

The Convergence and Divergence of International Humanitarian Law and International Human Rights Law

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Key Words

International Humanitarian Law

International Human Rights Law

Universality

Applicability

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Lex Specialis

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Customary Law

Declaration of Minimum Humanitarian Standards



Abstract

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In this minithesis, I demonstrate that International Humanitarian Law and International Human Rights Law are two distinct but related fields of law. First, the examination deals with the instance that the aim of both branches of law, the protection of human rights, is common, but the approach to reach this aim is different. In this regard, I show numerous points of divergence of both branches of law which have their origin in the fundamentally different historical developments of International Humanitarian Law and International Human Rights Law. I give the main attention to the application of both sets of law, whereby the contractions and legal gaps of the protection of human rights become apparent. The proposals dealing with the solution of these issues are discussed. I argue that a new legal instrument for a comprehensive and compatible protection of human rights is necessary, especially in times of internal strife. Regarding the question as to whether International Humanitarian Law or International Human Rights Law should apply if both branches are applicable, I take the view to apply the roman principle of law *lex specialis derogat legi generali* in such a way that the more specific rule whenever they have a specific justification for dealing with specific problems is applicable. Both branches of law do not merge to one, but they converge to a harmonious relationship, where they complement each other and provide the highest protection of human rights.

In the second part, I point out the achievements which have already been reached in the convergence of International Humanitarian Law and International Human Rights Law by juridical bodies and the international community of States. It starts with the Geneva Conventions in 1949, which are already influenced by the Declaration of Human Rights in 1948, and ends with the latest reached cross-pollination in the recent past, which is realised in the Roman Statute. I show that the convergence is done by reflection to the common principle such as humanity and human dignity and that numerous human rights have found their way into the humanitarian law instruments.

Finally, I suggest establishing a comprehensive codification of the law of conflict and crisis. Such a codification could combine all types of conflicts under one roof with a new systematic

order but without providing new substantive regulations. But the side effect of such clarity regarding the relationship between the different rules for the various types of conflicts would be the avoidance of loopholes and contradictions in the protection of human rights.

December 20005



Declaration

I declare that *The Convergence and Divergence of International Humanitarian Law and International Human Rights Law* is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete reference.

Clemens Loos

December 2005



Signed:

A rectangular box containing a handwritten signature in blue ink. The signature is cursive and reads "Clemens Loos".

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The Convergence and Divergence of International Humanitarian Law and International Human Rights Law

*hominum causa omne jus constitutum est*¹
Cicero

I. Introduction

During the Kosovo War in 1999, officials of the NATO used the term “collateral damage” to describe misrouted attacks that killed civilians.² The public saw this term as a military euphemism,³ which led to the term being voted the “taboo word of the year 1999” in Germany.⁴ However, from a humanitarian law perspective, the term “collateral damage” is used by several writers on international law as a technical term without any ethical qualification. The Additional Protocol I resorts to the expression “incidental loss of civilian life”,⁵ which has the same meaning.

The clash of these two different interpretations, that of public opinion and that of the professionals, finds its roots in the violation of the public’s concept of morality which is influenced by their understanding of current human rights. This clash also demonstrates the differences between International Humanitarian Law (IHL) and International Human Rights Law (IHRL).

This paper examines the points of divergence and of convergence between IHL and IHRL. In this inquiry, IHL is understood as that part of public international law which finds its

¹ all law is created for the benefit of human beings.

² Jane Perlez, “Conflict in the Balkans: The Overview; NATO Authorizes Bomb Strikes; Primakov, in Air, Skips U.S. Visit,” *The New York Times*, 24 March 1999, Section A; 1.

³ John M. Broder, “Crisis in the Balkans: White House Memo; From Baptism of Fire to Kosovo: Clinton as Commander in Chief,” *The New York Times*, 8 April 1999, Section A, 16.

⁴ Unwort des Jahres, “Unwort des Jahres 1999 – Kollateralschaden,” <<http://www.unwortdesjahres.org>> (10 December 2005).

⁵ See Article 51(5)(b) of the Additional Protocol I.

inspirations in human ideals, and which focuses on the protection of the individual in times of war.⁶ In this sense IHL covers the so-called “law of The Hague” as well as the so-called “law of Geneva”. The former relates to the rules that deal with restrictions and prohibitions on the means and methods of warfare;⁷ the latter contains provisions regarding the protection of victims of armed conflict and those who no longer take part in the hostilities.⁸ By comparison, IHRL consists of a set of international rules, on the basis of which individuals and groups can expect and claim certain behaviour or benefits from governments.⁹

The fundamentally different origins and historical developments of IHL and IHRL mean that there are significant areas of divergence between the two bodies of law.¹⁰ But there are also several similarities, such as the intention to protect human life and dignity.¹¹ More importantly, both sets of rules contain provisions for the treatment and protection of human beings based on considerations of humanity.¹² However, despite this common aim, their differing genesis creates loopholes and contradictions that hinder the entire protection of human rights. The international community of states, international law bodies and scholars have worked to overcome some of these issues, which has resulted in a convergence to some extent of the two systems of law. The purpose of the present inquiry is to demonstrate that the two systems are distinct but related.

This paper uses comparative analysis to highlight the points of divergence and convergence in IHL and IHRL. The analysis is carried out by micro comparison, where individual provisions and their effects on IHL and IHRL, will be compared, as well as a macro comparison, where IHL and IHRL will be focused on as a whole. In most instances, the comparisons begin with IHL, because it is the older field of law and is narrower in scope

⁶ Jean S. Pictet, “International Humanitarian Law: Definition,” in *International Dimensions of Humanitarian Law*, ed. UNESCO (Dordrecht: M. Nijhoff Publishers, 1988), xix.

⁷ Jean S. Pictet, “International Humanitarian Law: Definition,” in *International Dimensions of Humanitarian Law*, ed. UNESCO, xx.

⁸ Jean S. Pictet, “International Humanitarian Law: Definition,” in *International Dimensions of Humanitarian Law*, ed. UNESCO, xix.

⁹ International Committee of the Red Cross, “What is the difference between humanitarian law and human rights law?,” October 31, 2002.

[http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/57JR8L/\\$FILE/IHL_and_IHRL.pdf?OpenElement](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/57JR8L/$FILE/IHL_and_IHRL.pdf?OpenElement) > (10 December 2005).

¹⁰ Louise Doswald-Beck and Sylvain Vit , “International Humanitarian Law and Human Rights Law.” *International Review of the Red Cross*, 293 (1993) : 94-119, 94.

¹¹ Theodor Meron, “Convergence of International Humanitarian Law and Human Rights Law,” in *Human rights and Humanitarian Law*, 97-105, ed. Daniel Warner (The Hague: M. Nijhoff Publishers, 1997), 100.

¹² Karl Josef Bartsch, “Human Rights and Humanitarian Law” in Vol. II of *Encyclopaedia of Public International Law*, 1995 ed.

The thesis starts with an abridged history of IHL and IHRL. This chapter explains why the two branches of law diverged at the beginning of their existence and the impact of this divergence on some underlying philosophical criteria. Afterwards, the study is subdivided into two parts. The first part deals with the points of divergence, the second with the process of convergence. The scope of the thesis thereby allows only the consideration of questions of substance, not of supervision or implementation. The part on divergence considers the universal character of IHL and IHRL and discusses three legal principles in the context of each body of law. However, its main focus is the different approaches to the application of both set of rules. After a theoretical analysis, this point is demonstrated by two practical examples: internal strife and the currently important topic of international terrorism. The final topic illuminated under the chapter of divergence is the question of amnesty. At the end of each topic on divergence, various proposals of academics are designed to pave the way for the process of convergence are discussed. From then onwards, the thesis shows the points of convergence which have already been reached between the two legal branches. It starts with the 1949 Geneva Conventions, which were influenced by the 1948 Universal Declaration of Human Rights, and ends with the cross-pollination of the recent Roman Statute.



II. Historical and Philosophical Abridgement of IHL and IHRL

A. Historical Abridgement of International Humanitarian Law

The hour of birth of IHL was in the middle of the 19th Century. After the battle of Solferino in 1859 in northern Italy where 40 000 soldiers died, Henry Dunant, affected by the harm he saw, wrote down his experiences in the book “A Memory of Solferino”.¹³ His idea was to found national aid societies which would attend to the medical treatment of wounded soldiers on the field, and to establish a treaty for states to enable the work of the national aid societies and guarantee better treatment for the wounded.¹⁴ This project led to the establishment of the International Committee of the Red Cross (ICRC) and to the first 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.¹⁵ In 1929, the Convention on the Amelioration of the Condition of Wounded and Sick in Armed Forces in

¹³ Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, 3rd ed. (Geneva: ICRC, 2001), 26.

¹⁴ Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, 26.

the Field and on Prisoners of War was adopted.¹⁶ After the Second World War, the four Geneva Conventions were established, and these took the protection of civilians into consideration for the first time.¹⁷ All these treaties have the common aim of protecting non-combatants and those who no longer take part in the hostilities. These instruments are named the “law of Geneva” after the location where the Conventions were deliberated and adopted.¹⁸

At the same time that Henry Dunant wrote his “A Memory of Solferino” the President of the USA, Abraham Lincoln, charged Francis Lieber to write instructions for the combatants of the American civil war in order to limit the means and methods of land warfare.¹⁹ This written text had only internal character, but it influenced the later 1899 Convention with Respect to the Law and Customs of War and Land.²⁰ This was followed by other Conventions in 1907 which placed further restrictions and prohibitions on the means and methods of warfare.²¹

Prior to these two Conventions, the first International Humanitarian Law instrument, the Declaration on Renouncing the Use of Explosive Projectiles Under 400 Grammes Weight, was adopted in St. Petersburg in 1868.²² Another remarkable treaty which also deals with the prohibition of a specific type of weapon is the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, established in 1925.²³ Numerous other treaties banning specific weapons were established, and they are still today a habitual approach in the law of war, for example, the 1995 Protocol

¹⁵ Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, 27.

¹⁶ Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, 27.

¹⁷ Theodor Meron, “The Humanization of Humanitarian Law.” *American Journal of International Law* 94 (2000) : 239-278, 245.

¹⁸ Asbjorn Eide, “The Law of War and Human Rights – Differences and Convergences,” in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, 675-697, ed. Christophe Swinarski (Geneva: M. Nijhoff Publishers, 1984), 677.

¹⁹ Laura Lopez, “Uncivil Wars: The Challenge of Applying international Humanitarian Law to Internal Armed Conflict.” *New York University Law Review* 69 (1994) : 916-962, 920.

²⁰ Laura Lopez, “Uncivil Wars: The Challenge of Applying international Humanitarian Law to Internal Armed Conflict.” 920.

²¹ Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, 27. Such Conventions are, e.g., Convention (III) relative to the Opening of Hostilities; Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land; Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land; Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines; Convention (IX) concerning Bombardment by Naval Forces in Time of War; Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention; Convention (XI) relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War; Convention (XII) relative to the Creation of an International Prize Court and Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War.

²² Francois Bugnion, “The Role of the Red Cross in the Development of International Humanitarian Law: The International Committee of the Red Cross and the Development of International Humanitarian Law.” *Chicago Journal of International Law* 5 (2004) : 191-215, 199.

²³ Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, 24.

on Blinding Laser Weapons (Protocol IV) to the Convention on Conventional Weapons and the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.²⁴ Because the 1899 and 1907 Hague Conventions are still the mainstay of the law governing the conduct of hostilities, it has become customary to refer to the "law of The Hague" to describe the set of rules relating to the conduct of hostilities.²⁵

The International Court of Justice (ICJ), in its decision on the *Legality of the Threat or Use of Nuclear Weapons*, held that both sets of rules, the law of Geneva and the law of The Hague, are combined in the 1977 Additional Protocols of the 1949 Geneva Conventions in IHL.²⁶

B. Historical Abridgement of International Human Rights Law

By comparison, the development of human rights was a product of the Age of Enlightenment, namely by John Lock, Charles Montesquieu, and Jean Jacques Rousseau.²⁷ Compared to IHL, which started out as international law,²⁸ the human rights law came into force on the domestic level, since its primary function is to prevent the State interfering in the privacy of individuals.²⁹ The first sets of human rights were laid down in the Virginia Bill of Rights in 1776, and thirteen years later in the French Declaration of the Rights of Man and the Citizen.³⁰

Furthermore, the internationalisation of human rights was not influenced by one single man but was rather the result of the experience of the atrocities of World War II under which the whole community of states suffered.³¹ The Charter of the United Nations of 1945 set

²⁴ Francois Bugnion, "The Role of the Red Cross in the Development of International Humanitarian Law: The International Committee of the Red Cross and the Development of International Humanitarian Law." 199.

²⁵ Francois Bugnion, "The Role of the Red Cross in the Development of International Humanitarian Law: The International Committee of the Red Cross and the Development of International Humanitarian Law." 200.

²⁶ *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion of 8 July 1996, para. 75.

²⁷ Louise Doswald-Beck and Sylvain Vit , "International Humanitarian Law and Human Rights Law." 102.

²⁸ Asbjorn Eide, "The Law of War and Human Rights – Differences and Convergences," in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, 676.

²⁹ Hans-Peter Gasser, "International Humanitarian Law and Human Rights Law in Non-international Armed Conflict: Joint venture or Mutual Exclusion?" *German Yearbook of International Law* 45 (2002) : 149-162, 150.

³⁰ Robert Kolb, "The relationship between international humanitarian law and human rights law: A brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions." *International Review of the Red Cross* 324 (1998) : 409-419, 410.

³¹ Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge: Cambridge University Press, 2002), 194.

down the aim to protect international human rights,³² and in 1948 the Universal Declaration of Human Rights was proclaimed.³³ The importance of the Universal Declaration of Human Rights is based on the fact that it is the first international definition of human rights.³⁴ However, it is based on a resolution³⁵ of the General Assembly and therefore it has no binding effect.³⁶ Not until the two 1966 International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, did IHRL gain a binding character.³⁷ Several other treaties dealing with the special protection of specific single human rights or of a particular category of people have followed, including treaties outlawing genocide, torture, and racial discrimination, and the protection of the rights of women, children, refugees, and migrant workers.³⁸

Even though both basic legal instruments of IHL and IHRL, the Geneva Conventions and the Universal Declaration of Human Rights, were elaborated at the same time, no links between the two processes and no mutual influence are apparent.³⁹

C. Remarks on philosophical contrasts between International Humanitarian Law and International Human Rights Law

From the comparison of the historical development of both branches of law some underlying philosophical differences become apparent.

As already shown, humanitarian rights law originated from traumatic empirical encounters. A bundle of legal instruments try to enumerate violations exhaustively to ensure that they never happen again. In Kant's terminology, humanitarian law consists of *a posteriori* assertions, gained though painful and dearly-bought experiences.⁴⁰ In one sense they are based on the empirical evidence *homo homini lupus*⁴¹ as described by Hobbes in the light of

³² Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003), 521, 532.

³³ Ian Brownlie, *Principles of Public International Law*, 534.

³⁴ Louise Doswald-Beck and Sylvain Vit , "International Humanitarian Law and Human Rights Law." 103.

³⁵ General Assembly resolution 217 A (III) of 10 December 1948.

³⁶ Ian Brownlie, *Principles of Public International Law*, 14, 535, 539.

³⁷ Ian Brownlie, *Principles of Public International Law*, 12, 536.

³⁸ Ian Brownlie, *Principles of Public International Law*, 12, 536.

³⁹ Hans-Peter Gasser, "International Humanitarian Law and Human Rights Law in Non-international Armed Conflict: Joint venture or Mutual Exclusion?" 152-153.

⁴⁰ Anton H gli and Poul L bcke, eds., *Philosophielexikon*, (Hamburg: Rowohlt, 1991), s. v. "Kant".

⁴¹ The phrase *homo homini lupus* used Hobbes in its work *On the Citizen* published in 1642, see Thomas Hobbes, *On the Citizen*, trans. and ed. Richard Tuck (Cambridge: Cambridge University Press, 2000), 3. Nine years later, he discussed this topic in the light of the English Civil War (1642–1649) more detailed on the similar and also well known phrase *bellum omnium contra omne* (...]war as is of every man against every man)

his impressions of the English civil war and those trying to make the best out of it. In other words, the concept of IHL is realistic enough to take the cruelties of human beings into account. Therefore, it raises the question of whether there is a loophole in the law, in order to make the next better approximation. This is done by an inductive method; as for example, the means and methods of warfare are limited by specific treaties which ban single types of weapons.⁴² Since the birth of IHL until the present day this has given rise to a dense network of legal instruments protecting human beings in times of war.

Human rights, on the other hand, originate from a school of thought which roots in certain insights or axioms about human nature or human dignity which are considered self-evident without further necessity of justification.⁴³ Starting from such a foundation, human rights are developed as with a deductive science. This is also reflected in the abstract wording and the broad concept of human rights instruments, which cover a bunch of rights.⁴⁴ In epistemological terms, human rights are *a priori* assertions in the sense of Kant, carrying a high degree of evidence and necessity and independent of empirical evidence and contingencies.⁴⁵

D. Conclusion



The philosophical differences between IHL and IHRL, namely inductive versus deductive and the antagonism *a priori* versus *a posteriori*, root in the different historical origins of each branch of law. These fundamental differences continue to shine up to the present day through several legal principles, discussed more detailed in the next chapter in more detail below.

However, despite the different approaches of IHL and IHRL, both set of rules are answers to the suffering of human beings in war and other kind of suppression, and attempts to condemn and reduce such behaviour. Therefore, they have in common the protection of human dignity. This common aim results in several convergences between the fields of law, which will also be discussed below.

of its *Leviathan*, see Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1991), x, xxxix, 90.

⁴² See in this minithesis at 4.

⁴³ Louise Doswald-Beck and Sylvain Vité, "International Humanitarian Law and Human Rights Law." 101.

⁴⁴ Louise Doswald-Beck and Sylvain Vité, "International Humanitarian Law and Human Rights Law." 101.

⁴⁵ Anton Hügli and Poul Lübcke, eds., *Philosophielexikon*, s. v. "Kant".

III. Points of Divergence of International Humanitarian Law and International Human Rights Law

A. Principles of Law in International Human Rights Law and International Humanitarian Law

After the historical abridgements of IHL and IHRL, the examination of principles of both branches of law is a suitable starting-point for further detailed inquiries of the divergence and convergence of both legal bodies. The distinct historical origin and development of international human rights and humanitarian rules tends to result in different principles, as demonstrated just below.

1. Principle of Reciprocity

Reciprocity can be understood as a general principle which refers to the independence of obligations assumed by participants within the schemes created by a legal system.⁴⁶ It is an underlying principle of international law which is also predominant in IHL.⁴⁷ This is based in the interstate origin, because IHL is established as international law as just mentioned above.⁴⁸ Because of the lack of an organ of enforcement in international law, reciprocity is an essential instrument for the compliance of IHL.⁴⁹ This is in line with the fact that the level of centralisation in IHL is less developed. The state-centric, reciprocity-based origin of IHL also leads to the fact that the law of war traditionally protected persons on the side of the enemy, but it did not protect persons from their own government and authorities.⁵⁰ This is laid down in Article 4 of the Geneva Convention IV, which rules that the guarantees of the Fourth Geneva Covenant only apply to persons who find themselves, in the event of a conflict or occupation, in the hands of a belligerent or occupying power of which they are not nationals.⁵¹ In addition, the principle of reciprocity is also incorporated in common Article 2(3) of the Geneva Conventions and Article 96(2) of the Additional Protocol I, whereby

⁴⁶ René Provost, *International Human Rights and Humanitarian Law* (Cambridge: Cambridge University Press, 2002), 121.

⁴⁷ René Provost, *International Human Rights and Humanitarian Law*, 121.

⁴⁸ Georges Abi-Saab, "International Criminal Tribunals and the Development of International Humanitarian and Human Rights Law," in *Liber Amicorum Judge Mohammed Bedjaoui*, 649-658, ed. Emile Yakpo (The Hague: Kluwer Law International, 1999), 649, 650.

⁴⁹ Hanspeter Neuhold, Waldemar Hummer and Christoph Schreuer, eds., *Österreichisches Handbuch des Völkerrechts*, 4th ed. (Wien: Manz, 2004), para. 2904-2905.

⁵⁰ Theodor Meron, "The Humanization of Humanitarian Law." 256.

⁵¹ Theodor Meron, "The Humanization of Humanitarian Law." 257.

conventional norms govern belligerent relations among Contracting Parties but not between a party and a State not party to the Conventions.⁵² The principle of reciprocity remains relevant to conflicts in the present day, as is shown, for example, by the mutual deterrence regarding the treatment of captured combatants.⁵³

Beside the general applicability of IHL, the element of reciprocity is also partly relevant to the applicability of these norms to specific classes of individuals and groups, which can be seen in Article 4(A)(2) of the Geneva Convention III and Article 42 of the Additional Protocol I.⁵⁴ Application of IHL between regular forces and irregular combatants in an international armed conflict relies on direct reciprocity, whereas rules protecting non-combatants and combatants who are part of the regular forces of two States party to the Geneva Conventions apply regardless of reciprocity.⁵⁵

Irrespective of the fact that the principle of reciprocity is well-established in IHL, this principle is not absolute. For example, the guarantees of common Article 3 of the Geneva Conventions, applicable to non-international conflicts, have to be adhered to by all Parties, independent of the conduct of enemy combatants.⁵⁶ The same is true for Additional Protocol II, which between government forces and dissident armed forces requires pursuant to Article 1(1) of the Additional Protocol II that the latter be capable of implementing the rules set out in the Additional Protocol.⁵⁷ Moreover, such rules and principles of IHL which have the status of customary law or *ius cogens* are not subject to the principle of reciprocity.⁵⁸

The principle of reciprocity is alien to IHRL. Obligations under IHRL pertaining to substantive norms are absolute, which means unconditional and *erga omnes*.⁵⁹ This has its origin in the value of human dignity which is inherent to every human being and is justified by mere existence as such.⁶⁰ Hence, it becomes clear that the unconditional *erga omnes* provisions which protect the fundamental human rights of individuals cannot be subject to reciprocity.⁶¹

⁵² René Provost, *International Human Rights and Humanitarian Law*, 153.

⁵³ Theodor Meron, "The Humanization of Humanitarian Law." 250.

⁵⁴ René Provost, *International Human Rights and Humanitarian Law*, 158.

⁵⁵ René Provost, *International Human Rights and Humanitarian Law*, 158-159.

⁵⁶ René Provost, *International Human Rights and Humanitarian Law*, 156.

⁵⁷ René Provost, *International Human Rights and Humanitarian Law*, 157.

⁵⁸ Hilaire McCoubrey, *International Humanitarian Law – The Regulation of Armed Conflicts* (Aldershot: Dartmouth 1990), XXX.

⁵⁹ René Provost, *International Human Rights and Humanitarian Law*, 152.

⁶⁰ Louise Doswald-Beck and Sylvain Vité, "International Humanitarian Law and Human Rights Law." 101.

⁶¹ René Provost, *International Human Rights and Humanitarian Law*, 171.

In comparison to the State-centric system of IHL, the human rights system directly addresses the responsibility of governments *vis-à-vis* populations over which they exercise power, authority, or jurisdiction, largely regardless of nationality.⁶² Also the internationalisation of human rights law does not alter this situation. The accountability of a State which is party to a human rights treaty toward the other State Parties which is clearly visible in the right to state-complaint is reciprocal *prima facie* only.⁶³ But this does not change the original basis of the “obligation to respect” since this obligation is owed to the relationship to the individual and remains a unilateral one.⁶⁴ Furthermore, human rights law has achieved a high level of systematics, as the State is bound to a normative public order system which is not conditioned on the performance of any parallel obligation by other States.⁶⁵ Finally, human rights are more centralised than IHL, since monitoring bodies, such as constitutional courts on the domestic level and various human rights committees on the international level, have been established to observe adherence to them.⁶⁶

In conclusion, although the principle of reciprocity remains relevant in IHL, it is less important than it once was.⁶⁷ From the conclusion of the Prisoners of War Convention in 1929 to the adoption of Additional Protocol I in 1977, the field of legitimate reprisals shrank dramatically.⁶⁸ In Additional Protocol I, it finally results in the prohibition of reprisals against the civilian population, individual civilians and civilian objects, cultural objects, objects indispensable to the survival of the civilian population, the natural environment, and works or installations containing dangerous forces.⁶⁹ With regard to non-international conflicts, the application of IHL follows the same pattern as that of human rights.⁷⁰ However, in comparison to IHRL, the role of reciprocity still predominates in IHL. Instead of a system of synallagmatic obligations such as in IHL, IHRL presents a legal system with *erga omnes* obligations, with the underlying value of human dignity. Therefore it can be said that the principle of reciprocity is still an aspect which diverts IHL and IHRL even if the level of

⁶² Theodor Meron, “The Humanization of Humanitarian Law.” 256.

⁶³ Peter Kooijmans, “In the Shadowland between Civil War and Civil Strife: some Reflections on the Standard-setting Process,” in *Humanitarian law of armed conflict-challenges ahead: Essays in honour of Frits Kalshoven*, 225-247, eds., Astrid J.M. Delissen and Gerard J. Tanja (Dordrecht: M. Nijhoff Publishers, 1991), 235.

⁶⁴ Peter Kooijmans, “In the Shadowland between Civil War and Civil Strife: some Reflections on the Standard-setting Process,” in *Humanitarian law of armed conflict-challenges ahead: Essays in honour of Frits Kalshoven*, 236.

⁶⁵ René Provost, *International Human Rights and Humanitarian Law*, 171.

⁶⁶ René Provost, *International Human Rights and Humanitarian Law*, 123.

⁶⁷ René Provost, *International Human Rights and Humanitarian Law*, 172.

⁶⁸ Theodor Meron, “The Humanization of Humanitarian Law.” 249.

⁶⁹ See Article 51-56 of the Additional Protocol I.

⁷⁰ René Provost, *International Human Rights and Humanitarian Law*, 161.

polarity has diminished with the evolution of IHL away from reciprocity to an unconditional system of obligations.

2. Principle of Distinction⁷¹

Jean-Jacques Rousseau as early as 1762, laid down in his Social Contract the fundamentals for the principle of distinction when he wrote:

“War then is a relation, not between man and man, but between State and State, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers; [...] The object of the war being the destruction of the hostile State, the other side has a right to kill its defenders, while they are bearing arms; but as soon as they lay them down and surrender, they cease to be enemies or instruments of the enemy, and become once more merely men, whose life no one has any right to take.”⁷²

In these words it becomes clear that it is allowed to kill combatants during a war as long as they fulfil the criteria of combatants. Men are protected depending on their status - as long as or as soon as they can be distinguished from soldiers they receive protection. This principle is today incorporated and specified in Article 41, 50 of the Additional Protocol I, common Article 3 of the Geneva Conventions and stated by the ICJ in its Advisory Opinion on the *Nuclear Weapons* case where it says that one of the cardinal principles of IHL “is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants”.⁷³ It is also apparent in the different scope of personal application within the four Geneva Conventions. As is stated in Article 4 (4) of the Geneva Convention IV, combatants are protected by the first three Geneva Conventions, but not by the Fourth Geneva Convention.⁷⁴ The Fourth Convention grants the highest protection of the Geneva Conventions, but only for civilians who have fallen into the hands of the enemy. The principle of distinction is clearly demonstrated in Article 48 of the Additional Protocol I, which states that the war parties should distinguish between combatants and

⁷¹ Sometimes this principle is also called “principle of discrimination,” see, e.g., David S. Koller, “The Moral Imperative: Toward a Human Rights-Based Law of War.” *Harvard International Law Journal* 46 (2005) : 231-264, 231. This seems to be confusing, because IHL also knows the principle of non-discrimination, e.g., common Article 3 of the Geneva Conventions, but it is not the opposite of the principle of discrimination. Therefore, the term “principle of distinction” will be used in this thesis.

⁷² Jean Jacques Rousseau, *The Social Contract – Discourses*, trans. G. D. H. Cole (London: The Aldine Press, 1913), 8-9.

⁷³ *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion of 8 July 1996, para. 78.

⁷⁴ Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, 52.

civilians, and requires that operations be directed only against military objects. Article 51 (4) of the Additional Protocol I provides that indiscriminate attacks are prohibited.

The principle is also illustrated in Article 50 of the Additional Protocol I which defines civilians as “as any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) of the Geneva Convention III and Article 43 of the Additional Protocol I.” Within the definition of prisoner of war, this Article enumerates the conditions for combatants; among others, the fixed distinctive sign and the obligation to carry the arms openly in order to be easily distinguished from non-combatants. The different level of protection is further evidenced by Article 41 of the Additional Protocol I and Article 51 of the Additional Protocol I which prohibit the attack of civilians while avoiding such a clear rule for combatants. Civilians alone are afforded certain other legal protections, for instance regarding health and property.⁷⁵

The principle of distinction has also been used to generate other specific rules limiting the methods of warfare, such as the prohibition on starving civilians;⁷⁶ on the use of weapons that cannot be aimed at the intended objective, and the use of any weapons in an indiscriminate manner, such as anti-personnel land mines or the firebombing of a civilian population interspersed with a military presence.⁷⁷

In comparison, the principle of distinction is unknown to human rights.⁷⁸ Human rights law is based on the opposite principle that is the principle of equality. This principle was mentioned as early as the Stoic school, although it was at that stage dependent on class. It was with the constitution written by the natural philosophers during the Age of Enlightenment that the principle of equality became established in the sense in which it is still known today.⁷⁹ Today, the principle of equality is apparent from the use of “everyone/no one” in human rights provisions to show that all human beings are holders of the right.⁸⁰ In such provision, distinctions between the subjects of rights are totally unknown. Human rights may only be limited in order to guarantee other human rights.⁸¹

⁷⁵ See Article 51 (5)(b) and Article 52 of the Additional Protocol I.

⁷⁶ See Article 54 of the Additional Protocol I.

⁷⁷ David S. Koller, “The Moral Imperative: Toward a Human Rights-Based Law of War.” 238.

⁷⁸ David S. Koller, “The Moral Imperative: Toward a Human Rights-Based Law of War.” 259.

⁷⁹ See, e.g., Article 1 of the French “Declaration of the Rights of Man and of the Citizen of 1789.” “Men are born and remain free and equal in rights”.

⁸⁰ See, e.g., Article 2 – 6, 8, 10-15 and 17 – 29 of the Universal Declaration of Human Rights; Article 9 – 18, 21, 23 – 27, 29 30 and 32 – 35 of the Constitution of South Africa.

⁸¹ This is done in accordance with the legal principle of “praktische konkordanz”, which means the mutual balance of the values in conflict.

IHL and IHRL's differing approaches to the principle of distinction can be demonstrated by the example of the human right to life. The protection of the right to life is in apparent tension with the IHL principles of discrimination.⁸² The right of life is granted to everybody without any distinction and only limited pursuant to Article 29 (2) of the Universal Declaration of Human Rights for the purpose of securing respect for the human right or freedom of others. In contrast, IHL postulates, as discussed above, that human beings are allowed to be killed during warfare, a *prima facie* violation of the human rights of combatants as well as of civilians killed during war.⁸³ Only the principle of necessity, laid down in Article 35 of the Additional Protocol I, limits the killings, but this is obviously no "other human right" which could justify the killing in terms of human rights. Consequently, the distinction between combatants and civilians does not seem to be justified by human rights concerns.⁸⁴

In conclusion, the differing attitudes of IHL and IHRL to the principle of distinction evidence that IHL and IHRL are based on different fundamentals. It is one of the most significant points of divergence between the two bodies of law, and is especially obvious when one compares the approach of each to the central issue of the right to life.

3. Principle of Proportionality

The principle of proportionality was part of the Christian theory of the just war during the Middle Ages and, together with secular influences, formed the basis of the secular just war theory of writers such as Grotius and Vattel.⁸⁵ In these purely secular theories of the just war, proportionality was still a component of their analyses, but in the *jus ad bellum* sense of the word.⁸⁶ Nevertheless, Vattel was the first who pointed out that in his view moderation was an essential component of the just war.⁸⁷

The doctrine of proportionality was first limited to combatants, since during the nineteenth century war was conducted between professional armies, and the civilian population was not involved to any great extent.⁸⁸ In the Preamble of the 1899 Hague Convention (II), the

⁸² David S. Koller, "The Moral Imperative: Toward a Human Rights-Based Law of War." 247.

⁸³ David S. Koller, "The Moral Imperative: Toward a Human Rights-Based Law of War." 247.

⁸⁴ David S. Koller, "The Moral Imperative: Toward a Human Rights-Based Law of War." 247.

⁸⁵ Judith G. Gardam, "Proportionality and Force in International Law." *The American Journal of International Law* 77 (1983) : 391-413, 394.

⁸⁶ Hugo Grotius, *De Jure Belli ac Pacis Libri tres*, trans. Francis W. Kelsey (New York: Hein, 1925), V-VI; see also James T. Johnson, *Ideology, Reason and the Limitation of War* (Princeton: Princeton University Press, 1975), 214.

⁸⁷ Emer de Vattel, *The Law of Nations or the Principle of Natural Law*, trans. Charles G. Fenwick (Washington: Carnegie Institution of Washington, 1916), 247.

⁸⁸ Alexander P. Higgins, *Non-combatants and the War* (London: Oxford University Press, 1914), 15.

principle of proportionality is mentioned when it says: “the desire to diminish the evils of war so far as military necessities permit, are destined to serve as general rules of conduct for belligerents in their relations with each other and with populations.”⁸⁹ The idea of proportionality in armed conflict is given a binding character for the first time in Article 22 of the 1899 Hague Convention, which states that “The right of belligerents to adopt means of injuring the enemy is not unlimited.”

With the increase of affected civilians during First World War and the Spanish Civil War, however, proportionality in relation to civilian losses assumed greater significance and became an integral part of the rules implementing the norm of non-combatant immunity.⁹⁰ Its outcome has been that the concept of proportionality has assumed a pivotal role in determining the extent to which civilians are entitled to be protected from the collateral effects of armed conflict.⁹¹ It becomes evident that the principle of proportionality is related to the principle of distinction. In choosing the target pursuant to the principle of distinction the combatant automatically respects the principle of proportionality. *Vice versa*, one could say the principle of proportionality is disobeyed by violating the wrong target. The act of a combatant could have been proportional and therefore justified, if he or she would have chosen a less protected target, for e.g. another combatant instead of a civilian.

The principle of proportionality features in the detailed regulations set out in the Additional Protocol I. The provisions of the Additional Protocol I protect both combatants and non-combatants from disproportionate attacks, although most of the focus in the *travaux préparatoires* and by commentators has centred on the rule in relation to civilian losses.⁹²

The principle is contained in detail in several provisions of Additional Protocol I. Article 35 (1) of the Additional Protocol I specifies the previously noted paragraph of the preamble of the 1899 Hague Convention by stating that the right of Parties to choose means and methods of warfare is not unlimited. This is an abstract principle that encompasses the idea of limiting the infliction of casualties and damage to what is proportionate to the achievement of the

⁸⁹ International Committee of the Red Cross, “Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899,” < <http://www.icrc.org/ihl.nsf/FULL/150?OpenDocument> > (10 December 2005).

⁹⁰ See, e.g., Frits Kalshoven, *The Law of Warfare* (Leiden: Sijthoff, 1973) 27; Esbjörn Rosenblad, *International Humanitarian Law of Armed Conflict: some Aspects of the Principle of Distinction and Related Problems* (Geneva: Henry Dunant Institute, 1979), 53.

⁹¹ Judith G. Gardam, “Proportionality and Force in International Law.” 398.

⁹² Judith G. Gardam, “Proportionality and Force in International Law.” 406; see Conf. Doc. CDDH/III/SR.31, para. 42, in *14 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Official Records 305 (1978).

military goal.⁹³ Paragraph 2 is also based on the doctrine of proportionality and prohibits the employment of "weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."⁹⁴ The principle of proportionality is enshrined in more detail in Article 51 (5)(b), 57 (a)(iii) and (b) of the Additional Protocol I. Pursuant to Article 51(5)(b) of the Additional Protocol I, military planners must consider the principle of proportionality in the selection of the target and in assessing the means and method of that attack.⁹⁵ Article 57 (a)(iii) and (b) of the Additional Protocol I address the precautions which military planners have to take into consideration to meet the demand of proportionality before launching the attack.⁹⁶

The structure of Article 51(5)(b) of the Additional Protocol I shows that the principle of proportionality is a subset of the principle of distinction as it includes the violation of the principle of proportionality under the cases of indiscriminate.

After having reviewed the origin and meaning of the doctrine of proportionality in IHL, it is necessary to consider whether this principle is also part of IHRL and if so, in what way.

The European Convention on Human Rights (ECHR), in its Article 2(2), incorporates the principle of proportionality. This provision allows killing "when it results from the use of force which is no more than absolutely necessary". The European Court of Human Rights (ECtHR) emphasised in its judgment *Ergi v. Turkey* that a State's responsibility under Article 2 (2) of the ECHR is attached when the State has neglected to "take all feasible precaution in the choice of means and methods of security operation mounted against an opposing group with a view to avoiding or, at least, minimizing incidental loss of civilian life."⁹⁷ The Court has also stated in numerous judgments that it does not accept the excuses of States that their organs were involved in violent armed clashes or that the scale of the incidence of killings justified their actions.⁹⁸ Article 2(2) of the ECHR and the related ECtHR judgments show that IHRL includes a need for individual rights and their limits to be brought into due relation and to comply with the principle of proportionality.⁹⁹

⁹³ Michael Bothe, Karl Josef, Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts - Commentary on the two 1977 Protocols additional to the Geneva Conventions of 1949* (The Hague: M. Nijhoff Publishers, 1982), 195.

⁹⁴ Judith G. Gardam, "Proportionality and Force in International Law." 406.

⁹⁵ Judith G. Gardam, "Proportionality and Force in International Law." 407.

⁹⁶ Judith G. Gardam, "Proportionality and Force in International Law." 407.

⁹⁷ *Ergi v. Turkey*, Eur. Ct. HR, Judgment of 28 July 1998, Reports 1998-IV, paras 16, 98.

⁹⁸ *Kaya v. Turkey*, Eur. Ct. HR, Judgment of 19 February 1989, Reports 1998-I, paras. 297, 91; *Ergi v. Turkey*, Eur. Ct. HR, Judgment of 28 July 1998, Reports 1998-IV, paras 85, 98.

⁹⁹ Hans-Joachim Heintze, "The European Court of Human Rights and the Implementation of Human rights Standards During Armed Conflicts." *German Yearbook of International Law* 45 (2002) : 60-77, 73.

The principle of proportionality deserves especial attention in times of emergency when the danger of a disproportionate infringement of rights is particularly high.¹⁰⁰ At such times, rights of the individual are opposed against the “life of the nation”.¹⁰¹ The necessity of a mutual and proportional balance in the exercise of individual rights is also enshrined in Article 29 (2) of the Universal Declaration of Human Rights.

As it has been shown that proportionality is a principle of both IHL and IHRL, it is necessary to consider the relationship between IHL and IHRL with respect to this principle and whether this is a matter of convergence or divergence.

In the eyes of Professor Heintze, IHL is of significant relevance to the realisation of human rights.¹⁰² He points out that the ECtHR in the *Ergi* decision made indirect recourse to IHL when it commented on what constitutes a legitimate target of attack and whether the predicted risk for the civilian population is a legitimate commensurate measure against the military advantage.¹⁰³ Furthermore, he observes that the content of Article 2(2) of the ECHR, namely that the loss of life is not in itself seen as a violation of the right of life, finds an analogy in IHL, where it is stipulated that the killing of a combatant in an international armed conflict is not to be characterised as a violation of the right of life.¹⁰⁴ Common to both cases is the requirement that the use of force must be proportionate. Pursuant to Article 2(2) of the ECHR, the force must be absolutely necessary; pursuant to Article 35 of the Additional Protocol I the means and method of war are to be decided with regard to necessity and proportionality.¹⁰⁵ For Heintze, the principle of proportionality and the referring decisions of the ECtHR are evidence for the fusion of IHL and IHRL.¹⁰⁶

Opponents of this interpretation argue that the principle of proportionality in each body of law is realised differently.¹⁰⁷ Although the method used to balance proportionality is identical, the values with which the human rights have to be in proportion are different. The

¹⁰⁰ Jost Delbrück, “Proportionality” in Vol. III of *Encyclopaedia of Public International Law*, ed. 1997.

¹⁰¹ See Article 4 of the International Covenant on Civil and Political Rights and Article 15 ECHR.

¹⁰² Hans-Joachim Heintze, “The European Court of Human Rights and the Implementation of Human rights Standards During Armed Conflicts.” 74.

¹⁰³ Hans-Joachim Heintze, “The European Court of Human Rights and the Implementation of Human rights Standards During Armed Conflicts.” 74.

¹⁰⁴ Hans-Joachim Heintze, “The European Court of Human Rights and the Implementation of Human rights Standards During Armed Conflicts.” 75.

¹⁰⁵ Hans-Joachim Heintze, “The European Court of Human Rights and the Implementation of Human rights Standards During Armed Conflicts.” 75.

¹⁰⁶ Hans-Joachim Heintze, “The European Court of Human Rights and the Implementation of Human rights Standards During Armed Conflicts.” 73.

¹⁰⁷ Reinhard Haßenpflug, “Comment to the European Court of Human Rights and the Implementation of Human rights Standards During Armed Conflicts.” *German Yearbook of International Law* 45 (2002) : 78-81, 80.

proportionality test implied in the provisions of IHL postulates the maintenance of a careful balance between standards of humanitarian law and objectives of military necessity, whereas the proportionality test under IHRL intends restrictions of individual rights for the necessary safeguard of public interests¹⁰⁸ as, for example, the “life of the nation” in the mechanism of a state emergency. In some situations the scope of the public interest may be broader than that of military necessity - the use of certain weapons, for example, is justified by Article 2 (2)(c) of the ECHR but not by Article 35 of the Additional Protocol I. *Vice versa*, there may be situations where military necessity would justify the infringement of humanitarian standards although the public interest justifying the violation of these standards is rather low.¹⁰⁹

In conclusion, at first sight the principle of proportionality might be seen as a matter of the amalgamation of IHL and IHRL, because both fields of law make use of it. But one has to take into account that the criteria on which the proportionality tests are carried out are quite different. The notion of public interest will not always be in line with military necessity; rather, a fundamental disparity occurs in those values which underlie for the respective branch of law. Therefore, the divergence between IHL and IHRL on the principle of proportionality may outweigh the area of convergence.

In closing the discussion of the principles of reciprocity, distinction and proportionality, it is apparent that all three principles give preponderant evidence for the divergence of IHL and IHRL, even if they each have some characteristics of convergence.

B. Universality of International Humanitarian Law and International Human Rights Law

The value of an instrument of public international law depends not only on its legal quality. Its benefit is also founded on the universal legal force of treaty. The best legal text is useless if it is not recognised and observed by States.

For the purpose of this study the universality of IHRL mechanisms and IHL mechanisms must be scrutinised first, because it is fundamental for theoretical and practical issues of IHRL and IHL whether these sets of norms are universal or not. The questions which are discussed in the subsequent sections must be seen in the light of the concept of universality. They are only relevant to States which are party to human rights and humanitarian instruments. States

¹⁰⁸ Reindhard Haßenpflug, “Comment to the European Court of Human Rights and the Implementation of Human rights Standards During Armed Conflicts.” 80.

¹⁰⁹ Reindhard Haßenpflug, “Comment to the European Court of Human Rights and the Implementation of Human rights Standards During Armed Conflicts.” 81.

which are not participants do not even care about problems of this sort. In addition, universality itself is a legal aspect which either contributes the conflation or divergence of IHL and IHRL. Only if both fields of law are in accordance with each other regarding to the question of universality it would be a contribution to the convergence. If one branch of law is not universal in character but the other is, then the aspect of universality is a further indicator of divergence of IHL and IHRL. This point will also be considered in the following discussion.

The term “universality” is used by authors to denote very different meanings. The Oxford Dictionary defines “universal” as “of or belonging to or done etc. by all persons or things in the world or in the class concerned, applicable to all cases”.¹¹⁰ That means that a right is universal if it is applicable to all persons in the world, with the widest scope of application *ratione loci* and with the widest scope of application *ratione personae*.¹¹¹ A universal right applies to all persons regardless of place and regardless of any criterion which might restrict the in-group, such as time, place, property, birth, etc.¹¹²

1. Universality of International Human Rights

The question of whether human rights are universal cannot be answered with a simple yes or no. There are many different concepts of the universality of human rights¹¹³ which give different and sometimes completely contrary answers to this question. If one defines the universality of human rights as its world-wide realisation or implementation, it is obvious that one has to deny the universality of human rights, because neither has every State implemented all human rights norms nor is it possible to prevent all human rights violations.¹¹⁴ The same applies to the concept of historical origin, because human rights are primarily a creation of the Occident during the Age of Enlightenment.¹¹⁵ The idea of the Universal Declaration of Human Rights as somehow rooted in all cultures is nothing more than a myth.¹¹⁶

For this study, which focuses on the legal gaps between IHRL and IHL, the conception of formal acceptance is the most proper one for detecting such lacunas in the protection of

¹¹⁰ *The Concise Oxford Dictionary of Current English*, 7th ed. (1988), s. v. “Universal”.

¹¹¹ Eva Brems, *Human Rights: Universality and diversity* (The Hague: Kluwer Law International, 2001), 4.

¹¹² Eva Brems, *Human Rights: Universality and diversity*, 4; Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, Cornell University Press, 1989), 1.

¹¹³ Eva Brems describes sixteen different concepts of universality; Eva Brems, *Human Rights: Universality and diversity*, 4.

¹¹⁴ Eva Brems, *Human Rights: Universality and diversity*, 12.

¹¹⁵ Eva Brems, *Human Rights: Universality and diversity*, 7.

¹¹⁶ Eva Brems, *Human Rights: Universality and diversity*, 7.

human rights. Universality of human rights is therefore a formal concept which is reached when all states in the world adhere to binding international human rights instruments.¹¹⁷ When this situation is reached, universality is a legal reality.¹¹⁸ In fact, most authors hold a human rights instrument as universal if only a few States are missing.¹¹⁹ In other words, near universality is as good as full universality.¹²⁰

a) Universality of Human Rights in the Source of Conventional Law

According to the above definition of universal human rights, it is not possible to give a clear answer as to whether human rights are universal.¹²¹ The Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations with 48 States in favour and eight abstentions¹²² and the Vienna Declaration and Programme of Action, which reaffirms in Article 5 the universality of human rights, was adopted by a consensus of all states in 1993.¹²³ However, these two human rights instruments do not have binding character¹²⁴ because they are declarations.

The human rights instruments which have binding character are not accepted by all states in the world. The two human rights covenants are ratified by 154 and 151 states¹²⁵, respectively. Among the various human rights conventions which exist in addition to these two covenants, the Convention on the Right of the Child is the most widespread with 192

¹¹⁷ Philip Alston, "The Fortieth Anniversary of the Universal Declaration of Human Rights: A Time more for Reflection than for Celebration," in *Human Rights in Pluralist World-Individuals and Collectivities*, ed. Jan Berting (Westport: Meckler, 1990), 7.

¹¹⁸ Clarence J. Dias, "The Universality of Human Rights: A Critique." *Lokayan Bulletin* 103 (1993) : 43, 44.

¹¹⁹ Eva Brems, *Human Rights: Universality and diversity*, 6.

¹²⁰ Eva Brems, *Human Rights: Universality and diversity*, 6.

¹²¹ Eva Brems, *Human Rights: Universality and diversity*, 6.

¹²² Office of the United Nations High Commissioner for Human Rights, "The Universal Declaration of Human Rights," *DPI/1937/A*, December 1997. <<http://www.unhchr.ch/udhr/miscinfo/carta.htm>> (10 December 2005).

¹²³ Eva Brems, *Human Rights: Universality and diversity*, 6.

¹²⁴ Ian Brownlie, *Principles of Public International Law* 14.

¹²⁵ Office of the United Nations High Commissioner for Human Rights, "International Covenant on Civil and Political Rights, New York, 16 December 1966," <<http://www.ohchr.org/english/countries/ratification/4.htm>> (10 December 2005); Office of the United Nations High Commissioner for Human Rights, "International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966" <<http://www.ohchr.org/english/countries/ratification/3.htm>> (10 December 2005); Office of the United Nations High Commissioner for Human Rights, "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984," <<http://www.ohchr.org/english/countries/ratification/9.htm>> (10 December 2005); Convention on the Prevention and Punishment of the Crime of Genocide also has 139 parties, see International Committee of the Red Cross, "Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948," <<http://www.icrc.org/ihl.nsf/INTRO?OpenView>> (10 December 2005).

Parties.¹²⁶ Some other human rights instruments have a very low level of acceptance, which would preclude such treaties being considered universal.¹²⁷

Commentators who state that human rights are universal in the sense of formal acceptance refer primarily to the Universal Declaration of Human Rights.¹²⁸ But if one refers to the legal reality which universality creates, the human rights instruments must have a binding character for their participants. It does not mean that the Universal Declaration of Human Rights is unimportant,¹²⁹ but loopholes exist, because the protection of human rights through binding legal texts is not presently universal. Some 40 states are not participants to the International Covenant on Civil and Political Rights, and almost the same number of States is not participants to the International Covenant on Economic, Social and Cultural Rights. This means that in these countries, e.g. China¹³⁰, Indonesia and the USA¹³¹, certain universal human rights do not exist or have at least no international corresponding provisions for supervision of domestic human rights norms.

One reason why it is difficult to reach universal acceptance of human rights is the inconsistency of human rights. During the Cold War, human rights were divided for political reasons into civil and political rights, and economical, social and cultural rights.¹³² Today, there is a further inconsistency in human rights in that there is a different emphasis on human

¹²⁶ Office of the United Nations High Commissioner for Human Rights, "Convention on the Rights of the Child, New York, 20 November 1989," <<http://www.ohchr.org/english/countries/ratification/11.htm>> (10 December 2005).

¹²⁷ See, e.g., the International Convention against Apartheid in Sports has 59 Parties, see Office of the United Nations High Commissioner for Human Rights, "International Convention against Apartheid in Sports, New York 10 December 1985," <www.ohchr.org/english/countries/ratification/10.htm> (10 December 2005); Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty has 55 Parties, see Office of the United Nations High Commissioner for Human Rights, "Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, New York, 15 December 1989," <www.ohchr.org/english/countries/ratification/12.htm> (December 2005); the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families has 34 Parties, see Office of the United Nations High Commissioner for Human Rights, "International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families New York, 18 December 1990," <www.ohchr.org/english/countries/ratification/13.htm> (10 December 2005).

¹²⁸ Eva Brems, *Human Rights: Universality and diversity*, 6.

¹²⁹ The Universal Declaration of Human Rights has its importance as the first text with a broad and detailed concept of human rights, which gave and still gives many states a guideline for their constitutions and in addition, it is a moral force to the State community. Eva Brems, *Human Rights: Universality and diversity*, 6.

¹³⁰ China has not ratified the International Covenant on Civil and Political Rights, see Office of the United Nations High Commissioner for Human Rights, "International Covenant on Civil and Political Rights, New York, 16 December 1966," <<http://www.ohchr.org/english/countries/ratification/4.htm>> (10 December 2005)

¹³¹ Indonesia and USA have not ratified the International Covenant on Economic, Social and Cultural Rights, see Office of the United Nations High Commissioner for Human Rights, "International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966," <<http://www.ohchr.org/english/countries/ratification/3.htm>> (10 December 2005)

rights in the North and in the South.¹³³ Given the different generations of human rights and the differing levels of regional schemes for the supervision and control of states, it is not possible to identify one level of generalised acceptance.¹³⁴ Additionally, the effects of cultural relativism and the anthropological and philosophical incompatibility of different philosophical views are not inconsequential¹³⁵ and result in the unequal interpretation and direct operational application of human rights.¹³⁶

b) Universality of Human Rights in the Source of Customary Law

Even if there is no evidence of universal human rights in the source of treaty law, human rights could still be universal as customary law. A few international lawyers are of the opinion that the Universal Declaration of Human Rights has reached the status of customary law.¹³⁷ They argue that the basic principles of the Universal Declaration of Human Rights have influenced several national constitutions and are therefore regarded as a “general principle of law accepted by civilized nations”, that is a source of general international law in accordance with Article 38 of the ICJ-Statute.¹³⁸ Another argument is that the Universal Declaration of Human Rights is the authoritative interpretation and elaborated version of human rights mentioned in the Charter and has to be respected and observed according to Article 55(c) of the Charter.¹³⁹ Professor Sohn states that “the Declaration, as an authoritative listing of human rights, has become a basic component of international customary law, binding on all States, not only on members of the United Nations”.¹⁴⁰ It is an obligation of Article 56 of the UN-Charter to take action to accomplish the aims of the Charter, including

¹³² Hanspeter Neuhold, Waldemar Hummer and Christoph Schreuer, eds., *Österreichisches Handbuch des Völkerrechts*, 4th ed. (Wien: Manz, 2004), paras. 1358, 1383.

¹³³ Henry J. Steiner and Philip Alston, *International Human Rights in Context* (Oxford: Oxford University Press 2000), 368.

¹³⁴ Raúl E. Vinuesa, “Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law.” 1 (1998) : 69-110, 71.

¹³⁵ Peter R. Baehr, “Universaliteit van Mensenrechten: is het, kan het, moet het?” in *Grenzen van Mensenrechten*, 45-56, ed. Nicolaas J. Huls (Leiden, NJCM-Boekerij, 1995), 46-47.

¹³⁶ Raúl E. Vinuesa, “Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law.” 71.

¹³⁷ John P. Humphrey, “The International Bill of Human Rights: Scope and Implementation.” *William and Mary Law Review* 17 (1976) : 527-541, 529; Myres S. McDougal, Harold D. Lasswell and Lung-chu Chen, *Human Rights and World Public Order* (New Haven: Yale University Press, 1980), 273-274, 325-327.

¹³⁸ Myres S. McDougal, Harold D. Lasswell and Lung-chu Chen, *Human Rights and World Public Order*, 337.

¹³⁹ Philip Alston, “The Fortieth Anniversary of the Universal Declaration of Human Rights: A Time more for Reflection than for Celebration,” 4.

¹⁴⁰ Louis B. Sohn, “The New International Law: Protection of the Rights of Individuals Rather than States.” *American University Law Review* 32 (1982) : 1-64, 17.

human rights.¹⁴¹ However, to date the Universal Declaration of Human Rights has neither been accepted by governments nor by courts as a legal binding text with a normative character.¹⁴² Furthermore, as the two Covenants were adopted with the intention of giving legal effect to the human rights which are enumerated in the Universal Declaration of Human Rights,¹⁴³ *argumentum e contrario* the Universal Declaration of Human Rights has no binding character as customary law.

That does not mean that no human rights have reached the level of customary law. State practice and *opinio juris* demonstrating their acceptance as customary law could be proven for several human rights.¹⁴⁴ The American Law Institute Restatement (Third) of 1987 enumerates a list of human rights which were found to be customary law, including prohibition against slavery or slave trade, genocide, torture and other cruel, inhuman and degrading treatment, murder or causing the disappearance of individuals, prolonged arbitrary detention, and systematic racial discrimination.¹⁴⁵ The United Nation Commission on Human Rights (UNCHR) has added the right of self-determination of peoples, the individual right to leave and return to one's country and the principle of non-refoulement for refugees threatened by persecution.¹⁴⁶ Some scholars hold further human rights to be international customary law,¹⁴⁷ but their opinion is contentious.¹⁴⁸

In conclusion, one can say that human rights as such are not part of customary international law and cannot be called universal. Some core human rights have achieved this status and can therefore be seen as universal, but this set of provisions affords merely a rag rug of human rights protection. In considering the question of whether universality is an element which brings IHL and IHRL together or not, one has to realise that neither under the law of treaty nor customary law has international human rights reached the status of universal law.

¹⁴¹ Louis B. Sohn, "The New International Law: Protection of the Rights of Individuals Rather than States." 17.

¹⁴² Myres S. McDougal, Harold D. Lasswell and Lung-chu Chen, *Human Rights and World Public Order*, 337.

¹⁴³ Myres S. McDougal, Harold D. Lasswell and Lung-chu Chen, *Human Rights and World Public Order*, 337.

¹⁴⁴ Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989), 96–97.

¹⁴⁵ American Law Institute, Vol. 2 of *Restatement of the Law the Third, the Foreign Relations Law of the United States* (ALI, 1987), 161, para. 702.

¹⁴⁶ Hector Gros Espiell, *The Right to Self-Determination* (New York: United Nations, 1980), U.N. Doc.

E/CN.4/Sub.2/405 Rev. 1, pp. 11-12; Chama Mubanga-Chipova, *Analysis of the Current Trends and Development Regarding the Right to Leave Any Country – and to Return*, (New York: United Nations, 1987), U.N. Doc. E/Cn.4/Sub.2/1987/10, p. 7; Guy Goodwin-Gill, *The refugee in International Law* (Oxford: Clarendon Press, 1983), U.N. Doc. E/CN.4/ pp. 97-98.

¹⁴⁷ Professor Meron, e.g., holds that the rights of procedural guarantees is customary law. Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, 28.

2. Universality of International Humanitarian Law

It is much easier to determine IHL as universal than IHRL. In contrast to the field of human rights, the issues of political divergence and cultural particularities in the acceptance and implementation of treaties are unknown in IHL.¹⁴⁹ There is also no regional fragmentation as there is within IHRL.¹⁵⁰ Moreover, IHL is a bundled set of comprehensible binding instruments. The core treaties of the so-called “Geneva Law”, the four Geneva Conventions, are ratified by all the States of the world apart from two.¹⁵¹ In line with the opinion mentioned above, namely, instruments can still be universal even if a few States are missing, one could say that the core set of rules of IHL *strictu sensu* is universal.¹⁵² Since this is not the case with IHRL, universality is an item on which the two branches of law diverge.

3. Voids of Protection of Human Rights with regard to Universality

Due to the lack of universal adherence to the main binding human rights instruments such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights there is lack of legal protection. In countries which are not Parties to the two covenants, the legal protection of human rights goes further in times of war than in times of peace. Article 53 of the Geneva Convention IV, for example, protects the basic rights for workers among the civilian population of the Occupying Power and Article 55 of the Geneva Convention IV establishes the duty of the Occupying Power to ensure the food and medical supplies of the population. It is astonishing that in some States the protection of such basic social rights is better during an armed conflict than in times of peace.¹⁵³ But it must be mentioned that these contradictions do not originate from the

¹⁴⁸ Oscar Schachter, “International Law in Theory and Practice.” *Recueil des cours/Académie de Droit International de La Haye* 178 (1982) : 9-396, 339.

¹⁴⁹ Raúl E. Vinuesa, “Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law.” 72.

¹⁵⁰ Louise Doswald-Beck and Sylvain Vité, “International Humanitarian Law and Human Rights Law.” 117.

¹⁵¹ International Committee of the Red Cross, “States party to the main treaties,”

<<http://www.icrc.org/web/eng/siteeng0.nsf/iwpList103/6C6481C326D8DC31C1256E35004D53AB>> (10 December 2005).

¹⁵² Eva Brems, *Human Rights: Universality and diversity* 6.

¹⁵³ Xavier Philippe, “The Protection of Socio-economic Rights in International Humanitarian Law: Socio-Economic Rights in Armed Conflicts” (paper presented at the The Aix – UWC Colloquium on the Regional

misalignment of IHRL and IHL, but from the fact that States refuse to become party to the basic human rights treaties. Because of this, efforts to convince such States to ratify human rights instruments must be strengthened and continued.

C. Application of International Humanitarian Law and International Human Rights Law

This chapter deals with the question of whether a lack of protection of human rights arises from gaps between the scopes of IHL and IHRL. Such loopholes of protection would be significant clues for the divergence of both branches of law. Firstly, a description of the scope of application of each subject will be given. The application will be subdivided into the domains *ratione materiae*, *ratione personae*, *ratione tempore* and *ratione loci*. Secondly, potential loopholes within each domain will be examined. After this theoretical analysis the issue is further illuminated by considering practical issues such as internal strife and international terrorism.

1. Theoretical Issues on the application of International Humanitarian Law and International Human Rights Law



a) Ratione materiae

(1) Ratione materiae of International Humanitarian Law

Simply speaking, IHL applies during the time of war, as is stated throughout the 1907 Hague Conventions. But the actual legal situation differentiates between three kinds of conflicts: the international armed conflict, the non-international armed conflict and the internationalised non-international armed conflict.¹⁵⁴ To detect potential loopholes and contradictions in the protection of human rights of IHL and IHRL, a thorough scrutiny of the field of application of IHL to these three types of conflict is necessary.

(a) International Armed Conflict

Realisation of Socio-economic Rights: A European and Southern African Perspective, Cape Town, August 2003), 1.

¹⁵⁴ See as a whole Ingrid Detter, *The Law of War*, 2nd ed. (Cambridge: Cambridge University Press, 2000).

In accordance with common Article 2(1) of the Geneva Conventions, the Geneva Conventions are applicable in situations of armed conflicts. This refers not only to a declared war in a legal sense, but also to the factual situation of an armed conflict.¹⁵⁵ Even if both parties deny the existence of a state of war in a particular armed conflict, the Conventions apply.¹⁵⁶ Conversely, the Conventions would also apply, if a State declares war against another, but does not actually wage war against the other State.¹⁵⁷

The term “international armed conflict” is not expressly mentioned in the Geneva Conventions. However, common Article 3 of the Geneva Conventions uses the wording “armed conflict not of an international character” and, by implication, common Article 2 of the Geneva Conventions regulates the situation of international armed conflict.

The criteria to be fulfilled in order for a conflict to be regarded as an international armed conflict is a controversial question. Some authors tend merely toward the occurrence of *de facto* hostilities between States.¹⁵⁸ Other authors, however, postulate that a certain level of intensity of military force is required for a conflict to be termed “international armed conflict”.¹⁵⁹

The Additional Protocol I is applicable in times of international armed conflict, as is shown by Article 1(3) of the Additional Protocol I, which receives its scope of application from common Article 2 of the Geneva Conventions. But, pursuant to its Article 1(4), the Additional Protocol I extends the application of the Geneva Conventions to situations of national liberation wars. Article 1(4) of the Additional Protocol I requires a twofold condition: an armed conflict in which a people is struggling against colonial domination, alien occupation or a racist regime; and that the struggle must have the goal of exercising its right to self-determination.¹⁶⁰ During the debates on Article 1(4) of the Additional Protocol I, the same controversy occurred as arose over the definition of armed conflict in common Article 2 of the Geneva Conventions, namely that some countries said that “armed conflict” must be

¹⁵⁵ Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, 39.

¹⁵⁶ See common Article 2(1) of the Geneva Conventions.

¹⁵⁷ Christa Meindersma, “Applicability of Humanitarian Law in International and Internal Armed Conflict.” *The Hague Yearbook of International Law* 7 (1994) : 113-140, 115.

¹⁵⁸ Dietrich Schindler, “The Different Types of Armed Conflicts According to the Geneva Convention and Protocols.” *Hague Recueil* 163 (1979) : 121-163, 131; Richard Baxter, “The Duties of Combatants and the Conduct of Hostilities,” in *International Dimensions of Humanitarian Law*, 93-133, ed. UNESCO (Dordrecht: M. Nijhoff Publishers, 1988), 98.

¹⁵⁹ Ingrid Detter, *The Law of War*, 26.

¹⁶⁰ Christa Meindersma, “Applicability of Humanitarian Law in International and Internal Armed Conflict.” 121.

understood as implying a certain level of intensity. However, the wording does not require a minimum degree of intensity but simply that the conflict is armed.¹⁶¹

As well as the Geneva Conventions and Additional Protocol I, the ICJ has concluded that “in the event of international armed conflicts, these rules [of common Article 3 of the Geneva Conventions and Additional Protocol II] also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts”.¹⁶² But it is a general rule that in cases where more than one set of rules applies the higher standard of protection or stricter obligation should be the effective one.¹⁶³

(b) Non-International Armed Conflict

The provisions which are applicable to a non-international armed conflict are common Article 3 of the Geneva Conventions and Additional Protocol II. Neither set of rules contains a definition of a non-international armed conflict¹⁶⁴, but both use the negative description of the international armed conflict to define the scope of their application. However, the preconditions for this kind of conflict are somewhat different in common Article 3 of the Geneva Conventions and in Additional Protocol II as illustrated just below.

Under common Article 3 of the Geneva Conventions, to be an “armed conflict not of an international character”, the conflict must be in the territory of a High Contracting Party and it must be an “armed conflict”. Only small States are not High Contracting Parties and thus excluded from the application of common Article 3 of the Geneva Conventions and the first condition is therefore easy to determine objectively. More problematic is the definition of the term “armed conflict” in common Article 3 of the Geneva Conventions. In comparison to the other rules of the Geneva Conventions and Additional Protocol I, it is much more difficult to define “armed conflict” in non-international hostilities. This is because it is much more difficult to identify an armed conflict in an environment where force is a constant element used against common criminals or in large-scale operations aimed to quell riots or other civil disturbances.¹⁶⁵ Furthermore, given the absence of a neutral body to determine the existence

¹⁶¹ Christa Meindersma, “Applicability of Humanitarian Law in International and Internal Armed Conflict.” 121.

¹⁶² Christa Meindersma, “Applicability of Humanitarian Law in International and Internal Armed Conflict.” 129; ICJ 1986 Report 114.

¹⁶³ Christa Meindersma, “Applicability of Humanitarian Law in International and Internal Armed Conflict.” 130.

¹⁶⁴ Christa Meindersma, “Applicability of Humanitarian Law in International and Internal Armed Conflict.” 124.

¹⁶⁵ Lindsay Moir, *The Law of Internal Armed Conflict*, 34.

of an armed conflict, States hesitate to bind themselves to provisions which could be legally used against them.¹⁶⁶

Additional Protocol II gives a more extensive and precise protection than common Article 3 of the Geneva Conventions, therefore its area of application is much more restrictive. The dissident armed force or other organised armed group must be under a responsible command, which exercises enough control over part of its territory to enable them to carry out sustained and concerted military operations and to implement the Additional Protocol II.¹⁶⁷ In addition, Additional Protocol II only applies to armed conflicts with at least one armed force of a State Party,¹⁶⁸ whereas common Article 3 of the Geneva Conventions applies even if all parties to the conflict are rebel forces.¹⁶⁹ The reason for the more limited scope of application of Additional Protocol II was based in the exclusion of such activities as riots, sporadic acts of violence and other acts of a similar nature.¹⁷⁰ Therefore, Additional Protocol II applies only to conflicts of a relatively high degree of intensity.¹⁷¹ Consequently, there will be non-international armed conflicts which are covered by common Article 3 of the Geneva Conventions but not by Additional Protocol II.

Demarcation of the fields of application of common Article 3 of the Geneva Conventions and Additional Protocol II is not only a useful academic exercise. The definition of common Article 3 of the Geneva Conventions, which is gained in the delimitation of Additional Protocol II, is necessary to determine the relative jurisdiction of IHL and IHRL and therefore the initial point of the scope of common Article 3 of the Geneva Conventions is required to find out whether loopholes in legal protection with regard to human rights law exist.

The relation between common Article 3 of the Geneva Conventions and Additional Protocol II becomes of further relevance when one learns that some delegations wanted to shift the threshold of common Article 3 of the Geneva Conventions to surpass that of the Article 1 (2) of the Additional Protocol II so as to designate that internal disturbances and tensions are not classed as armed conflicts. But several other authors objected to this on the

¹⁶⁶ Lindsay Moir, *The Law of Internal Armed Conflict*, 34; see also Theodor Meron, *Human Rights in Internal Strife* (Cambridge: Grotius, 1987), 44.

¹⁶⁷ See Article 1(1) of the Additional Protocol II.

¹⁶⁸ Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, 133.

¹⁶⁹ Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, 69.

¹⁷⁰ Jean S. Pictet, *Development and Principles of International Humanitarian Law* (Dordrecht: M. Nijhoff Publishers, 1985), 48.

¹⁷¹ Jean S. Pictet, *Development and Principles of International Humanitarian Law*, 48.

basis that Article 1 (2) of the Additional Protocol II itself provides that common Article 3 of the Geneva Conventions should not be modified by the Additional Protocol II.¹⁷²

The distinction between international and non-international armed conflict is one of the major issues in IHL. It is not only an academic problem, but also a practical one as having two different sets of rules for the violation of humanitarian law contravenes the fundamental principle of law that similar crimes should be punished similarly.¹⁷³

This distinction is also useful to show a further divergence between IHL and IHRL, because, as will be discussed subsequently, various gaps occur with respect to the application of IHRL, leaving it open whether either the Geneva Conventions and Additional Protocol I or the common Article 3 of the Geneva Conventions and the Additional Protocol II are applicable.

As shown above, the Geneva Conventions state that an international conflict occurs between two sovereign States which are both High Contracting Parties.¹⁷⁴ The jurisprudence of the ICJ and the International Criminal Tribunal for the Former Yugoslavia (ICTY) extends the definition of an international armed conflict to conflicts where one party to the conflict is not High Contracting Party to the Geneva Conventions. In the *Nicaragua* cases the ICJ required that in order for a conflict to be deemed international, the foreign State must exercise "complete" control over the non-State Party.¹⁷⁵ "Complete" control meant the foreign State had to order the non-State Party to commit specific acts.¹⁷⁶ The ICJ held in the *Tadic* case, however, that this level of control is unnecessarily high.¹⁷⁷ According to the *Tadic* judgment, the foreign State need not give "specific instructions" to the non-State Party.¹⁷⁸ The foreign

¹⁷² Lindsay Moir, *The Law of Internal Armed Conflict*, 102.

¹⁷³ Audrey I. Benison, "War Crimes: A Human Rights Approach to a Humanitarian Law Problem at the International Criminal Court." *Georgetown Law Journal* 88 (1999) : 141–175, 153.

¹⁷⁴ See common Article 2 of the Geneva Conventions.

¹⁷⁵ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, ICJ, Judgment, ICJ Reports, 1986, para. 228, where Nicaragua accused the United States of funding and supporting a rebel military group within Nicaragua.

¹⁷⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, ICJ, Judgment, ICJ Reports, 1986, para. 228.

¹⁷⁷ *Prosecutor v. Tadic*, ICTY, IT-94-1, Appeals Chamber, Judgment of 15 July 1999, para. 130 seq.

¹⁷⁸ *Prosecutor v. Tadic*, ICTY, IT-94-1, Appeals Chamber, Judgment of 15 July 1999, para. 137 "Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group."

State, however, must still exercise "overall control" over the non-State Party, helping to plan its military campaigns and sharing its military objectives.¹⁷⁹

(c) Internationalised Non-International Armed Conflict

Internationalised non-international armed conflict occurs when foreign States intervene with their armed forces to a party to the conflict;¹⁸⁰ or if, as in the Yugoslavian War, a previously internal armed conflict shifts into an international one because one of the parties segregates and becomes a new sovereign State.¹⁸¹

There are different proposals in the literature as to which set of humanitarian rules should be applicable. Some authors want to qualify a conflict as internationalised when assistance is given to the government from another State.¹⁸² Other writers suggested that any substantial assistance to either side internationalises an armed conflict.¹⁸³ In accordance with the "Theory of Pairings" of Baxter, the rules for the internal armed conflict apply for the relation between the rebels and the government, and the rules for the international armed conflict apply for the relation between the intervening State and the government.¹⁸⁴

The criteria which determine a conflict as being internal or non-international are still unresolved and under academic discussion. However, as humanitarian law applies in any case the issue is irrelevant to the relation between IHL and IHRL and it therefore does not cause any problems in the relation to IHRL.

IHL applies exclusively in these three types of situations and, as will be illustrated below, only to selected groups of men. Consequently, there is no room for States to give them the possibility of derogating guaranteed rights.¹⁸⁵ Anything else would contradict the nature of IHL.

¹⁷⁹ *Prosecutor v. Tadic*, ICTY, IT-94-1, Appeals Chamber, Judgment of 15 July 1999, para. 130 seq. "(It is not sufficient for the group to be financially or even militarily assisted by a State[...] In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity."

¹⁸⁰ Christa Meindersma, "Applicability of Humanitarian Law in International and Internal Armed Conflict." 128.

¹⁸¹ Ingrid Detter, *The Law of War*, 48.

¹⁸² Ingrid Detter, *The Law of War*, 47.

¹⁸³ Ingrid Detter, *The Law of War*, 47.

¹⁸⁴ Dietrich Schindler, "The Different Types of Armed Conflicts According to the Geneva Convention and Protocols." 152.

¹⁸⁵ Louise Doswald-Beck and Sylvain Vit , "International Humanitarian Law and Human Rights Law." 100.

Having considered the scope *ratione materiae* of IHL, one will now look at the *ratione materiae* of IHRL in order to detect any lacunas and contradictions, and divergence or convergence, in the two bodies of law.



(2) Ratione materiae of *International Human Rights Law*

The application of human rights is unlimited in principle. Human rights apply everywhere, every time and in every situation,¹⁸⁶ although in the latter case there are reservations to its effectiveness, stemming mainly from the derogation and limitation of single human rights rules. A detailed examination of the instrument of derogation is therefore necessary to show the convergences and divergences between IHL and IHRL in the protection of human rights.

The right of derogation is based on the principle of State sovereignty.¹⁸⁷ States have to balance the value of the integrity of the life of the nation with the protection of the individual by adherence to human rights.¹⁸⁸

Under the International Covenant on Civil and Political Rights, certain conditions must be fulfilled for a State to derogate the application of human rights effectively. Human Rights can only be derogated in time of emergency which threaten the life of the nation; the measures must not be in contradiction to other international obligations of the State and must not be discriminatory.¹⁸⁹ The second condition is similar to the principle of good faith which is set out in Article 26 of the Vienna Convention on the Law of Treaties. Notwithstanding these requirements, derogation of the so-called “fundamental rights” are prohibited even in a state of emergency.¹⁹⁰ These fundamental rights were classified by the ICJ as *erga omnes* obligations.¹⁹¹ A further restriction on derogation is the procedural principle that states of emergency cannot be secret. According to Article 4(3) of the International Covenant on Civil and Political Rights the State has to inform the relevant State parties through the Secretary-General of the United Nations of the rules it wishes to derogate. One could summarise these conditions in the four principles of (i) exceptional threat, (ii) proportionality, (iii) non-discrimination and (iv) inalienability of fundamental rights and their character as peremptory

¹⁸⁶ H.-P. Gasser, “International Humanitarian Law and Human Rights Law in Non-international Armed Conflict: Joint venture or Mutual Exclusion?” 150.

¹⁸⁷ Raúl E. Vinuesa, “Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law.” 76.

¹⁸⁸ Raúl E. Vinuesa, “Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law.” 77.

¹⁸⁹ See Article 4 (1) of the International Covenant on Civil and Political Rights.

¹⁹⁰ See Article 4 (2) of the International Covenant on Civil and Political Rights.

¹⁹¹ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ, Judgment, ICJ Reports 1970, para. 32.

norms.¹⁹² Correspondent conditions are required for the derogation of human rights of the ECHR and the American Convention on Human Rights (ACHR).¹⁹³

If one starts from the wording of Article 4(1) of the of the International Covenant on Civil and Political Rights, it becomes clear that a state of emergency must be a significant disruption, on a higher level than that of civil disturbances common throughout the world, and that the whole population must be endangered.¹⁹⁴ However, the difficulty regarding the principle of exceptional threat under Article 4(I) of the of the International Covenant on Civil and Political Rights is that States have the right to determine when such a situation of public emergency exists¹⁹⁵ without any effective safeguard by a third party. Even the Optional Protocol to the International Covenant on Civil and Political Rights does not question the sovereign right of a State Party to declare a state of emergency.¹⁹⁶ Article 5(4) of the Optional Protocol gives only the Human Rights Committee the ability to receive information about the kind of derogation, and to conclude that the information was not detailed or that the normal legal regime of derogation according to the Covenant was not fulfilled.¹⁹⁷ This inadequate regulation of the derogation of human rights in the International Covenant on Civil and Political Rights has encouraged States to justify the denial of human rights. An example of this practice was Chile, which declared a state of emergency from 1973 until the end of its dictatorship without providing exact information about the derogation or its legitimacy.¹⁹⁸

The Human Rights Committee has stated that derogations of human rights in accordance with Article 4 of the International Covenant on Civil and Political Rights are to be of a temporary and exceptional character.¹⁹⁹

At the European level, the ECtHR has held that it is within its jurisdiction to determine whether the conditions laid down in Article 15 of the ECHR for the existence of the exceptional rights of derogation have been fulfilled.²⁰⁰ Thus, domestic governments are

¹⁹² Hernán Salinas Burgos, "The application of international humanitarian law as compared to human rights law in situations qualified as internal armed conflict, internal disturbances and tension, or public emergency, with special reference to war crimes and political crimes," in *Implementation of International Humanitarian Law*, 1-30, ed. Frits Kalshoven and Yves Sandoz (Dordrecht: M. Nijhoff Publishers 1989) 11.

¹⁹³ See Article 15 (1) of the European Convention; Article 27 (1) of the American Convention.

¹⁹⁴ Hernán Salinas Burgos, "The application of international humanitarian law as compared to human rights law in situations qualified as internal armed conflict, internal disturbances and tension, or public emergency, with special reference to war crimes and political crimes," in *Implementation of International Humanitarian Law*, 11.

¹⁹⁵ Theodor Meron, *Human Rights in Internal Strife*, 52.

¹⁹⁶ Theodor Meron, *Human Rights in Internal Strife*, 56.

¹⁹⁷ Theodor Meron, *Human Rights in Internal Strife*, 56; Silva, et al v. Uruguay (E.8/34) HRC 36, 130.

¹⁹⁸ Theodor Meron, *Human Rights in Internal Strife*, 54.

¹⁹⁹ Geneva Convention 5/13, U.N. Doc. HRC 36, 130.

²⁰⁰ *Lawless v. Ireland*, Eur. Ct. HR, 322/57, Judgment of 1 July 1961, 1 EHRR 15.

supervised by the ECtHR on whether any derogation they make is within the allowed margin of appreciation.²⁰¹ It is not within the jurisdiction of the ECtHR to substitute a government's assessment, but it has held that it has the function of reviewing the lawfulness of the measures adopted in conformity with the ECHR, taking into account the conditions and circumstances existing when the measures were taken and during the time they continued to apply.²⁰²

A further obstacle is the limited scope of norms that must not be derogated. The International Covenant on Civil and Political Rights contains the non-derogable right to life (Article 6), protection from torture (Article 7), protection from slavery (Article 8), freedom of thought, conscience and religion (Article 18) and freedom from *ex post facto* penal laws (Article 15).²⁰³ The ECHR only excludes four human rights: right to life and the prohibition on slavery, torture, and retroactive penal measures from derogation. The ACHR has the most extensive catalogue of non-derogable human rights, and is the only human rights treaty with juridical guarantees. Its list of non-derogable rights was extended by an advisory opinion of the Inter-American Court of Human Rights to include the juridical remedies of Article 7(6) (*habeas corpus*) and Article 25(1) (*amparo*). In giving its opinion, the Court said that the term "suspension of Guarantees" does not have an absolute meaning because the rights protected by this provision are inherent to man, but the full and effective exercise of the provisions could be derogated.²⁰⁴ The Court said further that Article 27(2) of the ACHR does not link the juridical guarantees to any specific provision of the Convention, which indicates the importance of these juridical remedies and that they have the character of being essential for ensuring the protection of non-derogable rights.²⁰⁵ The Court's opinion was given in the context of Latin America's negative experiences with abuses of the right of derogation, such as the above-mentioned example of Chile. It said that the right to life and to human treatment are threatened whenever the right to *habeas corpus* is partially or wholly suspended.²⁰⁶

²⁰¹ *Ireland v. United Kingdom*, Eur. Comm. HR, 5310/71, 2 EHRR 25.

²⁰² Raúl E. Vinuesa, "Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law." 80.

²⁰³ Hernán Salinas Burgos, "The application of international humanitarian law as compared to human rights law in situations qualified as internal armed conflict, internal disturbances and tension, or public emergency, with special reference to war crimes and political crimes," in *Implementation of International Humanitarian Law*, 11.

²⁰⁴ *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, I/A Court HR, Advisory Opinion OC-8 of 29 January 1987, paras. 17, 37.

²⁰⁵ *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, I/A Court HR, Advisory Opinion OC-8 of 29 January 1987, paras. 27, 41.

²⁰⁶ *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, I/A Court HR, Advisory Opinion OC-8 of 29 January 1987, paras. 36, 40.

Critics have criticised the limited scope of non-derogable rights. They say that the list of absolute inalienable human rights should be extended.²⁰⁷ They point especially to the gap in protection against arbitrary deportations, which is of particular relevance in time of emergency, and also to the right of due process.²⁰⁸ A derogation of the latter could potentially affect protection of the right of life which, although the most important non-derogable right, under Article 6 of the International Covenant on Civil and Political Rights is not absolute. It is therefore possible that a State could sentence the death penalty by summary procedure.²⁰⁹

In addition to the right of derogation, the International Covenant on Civil and Political Rights gives contracting States extensive possibilities to limit human rights as they may restrict the rights contained in Articles 12, 14, 18, 19, 21, and 22 of the International Covenant on Civil and Political Rights.²¹⁰

In contrast, the African Charter on Human and People's Rights and the International Covenant on Economic, Social and Cultural Rights have no regulations which provide the possibility of derogation²¹¹, and therefore grant the most coherent protection of human rights with the lowest level of State sovereignty.



(3) Voids of Protection of Human Rights relating to ratione materiae

After examining the material scope of applicability of IHL and IHRL and the gaps of protection, the contradictions and thus the possible violation of human rights can be scrutinised.

One contradiction is the different scope of protection for freedom of movement. On one side, the International Covenant on Civil and Political Rights does not include the prohibition of arbitrary deportations in the list of non-derogable human rights in Article 4(2). On the other side, the Geneva Conventions prohibit such deportation in Article 47(1) of the Geneva Convention IV.²¹² Given that the derogation articles in IHRL embody a compromise between

²⁰⁷ Hernán Salinas Burgos, "The application of international humanitarian law as compared to human rights law in situations qualified as internal armed conflict, internal disturbances and tension, or public emergency, with special reference to war crimes and political crimes," in *Implementation of International Humanitarian Law*, 24.

²⁰⁸ Theodor Meron, *Human Rights in Internal Strife*, 58.

²⁰⁹ Theodor Meron, *Human Rights in Internal Strife*, 63.

²¹⁰ Theodor Meron, *Human Rights in Internal Strife*, 58.

²¹¹ Raúl E. Vinuesa, "Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law." 76.

²¹² Theodor Meron, *Human Rights in Internal Strife*, 57.

two values, namely the protection of individual rights and the protection of national security in time of crisis, the paradox become obvious.²¹³ In time of emergency, which usually inheres a lower level of struggle than under an international armed conflict, the IHRL grants a lower protection of the human right than IHL would in times of an armed conflict.

Another contradiction is the different guarantee of due process in the two sets of law. As was discussed above, only the American Convention of Human Rights protects these rights. The International Covenant on Civil and Political Rights allows a State the possibility to derogate the right of due process in its Article 14, because that right is not contained in its list of non-derogable human rights in Article 4(2).²¹⁴ The Geneva Conventions' common Article 3 (1)(d) lays down the obligation for contracting States to observe the human right of due process.²¹⁵ These guarantees are extended and thoroughly detailed in Article 75(4) of the Additional Protocol I and Additional Protocol II which guarantees in Article 6 the right to a fair trial.²¹⁶ As with the prohibition on deportation, greater human rights protection is granted in times of higher turbulence, when a lower protection would be more understandable, because the State must ensure security.²¹⁷

A further imbalance within the scope of the material application of IHL and IHRL occurs if one envisages the right of life of Article 6 of the International Covenant on Civil and Political Rights in conjunction with the rights of due process in Article 14 of the International Covenant on Civil and Political Rights.²¹⁸ This imbalance was briefly averred to in the previous discussion on the *ratione materiae* of IHRL, but to more clearly show the contradiction between the rules of IHL and IHRL can be demonstrated, a fuller examination of the interplay between Articles 6 and 14 of the International Covenant on Civil and Political Rights is necessary.

If one reads Articles 6(2) and 14 of the International Covenant on Civil and Political Rights the question arises if Article 14 of the International Covenant on Civil and Political Rights is derogated in a time of emergency, it is nonetheless applicable in a trial with the

²¹³ Hernán Salinas Burgos, "The application of international humanitarian law as compared to human rights law in situations qualified as internal armed conflict, internal disturbances and tension, or public emergency, with special reference to war crimes and political crimes," in *Implementation of International Humanitarian Law*, 10.

²¹⁴ Theodor Meron, *Human Rights in Internal Strife*, 62.

²¹⁵ Theodor Meron, *Human Rights in Internal Strife*, 62.

²¹⁶ Peter Kooijmans, "In the Shadowland between Civil War and Civil Strife: some Reflections on the Standard-setting Process," in *Humanitarian law of armed conflict-challenges ahead: Essays in honour of Frits Kalshoven*, 243.

²¹⁷ Theodor Meron, *Human Rights in Internal Strife*, 62-63.

²¹⁸ Theodor Meron, *Human Rights in Internal Strife*, 64.

death penalty. One interpretation²¹⁹ says that the death penalty has in such a time only to respect the precondition of the prohibition of an arbitrary judgment.²²⁰ It says that the right of derogation in Article 4 of the International Covenant on Civil and Political Rights supplants the condition of Article 6(2) of the International Covenant on Civil and Political Rights not to impose the death penalty when norms of the covenant such as Article 14 of the International Covenant on Civil and Political Rights are in consideration of the judgment.²²¹

Another opinion goes further and is connected to the term “arbitrary”. Wako argues that, in conjunction with Article 6(2) of the International Covenant on Civil and Political Rights, the rules of due process of Article 14 of the International Covenant on Civil and Political Rights may not be derogated in times of emergency where a death penalty can be imposed.²²² This interpretation stresses that the death penalty can not be derogated (Article 4(2) of the International Covenant on Civil and Political Rights) and consequently neither can its entrenched provisions as the norms of procedural guarantees.²²³

The Human Rights Committee takes the view that the norms of due process of Article 14 of the International Covenant on Civil and Political Rights must be considered as norms “not contrary to the Covenant” in Article 6(2) of the International Covenant on Civil and Political Rights, that is it has said that the term “can only be imposed [...] not contrary to the Covenant” means the “right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal”.²²⁴ The Committee only allows a moderate derogation of Article 14 of the International Covenant on Civil and Political Rights, namely that “such derogations do not exceed those [procedural norms] strictly required by the exigencies of the actual situation [...]”.²²⁵ However, although the Committee gives a minimum standard for derogations, it does not try to restrain the possibility of derogating the due process guarantees in time of emergency *per se*.²²⁶

²¹⁹ Theodor Meron, *Human Rights in Internal Strife*, 64.

²²⁰ See Article 6(1) of the International Covenant on Civil and Political Rights

²²¹ Theodor Meron, *Human Rights in Internal Strife*, 65.

²²² Theodor Meron, *Human Rights in Internal Strife*, 64; Wako Report on Summary or Arbitrary Executions, U.N. Doc. E/CN.4/1983/16, p. 14.

²²³ Theodor Meron, *Human Rights in Internal Strife*, 64.

²²⁴ Theodor Meron, *Human Rights in Internal Strife*, 67; U.N. GAOP Supp. (No.40) 94, U.N. Doc. A/37/40 (1982).

²²⁵ U.N. Doc. CCPR/C21/Add. 3 p. 4 (1984); U.N. GAOP Supp. (No.40) p. 144; U.N. Doc. A/39/40 (1984).

²²⁶ U.N. GAOP Supp. (No.40) p. 144; U.N. Doc. A/39/40 (1984).

If one considers the Human Rights Committee as an authoritative interpretation,²²⁷ IHRL again causes a contradictory result in comparison to IHL. IHRL permits summary executions, because Article 6(2) of the International Covenant on Civil and Political Rights does not entrench the procedural guarantees of Article 14 of the International Covenant on Civil and Political Rights if this rule is derogated. In contrast, IHL grants these guarantees under common Article 3 (1)(d) of the Geneva Conventions explicitly for the enforcement of the death penalty. As in the previous discussion, this is another example of the inconsistency that grants a higher protection for human rights during periods when the integrity of the State is under greater threat.²²⁸

There are further examples of the inconsistency of IHRL. For instance, the Geneva Conventions and the two Additional Protocols guarantee the special protection of woman and children; prohibition of the taking of hostages; prohibition of medical experiments; acts of terrorism; and prohibition of collective punishment.²²⁹ In times of war, only IHL protects these rights because its rights cannot be derogated as those under regional or international human rights treaties can.

The contradictions discussed above are intensified if one considers the precondition in Article 4(1) of the International Covenant on Civil and Political Rights and Article 15 of the ECHR that a derogation must not contravene other rules of international treaties which the derogating State is party to. In accordance with Article 15 of the ECHR, the ECtHR in the *North Ireland* case scrutinised whether British law in Northern Ireland was in accordance with the Geneva Conventions.²³⁰ This means that, in time of armed conflict, the Geneva Conventions have double application: first, in a direct way and secondly, in conjunction with Article 4(1) of the International Covenant on Civil and Political Rights or Article 15 of the ECHR.²³¹

In contrast to this, in times of lower conflict, the Geneva Conventions are not applicable either directly or through Article 4(1) of the International Covenant on Civil and Political Rights, because the threshold “armed conflict” is independent from the method of application

²²⁷ Office of the United Nations High Commissioner for Human Rights, “Human Rights: Civil and Political Rights, Fact Sheet No. 15 (Rev.1), p. 16.” <www.ohchr.org/english/about/publications/docs/fs15.pdf> (10 December 2005).

²²⁸ Theodor Meron, *Human Rights in Internal Strife*, 64-65.

²²⁹ Raúl E. Vinuesa, “Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law.” 90.

²³⁰ *Ireland v. United Kingdom*, Eur. Ct. HR., Judgment, 18 January 1978, Series A, No. 25.

²³¹ Lindsay Moir, *The Law of Internal Armed Conflict*, 196-197.

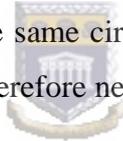
of the Geneva Conventions. This illustrates that IHL is a directly applicable set of law independent of and separate to IHRL.

All these contradictions and legal loopholes in the protection of human rights arose through the lack of harmonisation of the scope of the *ratione materiae* of IHL and IHRL at their time of establishment. Subsequently, the item *ratione materiae* gives reasons for the divergence of IHL and IHRL.

b) Ratione personae

(1) Ratione personae of International Humanitarian Law

After the illustration of the divergence of IHL and IHRL in respect of the scope *ratione materiae* the focus moves now to the relation of IHL and IHRL in the field *ratione personae*. The rights of IHL basically apply only to persons who belong to a particular category or with a specific nationality, even if in the same situation as others.²³² Conversely, human rights are basically applicable to all persons under the same circumstances and without discrimination. The scope of *ratione personae* under IHL therefore needs to be looked at in more detail.



(a) Ratione personae of International Humanitarian Law in times of International Armed Conflict

In times of international armed conflict, IHL distinguishes the field of application *ratione personae* between combatants on the one hand and civilians on the other.²³³

²³² Emanuela-Chiara Gillard, "International Humanitarian Law and Extraterritorial State Conduct," in *Extraterritorial Application of Human Rights Treaties*, 25-40, eds. Fons Coomans and Menno T. Kamminga (Antwerpen: Intersentia, 2004), 29.

²³³ Emanuela-Chiara Gillard, "International Humanitarian Law and Extraterritorial State Conduct," in *Extraterritorial Application of Human Rights Treaties*, 29.

(i) Combatants protected in times of International Armed Conflict by International Humanitarian Law

The four Geneva Conventions are in principle separate conventions. The first three Conventions relate to different kinds of protected combatants and the Fourth Convention contains rules for the lawful treatment of the civilian population.²³⁴ Article 4 of the Geneva Convention III enumerates the persons who are protected by the Geneva Conventions I – III:

All combatants who have fallen into the hands of the enemy, and:

1. Members of the armed force of a party to the conflict, even if the government or authority to whom they profess allegiance is not recognised by the adversary;

2. Members of other militias and volunteer corps, including those of organised resistance movements, who belong to a party to the conflict and operate in or outside their own territory, even if this is occupied; always provided that the group they belong to fulfils the following conditions:

a) to be commanded by a person responsible for his subordinates;

b) to have a fixed distinctive sign recognised at a distance;

c) to carry arms openly;

d) to conduct their operations in accordance with the laws and customs of war;

3. Participants in a *levée en masse*, provided they carry arms openly and respect the laws and customs of war;

4. Persons who accompany the armed forces without actually being members of welfare services;

5. Crew members of the merchant marine and the crews of civil aircraft of the parties to the conflict.²³⁵

From Article 87(2) and Article 100(3) of the Geneva Convention III it is clear that protection as a prisoner of war could only be acquired by a combatant who is not a national of the Detaining Power. The State's own nationals are not protected.

The Additional Protocol I extends the definition of combatant in its Article 43 by waiving the conditions of carrying arms openly and wearing a distinctive sign. The definition is

²³⁴ Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, 51.

²³⁵ Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, 52.

therefore broader and does not make any distinction between the regular armed forces of a State and the irregular armed forces of a resistance or liberation movement.²³⁶ It meets the new types of forces requirement which have been valid on the modern battlefield since World War II.²³⁷ In consequence, a higher number of fighters are awarded the benefit of protection for prisoners of war; a higher number than that of civilians.

The scope of combatants is not only broadened by extending the legal term of combatants itself. The fact that Article 1(4) of the Additional Protocol I broadens the field of application of *ratione materiae* as shown above also makes it possible that freedom fighters who fight against their own governments are protected by the Additional Protocol, irrespective of whether they are nationals of this government. Therefore, in respect of small groups of fighters of a liberation movement, the principle that IHL protects only nationals of a State is obsolete. It must be mentioned, however, that in practice there has been no case where Article 1(4) of the Additional Protocol I has come into application and, consequently, the extension of the legal status of combatants has been without practical relevance so far.²³⁸

The definition of the combatant is of critical significance, because it is constitutive for the status of prisoners of war²³⁹ and for the definition of civilians, who are defined as non-combatants.²⁴⁰



(ii) Civilians Protected in times of International Armed Conflict by International Humanitarian Law

The scope of protection of civilians during an international armed conflict is laid down in the Fourth Geneva Convention and broadened by Additional Protocol I.

Pursuant to its Article 4 (1), the Fourth Geneva Convention in principle applies when persons find themselves in the hands of a party to a conflict or of an occupying power of which they are not nationals. To be covered by the Fourth Geneva Convention, persons must

²³⁶ Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, 87.

²³⁷ International Committee of the Red Cross, *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: M. Nijhoff Publishers, 1987), Article 43 of Additional Protocol I, para. 1672.

²³⁸ Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, 86.

²³⁹ See Article 44 (1) of the Additional Protocol I.

²⁴⁰ See Article 4 (4) of the Geneva Convention IV; Article 50(1) of the Additional Protocol I.

be a national of a State which is a member State of the Geneva Conventions²⁴¹ and must not be protected by the first three Geneva Conventions.²⁴²

However, some rights are guaranteed for all persons without the distinction of nationality. The earliest comprehensive protection was contained in the Convention of the Amelioration of the Conditions of the Wounded in Armies in the Field of 1864, and was adopted by the Geneva Conventions I and II which are applicable to certain wounded, sick, or shipwrecked persons without the nationality requirement.²⁴³

Further exceptions from the general rule that persons must be in the hands of another party to the conflict or an occupying power are contained in Article 13 and 4(3) of the Geneva Convention IV. These Articles state that all persons without differentiation are protected by Part II of the Geneva Convention IV, which includes provisions for the general protection of populations against certain consequences of war. Another exception is contained in Article 70 of the Geneva Convention IV, which gives nationals of the occupying power some special rights against their own State.

In general, Additional Protocol I protects only civilians from opposing parties to the conflict. But this principle has further exceptions under Additional Protocol I than under Geneva Conventions IV. Pursuant to Article 43(2) of the Additional Protocol I provisions relating to attacks apply to all attacks in whatever territory they are conducted. Consequently, nationals are protected from attacks by their own military forces.²⁴⁴ Article 75 of the Additional Protocol I contains a wide range of fundamental human rights, and is applicable to the situations referred to in Article 1 of the Additional Protocol I.²⁴⁵ The provision is triggered by the situation, namely an international armed conflict, and not by the nationality of the civilian. The test of nationality is not incorporated.²⁴⁶ In addition, the expression “national origin” in Article 75 of the Additional Protocol I has been interpreted to stand for the ethnic group of the person and not their nationality, which means that the list of banned criteria does not exclude the party’s own nationals from the enjoyment of the protection provided for by this Article.²⁴⁷ An alternative interpretation of “national origin” argues that Article 75 of

²⁴¹ See Article 4 (2) of the Geneva Convention IV.

²⁴² See Article 4 (4) of the Geneva Convention IV.

²⁴³ Theodor Meron, *Human Rights in Internal Strife*, 30.

²⁴⁴ Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, 96.

²⁴⁵ Theodor Meron, *Human Rights in Internal Strife*, 32.

²⁴⁶ Theodor Meron, *Human Rights in Internal Strife*, 32.

²⁴⁷ Michael Bothe, Karl Josef, Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts - Commentary on the two 1977 Protocols additional to the Geneva Conventions of 1949*, 458.

Additional Protocol I applies to “persons who are in the power of a party to the conflict” which is stated at the beginning of this provision.²⁴⁸

**(b) *Ratione Personae* of International Humanitarian
Law of Non-international Armed Conflict**

During a non-international armed conflict, common Article 3 of the Geneva Conventions protects all persons who do not take an active part in the hostilities, including former combatants who have laid down their arms and those placed *hors de combat*.²⁴⁹ Even nationality is not mandatory as long as persons of their own party fall within the scope of the minimum standard of protection of this rule.²⁵⁰

Additional Protocol II applies to all persons who are affected by an armed conflict, without any adverse distinction.²⁵¹ “Persons who are affected by an armed conflict” means in this context any person who does not or does not any longer take in at the hostilities.²⁵² The scope of protected persons is therefore the same as under common Article 3 of the Geneva Conventions.

The short analysis of the *ratione personae* of IHL has shown that the personal scope of application of this body of law has significant differences depending on the type of conflict and the status of the person. This aspect is important when one now looks at the scope *ratione personae* of IHRL. If the personal field of application of IHRL is congruent with some aspects of IHL, but not with others, it would cause lacunas in the legal protection of human rights.

**(2) *Ratione personae* of International Human Rights
Law**

The range of protected persons under IHRL is broad. Everyone falls into the scope *ratione personae* of IHRL, because human rights are inherent to the mere existence of a person

²⁴⁸ Waldemar A. Solf, “Human rights in armed conflict: Some observations on the relationship of human rights law to the law of armed conflict,” in *World in Transition: Challenges to Human Rights, Development and World Order*, ed. Henry H. Han (Washington, D. C.: University Press of America, 1979), 44.

²⁴⁹ See common Article 3 (1) of the Geneva Conventions.

²⁵⁰ Theodor Meron, *Human Rights in Internal Strife*, 33.

²⁵¹ See Article 2(1) of the Additional Protocol II.

²⁵² International Committee of the Red Cross, *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Article 2 of the Additional Protocol II, 1359, para. 4485.

without prerequisites.²⁵³ Until the Advisory Opinion in the *Jurisdiction of the Courts of Danzig* in 1928 the predominant opinion was that international law could only attain internal relevance as derivative rights through an act of transformation.²⁵⁴ But in that decision the Permanent Court of International Justice stated that definite rules of international agreements create individual rights and obligations.²⁵⁵ This applies to both IHRL and IHL.²⁵⁶

In principle, IHRL applies to the relation between the government and its inhabitants independent of their nationality.²⁵⁷ But there are some exceptions to this principle.

Article 2(3) of the Economic and Social Covenant permits developing States to determine to what extent they wish to grant the social and economic human rights of the covenant to non-national inhabitants.²⁵⁸ The only preconditions on this are that the limitation of these rights must take place with “due regard to human rights” and with regard to the demands of the national economy.²⁵⁹ This rule includes two limitations of the comprehensive scope of the application of IHRL. The obvious one is the exclusion of foreigners from the protection of the human rights. The other is that this exclusion is limited only to developing States. From the perspective of the subject of human rights, the benefit of the rights of the International Covenant on Economic, Social and Cultural Rights depends on their nationality, their location and, theoretically, also the time, if a non-national stays in a country which becomes a developing state.



A further exception to the principle that IHRL applies to the relation between the government and its inhabitants independent of their nationality is stated in Article 1(2) of the International Convention on the Elimination of All Forms of Racial Discrimination. The wording of the rule says that the Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party between citizens and non-citizens. Some scholars interpret the provision to say that the right of the State Parties to distinguish between citizens and non-citizens is not covered by the protected fields stated in Article 1(1) of the

²⁵³ Louise Doswald-Beck and Sylvain Vité, “International Humanitarian Law and Human Rights Law.” 101.

²⁵⁴ Theodor Meron, *Human Rights in Internal Strife*, 33.

²⁵⁵ See, e.g., “Article 3 of the International Covenant on Civil and Political Rights states that ‘Everyone has the right to life, liberty and security of person.’ and Article 29(1) says: ‘Everyone has duties to the community.’” *Jurisdiction of the Courts of Danzig*, Permanent Court of Justice, Advisory Opinion No. 15, 3 March 1928, Ser. B., No. 15, 1928, p. 17-18.

²⁵⁶ Theodor Meron, *Human Rights in Internal Strife*, 34.

²⁵⁷ Theodor Meron, *Human Rights in Internal Strife*, 30.

²⁵⁸ Theodor Meron, *Human Rights in Internal Strife*, 30.

²⁵⁹ See Article 2(3) of the International Covenant on Economic, Social and Cultural Rights.

International Convention on the Elimination of Racial Discrimination²⁶⁰ and, moreover, that it determines a nationality test for the application of the convention.²⁶¹

The Committee on the Elimination of Racial Discrimination noted in its 42nd Session that Article 1(2) of the International Convention on the Elimination of Racial Discrimination is contrary to the interpretation that State Parties are under an obligation to report fully upon legislation on foreigners and its implementation.²⁶² Further, the Committee remarks that the rule must be without prejudice to other human rights instruments, especially the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.²⁶³

But this assertion by the Committee is not a convincing solution to the mistaken wording of Article 1(2) of the International Convention on the Elimination of Racial Discrimination. Failing universality of the human right conventions, a State could be a member of the Committee on the Elimination of Racial Discrimination but not of other human rights conventions. For example, that is the case with Indonesia which ratified the International Convention on the Elimination of Racial Discrimination²⁶⁴ but not the International Covenant on Economic, Social and Cultural Rights²⁶⁵ and International Covenant on Civil and Political Rights.²⁶⁶ Consequently, non-citizens could be without international protection from racism in comparison to citizens.

As can be seen, the regulations regarding the field of application *ratione personae* of IHL and IHRL are structured differently. IHL provides for numerous categories of cases and persons and different types of protection, whereas IHRL is basically applicable for everybody but limits the legal protection by exceptions. It becomes obvious that, besides from the different material legal concepts of each branch, these different approaches to the form of the

²⁶⁰ Michael Banton, *Combating Racial Discrimination* (London: Minority Rights Group, 2000), 64.

²⁶¹ Theodor Meron, "On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument." *American Journal of International Law*, 77 (1983) : 589-606, 594.

²⁶² See Article 1(2) of the International Convention on the Elimination of Racial Discrimination; U.N. Doc A/46/18.

²⁶³ See Article 1(2) of the International Convention on the Elimination of Racial Discrimination; U.N. Doc A/46/18.

²⁶⁴ See Office of the United Nations High Commissioner for Human Rights, "International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 March 1966," <<http://www.ohchr.org/english/countries/ratification/2.htm>> (10 December 2005).

²⁶⁵ See Office of the United Nations High Commissioner for Human Rights, "International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966," <<http://www.ohchr.org/english/countries/ratification/3.htm>> (10 December 2005).

²⁶⁶ See Office of the United Nations High Commissioner for Human Rights, "International Covenant on Civil and Political Rights, New York, 16 December 1966," <<http://www.ohchr.org/english/countries/ratification/4.htm>> (10 December 2005).

application of each branch contribute to an uncoordinated coexistence of IHL and IHRL. This leads to contractions and voids in human rights protections as will be discussed below.

(3) Voids of Protection of Human Rights relating to ratione personae

In sum, the most astonishing fact is the converse protection in IHL and IHRL of non-nationals and nationals. As shown, the protection of non-nationals is the basic principle of IHL. Nationals are only protected in certain circumstances.²⁶⁷ In contrast to this, IHRL excludes, under certain preconditions, non-nationals from the scope of human rights protection.²⁶⁸

The concerted consequences of the existing law are that, during an international armed conflict, non-nationals who reside in a developing country which makes use of its right to limit the right of the International Covenant on Civil and Political Rights, fall neither into the scope of application of the International Covenant on Civil and Political Rights nor do they enjoy the full legal protection of the Geneva Conventions and Additional Protocol I. The exceptions which dispense with the nationality test are still not sufficient. This circumstance is accentuated when one considers an alternative interpretation of the phrase “insofar as they are affected by a situation referred to in Article 1” of Article 75 of Additional Protocol I. According to its legislative history, Additional Protocol I was not intended to enhance the human rights standard between governments and their civilians.²⁶⁹ The scope of protected people is therefore limited to categories of persons especially affected by a conflict, such as collaborators, deserters, and nationals of State A who serve in the force of adverse State B.²⁷⁰ This view is in line with the “jurisdiction of the Parties to the conflict for matters of their internal competence”, as stated by the Canadian Delegation during the deliberation process of the Additional Protocol.²⁷¹ However, the price for such an interpretation is the enlargement of the gap of non-protected persons, namely civilians of the power in question.

²⁶⁷ See Article 4 of the Geneva Convention III; Article 4(1) of the Geneva Convention IV.

²⁶⁸ See in this minithesis at 42.

²⁶⁹ Michael Bothe, Karl Josef, Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts - Commentary on the two 1977 Protocols additional to the Geneva Conventions of 1949*, 460.

²⁷⁰ Michael Bothe, Karl Josef, Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts - Commentary on the two 1977 Protocols additional to the Geneva Conventions of 1949*, paras. 4429-4430.

²⁷¹ Michael Bothe, Karl Josef, Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts - Commentary on the two 1977 Protocols additional to the Geneva Conventions of 1949*, 460.

Once again it becomes obvious that a contradiction in legal protection exists because of the fact that International Convention on the Elimination of Racial Discrimination allows States to grant different rights to non-nationals and nationals. In times of non-international armed conflict, IHL prohibits all types of discrimination as a minimum standard of human rights protection under common Article 3 of the Geneva Convention. This means that protection against discrimination on the grounds of nationality is stronger in times of a non-international armed conflict than that provided by the International Convention on the Elimination of Racial Discrimination, which is designed to be applicable during all times but especially during times of peace.²⁷²

The insufficient systematic coordination of IHL and IHRL *ratione personae* is the reason for the loopholes and contradictions in the protection of human rights discussed above. It gives further evidence of the divergence of IHL and IHRL.

c) **Ratione tempore**

Simply speaking, IHRL is applicable at all times even if it is directed to times of peace, whereas IHL applies, according to common Article 2(1) and 2(2) of the Geneva Conventions, in times of war, armed conflict and occupation.²⁷³ With regard to the relative scope of application *ratione tempore* of IHRL and IHL, the ICJ stated in the *Nuclear Weapon Advisory Opinion* that IHL is *lex specialis* to IHRL²⁷⁴, which is also accepted by the majority of scholars.²⁷⁵ Some scholars hold this *lex specialis* rule as the only possible way to harmonise possible contradictory norms of IHL and IHRL whenever they have a specific justification for dealing with specific problems.²⁷⁶ In accordance with the *lex specialis* rule one has to define the scope *ratione tempore* of IHL by circumscribing the beginning and the end of a war, armed conflict or occupation. At the same time the temporal field of application of IHRL becomes clear since it is the opposite, i.e. that which is not within the *ratione tempore* of IHL.

²⁷² Hans-Peter Gasser, "International Humanitarian Law and Human Rights Law in Non-international Armed Conflict: Joint venture or Mutual Exclusion?" 161.

²⁷³ Hans-Peter Gasser, "International Humanitarian Law and Human Rights Law in Non-international Armed Conflict: Joint venture or Mutual Exclusion?" 161.

²⁷⁴ *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion of 8 July 1996, para. 25.

²⁷⁵ Judith Gardam, "The Contribution of the International Court of Justice to International Humanitarian Law." *Leiden Journal of International Law* 14 (2001) : 349-365, 360.

²⁷⁶ Joachim Abr. Frowein, "The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation." *Israel Yearbook of Human Rights* 28 (1999) : 1-16, 9.

(1) Ratione tempore of International Humanitarian Law

In accordance with common Article 2 (1) and Article 2(2) of the Geneva Conventions, the Geneva Conventions apply in times of war, armed conflict and occupation.

(a) Commencement of war

A state of war is a protracted continuing and serious clash of arms, compared to a mere incident “short of war”.²⁷⁷ The war can commence either in a technical or material way.²⁷⁸ The technical mode requires either a declaration of war against another State or an ultimatum with a conditional declaration of war as is laid down in Article 1 of the Hague Convention (III).²⁷⁹ Under the latter, war breaks out regardless of formal statements, but because of the actual recourse by a State to comprehensive force against another State. “Comprehensive” is understood as force in sense of time, space, quantity or quality.²⁸⁰

There is currently general agreement that the law of armed conflict applies to every situation of international armed conflict, even if a state of war does not exist or is not recognised.²⁸¹ An armed conflict is characterised as any difference arising between two States and leading to the intervention of members of the armed forces.²⁸² However, according to common Article 2 (2) of the Geneva Conventions, the actual conduct of armed hostilities is, not a *conditio sine qua non*. It states that the Geneva Conventions "shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."²⁸³

According to Article 42(1) of the 1907 Hague Regulations IV, a territory is considered occupied when it is placed under the actual authority of the hostile army. Whether such

²⁷⁷ Yoram Dinstein, “The Rule of Law in Conflict and Post-Conflict Situation: Comments on War.” *Harvard Journal of Law and Public Policy* 27 (2004) : 877-892, 886.

²⁷⁸ Yoram Dinstein, “The Rule of Law in Conflict and Post-Conflict Situation: Comments on War.” 885.

²⁷⁹ Yoram Dinstein, “The Rule of Law in Conflict and Post-Conflict Situation: Comments on War.” 886.

²⁸⁰ Yoram Dinstein, *War, Aggression and Self-Defence*, 3rd ed. (Cambridge: Cambridge University Press, 2001), 9-10.

²⁸¹ Wolf Heintschel von Heinegg, “Symposium: The Rule of Law in Conflict and Post-Conflict Situation: Factors in War to Peace Transitions, Comments on War.” *Harvard Journal of Law and Public Policy* 27 (2004) : 843-873, 844.

²⁸² International Committee of the Red Cross, *Commentary to the Geneva Convention relative to the Protection of Civilian in Time of War* (Geneva: ICRC, 1958), 20.

²⁸³ Wolf Heintschel von Heinegg, “Symposium: The Rule of Law in Conflict and Post-Conflict Situation: Factors in War to Peace Transitions, Comments on War.” 844.

authority has been established, and whether it can be exercised, is a question of fact.²⁸⁴ However, neither the Hague Regulations nor the Geneva Convention IV require an absolute and uncontested authority.²⁸⁵ Hence, the fact that the occupying forces meet resistance does not rule out the effectiveness of the occupation.

Only in the circumstances that the hostile force is able to use force against the occupied State's will is the occupation taken for a persistent use of military force by one State against the other State and thus an international armed conflict.²⁸⁶

The armed conflict continues as long as the occupying power is present and is exercising authority in the territory in question.²⁸⁷ The mere fact that the occupying forces cease to effectively exercise such authority does not automatically mark the end of the international armed conflict.²⁸⁸ The end of an occupation is a question of fact, which will be brought about by any loss of authority over the territory in question.²⁸⁹ The end of an international armed conflict will only occur if it is accompanied, in accordance with Article 118 (1) of the Geneva Convention III, by the "cessation of active hostilities" or, in accordance with Article 3(b) of the Additional Protocol I, by the "general close of military operations", or by any other form of terminating the war.²⁹⁰



(b) Termination of War

The end of a war means a return to peace insofar as the situation is characterised by the absence of military operations, including occupation.²⁹¹ Such a situation, called "negative" peace, presupposes the termination of war or international armed conflict and must be

²⁸⁴ Wolf Heintschel von Heinegg, "Symposium: The Rule of Law in Conflict and Post-Conflict Situation: Factors in War to Peace Transitions, Comments on War." 859.

²⁸⁵ Wolf Heintschel von Heinegg, "Symposium: The Rule of Law in Conflict and Post-Conflict Situation: Factors in War to Peace Transitions, Comments on War." 859.

²⁸⁶ Wolf Heintschel von Heinegg, "Symposium: The Rule of Law in Conflict and Post-Conflict Situation: Factors in War to Peace Transitions, Comments on War." 845.

²⁸⁷ Wolf Heintschel von Heinegg, "Symposium: The Rule of Law in Conflict and Post-Conflict Situation: Factors in War to Peace Transitions, Comments on War." 845.

²⁸⁸ International Committee of the Red Cross, *Commentary to the Geneva Convention relative to the Protection of Civilian in Time of War*, 20.

²⁸⁹ Wolf Heintschel von Heinegg, "Symposium: The Rule of Law in Conflict and Post-Conflict Situation: Factors in War to Peace Transitions, Comments on War." 845.

²⁹⁰ Wolf Heintschel von Heinegg, "Symposium: The Rule of Law in Conflict and Post-Conflict Situation: Factors in War to Peace Transitions, Comments on War." 845.

²⁹¹ Wolf Heintschel von Heinegg, "Symposium: The Rule of Law in Conflict and Post-Conflict Situation: Factors in War to Peace Transitions, Comments on War." 847.

distinguished from a mere suspension of war.²⁹² In the latter case, recommencing hostilities is not to be judged under the *jus ad bellum* and only in the case of a termination proper will the former belligerents again be protected by the prohibition of the use of force under Article 2 of the UN-Charter.²⁹³

A state of war or of an international armed conflict is terminated by the following acts:

- (1) an armistice brought into effect by an agreement between the parties to the conflict;
- (2) *debellatio*, if not followed by an occupation or some other exercise of authority by the organs of the victorious State;
- (3) a peace treaty, if that treaty is constitutive for the establishment of negative peace;
- (4) the "general close of military operations" and the "cessation of active hostilities," if the States concerned explicitly or implicitly agree that the silence of arms is to be of a lasting character.²⁹⁴

An occupation, being one form of an international armed conflict, does not imply either the "general close of military operations" or the "cessation of active hostilities" and, thus, does not terminate war.²⁹⁵



(2) *Exceptions of the lex specialis rule*

After demonstrating the *ratione tempore* of IHL and IHRL in accordance with the *lex specialis* rule, it is necessary to mention some recent changes to this traditional view. These changes have occurred because of the conflicts in Northern Cyprus and in former Yugoslavia, which have triggered an enduring discussion about the relationship between the *ratione tempore* of the law of armed conflict on the one hand and IHRL on the other.²⁹⁶ The limitations of the *lex specialis* rule have been discussed by scholars, courts and tribunals and

²⁹² Wolf Heintschel von Heinegg, "Symposium: The Rule of Law in Conflict and Post-Conflict Situation: Factors in War to Peace Transitions, Comments on War." 847.

²⁹³ Wolf Heintschel von Heinegg, "Symposium: The Rule of Law in Conflict and Post-Conflict Situation: Factors in War to Peace Transitions, Comments on War." 849.

²⁹⁴ Wolf Heintschel von Heinegg, "Symposium: The Rule of Law in Conflict and Post-Conflict Situation: Factors in War to Peace Transitions, Comments on War." 854-855.

²⁹⁵ Wolf Heintschel von Heinegg, "Symposium: The Rule of Law in Conflict and Post-Conflict Situation: Factors in War to Peace Transitions, Comments on War." 855.

²⁹⁶ Wolf Heintschel von Heinegg, "Symposium: The Rule of Law in Conflict and Post-Conflict Situation: Factors in War to Peace Transitions, Comments on War." 867.

their discussions are worthy of examination in order to afford a more detailed insight into the interlinkage *ratione tempore* of IHL and IHRL.

Some scholars hold the opinion that human rights remain applicable in times of international armed conflict and, thus, the armed forces will continue to be bound by human rights even if they are fighting a war abroad.²⁹⁷ They suggest detecting if IHL is *lex specialis* to IHRL, by interpretation of the *ratio legis* of the provision in question in each individual case, but they also hold that it could be feasible that both set of rules apply at the same time.²⁹⁸ If both bodies of law have the same *ratio legis* in a particular case either of them should be applicable.²⁹⁹ This is the case for example with the provisions of Article 13 of the Geneva Convention III on the one hand and of Article 3 of the ECHR on the other, both of which protect human beings from inhuman treatment.³⁰⁰ Further, these scholars argue that many of the military operations such as the IFOR/SFOR and the KFOR operations do not fall under the *ratio legis* of IHL, which is the protection of human beings against special danger during an armed conflict, because they do not act as a belligerent or occupying force.³⁰¹ By order of the United Nations they fulfil missions less like those of an armed force than the police.³⁰² Even if IHL is applicable in such situations, IHRL would be the more adequate body of law, because the actions of the armed forces have more in common with the enforcement of internal jurisdiction than with an armed conflict.³⁰³ In these scholars' view, the use of force against foreign territory is to be considered an exercise of jurisdiction, and the fact that such jurisdiction is exercised on or against foreign territory does not free the

²⁹⁷ Heike Krieger, "Die Verantwortlichkeit Deutschlands nach der EMRK für seine Streitkräfte im Auslandseinsatz [Germany's Responsibility under The European Convention on Human Rights for its Armed Forces Deployed Abroad]." *Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht* 62 (2002) : 669-698, 695; Ulrike Froissart, "Legal and Other Factors in Nation-Building in Post War Situations: Example Iraq," in *Krisensicherung und Humanitärer Schutz [Crisis Management and Humanitarian Protection]*, 99-124, ed. Horst Fischer et al. (Berlin: Berliner Wissenschafts-Verlag, 2004), 107.

²⁹⁸ Heike Krieger, "Die Verantwortlichkeit Deutschlands nach der EMRK für seine Streitkräfte im Auslandseinsatz." 695.

²⁹⁹ Heike Krieger, "Die Verantwortlichkeit Deutschlands nach der EMRK für seine Streitkräfte im Auslandseinsatz." 695.

³⁰⁰ Heike Krieger, "Die Verantwortlichkeit Deutschlands nach der EMRK für seine Streitkräfte im Auslandseinsatz." 695.

³⁰¹ Heike Krieger, "Die Verantwortlichkeit Deutschlands nach der EMRK für seine Streitkräfte im Auslandseinsatz." 695.

³⁰² Peter Dreist, "Streitkräftefremde Aufgaben im Kosovo." *Neue Zeitschrift für Wehrrecht* 44 (2002) : 45-58, 49-50.

³⁰³ Heike Krieger, "Die Verantwortlichkeit Deutschlands nach der EMRK für seine Streitkräfte im Auslandseinsatz." 696.

members of the armed forces, as organs of their State, from their obligations under human rights law.³⁰⁴

The proponents of the traditional opinion that humanitarian law and international human rights stand in a *lex specialis* relationship say that the above arguments are not convincing if it is accepted that international law is consensual in character.³⁰⁵ They say that States would have been unwilling to reaffirm and, moreover, to develop IHL after the adoption of the Universal Declaration of Human Rights in 1948 and of the two United Nations Pacts in 1966, if they had not held the view that the law of international armed conflict is *lex specialis* and, thus, prevails over human rights law.³⁰⁶ Furthermore, they argue that the provisions of humanitarian law are more precise because they are designed particularly for the situation of armed conflict, *inter alia*, and provide far-reaching protection for victims of such conflicts and hence for the protection of the individual human being. They say that IHL is a binding guideline for armed forces engaged in combat operations³⁰⁷ and that applying human rights law in times of international armed conflict as well would not make sense, as it would complicate the situation.³⁰⁸



(3) Decisions of the International Courts and Tribunals relating to the lex specialis rule

In addition to the academic discussion by scholars, the international courts and tribunals have also dealt with the question of the relation of IHL and IHRL in some of their decisions. The first time the ICJ considered the relation of IHL and IHRL was in its *Nuclear Weapons* Advisory Opinion, when it held that these two bodies of law are in a *lex specialis-lex generalis* relationship to each other. It underlined the dominant role of IHL in the regulation

³⁰⁴ Wolf Heintschel von Heinegg, "Symposium: The Rule of Law in Conflict and Post-Conflict Situation: Factors in War to Peace Transitions, Comments on War." 868.

³⁰⁵ Wolf Heintschel von Heinegg, "Symposium: The Rule of Law in Conflict and Post-Conflict Situation: Factors in War to Peace Transitions, Comments on War." 868.

³⁰⁶ Wolf Heintschel von Heinegg, "Symposium: The Rule of Law in Conflict and Post-Conflict Situation: Factors in War to Peace Transitions, Comments on War." 868.

³⁰⁷ Wolf Heintschel von Heinegg, "Symposium: The Rule of Law in Conflict and Post-Conflict Situation: Factors in War to Peace Transitions, Comments on War." 869.

³⁰⁸ Wolf Heintschel von Heinegg, "Symposium: The Rule of Law in Conflict and Post-Conflict Situation: Factors in War to Peace Transitions, Comments on War." 869.

of armed conflicts, but mentioned at the same time the importance of human rights norms in armed conflicts and supported the process of bringing the two legal regimes together.³⁰⁹

In the *Loizidou* case, the ECtHR held that “the responsibility of a Contracting Party may also arise when as a consequence of military action -- whether lawful or unlawful -- it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.”³¹⁰

This decision of the ECtHR to apply the ECHR during times of military occupation shows that regional human rights instruments are applicable in addition to humanitarian law, because the authority exercised by an occupying power has to be characterised as an exercise of "jurisdiction" in the sense of such legal instruments. This judgment supports the above-mentioned opinion that the *lex specialis* rule in regard to IHL and IHRL has become obsolete.³¹¹

This argument was presented by the applicants in the *Bankovic* case when claiming that their human right had been violated by the air attacks conducted by the eight NATO countries against targets in former Yugoslavia.³¹² In its judgment, the ECtHR specifies its findings from the *Loizidou* case and made it clear that "in keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention."³¹³ The jurisdiction of a Contracting State entails the respect of the human rights of the ECHR irrespective of the simultaneous application of IHL. In the *Bankovic* case the Court determined the precondition which must be fulfilled for the exceptional enhancement of its territorial jurisdiction. It stated, referring to its own case law, that the respondent State has to, “through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that

³⁰⁹ Hans-Joachim Heintze, “The European Court of Human Rights and the Implementation of Human rights Standards During Armed Conflicts.” 64.

³¹⁰ *Loizidou v. Turkey*, Eur. Ct. HR., Preliminary Objections, 310, 1995, Ser. A, p. 24.

³¹¹ Ulrike Froissart, “Legal and Other Factors in Nation-Building in Post War Situations: Example Iraq,” 110-111.

³¹² Wolf Heintschel von Heinegg, “Symposium: The Rule of Law in Conflict and Post-Conflict Situation: Factors in War to Peace Transitions, Comments on War.” 870.

³¹³ *Bankovic and Others v. Belgium and Others*, Eur. Ct. HR., 52207/99, Decision of 12 December 2001, para. 354.

territory, exercise all or some of the public powers normally to be exercised by that Government.”³¹⁴ Other recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State.³¹⁵ In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State.³¹⁶

The ECtHR emphasised that “the [European] Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States” and demanded that “the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.”³¹⁷

Certainly, a simple and clear law is worthwhile and desirable, as it supports legal certainty; but the main aim of both IHL and IHRL, namely the protection of the human being, should not be neglected thereby. The Court indirectly modifies the *lex specialis* rule in a very diffident way when it makes the extraterritorial jurisdiction dependent on several preconditions. It does not abandon the *lex specialis* rule, but takes the desirability of avoiding a gap or vacuum in the protection of human rights into account. If the preconditions are not fulfilled, there is no room for the simultaneous application of the law of armed conflict and of international human rights. The judgments of the ECtHR are in this regard a compromise between the traditionalists and the scholars who want to apply IHL and IHRL differently depending on each individual case.

The Organisation of American States (OAS) provides a different solution for the relationship *ratione tempore* of the two concurrent bodies of law. In cases when both IHL and IHRL have different levels of human rights protection the OAS applies that which grants higher protection to the individual.³¹⁸ The OAS does this in carrying out its mandate.³¹⁹

The view of the traditionalists that IHL and IHRL are in a *lex specialis – lex generalis* relationship to each other means that the scope of application *ratione tempore* of IHL and

³¹⁴ *Bankovic and Others v. Belgium and Others*, Eur. Ct. HR., 52207/99, Decision of 12 December 2001, para. 71.

³¹⁵ *Bankovic and Others v. Belgium and Others*, Eur. Ct. HR., 52207/99, Decision of 12 December 2001, para. 73.

³¹⁶ *Bankovic and Others v. Belgium and Others*, Eur. Ct. HR., 52207/99, Decision of 12 December 2001, para. 73.

³¹⁷ *Bankovic and Others v. Belgium and Others*, Eur. Ct. HR., 52207/99, Decision of 12 December 2001, para. 80.

³¹⁸ *Coard et al v. the United States*, I/A Com. on HR., No. 10.951, 29 September 1999, Report Nr. 109/99, para. 42.

IHRL will never be overlapping as is possible *ratione materiae* or *ratione personae*. As shown above, this view can leave legal gaps and, therefore, is evidence for the divergence of IHL and IHRL. In contrast, the view of the progressive scholars and the decisions of the Courts try to bring both branches together to provide a complete protection of human rights. This could be seen as an attempt to converge both bodies of law.

d) Ratione loci

Ratione loci is, in fundamental aspects, related to the question of universality, as it deals with the question of legal protection with regard to territory. Every international human rights treaty refers to the territory of the contracting State. If loopholes in the legal protection of individuals exist with regard to the territory in which they find themselves, it may be because of the absence of States bound to international human rights instruments or because of the limited scope of application *ratione loci* of the legal instrument. The first reason is founded in the universality of ratification and is political in nature, while the latter results from the text of the legal instrument and is a question of interpretation.

The question which arises concerning the scope *ratione loci* is whether international instruments also protect those State nationals who are currently not in their own territory. This point is of interest to the enquiry as to whether IHL and IHRL take a similar or different approach *ratione loci*.

(1) Ratione loci of International Human Rights Law

If one interpreted the wording of Article 2(1) of the International Covenant on Civil and Political Rights “all individuals within its territory and subject to its jurisdiction” literally, the scope of territorial application would be limited in situations of armed conflicts in which agents of the State or whole armies operate in foreign territories.³²⁰ However, other interpretations of Article 2(1) of the International Covenant on Civil and Political Rights consider it is possible for the Covenant to bind a State beyond its boundaries as discussed just below.

³¹⁹ Heike Krieger, “Die Verantwortlichkeit Deutschlands nach der EMRK für seine Streitkräfte im Auslandseinsatz.” 693.

³²⁰ Theodor Meron, *Human Rights in Internal Strife*, 40.

In its General Comments, the Human Rights Committee has interpreted this Article to say “that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”³²¹ “Anyone” in this context means that the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, irrespective of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons.³²² In its comments on the *Celiberti* case, the Human Rights Committee held that the wording in question “does not imply that the State Party concerned cannot be held accountable for violations of rights under the Convention which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it.”³²³ The Human Rights Committee gave weight to its interpretation with the argument that it would be not in line with Article 5 (1) of the International Covenant on Civil and Political Rights to permit a State Party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.³²⁴ Another good reason is given by Professor Tomuschat, who assumes that it was the will of the drafters to restrict the territorial scope to such situations where enforcing the Covenant would be likely to encounter exceptional obstacles, but never to grant State parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and the personal integrity of their citizens living aboard.³²⁵ In the opinion of Professor Buergenthal, the “and” of the wording “all individuals within its territory and subject to its jurisdiction” must be interpreted as a disjunctive conjunction to the end that the State Party is obliged to respect and grant the rights recognised in the Covenant “to all individuals within its territory” and “to all individuals to its jurisdiction”.³²⁶

On the regional level, the European Commission of Human Rights came to the same conclusion when it stated in the *Cyprus Case* that it is clear from the language, object of the

³²¹ Office of the United Nations High Commissioner for Human Rights, “Human Rights Committee - General Comments 31,” para. 10. < <http://www.ohchr.org/english/bodies/hrc/comments.htm> > (10 December 2005).

³²² Office of the United Nations High Commissioner for Human Rights, “Human Rights Committee - General Comments 31,” para. 10. < <http://www.ohchr.org/english/bodies/hrc/comments.htm> > (10 December 2005).

³²³ *Celiberti v. Uruguay*, Uruguay Communication No. 56/1979, July 29, 1981, U.N. Doc. CCPR/C/13/D/52/1979, para. 10(3).

³²⁴ Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford: Oxford University Press, 2000), 89.

³²⁵ Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 90.

³²⁶ Thomas Buergenthal, “To Respect and to Ensure: State Obligations and Permissible Derogations,” in *The International Bill of Human Rights: the Covenant on Civil and Political Rights, 72-91*, ed. Louis Henkin (New York: Columbia University Press, 1981), 74.

Article and the purpose of the whole Convention that the term “within their jurisdiction” of Article 1 of the ECHR means that the High Contracting Parties are bound to secure the rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad.³²⁷

(2) *Ratione loci of International Humanitarian Law*

For international armed conflicts, IHL does not generally refer its application to the territory; it rather has a sophisticated regulation of application with regard to persons who are protected. The protection is therefore irrespective of the place where the protected person is. An exception to this is common Article 2 (2) of the Geneva Conventions which provides that an occupying power in occupation on the territory of a State which is a party to the Geneva Conventions is obliged to grant the rights of the Geneva Conventions.

The result is quite different for non-international armed conflicts, as will be discussed more precisely in the chapter on “Applicable Law in times of Internal Strife” below.

To conclude the discussion of the *ratione loci* of IHL and IHRL, both bodies of law in the end came to the same conclusion, namely that the instruments are applicable even abroad of the contracting party’s territory. The intensive argumentation which scholars and the observing bodies of the acting human rights instrument had to undertake to reach this point resulted from the unclear wording of the instruments. In contrast, it is inherent in the Geneva Conventions that they apply to the protected persons of the conventions irrespective of the territory in they reside. The territorial unlimited protection is a principle of IHL, whereas IHRL needs an interpretation in this direction. Conversely, IHRL is unlimited in the scope of protected persons, whereas IHL has, as shown above, detailed and differentiated regulations on the protected person by the Geneva Conventions and its Additional Protocols.

The identical scope of application *ratione loci* shows that in this sphere IHL and IHRL are not contradicting and cause no loopholes of protection. It is the only one of the four different categories of application where IHL and IHRL are in harmony with each other and subsequently an example that in certain aspects of application IHL and IHRL are converging.

³²⁷ *Cyprus v. Turkey*, Eur. Comm. of HR, No. 6950/75, 2 Decisions and Reports, pp. 125, 136.

2. Theoretical Issues of application demonstrated by practical examples of International Humanitarian Law and International Human Rights Law

After the explanation of the theoretical issues of the application of IHL and IHRL and its loopholes, the focus will now turn to the practical legal relevance of the lacunas in the law of application using the situations of internal strife and transnational terrorism as examples. Both situations make highly pertinent illustrations since today most wars are internal³²⁸ and transnational terrorism is a currently life-threatening phenomenon. They also demonstrate that there is insufficient legal regulation and that, in respect of their applications, IHL and IHRL are preponderantly diverging.

a) Applicable Law in times of Internal Strife

As is stated in Article 1(2) of the Additional Protocol II, the instrument is not applicable in times of internal disturbances, tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature.³²⁹ The ICRC specifies internal disturbances in its Commentary as “situations in which there is no non-international armed conflict as such, but there exists a confrontation within the country, which is characterized by a certain seriousness or duration and which involves acts of violence. These latter can assume various forms, all the way from the spontaneous generation of acts of revolt to the struggle between more or less organized groups and the authorities in power. In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order. The high number of victims has made necessary the application of a minimum of humanitarian rules.”³³⁰

Internal tensions are described in the Commentary as “situations of serious tension (political, religious, racial, social, economic, etc.), but also the sequels of armed conflict or of

³²⁸ Richard N. Kiwanuka, “Humanitarian Norms and Internal Strife: Problems and Prospects,” in *Implementation of International Humanitarian Law*, 229-253, eds. Frits Kalshoven and Yves Sandoz (Dordrecht: M. Nijhoff Publishers, 1989), 230.

³²⁹ The term internal strife is not used in the Geneva Conventions and its Additional Protocols, but by many scholars as a generic term for conflicts described in Article 1 of Additional Protocol II. In this way, it will be done in this thesis too.

³³⁰ International Committee of the Red Cross, *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Article 1 Additional Protocol II, 1355, para. 4475.

internal disturbances. Such situations have one or more of the following characteristics, if not all at the same time:

- large scale arrests;
- a large number of “political” prisoners;
- the probable existence of ill-treatment or inhumane conditions of detention;
- the suspension of fundamental judicial guarantees, either as part of the promulgation of a state of emergency or simply as a matter of fact;
- allegations of disappearances.”³³¹

These types of conflicts are not covered by Article 1 (1) of the Additional Protocol II either, because they do not fulfil the geo-military characteristics that armed groups must be under responsible command or that these groups exercise such control over a part of a High Contracting Party’s territory that they are enabled to carry out military operations in a sustained and concerted manner and to implement the provisions of the Additional Protocol.³³² In practice, the threshold of application of common Article 3 of the Geneva Conventions with regard to the level of violence is so high that only internal conflicts with an intensity comparable to that of the Spanish civil war or the Nigerian Conflict are covered by Additional Protocol II.³³³ It is therefore obvious that internal strife itself does not reach this threshold.



The question remains as to whether common Article 3 of the Geneva Conventions applies in such situations since its threshold of application is lower than that of Additional Protocol II. Pictet holds in the ICRC Commentary to the Geneva Conventions that “the conflicts referred to in Article 3 are armed conflicts, with 'armed forces' on either side engaged in 'hostilities' -- conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country.”³³⁴ Since Pictet refers in his description to international war, it seems that the intensity of force of the conflict should not be too low. If the hostilities do not escalate to levels requiring the use of military institutions the conflict is legally containable within the domestic jurisdiction of the State; but beyond this, IHL

³³¹ International Committee of the Red Cross, *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Article 1 of the Additional Protocol II, 1355, para. 4476.

³³² See Article 1(1) of the Additional Protocol II.

³³³ Antonio Cassese, “The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts.” *International and Comparative Law Quarterly* 30 (1981), 418-439, 418.

³³⁴ International Committee of the Red Cross, *Commentary to the Geneva Convention relative to the treatment of Prisoners of War* (Geneva: ICRC, 1960), 37.

applies.³³⁵ The ICRC commentary tries to interpret the undefined term “armed conflict” as extensively as possible to achieve a wide application of common Article 3 of the Geneva Conventions³³⁶. However, States can deny the application to a situation of armed conflict, because there is no internationally administered supervisory and impartial humanitarian body for the implementation of this article.³³⁷ Pursuant to common Article 3 (2) of the Geneva Conventions, the ICRC may only offer its services to the State or opposing party but there is no obligation for the parties to accept such an offer. Additionally, no supervisory body exists which could oversee the implementation of common Article 3 of the Geneva Conventions.³³⁸ In times of disagreement with regard to the application of common Article 3 of the Geneva Conventions, the only applicable criterion is the intensity of violence.³³⁹ In the case of internal disturbances, such as sporadic violence or rebellion against a government by its own population, a State will often maintain it is able to master the situation and only domestic law applies.³⁴⁰ Subsequently, in times of internal disturbances, common Article 3 of the Geneva Conventions may in practice not be applicable. This outcome is unsatisfactory since every armed conflict with a higher intensity similar to a civil war begins as a low intensity conflict.³⁴¹ The guerrilla war in Uganda from 1980 to 1986, for example, began with a rebellion by twenty seven people and terminated after five years with 8000 combatants of the national resistance army.³⁴² In order to terminate internal conflicts governments call out police or military force and as a consequence the rule of law is weakened and massive human rights violations may occur.³⁴³

Theoretically, there are no loopholes, because the domestic legal human rights law applies when the IHL Instruments do not cover the conflict. Professor Draper used the formulation

³³⁵ Richard N. Kiwanuka, “Humanitarian Norms and Internal Strife: Problems and Prospects,” in *Implementation of International Humanitarian Law*, 236.

³³⁶ International Committee of the Red Cross, *Commentary to the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces on the Field* (Geneva: ICRC, 1952), 50.

³³⁷ M. Gandhi, “Common Article 3 of the Geneva Conventions 1949, In The Era Of International Criminal Tribunals,” *ISIL Year Book of International Humanitarian and Refugee Law*, 11, 2001. <<http://www.worldlii.org/int/journals/ISILYBIHRL/2001/11.html>> (10 December 2005).

³³⁸ M. Gandhi, “Common Article 3 of the Geneva Conventions 1949, In The Era Of International Criminal Tribunals,”

³³⁹ Hans-Peter Gasser, “International Humanitarian Law,” in *Introduction to International Humanitarian Law*, eds. M.K. Balachandran and Rose Verghese (New Delhi: ICRC, 1997); Christa Meindersma, “Applicability of Humanitarian Law in International and Internal Armed Conflict.” 115.

³⁴⁰ M. Gandhi, “Common Article 3 of the Geneva Conventions 1949, In The Era Of International Criminal Tribunals,”

³⁴¹ Richard N. Kiwanuka, “Humanitarian Norms and Internal Strife: Problems and Prospects,” 234.

³⁴² Richard N. Kiwanuka, “Humanitarian Norms and Internal Strife: Problems and Prospects,” 234.

³⁴³ Djamchid Momtaz, “The minimum humanitarian rules applicable in periods of internal tension and strife.” *International Review of the Red Cross* 324 (1998) : 455-462, 455.

that in times of armed conflict the regime of human rights “is there waiting in the background the whole time, to take over once the conflict abates.”³⁴⁴ But in practice this very technical understanding of the interlinkage between IHL and IHRL is thwarted by the principle of sovereignty of States. Besides the right to determine whether a conflict is internal strife or non-international armed conflict in the sense of common Article 3 of the Geneva Conventions, the State also has the power to decide a state of emergency with the consequent derogation of human rights.³⁴⁵ As shown earlier in this paper, the derogation of national human rights is in accordance with international and regional human rights instruments, except the African Charter.³⁴⁶

In practice, individuals are confronted with two types of gross violations of human rights in times of internal strife: arbitrary mass arrests and the suspension of judicial safeguards.³⁴⁷ Detainees may, for example, be unduly restrained, ill-treated or held in isolation.³⁴⁸ Defendants may be faced with the loss of their fundamental procedural rights, such as the right to an independent and impartial judge and the right to be subjected to a fair trial.³⁴⁹

The International Covenant on Civil and Political Rights and regional human rights treaties include provisions which protect detainees and defendants in imprisonment and before the court but, as mentioned above, these rights are derogable in a state of emergency.³⁵⁰ Regarding arbitrary arrests, the United Nations has established three instruments³⁵¹ to improve the protection of prisoners, but these instruments have no binding character. Moreover, in respect of the due process guarantees, even such declaratory instruments are lacking.

³⁴⁴ Gerald I. A. D. Draper, “The Relationship between the Human Rights and the Law of Armed Conflicts.” *Israel Yearbook of Human Rights* 1 (1971): 191-207, 191.

³⁴⁵ Hernán Salinas Burgos, “The application of international humanitarian law as compared to human rights law in situations qualified as internal armed conflict, internal disturbances and tension, or public emergency, with special reference to war crimes and political crimes,” in *Implementation of International Humanitarian Law*, 13-14.

³⁴⁶ Raúl E. Vinuesa, “Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law.” 76.

³⁴⁷ Djamchid Momtaz, “The minimum humanitarian rules applicable in periods of internal tension and strife.” 455.

³⁴⁸ Djamchid Momtaz, “The minimum humanitarian rules applicable in periods of internal tension and strife.” 455.

³⁴⁹ Djamchid Momtaz, “The minimum humanitarian rules applicable in periods of internal tension and strife.” 455.

³⁵⁰ Djamchid Momtaz, “The minimum humanitarian rules applicable in periods of internal tension and strife.” 459.

³⁵¹ Standard Minimum Rules for the Treatment of Prisoners 1955, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988, Basic Principles for the Treatment of Prisoners 1990.

Finally, even the non-derogable rights are often ignored because practical difficulties stand in the way of ensuring individual freedoms.³⁵²

b) Proposals for a better Protection of Human Rights relating to Internal Strifes

Given the inadequate legal protection from human rights violations in times of internal strife, various proposals have been made by scholars and the international community to improve human rights protection at these times.

H.P. Gasser elaborated a Code of Conduct in the Event of Internal Disturbances and Tensions.³⁵³ His concern is not the state of the law, but in accordance with the principle of the Geneva Conventions, is purely humanitarian in the sense of helping mankind.³⁵⁴ His instrument brings together a number of existing provisions which address the specific requirements of internal strife but does not propose new rules.³⁵⁵ Furthermore, he stresses that under IHRL, the government possesses a unilateral obligation to guarantee the fundamental human rights of all persons within its jurisdiction, and that internal conflicts automatically take place within the jurisdiction of the State irrespective of intensity or the stage of the conflict.³⁵⁶

A further suggestion to enhance the protection of human rights during internal strife is given by Kiwanuka. He dispenses with an instrument for internal strife, because to his point of view the applicable principles and standards do exist in the form of the International Bill of Human Rights accompanied by the three regional human rights conventions.³⁵⁷ He instead proposes more campaigning for ratification of IHL and IHRL instruments and the dissemination of IHL and IHRL among populations, and especially among individual

³⁵² Richard N. Kiwanuka, "Humanitarian Norms and Internal Strife: Problems and Prospects," in *Implementation of International Humanitarian Law*, 236.

³⁵³ Gasser, Hans-Peter, "A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct," *International Review of the Red Cross*, No. 262 (1988), 38–58.

³⁵⁴ Peter Kooijmans, "In the Shadowland between Civil War and Civil Strife: some Reflections on the Standard-setting Process," in *Humanitarian law of armed conflict-challenges ahead: Essays in honour of Frits Kalshoven*, 241.

³⁵⁵ Peter Kooijmans, "In the Shadowland between Civil War and Civil Strife: some Reflections on the Standard-setting Process," in *Humanitarian law of armed conflict-challenges ahead: Essays in honour of Frits Kalshoven*, 241.

³⁵⁶ Peter Kooijmans, "In the Shadowland between Civil War and Civil Strife: some Reflections on the Standard-setting Process," in *Humanitarian law of armed conflict-challenges ahead: Essays in honour of Frits Kalshoven*, 235, 242.

commanders of official and rebel forces, as well as an increased coordination between human rights and humanitarian organisations.³⁵⁸ In addition, he postulates the strengthening of the role of humanitarian organisations such as the ICRC by making them more acceptable to the parties.³⁵⁹

Professor Meron was the first to present a draft for a declaration of minimum humanitarian standards which could become the basis for a further additional Protocol to the Geneva Conventions or another international binding instrument in the future.³⁶⁰ In his draft declaration, Meron delineates that the scope of application should cover a) the entire population in b) times of internal strife irrespective of whether a declared state of emergency has been proclaimed with c) collective violence, including low-intensity violence, ranging from simple internal tensions to more serious internal disturbances, which are d) not already covered by humanitarian law.³⁶¹ The declaration should only contain non-derogable provisions. Furthermore, no limitations or restrictions to it must be permitted and gaps between the scope of application of common Article 3 of the Geneva Conventions and this new declaration must not be tolerated.³⁶²

In Meron's proposal the material substance for a new declaration on internal strife is guided by the directive that only rights which are essential to the protection of people are affected by internal strife.³⁶³ He mostly refers to the human rights of the humanitarian instruments, especially to guarantees of due process, to provisions addressing the phenomenon of massive and prolonged detentions, and to provision against disappearances.³⁶⁴ His concept served as a guideline for the declaration of minimum humanitarian standards which was formulated and adopted at an expert meeting convened by the Abo Akademi University Institute for Human Rights in Turku/Abo (Finland) in December 1990.³⁶⁵ This so-called *Turku Declaration* was discussed and deliberated at the OSCE Budapest summit in

³⁵⁷ Richard N. Kiwanuka, "Humanitarian Norms and Internal Strife: Problems and Prospects," in *Implementation of International Humanitarian Law*, 251.

³⁵⁸ Richard N. Kiwanuka, "Humanitarian Norms and Internal Strife: Problems and Prospects," in *Implementation of International Humanitarian Law*, 252-253.

³⁵⁹ Richard N. Kiwanuka, "Humanitarian Norms and Internal Strife: Problems and Prospects," in *Implementation of International Humanitarian Law*, 246.

³⁶⁰ Theodor Meron, *Human Rights in Internal Strife*, 141-142.

³⁶¹ Theodor Meron, *Human Rights in Internal Strife*, 146, 150.

³⁶² Theodor Meron, *Human Rights in Internal Strife*, 147.

³⁶³ Theodor Meron, *Human Rights in Internal Strife*, 154.

³⁶⁴ See as a whole: Theodor Meron, *Human Rights in Internal Strife*, 155-160; Theodor Meron and Allan Rosas "Current Development: A Declaration of Minimum Humanitarian Standards." *The American Journal International Law* 85 (1991) : 375-381, 375.

³⁶⁵ Theodor Meron and Allan Rosas "Current Development: A Declaration of Minimum Humanitarian Standards." 376.

1994³⁶⁶ and at the United Nations Commission on Human Rights from 1995 onwards.³⁶⁷ In the resolution 1995/29 the Commission on Human Rights resolve to elaborate on this proposal and to adopt it eventually in the future.³⁶⁸

The text of the *Turku Declaration* tries to bridge the gap of IHL and IHRL by defining its applicability without reference to changes of circumstances such as war and peace. In addition to the mentioned civil and political rights above it also contains socio-economic rights which must be strictly protected in times of strife. These include, *inter alia*, in Article 3(2)(a) *Turku-Declaration*, the right to health protection and, in Article 3(2)(f) *Turku-Declaration*, the right to food. The improvement becomes clear in light of the fact that under the *Turku-Declaration* even the socio-economical rights could not be suspended in times of emergency.³⁶⁹ Because of its mixed composition of human rights considerations and humanitarian law principles, some commentators do not consider the *Turku-Declaration* as official humanitarian law.³⁷⁰

Meron's proposal is the most progressive and ambitious one. Whereas the other suggestions do not create new law, his instrument does. However, this approach has been criticised by Kooijmans on several grounds. He states that the human rights provisions included in the *Turku-Declaration* do not belong to a system originally designed for armed conflict between States and which is substantially different in character from human rights law.³⁷¹ He suggests expanding the catalogue of non-derogable human rights by concluding

³⁶⁶ M. Gandhi, "Common Article 3 of the Geneva Conventions 1949, In The Era Of International Criminal Tribunals,"

³⁶⁷ U.N. Doc. E/CN.4/RES/1995/29, U.N. Doc. E/CN.4/RES/1996/26, U.N. Doc. E/CN.4/RES/1997/21, U.N. Doc. E/CN.4/RES/1998/29, U.N. Doc. E/CN.4/RES/1999/65, U.N. Doc. E/CN.4/DEC/2002/112, U.N. Doc. E/CN.4/1996/80, U.N. Doc. E/CN.4/1996/80/Add.1, U.N. Doc. E/CN.4/1996/80/Add.2, U.N. Doc. E/CN.4/1996/80/Add.3, U.N. Doc. E/CN.4/1997/77, U.N. Doc. E/CN.4/1997/77/Add.1, U.N. Doc. E/CN.4/1998/87, U.N. Doc. E/CN.4/1998/87/Add.1, U.N. Doc. E/CN.4/2001/91; see Office of the United Nations High Commissioner for Human Rights, "Documents on International Humanitarian Law," <www.unhcr.ch/huridocda/huridoca.nsf/FramePage/Subject%20inthlaw%20En?OpenDocument&Start=1&Count=1000&ExpandView> (10 December 2005).

³⁶⁸ U.N. Doc. E/CN.4/RES/1995/29; see Office of the United Nations High Commissioner for Human Rights, "1995/29. Minimum humanitarian standards," <www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/3ef0eed568f72d1802566db0043c9b6?Opendocument> (10 December 2005).

³⁶⁹ Xavier Philippe, "The Protection of Socio-economic Rights in International Humanitarian Law: Socio-Economic Rights in Armed Conflicts" 3.

³⁷⁰ Raúl E. Vinuesa, "Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law." 91 and Rosemary Abi-Saab, "Human Rights and Humanitarian Law in Internal Conflicts" *Human rights and humanitarian law, 107-123*, ed. Daniel Warner (The Hague: M. Nijhoff Publishers, 1997), 119.

³⁷¹ Peter Kooijmans, "In the Shadowland between Civil War and Civil Strife: some Reflections on the Standard-setting Process," in *Humanitarian law of armed conflict-challenges ahead: Essays in honour of Frits Kalshoven*, 246.

additional protocols to human rights instruments and not to humanitarian law instruments.³⁷² He also argues that the concept of reciprocity found in IHL creates confusion where human rights are concerned.³⁷³ He pleads that the difference between IHL and IHRL should be clearly distinguished in order to prevent a deleterious confusion. He prefers Gasser's approach since it is mainly didactic and moral and recalls pre-existing rules.³⁷⁴

Certainly, it is true that many existing international law instruments fail to fulfil their intention and the implementation of the existing rules would be preferable. But, as was shown above, in the special case of internal strife, the protection of human rights is unsatisfactory not only because of a lack of implementation but also because of the loopholes in the interface of human rights and humanitarian law instruments. However, even if he is correct that the *Turku-Declaration* causes technical issues, Gasser and Kooijman's approach does not provide a solution to bridge the gap in human rights protection in times of internal strife. Since the establishment of an international legal instrument requires a lot of time, the other ways to strengthen human rights protection should be undertaken in concert.

De lege lata regarding the example of internal strife has shown that IHL and IHRL do not provide a gapless protection of human rights. It is a further point demonstrating that IHL and IHRL are not well harmonised, leading to the conclusion that they are divergent on this aspect. However, the proposals considered above, especially Meron's Minimum Humanitarian Standards, demonstrate how both branches of law could possibly merge together. But while Meron's proposal remains under deliberations by the United Nations it has only the status *de lege ferenda*.

c) Applicable law on Transnational Terrorism

In order to scrutinise whether IHL or IHRL covers terrorism, it must first be clarified what is meant by terrorism. There is no international legal definition of terrorism, even though

³⁷² Peter Kooijmans, "In the Shadowland between Civil War and Civil Strife: some Reflections on the Standard-setting Process," in *Humanitarian law of armed conflict-challenges ahead: Essays in honour of Frits Kalshoven*, 246.

³⁷³ Peter Kooijmans, "In the Shadowland between Civil War and Civil Strife: some Reflections on the Standard-setting Process," in *Humanitarian law of armed conflict-challenges ahead: Essays in honour of Frits Kalshoven*, 245.

³⁷⁴ Peter Kooijmans, "In the Shadowland between Civil War and Civil Strife: some Reflections on the Standard-setting Process," in *Humanitarian law of armed conflict-challenges ahead: Essays in honour of Frits Kalshoven*, 246-247.

several attempts have been made.³⁷⁵ The definitional difficulty lies in the well-known sentence that one man's freedom fighter is another man's terrorist and *vice versa*, which it has not been possible to resolve up to now.³⁷⁶ In the context of the present inquiry "terrorism" is understood as acts which seem to be the clear opposite of typical acts in an internal armed conflict on the one hand, and an international armed conflict in which two or more states are parties involved, on the other.³⁷⁷ Positively speaking, terrorism is an armed conflict which falls outside these two categories but in which a State is engaged in a conflict with non-international State actors who use transnational armed forces, as for instance *al-qaeda*, the main active terrorist group in recent times.³⁷⁸ The question of the proper law on transnational counterterrorist military measures will also be considered just below.

(1) *Law applicable to acts of Terrorism*

Many treaties deal with the phenomenon of transnational terrorism and counter-terrorism, but these instruments do not exclude IHL. In fact several treaties explicitly state that no rights, obligation and responsibility of States or individuals under IHL are affected³⁷⁹ or, moreover, that IHL is pre-emptive to activities of armed forces during an armed conflict³⁸⁰, or that they do not apply where an alleged offender can be prosecuted for a war crime in accordance with the Geneva Conventions.³⁸¹ The conclusion could be drawn that the *lex specialis derogat lege generalis* rule is not inherent as far the law of war and the specific instruments dealing with terrorism are concerned.³⁸² With regard to the actions of armed

³⁷⁵ Hans-Joachim Heintze, "Völkerrecht und Terrorismus," in *Terrorismus als weltweites Phänomen*, 217-240, eds. Kai Hirschmann and Peter Gerhard (Berlin: Berlin Verlag Spitz, 2000), 220; Kevin Boyle, "Terrorism, States of Emergency and Human Rights," in *Anti-terrorist Measures and Human Rights*, 95-116, eds. Wolfgang Benedek and Alice Yotopoulos-Marangopoulos (Leiden: M. Nijhoff Publishers, 2004), 97.

³⁷⁶ Gabor Rona, "International Law under fire: Interesting Times for international Humanitarian Law: Challenges from the 'war on Terror.'" *The Fletcher Forum of World Affairs Journal* 27 (2003) : 55-70, 61.

³⁷⁷ Silja Vöneky, "The Fight against Terrorism and the Rules of the Law of Warfare," in *Terrorism as a Challenge for National and International Law. Security versus Liberty?*, 1-27, eds. Christian Walter et al., (Heidelberg: Springer, 2003), 3.

³⁷⁸ Silja Vöneky, "The Fight against Terrorism and the Rules of the Law of Warfare," in *Terrorism as a Challenge for National and International Law. Security versus Liberty?*, 3.

³⁷⁹ i.e. International Convention of the Suppression of Terrorist Bombing, Article 19(1); International Convention on the Suppression of the Financing of Terrorism Article 21; Intern-American Convention Against Terrorism, AG/Res. 1840 (XXXII – 0/02), Article 15 (2).

³⁸⁰ See Article 19(2) of the 1999 Bombings Convention.

³⁸¹ Silja Vöneky, "The Fight against Terrorism and the Rules of the Law of Warfare," in *Terrorism as a Challenge for National and International Law. Security versus Liberty?*, 4 -5; See Article 12 of the International Convention against the Taking of Hostage.

³⁸² Silja Vöneky, "The Fight against Terrorism and the Rules of the Law of Warfare," in *Terrorism as a Challenge for National and International Law. Security versus Liberty?*, 6.

forces, the law of armed conflict shall be the only applicable law; with regard to the acts of other actors, the applicability of the law of armed conflict is not *per se* excluded.³⁸³

(a) International Humanitarian Law and Terrorism

Now the question as to whether IHL applies to terrorist acts must be examined. First, one must look at whether terrorist acts are covered by the four Geneva Conventions and Additional Protocol I or by common Article 3 of the Geneva Conventions and Additional Protocol II.

(i) Application of the law of international armed conflict relating to international terrorism

To be within the application of the four Geneva Conventions and Additional Protocol I, terrorism must fulfil the conditions set out in common Article 2 of the Geneva Conventions, namely that it could be qualified as an armed conflict which occurs between at least two contracting parties or if the territory of a contracting party is occupied by the terrorist. Terrorists usually do not occupy territories of states, because one of their typical characteristics is their clandestine procedure.³⁸⁴ The terrorist violations therefore would have to be within the first condition under common Article 2 of the Geneva Conventions, which means that they must meet two requirements: the terrorist acts must reach a certain level of intensity and the terrorists must be subject to international law.³⁸⁵ However, the latter requirement is not met by terrorist groups because they do not enjoy subjective status under international law, which usually only States do.³⁸⁶ Subsequently, they can never become a party to an armed conflict. The two exceptions which exist to this rule are also not fulfilled. As shown above, according to 1(4) of the Additional Protocol I, freedom fighters can become party to an armed conflict, if their struggle for freedom is waged in the exercise of their right to self-determination against colonial suppression.³⁸⁷ In practice, no such conflict has ever been recognised under the Additional Protocol I and the Geneva Conventions.³⁸⁸

³⁸³ Silja Vöneky, “The Fight against Terrorism and the Rules of the Law of Warfare,” in *Terrorism as a Challenge for National and International Law. Security versus Liberty?*, 6.

³⁸⁴ Herfried Münkler, *Die neuen Kriege*, 3rd ed. (Hamburg: Rowohlt, 2002), 176.

³⁸⁵ Silja Vöneky, “The Fight against Terrorism and the Rules of the Law of Warfare,” in *Terrorism as a Challenge for National and International Law. Security versus Liberty?*, 7-8.

³⁸⁶ Silja Vöneky, “The Fight against Terrorism and the Rules of the Law of Warfare,” in *Terrorism as a Challenge for National and International Law. Security versus Liberty?*, 9.

³⁸⁷ See in this minithesis at 26.

³⁸⁸ Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, 86.

Non-state actors such as a terrorist group may be a party to an armed conflict, if they are recognised as belligerents by a State.³⁸⁹ But as it is very unlikely that a State considers a terrorist group as belligerents this exception shall be left aside as well.³⁹⁰

Although it has been illustrated that terrorists cannot become party to an armed conflict, nevertheless it could be possible that the acts carried out by them are covered by IHL.³⁹¹ This would be the case if their acts could be attributed to a State Party of the Geneva Conventions, and then that State would be party to the conflict and not the terrorist group.³⁹² The question of accountability is usually discussed with regard to *ius ad bellum*, but it is a general principle of international law to establish whether an action has been undertaken by a certain subject under international law.³⁹³ The jurisprudence of the ICJ and tribunals has elaborated five different levels of linkage between the State and the non-state actor.³⁹⁴ From the weakest to the strongest level of connection these are first, “inaction/inability”, meaning that the State is not able to intervene in the terrorist’s planning because of its weakness. The next step is called “toleration/approved”, which implies that the State is able but not disposed to take action against terrorists.³⁹⁵ A closer link is the “support” of the non-state actors by the State.³⁹⁶ If the State “sponsors” the terrorist, it embraces the terrorist’s activities. On the last level the states have “effective”³⁹⁷ or “overall control”³⁹⁸ of the terrorist’s activities or *a maiore ad minus* the same has to be true if the terrorist group has controlled and financed the State.³⁹⁹

Prior to the terrorist attacks of September 11th, 2001, only the last two levels “controlling and sponsoring” were considered to constitute accountability between the acting terrorists and

³⁸⁹ Rüdiger Wolfrum and Christiane E. Phillipp “The Status of the Taliban: Their Obligations and Rights under International Law.” *Max Planck Yearbook of United Nations Law* 6 (2002) : 559-601, 578.

³⁹⁰ Silja Vöneky, “The Fight against Terrorism and the Rules of the Law of Warfare,” in *Terrorism as a Challenge for National and International Law. Security versus Liberty?*, 9.

³⁹¹ Silja Vöneky, “The Fight against Terrorism and the Rules of the Law of Warfare,” in *Terrorism as a Challenge for National and International Law. Security versus Liberty?*, 9.

³⁹² Silja Vöneky, “The Fight against Terrorism and the Rules of the Law of Warfare,” in *Terrorism as a Challenge for National and International Law. Security versus Liberty?*, 9.

³⁹³ Rüdiger Wolfrum and Christiane E. Phillipp “The Status of the Taliban: Their Obligations and Rights under International Law.” 594.

³⁹⁴ Bruno Simma, “Terrorismusbekämpfung und Völkerrecht,” in *Neue Bedrohung Terrorismus. Der 11. September 2001 und die Folgen*, 92-108, ed. Ellen Bos and Antje Helmerich (Münster: Lit, 2003), 102-103.

³⁹⁵ See *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, ICJ, Judgment, ICJ Report 1980, 3 et seq.; see also Article 11 of the Draft Rules on State Responsibility 2001.

³⁹⁶ Bruno Simma, “Terrorismusbekämpfung und Völkerrecht,” in *Neue Bedrohung Terrorismus. Der 11. September 2001 und die Folgen*, 102.

³⁹⁷ I.e., the terrorists were acting on the instructions of, or under the direction or control of, that State in carrying out the conduct; see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, ICJ, Judgment, ICJ Reports, 1986, paras. 14, 103; Article 8 ILC Draft Rules on State Responsibility 2001.

³⁹⁸ *Prosecutor v. Tadic*, ICTY, IT-94-1, Appeals Chamber, Judgment of 15 July 1999, para. 137.

³⁹⁹ Bruno Simma, “Terrorismusbekämpfung und Völkerrecht,” in *Neue Bedrohung Terrorismus. Der 11. September 2001 und die Folgen*, 103.

the State.⁴⁰⁰ Nowadays, however, even mere “inaction” or “toleration” of terrorist attacks by the State establishes accountability.⁴⁰¹

In sum therefore, terrorist acts in a specific case are covered as international armed conflict by common Article 2 of the Geneva Conventions if the above mentioned conditions are fulfilled. The Geneva Conventions and Additional Protocol I would then apply.

(ii) Application of the law of Non-international Armed Conflict relating to Terrorism

The question remains as to whether under certain circumstances the law of non-international armed conflict also applies. Additional Protocol II requires pursuant to Article 1 (1) of the Additional Protocol II that the non-state actor has “control over a part [of] the territory”. As mentioned above, it is very unusual that this condition is fulfilled by terrorist organisations, and the applicability of Additional Protocol II can therefore be excluded.⁴⁰²

Finally, it has to be examined whether the lower threshold of common Article 3 of the Geneva Conventions accommodates an internal conflict in which a terrorist participates.

Terrorist acts have to meet two conditions to be covered by common Article 3 of the Geneva Conventions. They must have the character of an armed conflict which is not an international one.⁴⁰³ The term “armed conflict” used in common Article 2(1) of the Geneva Conventions in respect of an international conflict covers hostilities irrespective of their intensity, duration or scale of conflict.⁴⁰⁴ In contrast to this, the scope of this term in the context of common Article 3 of the Geneva Conventions is quite problematic.⁴⁰⁵

Derek Jinks tries to sharpen this term by comparing its usage in Additional Protocol II and by the judgment of the *Prosecutor v. Tadic*.⁴⁰⁶

⁴⁰⁰ Bruno Simma, “Terrorismusbekämpfung und Völkerrecht,” in *Neue Bedrohung Terrorismus. Der 11. September 2001 und die Folgen*, 104.

⁴⁰¹ Bruno Simma, “Terrorismusbekämpfung und Völkerrecht,” in *Neue Bedrohung Terrorismus. Der 11. September 2001 und die Folgen*, 105.

⁴⁰² Silja Vöneky, “The Fight against Terrorism and the Rules of the Law of Warfare,” in *Terrorism as a Challenge for National and International Law. Security versus Liberty?*, 9.

⁴⁰³ See common Article 3 of the Geneva Conventions.

⁴⁰⁴ Derek Jinks, “September 11 and the Law of War.” *The Yale Journal of International Law* 28 (2003) : 1-49, 22.

⁴⁰⁵ Derek Jinks, “September 11 and the Law of War.” 23.

⁴⁰⁶ Derek Jinks, “September 11 and the Law of War.” 27-28.

In Additional Protocol II the term “armed conflict” has to be interpreted more restrictively than in common Article 3 of the Geneva Conventions, because its provisions grant a higher level of protection than the minimum standard of common Article 3 of the Geneva Conventions and, simultaneously, its field of application is much more narrow.⁴⁰⁷ It is made explicit that the broad scope of common Article 3 of the Geneva Conventions is not affected by the higher threshold of Additional Protocol II when Article 1(1) of the Additional Protocol II states “without modifying its existing conditions of application.”

The specified the term “armed conflict” as follows: “An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”⁴⁰⁸

At first glance this definition might be read to imply that an "armed conflict" exists only if the armed group exercises control over a portion of the State's territory and at second glance the definition might be read to classify internal hostilities as an "armed conflict" only if the armed violence is "protracted".⁴⁰⁹ However, the Tribunal did not postulate that armed groups exercise control over territory within the State; in defining the territorial field of application of humanitarian law it only made clear that such law applies (1) even in a territory no longer under the control of the State and (2) throughout such a territory.⁴¹⁰

The question of whether internal armed violence is "protracted" or not is determined by reference to the entire period from the initiation to the cessation of hostilities.⁴¹¹ The laws of war apply also to acts committed prior to the point at which the "protracted" threshold was overstepped.⁴¹² That means that the "protracted" requirement does not exclude acts committed in the early stages of an internal armed conflict.⁴¹³ In conclusion, the "protracted" armed

⁴⁰⁷ Derek Jinks, “September 11 and the Law of War.” 26.

⁴⁰⁸ Prosecutor v. Tadic, ICTY, Decision of 2 October 1995, para. 70.

⁴⁰⁹ Derek Jinks, “September 11 and the Law of War.” 28.

⁴¹⁰ Derek Jinks, “September 11 and the Law of War.” 28.

⁴¹¹ Derek Jinks, “September 11 and the Law of War.” 28.

⁴¹² Derek Jinks, “September 11 and the Law of War.” 28.

⁴¹³ Derek Jinks, “September 11 and the Law of War.” 28.

violence requirement is best understood as little more than a restatement of the general rule excluding rebellion and mere acts of banditry from the scope of humanitarian law.⁴¹⁴ This is also in line with the drafting history of the Geneva Conventions, namely that the interpretation of the term “armed conflict” “should be applied as widely as possible”⁴¹⁵, which is inherent in the intentional renouncement of the definition of the term “armed conflict”. The only examples given by the ICRC Commentary of situations which are too insignificant to be called armed conflicts are the rebellion of a handful of individuals raised against the State and the attack of a police station.⁴¹⁶ Terrorist attacks which are carried out by a terrorist organisation that commits a series of assaults therefore fulfil the condition of the definition that the violence must be “protracted”.⁴¹⁷ It is not a condition which excludes the possibility that terrorist acts are not covered by the term “armed conflict” in the meaning of common Article 3 of the Geneva Conventions.

The question remains as to whether a terrorist organisation could be a party of a “conflict not of an international character”. The answer depends on the interpretation of this term. The most restrictive opinion holds that only civil wars are accommodated by this term.⁴¹⁸

Another view reads common Article 3 of the Geneva Conventions so as to say that it only applies to armed conflicts within the territory of one State and not to transnational or international ones.⁴¹⁹



Finally, a third opinion interprets the provision broadly. Here, common Article 3 of the Geneva Conventions covers all conflicts which do not belong to the scope of the international armed conflicts of common Article 2 of the Geneva Conventions.⁴²⁰

⁴¹⁴ Derek Jinks, “September 11 and the Law of War.” 28.

⁴¹⁵ International Committee of the Red Cross, *Commentary to the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces on the Field*, 50.

⁴¹⁶ International Committee of the Red Cross, *Commentary to the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces on the Field*, 49.

⁴¹⁷ Silja Vöneky, “The Fight against Terrorism and the Rules of the Law of Warfare,” in *Terrorism as a Challenge for National and International Law. Security versus Liberty?*, 7.

⁴¹⁸ See, e.g., Morris Greenspan, *The Modern Law of Land Warfare* (Berkeley and Los Angeles: University of California Press, 1959), 619-27 (suggesting that Common Article 3 of the Geneva Conventions applies only to „insurgents“ and „belligerents“); Jordan J. Paust, “Addendum: War and Responses to Terrorism,” *The American Society of International Law Insights*, September 2001. <<http://www.asil.org/insights/insigh77.htm#addendum2> (Sept. 2001) > (10 December 2005) arguing that Common Article 3 of the Geneva Conventions applies only if the non-state armed group constitutes an „insurgency“; see also Lindsay Moir, *The Law of Internal Armed Conflict*, 17 “Civil war is, after all, the very situation in which the struggle has attained such proportions as to make both parties analogous to belligerents in the international law sense.”

⁴¹⁹ Derek Jinks, “September 11 and the Law of War.” 40.

⁴²⁰ Derek Jinks, “September 11 and the Law of War.” 40.

The first opinion is supported by the drafting history of the Geneva Conventions.⁴²¹ In addition, the delegates had the Spanish civil war in mind when they established this provision. This understanding is also endorsed by many commentators.⁴²²

But there are also many arguments against this view. There is nothing in the language of common Article 3 of the Geneva Conventions to say that “non-international conflicts” only covers civil wars.⁴²³ In addition, the historical argument may also be rejected, if one looks closely at the deliberations: The Conference refused a proposal by the U.S. delegation that would have established a similar threshold.⁴²⁴ Lastly, this restrictive reading frustrates the general purposes of the provision as it does not coincide with the broad conception of the material field of common Article 3 of the Geneva Conventions as discussed in the previous paragraph.⁴²⁵

The second view finds support in the wording of common Article 3 of the Geneva Conventions when it says “territory of one of the High Contracting Parties”. This is a strong reason, but there are also several arguments against it.

First, this reading of the provision would create an inexplicable regulatory gap in the Geneva Conventions, because only international and internal armed conflicts would be covered by the Geneva Conventions, and not armed conflicts between a State and a transnational armed group or an internal armed conflict that spills over an international border into the territory of another State.⁴²⁶ The jurisprudence also implicitly opposed this interpretation in concluding that the armed conflict in former Yugoslavia included both internal and international aspects - and that the applicable humanitarian law varied accordingly.⁴²⁷ The purpose of the provision is not to limit the field of application, because it states that wholly internal matters are a matter of international humanitarian law. Moreover, this wording serves the purpose of demonstrating that the application of the provision postulates a nexus to the jurisdiction of a State Party to the Conventions.⁴²⁸

The third opinion is supported by the systematics of the Geneva Conventions. The wording “armed conflict not of an international character” is chosen in respect of the language

⁴²¹ See, e.g., Final Diplomatic Record of 1949 Geneva Conventions, 53-94.

⁴²² Gerald I.A.D. Draper, *The Red Cross Conventions* (London: Stevens, 1958), 83; Lindsay Moir, *The Law of Internal Armed Conflict*, 18-22.

⁴²³ Derek Jinks, “September 11 and the Law of War.” 39.

⁴²⁴ Final Diplomatic Record of 1949 Geneva Conventions, 121.

⁴²⁵ Derek Jinks, “September 11 and the Law of War.” 39.

⁴²⁶ Derek Jinks, “September 11 and the Law of War.” 41.

⁴²⁷ *Prosecutor v. Tadic*, ICTY, IT-94-1-AR72, Appeals Chamber, 2 October 1995 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction).

of common Article 2 of the Geneva Conventions. This Article uses the text “armed conflict [...] between two or more High Contracting Parties”, which means that common Article 2 of the Geneva Conventions covers all international armed conflicts. If common Article 2 of the Geneva Conventions accommodates all international armed conflicts, the language of common Article 3 of the Geneva Conventions, “armed conflict not of an international character”, has to be interpreted such that it covers all armed conflicts which are not covered by common Article 2 of the Geneva Conventions.⁴²⁹ This understanding has the advantage that it avoids any loophole regarding armed conflicts needing to cross the upper threshold of common Article 3 of the Geneva Conventions.⁴³⁰ IHL therefore regulates all armed conflicts with at least the minimum standard of common Article 3 of the Geneva Conventions.⁴³¹ Having reviewed all three interpretations, this last interpretation would seem the most convincing one.

As shown above, depending on the type of terrorist acts, they may theoretically be covered by either the law of international armed conflict or by the law of non-international armed conflict. To continue the analysis of divergence and convergence of IHL and IHRL, having considered the applicability of IHL to terrorism, the focus now has to turn to the relation between IHRL and terrorism.



(b) International Human Rights Law and Terrorism

In principle, the application of IHRL to terrorism does not cause any great problems. Pursuant to the extensive discussion of the field of application *ratione loci* mentioned above, terrorist acts are also covered by the International Covenant on Civil and Political Rights and regional human right instruments if the terrorist’s home country is party to such a treaty even if they act outside of its territory. As the Geneva Conventions do not cover terrorism but only terrorist acts the same is true for human rights instruments.⁴³²

More problematic is the possibility of derogation of human rights during a state of emergency. It must therefore be scrutinised whether the protection of human rights is limited in respect of terrorist acts. The material conditions⁴³³ of Article 4 of the International

⁴²⁸ Derek Jinks, “September 11 and the Law of War.” 41.

⁴²⁹ Derek Jinks, “September 11 and the Law of War.” 41.

⁴³⁰ Derek Jinks, “September 11 and the Law of War.” 41.

⁴³¹ Derek Jinks, “September 11 and the Law of War.” 41.

⁴³² Hans-Joachim Heintze, “Völkerrecht und Terrorismus,” in *Terrorismus als weltweites Phänomen*, 230.

⁴³³ See in this minithesis at 31.

Covenant on Civil and Political Rights must be fulfilled before a State can proclaim the state of emergency. The question arises as to whether terrorist acts reach the intensity “which threatens the life of the nation”.⁴³⁴ This issue gives rise to two difficulties: first, there exists no legally binding definition of the term “threat to the life of the nation”; even the relatively recent General Comment No. 29 on the International Covenant on Civil and Political Rights avoids a specification.⁴³⁵ Only the European Court of Human Rights has defined such a threat as “[...] an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.”⁴³⁶ Definitions⁴³⁷ formulated by scholars also describe a situation with a high level of intensity.

In addition to the lack of a binding definition, there is no monitoring body to determine whether or not a state of emergency exists.⁴³⁸ For example, when the United Kingdom notified the derogation of Article 9 of the International Covenant on Civil and Political Rights following the terrorist attacks of September 11th, 2001, it gave the reason that: “There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom.”⁴³⁹ To the contrary, however, Derek Jinks does not see any cause for the U.S. to maintain that there is a threat of the life to the nation after the bomb assaults in New York and Washington.⁴⁴⁰ He argues that the nature of the emergency itself may fail to satisfy the threshold requirement “threatening the life of the nation” of Article 4 of the International Covenant on Civil and Political Rights, because the continuing,

⁴³⁴ See Article 4(1) of the International Covenant on Civil and Political Rights.

⁴³⁵ Office of the United Nations High Commissioner for Human Rights, “Human Rights Committee - General Comments 29,” <<http://www.ohchr.org/english/bodies/hrc/comments.htm>> (10 December 2005).

⁴³⁶ *Lawless v. Ireland*, Eur. Ct. HR, 322/57, Judgment of 1 July 1961, 1 EHRR 28; see also the Greek Case, Report of 5 November 1969 Yearbook XII, 72; see also *Branning and McBride v. United Kingdom*, Eur. Ct. HR., 1994, 17 EHRR, 1994 539.

⁴³⁷ See in this minithesis at 28.

⁴³⁸ Hernán Salinas Burgos, “The application of international humanitarian law as compared to human rights law in situations qualified as internal armed conflict, internal disturbances and tension, or public emergency, with special reference to war crimes and political crimes,” in *Implementation of International Humanitarian Law*, 12.

⁴³⁹ Bayefsky.com - The UN Human Rights Treaties, “United Kingdom notification of derogation from Article 9 of the Covenant, 18 December 2002,” <http://www.bayefsky.com/html/uk_t2_ccpr.php> (10 December 2005).

⁴⁴⁰ Derek Jinks, “International Human Rights Law and the War on Terrorism.” *Denver Journal of International Law and Policy* 31 (2002) : 58-68, 67.

non-specific and ill-defined threat of terrorist activity does not satisfy it.⁴⁴¹ Moreover, because "states of exception" are, by their nature, of limited duration, the U.S. may not manufacture an ongoing state of emergency by waging a protracted - perhaps indefinite - "war on terrorism".⁴⁴² This reasoning would also be transferable to the situation of the United Kingdom after the terrorist attacks. These two different interpretations of "threatening to life of the nation" imply that Governments might exercise the option of derogation arbitrarily.⁴⁴³

Finally, the regime of derogation as an outcome of state sovereignty does not void human rights protection in time of terrorism, but the lack of a clear definition for terrorism and the absence of a monitoring body cause uncertainty of law.

A further question with regard to terrorism concerns the scope *ratione personae* in the case of transnational terrorists. By definition, transnational terrorists are not nationals of the targeted states,⁴⁴⁴ and the issue is whether they are within the scope of the personal application of IHRL. The answer is quite clear, even if reality often shows a different picture. Although the General Comment No. 29 on the International Covenant on Civil and Political Rights fails to mention that non-nationals also fall under the scope of the Covenant, it nonetheless emphasises that the principle of non-discrimination is inherent in the Covenant⁴⁴⁵ and moreover explicitly stated in Article 4 (1) of the International Covenant on Civil and Political Rights. The Comment No. 29 refers also to the minority rights which have to be considered when a State wants to proclaim a state of emergency.⁴⁴⁶

In conclusion, the human rights instruments are in principle applicable with regard to terrorist acts; only the right of derogation gives States the possibility to limit the protection of human rights without any international independent and binding control. Fortunately, in practice, States have been reluctant to make use of their right to derogate human rights in times of transnational terrorism.⁴⁴⁷

⁴⁴¹ Derek Jinks, "International Human Rights Law and the War on Terrorism." 67.

⁴⁴² Derek Jinks, "International Human Rights Law and the War on Terrorism." 67.

⁴⁴³ Kevin Boyle, "Terrorism, States of Emergency and Human Rights," in *Anti-terrorist Measures and Human Rights*, 108.

⁴⁴⁴ Gabor Rona, "International Law under fire: Interesting Times for international Humanitarian Law: Challenges from the 'war on Terror.'" 58.

⁴⁴⁵ Kevin Boyle, "Terrorism, States of Emergency and Human Rights," in *Anti-terrorist Measures and Human Rights*, 107.

⁴⁴⁶ Office of the United Nations High Commissioner for Human Rights, "Human Rights Committee - General Comments 29," para. 8. < <http://www.ohchr.org/english/bodies/hrc/comments.htm> > (10 December 2005).

⁴⁴⁷ David S. Koller, "The Moral Imperative: Toward a Human Rights-Based Law of War." 206.

In summary, in the case of transnational terrorism, the fields of application of IHL and IHRL basically overlap, which has the positive effect that international law covers terrorist acts and loopholes do not arise. In this regard IHL and IHRL are merged together.

(c) Discussion of the best Legal Solutions for Dealing with Terrorism

After it has been demonstrated that both bodies of law are basically applicable, interesting questions arise as to which law offers the most appropriate instruments for the protection of human rights against terrorist acts, and the relationship between IHL and IHRL in such circumstances.

Some scholars hold the opinion that the Geneva Conventions privilege violating terrorists.⁴⁴⁸ Consequently, they plead that only human rights should apply and that the application of the law of armed conflict should not be artificially broadened to transnational terrorist acts.⁴⁴⁹ They say that such a broadening would blur the difference between situations where the law allows individuals to liquidate each other or where the law prohibits killings, because every attack on a military installation, even if undertaken without any separation from the civilian population, the way most terrorist acts occur, would be *per se* a combat operation and those who carry it out would enjoy the privileged status of a combatant.⁴⁵⁰ The result would be to turn every act of violence into an act of war, and all those who committed it into lawful combatants who enjoyed a combatant's privileges, but such a privilege has to be limited to a certain number of situations.⁴⁵¹

Further, they argue that if the Geneva Conventions were applicable, terrorists could start to claim that they were combatants and prisoners of war,⁴⁵² giving them a potential platform from which to influence public opinion.⁴⁵³

In addition, they stress that the inapplicability of humanitarian law to cover terrorist acts should be viewed as a benefit rather than an obstacle.⁴⁵⁴ One has to bear in mind the

⁴⁴⁸ Christian Tomuschat, "Der 11. September 2001 und seine rechtlichen Konsequenzen." *Europäische Grundrechte-Zeitschrift* 28 (2001) : 535-545, 536.

⁴⁴⁹ Steven Ratner, "Rethinking the Geneva Conventions," *Crimes of War Project*, 30 January 2003. <<http://www.crimesofwar.org/expert/genevaConventions/gc-ratner.html>> (10 December 2005).

⁴⁵⁰ Steven Ratner, "Rethinking the Geneva Conventions".

⁴⁵¹ Steven Ratner, "Rethinking the Geneva Conventions".

⁴⁵² Christopher Greenwood, "Terrorism and Humanitarian Law: The Debate over Additional Protocol I." *Israel Yearbook on Human Rights* 18 (1989) : 187-207, 192; Adam Roberts, "Counter-terrorism, Armed Force and the Laws of War." *Survival* 44 (2002) 7-32, 9.

compromise nature of humanitarian law; during armed conflicts killings of enemy combatants by armed forces is lawful, as is detaining without charges or trial anyone who poses a security risk.⁴⁵⁵ In peacetime, the violations of human rights such as the right of life and the due process guarantee would be prosecuted by domestic and international criminal and human rights, but these standards are thereby sacrificed to minimise human suffering.⁴⁵⁶ In addition, the judicial guarantees are much more specific in the national and international human rights instruments, and other issues such as the rules applicable to the use of firearms by law enforcement officials, medical ethics, or the definition of torture, human rights law and the jurisprudence of its international enforcement bodies are more detailed.⁴⁵⁷

In contrast, advocates of the view that IHL is the appropriate body of law to deal with terrorist attacks emphasise that there are provisions in IHL to prohibit the worst and most common terrorist acts concerning both civilians and combatants. They point to Article 51 (2) of the Additional Protocol I which states that civilians shall not be the object of attacks, and in particular that it is prohibited to spread terror among the civilian population by threats of violence; Article 33 (1) of the Geneva Convention IV which prohibits all measures of terrorism;⁴⁵⁸ Article 34 of the Geneva Convention IV which prohibits hostage-taking; and Article 23 (b) Hague Regulation which prohibits the treacherous killing of civilians or combatants.⁴⁵⁹ Additionally, Article 146 seq. of the Geneva Convention IV obliges State parties to make grave breaches such as wilful killing or wilfully causing great suffering or taking hostages liable to punishment, and to prosecute or extradite perpetrators of these offences.⁴⁶⁰

⁴⁵³ Silja Vöneky, "The Fight against Terrorism and the Rules of the Law of Warfare," in *Terrorism as a Challenge for National and International Law. Security versus Liberty?*, 19.

⁴⁵⁴ Gabor Rona, "International Law under fire: Interesting Times for international Humanitarian Law: Challenges from the 'war on Terror.'" 63.

⁴⁵⁵ Gabor Rona, "International Law under fire: Interesting Times for international Humanitarian Law: Challenges from the 'war on Terror.'" 63.

⁴⁵⁶ Gabor Rona, "International Law under fire: Interesting Times for international Humanitarian Law: Challenges from the 'war on Terror.'" 63.

⁴⁵⁷ Marco Sassòli, "Use and Abuse of the Laws of War In the 'War on Terrorism'." *Law & Inequality Law Journal* 22 (2004) : 195-221, 214.

⁴⁵⁸ Hans-Peter Gasser, "Acts of terror, 'terrorism' and international humanitarian law." *International Review of the Red Cross* 84 (2002) : 547-570, 555.

⁴⁵⁹ Silja Vöneky, "The Fight against Terrorism and the Rules of the Law of Warfare," in *Terrorism as a Challenge for National and International Law. Security versus Liberty?*, 12.

⁴⁶⁰ Silja Vöneky, "The Fight against Terrorism and the Rules of the Law of Warfare," in *Terrorism as a Challenge for National and International Law. Security versus Liberty?*, 13.

These prohibited and unlawful acts refer to international armed conflicts, but during non-international armed conflict the terrorist acts against civilians and *hors des combat* are also prohibited by Articles 4(2) and 13 (2) of the Additional Protocol II.

It is correct that not all human rights violations are prohibited under IHL, for instance the killing of hostile combatants or attacking of military targets of the adversary.⁴⁶¹ But that does not mean that such acts are upheld by the law of armed conflict if they are carried out by terrorists during an armed conflict to which IHL is applicable.⁴⁶² Terrorists only receive the privileges of the Geneva Conventions if they fulfil the conditions of combatants (Article 4 of the Geneva Convention III).⁴⁶³ This is quite unlikely, because it is the nature of a terrorist to act clandestinely without carrying arms openly and without a recognisable sign.⁴⁶⁴ Similarly, because, as shown above, prisoner of war status depends upon the status of combatant⁴⁶⁵, terrorists are also usually not privileged by the provisions which grant rights to prisoners of war.⁴⁶⁶ Finally, terrorists normally do not obtain advantages from the rule of doubt laid down in Article 5 (2) of the Geneva Convention III, because it only applies if the presumption of a “belligerent act” is met and if “any doubt arise[s]”.⁴⁶⁷ These is not usually the case with terrorist acts which are carried out by persons who do not fulfil the conditions of combatants and therefore do not give reason to question whether these persons could not be combatants.⁴⁶⁸ Consequently, the rule of doubt is in general not applicable to terrorist acts and grants them no privileges.

Furthermore, IHL provides more detailed protection for the human rights that are particularly endangered in armed conflicts than IHRL.⁴⁶⁹ In some instances IHL provides the

⁴⁶¹ Silja Vöneky, “The Fight against Terrorism and the Rules of the Law of Warfare,” in *Terrorism as a Challenge for National and International Law. Security versus Liberty?*, 13.

⁴⁶² Silja Vöneky, “The Fight against Terrorism and the Rules of the Law of Warfare,” in *Terrorism as a Challenge for National and International Law. Security versus Liberty?*, 13.

⁴⁶³ See in this minithesis at 38.

⁴⁶⁴ Silja Vöneky, “The Fight against Terrorism and the Rules of the Law of Warfare,” in *Terrorism as a Challenge for National and International Law. Security versus Liberty?*, 14.

⁴⁶⁵ See in this minithesis at 38.

⁴⁶⁶ Silja Vöneky, “The Fight against Terrorism and the Rules of the Law of Warfare,” in *Terrorism as a Challenge for National and International Law. Security versus Liberty?*, 15.

⁴⁶⁷ Silja Vöneky, “The Fight against Terrorism and the Rules of the Law of Warfare,” in *Terrorism as a Challenge for National and International Law. Security versus Liberty?*, 17.

⁴⁶⁸ Joachim Abr. Frowein, “Der Terrorismus als Herausforderung für das Völkerrechts.” *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 62 (2002) : 879 – 906, 896.

⁴⁶⁹ See, e.g., Article 41 of the Additional Protocol I, protecting the right to life of enemies *hors de combat*; Article 56 of the Additional Protocol I, protecting the right to a health environment; Article 56 of the Geneva Convention IV, protecting the right to health of inhabitants of occupied territories.

sole human rights protection for victims of armed conflicts⁴⁷⁰ because human rights law fails to address them.⁴⁷¹

Notwithstanding the above, even if terrorists do not meet the status of combatants or prisoners of war, the law of armed conflict does provide with some protection. Common Article 3 of the Geneva Conventions and Article 75 of the Additional Protocol I, to the extent that it reflects customary law, provide terrorists with a minimum standard of human rights.⁴⁷² This point has been made by the United Nations High Commissioner for Human Rights and other human rights organisations in respect of the incidents in Guantánamo. In sum, the terrorists usually do not gain from the law of armed conflicts, because they do not meet the conditions of a combatant and a prisoner of war. They do, however, receive a basic protection, which is adequate to their situation.

(d) A Compromise as the Best Solution Dealing with Terrorism

It is difficult to decide which of the two approaches should be preferred. The best answer might be a middle way combining both sets of law. A possible option lies in the accurate application of the roman principle of law *lex specialis derogat legi generali*.⁴⁷³ This principle applies if two branches of laws or two single provisions are both applicable and in conflict.⁴⁷⁴ The rule says that the more precise and detailed provision enjoys precedence, but only in issues both sets of laws deal with.⁴⁷⁵ The *lex specialis* rule deserves favour because if one could describe the relationship between IHL and IHRL such that one branch dominates the other it could be argued that IHL violates IHRL, or *vice versa*, which would seem a strange

⁴⁷⁰ See, e.g., Article 57 of the Additional Protocol I, detailing rules of behaviour for those conducting hostilities, which essentially translates the right to life and physical integrity into those detailed rules.

⁴⁷¹ Marco Sassòli, "Use and Abuse of the Laws of War In the 'War on Terrorism'." 214.

⁴⁷² Silja Vöneky, "The Fight against Terrorism and the Rules of the Law of Warfare," in *Terrorism as a Challenge for National and International Law. Security versus Liberty?*, 16.

⁴⁷³ Other Commentators prefer the application one of both branches and do not mention the possibility of a combined application. See as a whole, Derek Jinks, "International Human Rights Law and the War on terrorism." 68. Gabor Rona, "International Law under fire: Interesting Times for international Humanitarian Law: Challenges from the 'war on Terror.'" 69 et seq.; Silja Vöneky, "The Fight against Terrorism and the Rules of the Law of Warfare," in *Terrorism as a Challenge for National and International Law. Security versus Liberty?*, 11 and 27.

⁴⁷⁴ Gabor Rona, "International Law under fire: Interesting Times for international Humanitarian Law: Challenges from the 'war on Terror.'" 56.

⁴⁷⁵ Marco Sassòli, "Use and Abuse of the Laws of War In the 'War on Terrorism'." 215.

result.⁴⁷⁶ The principle of *lex specialis* gives priority to the more specific rule whenever they have a specific justification for dealing with specific problems, and leads subsequently to the only possible way to harmonise IHL and IHRL.⁴⁷⁷ That becomes clear, for example in the relation of Additional Protocol II and the International Covenant on Civil and Political Rights. When Protocol II in its more detailed provisions establishes a higher standard than the Covenant, this higher standard would prevail, on the basis of the fact that the Protocol is *lex specialis* in relation to the Covenant.⁴⁷⁸ On the other hand, if the International Covenant on Civil and Political Rights contains a human right which does not have an equivalent in the Additional Protocol II which provides for a higher standard of protection than the protocol, it should be regarded as applicable irrespective of the relative times at which the two instruments came into force for the respective State.⁴⁷⁹ It is a general rule for the application of concurrent instruments of Human Rights - and Part II "Humane Treatment" [of Protocol II] is such an instrument - that they implement and complete each other instead of forming a basis for limitations.⁴⁸⁰

In addition, the father of public international law, Hugo Grotius, noted an added advantage of applying the *lex specialis* principle when he stated that "special provisions are ordinarily more effective than those that are general."⁴⁸¹

The Vienna Conventions on the Law of Treaties do not consider the *lex specialis* principle, but the ICJ gives it particular attention in its Advisory Opinion in the *Nuclear Weapons* case. It states:

"The ICJ observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life also applies during hostilities. The test of what is an arbitrary

⁴⁷⁶ Joachim Abr. Frowein, "The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation." 9.

⁴⁷⁷ Joachim Abr. Frowein, "The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation." 9.

⁴⁷⁸ Michael Bothe, Karl Josef, Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts - Commentary on the two 1977 Protocols additional to the Geneva Conventions of 1949*, 636, see also International Committee of the Red Cross, *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, paras. 4429-4430.

⁴⁷⁹ Michael Bothe, Karl Josef, Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts - Commentary on the two 1977 Protocols additional to the Geneva Conventions of 1949*, 636.

⁴⁸⁰ Michael Bothe, Karl Josef, Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts - Commentary on the two 1977 Protocols additional to the Geneva Conventions of 1949*, 636.

⁴⁸¹ Hugo Grotius, *De Jure Belli ac Pacis Libri tres*, XXIX, para. 29.

deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.”⁴⁸²

Even if this Advisory Opinion received criticism, amongst other things for failing to consider that human rights law also rules on arbitrary deprivation of human life in Article 29(2) of the Universal Declaration of Human Rights⁴⁸³, the ICJ provides a detailed approach of how to apply the principle *lex specialis* to IHRL and IHL. Firstly, both bodies of law must be applicable. Secondly, they must provide regulations on issues dealt with by both branches. Thirdly, none of the provisions may be derogated and, finally, the regulation which offers the more precise mechanism applies with respect to the particular issue by specifying the content of the more general rule. Consequently, this outcome does not mean that a treaty as a whole must be applied nor that it displaces the entirety of the other treaty which it is in conflict with. Even if IHL plays the dominant role in view of the Court, the importance of other human rights norms in armed conflicts is also stressed, thus supporting the need to bring the two legal regimes into closer harmony.⁴⁸⁴ It is conceivable that the same approach could be applied to other human rights issues with IHRL providing more precise regulation to complete the rudimental provision of IHL. The Advisory Opinion does not exclude this possibility.⁴⁸⁵

In its recently issued Advisory Opinion in the case of the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court confirmed its position.⁴⁸⁶ Israel argued that the International Covenant on Economic, Social and Cultural Rights was not applicable. It said that it had “consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction” and added that this is “based on the well-established distinction between human rights and humanitarian

⁴⁸² *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion of 8 July 1996, para. 25.

⁴⁸³ David S. Koller, “The Moral Imperative: Toward a Human Rights-Based Law of War.” 261. - This point of critic could be rejected by the fact that the Universal Declaration of Human Rights is a non-binding instrument.

⁴⁸⁴ Hans-Joachim Heintze, “The European Court of Human Rights and the Implementation of Human rights Standards During Armed Conflicts.” 64.

⁴⁸⁵ Marco Sassòli also limits the *lex specialis* principle regarding to IHL only to those issues where it is more detailed. Marco Sassòli, “Use and Abuse of the Laws of War In the ‘War on Terrorism’.” 215.

⁴⁸⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion of 9 July 2004, para. 112.

law under international law”.⁴⁸⁷ Further, it stated “the Committee’s mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights.”⁴⁸⁸

In its recent General Comment No. 31 on Article 2 of the International Covenant on Civil and Political Rights, the Human Rights Committee stated that “the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable.”⁴⁸⁹ While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”⁴⁹⁰ It noted further with regard to the Near East Conflict that “the Palestinian population within the same jurisdictional areas were excluded from both the report and the protection of the Covenant”⁴⁹¹ and reaffirmed “its view that the State Party’s obligations under the Covenant apply to all territories and populations under its effective control.”⁴⁹²

The ICJ endorsed the Committee’s concerns and said that “the Court cannot accept Israel’s view. [...] In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights.”⁴⁹³ Consequently, the Court grounded its Advisory Opinion in both IHL and IHRL.⁴⁹⁴

The ICJ’s view in the *Nuclear Weapons* case was also adopted by the Inter-American Commission on Human Rights when it preferred the application of IHL over human rights law.⁴⁹⁵

Other voices are also in line with the ICJ and the Commission on Human Rights’ perspective. For example Human Rights Watch proposes that “during a non-international armed conflict, international humanitarian law as the *lex specialis* takes precedence, but does

⁴⁸⁷ U.N. Doc. E/1990/6/Add. 32, para. 5.

⁴⁸⁸ U.N. Doc. E/1990/6/Add. 32, para. 5.

⁴⁸⁹ Office of the United Nations High Commissioner for Human Rights, “Human Rights Committee - General Comments 31.” para. 10. < <http://www.ohchr.org/english/bodies/hrc/comments.htm> > (10 December 2005).

⁴⁹⁰ Nature of the General Legal Obligation on States Parties to the Covenant, U.N. GAOR, Hum. Rts. Comm., 80th, Office of the United Nations High Commissioner for Human Rights, “Human Rights Committee - General Comments 31.” para. 11. < <http://www.ohchr.org/english/bodies/hrc/comments.htm> > (10 December 2005); U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

⁴⁹¹ U.N. Doc. E/C.12/1/Add. 27, para. 8.

⁴⁹² U.N. Doc. E/C.12/1/Add.90, paras. 15, 31.

⁴⁹³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion of 9 July 2004, para. 112.

⁴⁹⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion of 9 July 2004, paras. 123-137.

⁴⁹⁵ *Abella v. Argentina*, Inter-American Commission on Human Rights, No. 11.137, Report No. 5/97, OEA/Ser.L/V/II.98, doc. 7 rev. 157-171.

not replace, human rights law [...] where the law is absent, vague, or inapplicable, human rights law standards still apply."⁴⁹⁶

The resolution of the relationship between IHL and IHRL proposed above may get further credence from a view which says that the *lex specialis* law of armed conflict completely pre-empts the *lex generalis* of the rest of international law, including human rights law, was constituted at a time when strict compartmentalisation between conditions of peace and war were possible, and therefore is no longer maintainable today.⁴⁹⁷ This view supports a step of convergence between IHL and IHRL in which the realms of law are not in mutual opposition, but in a harmonious relationship, where they complement each other. The approach taken by the ICJ probably provides the highest protection of human rights in issues like transnational terrorism because it avoids scarifying the vitality of either IHRL or IHL.⁴⁹⁸ The fields of law are kept separate and do not merge to one, but at the level of application, depending on which of the concurring regulations is more specific, the rules of either branch may apply.

(2) Examples of issues where either International Human Rights Law or International Humanitarian Law Provide the better Human Rights Protection



The approach to reconciling IHL and IHRL described above could also be used to provide an adequate outcome in other situations in which IHL and IHRL are in a concurrent relationship. The following discussion looks at examples where IHRL provides the more detailed approach in times of armed conflicts and others in which IHL contains the more precise regulation.

⁴⁹⁶ Human Rights Watch, "Enduring Freedom: Abuses by U.S. Forces in Afghanistan 48 (2004)," <http://www.hrw.org/reports/2004/afghanistan0304/afghanistan0304.pdf> (10 December 2005).

⁴⁹⁷ Vera Gowlland-Debbas, "The Right to Life and Genocide: The Court and an International Public Policy," in *International Law, the International Court of Justice and Nuclear Weapons*, 315-337, eds. Laurence Boisson de Chazournes and Philippe J. Sands (Cambridge: Cambridge University Press 1999), 325.

⁴⁹⁸ See generally Dale Stephens, "Human Rights and Armed Conflict--the Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case." *Yale Human Rights and Development Law Journal* 4 (2001) : 1-24, 8. Arguing that the ICJ decision expands the protection of human rights in armed conflict, where this expansion was previously unsettled. Stephens contends that the decision highlights shared humanitarian impulses rather than the differences between the two bodies of law.

(a) Examples of rights where International Human Rights Law provides the better Human Rights Protection

One area where IHRL provides more detailed regulation than IHL is in respect of the principle of proportionality. Under IHL, this principle is ambiguous and appears to be a vague general standard rather than a set of clear specific rules.⁴⁹⁹

Another example where IHRL provides the better protection of human rights is in the area of detention, where international human rights instruments grant a higher standard than IHL.⁵⁰⁰

As already mentioned above, IHLR ensures a higher level of legal standard in the fields of judicial guarantees, the use of firearms by law enforcement officials, medical ethics, and the definition of torture.⁵⁰¹

On the treatment of civilians detained pre-trial or who are serving a sentence, the law on occupied territories in Article 76 of the Geneva Convention IV contains only a general rule and the law applicable to a party's own territory foresees no specific rule at all.⁵⁰² On these issues, therefore, human rights law must also prevail.⁵⁰³

IHL ignores the right of liberty, which entails the prohibition of arbitrary detention, on a detaining party's own territory. Geneva Convention IV provides for no specific judicial guarantees. Here, human rights law is the *lex specialis* and in accordance with Article 9 of the International Covenant on Civil and Political Rights any arrest must be based on domestic legislation.⁵⁰⁴

For non-international armed conflicts human rights law provides the better protection with regard to the issues of arrest, detention and internment.⁵⁰⁵ In contrast to Article 9 (1) of the International Covenant on Civil and Political Rights, IHL does not contain any provision requiring a legal basis for arrest, detention, or internment.⁵⁰⁶

The requirement of a legal basis in Article 9 (1) of the International Covenant on Civil and Political Rights means that the debate about the detention of unlawful combatants does not

⁴⁹⁹ David S. Koller, "The Moral Imperative: Toward a Human Rights-Based Law of War." 263.

⁵⁰⁰ Karima Bennoune, "Toward a Human Rights Approach to Armed Conflict: Iraq 2003." *U.C. Davis Journal of International Law & Policy* 11 (2004) : 171-228, 226.

⁵⁰¹ Marco Sassòli, "Use and Abuse of the Laws of War In the 'War on Terrorism'." 214.

⁵⁰² Marco Sassòli, "Use and Abuse of the Laws of War In the 'War on Terrorism'." 216.

⁵⁰³ Marco Sassòli, "Use and Abuse of the Laws of War In the 'War on Terrorism'." 216.

⁵⁰⁴ Marco Sassòli, "Use and Abuse of the Laws of War In the 'War on Terrorism'." 216.

⁵⁰⁵ Marco Sassòli, "Use and Abuse of the Laws of War In the 'War on Terrorism'." 217.

arise, because no one can be deprived of his or her liberty unless this is based on the law.⁵⁰⁷ In contrast to this, IHL does not provide a combatant status for non-international armed conflicts.⁵⁰⁸

(b) Examples of rights where International Humanitarian Law provides the better Human Rights protection

In other spheres of the right of the prohibition of arbitrary deprivation of liberty, IHL prevails over human rights law. According to Article 21 of the Geneva Convention III, enemy combatants may be interned as prisoners of war simply on the grounds that they are combatants, without any individual judicial or administrative decision.⁵⁰⁹ As *lex specialis* for combatants, this prevails over human rights law and domestic law.⁵¹⁰

Civilians detained upon the individual decision of an administrative board for imperative reasons of security, have a right of appeal and a review every six months.⁵¹¹

In addition, in an international armed conflict, Geneva Convention III offers detailed rules on the treatment of prisoners of war and is *lex specialis* concerning their freedom of movement, their right to be treated humanely, their right to family life, their right to work, and their right to health.⁵¹²

Common Article 3 of the Geneva Conventions covers with its human rights-like provisions on humane treatment all persons affected by the conflict. Article 4 of the Additional Protocol II contains specific provisions benefiting persons whose liberty has been restricted.⁵¹³ Pursuant to common Article 3(d) of the Geneva Conventions and Article 6 of the Additional Protocol II judicial guarantees apply to the prosecution of offences related to the conflict.⁵¹⁴ Thus, IHL also provides the more specific rules for non-international armed conflicts.

⁵⁰⁶ Marco Sassòli, "Use and Abuse of the Laws of War In the 'War on Terrorism'." 217.

⁵⁰⁷ Marco Sassòli, "Use and Abuse of the Laws of War In the 'War on Terrorism'." 217.

⁵⁰⁸ From a political point of view it is interesting to mention that U.K. derogated Article 9 of the International Covenant on Civil and Political Rights with respect to the confrontation of the Taliban-regime in the aftermath of the terror attacks on September 11 2001.

⁵⁰⁹ Marco Sassòli, "Use and Abuse of the Laws of War In the 'War on Terrorism'." 216.

⁵¹⁰ Marco Sassòli, "Use and Abuse of the Laws of War In the 'War on Terrorism'." 216.

⁵¹¹ Marco Sassòli, "Use and Abuse of the Laws of War In the 'War on Terrorism'." 216; see Article 43 of the Geneva Convention IV; Article 78 of the Geneva Convention IV.

⁵¹² Marco Sassòli, "Use and Abuse of the Laws of War In the 'War on Terrorism'." 215.

⁵¹³ Marco Sassòli, "Use and Abuse of the Laws of War In the 'War on Terrorism'." 217.

⁵¹⁴ Marco Sassòli, "Use and Abuse of the Laws of War In the 'War on Terrorism'." 217.

These examples show that a proper application of the *lex specialis* rule means that either IHL or IHRL may apply, depending on which provides the better human rights protection in a specific case. In the case of terrorism, just one terror attack may violate a number of human rights and the applicable set of rules may differ for each human right violated. The same is true for every issue to which both branches of law apply concurrently.

A convergence of IHL and IHRL can be seen in the case of transnational terrorism in any event, but by the accurate application of the principle of law *lex specialis derogat legi generali* a much greater potential of convergence of IHL and IHRL could be gained. In conclusion, with regard to internal strife, IHL and IHRL diverge in such a significant way that the gaps could only be closed by new legal instruments. In respect of transnational terrorism, both fields of law apply and, with an accurate interpretation of the *lex specialis* rule, converge to provide an interlinked system without loopholes.

D. Amnesty relating to International Humanitarian Law and International Human Rights Law

The following chapter deals with the question of amnesty, which is also regulated differently in IHL and IHRL. For the purpose of this inquiry only legal aspects will be discussed; as the interesting political questions regarding amnesty are beyond the scope of this examination. First, a brief survey will illustrate the legal position of IHL and IHRL with regard to amnesty after which a possible way to overcome the differences will be proposed.

Amnesty is basically understood as an act of forgiveness that a sovereign State grants to individuals who have committed an offensive act.⁵¹⁵ For a State, the opposite of granting amnesty is the duty to prosecute or extradite. Both legal institutions address the question of how a State should respond to crimes and both are anchored in international law.

⁵¹⁵ *Black's Law Dictionary*, 6th ed. (1990), s. v. "amnesty".

1. Amnesty in the field of International Humanitarian Law

In IHL, depending on the type of conflict, the duty to prosecute or extradite and the possibility of granting amnesty are both applicable.⁵¹⁶

With regard to international armed conflicts, pursuant to Articles 49/50/129/146 of the Geneva Conventions I/II/III/IV, Parties have an obligation to search for, prosecute, and punish perpetrators of grave breaches of the Conventions unless they choose to hand over such persons for trial by another State Party. The possibility of granting amnesty is not provided for in respect of grave breaches of the scope of application of the Geneva Conventions.⁵¹⁷

In contrast, the granting of amnesty is lawful in certain cases under Article 6(5) of the Additional Protocol II, as it calls for the “broadest possible amnesty”. Consequently, amnesty can only be granted following conflicts of a non-international character, since Additional Protocol II applies only to this type of conflict. It is, however, highly controversial as to which types of acts amnesty should be granted according to this rule.

The restrictive interpretation of Article 6(5) of the Additional Protocol II resorts to the wording of the provision, which grants amnesty only “to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict”. On this view, amnesty shall only be granted for combat activities otherwise subject to prosecution as violations of the criminal laws of the States in which they take place, but not to violations of international humanitarian law.⁵¹⁸ This interpretation leads to the same result as the regulation of the “immunity” of lawfully acting combatants of international armed conflicts.⁵¹⁹

The wider interpretation of Article 6(5) of the Additional Protocol II extends to violations of IHL. This interpretation is more consistent with the object of the sub-paragraph, namely to encourage gestures of reconciliation which can contribute to re-establishing normal relations

⁵¹⁶ See Article Articles 49/50/129/146 of the Geneva Convention I/II/III/IV and Article 6(5) of the Additional Protocol II.

⁵¹⁷ International Committee of the Red Cross, *Commentary to the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces on the Field*, 373.

⁵¹⁸ Douglass Cassel, “Accountability for International Crime and Serious Violations of Fundamental Human Rights: Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities.” *Law and Contemporary Problems* 59 (1996) : 197-228, 218.

⁵¹⁹ Douglass Cassel, “Accountability for International Crime and Serious Violations of Fundamental Human Rights: Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities.” 218.

in a nation which has been divided.⁵²⁰ Furthermore, this interpretation is underpinned by the historical evolution of this rule. A Soviet proposal that persons guilty of crimes against humanity should not receive protection but that "rules be laid down for their punishment" was unsuccessful as well as a proposal to exclude crimes against humanity and war crimes.⁵²¹ In addition, it makes no sense to reduce the amnesty provision only to criminal law, since the same regulation could have been used for the combatant immunity of international armed conflict.⁵²² Together, the literal, contextual, and logical interpretation mean that the wider interpretation is to be preferred, meaning that violators of IHL during an internal conflict should also be granted amnesty.

2. Amnesty in the field of International Human Rights Law

In comparison to IHL, amnesty is unknown to IHRL. Instead of granting amnesty, IHRL provides only the duty to prosecute or extradite.⁵²³ The Genocide Convention and Torture Convention provide an absolute obligation to prosecute persons responsible for genocide or torture as defined in the Conventions.⁵²⁴ Several commentators have interpreted the wording of the Conventions against Torture in such a way that it allows for some types of crime amnesties, whereas the Genocide Convention contains a more water-tight obligation to prosecute and punish.⁵²⁵ However, such an argument misinterprets the nature of the "prosecute or extradite" formulation used in the Torture Convention. First, this phrase is reproduced verbatim in several other modern international criminal conventions and second, this wording has to be in line with other rights, such as "the right to be presumed innocent" of

⁵²⁰ International Committee of the Red Cross, *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Article 6(5) of the Additional Protocol II, para. 4618.

⁵²¹ Howard S. Levie, ed., *The Law of Non-International Armed Conflict - Protocol II to the 1949 Geneva Conventions*, (Dordrecht: M. Nijhoff Publishers, 1987), 170.

⁵²² Howard S. Levie ed., *The Law of Non-International Armed Conflict - Protocol II to the 1949 Geneva Conventions*, 170.

⁵²³ The Human Rights Committee held repeatedly that States parties are under an obligation to bring perpetrator of human rights violations to justice: see *Babato v. Uruguay*, Communication No. 84/1081, HRC Report, GAOR Suppl. No. 40 (U.N. Doc. A/38/40), 124, (1124), para. 11 (1983); *Quinteros v. Uruguay*, Communication No. 107/1981, Selected Decisions under the optional Protocol, Vol. 2 U.N. Doc. CCPR(C/OP/2, 138 et seq., (143), para. 15 (1983); *Baboeram et al. v. Suriname*, Communication Nos. 146/1983, 148 to 154/1983, (176 para. 16); *Miango Muiyo v. Zaire*, Communication No. 194/1985, HRC Report, GAOR Suppl. No. 40 (U.N. Doc. A/43/40) 218, para. 11 (1988).

⁵²⁴ See Article 4 Genocide Convention and Article 7 of the Convention against Torture.

⁵²⁵ Diane F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime." *Yale Law Journal*, 100 (1991) : 2537-2615, 2604.

Article 14(1) of the International Covenant on Civil and Political Rights, and the right “to take proceedings before a court in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful” of Article 9(4) of the International Covenant on Civil and Political Rights.⁵²⁶ The wording of the Convention against Torture was therefore chosen in such a way as to avoid the suggestion of a predetermined outcome of the judicial proceedings, and to recognise that there are legitimate reasons for the termination of an investigation or the dismissal of a case prior to trial.⁵²⁷

The general international and regional human right instruments do not contain rules which deal specifically with the duty to punish human rights violations, but they omit to “ensure” the rights enumerated therein.⁵²⁸ But the Human Rights Committee in its authoritative interpretation derives the duty to prosecute from Article 2(1) of the International Covenant on Civil and Political Rights, in conjunction with the substantive article violated.⁵²⁹

In contrast to this, the Committee has stated several times that amnesty is not consistent with the wording of the International Covenant on Civil and Political Rights.⁵³⁰ Furthermore, it has not accepted the argument that amnesty is necessary to restore human rights.⁵³¹ Rather, it has argued that by granting amnesties a State Party contributes “to an atmosphere of impunity with grave human rights violations.”⁵³²

After the fundamental principles, universality and application, amnesty is a further area where, according to the status *de lege lata*, IHL and IHRL are in an opposite and divergent relationship, at least for the situation of internal armed conflicts. As with the other areas of divergence, scholars, commentators, and international legal institutions, have made proposals to bridge these gaps. These proposals are presented in the following.

⁵²⁶ Michael Scharf, “Accountability for International Crime and Serious Violations of Fundamental Human Rights: The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes.” *Law & Contemporary Problems* 59 (1996) : 41-62, 46.

⁵²⁷ Michael Scharf, “Accountability for International Crime and Serious Violations of Fundamental Human Rights: The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes.” 46.

⁵²⁸ Michael Scharf, “Accountability for International Crime and Serious Violations of Fundamental Human Rights: The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes.” 48.

⁵²⁹ Office of the United Nations High Commissioner for Human Rights, “Human Rights Committee - General Comments 6,” < <http://www.ohchr.org/english/bodies/hrc/comments.htm> > (10 December 2005); HRI/Gen/1Rev.1, 7-8, para. 1.

⁵³⁰ Gwen K. Young, “Amnesty and Accountability.” *U.C. Davis Law Review* 35 (2002) : 427-482, 452.

⁵³¹ Concluding Observations on Chile, U.N. Doc. CCRP/C/79/Add.104, (1999), para. 6.

⁵³² Communication No. 322/1988 (1994), U.N. Doc. CCPR/C51/D/322/1988 (1994), paras 12, 4; see also Comments on Uruguay, U.N. Doc. CCPR/C/79/Add.19, (1993) para. 7; Comments on Haiti, U.N. Doc. CCPR/C/79/Add.49, (1995) para. 8.

3. Proposals to overcome the differences between International Humanitarian Law and International Human Rights Law with regard to Amnesty

Both the UNHRC as a representative of the United Nations and the ICRC are against the legal institute of amnesty, at least with regard to international armed conflicts. However, for internal armed conflicts the institutions both take a different approach. One reason for this is the fundamental differences of IHL and IHRL. Human rights law is *par excellence* the embodiment of a value-oriented approach of law whereas IHL, with its pragmatic approach, is related to Jürgen Habermas' notion of law as a social construction, where the values emerge from a social consensus negotiated through debate, compromise and persuasion.⁵³³ The latter approach would be consistent with amnesty in conjunction with a truth and reconciliation commission, where judicial or political bodies grant amnesty in exchange for facts pertaining to crimes.⁵³⁴ Whether an amnesty has the potential of restoring peace to society certainly depends on the individual case, the type and scope of the amnesty, the particularities of the State concerned, its culture, the alternative remedies and so forth.⁵³⁵ But the possibility that amnesty could be a contribution to the reconciliation process should hinder a complete ban on it.

A solution to preventing clear injustices in domestic amnesty processes, such as the self- and blanket amnesty invoked in Chile in 1978⁵³⁶, could be seen in the recently established International Criminal Court (ICC). The ICC is the appropriate international body to consider this issue, as its main aim is to ensure individual accountability for human rights violators.⁵³⁷ The ICC-Statute does not address amnesty directly, but Article 17 of the ICC-Statute may give some hints as to how the issue may be dealt with. Article 17 of the ICC-Statute describes the cases over which the ICC has no jurisdiction, for instance if the State in question is already investigating the case.⁵³⁸ The crucial question is whether amnesty proceedings could

⁵³³ See generally, Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg, (Cambridge, MA: MIT Press, 1998).

⁵³⁴ Gwen K. Young, "Amnesty and Accountability." 442.

⁵³⁵ Anja Seibert-Fohr, "The Fight against Impunity under the International Covenant on Civil and Political Rights." *Max Planck Yearbook of United Nations law* 6 (2002) : 301-344, 333.

⁵³⁶ See Decree Law No. 2191, 19 April 1978, Chile, published in *Diario Oficial*, No. 30,042 19 April 1978.

⁵³⁷ See Preamble of the ICC-Statute.

⁵³⁸ See Article 17 of the ICC-Statute.

be understood as investigations under Article 17 of the ICC-Statute.⁵³⁹ There is no hint in the Statute on the way in which the term “investigation” should be interpreted.⁵⁴⁰ In conjunction with Article 53 of the ICC-Statute which permits the prosecutor discretion, the ICC may in future decide to interpret the term “investigation” itself,⁵⁴¹ Such a decision could decide whether a domestic amnesty fulfils a proper and just investigation.⁵⁴² If it decides that a domestic amnesty does not, the ICC could assert its right to prosecute.

Commentators have already elaborated guidelines to define whether a specific case of amnesty is in line with Article 17 of the ICC-Statute or not.⁵⁴³ Common to all proposals for such guidelines is the preclusion of amnesty for violations of crimes against humanity, war crimes and the crime of genocide.⁵⁴⁴

The view that the ICC has the discretion to decide whether a certain case of amnesty is in line with justice or not is a workable compromise between Article 6(5) of the Additional Protocol II and the rest of the international law instruments. First, the ICC is an independent and highly-qualified monitoring body. Second, the solution still allows the possibility to give States the chance to deal with their past by granting amnesty, if this is in line with the most important principles of democracy and human rights. Finally, if the amnesty process does not fulfil these fundamental requirements, the ICC has the possibility to prosecute the crimes in question.

The described proposal is an appropriate possibility for how IHL and IHRL could be brought together. The conjunction of IHL and IHRL in respect of amnesty is embodied in the ICC-Statute and shows that convergence leads to a situation which allows for an individual solution in each case.

⁵³⁹ See Gwen K. Young, “Amnesty and Accountability.” 464-475.

⁵⁴⁰ Gwen K. Young, “Amnesty and Accountability.” 460.

⁵⁴¹ Gwen K. Young, “Amnesty and Accountability.” 461.

⁵⁴² See Article 53 in conjunction with Article 17 of the ICC-Statute and Gwen K. Young, “Amnesty and Accountability.” 469.

⁵⁴³ Gwen K. Young, “Amnesty and Accountability.” 476; Andreas O’Shea, *Amnesty for Crime in International Law and Practice* (The Hague: Kluwer Law International, 2002), 326; Douglass Cassel, “Accountability for International Crime and Serious Violations of Fundamental Human Rights: Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities.” 219.

⁵⁴⁴ Gwen K. Young, “Amnesty and Accountability.” 477; Andreas O’Shea, *Amnesty for Crime in International Law and Practice*, 326.

E. Conclusion

The examinations of the divergence and convergence of IHL and IHRL in respect of the principles of law, universality, application, and amnesty has led to the following outcomes:

The discussed principles of reciprocity, distinction, and proportionality are preponderant examples of the divergence of IHL and IHRL. For the most part, the two bodies of law diverge in respect of these fundamental principles. It is arguable that there may be some convergence regarding the principle of proportionality as both branches of law make use of it. However, as already mentioned above, the criteria on which the proportionality tests are carried out are quite different and so ultimately the doctrine of proportionality should also be seen as a subject of divergence.

The same is true for the question of universality of IHL and IHRL. IHL with its four binding Geneva Conventions is at least partly universal. On the other hand, IHRL, although designed for universal acceptance, has not yet reached the status of universality according to the formal concept of universality of human rights because of the lack of State Parties to the basic human rights treaties. Universality is therefore a further example dividing the two branches of law.

The divergence also prevails with respect to the topic of application. Direct comparison demonstrates many contradictions in the application of IHL and IHRL and legal gaps in the protection of human rights. These are all evidence that IHL and IHRL diverge with respect to application. Only the application *ratione loci* has the same scope and indicates that IHL and IHRL have had points of convergence from their early existence.

Last but not least the topic of amnesty enters into the queue of diverging aspects. This is largely because the legal institute of amnesty is totally unknown for IHRL whereas IHL makes use of amnesty at least for perpetrators of non-international armed conflicts.

These points show that IHL and IHRL are at least in several aspects divergent. However, the international community of States, scholars and international legal institutions are aware of the disadvantages of this divergence to the protection of human rights and have therefore tried to overcome these problems. This will be discussed in the following chapter.

IV. Development of Convergence of International Humanitarian Law and International Human Rights Law

Despite the demonstrated different origins, matters of divergence, contradictions and loopholes, IHL and IHRL have started to merge together. One reason for this phenomenon is the increase in internal conflicts and the concurrent decrease of international conflicts.⁵⁴⁵ Human rights bodies and humanitarian law bodies, such as the United Nations and the ICRC, have taken this change into consideration by establishing new norms and reinterpreting existing norms. In doing so, they have pulled humanitarian law in the direction of human rights law.⁵⁴⁶ The following chapter deals with the topics where interlinkages between the both branches of law already have been developed. The confluence is examined in four different categories, namely international treaty law, the statutes of the *ad hoc* tribunals and the ICC, the decisions of the ICJ and the tribunals, and customary law. For each category, the development of convergence is demonstrated in chronological order.



A. Lieber Code

In 1863, during the American Civil War, the so-called Lieber Code, an internal document of *Instructions for the Government of Armies of the United States in the Field*, was established.⁵⁴⁷ Even if it is not part of the source of international treaty law, it has to be briefly mentioned as an early example of the human rights impact on the law of war, which significantly influenced the later development of IHL.⁵⁴⁸ The Lieber Code stemmed from the cruelties and characteristic of a civil war, namely that as both parties of a civil war are nationals of the one State, the casualties and loss to the nation are doubled.

The human rights found in the Lieber Code include the prohibition on rape (Article 47), enslavement, slavery (Article 43) and the distinction between captured enemies on the ground

⁵⁴⁵ M. Cherif Bassiouni, “Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights.” *The Global Community: Yearbook of International Law and Jurisprudence*, (2001) : 3-51, 5.

⁵⁴⁶ Theodor Meron, “The Humanization of Humanitarian Law.”244.

⁵⁴⁷ Theodor Meron, “Francis Lieber’s Code and Principles of Humanity.” *Politics, values, and functions* (1997) : 249-260, 250.

⁵⁴⁸ Theodor Meron, “Francis Lieber’s Code and Principles of Humanity.” 257.

of colour (Article 57-58).⁵⁴⁹ The Lieber Code shows that, even in the early days of humanitarian and human rights law, the two fields of law had significant points of contact and protected some common values. These points serve as a starting point for convergence in later times.

B. Conventional Law

1. Geneva Conventions

Even if the deliberations on the Universal Declaration of Human Rights and on the Geneva Conventions took place independently from each other, the Geneva Conventions incorporated references to international human rights into IHL for the first time.⁵⁵⁰ These were presumably influenced by the 1945 Charter of the United Nations which mentions human rights eight times in its text, and by the spirit of humanity after World War II.⁵⁵¹

a) Convergence of International Humanitarian Law and International Human Rights Law relating to Political and Civil Rights

In the following, the points of convergence between IHL and IHRL in respect of the Geneva Conventions and the International Covenant on Civil and Political Rights are explored.

An example of the impact of human rights on the Geneva Conventions can be seen in the numerous regulations of the Fourth Geneva Convention which deals with issues usually only covered by human rights instruments in peacetime.⁵⁵² In the Fourth Geneva Convention, such regulations include humane treatment in detention, judicial guarantees and special treatment

⁵⁴⁹ Theodor Meron, "The Humanization of Humanitarian Law," 245.

⁵⁵⁰ Hans-Peter Gasser, "International Humanitarian Law and Human Rights Law in Non-international Armed Conflict: Joint venture or Mutual Exclusion?" 154.

⁵⁵¹ Arthur H. Robertson, "Humanitarian law and human rights," in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, 793-802, ed. Christophe Swinarski (Geneva: M. Nijhoff Publishers, 1984), 793.

⁵⁵² Hans-Peter Gasser, "International Humanitarian Law and Human Rights Law in Non-international Armed Conflict: Joint venture or Mutual Exclusion?" 156.

for women and children.⁵⁵³ The reason for the adaptation of these human rights to humanitarian law is motivated by the high risk of human rights violation of civilians in the situations covered by the Fourth Geneva Convention, such as individuals in the enemy's territory and inhabitants of occupied territories.⁵⁵⁴

Although, as already demonstrated above, there are contradictions in the protection of human rights regarding the scope *ratione materiae* of IHL and IHRL, there are also points of concordance. The fundamental rights, i.e. those rights which are non-derogable at any time, and thus also applicable during an internal strife, closely resemble the fundamental guarantees of common Article 3 of the Geneva Conventions which apply in times of non-international armed conflict and as customary law in all kinds of armed conflict.⁵⁵⁵ Since internal strife and non-international armed conflict are, in the hierarchy of intensity, close to each other, the field of protected rights is also almost identical. The fundamental rights of the International Covenant on Civil and Political Rights such as the right to life, the prohibition of torture, the juridical guarantees including the prohibition of retroactive penal measures and the right to be recognised everywhere as a person before the law, are also covered by common Article 3 of the Geneva Conventions.⁵⁵⁶ Even if not included in common Article 3 of the Geneva Conventions and therefore not applicable in times of internal conflict, several norms of the Third and Fourth Geneva Conventions grant the right of religious freedom to prisoners of war and to civilians.⁵⁵⁷ This includes the right to the spiritual services of ministers of religion, their special protection⁵⁵⁸ and the exercise of religious duties including receiving spiritual assistance from ministers of their faith.⁵⁵⁹ Additionally, the possibility of being buried according to the rites of one's own religion is granted by the Geneva Convention.⁵⁶⁰

The prohibition of slavery, which is a fundamental right under the International Covenant on Civil and Political Rights, is not mentioned explicitly in the Geneva Conventions, but the possibility of slavery is prohibited by the various forms of protection given elsewhere in the

⁵⁵³ Hans-Peter Gasser, "International Humanitarian Law and Human Rights Law in Non-international Armed Conflict: Joint venture or Mutual Exclusion?" 156.

⁵⁵⁴ Hans-Peter Gasser, "International Humanitarian Law and Human Rights Law in Non-international Armed Conflict: Joint venture or Mutual Exclusion?" 156.

⁵⁵⁵ Hans-Peter Gasser, "International Humanitarian Law and Human Rights Law in Non-international Armed Conflict: Joint venture or Mutual Exclusion?" 157.

⁵⁵⁶ Louise Doswald-Beck and Sylvain Vit , "International Humanitarian Law and Human Rights Law." 110.

⁵⁵⁷ Louise Doswald-Beck and Sylvain Vit , "International Humanitarian Law and Human Rights Law." 110.

⁵⁵⁸ See Article 33, 35, 36 of the Geneva Convention III.

⁵⁵⁹ See Article 34 of the Geneva Convention III, Article 27, 38(3) and 93 of the Geneva Convention IV.

⁵⁶⁰ See Article 17 of the Geneva Convention I, Article 120 of the Geneva Convention III and Article 130 IV of the Geneva Convention.

Geneva Conventions.⁵⁶¹ Furthermore, with regard to civilians, the prohibition of slavery is laid down in Article 4(2) of the Additional Protocol II.

Other fundamental rights such as Article 11 of the International Covenant on Civil and Political Rights and the right of conscience are not mentioned either in common Article 3 of the Geneva Conventions or elsewhere in the Geneva Conventions, because they are basically irrelevant in times of war.⁵⁶² However, the missions dispatched by the Secretary-General in 1985 and 1988 to inquire into the situation of prisoners of war in Iran and Iraq had to deal, amongst other things, with freedom of opinion and conscience, because Iran had been accused of indoctrinating and brainwashing Iraqi prisoners.⁵⁶³ The mission stated in its report that "the freedom of thought, religion and conscience of every prisoner of war should be strictly respected. No ideological, religious or other pressure should be brought to bear on prisoners."⁵⁶⁴ The report did not resort to Article 14 of the International Covenant on Civil and Political Rights to bridge the gap of the protection of the freedom of conscience of IHL as is suggested by Professor Meron.⁵⁶⁵ However, it still shows yet again how gaps between the two branches of law can be filled by mutual application.

A further example relating to the civil and political rights is the protection of the right of life. Neither body of law has abolished the death penalty, but both lay down restrictions on its execution.⁵⁶⁶ Under the Geneva Conventions, Article 75 of the Geneva Convention IV requires a delay of at least six months between the sentence and its execution, and Article 68(4) of the Geneva Convention IV prohibits the death sentence from being pronounced on persons under eighteen. Common Article 3 of the Geneva Conventions prohibits carrying out the death penalty without a proper judgment pronounced by a regularly constituted court. This last limitation of the execution of the death penalty is entirely congruent with the provisions at the end of Article 6(2) of the International Covenant on Civil and Political Rights.

A final example of the protection of a human right in humanitarian law is the protection of the family stipulated in Article 17 of the International Covenant on Civil and Political Rights. The protection of family life is taken into account in a number of different ways, such as the

⁵⁶¹ Louise Doswald-Beck and Sylvain Vité, "International Humanitarian Law and Human Rights Law." 110.

⁵⁶² Louise Doswald-Beck and Sylvain Vité, "International Humanitarian Law and Human Rights Law." 111.

⁵⁶³ Theodor Meron, *Humanization of Humanitarian Law*, 268.

⁵⁶⁴ Report of a Mission dispatched by the Secretary-General to inquire into the situation of prisoners of war in the Islamic Republic of Iran and the Republic of Iraq, U.N. Doc. S/16962, annex, para. 294.

⁵⁶⁵ Theodor Meron, *Humanization of Humanitarian Law*, 268.

⁵⁶⁶ Karima Bennoune, "Toward a Human Rights Approach to Armed Conflict: Iraq 2003." 208–209.

provision requiring the separation of children from adults if interned (unless they are members of the same family), and special provisions for children who are orphaned or separated from their families.⁵⁶⁷ Article 70 et seq. of the Geneva Convention III and Article 25 et seq. of the Geneva Convention IV help to protect the family by requiring that members of dispersed families be kept informed of the situation and whereabouts of other family members and by transmitting letters between them.⁵⁶⁸

A further principle common to IHL and IHRL is the principle of non-discrimination, a principle of such significance that it is implemented in every human rights treaty, e.g. Article 2(1) of the Universal Declaration of Human Rights, Article 2(1) of the International Covenant on Civil and Political Rights, and Article 2(2) of the International Covenant on Economic, Social and Cultural Rights. The principle is similarly stated in several places in the Geneva Conventions and the Additional Protocols, e.g. common Article 3 of the Geneva Conventions, Article 27 of the Geneva Convention IV, and Article 9 of the Additional Protocol I.

The number of rights covered by both bodies of law, such as the fundamental rights, the regulation concerning the death penalty, the principle of non-discrimination and other civil rights are proof that the two branches protect a significant number of the same values.



b) Convergence of International Humanitarian Law and International Human Rights Law relating to Social, Cultural and Economical Rights

This section looks at the instances where social and economical rights are covered by the Geneva Conventions.

The enjoyment of health stated in Article 12 of the International Covenant on Economic, Social and Cultural Rights is also reflected in the Geneva Conventions, e.g. common Article 3(1)(2) of the Geneva Conventions, which stipulates that the wounded must be collected and given the medical care that they need. Detailed rules for the medical attention of prisoners of war and civilian internees may also be found in the Geneva Conventions.⁵⁶⁹

In addition, the social and economical right of adequate housing, food and clothes of Article 11 of the International Covenant on Economic, Social and Cultural Rights is found in

⁵⁶⁷ Louise Doswald-Beck and Sylvain Vit , "International Humanitarian Law and Human Rights Law." 111.

⁵⁶⁸ Louise Doswald-Beck and Sylvain Vit , "International Humanitarian Law and Human Rights Law." 111.

⁵⁶⁹ See Article 30 to 32 of the Geneva Convention III, Article 91, 92 of the Geneva Convention IV.

several provisions of the Geneva Conventions, such as Article 25 et seqq. of the Geneva Convention III regarding prisoners of war and Article 89 et seq. of the Geneva Convention IV for interned civilians.⁵⁷⁰ According to Article 55 of the Geneva Convention IV, an occupying power must ensure that the people as a whole have the necessary means of survival and that outside relief shipments must be accepted if they are necessary to achieve this purpose.⁵⁷¹

The above-mentioned provisions grant rights only to people of the adversary party.⁵⁷² In contrast to this, Article 23 of the Geneva Convention IV also provides relief for the Parties' own populations, but this right is not as absolute as those that apply in occupied territory.⁵⁷³

This discussion demonstrates that points of convergence exist not only between civil and political rights and humanitarian law but also between social and economical rights and humanitarian law.

c) Convergence of IHL and IHRL relating to the field of application

In addition to overlap in the substance of protected human rights within IHL and IHRL there are also similarities in the field of application. The principle of humanitarian law to not concern itself with the relationship between a State and its nationals is broken by the exception of common Article 3 of the Geneva Conventions which is applicable to all persons, independent of their nationality.⁵⁷⁴ This exception is derived from the general application of human rights, although as a first-time aberration of the traditional humanitarian approach, the absolute scope of personal application is found only in the so-called minimum convention of common Article 3 of the Geneva Conventions, with its guarantees of some fundamental human rights.⁵⁷⁵

In recent times IHL and IHRL have begun to merge together on another point in respect of the topic of application. The Human Rights Committee has interpreted several human rights as non-derogable even though they are not enumerated in the list of fundamental human rights of Article 4(2) of the International Covenant on Civil and Political Rights.⁵⁷⁶ In its General

⁵⁷⁰ Louise Doswald-Beck and Sylvain Vit , "International Humanitarian Law and Human Rights Law." 110.

⁵⁷¹ Louise Doswald-Beck and Sylvain Vit , "International Humanitarian Law and Human Rights Law." 109.

⁵⁷² It is a principle that IHL basically protects only people of the adversary party, see Article 4 of the Third Geneva Conventions and Article 4 of the Fourth Geneva Conventions.

⁵⁷³ Louise Doswald-Beck and Sylvain Vit , "International Humanitarian Law and Human Rights Law." 109.

⁵⁷⁴ Louise Doswald-Beck and Sylvain Vit , "International Humanitarian Law and Human Rights Law." 112.

⁵⁷⁵ Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, 69.

⁵⁷⁶ Office of the United Nations High Commissioner for Human Rights, "Human Rights Committee - General Comments 29," para. 13. < <http://www.ohchr.org/english/bodies/hrc/comments.htm> > (10 December 2005).

Comment No. 29 on Article 4 of the International Covenant on Civil and Political Rights, the Human Rights Committee held that the incorporation of the principle of non-discrimination into the mechanism of derogation means that the elements and dimensions of the right to non-discrimination contained in Articles 2, 3, 14 (1), 23 (4), 24 (1), 25, and 26 of the International Covenant on Civil and Political Rights cannot be derogated from in any circumstances.⁵⁷⁷

In addition, the Human Rights Committee considers that several other human rights should rightly be among the non-derogable rights of Article 4 (2) of the International Covenant on Civil and Political Rights. The Committee holds the prohibition of hostages and unacknowledged detention of Article 9 of the International Covenant on Civil and Political Rights and the right in Article 10 of the International Covenant on Civil and Political Rights that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person as non-derogable.⁵⁷⁸ It bases its view on the status of general international law in respect of these norms.⁵⁷⁹ Also, the right of minorities in Article 27 of the International Covenant on Civil and Political Rights includes elements that must be respected in all circumstances, which the Committee bases on the prohibition against genocide in international law, the inclusion of a non-discrimination clause in Article 4 (1) of the International Covenant on Civil and Political Rights itself, and in the non-derogable nature of Article 18 of the International Covenant on Civil and Political Rights.⁵⁸⁰

In light of the fact that the Rome Statute of the International Criminal Court confirms that the prohibition of the deportation or forcible transfer of populations without grounds permitted under international law, constitutes, in the form of forced displacement, a crime against humanity, the right to derogate from Article 12 of the International Covenant on Civil and Political Rights during a state of emergency can never be accepted as justifying such measures.⁵⁸¹ The Committee also holds the guarantee of remedies for the provisions of the International Covenant on Civil and Political Rights which is provided in Article 2 (3) of the

⁵⁷⁷ Office of the United Nations High Commissioner for Human Rights, “Human Rights Committee - General Comments 29,” para. 8. < <http://www.ohchr.org/english/bodies/hrc/comments.htm> > (10 December 2005).

⁵⁷⁸ Office of the United Nations High Commissioner for Human Rights, “Human Rights Committee - General Comments 29,” para. 13(a). < <http://www.ohchr.org/english/bodies/hrc/comments.htm> > (10 December 2005).

⁵⁷⁹ Office of the United Nations High Commissioner for Human Rights, “Human Rights Committee - General Comments 31,” para. 13(b). < <http://www.ohchr.org/english/bodies/hrc/comments.htm> > (10 December 2005).

⁵⁸⁰ Office of the United Nations High Commissioner for Human Rights, “Human Rights Committee - General Comments 29,” para. 13. < <http://www.ohchr.org/english/bodies/hrc/comments.htm> > (10 December 2005).

⁵⁸¹ Office of the United Nations High Commissioner for Human Rights, “Human Rights Committee - General Comments 29,” para. 13. < <http://www.ohchr.org/english/bodies/hrc/comments.htm> > (10 December 2005).

International Covenant on Civil and Political Rights is a non-derogable right, because it constitutes a treaty obligation inherent to the context of the whole Convention.⁵⁸²

The same is true for the fair trial and due process guarantees. The Committee is of the opinion that the principles of legality and the rule of law require that the fundamental requirements of fair trial must be respected during a state of emergency.⁵⁸³ It bases this view on the fact that certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict.⁵⁸⁴ Consequently, there is no justification for derogation of these guarantees during other emergency situations.

Although the General Comments have no binding character, they are provided to clarify the duties of State Parties with respect to certain provisions and influence the development of law as authoritative interpretations.⁵⁸⁵

General Comment No. 29 looks at the limits on derogation in human rights law. Such limits are a merger with the systematics of IHL, which does not allow for derogation.⁵⁸⁶ In addition, in the special case of the last human right mentioned above, the due process guarantees, IHRL also refers to the content of humanitarian law. In sum, despite the many examples of divergence concerning the topic of application which were discussed earlier in this paper, some points of convergence emerge, supported by recent work from the Human Rights Committee.



2. Additional Protocols to the Geneva Conventions

A big step toward the convergence of IHL and IHRL was taken at the 1968 Conference on Human Rights in Tehran, at which the United Nations considered the application of human rights in armed conflict for the first time.⁵⁸⁷ The conference led to Resolution 2444 of the General Assembly which invited the Secretary-General, in consultation with the ICRC, to study steps to expand the application of existing humanitarian conventions in all armed

⁵⁸² Office of the United Nations High Commissioner for Human Rights, “Human Rights Committee - General Comments 29,” para. 14. < <http://www.ohchr.org/english/bodies/hrc/comments.htm> > (10 December 2005).

⁵⁸³ Office of the United Nations High Commissioner for Human Rights, “Human Rights Committee - General Comments 29,” para. 16. < <http://www.ohchr.org/english/bodies/hrc/comments.htm> > (10 December 2005).

⁵⁸⁴ Office of the United Nations High Commissioner for Human Rights, “Human Rights Committee - General Comments 29,” para. 16. < <http://www.ohchr.org/english/bodies/hrc/comments.htm> > (10 December 2005).

⁵⁸⁵ Office of the United Nations High Commissioner for Human Rights, “Human Rights: Civil and Political Rights, Fact Sheet No. 15 (Rev.1), p.16.” < www.ohchr.org/english/about/publications/docs/fs15.pdf > (10 December 2005).

⁵⁸⁶ Louise Doswald-Beck and Sylvain Vité, “International Humanitarian Law and Human Rights Law.” 100.

⁵⁸⁷ Louise Doswald-Beck and Sylvain Vité, “International Humanitarian Law and Human Rights Law.” 112.

conflicts and for additional international conventions to ensure a better protection for civilians, prisoners and combatants.⁵⁸⁸ This order was followed by the Diplomatic Conference from 1974 to 1977 with the outcome of the two 1977 Additional Protocols to the Geneva Conventions.⁵⁸⁹

The historical importance of the 1968 conference lies in the fact that it was the first time that the United Nations took the war of armed conflict into consideration. This consideration is evidenced in the report of the Secretary-General which says with regard to the International Bill of Human Rights that human rights in armed conflict “may be invoked to protect human rights at all times and everywhere and thus complete in certain respects and lend support to the international instruments especially applicable in conditions of war or armed conflicts.”⁵⁹⁰

The Additional Protocol, in its fourth part, is the first instrument to contain a comprehensive conventional set of rules regulating the protection of civilians against the effects of hostilities.⁵⁹¹ This emphasis on individual protection during times of war is a significant contribution to the humanisation of humanitarian law.⁵⁹²

Article 75 of Additional Protocol I codifies the fundamental human rights.⁵⁹³ As well as the content of protected rights being derived from the international human rights instruments, the scope of the *ratione personae* is taken from the mechanisms of human rights law.⁵⁹⁴ In contrast to common Article 3 of the Geneva Conventions, Article 75 of Additional Protocol I extends the field of protection to all persons, as under human rights law. The usual distinction between different groups such as prisoners of war, civilians, nationals and non-nationals is not made. In addition, the text of Article 75 of the Additional Protocol I draws on the International Covenant on Civil and Political Rights⁵⁹⁵ with regard to its content.⁵⁹⁶ For example, Article 75 (4) of the Additional Protocol I contains protection which corresponds to

⁵⁸⁸ “Resolution XXIII of the United Nations General Assembly, adopted on 10 December 1968,” *The Law of Armed Conflict: a collection of conventions, resolutions and other documents*, ed. Dietrich Schindler (Leiden: Nijhoff, 2004), 1999.

⁵⁸⁹ Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, 34.

⁵⁹⁰ Respect for Human Rights in Armed Conflicts, Report of the Secretary-General, U.N. Doc. A/8052, para. 16 (1970).

⁵⁹¹ Judith Gardam, “The Contribution of the International Court of Justice to International Humanitarian Law.” 354.

⁵⁹² Judith Gardam, “The Contribution of the International Court of Justice to International Humanitarian Law.” 354.

⁵⁹³ Hans-Peter Gasser, “International Humanitarian Law and Human Rights Law in Non-international Armed Conflict: Joint venture or Mutual Exclusion?” 156.

⁵⁹⁴ Theodor Meron, *Human Rights in Internal Strife*, 32.

⁵⁹⁵ Dietrich Schindler, “Human Rights and Humanitarian Law: Interrelationship of the Laws.” *American University Law Review*, 32 (1982) : 935, 937.

⁵⁹⁶ Theodor Meron, *Human Rights in Internal Strife*, 33.

the prohibition of deprivation included in Article 9 and to the due process guarantees of Article 14 of the International Covenant on Civil and Political Rights.⁵⁹⁷

Additional Protocol I also specifies and extends several human rights already protected in the Geneva Conventions, such as the supply of basic needs and relief actions.⁵⁹⁸

The influence of human rights on Additional Protocol II is obvious too. The preamble of Additional Protocol II recalls that “international instruments⁵⁹⁹ relating to human rights offer a basic protection to the human person”.⁶⁰⁰ This reference means that during non-international armed conflicts human rights conventions continue to take effect.⁶⁰¹ Protocol II greatly imitates the International Covenant on Civil and Political Rights in wording and content, and this is especially apparent in the provision on detention (Article 5 of the Additional Protocol II) and judicial guarantees (Article 6 of the Additional Protocol II).⁶⁰² These norms are, like Article 75 of the Additional Protocol I, applicable to everyone whose liberty has been restricted.⁶⁰³ The avoidance of the usual distinction regarding the *ratione personae* is drawn from human rights law.

The Additional Protocols are further examples of the merging of IHL and IHRL that has resulted from the impact on IHL of international human rights instruments, and in particular the two Covenants. This impact was reflected in the historical process which established the two Additional Protocols and is particularly evident in the content and design of Article 75 of Additional Protocol I and Article 5 and 6 of Additional Protocol II.

⁵⁹⁷ Asbjorn Eide, “The Law of War and Human Rights – Differences and Convergences,” in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, 688.

⁵⁹⁸ See Article 69 and 70 of the Additional Protocol I.

⁵⁹⁹ In accordance to the ICRC Commentary, international instruments relating to human rights means the instruments adopted by the U.N., such as The International Bill of Rights (i.e., Universal Declaration of Human Rights; International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights), instruments concerning specific aspects of the protection of human rights, e.g., Convention on Genocide, the Convention on the Elimination of Racial Discrimination, and the Convention on Torture as well as regional human right instruments. See International Committee of the Red Cross, *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, paras. 1339-1340.

⁶⁰⁰ See para. 2 of the Preambular of Additional Protocol II.

⁶⁰¹ Hans-Peter Gasser, “International Humanitarian Law and Human Rights Law in Non-international Armed Conflict: Joint venture or Mutual Exclusion?” 156.

⁶⁰² Hans-Peter Gasser, “International Humanitarian Law and Human Rights Law in Non-international Armed Conflict: Joint venture or Mutual Exclusion?” 156.

⁶⁰³ See Article 5 of the Additional Protocol.

3. Convention on the Rights of the Child

Another treaty which proves the continuing merger of IHL and IHRL is the 1989 Convention on the Rights of the Child.⁶⁰⁴ This Convention has to be placed among the family of human rights treaties, because of its adoption procedure, the substance of rules which it establishes⁶⁰⁵ and its United Nations monitoring body, the Committee on the Rights of the Child. The most interesting matter for present purposes is the regulation of Article 38 of the Convention on the Rights of the Child, which serves as a spot of breach of human rights law in order to interlace it with humanitarian law. According to Article 38(1) of the Convention on the Rights of the Child, the rules of humanitarian law which are relevant to the child shall be respected by the High Contracting Parties of the Convention on the Rights of the Child. This has the positive side-effect that such IHL rules gain a universal application, because the Convention on the Rights of the Child is the most ratified international treaty and is thus more widespread than the two Additional Protocols with their detailed protection regulations of the child in times of armed conflict.

Pursuant to Article 38 (4) of the Convention on the Rights of the Child State Parties shall in accordance with their obligations under IHL take all feasible measures to ensure protection and care of children who are affected by an armed conflict. Although such an example of a human rights treaty provision cross-referencing IHL and specifically addressing times of armed conflict is rare, it shows that IHRL does on occasion take IHL into consideration and in doing so furthers their convergence.

4. International and Regional Monitoring Bodies

In recent times, several United Nations bodies have paid remarkable attention to humanitarian law. This includes the Working Group on Enforced and Involuntary Disappearances which, in its draft of a legally binding normative instrument for the protection of all persons from enforced disappearance,⁶⁰⁶ considers the grounds for determining whether

⁶⁰⁴ Daniel O'Donnell, "Trends in the application of international humanitarian law by United Nations human rights mechanisms." *International Review of the Red Cross*, 324 (1998), 481-503, 491.

⁶⁰⁵ L Louise Doswald-Beck and Sylvain Vité, "International Humanitarian Law and Human Rights Law." 113.

⁶⁰⁶ U.N. Doc. E/CN.4/2005/66.

there is danger if a person were to be expelled, returned or extradited to another State.⁶⁰⁷ One of its grounds is the existence in the State of serious violations of IHL and IHRL.⁶⁰⁸

The Commission on Human Rights, in the so called *Kälin* Report on the Situation of Human Rights in Kuwait, stated that “there is a consensus within the international community that the fundamental human rights of all persons are to be respected and protected both in times of peace and during periods of armed conflict”.⁶⁰⁹

The Human Rights Committee, too, has not avoided reference to humanitarian law, as illustrated in the General Comments No. 29 mentioned above.⁶¹⁰

These three examples show that the United Nations bodies do not hesitate to resort to humanitarian law where necessary. In doing so, the members, experts and delegates of such bodies are assisting the further erosion of the borders between IHL and IHRL.

Regional human rights bodies are also deepening the convergence between IHL and IHRL as demonstrated by the *Abella* Case of the American Commission on Human Rights.⁶¹¹ The case concerned summary executions which arose out of an armed conflict⁶¹² and which are prohibited by Article 3 and Article 5 of the ACHR. The American Commission was unable to resolve the case merely by considering these non-derogable human rights but had to also refer to IHL “because the American Convention contains no rules that either define or distinguish civilians from combatants and other military targets, much less, specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations.”⁶¹³ Therefore, the American Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of this and other kinds of claims alleging violations of the American Convention in combat situations.”⁶¹⁴ In the view of the American Commission this is the only way to avoid having to “decline to exercise its jurisdiction in many cases involving

⁶⁰⁷ See Article 16 of the Draft International Convention for the Protection of all Persons from Enforced Disappearance, U.N. Doc. E/CN.4/2005/WG.22/WP.1/REV.4.

⁶⁰⁸ U.N. Doc. E/CN.4/2005/66 para. 70; Another example is that this Working Group believes that the establishment of the United Nations Human Rights Verification Mission in Guatemala (MINUGUA) can make a decisive contribution to ongoing efforts in Guatemala to put an end to the violations of human rights, including enforced or involuntary disappearances and to the violation of international humanitarian law, see U.N. Doc. E/CN.4/1995/36 para. 183.

⁶⁰⁹ U.N. Doc. E/CN.4/1992/26 para. 33.

⁶¹⁰ See in this minithesis at 98.

⁶¹¹ Kenneth Watkin, “Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict.” *The American Journal International Law* 98 (2004) : 1-34, 23.

⁶¹² Kenneth Watkin, “Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict.” 17.

⁶¹³ *Abella*, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L/V/H.98, doc. 7 rev., P 161.

⁶¹⁴ *Abella v. Argentina*, Inter-Am. C.H.R., paras. 161, OEA/Ser.L/V.97, doc. 38 (1997).

indiscriminate attacks by State agents resulting in a considerable number of civilian casualties”, which would lead to an absurd outcome “in light of the underlying object and purposes of both the American Convention and humanitarian law treaties.”⁶¹⁵

A further example of convergence between IHL and IHRL is the fact that the most recent conventions on human rights dispense with the possibility for derogation of human rights. This includes the 1981 African Charter on Human and People’s Rights,⁶¹⁶ the youngest of the three regional human rights instruments, and the 1989 Conventions on the Right of the Child. IHL’s lack of derogation may have contributed to these developments.⁶¹⁷

That the various United Nations bodies consider the convergence of IHL and IHRL to be a desirable aim for the strengthening of human rights protection is evidenced by the number of such bodies that are open to resorting to IHL.

C. Statutes of the three international juridical bodies

The establishment of the International Criminal Tribunal for Rwanda (ICTR) are further evidence for the convergence of IHL and IHRL. In respect of the, the Security Council repeatedly cited humanitarian law in its establishment of an international tribunal “for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”⁶¹⁸ In resolution 955 the Security Council established the ICTR “for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda, and Rwanda citizens responsible for genocide and other such violations committed on the territory of [neighbouring] States, between 1 January 1994 and 31 December 1994.”⁶¹⁹

The establishment and existence of ICC, together with these two tribunals is inherently a convergence of IHL and IHRL as the bodies combine characteristics of both branches of law.⁶²⁰ Two of the greatest achievements of these institutions are the responsibility of individuals for violations of the law of war and their jurisdiction over a wide catalogue of

⁶¹⁵ Abella v. Argentina, Inter-Am. C.H.R., paras. 161, OEA/Ser.L/V.97, doc. 38 (1997).

⁶¹⁶ Raúl E. Vinuesa, “Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law.” 76.

⁶¹⁷ Louise Doswald-Beck and Sylvain Vité, “International Humanitarian Law and Human Rights Law.” 100.

⁶¹⁸ U.N. Doc. S.C. Res. 780 (1992).

⁶¹⁹ U.N. Doc. S.C. Res. 955 (1994).

⁶²⁰ Georges Abi-Saab, “International Criminal Tribunals and the Development of International Humanitarian and Human Rights Law,” in *Liber Amicorum Judge Mohammed Bedjaoui*, 652.

crimes.⁶²¹ These achievements are both made possible through the merging of human rights and humanitarian law elements.

The ICC statute does not criminalise violations of human rights in a formal sense, but only violations of international humanitarian law⁶²² as is evident from the wording that “all delegations agreed that the Court’s jurisdiction relates to serious violations of international criminal law, not International Human Rights Law.”⁶²³ However, if one considers the list of rights which are protected by the tribunals and the ICC it is apparent that they are derived from both IHRL and IHL. The genocide definition of the ICTR and ICC statute is taken from the human rights law of the 1948 Genocide Convention.⁶²⁴ The statutes of all three bodies refer to the war crimes defined in the Geneva Conventions and their Additional Protocol I.⁶²⁵ The crimes listed in the statutes are indistinguishable from human rights, for example the prohibitions on wilful killing, torture, inhuman treatment and practice of apartheid.⁶²⁶ Similarly, the listed crimes clearly reflect the norms stated in common Article 3 of the Geneva Conventions and the rights constituting the crimes against humanity.⁶²⁷ The human rights influence on the Geneva Conventions which has been discussed previously is now repeated at the higher level of international criminal instruments, but without the required nexus of an armed conflict.⁶²⁸ This leads to a result where IHL and the corresponding institutions have become central to the protection of human rights.⁶²⁹ A further development is the express prohibition on capital punishment contained in the statutes of the three juridical bodies.⁶³⁰

Furthermore, the ICC-Statute in particular fills in some gaps between IHL and IHRL in the field of application.⁶³¹ The definition of war crimes in Article 8 of the ICC-Statute abandons

⁶²¹ Audrey Benison, “War Crimes: A Human Rights Approach to a Humanitarian Law Problem at the International Criminal Court.” 158-159.

⁶²² Theodor Meron, “The Humanization of Humanitarian Law.” 265.

⁶²³ Darryl Robinson, “Defining ‘Crimes against Humanity’ at the Rome Conference.” *American Journal of International Law*, 93 (1999), 43-57, 53.

⁶²⁴ Kingsley Chiedu Moghalu, “International Humanitarian Law from Nuremberg to Rome : the Weighty Precedents of the International Criminal Tribunal for Rwanda.” *Pace international law review* 14 (2002) : 273-305, 279.

⁶²⁵ See Article 50, 51, 129, 146 of the Geneva Conventions I, II, III, IV and Article 85 of the Additional Protocol I.

⁶²⁶ Theodor Meron, “The Humanization of Humanitarian Law.” 253, 266.

⁶²⁷ Theodor Meron, “The Humanization of Humanitarian Law.” 266.

⁶²⁸ Theodor Meron, “The Humanization of Humanitarian Law.” 253.

⁶²⁹ Theodor Meron, “The Humanization of Humanitarian Law.” 253.

⁶³⁰ Georges Abi-Saab, “International Criminal Tribunals and the Development of International Humanitarian and Human Rights Law,” in *Liber Amicorum Judge Mohammed Bedjaoui*, 653-654.

See Article 24 of the ICTY-Statute, Article 23 of the ICTR-Statute, and Article 77 of the ICC-Statute.

⁶³¹ Fausto Pocar, “The Rome Statute of the International Criminal Court and Human Rights,” in *The Rome Statute of the International Criminal Court*, 67-74, eds. Mauro Politi and Guiseppe Nesi (Aldershot: Ashgate, 2001), 68-69.

the distinction between international and non-international armed conflict as it expressively includes “serious violations of common Article 3 of the Geneva Conventions war crimes” and “other serious violations of the laws and customs applicable in armed conflicts”, both of which are applicable in armed conflicts not of an international character.⁶³² As mentioned above, the ICC conflates IHL and IHRL as it deals with war crimes and crimes committed in times of peace under the same roof. In addition, in contrast to IHL, the Statute extends the scope of personal application. It is not limited to military personnel, but rather codifies the judgment cited above that all persons, including civilians, may be held responsible for a violation of Article 5 seq. of the ICC-Statute.⁶³³ Moreover, according to the ICC-Statute, crimes can be committed not only in furtherance of State policy, but also the policy of a non-State entity.⁶³⁴

In addition to the tribunal’s and ICC’s jurisdiction of a combination of rights from human rights law and humanitarian law, the existence of these institutions marks a merger of IHL and IHRL *per se*.

The human rights regimes are concerned with the behaviour of States toward their nationals. Only a State can be held responsible for violations of human rights on the domestic level as well as on the international level,⁶³⁵ since human rights are effective in their classical function as rights of negative liberty only between the State and the human being.⁶³⁶ In democracies, a perfected system of remedies against the State for unlawful interference in human rights is in force.⁶³⁷ On the international level, a rudimentary system of remedies exists⁶³⁸, which allows for complaints to be brought before the human rights treaty bodies.

In contrast, IHL provides for the individual criminal responsibility of commanders for crimes of “omission”, as stated in Article 86 seq. of the Additional Protocol I, Article 7(3) of

⁶³² Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights*, (London: Sweet and Maxwell, 2003), para. 6-007.

⁶³³ See Article 25 of the ICC-Statute.

⁶³⁴ See Article 7(2)(a) of the ICC-Statute.

⁶³⁵ Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights*, para. 6-016.

⁶³⁶ Bodo Pieroth and Bernhard Schlink, *Grundrechte – Staatsrecht II*, 17th ed. (Heidelberg: C. F. Müller Juristischer Verlag, 2001), paras. 57-58.

⁶³⁷ See, e.g., Article 93 and 100 of the German Basic Law and Art. 167 and 172 of the Constitution of South Africa.

⁶³⁸ Five of the Committees (Human Rights Committee, Committee on the Elimination of Racial Discrimination, Committee Against Torture, Committee on the Elimination of Discrimination Against Women, Committee on Migrant Workers) are able, under certain conditions, to receive complaints from individuals who claim that their rights of the treaties have been violated; see Dinah Shelton, *Remedies in International Human Rights Law*, 2nd ed., (Oxford: University Press, 2005), 105 and Office of the United Nations High Commissioner for Human Rights, “Human Rights Bodies - Complaints Procedures,”

<<http://www.ohchr.org/english/bodies/petitions/index.htm>> (10 December 2005).

the -Statute, Article 6(3) of the ICTR-Statute and Article 28(2) of the ICC-Statute.⁶³⁹ However, the duty on Contracting States, pursuant to Articles 49/50/129/146 of the Geneva Convention I/II/III/IV respectively to enact legislation providing penal sanction for the perpetrators of grave breaches has unfortunately been missed by most of them.⁶⁴⁰

To sum up, one could say that the regimes for responsibility under human rights law are the better developed at the domestic level, although their establishment at the international level is, under the Draft Articles on State Responsibility for International Wrongful Acts, at an early stage and has not yet been adopted as a declaration or a convention.⁶⁴¹ *Vice Versa*, IHL has a proper system of criminal responsibility under traditional international law, but its implementation at the domestic level is insufficient.⁶⁴² The statutes of the *ad hoc* tribunals and the ICC conflate these two semi-developed regimes of responsibility into fully functioning juridical bodies as they provide direct remedies on the international level similar to the IHRL mechanism. From IHL comes the individual responsibility for violations of crimes without a nexus to a war as defined in the crimes against humanity.⁶⁴³ However, humanitarian law is shifted from rules of conduct to rights of privacy against State interference, which is the nature of human rights. It could be said that one of the most important contributions of the criminal tribunals and the ICC to IHL is the termination of individual impunity.



The foundation of the three international juridical bodies is an embodiment of the convergence of IHL and IHRL *per se* in that they are all United Nations institutions with the purpose of prosecuting violations of IHL, an area which the United Nations ignored a long time. Furthermore, the confluence of IHL and IHRL is reflected in the application *ratione materiae* by the abandoning of the distinction between times of peace and war. In addition, the statutes contribute to the convergence of IHL and IHRL through their regulation of responsibility for breaches of protected rights.

⁶³⁹ Ilias Bantekas, *Principles of direct and superior responsibility in international humanitarian law*, (Manchester: Juris Publishing, 2002), 95.

⁶⁴⁰ Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, 81.

⁶⁴¹ International Law Commission, "Draft articles on Responsibility of States for Internationally Wrongful Acts, 2001," < http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm > (10 Decembers 2005).

⁶⁴² Bartram S. Brown, "Nationality and Internationality in International Humanitarian Law." *Stanford Journal of International Law* 34 (1998) : 347-406, 353-354.

⁶⁴³ Theodor Meron, "The Humanization of Humanitarian Law." 253.

D. Decisions of the International Court of Justice, International Tribunal for former Yugoslavia, and International Tribunal for Rwanda

1. International Court of Justice

The ICJ has contributed to the convergence between IHL and IHRL by three decisions. In the judgment of the *Corfu Channel* case the Court mentioned for the first time the principle of humanity when it stated that the obligation to notify of the existence of a minefield and to warn approaching ships of danger is not based on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognised principles, namely elementary considerations of humanity, which are even more exacting in peace than in war.⁶⁴⁴

It developed the humanitarian aims and the idea of humanity as an underlying principle in IHL further in the *Nicaragua* case and later in the *Nuclear Weapons* Advisory Opinion.⁶⁴⁵ In the *Nicaragua* case the Court stated that the obligation to respect the Conventions does not derive solely from the Geneva Conventions themselves, but from the general principles of humanitarian law.⁶⁴⁶ The Court describes the Geneva Conventions as being a development of these principles in some respects and in other respects as being no more than the expression of such principles.⁶⁴⁷ For example it noted that common Article 3 of the Geneva Conventions contains such general principles of humanitarianism that it applies to times of international armed conflict as well as its expressed application to non-international armed conflict.⁶⁴⁸ In the Court's view this is also a description of what is meant by the phrase "elementary considerations of humanity".⁶⁴⁹

As just demonstrated, in shaping the fundamental general principles of humanitarian law, the ICJ refers only to the Geneva Law, but in the *Nuclear Weapons* Advisory Opinion it took

⁶⁴⁴ *Corfu Channel (United Kingdom v. Albania)*, ICJ, Judgment of 15 December 1949, para. 22.

⁶⁴⁵ Judith Gardam, "The Contribution of the International Court of Justice to International Humanitarian Law." 355.

⁶⁴⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, ICJ, Judgment, ICJ Reports, 1986, para. 220.

⁶⁴⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, ICJ, Judgment, ICJ Reports, 1986, para. 218.

⁶⁴⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, ICJ, Judgment, ICJ Reports, 1986, para. 218.

⁶⁴⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, ICJ, Judgment, ICJ Reports, 1986, para. 218.

the The Hague Law into account.⁶⁵⁰ In its Advisory Opinion, the Court twice incorporated the human rights approach into the legal system of means and methods of warfare in international armed conflicts. As already analysed under the heading of the *lex specialis* relation of IHL to IHRL, the ICJ has influenced humanitarian law through a human rights interpretation of IHL norms.⁶⁵¹ Besides the right to life, the Court has confirmed the relevance of other compatible human rights norms in the International Covenant on Civil and Political Rights to times of armed conflict, continuing the process of bringing the two set of rules into closer harmony.⁶⁵² In so doing, the Court has used the changing values of the international community to adjust the legal boundaries of the relationship between IHL and IHRL.⁶⁵³

In comparison to the *Nicaragua* and the *Corfu Channel* cases, the Court in the *Nuclear Weapons* Advisory Opinion stressed the humanitarian principles of IHL with regard to combatants.⁶⁵⁴ It stated that the “intrinsicly humanitarian character of the legal principles (...) permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.”⁶⁵⁵ It said that the cardinal principles constituting the fabric of humanitarian law are as follows: “The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.”⁶⁵⁶

With this statement, the Court pointed out that these principles underlie the value of humanity, which must be taken in consideration by the means and methods of warfare, and is not limited to civilians but is also relevant for combatants. In the two other decisions noted

⁶⁵⁰ *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion of 8 July 1996, para. 75.

⁶⁵¹ See in this minithesis at 78.

⁶⁵² Judith Gardam, “The Contribution of the International Court of Justice to International Humanitarian Law.” 360.

⁶⁵³ Judith Gardam, “The Contribution of the International Court of Justice to International Humanitarian Law.” 360.

⁶⁵⁴ Judith Gardam, “The Contribution of the International Court of Justice to International Humanitarian Law.” 356.

⁶⁵⁵ *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion of 8 July 1996, para. 86.

above, the ICJ similarly acknowledged humanity as inherent to humanitarian law and steered toward a convergence of IHL and IHRL by emphasising this as a common value to both branches of law.

2. International Criminal Tribunal for the Former Yugoslavia

Even if the statutes of the tribunals do not comprise new substantive law, the tribunals have delivered some noteworthy developments on definitions and the practical application of human rights violations.

In the *Celebici* case, the Trial Chamber carefully opened the field of *ratione personae* of Article 4 Geneva Convention IV to include non-nationals.⁶⁵⁷

The Trial Chamber found against applying the domestic provisions on citizenship in a situation of violent State as such provisions should not be determinative of the protected status of persons caught up in conflicts which ensue from such events.⁶⁵⁸ It based its opinion on the Commentary to the Fourth Geneva Convention which states that "the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests" and thus that their protection should be applied to as broad a category of persons as possible.⁶⁵⁹ The Chamber encouraged the suppression of the international law principle of sovereignty, which is the underlying principle of the nationality test of Article 4 of the Geneva Convention IV, in favour of humanitarian law. In addition, Trial Chamber cited the intention of the Security Council which was to effectively address a situation that it had determined to be a threat to international peace and security and to end the suffering of all those caught up in the conflict in finding that the International Tribunal should not deny the application of the Fourth Geneva Convention to any particular group of persons solely on the basis of their citizenship status under domestic law.⁶⁶⁰ The Trial Chamber further argued that "[a]s such, and insofar as they were not protected by any of the other Geneva Conventions, they must be considered to have been 'protected persons' within the meaning of the Fourth Geneva Convention".⁶⁶¹ The Chamber concluded that this interpretation accorded with

⁶⁵⁶ *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion of 8 July 1996, para. 76.

⁶⁵⁷ *Prosecutor v. Delalic*, ICTY, IT-96-21-T, Judgment, 16 November 1998, para. 263.

⁶⁵⁸ *Prosecutor v. Delalic*, ICTY, IT-96-21-T, Judgment, 16 November 1998, para. 263.

⁶⁵⁹ *Prosecutor v. Delalic*, ICTY, IT-96-21-T, Judgment, 16 November 1998, para. 263.

⁶⁶⁰ *Prosecutor v. Delalic*, ICTY, IT-96-21-T, Judgment, 16 November 1998, para. 263.

⁶⁶¹ *Prosecutor v. Delalic*, ICTY, IT-96-21-T, Judgment, 16 November 1998, para. 265.

human rights doctrine as it has developed with increasing force since World War II.⁶⁶² It observed that rigid application of the nationality requirement, intended to prevent interference in a State's relations with its nationals, was totally incongruous with human rights, which offered nationals protection against their governments.⁶⁶³

In sum, the Chamber is a further example of the use of human rights law to give reasons for the application of humanitarian law, namely to provide for the adequate legal protection of civilians in the circumstances of the Yugoslavian War.

In the *Tadic* case the also favoured human rights doctrine over the principle of sovereignty.⁶⁶⁴ In this case, the human rights approach resulted not in the relativisation of the nationality test, but in the diminishing of international and internal armed conflicts.⁶⁶⁵

“Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turns to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.”⁶⁶⁶



The outcomes of both cases found their way into the statute of the ICC as discussed above. The cases demonstrate that the ICTY converges IHL and IHRL through bringing both set of rules side by side.

3. International Criminal Tribunal for Rwanda

The ICTR has also contributed to the convergence of IHL and IHRL with its decisions. In the *Akayesu* judgment, the ICTR interpreted the definition of genocide for the first time since the Genocide Conventions had been established.⁶⁶⁷ In the same judgment, the ICTR provided a definition of rape as a crime under international law for the first time in legal history and made the first conviction by an international tribunal for rape as a specific crime under the

⁶⁶² *Prosecutor v. Delalic*, ICTY, IT-96-21-T, Judgment, 16 November 1998, para. 266.

⁶⁶³ *Prosecutor v. Delalic*, ICTY, IT-96-21-T, Judgment, 16 November 1998, para. 266.

⁶⁶⁴ *Prosecutor v. Tadic*, ICTY, IT-94-1-A72, Appeal on Jurisdiction, 2 October 1995, para. 97.

⁶⁶⁵ *Prosecutor v. Tadic*, ICTY, IT-94-1-A72, Appeal on Jurisdiction, 2 October 1995, para. 97.

⁶⁶⁶ *Prosecutor v. Tadic*, ICTY, IT-94-1-A72, Appeal on Jurisdiction, 2 October 1995, para. 97.

rubric of crimes against humanity.⁶⁶⁸ “The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive. This act must be committed:

- (a) as part of a wide spread or systematic attack;
- (b) on a civilian population;
- (c) on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds.”⁶⁶⁹

Another remarkable development in the jurisdiction of the ICTR has been to hold civilians liable for violations of IHL. The Tribunal stated that “the duties and responsibilities of the Geneva Conventions and the Additional Protocols, hence, will normally apply only to individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or de facto representing the Government, to support or fulfil the war efforts.”⁶⁷⁰ The Tribunal extended the class of criminal liable persons to civilians by reference to the Tokyo trials that held civilians to be responsible for violations of IHL and through consideration of the humanitarian object and purpose of the Geneva Conventions and the Additional Protocols, i.e. to protect war victims from atrocities.⁶⁷¹ The Tribunal concluded that the laws of war must apply equally to civilians and to combatants in the conventional sense.⁶⁷² This judgment affirmed and clarified that IHL has lost its limitation to combatant as perpetrators of IHL. The convergence with human rights law becomes evident when one considers that individual perpetrators of human rights violations are held responsible on the domestic level by the institution of criminal law. According to Article 49/50/129/146 of the Geneva Convention I/II/III/IV, States have to provide legislation that ensures effective penal sanctions for persons committing grave breaches of the Geneva Conventions.⁶⁷³ However, to date only a few State Parties to the Geneva Convention have fulfilled their obligation to establish such

⁶⁶⁷ Kingsley Chiedu Moghalu, “International Humanitarian Law from Nuremberg to Rome : the Weighty Precedents of the International Criminal Tribunal for Rwanda.” 279.

⁶⁶⁸ Kingsley Chiedu Moghalu, “International Humanitarian Law from Nuremberg to Rome : the Weighty Precedents of the International Criminal Tribunal for Rwanda.” 284.

⁶⁶⁹ *Prosecutor v. Akayesu*, ICTR-96-4-T, Decision of 2 September 1998, para. 598.

⁶⁷⁰ *Prosecutor v. Akayesu*, ICTR-96-4-T, Decision of 2 September 1998, para. 631.

⁶⁷¹ *Prosecutor v. Akayesu*, ICTR-96-4-T, Decision of 2 September 1998, para. 633.

⁶⁷² *Prosecutor v. Akayesu*, ICTR-96-4-T, Decision of 2 September 1998, para. 634.

⁶⁷³ Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, 80.

legislation.⁶⁷⁴ Bearing these circumstances in mind, the ICTR's approach to protect humanitarian law through ascribing individual criminal liability at the international level is a useful method to ensure the personal unlimited scope of individual liability of human rights violations.⁶⁷⁵ One could sum up these developments in the words of George Aldrich, namely that "the development of international humanitarian law since the World War II has made individual criminal liability an explicit part of the law."⁶⁷⁶

The ICTR's extension of liability for violations of IHL to individuals to be in line with the approach for human rights violations on the domestic level is a notable contribution to the convergence of IHL and IHRL.

E. Customary International Law

After illustrating that international treaty law, international human right bodies and the international juridical bodies have all supported the process of convergence of IHL and IHRL finally the focus turns on customary international law, the last object of research.

Customary international law has also improved the convergence of IHL and IHRL. In particular, it is through customary law that some rules have been recognised as norms whose violation gives rise to individual criminal responsibility.⁶⁷⁷ This has obvious implications for human rights law and for future proceedings before the international juridical bodies.⁶⁷⁸

In Article 38 ICJ-Statute customary international law is defined "as evidence of a general practice accepted as law." Customary law therefore requires two elements: practice and *opinio juris*. *Opinio juris* means that the practice has to be carried out as of right.⁶⁷⁹

Judges, scholars, governments, bodies of international law and nongovernmental organisations have greatly accelerated the development of customary law as they are often prepared to accept a rather large gap between practice and the norms concerned without questioning their binding character.⁶⁸⁰ On several occasions, gradual and partial compliance have been accepted as fulfilling the requirements for the formation of customary law despite

⁶⁷⁴ Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, 81-82.

⁶⁷⁵ Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, 188.

⁶⁷⁶ Theodor Meron, "The Humanization of Humanitarian Law." 245.

⁶⁷⁷ Theodor Meron, "The Continuing Role of Custom in the Formation of International Humanitarian Law." *American Journal of International Law*, 90 (1996), 238-249, 244.

⁶⁷⁸ Theodor Meron, "The Continuing Role of Custom in the Formation of International Humanitarian Law." 244.

⁶⁷⁹ Louise Doswald-Beck and Jean-Marie Henckaerts, eds., *International Customary Humanitarian Law* (Cambridge: Cambridge University Press, 2004) xxxix.

⁶⁸⁰ Theodor Meron, "The Humanization of Humanitarian Law." 244.

general practice, especially on the battlefield.⁶⁸¹ Courts and tribunals have frequently ignored operational or battlefield practice.⁶⁸² The great advantage of regarding a norm as customary is its binding and universal character.⁶⁸³ In addition, most of the rules declared to be customary are also applicable in non-international conflicts.⁶⁸⁴

Two specific decisions where judicial bodies declared norms to be customary are worth noting. The International Military Tribunal for the Trial of German Major War Criminals stated in its decision that “these rules laid down in the Conventions [Hague Regulations of 1907] were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war”.⁶⁸⁵ The *Nicaragua* case mentioned previously is a further example of the establishment of customary international humanitarian law by a juridical body. In its judgment, the Court declared that common Article 3 of the Geneva Conventions is part of the general principles of humanitarian law, which meant in this context customary law.⁶⁸⁶

Most of the substantive provisions of the Geneva Conventions I, II, and III, reflect customary law, as they are based on earlier Geneva Conventions.⁶⁸⁷ Although the Fourth Geneva Convention with its protection of civilians in times of war has no predecessor, several of its norms are customary in nature too.⁶⁸⁸ The status of each norm as customary law can only be determined *in concreto*.⁶⁸⁹ The focus should, however, be turned to where customary law has particular relevance, namely in respect of the Additional Protocols. This is because, in contrast to the Geneva Conventions, these instruments have still not been ratified by a remarkable number of States.

From a human rights perspective, the fundamental human rights of Article 4(2) of the International Covenant on Civil and Political Rights are part of the corpus of customary law.⁶⁹⁰ In situations of armed conflict, rights such as the right to life, protection and servitude

⁶⁸¹ Theodor Meron, “The Humanization of Humanitarian Law.” 244.

⁶⁸² Theodor Meron, “The Humanization of Humanitarian Law.” 244.

⁶⁸³ Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, 79-80.

⁶⁸⁴ *Prosecutor v. Tadic* (a/k/a Dule), IT-94-1-AR72, Appeal on Jurisdiction, 2 October 1995, para. 94 et seqq.

⁶⁸⁵ *The Trial of German Major War Criminals*, International Military Tribunal Judgment of 30 September 1946 – 1 October 1946, 65.

⁶⁸⁶ Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, 28.

⁶⁸⁷ Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, 45.

⁶⁸⁸ See as a whole Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, 47 et seq.

⁶⁸⁹ Theodor Meron, “On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument” 594.

⁶⁹⁰ Raúl E. Vinuesa, “Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law.” 88.

and freedom from retroactive penal laws are also recognised as part of IHL.⁶⁹¹ The broad acceptance of these customary human rights in both times of peace and armed conflict implies that the substance of these norms should be also observed under a state of emergency.⁶⁹²

The ICRC's extensive recently published study on "International Customary Humanitarian Law" finds the status of International Customary Humanitarian Law in 161 rules.⁶⁹³ Most interesting for the question of convergence of IHL and IHRL is the study's examination of the rules regarding the treatment of civilians and persons *hors de combat*. The study does not look at whether the guarantees apply equally outside armed conflicts⁶⁹⁴, but even its view that most of the guarantees apply during both times of international and internal armed conflict is very significant. It is especially valuable for guarantees with a specific human rights impact, as the characterisation of human rights as customary norms is essential to support the implementation of human rights and humanitarian principles in internal conflicts.⁶⁹⁵ By way of example, Rule 105 says: "Family life must be respected as far as possible"⁶⁹⁶ and the juridical guarantees laid down in Rules 100-104 are applicable as customary law in both internal and international conflicts.⁶⁹⁷

Customary international law is an area where one can see that scholars, tribunals, courts and international human rights bodies are pushing the process of convergence forward. This is based in the fact that customary law gives rise to individual criminal responsibility and in the fact that customary law is binding and enjoys universal applicability. If a rule is customary in character, several contradictions which can arise regarding the application *ratione materiae* and *ratione loci* are overcome. Only a few customary rights have been mentioned here, but they are sufficient evidence that the process of convergence of IHL and IHRL gains from customary international law.

⁶⁹¹ Raúl E. Vinuesa, "Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law." 88.

⁶⁹² Raúl E. Vinuesa, "Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law." 88.

⁶⁹³ Louise Doswald-Beck and Jean-Marie Henckaerts, eds., *International Customary Humanitarian Law*, xxxix.

⁶⁹⁴ Louise Doswald-Beck and Jean-Marie Henckaerts, eds., *International Customary Humanitarian Law*, 299.

⁶⁹⁵ Rosemary Abi-Saab, "Human Rights and Humanitarian Law in Internal Conflicts" *Human rights and humanitarian law*, 122.

⁶⁹⁶ Louise Doswald-Beck and Jean-Marie Henckaerts, eds., *International Customary Humanitarian Law*, 379.

⁶⁹⁷ Louise Doswald-Beck and Jean-Marie Henckaerts, eds., *International Customary Humanitarian Law*, 379.

F. Conclusion

The inquiry in *Chapter IV*. has shown that, as well as the points of divergence between IHL and IHRL, a noteworthy number of convergences exist. This is especially true for the conventional law since numerous human rights have found their way into the Geneva Conventions and their Protocols. The broad accord in the content of human rights within the human rights treaties and the Geneva Conventions and their Additional Protocols proves that IHL and IHRL have at least in part already started to converge. At the same time, a comparison of the regulations of the two sets of law demonstrates that the provisions of the Geneva Conventions are very detailed, whereas the human rights provisions in the human rights treaties are mostly short and simple. This distinction should not be seen as undesirable, because it is justified in the fact that humanitarian law is most of the time *lex specialis* to human rights law and the more specific law is usually more detailed. Another reason is the higher level of danger in times of armed conflict, which needs more specific regulation with a lower level of differing interpretations. Lengthy proceedings about the content of human rights as occur in the domestic constitutional courts would be disadvantageous in times of war.

The foundation of the international criminal tribunals and the ICC as well as the judgments of these tribunals and the ICJ have accelerated the process of convergence of IHL and IHRL. Other international law bodies have also contributed to the convergence by publishing interpretations which bring both branches of law close together, by interlinking IHL and IHRL through cross-references and mutual citations, and by establishing customary international law.

It is remarkable that the main part of the process of convergence started only thirty years ago or so. In this time the Additional Protocols have come into force, the international tribunals and the ICC have been established and the human right bodies of the United Nations have begun to make active contributions to the confluence of IHL and IHRL.

V. Conclusion

The investigation has elicited several points of divergence. As a start, the historical beginnings of IHL and IHRL are quite different. Henry Dunant's personal experience with the cruelties of war lent a pragmatic impact to the foundation of IHL. In contrast, the human rights were developed by philosophers as a reaction to the age of absolutism and were

supported by a social movement. The subsequent internationalisation of human rights law in answer to World War II was based on a worldwide acceptance. For these reasons, human rights law is much broader in concept. These historically distinct origins have had their effects on the further elaboration of both branches of law and consequently on their relation to one other.

The divergence is already apparent in the underlying philosophical foundations of IHL and IHRL. Such differences include the antagonism of the *a posteriori* assertion of humanitarian law against the *a priori* assertion of human rights and the inductive approach of IHL in contrast to the deductive approach of IHRL. The differences between IHL and IHRL are further evidenced in respect of principles of law like the principle of reciprocity, the principle of distinction and the principle of proportionality. It is not surprising that the differences in the hypostatic elements of the two branches of law also influence their concrete regulations.

The universality of IHL and IHRL is similarly non-congruent. This is based on the fact that the international human rights treaties have not reached universal acceptance among the international community of States whereas the Geneva Conventions have done so. This can lead to contradictory levels of human rights protection, especially if a State ratifies humanitarian treaties like the Geneva Conventions, but rejects the acceptance of the human rights covenants. In such cases, the legal protection for some human rights is higher in times of war than in peace, although it should be mentioned that this outcome depends more on the differing universal acceptance of IHL and IHRL than on the content and substance of the two bodies of law.

The divergences between IHL and IHRL caused by the *a priori* assertion of human rights and the principles of reciprocity and distinction become obvious in their separate approaches to the field of application. Human rights are in principle unlimited and moreover the subset of core human rights is *erga omnes* in character. In contrast, the rights in IHL are only granted to certain groups of people. Since the scopes of application are not coordinated, loopholes in the protection of human rights occur. Furthermore, the approaches how both branches set their scope of applications are opposed. IHRL provides a holistic scope of application, subject to some exceptions allowing derogation in times of emergency, whereas IHL provides a detailed and segmented scope of application depending on the type of conflict, status of the person, nationality and location. These differences have their origin in the inductive versus deductive antagonism between IHL and IHRL. Since the scopes of application are not coordinated, loopholes in the protection of human rights occur.

The disharmony regarding the application of IHL and IHRL becomes particularly evident the respective scope of protection of freedom of movement, the guarantee of due process and the protection of the right of life. For these human rights the level of protection is higher in times of war than in times of peace. In addition, guarantees for the special protection of women and children, the prohibitions on taking hostages, on medical experiments, collective punishment and acts of terrorism are granted and protected only by IHL and not IHRL in times of war. The issue of nationality leads to loopholes in human rights protection as, during an international armed conflict, IHL applies only to non-nationals and certain human rights can be derogated or limited in their application on grounds of nationality too. In the case of internal strife in particular, lacunas in human rights protection could permit human rights violations such as arbitrary mass arrests and the suspension of judicial safeguards. This is because the principle of sovereignty of States gives them the right to determine a conflict as non-international armed conflict and to ascertain a state of emergency.

On the other hand, in certain situations rather than a void of human rights protection, both branches of law may apply. Examples include the field of application *ratione temporis* and the topic of transnational terrorism. Such situations bring to light the need to solve the issue of the appropriate application of the *lex specialis* principle with respect to IHL and IHRL.

The question regarding how to deal with human rights violations committed in past internal conflicts is also a controversial topic between the two branches of law. The possibility of amnesty is totally unknown to IHRL since it is based on the legal principle *aut dedere aut judicare*. In contrast, IHL allows the possibility to grant amnesty in non-international armed conflicts.

The only aspect which does not cause contradictions or voids in human rights protection is the field of application *ratione loci*. This is because both branches of law apply even outside their territory.

In light of the many areas of divergence between IHL and IHRL, scholars, international human rights and humanitarian bodies, and the international community of States reflected on the common goal of IHL and IHRL, namely the dignity of human beings and its legal protection. As a result, they began to overcome the unsatisfying legal protection of human rights by proposing new legal instruments, making progressive judgments and adopting new regulations favouring human rights.

Although the Geneva Conventions were not adjusted directly to the Universal Declaration of Human Rights and the UN-Charter, the adoption of the Fourth Geneva Convention saw some major steps toward the convergence of IHL and IHRL. The Fourth Geneva Conventions

deals *inter alia* with issues in peacetime, which are usually only covered by human rights instruments. Another point of convergence can be seen in the set of human rights in common Article 3 of the Geneva Conventions, which is almost identical to the non-derogable human rights, covering rights such as the right to life, juridical guarantees, and prohibition of torture. In addition, common Article 3 of the Geneva Conventions provides further evidence of convergence as it dispenses with the nationality test of IHL and is applicable to all persons irrespective of their nationality, as with IHRL. Besides common Article 3, the Geneva Conventions grant civil rights, such as the freedom of religion and the protection of the family, as well as the social rights like enjoyment of health, adequate housing, food and clothes. Also common to the Geneva Conventions and human rights instruments is the principle of non-discrimination.

The Additional Protocols are the next major step in the merger of IHL and IHRL and are influenced by both IHL and IHRL-related bodies. They are the first time that IHL has provided protection to civilians against hostile attacks and overcome the dividing scope of *ratione personae* in respect of the fundamental rights. They humanise humanitarian law by broadening the protection of human rights during times of armed conflicts. The confluence of IHL and IHRL is visible in the wording of Additional Protocol II, which refers to the human rights covenants. Next, the statutes of the *ad hoc* tribunals for the former Yugoslavia and the Rwanda and the Roman Statute of the ICC allow the two branches of law to flow together. The statutes take the legal institute of individual responsibility from IHL, dispense with the differentiation between non-international and international conflict and utilise a set of protected rights originating from both IHL and IHRL. The Roman Statute uses the technical approach of cross-referencing to the Geneva Conventions and the Additional Protocols in respect of the definition of war crimes. The method of cross-referencing is also used within the Convention on the Rights of the Child in its references to provisions of the Geneva Conventions.

The adoption of new and progressive instruments converging IHL and IHRL has also seen the establishment of new international human rights monitoring bodies which stress the importance of taking IHL into consideration when dealing with human rights issues. A prominent example is the Human Rights Committee's General Comments on the International Covenant on Civil and Political Rights. Also, decisions of the ICJ and the two *ad hoc* tribunals have contributed to the process of convergence of IHL and IHRL. The ICJ has emphasised the principle of humanity which is inherent in both bodies of law and has helped to turn the focus on their points of convergence rather than divergence. The ICTY has

suppressed the principle of state sovereignty by rejecting the nationally test and diminishing international and non-international armed conflicts in favour of broadening the scope of application of IHL. The ICTR holds civilians liable for violations of IHL.

IHL and IHRL's historically independent development and their differing relationships with the fundamental principles are the main reasons for their differences. Despite the fact that several points of divergence existed, the efforts to overcome the obstacles to their convergence was unforeseen. It is notable that IHL began to take IHRL into consideration after World War II, but the International Law Commission refused to put IHL on its agenda at that time. This was because it considered IHL to be superfluous on the ground that the UN-Charter condemned and prohibited war. The turning point away from this view for the United Nations was the Conference on Human Rights in Teheran in 1968. In the decades since the Conference, IHL and IHRL have converged in several areas, including the confluence of the sets of protected rights, the harmonising and broadening of the scope of applications of each set of rules and the mutual cross-referencing of both branches.

Scholars have submitted various proposals to overcome the remaining points of divergence between IHL and IHRL. In respect of the lack of an applicable law during internal strife, scholars have proposed drafts ranging from a moderate Code of Conduct based on existing rules⁶⁹⁸ to a progressive new declaration of minimum humanitarian standards combining elements of IHL and IHRL. Another approach suggests simply strengthening the existing instruments and increasing their ratification and dissemination.

Regarding the question as to which branch of law should apply if both are applicable, as is the case with transnational terrorism, the suggestions vary from solely IHL or solely IHRL to a compromise through the application of the *lex specialis* principle. The advocates of the latter approach suggest that the *lex specialis* principle should be applied at the level of individual provisions, so that the more detailed provision will take precedence, but not necessarily the whole instrument from which it came. The result of this view leads to a complementary application of IHL and IHRL allowing the highest available standard of human rights protection.

The proposal to converge IHL and IHRL in respect of the issue of amnesty suggests using the power of the ICC to decide whether a particular domestic amnesty resulted from an

⁶⁹⁸ Peter Kooijmans, "In the Shadowland between Civil War and Civil Strife: some Reflections on the Standard-setting Process," in *Humanitarian law of armed conflict-challenges ahead: Essays in honour of Frits Kalshoven*, 241.

appropriate and fair investigation. If the ICC found that the domestic amnesty did not, it could then assert its right to prosecute.

The study has shown that IHL and IHRL are distinct because of their historical origin and partly different principles, but at the same time related through their common values, such as humanity and human dignity, which have already led to their convergence in various respects.

The next step in the ladder of convergence could be a comprehensive codification of the law of conflict and crisis. Such a codification could combine all types of conflict under one roof. The codification could consist of a general part and specific parts with the general part applicable to every specific part. The general part could cover, *inter alia*, general definitions, fundamental principles and the relation of the codification to other international law instruments, especially the human rights treaties. In respect of the latter, the correct application of the *lex specialis* rule could be stated. Each specific part could deal with one type of conflict. It may be most suitable to start with provisions for international armed conflict, since these regulations are largely purely humanitarian rules and are very specific, less general and numerous. The second part could deal with the rules of non-international armed conflict, pursuant to Additional Protocol II, followed by the regulations of common Article 3 of the Geneva Conventions. The fourth part could consider new regulations for internal strife. The fifth part could modify the instrument of derogation of human rights to limit its abuse. For crises not caused by *force majeure*, such as natural disasters, derogation could be restricted to a certain period, e.g. six months. The derogation could be renewable, but only after the State in question has submitted a well-founded communication on the need for an extension to the Human Rights Committee. Finally, the sixth specific part could determine the provisions applicable to terrorism.

The aim of the codification exercise should not be to provide new substantive regulations, but rather to establish a comprehensive instrument that brings clarity to the relationship between the different rules for the various types of conflict. Clarity should already be promoted by the systematic order of the different specific parts of the codification. There should be no loopholes between the scopes of application of the specific parts. Moreover, the definitions of the field of application should be as precise as possible to avoid any issues of classification. The advantage of such a codification would be the independent regulation of each type of conflict, which would allow the possibility to adjust the provisions to the needs of each situation - e.g. the provisions for international conflicts could be formulated precisely, since in times of war lack of ambiguity is necessary. At the same time, the general part could allow the possibility to highlight similarities and mutual relationships through the use of

common principles and definitions. A further benefit of a modular approach would be the ease with which a further element could be added if desired. Also, the suggestions made in respect of the limitation of derogation could be designed to exert pressure on State Parties, but not cut their right of sovereignty in such a way that it would make getting ratifications impossible. Finally, the different specific parts of the codification could provide, depending on the subject they deal with, sets of rules which diverge as little as possible but converge as much as necessary.



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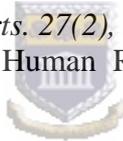
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