of 1977 does not reflect customary law and even encourages to some extent the right to take reprisals against civilians.¹⁹ However, in *Kupreskic* the ICTY inferred the absence of the *tu quoque* defence as flawed in principle because “it envisages humanitarian law as based upon a narrow bilateral exchange of rights and obligations,” but these obligations are unconditional and not based on reciprocity.²⁰

The Tribunal affirmed that Articles 57 and 58 of the I Additional Protocol of 1977 which prohibit indiscriminate attacks against civilians as part of customary law, mainly because no State contested them.²¹ The Tribunal spoke only about treaty provisions and State attitudes with regard to them, not attitudes with regard to their customary status specifically. As for reprisals against civilians, the Tribunal stated that under customary international law they are prohibited as long as civilians find themselves in the hands of the adversary. With regard to civilians in combat zones, reprisals against them are prohibited by Article 51(6) of the First Additional Protocol of 1977, whereas reprisals against civilian objects are outlawed by Article 52(1) of the same instrument. But for the Tribunal the question nevertheless arose as to whether these provisions, assuming that they were not declaratory of customary international law, have subsequently been transformed into general rules of international law; were those States which have not ratified the First Protocol (including the U.S., France, India, Indonesia, Israel, Japan, Pakistan and Turkey), nevertheless bound by general rules having the same purport as those two provisions? The Tribunal thus elaborated upon the constituents of customary law and specified that

“Admittedly, there does not seem to have emerged recently a body of State practice consistently supporting the proposition that one of the elements of custom, namely *usus* or *diuturnitas* has taken shape. This is however an area where *opinio iuris sive necessitatis* may play a much greater role than *usus*, as a result of the aforementioned Martens Clause. In the light of the way States and courts have implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.”²²

The Tribunal supported this approach by referring to inherently barbarous character of reprisals against civilians and their contradiction with fundamental human rights, as well as to the 1970 General Assembly resolution emphasising that civilians must not be the object of reprisals, and further overruled the concerns regarding the lack of consensus in State practice.²³ At the same time, this attitude is completely opposite to what the International Court of Justice held in an analogous situation in *North Sea*

¹⁹ Kwakwa, *The International Law of Armed Conflict: Personal and Material Fields of Application* (1992), 142-143, 150, 157

²⁰ *Kupreskic*, paras 511, 515

²¹ *Kupreskic*, para. 524

²² *Kupreskic*, para. 527

²³ *Kupreskic*, paras 528-529, 532

Continental Shelf where it required clear and definite evidence of State practice for proving the customary character of treaty norms which have not previously possessed customary status. In *Kupreskic* the ICTY found a different solution but also stated the grounds for that, which was linked with the substantive character of the relevant norms.

The ICTY's analysis of the sources of humanitarian law does not quite accord with Meron's attitude on the customary law status of the provisions of the Geneva Conventions. However, Meron notes in the later contribution that *Kupreskic* does not satisfy the traditional custom-generation test but is inclined to support its findings by reference to the general non-reciprocal character of humanitarian law requiring objective application.²⁴

US courts under the Alien Tort Claims Act, in order to exercise jurisdiction over violations of international law, have to demonstrate that the rule in question forms part of general international law, in other words they are, as consistently emphasised in jurisprudence, "universal, definable and obligatory." In several cases, US courts in several cases have affirmed the customary law status of the norms prohibiting torture, arbitrary deprivation of life, or arbitrary detention, by reference to the provisions of treaties, declarations and *jus cogens*, as opposed to State practice.²⁵

The Supreme Court of the United States presumably implied the customary status of the fair trial and due process safeguards under Article 75 of the 1977 I Additional Protocol to the 1949 Geneva Conventions, when it treated these safeguards as international standards controlling the establishment and operation of the Military Commissions set up to try the suspects of the "war on terror," even though the United States is not party to this Protocol.²⁶ Later in the Decision, the Court expressly referred to the "the principles, articulated in Article 75 and indisputably part of the customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him."²⁷

Thus, the international and national jurisprudence admits that in certain cases customary law could come into existence even without the requirement of State practice being adequately satisfied. Whether or not we can straightforwardly affirm the customary status of all fundamental human rights is not the crucial point. The crucial point instead is that, given the approach of international tribunals to affirm the customary status of certain human rights even in the absence of the requisite State practice, an international tribunal would be able to perform the similar task with regard to every human right. The problems depicted in Meron's earlier contributions have been clarified in subsequent jurisprudence. Hathaway's argument is inconsistent with the entire framework of the emergence of customary human rights and humanitarian law.

2. Normative Character: Peremptory Status and the Absence of Reciprocity

Peremptory norms (*jus cogens*) are defined in Article 53 of the 1969 Vienna Convention on the Law of Treaties as the norms from which no derogation is permitted, and agreements contrary to these norms are void. Thus, due to their significance as public policy, they are norms that have to apply universally and

²⁴ Meron, *The Humanisation of Humanitarian Law*, *AJIL* (2000), 250-251

²⁵ *Filartiga*, 77 ILR 169; *Trajano v Marcos*, 103 ILR 527; *Hilao v Marcos*, 104 ILR 128; *Xuncax v Gramajo*, 104 ILR 184

²⁶ *Hamdan v Rumsfeld, Secretary of State et al.*, No. 05-184, 29 June 2006, at 70

²⁷ *Id.*, 71

uniformly without admitting the separate regulation *inter se*.²⁸ The argument that human rights and humanitarian law norms are part of international *jus cogens* has not been accepted without opposition. Apart from the isolated claims that there is no *jus cogens* in these fields, the mainline objection is that while some norms, for instance the prohibition of torture, is part of *jus cogens*, most of human rights and humanitarian norms are not.

As Fitzmaurice emphasised, most of the cases of *jus cogens* are “cases where the position of the individual is involved.”²⁹ Furthermore, as Judge Tanaka put forward,

“if we can introduce in the international field a category of law, namely *jus cogens* ... a kind of imperative law which constitutes the contrast to *jus dispositivum*, capable of being changed by way of agreement between States, surely the law of human rights may be considered to belong to the *jus cogens*.”³⁰

Most significantly, Verdross observes that “a very important group of norms having the character of *jus cogens* are *all rules* of general international law created for a humanitarian purpose.”³¹

The peremptory character of some human rights is affirmed in judicial practice. According to the Inter-American Commission, the right to life is part of *jus cogens*.³² According to the ICTY, the prohibition of torture is a peremptory norm, similar to “the other general principles protecting fundamental human rights.”³³ The US and Canadian Courts of Appeal, as well as Canadian Supreme Court, also accepted that the prohibition of torture is a peremptory norm of public international law.³⁴ The US court in *Xuncax v Gramajo* affirmed the peremptory status of the prohibition of summary execution, disappearance, torture and arbitrary detention.³⁵ The Court of Appeals for the Ninth Circuit similarly considered that forced labour, torture, murder and slavery are violations of *jus cogens*.³⁶

²⁸ Cf. A Orakhelashvili, *Peremptory Norms in International Law* (Oxford, OUP 2006)

²⁹ Fitzmaurice, Report on the Law of Treaties, 2 YbILC 1958, 40

³⁰ ICJ Reports, 1966, 298

³¹ Verdross, *Jus Dispositivum and Jus Cogens in International Law*, AJIL (1966), 59 (emphasis added)

³² *Victims of the Tugboat “13 de Marzo”*, Case 11.436, Report No. 47/96, OEA/Ser.L/V/II.95, Doc. 7 rev. at 127 (1997), para. 79

³³ *Furundzija*, Judgment of 10 December 1998, case no. IT-95-17/I-T, paras 147-155; see also *Delalic*, Judgment of 16 November 1998, case no. IT-96-2-T, para. 466; *Kunarac*, Judgment of 22 February 2001, case No. IT-96-23-T, para. 454

³⁴ *Siderman de Blake*, Court of Appeals (Ninth Circuit), 103 ILR 472; *Bouzari v Islamic Republic or Iran* (Court of Appeal for Ontario), 30 June 2004, Docket: C38295, para. 36, per Goudge JA; *Suresh v Canada (Minister of Citizenship and Immigration and Others)*, Supreme Court, 11 January 2002, 124 ILR 344, paras 61-65; it should be noted that the Canadian Supreme Court’s attitude regarding the peremptory status of the prohibition of torture is misrepresented in academic contributions, see Bourgon, *The Impact of Terrorism on the Principle of ‘Non-Refoulement’ of Refugees: The Suresh Case before the Supreme Court of Canada*, 1 *Journal of International Criminal Justice* (2003), 174, 184. The Supreme Court, which decided the case on the basis of Canadian, not international, law, was not required to decide this issue in finalised terms, which is stated as a clear reason in paragraph 65 of the Judgment. It is crucial however that the Supreme Court acknowledged the arguments in favour of the peremptory status of the prohibition of torture and did not contradict them and, most importantly, used the aforementioned position to interpret the Canadian and international provisions with the result that the return of the person to the country where torture may be faced contradicts to the Canadian “principles of fundamental justice,” *id.*, paras 66ff.

³⁵ *Xuncax v Gramajo*, 184

³⁶ *Doe v Unocal*, US Court of Appeals (9th Circuit), 18 September 2002, 14208

As can be seen, judicial practice says enough about the peremptory character of individual human rights. However, the doctrinal treatment of the subject reveals the need to have independent criteria for identifying peremptory human rights, especially in terms of the doctrinal debate as to whether all human rights are peremptory or only some of them possess such status. Several authors argue that only those human rights that are non-derogable in the state of emergency³⁷ can be part of *jus cogens*.³⁸

But the fact that a given right is derogable in a treaty instrument does not exclude an inherent limitation on derogatory powers of States due to a norm's peremptory character. As the UN Human Rights Committee emphasised in its General Comment No. 29 (2001),

“The enumeration of non-derogable provisions in article 4 [ICCPR] is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law. ... the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2 [ICCPR]. States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.”

Therefore, certain rights “derogable” in the state of emergency can be peremptory. This is clear with regard to due process guarantees and the right to fair trial,³⁹ as well as the freedom from illegal deprivation of liberty.

The approach that the scope of peremptory human rights law extends well beyond the rights that are not derogable in the state of emergency has been affirmed repeatedly by the EU Court of First Instance. The Court has included within *jus cogens* the rights such as the procedural due process guarantees and the right to property.⁴⁰

The peremptory status of humanitarian status is reinforced by the fact that humanitarian law outlaws agreements adversely affecting its operation, and protects

³⁷ See *infra* section II.5

³⁸ Meron (1987), 59. Meron, *Human Rights Law-making in the United Nations* (OUP 1986), 192, also doubts that, because it is not non-derogable under Article 4 ICCPR, the prohibition of prolonged arbitrary detention is peremptory. See also Higgins, *Derogations under Human Rights Treaties*, *BYIL* (1976-77), 282, for a similar view.

³⁹ The peremptory status of due process guarantee is doubted in Zappala, *Human Rights in International Criminal Proceedings* (2003), 9, 154. But judicial practice proves the opposite. *Tadic* (Allegations of Contempt), 27 February 2001, suggests that Article 14 ICCPR reflects *jus cogens*. The Special Court for Sierra Leone held that the right to have the criminal conviction against oneself reviewed by the higher tribunal as enshrined in Article 14(5) ICCPR is part of *jus cogens*, *Prosecutor v Sam Hinga Norman*, Case No. SCSL-2003-08-PT, para. 19. The Report of Chernichenko, S., & Treat, W., *The right to fair trial: Current recognition and measures necessary for its strengthening: Final Report*, E/CN.4/Sub.2/1994/24, 3 June 1994, paras 127-159, affirms that while formally derogable, the due process guarantees are practically non-derogable and unrestricted in emergency situations because it is essential in observance of other rights, paras 133-159. See also IACtHR decisions on *Habeas Corpus*, Advisory Opinion OC-8/87, January 30, 1987, (Ser. A) No. 8 (1987), 96 ILR 392, paras 27-29, and *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87, October 6, 1987, (Ser. A) No. 9 (1987), 92 ILR 405, paras 23-25.

⁴⁰ *Ahmed Ali Yusuf and Al Barakaat International Foundation*, Case T-306/01, 21 September 2005; *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, Case T-315/01, 21 September 2005. The same court reaffirmed this approach in *Chafiq Ayadi v Council of the European Union*, Case T-253/02, 12 July 2006; *Faraj Hassan v Council of the European Union and Commission of the European Communities*, Case T-49/04, 12 July 2006

basic rights of human persons which is the classic feature of *jus cogens*.⁴¹ According to the Common Articles 6/6/6/7 and 7/7/7/8 to the Geneva Conventions, and Article 49 of the IV Geneva Convention, the humanitarian law safeguards cannot be affected by the agreement between States or even by the consent of the protected persons. This means that the Geneva Conventions are in principle non-derogable in their entirety. When their terms are strict and allow no deviation or special agreements, they must be deemed to have peremptory application.

According to Meron, the clause in Common Article 6/6/6/7 is supposed, like *jus cogens*, to bring about the nullity of conflicting agreements but unlike *jus cogens* it derives from express provisions of the Geneva Conventions. Such agreements can in some cases violate *jus cogens*.⁴² According to Quigley, the effect of Articles 6/6/6/7 and 7/7/7/8, as well as Article 47 of the IV Geneva Convention is that the renunciation of the rights under the Geneva Conventions either by the State or by the affected individuals is invalid.⁴³

The peremptory status of human rights and humanitarian law norms is among the factors that impacts the nature of treaty obligations in which these norms are safeguarded. Both bodies of law protect individuals objectively, without regard to their nationality. International tribunals have repeatedly affirmed that humanitarian treaties have a specific objective character because they protect not the interests of contracting States but the fundamental rights of individuals or their groups. In the Advisory Opinion on *Reservations*, the International Court emphasised the special character of the 1948 Genocide Convention, stressing that "In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties."⁴⁴ The European Commission of Human Rights has affirmed the similar character of the ECHR in *Austria v Italy*,⁴⁵ and later in *Ireland v UK*.⁴⁶

Similarly, the UN Human Rights Committee emphasised that the ICCPR is not a web of inter-State obligations, but is designed to safeguard individual human beings.⁴⁷ Humanitarian law treaties also possess a similar character. They are not intended to benefit or protect State interests; they are primarily designed to protect human beings *qua* human beings. "Unlike other international norms, such as those of commercial treaties which can legitimately be based on the protection of reciprocal interests of States, compliance with humanitarian rules could not be made dependent on a reciprocal or corresponding performance of those obligations by States."⁴⁸ Geneva Conventions embody not merely engagements "concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solely

⁴¹ Sassoli, State Responsibility for Violations of Humanitarian Law, 84 *International Red Cross Review* (2002), 414

⁴² Meron, The Humanisation of Humanitarian Law, 94 *AJIL* (2000), 252

⁴³ Quigley, J., The Israel-PLO Agreements versus the Geneva Civilians Convention, 7 *Palestinian Yearbook of International Law* (1992-94), 46

⁴⁴ *ICJ Reports*, 1951, 23

⁴⁵ *Austria v Italy*, 4 *YB ECHR* (1961), 140

⁴⁶ *Ireland v. UK*, 58 *ILR* 188, at 291

⁴⁷ General Comment 24(52), para. 17, 2 *IHRR* (1995), 10

⁴⁸ *Kuprsekic*, Judgment of 14 January 2000, para. 518

contracted before the world as represented by the other contracting parties.”⁴⁹ An objective character may thus be attributed to obligations embodied in treaties on human rights and humanitarian, whether of universal or regional scope.

The objective character of treaty obligations relates also to their subject-matter character. To illustrate, as Fitzmaurice does, under the 1948 Genocide Convention the parties “did not undertake not to commit genocide only in relation to one another’s subjects or citizens; they undertook not to commit genocide at all, even in relation to their own subjects and citizens, and irrespective of what other States were doing or of whether these could or could not be regarded as parties to the Conventions. In short, the Convention lays down a code of behaviour, to be conformed to invariably and *erga omnes*; and this is the characteristic feature of every norm-creating convention.”⁵⁰ The code of obligations in humanitarian treaties is “absolute and admits of no derogations.”⁵¹ As Kolb submits, the *erga omnes* aspect of integral treaties necessitates the interdiction of subsequent agreements which are incompatible with their object.⁵² One consequence of a norm’s peremptory character is that if it is embodied in a treaty it cannot be set aside in response to a material breach in line with Article 60 of the 1969 Vienna Convention.⁵³ Article 60 allows the reciprocal termination of treaties by one State when another State commits a material breach of that treaty. But human rights norms protect not the individual interests of a State but the interests of the mankind as such and the interests they protect are not at the disposal of States, nor can these interests be damaged by reprisals or reciprocal non-compliance.⁵⁴

It was only at the Vienna Conference on which the Vienna Convention was adopted that, at the proposal of the Swiss delegation, the provision was inserted in the document – currently Article 60(5) – according to which the right of reciprocal termination of treaties does not extend to treaties of humanitarian character protecting the rights of the individual. This covers both human rights and humanitarian law treaties. Similarly, both human rights and humanitarian law norms are among the restrictions that States shall not violate when taking countermeasures (reprisals) against another State in response to the latter’s previous violation of its international obligations.⁵⁵ In addition, both bodies of international law generate *erga omnes* obligations that enable States to raise the question of the breach of the relevant norm

⁴⁹ Pictet, *Commentary to the First Geneva Convention of 1949* (1952), 17-18

⁵⁰ Fitzmaurice, *Judicial Innovation: Its Uses and Its Perils, Cambridge Essays in International Law* (London, 1965), 33-34. “Norm-creating” meaning a convention that independently creates norms, or embodies the norms binding States even without any conventional obligation.

⁵¹ Fitzmaurice (1965), 34. The Geneva Conventions, for instance, are the rights treaties that admit no derogation based on calculation, Quigley (1992-1994), 61

⁵² Kolb (2001), 150

⁵³ Kupreskic, para. 520; Simma, *Reflections on Article 60 of the Vienna Convention on the Law of Treaties and Its Background in General International Law*, 20 *Österreichische Zeitschrift für öffentliches Recht* (1970), 23, 54, making parallels, in terms of the impact of *ius cogens*, between the reciprocity measures in the law of treaties and reprisals.

⁵⁴ Barile, *The Protection of Human Rights in Article 60, Paragraph 5 of the Vienna Convention on the Law of Treaties, International Law at the Time of its Codification, Essays in Honour of Roberto Ago*, volume II (1987), 3-4

⁵⁵ See ILC Articles on State Responsibility, Article 50, Report of the UN International Law Commission on the work of its Fifty-third session (2001), *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10)*, 43.

and demand reparation, even if that State has no individual link to, and has suffered no damage or prejudice, from this breach.⁵⁶

The non-reciprocal character of basic humanitarian law norms was affirmed in jurisprudence with regard to the issue of belligerent reprisals as a broader issue of reciprocity in humanitarian law. The ICTY in *Kupreskic* confronted the issue whether the attacks committed by Croatian forces against the Muslim population were justifiable because similar attacks were allegedly being perpetrated against the Croat population. The Tribunal considered it as a defining characteristic of humanitarian law that the key standards must be upheld regardless of the conduct of enemy combatants. This entails the irrelevance of reciprocity, particularly in relation to obligations under humanitarian law “which have an absolute and non-derogable character.”⁵⁷ The *tu quoque* argument is not only universally rejected but also flawed in principle because it envisages humanitarian law as based upon a narrow bilateral exchange of rights and obligations. However, humanitarian law lays down absolute obligations that operate unconditionally and cannot be broken in response to the previous breaches. Instead, the general erosion of reciprocity in the application of humanitarian law follows.⁵⁸

The ICTY emphasised that as a consequence of their absolute character humanitarian law imposed not synallagmatic obligations but obligations towards the international community as a whole. Most humanitarian norms such as those prohibiting war crimes, crimes against humanity and genocide, are peremptory norms. The Tribunal’s reasoning clearly linked the absence of reciprocity in humanitarian law to the peremptory character of the relevant norms as it confirmed that the impermissibility of reciprocal breach as well as the limitations on the reciprocal termination of a treaty in case of its breach under Article 60(5) of the Vienna Convention on the Law of Treaties follow from the peremptory character of the relevant norms.⁵⁹

3. Interpretation of Treaties

Treaties in the field of human rights and humanitarian law are normally interpreted by reference to the principle of effectiveness, in accordance with the interpretation rules under Article 31 of the Vienna Convention on the Law of Treaties. Fitzmaurice defines this principle by stating that “treaties are to be interpreted with reference to their declared or apparent objects and purposes; and particular provisions are to be interpreted so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text.”⁶⁰ The principle of effectiveness inherently contradicts the notion of restrictive interpretation of treaties,⁶¹ which is not part of international law. As Lauterpacht observes, “restrictive interpretation of treaty obligations finds no support in the practice of the Court and is indefensible on grounds of principle.”⁶² Brownlie also finds that the principle of

⁵⁶ See *Barcelona Traction*, *ICJ Reports* 1970, 33-34, and Article 48, ILC Articles on State Responsibility.

⁵⁷ *Kupreskic*, para. 511

⁵⁸ *Kupreskic*, paras 517-518

⁵⁹ *Kupreskic*, paras 519-520

⁶⁰ Fitzmaurice, *Law and Procedure of the International Court* (1986), 345

⁶¹ H Lauterpacht, *Restrictive Interpretation and Effectiveness in the Interpretation of Treaties*, *BYIL* 1949, 50-51, 69

⁶² Lauterpacht, *The Development of International Law by the International Court* (1958), 338-340

restrictive interpretation has no support under the Vienna Convention on the Law of Treaties.⁶³

The *Golder* case before the European Court of Human Rights involved the situation in which the Home Secretary had not allowed the Applicant to consult a solicitor with a view of bringing a civil action. The question was whether this refusal violated the Applicant's rights under Article 6, even as this provision enumerates fair trial safeguard and does not expressly admit of the right to access to a court.⁶⁴ The Court observed that

"Were Article 6(1) to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from a danger of arbitrary power, would have serious consequences which are repugnant to the aforementioned principles and which the Court cannot overlook.

It would be inconceivable, in the opinion of the Court, that Article 6(1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings."⁶⁵

Therefore, the right of access constituted an inherent element of the right to fair trial. The Court also observed that its interpretation was not extensive interpretation but the interpretation on the basis of the text and the object and purpose of the treaty.⁶⁶

In several other cases, the European Court stated its policy to interpret the Convention safeguards so as to make them practical and effective, not theoretical and illusory. In *Soering*, this interpretation enabled the Court to construe the prohibition of torture under Article 3 as extending not just to actual torture but also to the extradition to the State in which the observance of Article 3 was at risk.⁶⁷ In *Artico*, the Court found that Article 6 of the Convention required granting free legal aid to the Applicant.⁶⁸ Similarly, in the three cases related to the application of the European Convention in the situation of an armed conflict, the Court has emphasised that "The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 [prohibiting the arbitrary deprivation of life] be interpreted and applied so as to make its safeguards practical and effective"⁶⁹

The US Supreme Court implied the reference to the principle of effectiveness when in *Hamdan* it characterised the normative content of Common Article 3 of the 1949 Geneva Conventions as the provision producing the straightforward effect designed to make difference on the ground:

"Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But requirements they are nonetheless. The commission that the President has convened to try Hamdan does not meet those requirements."⁷⁰

⁶³ Brownlie, *Principles of Public International Law* (2003), 606

⁶⁴ *Golder v UK*, 4451/70, Judgment of 21 February 1975, para. 26

⁶⁵ *Id.*, para. 35

⁶⁶ *Id.*, para. 36

⁶⁷ *Soering*, 14038/88, Judgment of 7 July 1989, paras 87-88

⁶⁸ *Artico*, 6694/74, Judgment of 13 May 1980, para. 33

⁶⁹ *Khashiyev*, para. 131; *Isayeva*, para. 172; *Issayeva, Yusupova & Bazayeva v Russia*, para. 168 (for full citations see *infra* notes 92, 95, 104

⁷⁰ *Hamdan v Rumsfeld*, at 72

Effectiveness in interpretation of treaty provisions means that the clauses drafted in general terms can produce specific effect and thus impact the situations that fall within the scope of their applicability.

4. The Scope of Application of the Two Bodies of Law

The common background is that while humanitarian law applies only to the armed conflicts, as stipulated, for instance, in Article 2 of the 1949 Geneva Conventions, human rights law applies both in peace and war. According to the European Union Guidelines on promoting compliance with international humanitarian law, human rights law and humanitarian law

“are distinct bodies of law and, while both are principally aimed at protecting individuals, there are important differences between them. In particular IHL is applicable in time of armed conflict and occupation. Conversely, human rights law is applicable to everyone within the jurisdiction of the State concerned in time of peace as well as in time of armed conflict. Thus while distinct, the two sets of rules may both be applicable to a particular situation and it is therefore sometimes necessary to consider the relationship between them.”⁷¹

The Guidelines could not contribute more to this subject as the human rights law issue has been beyond its focus. But other authorities clearly confirm the interdependence between these two fields of international law. As the International Court emphasised in the Advisory Opinion on the *Construction of the Wall in the Occupied Palestinian Territory* and *DRC v Uganda*, human rights treaties continue applying in wartime. They apply together with humanitarian law.⁷² UN Report on the situation with the detainees in Guantanamo emphasises the complementarity of human rights law and humanitarian law, especially referring to the applicability of human rights in wartime.⁷³

In terms of the applicability of humanitarian law, the International Criminal Tribunal for the Former Yugoslavia noted that “Once the existence of an armed conflict has been established, international humanitarian law, including the law on crimes against humanity, continues to apply beyond the cessation of hostilities.”⁷⁴ As the UN General Assembly emphasised in its Resolution regarding the Israel’s occupation of Golan Heights, “all relevant provisions of the Regulations annexed to the Hague Convention IV of 1907, and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, continue to apply to the Syrian territory occupied by Israel since 1967, and call[ed] upon the parties thereto to respect and ensure respect for their obligations under these instruments in all circumstances.” The UN Security Council resolution 592 (1986) reaffirms the same in relation “to the Palestinian and other Arab territories occupied by Israel since 1967, including Jerusalem.”

⁷¹ European Union Guidelines on promoting compliance with international humanitarian law, 2005/C 327/04, para. 12, *Official Journal of the European Union*, 21.12.2005

⁷² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, General List No. 131, para. 106; *Case Concerning the Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda), Judgment of 19 December 2005, General List No. 116, para. 216

⁷³ Situation of detainees at Guantánamo Bay, E/CN.4/2006/120, at 10

⁷⁴ *Kunarac*, para. 414

As the ICTY has further formulated, human rights law and humanitarian law are mutually complementary and their use for ascertaining each other's content and scope is both appropriate and inevitable:

“Because of the paucity of precedent in the field of international humanitarian law, the Tribunal has, on many occasions, had recourse to instruments and practices developed in the field of human rights law. Because of their resemblance, in terms of goals, values and terminology, such recourse is generally a welcome and needed assistance to determine the content of customary international law in the field of humanitarian law. With regard to certain of its aspects, international humanitarian law can be said to have fused with human rights law.”⁷⁵

At the same time, the Tribunal specified that “notions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law.”⁷⁶ This factor the Trial Chamber took as the guidance in examining more specifically the definition of the crime of torture.

The parallel application of human rights law and humanitarian law can, in certain cases, face procedural impediments. The *Las Palmeras* case before the Inter-American Court of Human Rights involved the situation of internal conflict; while the applicant requested the Court to rule that the respondent State had breached both the 1969 American Convention on Human Rights and Common Article 3 of the 1949 Geneva Conventions, the respondent State objected that the Court was not competent to apply humanitarian law, because its competence was limited to the American Convention.⁷⁷ At the same time, the Respondent did not contest that the internal conflict was the subject-matter of the case and that conflict was covered by Common Article 3. The Inter-American Commission argued that the references to Common Article 3 would be necessary to find out whether the deprivations of life in this armed conflict were justified, because human rights law alone could not provide the necessary explanation. Therefore, the Commission called upon the Court to adopt proactive methods of interpretation enabling it to examine Article 4 of the American Convention regarding the right to life in conjunction with Common Article 3. The latter provision was instrumental in interpreting the former one.⁷⁸

The Court responded that it can determine the American Convention “has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions.”⁷⁹ Thus the Court accepted the respondent's preliminary objection, refusing to examine the legality of the respondent's action under Common Article 3.

As similar, though not identical, development was seen at the Merits stage of the *Loizidou* case of the European Court of Human Rights, dealing with the deprivation of property in the territory belonging to the Republic of Cyprus but occupied for some decades by Turkey. The Court was able to find a continuous breach of property rights under Article 1, Protocol 1 to the European Court of Human Rights by reference to that instrument solely.⁸⁰ Although the relevant norms of humanitarian law clearly apply to the deprivation of property in the state of

⁷⁵ *Kunarac*, para. 467

⁷⁶ *Id.*, para. 471

⁷⁷ *Las Palmeras*, Judgment of February 4, Series C, No 67, 2000, para. 28

⁷⁸ *Id.*, paras 29-31

⁷⁹ *Id.*, 33

⁸⁰ *Loizidou v Turkey*, Merits, 1996-VI Eur. Ct. H.R. 2216 (18 December 1996)

occupation as was the case in the Northern Cyprus, the European Court was able to resolve case on the basis of human rights law only, to which its mandate is restricted.

The general conclusion therefore seems to be that each of the two bodies of law can apply to the relevant armed conflict, and do so individually. Each of these bodies of law can provide standards in terms of the assessment of the relevant conduct of the State. However, as the further analysis demonstrates, it would be a too inconsiderate approach to consider each of these fields as self-contained, that is capable to resolve the relevant issues on their own. The subject-matters governed by one body of law are frequently also governed by the other body of law, and whatever the formal and procedural constraints on the powers of national and international decision-making bodies, in the exercise of their mandate they are expected, at least by implication, to consider the impact of both human rights law and humanitarian law, to ensure the outcomes permissible at the level of international law.

5. The Effect of the Emergency Derogation

Human rights treaties consider the state of war – that is the state of applicability of humanitarian law – as the condition in which States can alleviate their treaty obligations in certain ways, that is by use of their power to adopt emergency derogations from human rights treaties. Under Article 4 of the International Covenant on Civil and Political Rights and Article 15 of the European Convention on Human Rights, in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties may take measures derogating from their obligations under the relevant treaty to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law. Certain basic rights which are also fundamentally relevant from the viewpoint of humanitarian law, such as the right to life and freedom from torture, are exempted from the power of derogation.

The reference in derogation clauses to the “war or other public emergency threatening the life of the nation” leaves open the possibility of derogation both in relation to international and internal conflicts. Other obligations of States-Parties include the obligations under international humanitarian law. While administering Article 15 ECHR, the European Court of Human Rights is duty-bound to test whether the conduct and measures of the derogating State are in accordance with humanitarian law. Derogation measures from other treaties, such as ICCPR, have also to be in accordance with the provisions of humanitarian law treaties, as well as other humanitarian law provisions, presumably of customary law status.⁸¹ and the requirements of the latter body, especially its imperatives of the distinction between civilian and military targets, necessity and proportionality, and humane treatment of protected persons represents the bottom line below which the derogation from human rights treaties cannot justify the freedom of action of States-Parties. In other words, while emergency derogations from human rights law are possible, from humanitarian law they are not, because humanitarian law applies precisely to those situations which are among those justifying the emergency derogations from human rights treaties.

⁸¹ P van Dijk *et al.*, *Theory and Practice of the European Convention on Human Rights* (2006), 1067-1068

III. Substantive Norms

1. General Aspects

There is an overlap between human rights law and humanitarian law in providing the protection of certain individual rights. Both bodies of law guarantee the freedom from torture (Article 7 ICCPR, Article 3 ECHR; Common Article 3 GCs, Article 75 I AP); freedom of religion (Article 18 ICCPR, Article 9 ECHR; Article 58 IV GC). The fundamental guarantees enshrined in Common Article 3, Article 75 of the I Additional Protocol and Articles 4-6 of the II Additional Protocol is reinforced by their link to fundamental human rights. These guarantees, especially Common Article 3, apply to both international and internal conflicts, and reaffirm in categorical terms certain rights which are derogable under human rights treaties, such as the right to fair trial.⁸² Articles 27 to 34 of the IV Geneva Convention include extensive references to basic human rights in armed conflict, including the right of individuals to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs; as well as prohibition of pillage, taking of hostages and taking reprisals against civilians.

Thus, the observation that basic humanitarian norms are practically indistinguishable from fundamental human rights⁸³ seems to have support at the normative level. The following sections verify this working assumption in terms of certain specific individual rights.

2. Freedom from Arbitrary Deprivation of Life

The relationship between human rights law and humanitarian law in terms of the right to life has been determined, in general terms by the International Court of Justice in the *Nuclear Weapons Advisory Opinion* as the relationship between *lex generalis* and *lex specialis*. As the Court put it,

“the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what constitutes an arbitrary deprivation of life, however, then must be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict. 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.”⁸⁴

Thus, the Court could not say more on the basis of human rights norms *per se* whether or not the use of nuclear weapons would be unlawful as causing the arbitrary deprivation of life. The UN Special Rapporteur on Human Rights in the Occupied Palestinian Territories John Dugard further clarifies the interaction between the two sets of international legal norms as follows:

“For both human rights law and international humanitarian law the protection of human life is the primary goal. Article 6, paragraph 1, of the International Covenant on Civil and Political Rights states that “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” While accepting that combatants engaged in an armed conflict will be exposed to life-threatening situations, international humanitarian law seeks to limit harm to

⁸² Chernichenko & Treat Report, para. 137 (*supra* note 39)

⁸³ Meron (2000), 253

⁸⁴ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996*, 226, at 240 (8 July 1996)

civilians by requiring that all parties to a conflict respect the principles of distinction and proportionality. The principle of distinction, codified in article 48 of the Additional Protocol I to the Geneva Conventions of 1949, requires that “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” Acts or threats of violence, the primary purpose of which is to spread terror among the civilian population, are prohibited (art. 51, para. 2). The principle of proportionality codified in article 51, paragraph 5 (b) prohibits an attack on a military target which may be expected to cause incidental loss of civilian life, injury to civilians and damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated.”⁸⁵

Thus, the norms of humanitarian law serve as further elaboration of the parameters of the right to life in armed conflicts, and define circumstances in which the deprivation of life is or is not arbitrary. In addition to the standards referred to by the Special Rapporteur, Article 57 of the I Additional Protocol requires that the commanders who plan the military attack have to verify whether the relevant attack will bring about more civilian casualties than absolutely necessary for ensuring tangible military advantage, and if the answer is negative, cancel the attack.

Furthermore, the independent relevance of the human rights provisions regarding the prohibition of arbitrary deprivation of life is increased in the context of military occupation where the considerations of military necessity are no longer as pressing as in the case of hostilities. In such situations, Article 6 ICCPR, together with other relevant human rights provisions, can directly determine the legality of the relevant action of States.⁸⁶

As we have seen, the preliminary objections Judgment of the Inter-American Court of Human Rights in *Las Palmeras* refused to examine the compatibility of the deprivations of life involved in that case from the perspective of Common Article 3 of the 1949 Geneva Conventions.⁸⁷ At the merits stage of the same case, the Inter-American Court has concluded, through the use of human rights standards only, that the deprivation of life of the relevant persons contravened Article 4 of the Inter-American Convention.⁸⁸ This approach confirms that human rights law can at times be self-sufficient in dealing with the relevant violations, without needing assistance from humanitarian law. Such independent standing of human rights law is both understandable and indispensable – human rights law is designed so as to respond to the situations it applies to in autonomous way, if needed.

The specific aspects of the interchangeability of international human rights law and international humanitarian law at the example of the right to life is demonstrated by the judgments of the European Court of Human Rights related to armed conflicts, notably in the Chechen Republic of the Russian Federation. The principles related to the observance of the right to life in armed conflicts used by the Court in these cases are in their background the same as those embodied in the Court’s jurisprudence in terms of the general aspects of the use of lethal force by State agents, for instance the *McCann* case where the European Court ruled the use of force by British security agents in Gibraltar as falling short of being absolutely necessary.⁸⁹ In *Kelly*, the European Court stated that “The text of Article 2 [of the European Convention], read as a whole, demonstrates that it covers not only intentional killing

⁸⁵ Report of 17 December 2002, E/CN.4/2003/30, at 5; see further Dinstein, 117 (*infra* note 143)

⁸⁶ On the similarly differentiated application of certain humanitarian law regimes depending on whether there is the state of hostilities or of occupation see *infra* section IV.1

⁸⁷ *Supra* note 77

⁸⁸ *Las Palmeras*, Judgment of December 6, 2001, Ser. C, No. 90 (2001)

⁸⁹ *McCann and Others v. the United Kingdom*, 18984/91 (27/09/95), paras 199-201, 213

but also the situations where it is permitted to “use force” which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is only one factor however to be taken into account in assessing its necessity. Any use of force must be no more than “absolutely necessary” for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c)” of Article 2. Furthermore, “This term indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is “necessary in a democratic society” under paragraphs 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims”⁹⁰

Human rights law can indeed offer its own criteria for assessing the proportionality and necessity of the use of lethal force. For instance, the European Court of Human Rights has rules that that States should make non-lethal weapons available to their forces for use against mixed targets. The Court in *Güleç v Turkey*, in which it dealt with the use of lethal force to quell a not quite peaceful demonstration, accepted that

“the use of force may be justified in the present case under paragraph 2 (c) of Article 2, but it goes without saying that a balance must be struck between the aim pursued and the means employed to achieve it. The gendarmes used a very powerful weapon because they apparently did not have truncheons, riot shields, water cannon, rubber bullets or tear gas. The lack of such equipment is all the more incomprehensible and unacceptable because the province of Şırnak, as the Government pointed out, is in a region in which a state of emergency has been declared, where at the material time disorder could have been expected.”⁹¹

This gives the impression that the standards of the protection of human life are, from the perspective of the European Convention on Human Rights, generally the same both in peacetime and wartime and, as we shall see below, the use by the Court of the Convention-based criteria of legitimate aim, necessity and proportionality largely allows the application of this general standard in a way that considers the specificity of the situations involving armed conflicts.

The case of *Khashiyev v Russia* has dealt with the claims of unlawful deprivation of life in the context of the non-international armed conflict, namely the operation of Russian armed forces to take control of Grozny from the Chechen rebels. The Court found it established that the part of Grozny where the relevant persons were killed had been under the control of Russian forces,⁹² that is there were no actual hostilities going on in that area. In terms of the legal framework applicable to the case, the Court began by observing that “Article 2, which safeguards the right to life and sets out those circumstances in which deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which no derogation is permitted,” and that “it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed.” Especially the inferences of fact may be drawn as to the perpetration of killings in cases where the matter lies within the exclusive knowledge of the authorities.⁹³

⁹⁰ *Kelly v UK*, Application no. 30054/96, 4 May 2001, para. 93

⁹¹ *Güleç v. Turkey* Judgment of 27 July 1998, *Reports* 1998-IV, para. 71

⁹² *Khashiyev and Akayeva v Russia*, Judgment of 24 February 2005, Nos. 57942/00 & 57945/00, para. 16ff.

⁹³ *Id.*, paras 131-132

The Court found that the killings were not justified under the exceptions to the prohibition of the arbitrary deprivation of life under Article 2. The Government had not claimed that any of the exceptions applied, and domestic authorities had admitted that deaths were unlawful. The Court also found established that the relevant persons were killed by the servicemen.⁹⁴ This case could be governed presumably by human rights law only, as the hostilities were over in the relevant area and the application of humanitarian law was not strictly necessary despite the general context of an armed conflict. However, the standard of the right to life applied in this case in terms of human rights law confirms at least the same degree of protection that would have to be afforded to civilians under humanitarian law, had it been applicable.

A more complex situation is presented in *Isayeva v Russia*, where the European Court dealt with the claims of deprivation of the life of civilian persons in the context of the special operation by Russian forces to round the rebels up with the purpose of destroying or disabling them, and the consequent aerial bombardment. As the rebels were enticed from Grozny, they arrived in the village Katyr-Yurt, unexpectedly for the civilian population. In the course of the unexpected bombing several individuals were killed or handicapped. The rebels present in the village either escaped or were destroyed in the course of the operation that lasted three days.⁹⁵ The applicant claimed that the use of force which resulted in deaths was neither absolutely necessary nor strictly proportionate and thus violated Article 2. Indiscriminate lethal weapons were used and civilian population was neither warned nor provided safe exit. Most rebels and their leaders had escaped the bombardment and hence no tangible military advantage was gained by the State.⁹⁶ It is significant that the substance of these claims raises issues under international humanitarian law, namely under the number of provisions of the I Additional Protocol of 1977 (which is not strictly applicable to internal conflicts), and also under Common Article 3 of the 1949 Geneva Conventions.

The Government pleaded the exception under Article 2(2), that is the use of force “absolutely necessary in the circumstances for protection of a person from unlawful violence ... necessary and proportionate to suppress the active resistance of the illegal armed groups, whose actions were a real threat to the life and health of the servicemen and civilians.” Most civilian casualties had occurred in the area and in the period of the most severe fighting between the federal troops and the rebels.⁹⁷

The Court affirmed, in the same way as *Khashiyev* above, the fundamental status of the Article 2 prohibition of arbitrary deprivation of life in this context.⁹⁸ Unlike that case, however, the Court in *Isayeva* was dealing with the situation of ongoing armed conflict. The Court observed that the use of lethal force in this situation must be “absolutely necessary” for the protection of lives to be justifiable under Article 2, which is a stricter requirement than the requirement of necessity in terms of the margin of appreciation of States under Articles 8 to 11 of the European Convention. It was particularly necessary “to examine whether the operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force” and whether “the authorities were not negligent in their choice of action.”⁹⁹

⁹⁴ Id., paras 140, 147

⁹⁵ *Isayeva v Russia*, Judgment of 24 February 2005, No. 57950/00, paras 13ff., 103

⁹⁶ Id., paras 163-165

⁹⁷ Id., para. 169

⁹⁸ Id., para. 172

⁹⁹ Id., paras 173-175

Significantly enough, the Court accepted the starting-point justification of legitimacy of the military action of Russian federal forces. As the Court put it,

“the situation that existed in Chechnya at the relevant time called for exceptional measures by the State in order to regain control over the Republic and to suppress the illegal armed insurgency. Given the context of the conflict in Chechnya at the relevant time, those measures could presumably include the deployment of army units equipped with combat weapons, including military aviation and artillery. The presence of a very large group of armed fighters in Katyr-Yurt, and their active resistance to the law-enforcement bodies, which are not disputed by the parties, may have justified use of lethal force by the agents of the State, thus bringing the situation within paragraph 2 of Article 2.”¹⁰⁰

The real question was however *how* and *in which manner* this military operation, including the bombing, was conducted. The Court required that the fair balance must be struck between the above-mentioned legitimate aim and the means employed to achieve it. Although the Court had no information provided by the Russian Government as to the planning and execution of this operation, it held that the arrival of the rebel fighters to Katyr-Yurt could not have been unexpected to the military commanders, and that they had done nothing to warn the population of the incoming military operation. This operation was not spontaneous.¹⁰¹ There was some degree of informing the population on the day of operation and information was presumably spread about the humanitarian corridor the population could use for exit, but only after the bombing had started. In addition, the inhabitants were prevented from using their ways out since the relevant roadblocks were closed for some days.¹⁰² Russia had not argued that divulging the details of military operation to the civilian population could have endangered the success and efficiency of this operation, and thus this failure to inform the population could be justified in terms of military necessity.

The Court also judged the issue of the use of weapons in the context of Article 2 of the European Convention. The Military had not considered the effect of the use of air force on civilians in the area which accommodated both significantly large population as well as refugees. The General who called air force in did not specify which weapons they should carry and they did carry heavy bombs by default. The Court evaluated this process in a way that can also be relevant in terms of the assessment of State conduct in terms of international humanitarian law:

“The Court considers that using this kind of weapon in a populated area, outside wartime and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society. ... Even when faced with a situation where, as the Government submit, the population of the village had been held hostage by a large group of well-equipped and well-trained fighters, the primary aim of the operation should be to protect lives from unlawful violence. The massive use of indiscriminate weapons stands in flagrant contrast with this aim and cannot be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents.”¹⁰³

Thus, although the operation was by itself legitimate in crushing the rebellion, the ways of its performance did not adequately consider the needs to protect human lives. The case of *Issayeva, Yusupova & Bazayeva* dealt with the bombing of the civilian convoy by the air force in October 1999. The applicants had expressly made the

¹⁰⁰ Id., para. 180; but see also Article 2(3) of the Convention, justifying the use of lethal force for quelling insurrection.

¹⁰¹ Id., paras 181-188

¹⁰² Id., paras 193-194

¹⁰³ Id., paras 189-191

reference to the Common Article 3 of the 1949 Geneva Conventions as prohibiting the indiscriminate attacks on civilians. The Government argued that the actions of air force were necessary for protecting the population from the danger of rebellion, in terms of Article 2(2).¹⁰⁴

The Court confirmed its right “to make an assessment of the legitimacy of the attack, as well as of how the operation had been planned and executed.” Like the previous case, the Court accepted that “the situation that existed in Chechnya at the relevant time called for exceptional measures on behalf of the State in order to regain control over the Republic and to suppress the illegal armed insurgency. These measures could presumably include employment of military aviation equipped with heavy combat weapons. The Court [was] also prepared to accept that if the planes were attacked by illegal armed groups, that could have justified use of lethal force, thus falling within paragraph 2 of Article 2.”¹⁰⁵ The Government failed to produce the evidence enabling the Court to make such finding.

It is noteworthy that in this case, in addition to what it said in *Isayeva*, the Court qualifies the legality of the use of air force by cases where the planes are attacked by rebels. Thus the Court seems to suggest that the use of planes against the rebels as such does not satisfy the requirements of Article 2. It does not seem that humanitarian law accepts such qualification. What the Court says here is that the military cannot attack the rebels first, or if it can, it cannot use certain weaponry, and leaves open the question of what ought to be done if the context of the relevant military operation requires using those weapons.

As for the actual circumstances of the attack, the Court was not in the possession of the detailed information, but given the context of the conflict in Chechnya at the relevant time, the Court assumed “that the military reasonably considered that there was an attack or a risk of attack from illegal insurgents, and that the air strike was a legitimate response to that attack.”¹⁰⁶ However, the authorities knew or ought to have known that the road was full of civilian vehicles and they should have alerted the officers to the need for the extreme caution in using the lethal force. The Military used an extremely powerful reason for whatever aims it was trying to achieve.¹⁰⁷ Therefore, the operation was not executed with the necessary care for civilians and was illegal under Article 2 because of its lack of proportionality. This reference to proportionality and the implied reference to the need of taking precautions in attack resemble the regulation under the I Additional Protocol of 1977. Although this instrument did not apply to this internal conflict, the European Court’s response comes close to the application of its principles by analogy.

In general, the decisions of the European Court of Human Rights on the matter of the right to life in armed conflict demonstrates that even though Article 2 of the Convention, drafted as a general clause, does not elaborate upon the specific conduct that may be expected by the Military in such contingencies, in terms of precaution, proportionality and necessity, it can nevertheless be applied as having the effect on armed conflict comparable to what the consistent application of the detailed provisions of the 1977 I Additional Protocol would have in internal armed conflicts. The European Court’s policy to interpret the Convention safeguards in a way to make

¹⁰⁴ *Issayeva, Yusupova & Bazayeva v Russia*, Judgment of 24 February 2005, Nos. 57947/00, 57948/00 & 57949/00, paras 15ff., 155-160; Common Article 3 was also referred to by the Rights International, a non-governmental organisation intervening in the case, *id.*, paras 163, 167

¹⁰⁵ *Id.*, paras 175, 178

¹⁰⁶ *Id.*, paras 180-181

¹⁰⁷ *Id.*, paras 186, 195

them practical and effective allows it to secure the legal outcome required both under human rights law and humanitarian law, even though it does not directly apply the provisions of the latter body of law, as norms falling outside its competence. The application of Article 2 by reference to the established Convention standards such as legitimacy of aim, necessity and proportionality is undoubtedly useful and helps it to arrive at sound decisions. But in broader terms of legal policy, the legitimacy of the Court's findings in the cases involving armed conflicts will always be conditional upon the compliance of these findings with the standards of international humanitarian law – another body of international law that also governs the same subject-matter by reference to humanitarian considerations and necessity. Therefore, the Court's approach should be based, as it mostly is, on the implicit application of the same standards as are applicable under humanitarian law, albeit cloaked in the Convention-specific categories of legitimacy, necessity and proportionality.

The point of convergence of the two fields is not to doubt the self-sufficiency of any of the two fields of law, especially human rights law, in addressing the relevant violations. Its point rather is that the two fields are guided by the same purpose and come up with similar solutions; the application of norms in one field has to consider the requirements in the other field.

3. Freedom from Torture

The prohibition of torture is an essential part of both human rights law and humanitarian law. Torture committed in an armed conflict or in the occupied territories is illegal, with requisite legal consequences, under both bodies of law.

Therefore, and most importantly, the prohibition of torture has proved to be the standard whose interpretation and application in practice requires the cross-analysis of international human rights law and international humanitarian law. In a number of cases, such as *Furundzija*, *Delalic* and *Kunarac*, the International Criminal Tribunal for the Former Yugoslavia has indeed performed the comparative analysis of the both bodies of law to clarify the content of the standard of prohibition of torture applicable as part of the crimes over which the Tribunal has jurisdiction.¹⁰⁸ As *Furundzija* affirmed, “international law, while outlawing torture in armed conflict, does not provide a definition of the prohibition,” and thus accepted the need to resort to human rights law to clarify the meaning of this prohibition.¹⁰⁹ The *Delalic* case especially confirms that for understanding the content of the prohibition of torture as part of the war crimes under the ICTY Statute and hence of international humanitarian law, especially as embodied in Common Article 3 of the 1949 Geneva Conventions, extensive analysis of the content of the prohibition of torture under human rights treaties is required. In this field, human rights law effectively serves as the interpretative guide of the relevant aspects of humanitarian law. As the ICTY affirmed repeatedly both in *Delalic* and *Furundzija*, the definition of torture under the 1984 UN Convention included those contained in the 1975 UN Declaration against Torture or the 1985 Inter-American Convention against Torture, and thus it constituted a consensus representative of customary international law. The Torture Convention did not, unlike other instruments, refer to torture as an aggravated form of ill-treatment.¹¹⁰ Further references are made to the jurisprudence of the European Court of Human Rights.

¹⁰⁸ See in general, *Furundzija*, paras 134-146; *Delalic*, paras 440ff.

¹⁰⁹ *Prosecutor v Furundzija*, Case IT-95-17/1-T, Judgement, 10 December 1998, para 159

¹¹⁰ *Delalic*, paras 458-459; *Furundzija*, para. 160

Therefore, the Tribunal in *Delalic* has adopted, for the prosecution of torture as violations of international humanitarian law under Articles 2 and 3 of its Statute, the following definition of the elements of torture:

“(i) There must be an act or omission that causes severe pain or suffering, whether mental or physical, (ii) which is inflicted intentionally, (iii) and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind, (iv) and such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.”¹¹¹

This definition mirrors the definition included in Article 1 of the UN 1984 Convention against Torture.¹¹² In *Kunarac*, the Tribunal, having emphasised the different purposes of human rights law and international criminal law, stated that the Torture Convention definition can only apply to international criminal proceedings *mutatis mutandis*, nevertheless affirmed that the Convention definition can provide to the Tribunal the interpretational aid.¹¹³

This is similar, for instance, to the use by the European Court of Human Rights in *Selmouni* of the UN Convention definition of torture to determine the meaning of torture under Article 3 of the European Convention on Human Rights.¹¹⁴ The fact that similar exercise has been performed by the Tribunal across the different fields of international law only confirms their growing convergence.

In addition, *Kunarac* elaborates upon the different definition of the elements of torture, excluding the requirement of the involvement of State officials,¹¹⁵ and for this purpose refers to a general, and broader, customary international law prohibition of torture. The unclear issue was whether customary law limited the prohibition of torture to the acts committed by State agents, and whether the purposes for which torture must be perpetrated to fall within the scope of Article 1 of the 1984 Convention were *in toto* part of customary law. The Tribunal was unable to give an affirmative answer to the first question. With regard to the second question, the Tribunal stated that “There is no requirement under customary international law that the conduct must be solely perpetrated for one of the prohibited purposes. ... the prohibited purpose must simply be part of the motivation behind the conduct and need not be the predominating or sole purpose.”¹¹⁶ The reference to this broader general

¹¹¹ *Delalic*, para. 494; see also the definition included in *Furundzija*, para. 162

¹¹² According to Article 1 of the 1984 Convention, “For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

¹¹³ *Kunarac*, para. 482

¹¹⁴ *Selmouni*, paras 97-98

¹¹⁵ According to the Trial Chamber, “in the field of international humanitarian law, the elements of the offence of torture, under customary international law are as follows: (i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental; (ii) The act or omission must be intentional; (iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.”

¹¹⁶ *Kunarac*, para. 486

prohibition of torture applicable in both relevant fields of law is a yet another confirmation of the convergence of these fields under customary, or general, international law, and the impact of such convergence on the application of the relevant treaty provisions. This also seems to respond to the need of adapting the definition of torture to the context of armed conflicts, where the human rights definition of torture, putting the emphasis on the relationship between the State and the individual in terms of defining the perpetrator and motives, may not be the only acceptable one.

4. Freedom from Arbitrary Detention

The UN Report on Guantanamo Detainees explains the relationship between human rights and humanitarian law provisions on the detention of individuals as the relationship between the general law and special law in the following terms:

“any person having committed a belligerent act in the context of an international armed conflict and having fallen into the hands of one of the parties to the conflict (in this case, the United States) can be held for the duration of hostilities, as long as the detention serves the purpose of preventing combatants from continuing to take up arms against the United States. Indeed, this principle encapsulates a fundamental difference between the laws of war and human rights law with regard to deprivation of liberty. In the context of armed conflicts covered by international humanitarian law, this rule constitutes the *lex specialis* justifying deprivation of liberty which would otherwise, under human rights law as enshrined by Article 9 of ICCPR, constitute a violation of the right to personal liberty.”

The crucial question was whether the ongoing detention of the Guantánamo Bay detainees as “enemy combatants” does in fact constitute arbitrary deprivation of the right to personal liberty. In this context, the Report emphasises that the global struggle against international terrorism does not, as such, constitute an armed conflict for the purposes of the applicability of international humanitarian law.¹¹⁷ It further specifies that the regime of detention of both lawful and unlawful combatants must be the same: as the detention under humanitarian law is merely a protective custody, unlawful combatants must be tried or released at the end of hostilities. However, “the objective of the ongoing detention [was] not primarily to prevent combatants from taking up arms against the United States again, but to obtain information and gather intelligence on the Al-Qaeda network.”¹¹⁸ Furthermore, in terms of the factual background that serves the applicability of the law of armed conflicts, while the US forces continue to be engaged in combat operations in Afghanistan, “they are not currently engaged in an international armed conflict between two Parties to the Third and Fourth Geneva Conventions. In the ongoing non-international armed conflicts involving United States forces, the *lex specialis* authorizing detention without respect for the guarantees set forth in article 9 of ICCPR therefore can no longer serve as basis for that detention.”¹¹⁹

¹¹⁷ UN Report, supra note 73, at 12-13, paras 19-21. The UN Report refers to the attitude of the International Committee of the Red Cross, according to which the “war on terror” as such cannot trigger the applicability of humanitarian law and this body of law will in any event apply only to the actual hostilities as opposed to the broader notion of the “war on terror.” On the notion of “war on terror” see generally V Lowe, Security Concerns and National Sovereignty in the Age of World-Wide Terrorism, in Macdonald & Johnston, *Towards World Constitutionalism. Issues in the Legal Ordering of the World Community* (2005), 655-679

¹¹⁸ UN Report, at 13, para. 22

¹¹⁹ Id., at 13-14, para. 24; As a matter of fact, fewer than 10 of the Guantanamo detainees have been referred to Military Commissions. The rest are being detained without charges, id., at 20, para 38

In other words, the *lex specialis* justification no longer applies and the general law of human rights continues to govern and outlaw the detention of the Guantanamo detainees.

5. Procedural Safeguards

The rights to fair trial and due process is regulated and recognised both by human rights and humanitarian law. These rights are embodied in Article 14 ICCPR, Articles 105 and 106 of the Third Geneva Convention on the Prisoners of War, and Article 75 of the First Additional Protocol. In addition, Article 5 of the Third Geneva Convention stipulates that persons detained in the course of armed conflict have the right to have their status verified by the competent tribunal. Articles 68 to 78 of the IV Geneva Convention list a number of procedural due process and fair trial guarantees that have to be afforded to individuals in occupied territories. These provisions largely overlap with safeguards provided in human rights treaties. Furthermore, the fair trial safeguards under the Common Article 3 apply to all armed conflicts, and it is hardly possible to justify derogation from the right to fair trial in a less grave emergency situation.¹²⁰

In *Al-Jedda*, the English Divisional Court dealt with the situation where the individual detained in Iraq has complained about the illegality of its detention because it was not accompanied by the proper procedure to review the legality of the detention, as required under Article 5(4) of the European Court of Human Rights. This provision requires that the review must be performed by the Court, while Article 78 of the IV Geneva Convention requires that the review must be performed by the competent body set up by the detaining power. The detainees in this case were to be presented to Divisional Internment Review Committee (DIRC), which is not a court. The Court held that

“Although the Commander and the panel [i.e. DIRC] do not have the qualities of independence and impartiality sufficient to meet the requirements of Article 6 ECHR, we do not think that complaint could properly be made of them in the context of Article 78 of [the IV Geneva Convention].”¹²¹

Thus, the court holds that if the procedural requirements of due process under the IV Geneva Convention are lower than the requirements under Articles 5 and 6 of the European Convention on Human Rights, it is dispensed from the duty to apply the European Convention standards properly. This fails in the face of the fact that human rights law and humanitarian law provide separate standards for the conduct of States and each of these standards must be complied with irrespective what the other standard requires.

The detention of terrorism suspects at the US base at Guantanamo raises similar issues. Section 4 of the Presidential Military Order of 2001 authorises the trial of the persons detained in the course of the “war on terror” by the military commissions to be set up by the Secretary of Defence.¹²² In this process, the

¹²⁰ Stavros, Fair Trial in Emergency Situations, *ICLQ* (1992), 349

¹²¹ *Al-Jedda* (Divisional Court), paras 128-140

¹²² *Presidential Military Order on the Detention, Treatment, and Trial of Certain Non-citizens in the War against Terrorism*, November 13, 2001, 41 ILM 252. Most recently, the final executive order of the President of the United States permits the commissions to impose the sentences of imprisonment and of death on individuals on the basis of hearsay and coerced testimony. *International Herald Tribune*, 19 February 2007, page 8.

establishment and operation of these commissions revealed a number of violations of both human rights law and humanitarian law.

As the UN Report on Guantanamo Detainees also affirms, similar to the issue of the detention as such, the matter is governed by human rights law solely as the conditions of the applicability of humanitarian law are no longer met. The Report emphasises that the Military Commissions established by the Order displace the jurisdiction belonging to the ordinary courts or judicial tribunals and deny to the accused the well-established procedures of ordinary civilian courts or military tribunals.¹²³ Pursuant to the General Comment 13 (1984) of the UN Human Rights Committee, the Report affirms that fair trial guarantees shall apply both to ordinary and specialised tribunals, and thus Article 14 ICCPR fully applies to the case of establishment of Military Commissions. In addition, the Judges of the Commissions

“should be commissioned officers of the armed forces and may be removed by the Appointing Authority. Such provisions suggest not only interference by but full control over the commissions’ judges by the executive: the requirement of an independent judiciary is clearly violated. In addition, there appears to be no impartial judicial mechanism for resolving conflict of jurisdiction: decisions on issues of jurisdiction and competence are made by the Appointing Authority, leaving the military commissions outside the control of judicial authorities.”¹²⁴

Another problematic point is that the evidence can be admitted against the individual without the individual having seen it, which violates Article 14(3) ICCPR which guarantees the right to prepare one’s defence. The possibility of appeal to a regularly constituted tribunal is also very restricted, which contravenes Article 14(5) ICCPR. Thus, although the Presidential Order was committed to “provide a full and fair trial,” its provisions did not guarantee that right.¹²⁵

The Report concludes that “The persons held at Guantánamo Bay are entitled to challenge the legality of their detention before a judicial body in accordance with article 9 of ICCPR, and to obtain release if detention is found to lack a proper legal basis. This right is currently being violated, and the continuing detention of all persons held at Guantánamo Bay amounts to arbitrary detention in violation of article 9 of ICCPR.” In addition, the Executive effectively operates as the Judiciary and this contravenes Article 14 ICCPR.¹²⁶

The US jurisprudence, namely the cases decided in the context of the detentions at Guantanamo, can offer the relevant material for ascertaining the intersection between human rights law and humanitarian law in this aspect. Analysing the problem in terms of how this issue has been treated in the US judicial system and then from the international legal perspective, is instructive for understanding and analysing the interaction of human rights law and humanitarian law in the aspect of procedural safeguards.

In the case of *Rasul v Bush*, the US Supreme Court had to address the question whether aliens could exercise their right to *habeas corpus* for judicial review of their detention in a territory over which the United States exercises exclusive jurisdiction though not the ultimate sovereignty.¹²⁷ The Court ruled that the petitioner’s absence from the Court’s jurisdiction, such as overseas, does not rule the *habeas corpus* out, because *habeas corpus* acts not upon the prisoner who seeks help but upon the person

¹²³ UN Report, at 17, para. 30

¹²⁴ Id., 17-18, paras 31-32

¹²⁵ Id., 18-20, paras 34, 36, 40

¹²⁶ Id., 36, paras 84-85

¹²⁷ *Shafiq Rasul et al. v George Bush*, Nos. 03-334 and 03-343, 28 June 2004, at 6

who holds that prisoner.¹²⁸ The Court further used the established common law principles to affirm that *habeas corpus* extends to every person detained abroad by the Executive, whether a US citizen or an alien.¹²⁹

While this case does not directly draw on either international human rights law or humanitarian law, it is decided in the context of the applicability of the both fields. Without expressly referring to any of these bodies of law, *Rasul* is in line with Article 14 of the ICCPR regarding the individual right to challenge one's detention before the competent authority; and with Article 5 of the Third Geneva Convention according to which persons detained in the course or in relation to an armed conflict have the right to challenge their detention before and request the determination of their status by the regularly constituted court.

In *Hamdi v Rumsfeld*, the Supreme Court effectively accepted the rationale underlying humanitarian law that the purpose of detention of individuals in armed conflicts is neither revenge, nor punishment, but solely protective custody to prevent the relevant persons from taking up arms again.¹³⁰ The Government tried to justify the detention of Hamdi by invoking some kind of margin of appreciation. The Government contended that the "war of terror" could last for two generations and during that period the release of Hamdi could cause him joining the forces hostile to the United States. Therefore, Hamdi's detention could effectively last indefinitely.¹³¹

The Court responded to such assertion of the margin of appreciation by the reference to the straightforward reference to the clear principle of international law embodied in Article 118 of the Third Geneva Convention that prisoners are to be released and repatriated after the end of active hostilities. Therefore, indefinite detention was not authorised. But the Court referred to the fact that active hostilities were ongoing against the Taliban in Afghanistan and the Government could detain individuals legitimately detained as Taliban combatants engaged in hostilities against the United States.¹³²

Even if the detention was legitimate, the constitutional venues of disputing the individual's enemy combatant status was still relevant, in the context that Hamdi was trying to achieve judicial review of his detention through *habeas corpus*. Judicial mechanism had to be employed to ensure that the individual was not deprived of his life and liberty without the due process of law.¹³³ A citizen-detainee seeking to challenge his classification as an enemy combatant must receive "a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker." According to the Court, the ability of the military to conduct war without being undermined by litigation should be considered, "the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator."¹³⁴

In *Hamdan v Rumsfeld*, the Supreme Court used the international humanitarian law reasoning more extensively. The most problematic question of the legality of detention of the Guantanamo prisoners did not directly come before the

¹²⁸ *Id.*, 10-11

¹²⁹ *Id.*, 12-13

¹³⁰ *Hamdi et al. v Rumsfeld, Secretary of State, et al.*, No. 03-6696, 28 June 2004, at 10-11

¹³¹ *Id.*, 12

¹³² *Id.*, 12-14; the Court also referred to the 1907 Hague Convention and academic contributions.

¹³³ *Id.*, 17-18, 21-22

¹³⁴ *Id.*, 26, 28-29

Court – which may perhaps be viewed as an impact of *Hamdi* – and the Court gave the following description of its task in this case:

“Hamdan does not challenge, and we do not today address, the Government’s power to detain him for the duration of active hostilities in order to prevent such harm. But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.”¹³⁵

In furtherance to this priority, the Court was examining the legality of procedures of the Military Commission established to try persons detained in the course of the “war of terror.” In particular, these procedures allowed excluding the evidence from the knowledge of the accused.¹³⁶

The Court considered also that Hamdan could not be tried by the Military Commission according to the US law, because such commissions could only be justified by military necessity which was not present in this case. The petitioner’s involvement in the dealings long predating the attacks of September 11, 2001 could well be a crime but not the one against the law of war which may be tried by such commissions; these actions were not performed during the war.¹³⁷

The issue of applicability of international humanitarian law was raised by the Government’s contention that the procedural safeguards under the 1949 Geneva Convention did not apply to this case, because Hamdan’s capture was concerned not with the war between the United States and the Taliban Government in Afghanistan, which would be the conflict of the type covered by Article 2 of the Convention.¹³⁸ Instead, the US had been fighting Al-Qaeda – a non-State actor and not a “High Contracting Party” to the Convention – and the Convention did not extend to this type of conflict. The Court avoided the issue of the general applicability of the Geneva Convention, by relying on Common Article 3, which extends minimum safeguards of the treatment of individual protected persons to all conflicts occurring in the territory of the signatory State, whether international or internal. This falls short of the full protection under the Third Geneva Convention, but provides the basic minimum standard of protection.¹³⁹

Common Article 3 refers to the “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples,” without defining this concept more precisely. The Supreme Court emphasised that the Commentary to the Fourth Geneva Convention defines “regularly constituted” tribunals to include “ordinary military courts” and “definitely exclude all special tribunals.” According to the interpretation of the International Committee of the Red Cross, “regularly constituted tribunals” refer to tribunals “established and organized in accordance with the laws and procedures already in force in a country.” Thus, although the Geneva Convention did not define the notion of a “regularly constituted court,” it must be understood to “incorporate at least the barest of those trial protections that have been recognized by customary international law.” The Court used by analogy the procedural safeguards mentioned in Article 75 of the 1977 I Additional Protocol to the Geneva Conventions. Even as the United States did not

¹³⁵ *Hamdan v Rumsfeld, Secretary of State et al.*, No. 05-184, 29 June 2006, at 72

¹³⁶ *Id.*, 49-50

¹³⁷ *Id.*, 48-49

¹³⁸ According to Article 2, “the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”

¹³⁹ *Hamdan*, 65-68

ratify this Protocol, it embodied the basic procedural standards which benefited all persons at the hands of the adversary. This included the right of the accused to be presented of the evidence against him and, the statutory derogation absent, the Government was bound to present it to him.¹⁴⁰

Although there is no significant reference to human rights law in the US jurisprudence related to the Guantanamo detainees, this jurisprudence, notably *Hamdan*, shows some degree of implicit consideration for international human rights standards. The attitude of the Inter-American Commission on Human Rights on this subject is particularly reflective of the parallel significance of the two bodies of law in this field:

“without prejudging the possible application of international humanitarian law to the detainees at Guantanamo Bay, the Commission considers that precautionary measures are both appropriate and necessary in the present circumstances, in order to ensure that the legal status of each of the detainees is clarified and that they are afforded the legal protections commensurate with the status that they are found to possess, which may in no case fall below the minimum standards of non-derogable rights. On this basis, the Commission hereby requests that the United States take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal.”¹⁴¹

Thus, the Inter-American Commission takes the view that the situation involving the breach of procedural guarantees governed by humanitarian law is not less governed by international human rights law. The relevance of human rights law in this context is to provide the outer layer of protection to individuals, among others when humanitarian law ceases its application after the end of hostilities, and to provide the interpretative guidance for understanding the content of fair trial guarantees under the humanitarian law. Some decisions of national courts, especially the case of *Al-Jedda*, essentially misconceive the relationship of the two fields of international law in relation to the fair trial guarantees.

IV. Special Problems

1. The Law of Occupation

Under *jus in bello*, the occupying power is under the whole range of obligations towards the population of the occupied territory, in terms of the observance in the occupied territory of different sets of international norms, such as international humanitarian law and human rights law. As Pellet points out, the powers of the occupying State are indeed restricted by international law.¹⁴² As Dinstein further emphasises, the acts of the occupying power which violate applicable humanitarian law and human rights law provisions are null and void.¹⁴³

As Article 42 of 1907 Hague Regulations determines, the territory is under occupation if effectively taken under control. The applicability of the law of occupation is challenged and denied in some cases, but is always upheld by the overwhelming attitude of the international community, with the effect of precluding the validation of certain claims as to the States being present in the relevant territory

¹⁴⁰ *Id.*, 69-72

¹⁴¹ *Decision to Request Precautionary Measures*, 12 March 2002

¹⁴² A Pellet, *The Destruction of Troy Will Not take Place*, in E Playfair (ed.), *International Law and the Administration of Occupied Territories* (OUP 1992), 117

¹⁴³ Y Dinstein, *Belligerent Occupation and Human Rights*, 8 *Israel Yearbook of Human Rights* (1978), 142

as liberating powers. This has by the adoption of the Security Council Resolution 1483 (2003) which determined the status, rights and obligations of the occupied powers in Iraq.

The starting-point for the applicability of humanitarian law to the construction of the Wall lies with the fact that the Palestinian territory is under belligerent occupation. The Court approached the pertinent issues of humanitarian law by affirming the customary law status of the 1907 Hague Regulations regarding the conduct of hostilities annexed to the IV Hague Convention of 1949.¹⁴⁴ The Court excluded the relevance of Article 23(g) of the Hague Regulations which deals with the seizure of property because it does not fall within the category of norms applicable to belligerent occupation.¹⁴⁵ This view has been opposed,¹⁴⁶ but it is logically and normatively consistent. The law of occupation applies to the areas over which the occupying power exercises effective control. It does not apply to situations where the army of the adversary is still capable of fighting, thereby precluding the exclusive control of the would-be occupying power.¹⁴⁷ Therefore, the situation in Palestine cannot be subjected to the law applicable to hostilities if it is governed by the law of belligerent occupation, because no territory can legally be the occupied territory and area of hostilities at the same time. The Court's decision to exclude Article 23(g) from consideration is thus correct.

As for the findings regarding the compliance, the Court observed in similar terms that "the construction of the wall has led to the destruction or requisition of properties under conditions which contravene the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and of Article 53 of the Fourth Geneva Convention."¹⁴⁸ The Court pointed out that, on the material before it, the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were not justified by the considerations of military necessity.¹⁴⁹

Humanitarian law is obviously based on the balance of military necessity and humanitarian considerations. However, these criteria are vague and undefined, and they themselves cannot constitute the criteria for the rights and duties of the occupying power, and more is required for determining whether the action of the occupant is lawful or not.¹⁵⁰ Therefore, the proper way is not to refer to such indeterminate categories *per se*, but to ascertain the legality of the action by the occupying power by reference to its impact in terms of the requirements embodied in the specific norms of international humanitarian law. This is even more obvious as the relevant actions of the occupying power frequently take place in the context where human rights law is applicable together with international humanitarian law. Therefore, judging the legality of the relevant conduct of the occupant just in terms of the general requirements of necessity, proportionality or humanity can result in prejudicing the requirements not only of humanitarian law, but also of human rights law.

¹⁴⁴ *Wall in OPT*, Opinion, para. 89

¹⁴⁵ Opinion, para. 24

¹⁴⁶ Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 *AJIL* (2005), 96

¹⁴⁷ Gasser, *Protection of Civilian Population*, in Fleck, *Handbook of the Law of Armed Conflicts* (1995), 242-243

¹⁴⁸ *Wall in OPT*, Opinion, para. 132. These findings were preceded by identical findings by the UN Special Rapporteur Dugard, E/CN.4/2004/6/Add.1, 12, para. 29

¹⁴⁹ Opinion, para. 135

¹⁵⁰ Pellet, 171-172, 197

To illustrate, the Israeli High Court's decision in *Beit Surik*, which addresses the legality and legal consequences of the wall constructed in the Occupied Palestinian Territory, addresses this question as a mixture of public international law and Israeli administrative law.¹⁵¹ Although the High Court mentions, on several occasions, the norms of humanitarian law applicable in this situation, the decision does not really address the impact of the action by the occupying power on the integrity of specific norms of applicable international law, which binds the occupying power both as a matter of humanitarian law and human rights law.

The International Court has affirmed in the *Palestine Wall* case that human rights treaties apply both in peacetime and wartime. At the same time, the Court affirmed that the International Covenant on Civil and Political Rights binds States even in relation to their actions performed outside their territory.¹⁵² As for the applicability of the International Covenant on Economic, Social and Cultural Rights, the Court referred to the disapproval by the UN Committee on Economic and Social Rights of Israel's attitude that the Palestinian population was excluded from the protection of the Covenant because "the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction." Instead the Committee reiterated "its view that the State party's obligations under the Covenant apply to all territories and populations under its effective control."¹⁵³ The Court concluded that the construction of the Wall and its associated regime "impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights."¹⁵⁴

As for the violations of civil and political rights, the Court observed that the construction of the Wall had deprived the significant number of Palestinians of their freedom to choose the place of their residence. These measures also "impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights."¹⁵⁵

In the *Congo-Uganda* case, the Congo claimed that serious and widespread human rights and humanitarian law violations were committed by the Ugandan forces in the Congo, against the lives and property of the Congolese population.¹⁵⁶ The Court did not find it necessary to examine facts in relation to every such incident, but concluded, mainly on the basis of the UN Reports, that these violations were indeed committed.¹⁵⁷ As the Court observed,

"Having examined the case file, the Court considers that it has credible evidence sufficient to conclude that the UPDF troops committed acts of killing, torture and other forms of inhumane treatment of the civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, incited ethnic conflict and took no steps to put an end to such conflicts, was involved in the training of child soldiers,

¹⁵¹ *Beit Surik Village Council v The Government of Israel*, HCJ 2056/04, 30 June 2004

¹⁵² *Wall in OPT*, Opinion, paras 105-109

¹⁵³ Opinion, para. 112

¹⁵⁴ Opinion, paras 133-134

¹⁵⁵ Opinion, para. 133. Dugard Report also points to the severe restrictions on the freedom of movements of Palestinians who live within the Wall. E/CN.4/2004/6/Add.1, 8, para. 9

¹⁵⁶ *Congo-Uganda*, paras 181-195

¹⁵⁷ *Congo-Uganda*, paras 205-207

and did not take measures to ensure respect for human rights and international humanitarian law in the occupied territories.”¹⁵⁸

The Court confirmed, in terms of the applicable legal regime, the findings made in *Wall in the OPT*, that human rights treaties did not cease applying in the situation of an armed conflict, that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration, and added that human rights law applied in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.¹⁵⁹ Therefore, the Court concluded “that Uganda is internationally responsible for violations of international human rights law and international humanitarian law committed by the UPDF and by its members in the territory of the DRC and for failing to comply with its obligations as an occupying Power in Ituri in respect of violations of international human rights law and international humanitarian law in the occupied territory.”¹⁶⁰

Thus, the law of occupation is yet another area witnessing the convergence between international human rights law and international humanitarian law. The two bodies of law not only apply to the same situations, but can also result in outlawing the same conduct.

2. Individual Criminal Responsibility and Duty to Prosecute

Both human rights and humanitarian law conventions impose on States the obligation to prosecute or extradite persons accused of the crimes that violate their norms. Article 7 of the 1984 Torture Convention obliges States-parties to bring persons accused of torture before its competent organs of prosecution,¹⁶¹ which is the universal obligation to exercise criminal jurisdiction.¹⁶² Articles 49/50/129/146 of 1949 Geneva Conventions oblige States to search for and try persons accused of grave breaches of these Conventions.¹⁶³ The same obligation is extended to breaches of Additional Protocol I under its Article 85.

The parallelism of human rights law and humanitarian law in this area becomes even more obvious after ascertaining that certain human rights norms imply the duty to prosecute even without stating it in express terms. As the UN Special Rapporteur van Boven specifies, a serious human rights violation places on States the duties to investigate the facts, to take action thereon as appropriate, to bring the persons responsible to justice, to provide appropriate, including medical, treatment to

¹⁵⁸ *Congo-Uganda*, para. 211

¹⁵⁹ *Congo-Uganda*, para. 216

¹⁶⁰ *Congo-Uganda*, para. 220

¹⁶¹ The UN Committee against Torture considered that the prosecution of Senator Pinochet in the UK, if he was not extradited to another country, would satisfy the UK obligations under CAT, CAT/C/SR.360, 5

¹⁶² Burns & McBurney, *Impunity and the United Nations Convention against Torture: A Shadow Play without an Ending*, C. Scott (ed.), *Torture as Tort* (2001), 281

¹⁶³ Grave breaches are defined as “acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”

victims, and to pay compensation to them and their families.¹⁶⁴ General human rights treaties such as ICCPR, ECHR and ACHR do not lay down the explicit obligation for States to investigate the breaches and prosecute the perpetrators. The absence of such express clause has not prevented inferring these obligations from the general obligation clauses as well as the object and purpose of these treaties.

Although the European Convention on Human Rights does not explicitly elaborate upon this issue, the European Court considers that consequential obligations are inherent to substantive Convention human rights. In *Cyprus v Turkey* and *Assenov*, the Court emphasised that Articles 2 and 3 of the European Convention, in conjunction with Article 1, impose on States not only obligations to abstain from breaches of the right to life and freedom from torture, but also to take consequential steps to punish perpetrators.¹⁶⁵ In *Aksoy, Kaya* and *Yasa* the European Court interpreted Article 13 of the European Convention as requiring the criminal responsibility of perpetrators, along with the duty to award civil remedies.¹⁶⁶ Similarly, the European Court in *Kelly* underlined the need for absolute performance of the right to life. Article 2 of the European Convention implies in its content that those responsible for unlawful killing must be found and punished. As the Court emphasised, “The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State’s general duty under Article 1 of the Convention to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”, also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.”¹⁶⁷ Furthermore, “The investigations required under Articles 2 and 13 of the Convention must be able to lead to the identification and punishment of those responsible.”¹⁶⁸

The UN Human Rights Committee has gradually developed the approach that serious breaches of the ICCPR cause consequences in terms of criminal prosecution and civil remedies.¹⁶⁹ In earlier decisions the Committee asserted that the International Covenant on Civil and Political Rights does not provide for an individual to require that the State party criminally prosecute another person.¹⁷⁰ But in *Rodriguez* the Committee reversed that approach by pointing to multiple consequential duties of the State including the duty to prosecute the perpetrators and the duty to give remedies to the victims.¹⁷¹

Thus, the practice of human rights organs affirms that substantive human rights inherently include the consequential obligations with regard to criminal prosecution of perpetrators and civil remedies for victims. This is yet another area of the overlap and parallelism between human rights law and humanitarian law. The monitoring bodies uniformly take this approach even as the respective procedural

¹⁶⁴ Van Boven, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, E/CN.4/Sub.2/1993/8, 2 July 1993, 57-58

¹⁶⁵ *Cyprus v Turkey*, Application no. 25871/94, 10 May 2001, para. 131; *Assenov*, Judgment No 24760/94 of 28 October 1998, 28 EHRR (1999), paras 90-106

¹⁶⁶ *Aksoy v Turkey*, 21987/93, para. 98; *Kaya*, Judgment of 19 February 1998, para.105; *Yasa*, Judgment of 27 July 1998, para. 74

¹⁶⁷ *Kelly*, para. 94

¹⁶⁸ *Kelly*, para. 105

¹⁶⁹ N Rodley, *Treatment of Prisoners in International Law* (1999), 112

¹⁷⁰ *HCMA v The Netherlands*, Communication No 213/1986, Decision of 30 March 1989, para. 11.6; *SE v Argentina*, Communication No 275/1988, Decision of 26 March 1990, para 5.5

¹⁷¹ *Hugo Rodriguez v Uruguay*, Communication No. 322/1988, 09/08/94, CCPR/C/51/D/322/1988, paras 12.3, 14

obligations are not fixed in the relevant human rights treaties. Implying the procedural element in these provisions of human rights treaties is a yet another confirmation of the use of the principle of effectiveness as interpretative principle applicable to human rights treaties.

3. The Impact on the Powers of the Security Council

The exercise by the UN Security Council of its primary responsibility to maintain the international peace and security and adopt decisions binding on member States¹⁷² frequently affects the operation of international human rights law and international humanitarian law, thus raising the special problem of fragmentation of legal regimes. This raises the question how far the Council can go in impacting the legal outcomes required by the operation of these two bodies of law, especially as the bulk of norms in these branches of international law represent *jus cogens* that unconditionally binds the Security Council. This is even so as Article 103 of the Charter makes the Charter obligations prevail over other international agreements. The issue of conflict between Article 103 and *jus cogens* has been clearly addressed by Judge Lauterpacht in *Bosnia*. Even if the Charter prevails over other international agreements, the same is not true for norms which are part of *jus cogens*. Therefore, “the relief which Article 103 may give the Security Council in case of one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and *jus cogens*.”¹⁷³ Similarly, Professor Gasser considers that “Article 103 makes it clear that there is also no way for the Security Council to disregard international obligations other than those enshrined in international treaties, i.e. general principles of law or customary law.” *Jus cogens* norms including the considerations of humanity constitute absolute prohibitions which bind hands not only of States but also of the Security Council.¹⁷⁴ This is confirmed by the ILA Reports on Accountability of International Organisations, which states that although Article 103 establishes the primacy of the Charter obligations, the Member States cannot be required to breach peremptory norms of international law.¹⁷⁵

As the International Criminal Tribunal for the Former Yugoslavia has emphasised, the Council is not *legibus solutus* (unbound by law).¹⁷⁶ A similar view seems to have recently prevailed within the Council itself. In the process of adoption of the resolution 1483(2003), which confirmed the status of the occupying powers in Iraq, the President of the Security Council emphasised that

“under the Charter the powers delegated to the Security Council under this resolution are not open-ended or unqualified. They should be exercised in ways that conform with “the principles of justice and international law” mentioned in article 1 of the Charter, and especially in conformity with the Geneva Conventions and the Hague Regulations, besides the Charter itself.”¹⁷⁷

¹⁷² UN Charter, Articles 24 and 25

¹⁷³ Separate Opinion, *ICJ Reports*, 1993, 440

¹⁷⁴ H-P Gasser, *Collective Economic Sanctions and International Humanitarian Law*, 56 *ZaöRV* (1996), 881; E. De Wet & A. Nollkaemper, *Review of Security Council Decisions by National Courts*, 45 *German YIL* (2002), 191

¹⁷⁵ M. Shaw & K. Wellens, *Third ILA Report on Accountability of International Organisations* (2003), 13; M. Shaw & K. Wellens, *Final ILA Report on Accountability of International Organisations* (2004), 19

¹⁷⁶ *Prosecutor v. Tadić*, Case IT-94-1-AR72, 35 ILM, paras 20-28 (ICTY 1995).

¹⁷⁷ S/PV.4761, at 11-12

In terms of human rights law, there are a number of instances confirming that the Security Council is bound by human rights norms. The decision of the ICTY Appeals Chamber in *Tadic* gives an impression that the right to fair trial is an unconditional limitation on the powers of the Security Council and that the observance of the right to fair trial and the related procedural safeguards was a *sine qua non* for the validity of the Council's measures such as the establishment of the International Criminal Tribunal for the Former Yugoslavia.¹⁷⁸ The Council's compliance with economic and social rights is also crucial for the legality of its measures, particularly economic sanctions.¹⁷⁹ A similar approach has also been affirmed in practice. The General Comment No.8 of the UN Committee on Economic and Social Rights clearly stated that when the Security Council imposes sanctions under Chapter VII, the economic and social rights still serve as limitations on the permissible scope of those sanctions. The provisions of the ICESCR, "virtually all of which are also reflected in a range of other human rights treaties as well as the Universal Declaration of Human Rights, cannot be considered to be inoperative, or in any way inapplicable, solely because a decision has been taken that considerations of international peace and security warrant the imposition of sanctions."¹⁸⁰

Most recently the primacy of human rights as *jus cogens* over the measures ordered by the Security Council has been raised and repeatedly reaffirmed by the EU Court of First Instance, in the cases of *Ahmed* and *Kadi*, which related to the action by the EC Council involving the adoption of measures, such as the Common Position 1999/727/CFSP and the Regulation No 377/2000 regarding the freezing of financial funds held abroad by the Taliban; there were later followed by other comparable Community measures.¹⁸¹ These measures were adopted to implement the UN Security Council Resolution 1267 (1999) which was directed against the Taliban regime in Afghanistan.

The Court made it clear that the matter before it was that of judicial review. The fundamental human rights fall within the scope of judicial review and could lead to the annulment of the contested regulation.¹⁸² The Court stated, most pertinently, that

"the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible. ...

International law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community.

¹⁷⁸ *Tadic* (Appeals Chamber), paras 41-47; It is submitted that the right to fair hearing in criminal proceedings is part of *jus cogens*, E. De Wet & A. Nollkaemper, Review of Security Council Decisions by National Courts, 45 *German YIL* (2002), 182-183. See *id.*, 183-184, for the practice affirming such assumption. See also De Wet, The Role of Human Rights in Limiting the Enforcement Power of the Security Council: A Principled View, De Wet & Nollkaemper (eds.), *Review of the Security Council by Member States* (2003), 22; Herdegen, Review of the Security Council by National Courts: A Constitutional Perspective, De Wet & Nollkaemper (eds.), *Review of the Security Council by Member States* (2003), 79.

¹⁷⁹ A Reinisch, Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions, 95 *AJIL* (2001), 861-863

¹⁸⁰ ICESCR Committee, General Comment No. 8 (1997), para. 7

¹⁸¹ *Ahmed*, Case T-306/01, paras 10-16; *Kadi*, Case T-315/01, paras 10-16

¹⁸² *Ahmed*, paras 226, 230; *Kadi*, paras 176, 180

The indirect judicial review carried out by the Court in connection with an action for annulment of a Community act adopted, where no discretion whatsoever may be exercised, with a view to putting into effect a resolution of the Security Council may therefore, in some circumstances, extend to determining whether the superior rules of international law falling within the ambit of *jus cogens* have been observed, in particular, the mandatory provisions concerning the universal protection of human rights, from which neither the Member States nor the bodies of the United Nations may derogate because they constitute ‘intransgressible principles of international customary law.’”¹⁸³

This line of reasoning emphasises the independent, and original, relevance of *jus cogens*, which includes human rights and humanitarian law, as an aspect of the hierarchy of norms in the international legal system. In relation to judicial review of the Security Council acts, *jus cogens* can achieve the result that other concepts and categories arguably cannot. The reason why *jus cogens* binds the Security Council and justifies the judicial review relates to its hierarchical superiority over the powers of the treaty-based organ. If *jus cogens* prevails over treaties, then it also sets limits to the validity of the acts adopted by treaty-based organs. The function of international tribunals is not to uphold invalid acts and the decision of the Court of First Instance confirms just this.

It is arguable that to review the Security Council decisions may be inappropriate for the EC courts the UN Charter enjoys hierarchically higher status and, as soon as this is the case, the EC legal system must follow. The key to judicial review is the normative standard that constrains the validity of the acts adopted by the Security Council and is *also* the part of the law that imperatively binds the EC as the treaty-based institution.

Thus the Court affirmed that if the right, or its element, is recognised as peremptory, judicial review will follow:

“In this action for annulment, the Court has moreover held that it has jurisdiction to review the lawfulness of the contested regulation and, indirectly, the lawfulness of the resolutions of the Security Council at issue, in the light of the higher rules of international law falling within the ambit of *jus cogens*, in particular the mandatory prescriptions concerning the universal protection of the rights of the human person.”¹⁸⁴

The relevance of humanitarian law as a limitation on the Security Council’s powers is clear. The principal areas in which humanitarian law is relevant involve the UN-authorized military operations and the regime of the UN economic sanctions. The UN Secretary-General is clearly of the view that UN forces are bound by existing humanitarian law.¹⁸⁵ The 1971 Zagreb Resolution and the 1975 Wiesbaden Resolution of the Institute of International Law clearly state that humanitarian law applies to the United Nations and must be complied with in every circumstance by the United Nations Forces engaged in hostilities.¹⁸⁶

According to the ILA Report on the Accountability of International Organisations, the UN economic sanctions are subject to peremptory norms, particularly the fundamental humanitarian rules, such as the principles of

¹⁸³ *Ahmed*, paras 276-277, 281-282, 337; *Kadi*, paras 225-226, 230-231, 282

¹⁸⁴ *Ahmed*, para. 337; *Kadi*, para, 282

¹⁸⁵ UN Secretary-General’s Bulletin on “Observance by United Nations Forces of International Humanitarian Law”, UN Doc ST/SGB/1999/13 (6 August)

¹⁸⁶ Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May be Engaged, Session of Zagreb, 1971; Conditions of Application of Rules, other than Humanitarian Rules, of Armed Conflict to Hostilities in which United Nations Forces May be Engaged, Session of Wiesbaden, 1975

proportionality and necessity under international humanitarian law.¹⁸⁷ The ILA Final Report emphasises that when taking and implementing decisions such as those concerning the use of force, temporary administration of territory, imposition of coercive measures, launching of peacekeeping or peace-enforcement operations, international organisations shall observe basic human rights obligations and applicable norms and principles of humanitarian law.¹⁸⁸ The relevance of humanitarian law as the limitation on Security Council measures primarily implies an obligation not to deprive civilians of the access to the goods necessary for their survival.¹⁸⁹ Any sanctions regime is governed by humanitarian law, above all by norms essential for the survival of civilian population, to secure food, water, shelter, medicines and medical care.¹⁹⁰ The measures of the Security Council may not lead to the starvation of civilian population.¹⁹¹ The Martens clause test also applies,¹⁹² which means that the Council's measures cannot result in offending the laws of humanity and dictates of public conscience.

The relevance of humanitarian law as the limitation on the powers of the Security Council was dealt with by the English Divisional Court in the *Al-Jedda* case. The issue was the legality of the power to detain and intern individuals under paragraph 10 of the Security Council Resolution 1546 (2004), which was adopted on 8 June 2004 in anticipation of the transfer of the authority of the Coalition Provisional Authority (CPA) to the Iraqi interim government.¹⁹³ The court held that this power of detention and internment was conferred pursuant to Article 78 of the IV Geneva Convention, and the Resolution “provides a clear indication of the intention that the powers previously derived from Article 78 of Geneva IV were to be continued.”¹⁹⁴ The court's judgment did not address the question whether the detentions and internments in Iraq were accompanied by the procedure of appeal, as is required under Article 78 of the IV Geneva Convention. This provision confers the powers to the occupant on the condition of providing legal venues to verify the propriety of arrests and the court's failure to address this issue properly renders its judgment of doubtful value. The Court stated that “the procedures applied to the claimant's detention do not strictly meet the requirements of Article 78, since the decision-maker was a single individual rather than an administrative board. On the other hand, the non-compliance is in our view more technical than substantial.” This “technical” non-compliance with the procedural requirements of Article 78 did not have the automatic effect of rendering the detention unlawful.¹⁹⁵

The Divisional Court has also examined the legality of the Council Resolution's alleged displacement of the applicant's right to be free from arbitrary

¹⁸⁷ M. Shaw & K. Wellens, Third ILA Report on Accountability of International Organisations (2002), 11, 15

¹⁸⁸ M. Shaw & K. Wellens, Final ILA Report on Accountability of International Organisations (2004), 23

¹⁸⁹ Gasser, Collective Economic Sanctions and International Humanitarian Law, 56 *ZaöRV* (1996), 885-887; Reinisch, Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions, 95 *AJIL* (2001), 860-861

¹⁹⁰ M. Bossuyt, The adverse consequences of economic sanctions on the enjoyment of human rights. Working paper, E/CN.4/Sub.2/2000/33, 10

¹⁹¹ Gasser, Collective Economic Sanctions and International Humanitarian Law, 56 *ZaöRV* (1996), 882

¹⁹² M. Bossuyt, The adverse consequences of economic sanctions on the enjoyment of human rights. Working paper, E/CN.4/Sub.2/2000/33, 12

¹⁹³ *Regina (Al-Jedda) v the Secretary of State for Defence*, Queens Bench Divisional Court, Case No: CO/3673/2005, Judgment of 12 August 2005

¹⁹⁴ *Id.*, paras 87, 92

¹⁹⁵ *Id.*, paras 126, 144

detention under Article 5 of the European Convention on Human Rights. In the first place, the court stated that it was not addressing the issue of *jus cogens* because the applicant had not pressed it in relation to the effect of Article 103 of the Charter.¹⁹⁶ This enabled the court to examine the impact of the Council resolution on the right to be free from arbitrary detention without regard to the peremptory status of that right. The court simply held that the Security Council could, by virtue of Article 103, displace the individual's right to be free from arbitrary detention.¹⁹⁷

The Divisional Court's approach supports the blanket authority of the UN Security Council to authorise States to detain persons in violation of human rights and humanitarian law provisions under the treaties such as the European Convention on Human Rights and the IV Geneva Convention. This approach is neither conducive to the rule of law in general, nor accords with the principle that the Council is not *legibus solutus* (unbound by law).

In fact, the Court of Appeal's decision in the same case, while reaffirming the Divisional Court's approach, actually upholds the view that Chapter VII measures of the Security Council are not bound by law:

"If the Security Council is acting under Chapter VI, the principles of justice and international law are likely to weigh heavily with it in its search for the settlement of an international dispute by peaceful means, but we are not concerned with Chapter VI on this appeal."¹⁹⁸

This statement demonstrates that the Court of Appeal is swimming against the tide of the development of international law. But it also demonstrates that the reasoning based on downplaying the relevance of *jus cogens* as a limitation on the powers of the Security Council will indispensably lead to presenting the powers of the Council as exempted from the operation of legal standards. The peremptory status, which the basic norms of both human rights and humanitarian law share, confirms the convergence of the two fields as the limitation on the powers of the Security Council, on occasions not properly implemented by national courts.

V. Conclusion

This contribution has examined and analysed the basic points of interaction and intersection between human rights law and humanitarian law in the international legal system. These two bodies of law are obviously separate in terms of their content and scope of application. At the same time, there are essential points of overlap and convergence between the two areas. Both areas of law serve the overarching purpose of the protection of the individual. The emergence of norms in both areas is governed by similar requirements, which deviate from the traditional requirements of customary law consisting above all in State practice. Both human rights law and humanitarian law possess peremptory status.

¹⁹⁶ Id., para. 114; similarly, the Court of Appeal in the same case (*R (Al-Jedda) v the Secretary of State of Defence*, [2006] EWCA Civ 327, 29 March 2006, *per* Brooke LJ) asserted that the reason why it was not concerned with the involvement in the case of *jus cogens* was that "in the present case Mr Starmer [the barrister representing the Appellant] did not suggest that the rights conferred by Article 9 of the ICCPR or Article 5 of the ECHR constituted *ius cogens*," para. 68. In other words, the basis for decision was, in the Court of Appeal's judgment, whether the barrister thought that the freedom from arbitrary detention was part of *jus cogens* – apparently not whether this right is actually part of *jus cogens*.

¹⁹⁷ *Al-Jedda* (Divisional Court), paras 94-122

¹⁹⁸ Court of Appeal Decision, para. 71

In terms of their substantive content, human rights law and humanitarian law either lay down identical requirements; or the requirements of one body of law can be used for interpreting and applying the requirements of the other body. But in no circumstances can any of the two bodies of law be invoked as curtailing the level of protection afforded to the individual under the other body of law.

In terms of the legal consequences, human rights law and humanitarian law are also in common in generating the duty of States to prosecute the serious breaches of their norms, and in providing the limitations on institutional powers of the United Nations.

As witnessed in practice, none of these aspects have developed without resistance from Governments, courts or writers. But they have nevertheless developed to reach their present stage, if only because they provide the minimum standard for the protection of the individual, below which there could be no adequate level of protection that would satisfy the legal conscience of the international community, as opposed to that of individual decision-makers.