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INTERNATIONAL HUMANITARIAN LAW
AND INTERNATIONAL HUMAN RIGHTS LAW:
FROM SEPARATION TO COMPLEMENTARY APPLICATION

By Nancie Prud’homme

Thesis submitted in fulfilment of the requirements for
the degree of Doctor of Philosophy

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May 2012
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The relationship between international human rights and humanitarian law has been a central topic for many years now and for good reasons. The interest in, and importance of, discussing the interplay between the two disciplines is highlighted in the introductory quotation. Simply, the interaction between international human rights and humanitarian law during situations of armed conflict has great practical importance both at the protection and the implementation level.

The articulation of the interplay between the two legal frameworks directly impacts upon the protection that individuals can be afforded in a given conflict. For example, the applicability of human rights law can affect how and when armed forces resort to lethal force in specific circumstances. Likewise, how the interplay between the disciplines is construed could affect the legal protection and guarantees given to individuals detained during a conflict. The interpretation of the interplay between the disciplines can further decide whether a given State will or will not be found responsible for human rights violations occurring in the context of fighting. The interplay between the disciplines is also directly relevant to their implementation and to the means of redress that will be available to alleged victims. The examination of situations linked to armed conflict by human rights bodies might, for example, provide a monitoring and accountability forum for humanitarian law violations.
Introduction

The importance of clarifying the interplay between international human rights and humanitarian law is even more pressing in light of the obstacles and difficulties faced by each branch of law in providing adequate protection. As will be seen, both international human rights and humanitarian law have their own perceived weaknesses or gaps with potential risks of inadequate protection in certain circumstances. Moreover, in situations of conflict, States often take political stances of self-interest and interpret situations in a manner that may not be legally sound and correspond to what is really happening in practice. Legal uncertainties in such contexts rarely ensure protection of individuals. In reaction, some organisations and authors will advocate for the application of whichever rules will provide maximum protection, but such positions and interpretation of the law risk being impractical on the ground. These constitute additional underlying reasons why the interplay between the two disciplines must be clarified.

Just a decade ago there existed a clear gap in the literature focusing on the interplay between international human rights and humanitarian law and attempting to clarify the complex relationship. In the last ten years a huge amount of material has been published on the subject, and this topic continues to expand. Often, however, research is undertaken for shorter articles and material is not published in monograph form. On account of this, most publications cannot probe as deeply as the topic requires. As a result, the literature appears not to address some crucial angles or facets of the interplay between international human rights and humanitarian law that are essential to contributing to its clarification. This work seeks to address current gaps in the literature with the aim of assisting the next phase of the interplay between the disciplines, that of developing the complementary approach in a legally sound and practical manner.

It is submitted that the literature on the interplay between international human rights and humanitarian law currently has three main gaps. Firstly, the literature often fails to examine thoroughly or address the background from which the relationship between the disciplines stems; discussions regarding the interplay often take place in a historical and contextual vacuum. Part I of this work attempts to fill this gap by examining international human rights and humanitarian law separately. It positions the topic of the relationship between the disciplines by addressing where each legal framework comes from, how they developed and how the need for linking
them was acknowledged. It also examines the specific scope of application of each field, how they diverge and converge. Part I provides an understanding of the specificities of each discipline and context in which their relationship was first established, which constitute essential aspects of the relationship between international human rights and humanitarian law.

More specifically, chapter 1 examines how international humanitarian law and international human rights law were developed as international frameworks at slightly different times, and construed separately. In the next phase of their substantive development, the fields have grown in less isolated environments. Experts involved in international humanitarian law have shown increasing interest in international human rights law and vice-versa, and links slowly started to be developed between the two disciplines. At the institutional level the United Nations and the International Committee of the Red Cross revised their earlier positions on the interplay between the two legal frameworks. From a position supporting the compartmentalisation of international human rights and humanitarian law, the main custodians of these two branches of law began to advocate their interplay. The more contemporary substantive development of them both also strengthened the emerging mainstream position affirming the need to consider a relationship between the disciplines and to promote their concurrent application. Recent decades confirmed the existence and establishment of a lasting relationship between international human rights and international humanitarian law, but did not necessarily articulate the functioning of such a relationship.

Understanding the separate scopes of application and how each operates is essential to clarifying the interplay between the two disciplines. As such, chapter 2 examines how the scope of application of international human rights and international humanitarian law both converge and diverge. It explains how the applicability of international humanitarian law is dependent on the existence of an armed conflict and the application of its substantive norms can be subject to the type of on-going conflict and the category of persons concerned. In contrast, it addresses how international human rights law is applicable to all individuals in time of peace or conflict with, however, the possibility for States to limit or derogate from some provisions in human rights treaties. International humanitarian law is not built around territorial components; it applies automatically, with particular concern for
categories of persons, whenever an armed conflict exists. In turn, the primary territorial scope of application of international human rights law is within the borders of the State concerned, with the possibility of extraterritorial applicability in a number of circumstances. While marked differences exist in the scope of application of international human rights and humanitarian law, it remains that the disciplines are both applicable in situations of armed conflict. This automatically creates an overlap and links between them, thus creating the need to articulate their relationship. Chapter 2 further highlights some difficulties in the application of each discipline. Such examination of the separate scope of application is vital, as in practice it is often in areas which are not clearly set out within one or the other discipline that problems with their interplay arise.

The second gap in the literature on the interplay between the disciplines lies in the lack of investigation into the technical, legal and theoretical underpinnings of the interplay between international human rights and international humanitarian law. The scarce in-depth research or exhaustive analysis of the approaches taken to articulate the relationship between the two disciplines creates a set of problems. Mainly, oftentimes in literature addressing the issue, there appears to be a lack of coherent legal reasoning supporting the articulation of the interplay between international human rights and humanitarian law. Part II of this work seeks to provide a more in-depth analysis of these aspects. It addresses the articulation of the interplay between the two disciplines by examining different approaches which have been advocated over the years and the various arguments presented to support these approaches. Part II examines the main arguments which led to the consensus that international human rights and humanitarian law should be applied concurrently. It also considers the articulation of the interplay by the International Court of Justice. It further questions the use of the *lex specialis* principle and rejects the argument that this principle can provide a definitive solution for the relationship between the two.

More specifically, Chapter 3 discusses some of the arguments for and against the concurrent application of international human rights and humanitarian law. It demonstrates how their intertwined substantive content, coupled with certain similar goals and parallel fields of application, provide a strong argument towards the premise that they cannot be totally dissociated one from another. It shows that the will of the international community to see wider interaction between the two fields
of international law is even more clearly understood and validated by the struggle to adequately protect individuals in isolation from one another. The existence of a relationship between international human rights and international humanitarian law is now widely accepted; their concurrent application is at present more or less a fait accompli, although there remain debates on the nature of their interaction. Chapter 3 confirms that the international community has now moved into another phase in relation to the relationship between international humanitarian and human rights law, that of developing an understanding of their interplay and concurrent application.

Chapter 4 shows the importance of the case-law of the International Court of Justice for the relationship between international human rights and humanitarian law. It explains how the ICJ confirmed the continuous application of human rights during armed conflict and authoritatively stated the need to apply the two legal frameworks concurrently. Chapter 4 rejects the idea that the lex specialis theoretical model, based on the specificity and generality of the law, can definitively solve the interplay and facilitate the co-application of international human rights law and international humanitarian law. Often leading to the primacy of one field over the other, this theory oversimplifies the more complex and multifaceted relationship between the two fields of international law. The examination and critical appraisal of the theory of lex specialis is a vital step in building a more coherent partnership between the bodies of law, and in clarifying their interplay. Moving away from the general/specific criterion that was the province of lex specialis, other avenues must be identified to develop and crystallise the current movement towards the complementary use of international human rights and humanitarian law and the development of their interplay.

The third and final gap which appears to still exist in material on the relationship between the frameworks is the lack of wide and comparative examination of the interplay in practice. Thus far, most of what has been published on the issue often seems to focus on how a single implementing body has applied each of them, or concentrate on only one aspect of the interplay. This appears to limit the input of contribution to the field, and the potential to clarify truly the concurrent application of international human rights and humanitarian law. Part III endeavours to provide such a comparative examination of the subject. Hence, it addresses a wide range of examples of how the United Nations, the ICRC, as well as
regional human rights mechanisms have dealt with the concurrent application of the legal frameworks. On the basis of this practice, Part III also compares different approaches, identifies problems and best practice, and provides suggestions for moving forward with the development of the complementary approach.

More specifically, Chapter 5 highlights the way the complementary movement or partnership between international human rights and humanitarian law is currently being built. It examines how the implementation and enforcement of the disciplines has been tackled in practice by regional and international bodies. Through a number of examples it addresses the work of various UN human rights treaty and Charter bodies, the African, Inter-American and European human rights mechanisms, as well as the ICRC study on customary international humanitarian law. The examples presented illustrate how these institutions have, through their practice, advanced the complementary approach introduced many years ago. Chapter 5 shows that institutions often appear to struggle to articulate clearly the relationship between international human rights and humanitarian law. It submits, however, that the practice of these bodies has greatly contributed to advancing the complementarity of international human rights and humanitarian law, and to the clarification of their interplay. It is suggested that through their application of international human rights and humanitarian law, and their assessment of situations of armed conflict in the cases studied, the UN bodies, regional systems and ICRC study provide trends or patterns that could assist the future complementary application of the disciplines and their more coherent and effective co-existence.

Chapter 6 exposes the difficulties of blind reliance on general principles such as the *lex specialis* and problems with adopting any vertical or top-down approach to articulate the interplay between international human rights and humanitarian law. Chapter 6 positions the complementary approach as the foundation for the interplay. In so doing, it discusses the way in which complementarity goes beyond mere parallel application, and requires an active interplay according to which the two bodies of law are able to influence and inform one another. This understanding is essential in order to implement the co-existence and complementary application of the disciplines in a manner which is coherent, consistent and practical. Chapter 6 explains how progress can only be achieved through sustained and continued efforts involving all stakeholders. The Chapter examines the ways in which such a process
could be established, and suggests guiding questions to be utilised in such a process, as well as examples of how these may lead to clarification of the interplay.

This study highlights how the relationship between international humanitarian law and international human rights law is a multifaceted one. It assesses how the interplay between the two disciplines developed – from separation to complementary application. The study examines the challenges facing policy makers and bodies involved in implementing the two legal frameworks. It provides suggestions for moving forward and solving some of these challenges. The scope of this study is wide-ranging. Within the field of international humanitarian law, it is in the area of the rules on protection in which the interplay with human rights law is most visible and this will be reflected in the examination conducted in this study. Other rules, such as use of force between combatants, will also be addressed as necessary. In addition, both treaty law and customary international law will be shown as relevant to the development of the relationship between the two legal frameworks. Likewise, the examination of international human rights law will encompass not only human rights treaties and their monitoring bodies, but also the United Nations Charter-based human rights system.

Several terms will be used within the following chapters to discuss the relationship between international human rights and humanitarian law. For the purpose of this study, the terms relationship and interplay will be used interchangeably to refer to the interaction between international human rights and humanitarian law and the ways in which the two disciplines relate to one another. The concurrent application of international human rights and humanitarian law will refer to the simultaneous or co-application of the two fields, as opposed to an exclusionary approach which rejects the notion of applying them simultaneously. As will be further discussed, the concurrent application is construed in the following chapters as having two forms – the parallel and the complementary application of the two disciplines. Just as two parallel lines run side by side without ever touching one another, the parallel application of human rights and humanitarian law entails that each body of law will be simultaneously applied but without directly interacting. In practice for example, this would mean that an implementing mechanism might discuss applicable legal norms to a situation under both international human rights and humanitarian law, but as separate lists of possible violations without further
combining the norms in their interpretation of the situation. In contrast, in the following chapters the complementary application refers to the use of international human rights and humanitarian law in such a way as to ensure that their rules interact, feed into each other and affect the interpretations of each set of rules, taking account of the circumstances in which they apply and working together to fill gaps in protection.
PART I: UNDERSTANDING INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW, AND THEIR RELATIONSHIP
1. The Establishment of a Relationship between International Humanitarian Law and International Human Rights Law

The international frameworks of humanitarian law and human rights law first grew in separate environments and for a good period of time were treated as two distant sections of public international law that should be examined and interpreted in isolation from one another. With time it appeared that such a stance could not be maintained and that it was no longer desirable or feasible to consider them as two completely foreign branches of international law, and from the 1960s there appeared to be a consensus on the need to bring the two closer together. This consensus led to the construction of bridges between the two disciplines.

This chapter briefly considers early history and the development of rights in the 17th and 18th Century. It also examines the codification of international humanitarian law and international human rights law and the establishment of a relationship between them.

1.1. Early History

Institutions and individuals involved in developing the two legal frameworks as we know them today have used historical examples, references to religious writings and philosophers, to suggest that the roots and core values underpinning international human rights and humanitarian law date back thousands of years. Whether the concept of human rights or humanitarian law can be attributed to early history this way is subject of debate. Certainly, concepts of justice, ethics and existence of moral values predate the adoption of modern international human rights and humanitarian law treaties, which undoubtedly incorporate such ideals. While it would be difficult to prove that these historical events directly led to the adoption of international human rights and humanitarian law, the potential role of events and writings predating the establishment of the legal frameworks deserve some attention.

Some historians and legal scholars affirm that human rights and humanitarian norms are as old as humanity itself, first emerging as concepts and ideals, rather than
rules in codified systems as we know them today.\textsuperscript{1} While we know how human rights and humanitarian law developed into international legal frameworks, it is indeed difficult to identify when and how the core values behind their legal rules initially emerged. According to Gordon Lauren, the ideals behind international human rights law emerged “when ideas were communicated by oral traditions, inscribed on clay tablets, or written on parchment. It began as soon as men and women abandoned nomadic existence and settled in organized societies”.\textsuperscript{2} Following this, evidence of the ideals and discussions on the core values behind the two legal branches might be found in early civilizations during the Antiquity, and subsequently developed during the Middle Ages and in modern times before finally being transformed into norms and legal systems.

Throughout antiquity, issues of justice, human dignity, equality, rights and duties of individuals were addressed in most societies both orally and in writing. To cite one example, African societies are said to have contributed to the ideals behind human rights by “develop[ing] ideas about distributive justice designed to ensure the welfare of all and evolved a variety of thoughts about ways to offer protection from the abuse of political authority.” The need to have certain rules to protect some individuals was acknowledged through various forms by early civilizations. In the context of war, it has been noted that in early history disputes between tribes were accompanied by the creation of some minimum rules of conduct articulated to curb violence.\textsuperscript{4} Evidence of the promotion of social justice and the introduction of some form of rules protecting individuals and embedding such values were found in early civilizations, notably in Ancient Near East, Ancient Egypt, Ancient Greece, Ancient

\begin{footnotesize}
\begin{enumerate}
\item Gordon Lauren, ibid., 5.
\item Ibid., 112.
\end{enumerate}
\end{footnotesize}
Rome, India and China. It is possible that through oral tradition and by following documents resembling codes of conduct and constitutions, these early societies contributed to the advancement of the concepts and ideals behind international humanitarian and human rights law.

Aside from within the political arena, principles related to the two disciplines developed in the realm of religious discourse and through the writings of philosophers. Indeed, religious writings and teachings encompass some notions of justice, dignity and equality and address the rights and responsibilities of individuals. For instance, the concept of equality and its respect is found in the Bible. Providing for gender equality, the Old Testament asserts: “God created man in his own image. In God's image he created him; male and female he created them.”

Supporting equality between all individuals the New Testament affirms: In Christ there is neither Jew nor Greek, slave nor free, male nor female. Humanitarian behaviour during combat has also been promoted in most religions. For instance we can read in Islam references to the humane treatment of captives:

The captive is your brother. It is by the grace of Allah that he is in your hands and working for you. Since he is at your mercy, ensure that he is fed and clothed as well as you are. Do not demand from him beyond his strength. Help him instead to accomplish his tasks.

Admittedly, religion has been repetitively used as a tool for abuse of power throughout history, yet the Buddhist, Christian, Confucian, Hindu, Islamic, Jewish as well as other religious traditions have all incorporated certain concepts related to the protection of individuals.

In addition to religious doctrine and teachings, many have attributed the development of human rights and humanitarian values to jurists and philosophers. For instance it was said that Hugo Grotius, considered by many as the father of

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8 Ibid., Galatians 3:28.

international law, played at the end of the 16th and beginning of the 17th century a substantial part in the development of both international humanitarian law and international human rights law. In his book *De jure belli ac pacis*, as well as in other works, Grotius promoted the idea that nations are bound by natural law. Under the principles of natural law individuals are born good, free and as such are owed the respect of certain fundamental rights. Grotius also foresaw in *De jure belli ac pacis* the inclusion of humanitarian ideals in the conduct of war. In the 17th and 18th centuries, several other philosophers, such as Hobbes, Locke and Vattel, advanced the concept of natural law referred to by Grotius. They argued that governments have a responsibility to protect the fundamental rights that are inherent to all human beings. These philosophers further developed ideals of justice and some might say set the basis for the recognition and respect of human rights and freedoms. In addition to these individuals, Jean-Jacques Rousseau has been known for his contribution to the natural law movement, as well as praised for his role in the early development of international humanitarian law. In his *Social Contract* he stated for instance that:

War [...] 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; not as members of their country, but as its defenders. [...] 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.

Rousseau’s principles were viewed as revolutionary in the 18th century and indeed are today found in international humanitarian law.

On the one hand, it might be claimed that thousands of years of history contributed to the establishment of international humanitarian law and international human rights law as we know them today, and that early history played a role in moulding the two frameworks, as well as the manner they currently relate to each other. On the other hand, early concepts and ideals, that appear to resonate with rules found in the two legal frameworks, cannot necessarily be considered as the definitive

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10 H Grotius, *De jure belli ac pacis* (Ed Nova, Amsterdam 1651).
11 Djiena Wembou and Fall (n 5) 33; Haug (n 4) 500.
source of these legal frameworks. As noted by Freeman in relation to human rights, “[t]he very idea of such a ‘source’ contains an important ambiguity. It can refer to the social origins or to the ethical justification of human rights.”

1.2. 17th - 18th Centuries: Codification of Rights in the Domestic Context

It has been stated that the enactment of the Magna Carta by John, King of England, in 1215 represented one of the first key events leading to the codification and establishment of contemporary human rights law. Initiated because of a quarrel between the King, his barons and Pope Innocent III, the Magna Carta declared:

In the first place we have granted to God, and by this our present charter confirmed for us and our heirs forever that the English Church shall be free, and shall have her rights entire, and her liberties inviolate; and we will that it be thus observed […]. We have also granted to all freemen of our kingdom, for us and our heirs forever, all the underwritten liberties, to be had and held by them and their heirs, of us and our heirs forever.

The Magna Carta provided for the protection of certain rights and guarantees, including due process and the right of habeas corpus. It asserted among other things that “[n]o widow shall be compelled to marry”; “[a] freeman shall not be amerced for a slight offense, except in accordance with the degree of the offense”; and “[i]t shall be lawful in future for anyone […] to leave [the] kingdom and to return, safe and secure by land and water”. Freeman discusses the importance of the Magna Carta, stating that:

The Magna Carta […] recognizes ‘subjective’ rights by such terms a ‘his rights’ […]. The concept of rights was, however, at that time embedded in customary law. The Magna Carta was, furthermore, a text whose purpose was to provide remedies for specific grievances. It was therefore not a charter of the rights of Englishmen, still less of human rights. Yet its reputation as a precursor of modern human-rights texts is not wholly unmerited. Article 39, for example, says that no free man shall be arrested, imprisoned, expropriated, exiled or in any way ruined, except by the lawful judgment of his peers or by the law of the land. […] This article was more limited than it might appear, as the category of ‘free men’ was created by royal prerogative.

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34 Magna Carta (15 June 1215) art 1.
36 Ibid., art 8.
37 Ibid., art 20.
38 Ibid., art 42.
39 Freeman (n 13) 19.
It has been said that the Magna Carta prompted the inclusion of human rights in the Common Law of England and paved the way for the adoption of other instruments encompassing human rights in the 17th century. The English Parliament promulgated the Petition of Rights in 1628, the Habeas Corpus Act in 1679, and the Bill of Rights in 1689. These instruments were significant, they affirmed rights and liberties included in the Magna Carta and also introduced a whole range of new rights, including the prohibition of cruel or inhuman treatment subsequently incorporated in many international treaties.

While human rights began to be recognised in a more contemporary written form in England and in some treaties providing for the protection of minorities in the 17th century, it is the political reality of the next century that is said to have truly prompted the substantive development of fundamental rights and the adoption of Bills of Rights and declarations of a human rights nature. The religious persecution, abuse of power, and domination that were prominent in many societies at that time, led to the emergence of human rights documents:

The demand for human rights, in the modern sense of the word, started as a liberal reaction, influences by rationalist thinking in the 17th and 18th century, to the unfreedom caused by feudalism or monarchism. It was initially a European and North American movement, and became a formidable ideological rallying point in the evolution of the Western civilisation during the 18th and the 19th centuries, strongly influencing the shape of domestic political institutions and the constitutional development in general.

In the United States, the Virginia Declaration of Rights was adopted in June 1776 and, only a few weeks later, the American Declaration of Independence asserted: “[w]e hold these truths to be self-evident: That all men are created equal; that they

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20 Petition of Rights (1628).
21 Habeas Corpus Act (1679).
22 English Bill of Rights (1689).
23 For instance, the Treaty of Westphalia, the Treaties of Utrecht and the Treaty of Paris provided for the protection of religious minorities: Treaty of Westphalia (24 October 1648); Treaties of Utrecht (1713); Treaty of Paris (1763).
24 On that topic see for instance W Schabas, Précis du Droit International des Droits de la Personne (Yvon Blais, Cowansville 1997) 7; Djiena Wembou and Fall (n 5) 51.
26 Virginia Declaration of Rights (12 June 1776).
are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness [...].”

A decade later, in 1789, inspired by the Declaration of Independence and other existing human rights instruments, a proposal to incorporate the American Bill of Rights into the Constitution of the United States28 was presented to the American Congress.29 This initiative led to the adoption of constitutional amendments affording human rights protections, including freedom of speech, freedom of the press and the right to a fair trial.30 Concurrently with the development of human rights protections in the American system, the National Assembly of France adopted the Declaration of the Rights of Man31 in the first days of the French Revolution in August 1789. Modelled on the American Bill of Rights,32 the Declaration affirmed: “[m]en are born and remain free and equal in rights”;33 “[n]othing may be prevented which is not forbidden by law”;34 “[n]o person shall be accused, arrested, or imprisoned except in the cases and according to the forms prescribed by law”;35 “all persons are held innocent until they shall have been declared guilty”;36 “[n]o one shall be disquieted on account of his opinions, including his religious views”.37

The impact of the instruments emerging in the 17th and 18th Century upon the development of international human rights and humanitarian law has been debated, similarly to the role played by early history, religion and philosophers. Moyn stated that:

Almost unanimously, contemporary historians have adopted a celebratory attitude toward the emergence and progress of human rights, providing recent enthusiasms with uplifting back-stories, and differing primarily about whether to locate the true break-through with the Greeks or the Jews, medieval Christians or early modern philosophers, democratic

27 American Declaration of Independence (4 July 1776).
28 Constitution of the United States (17 September 1787).
29 Resolution of the First Congress Submitting Twelve Amendments to the Constitution (4 March 1789).
31 Declaration of the Rights of Man (26 August 1789).
32 The French were in fact assisted in the drafting of their instrument by Thomas Jefferson, newly nominated as American Ambassador in Paris and a crucial contributor in the drafting of the American Declaration of Independence. See Schabas (n 24) 8.
33 Declaration of the Rights of Man (n 31) art 1.
34 Ibid., art 5.
35 Ibid., art 7.
36 Ibid., art 9.
37 Ibid., art 10.
revolutionaries or abolitionist heroes, American internationalists or antiracist visionaries. In recasting world history as raw material for the progressive ascent of international human rights, they have rarely conceded that earlier history left open diverse paths into the future, rather than paving a single road toward current ways of thinking and acting. And in studying human rights more recently, once they did come on the scene, historians have been loathe to regard them as only one appealing ideology among others. Instead, they have used history to confirm their inevitable rise rather than register the choices that were made and the accidents that happen.\textsuperscript{38}

Whether international human rights and humanitarian law as we know them today have emerged from similar influences and values dating back thousands of years may remain questionable. What is not, however, is the fact that some of the examples provided above have been and continued to be referred to when developing and enforcing the two legal frameworks.

1.3. 19th Century: Emergence of an International Framework to Deal with Armed Conflict

Despite seeing human rights concepts being transformed into norms and the inclusion of protections of a human rights nature into domestic legislation, the protection of individuals had not reached an international law status at the end of the 18th century. At that moment international law was still exclusively concerned with regulating the relationship between States and the internationalisation of human rights was barely contemplated. In fact, the development of human rights law was put on hold during the 19th century. In contrast, this period was crucial to the development of humanitarian law. It is during this time that international humanitarian law was first codified. The translation of the concepts of humanity into international binding rules began in the 1860s from “the result of two initiatives taken independently from one another.”\textsuperscript{39} During this period Henry Dunant and Francis Lieber were respectively advocating for a humanitarian approach to war and the regulation of the conduct of hostilities. In fact, along with Tsar Alexander II of Russia, these two individuals are the pre-eminent figures behind modern international humanitarian law; as a direct result of their ideas, “Geneva Law” and


\textsuperscript{39} F Bugnion, ‘Droit de Genève et Droit de La Haye’ (2001) 844 IRRC 901, 901. [Translated by the author]
“Hague Law” emerged as the two frameworks regulating armed conflicts and joined today under the discipline of international humanitarian law.40

1.3.1. Geneva Law

In June 1859, Henry Dunant travelled to Castiglione in Italy to meet Napoleon III concerning his business venture in Algeria. Dunant arrived during the Battle of Solferino and saw thousands of wounded soldiers lacking care and medical attention. After witnessing the 16-hour battle between the Austrian Empire and the Franco-Sardinian Alliance armies, Dunant decided to stay in the village to help the wounded and sick. 40,000 persons were wounded or died in the battlefield, but what astounded Dunant most was the lack of aid for those individuals. Unable to forget the suffering witnessed in Solferino, Dunant wrote A Memory of Solferino a few years later in 1862.41 In a short time the book became a cornerstone work for the humanitarian movement and for developing the international humanitarian legal framework.42 The book described in detail the desolation of conflict and the suffering witnessed in the battlefield.43 More significantly, it strongly emphasized the fact that suffering could have been alleviated and, in some cases, even prevented. Dunant’s work proved to be extremely valuable as he put forward key ideas which led to the adoption of the Geneva Conventions and to the creation of what became the International Committee of the Red Cross (ICRC). Dunant first asked in his book: “[w]ould it not be possible, in time of peace and quiet, to form relief societies for the purpose of having care given to the wounded in wartime by zealous, devoted and thoroughly qualified volunteers?”44 To support the creation of such societies Henry Dunant further

40 The ‘law of armed conflict’ may be a more accurate description of a legal framework that includes rules on the conduct of hostilities; however, international humanitarian law is more commonly used. See chap 1.5.2, notes 104-105 and accompanying text.
41 H Dunant, A Memory of Solferino (ICRC, Geneva 1986).
42 For more details on Dunant’s life and on the events leading to the publication of A Memory of Solferino see JF Hutchinson, Champions of Charity: War and the Rise of the Red Cross (Westview Press, Boulder 1996) 11-20; C Moorehead, Dunant’s Dream: War, Switzerland, and the History of the Red Cross (Carroll and Graf, New York 1999) 1-8.
43 For instance see Dunant (n 41) 4-5: “On that memorable twenty-fourth of June, more than 300,000 men stood facing each other; the battle line was five leagues long, and the fighting continued for more than fifteen hours. […] Here is a hand-to-hand struggle in all its horror and frightfulness; Austrians and Allies trampling each other under foot, killing one another on piles of bleeding corpses, felling their enemies with their rifle butts, crushing skulls, ripping bellies open with sabre and bayonet. No quarter is given; it is a sheer butchery; a struggle between savage beasts, maddened with blood and fury. Even the wounded fight to the last gasp. When they have no weapon left, they seize their enemies by the throat and tear them with their teeth.”
44 Ibid., 27.
recommended the formulation of principles and the adoption and ratification of an international treaty:

On certain special occasions, as, for example, when princes of the military art belonging to different nationalities meet at Cologne or Châlons, would it not be desirable that they should take advantage of this sort of congress to formulate some international principle, sanctioned by a Convention inviolate in character, which, once agreed upon and ratified, might constitute the basis for societies for the relief of the wounded in the different European countries? It is the more important to reach an agreement and concert measures in advance, because when hostilities once begin, the belligerents are already ill-disposed to each other, and thenceforth regard all questions from the one limited standpoint of their own subjects.\(^{45}\)

While Dunant’s ideas might nowadays seem simple and straightforward they were in fact visionary for the time, and his book was eye-opening for many:

Suddenly it seemed incredible that no one had ever organized help for those wounded in battle. Other people besides Dunant had seen a need, but never with his blinding perception. Never with his ability to write so clearly. And never at the right moment.\(^{46}\)

Following the publication of *A Memory of Solferino*, the humanitarian movement grew at a faster pace. Dunant’s book was translated into many languages and read by several influential persons. In February 1863, Gustave Moynier, president of the Welfare Society of Geneva, presented the conclusion of the book to his Society and proposed the establishment of permanent relief societies to help individuals wounded during war. As a result, four members of the Society\(^{47}\) were assigned to help Dunant with the implementation of his ideas. After being established as the International Committee for Relief to the Wounded (later known as the International Committee of the Red Cross), Dunant and his colleagues convened an international conference.\(^{48}\) In October 1863 the conference concluded its work with the adoption of ten resolutions and three recommendations:

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\(^{47}\) The four members were Gustave Moynier, Dr. Louis Appia, Dr. Theodore Maunoir and General Guillaume-Henry Dufour. V Harouel, *Histoire de la Croix-Rouge* (Presses Universitaires de France, Paris 1999) 8.

\(^{48}\) For details on the establishment of the International Committee for Relief to the Wounded and the organisation of the international conference see ICRC, ‘From the Battle of Solferino to the First Geneva Convention and Beyond: Founding and Early Years of the ICRC (1863-1914)’ <www.icrc.org/Web/eng/siteeng0.nsf/iwpList288/FAFDE5C21C6256B66005B0E39>; Hutchinson (n 42) 20-30; Moorehead (n 42) 13-22.
The conference recommended that national relief societies be set up, and asked the governments to give them their protection and support. In addition, the conference expressed the wish that in wartime belligerent parties declare lazarets and field hospitals neutral, i.e. inviolate, that similar protection be extended to army medical staff, voluntary helpers and the wounded themselves, and finally that the governments choose a common distinctive sign marking persons and objects to be protected.49

In the months following the international event, the first relief societies emerged, and the International Committee began to organise a diplomatic conference to transform the resolutions into conventional binding rules.50 This conference gave birth to contemporary international humanitarian law, adopting the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field in 1864.51 As noted by Antoine Bouvier and Marco Sassòli, at this meeting “[f]or the first time, States agreed to limit- in an international treaty open to universal ratification-their own power in favour of the individual and, for the first time, war gave way to written, general law.”52 The 1864 Geneva Convention contributed significantly to the current legal framework of international humanitarian law; it developed substantive norms that are still today at the core of the instruments dealing with armed conflicts.53

The 1864 Geneva Convention remained unchanged until 1906, when there was a will to expand the instrument to reflect the lessons learned during the Austro-Prussian War that had taken place during that period.54 This wish to have a new instrument to answer the needs of wounded and sick individuals during war led to the adoption of the 1906 Convention for the Amelioration of the Condition of the Condition of the

50 For details on the establishment of the first relief societies and the Diplomatic Conference see ICRC (n 48); Hutchinson (n 42) 31-58; Moorehead (n 42) 38-50.
51 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (22 August 1864).
52 Bouvier and Sassòli (n 9) 99.
53 As succinctly written by Brown (n 46) 29: “This document- a milestone in the history of mankind- guaranteed neutrality for ambulances, hospitals and medical workers and their equipment; for local inhabitants who where helping the wounded; for wounded enemy soldiers and it also required their captors to treat their wounds or to arrange for this to be done. It spelled out the obligation of armies to search for and collect the wounded. Finally it established the red cross in a white background as an international symbol of protection and neutral assistance in times of war.”
54 Haug (n 4) 501. On the Austro-Prussian War and the events leading to the adoption of the 1906 Convention, see also Hutchinson (n 42) 71-102; Moorehead (n 42) 119-148.
Wounded and Sick in Armies, replacing the 1864 instrument. In July 1929, a revision of the 1906 Convention was undertaken, and the third version of the 1864 Geneva Convention was adopted at an international diplomatic conference in Geneva. As a result of the experience of World War I, the delegates of the 1929 Diplomatic Conference also conveyed the need to develop an instrument regarding exclusively the treatment of prisoners of war, and adopted the Convention relating to the Treatment of Prisoners of War.

1.3.2. Hague Law

While Dunant was participating in the development of Geneva Law aimed at the protection of victims of war, Francis Lieber and Tsar Alexander II of Russia were involved in the establishment of international legal norms dealing with the conduct of hostilities, also known as Hague Law. In the 1860s, Francis Lieber (a German university professor immigrant in the United States) was asked to draft amendments to the rules of combat for the troops fighting in the American Civil War. The work of Lieber resulted in the publication of the 1863 Instructions for the Government of Armies of the United States in the Field (General Orders No.100).

The General Orders No.100, or the Lieber Code as it became known, was not a treaty but a field manual instructing the American Army on how to behave in combat. The Lieber Code, however, had a significant impact in the military sphere and was used as a model for drafting military manuals. Hence, albeit at different levels, Henry Dunant and Francis Lieber simultaneously initiated the codification of a humanitarian ideology in the 1860s.

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55. Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (6 July 1906).
56. Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (27 July 1929).
57. Convention relative to the Treatment of Prisoners of War (27 July 1929).
59. Instructions for the Government of Armies of the United States in the Field (General Orders No.100) (24 April 1863).
60. van der Wolf and van der Wolf (n 1) 21 note that: “other countries issued comparable manuals and codes in the next decades (Prussia, the Netherlands, France, Russia, Serbia, Argentine, Great Britain and Spain). The rules Lieber had devised were clearly so consistent with the accepted practice, that these rules formed the basic texts for the other manuals and codes to come.”
61. See Djiena Wembou and Fall (n 5) 34-35; Haug (n 4) 501-502.
In parallel with Lieber’s work, Tsar Alexander II of Russia also contributed to the establishment of the international legal framework on the means and methods of warfare. Concerned by the invention of explosive bullets, designed to explode on impact with a skin-like surface, and the possibility that such a weapon could be used on Russian soldiers, Tsar Alexander II suggested the organisation of an International Military Commission to discuss the prohibition of explosive bullets.\(^{62}\) The meeting led in December 1868 to the adoption of the St-Petersburg Declaration,\(^ {63}\) prohibiting the use of explosive bullets of less than 400 grams. The St-Petersburg Declaration also included general rules concerning the conduct of war and affirmed, for instance, that the “only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy […]”.\(^ {64}\) In effect, the International Military Commission in St-Petersburg rejected the possibility for armed forces to use unlimited means and methods of warfare and introduced the concept that the use of force should be limited by military necessity.

The next initiative in the establishment of what was to become Hague Law was the drafting of the Oxford Manual, formally known as The Laws of War on Land.\(^ {65}\) The Oxford Manual was unanimously adopted in September 1880 by the Institute of International Law.\(^ {66}\) The intended nature of the Manual and its position on war were stated in its preface as follows:

> War holds a great place in history, and it is not to be supposed that men will soon give it up -- in spite of the protests which it arouses and the horror which it inspires -- because it appears to be the only possible issue of disputes which threaten the existence of States, their liberty, their vital interests. But the gradual improvement in customs should be reflected in the method of conducting war. It is worthy of civilized nations to seek, as has been well said (Baron Jomini), "to restrain the destructive force of war, while recognizing its inexorable necessities". […]

The Institute, too, does not propose an international treaty, which might perhaps be premature or at least very difficult to obtain; but, being bound by its by-laws to work, among other things, for the observation of the laws of war, it believes it is fulfilling a duty in offering to the governments a

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\(^{62}\) van der Wolf and van der Wolf (n 1) 24; Bugnion (n 39) 903-904.

\(^{63}\) Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight (11 December 1868) [thereafter St-Petersburg Declaration].

\(^{64}\) Ibid.

\(^{65}\) The Laws of War on Land (9 September 1880) [thereafter Oxford Manual].

\(^{66}\) van der Wolf and van der Wolf (n 1) 24: “In 1873 the Institute of International Law was founded. The (still existing) Institute is an unofficial but highly respected body of leading scholars, whose eminence leads to their resolutions and proposals receiving the highest respect and often form the basis for draft agreements submitted to governments.”
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‘Manual’ suitable as the basis for national legislation in each State, and in accord with both the progress of juridical science and the needs of civilized armies.67

The Oxford Manual, together with the Lieber Code and the St-Petersburg Declaration laid down and clarified the accepted practice and limits in the means and methods of warfare; they constituted essential material for the 1899 and 1907 International Peace Conferences leading to the codification of the conduct of hostilities.

In 1899, Tsar Nicholas II of Russia convened an International Peace Conference in The Hague with the aim of “seeking the most effective means of ensuring to all peoples the benefits of a real and lasting peace, and, above all, of limiting the progressive development of existing armaments”.68 While ultimately not reaching an agreement on armaments, the 1899 Peace Conference was very fruitful and led to the adoption of the 1899 Hague Conventions and Declarations.69 A Second International Peace Conference was convened in 1907 to further discuss issues related to the conduct of hostilities. The event was of great importance for the development of international humanitarian law as it concluded its work with the adoption of 14 treaties.70 Following these developments, there was already as of

67 The Laws of War on Land (9 September 1880) Preface.
69 Final Act of the International Peace Conference (29 July 1899); 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 (29 July 1899); Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864 (29 July 1899); Declaration (IV, 1) to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature (29 July 1899); Declaration (IV, 2) concerning Asphyxiating Gases (29 July 1899); Declaration (IV, 3) concerning Expanding Bullets (29 July 1899).
70 Final Act of the Second Peace Conference (18 October 1907)<www.icrc.org/ihl.nsf/FULL/185?OpenDocument>; Convention (III) relative to the Opening of Hostilities (18 October 1907); Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (18 October 1907); Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of war on Land (18 October 1907); Convention (VI) relating to the Status of enemy Merchant ships at the Outbreak of Hostilities (18 October 1907); Convention (VII) relating to the Conversion of Merchant Ships into War-Ships (18 October 1907); Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines (18 October 1907); Convention (IX) concerning Bombardment by Naval Forces in Time of War (18 October 1907); Convention (X) for the Adaptation to Maritime warfare of the Principles of the Geneva Convention (18 October 1907); Convention (XI) relative to certain Restriction with regard to the exercise of the Right of Capture of Naval war (18 October 1907); Convention (XII) relative to the Creation of an International Prize Court (18 October 1907); Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War (18 October 1907); Convention (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons (18 October 1907).
1929 an important body of codified norms regulating the conduct of hostilities and limiting the means and methods of warfare (Hague Law) and aiming at the protection of civilians and those *hors de combat* during armed conflicts (Geneva Law).

### 1.4. World War I: The League of Nations and Prelude to the Internationalisation of Human Rights Law

In contrast with humanitarian law which was already established as an international legal framework, until World War I human rights norms existed domestically, at the constitutional and national level, but did not have binding force in the international arena. In the aftermath of World War I, this situation changed slightly and a move towards the internationalisation of human rights was witnessed.

The conscience of the international community had been troubled by the scale of the conflict and acts committed during World War I and, as a result, was eager to consider the inclusion of human rights within the sphere of public international law.\(^{71}\) While the uneasiness of the international community did not result in the wholesale adoption of human rights guarantees, a series of peace treaties and the Covenant of the League of Nations\(^ {72}\) were adopted and contributed significantly to the internationalisation of human rights law. The 1919 Covenant of the League of Nations did not encompass any provision specifically referring to the term human rights but its content advanced and protected many human rights. The Covenant created a mandates system to assist with the “well-being and development” of “peoples not yet able to stand by themselves under the strenuous conditions of the modern world”.\(^ {73}\) In that respect, it asserted that Mandatories would administer territories in such a way as to “guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade […]”.\(^ {74}\) Together with the peace treaties of World War I, the Covenant of the League of Nations also protected minority rights, labour rights and refugees.

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\(^ {71}\) Lauren (n 1) 83-90.

\(^ {72}\) Covenant of the League of Nations (Including Amendments Adopted to December 1924) (28 April 1919).

\(^ {73}\) *Ibid.*, art 22.

\(^ {74}\) *Ibid.*, art 22.
In the aftermath of World War I the issue of self-determination was widely discussed and it was clear that failing to address the question of minorities could jeopardize long-lasting peace. In that context the peace treaties developed substantive protection for minorities:75

After lengthy and often difficult negotiations, the peacemakers created an international legal foundation for such protection through a series of highly innovative agreements known collectively as the Minority Treaties. This protective regime began with five treaties that required Poland, Czechoslovakia, Yugoslavia, Romania, and Greece, as beneficiaries of the peace settlement and as a condition of their creation or expansion, to assume obligations towards citizens within their borders. Similar obligations then were imposed by treaties on four of the vanquished states from the war, including Austria, Bulgaria, Hungary, and Turkey. Together, these treaty provisions, along with others that would soon follow, required the signatories “to assure full and complete protection of life and liberty” to all of their inhabitants “without distinction of birth, nationality, language, race or religion.” They provided a number of guarantees that all minorities would be equal before the law and able to fully enjoy the same civil and political rights, including the right to freely use their own language, and the right to establish charitable, religious, social, and economic institutions of their choosing.76

The peace treaties adopted in the aftermath of World War I formed a legal normative framework for the protection of minorities for which the League of Nations served as a guardian and held responsibility for the implementation of those rights.77 The Covenant of the League of Nations called for the establishment of the Permanent Court of International Justice,78 which also enabled members of minority groups to obtain review for the violations of their rights.

In addition to their role in the protection of minorities, the Covenant of the League of Nations and the peace treaties, especially the Treaty of Versailles,

75 See especially Treaty of Versailles (28 June 1919); Treaty of Peace between the Allied and Associated Powers and Austria (Saint-Germain-en-Laye, 10 September 1919); Treaty of Peace between the Allied and Associated Powers and Bulgaria (Neuilly-sur-Seine, 27 November 1919); Treaty of Peace between the Allied and Associated Powers and Hungary, Protocol and Declaration (Trianon, 4 June 1920); Treaty of Peace [with Turkey] (Lausanne, 24 July 1923). For a full list of the peace treaties that included minority protections and details on the minorities they intended to protect, see P Thornberry, *International Law and the Rights of Minorities* (Clarendon Press, Oxford 1991) 41-42.
77 See for instance the Treaty of Peace between the Allied and Associated Powers and Turkey (Sèvres, 10 August 1920) art 151 which affirmed: “The Principal Allied Powers, in consultation with the Council of the League of Nations, will decide what measures are necessary to guarantee the execution of the provisions of this Part [Part IV: Protection of Minorities]. The Turkish Government hereby accepts all decisions which may be taken on this subject.”
78 Covenant of the League of Nations (n 72) arts 13-14.
provided for the protection of labour rights.\textsuperscript{79} To implement these rights, the Treaty of Versailles established the International Labour Office,\textsuperscript{80} a permanent organisation and predecessor of the current International Labour Organization. The League of Nations was also concerned with another human rights matter, the recognition of refugee status, a crucial issue at the end of World War I. In that respect the League of Nations established the High Commission for Refugees in 1921 and replaced it in 1933 with the Nansen International Office for Refugees, ancestor of the present United Nations Office of the High Commissioner for Refugees. The League of Nations and its Commissioners facilitated agreements for World War I refugees and addressed vital refugees issues including “access to courts, the right to work, protection against expulsion, equality in taxation, and the nature of national responsibilities to honour League of Nations identity certificates.”\textsuperscript{81}

With the various peace treaties and the Covenant of the League of Nations tackling subjects such as labour rights, refugee protection and minority rights, a small but noticeable change in the way States were approaching human rights was observed in the aftermath of World War I; the protection of human rights beyond the domestic constitutional level was starting to be considered.

\textbf{1.5. World War II-1960s: The Birth of International Human Rights Law, the Adoption of the 1949 Geneva Conventions and the Encounter of the two Legal Frameworks}

\textbf{1.5.1. The Adoption of the United Nations Charter and the Internationalisation of Human Rights Law}

While humanitarian law developed earlier directly at the international level through the codification of different types of rules - i.e. rules regarding the conduct of

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\textsuperscript{79} See for instance the Treaty of Versailles (n 75) art 427 which provided for “[t]he right of association for all lawful purposes by the employed as well as by the employers”; “[t]he payment to the employed of a wage adequate to maintain a reasonable standard of life”; “[t]he adoption of an eight hours day or a forty-eight hours week as the standard to be aimed at”; “[t]he adoption of a weekly rest”; “[t]he abolition of child labour”; “[t]he principle that men and women should receive equal remuneration for work of equal value”. See also Covenant of the League of Nations (n 72) art 23 asserting that the League’s Members “will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organisations”.

\textsuperscript{80} Treaty of Versailles, \textit{ibid.}, arts 388-389.

hostilities and rules concerning the protection of victims - it is only following World War II that human rights were given real international standing. At that point, the international community decided to proceed to the internationalisation of human rights law. Unlike the law of armed conflict, which had already entered public international law in the 1860s, before 1945 human rights remained mainly within the domestic sphere. Until then, States considered international law as a framework dealing exclusively with the conduct between States, and not as a system with the competence of scrutinising national systems and intervening in the relationship between States and their nationals. The unfolding of World War II brought about a seismic shift in the field of human rights law. Prompted by the atrocities committed by the Nazi regime, the international community began to show great interest in domestic affairs; it was felt that more could have been done to prevent the atrocities, and that the existence of an effective international system for the protection of human rights could have served that purpose. The conduct of States within their borders suddenly became a subject of international concern.

In January 1941, the American President Franklin Roosevelt affirmed in his State of the Union address:

In the future days which we seek to make secure, we look forward to a world founded upon four essential human freedoms.

The first is freedom of speech and expression—everywhere in the world.

The second is freedom of every person to worship God in his own way—everywhere in the world.

The third is freedom from want, which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world.

The fourth is freedom from fear, which, translated into world terms, means a worldwide reduction of armaments [...].

82 See above section 1.3.
President Roosevelt publicly called for the protection of human rights in all countries. The four freedoms speech, as it became known, constituted a key event, contributing to the internationalisation of human rights law.

Before and shortly after the end of World War II, the allied countries met to discuss how peace should and could be maintained. They expressed their wish to replace the League of Nations, which had collapsed with the unfolding of World War II, and establish a new international organisation with the power of maintaining security and helping prosperity. On the initiative of these countries, a conference was convened in San Francisco which brought together representatives from 50 countries. On April 25th, 1945, the Charter of the United Nations was adopted in San Francisco and, with it, the United Nations was established. States rejected the inclusion within the Charter of a catalogue of rights resembling a Bill of Rights and providing comprehensive human rights protection, and article 2(7) of the Charter provided States with a justification to opposed intervention in what they perceived as domestic affairs. That being said, the Charter declared the following as being one of the United Nations’ purposes:

To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion […] 88

In addition to including the protection of human rights among its purposes, the United Nations Charter made several references to human rights which, despite the vagueness of their wording, advanced the protection of human rights. In that respect, the Charter conferred to the United Nations the legal authority to define and codify human rights; it gave to the organisation the competence to create institutions and

86 Ibid., vol II, 919.
87 Charter of the United Nations (26 June 1945) Can TS 1945 No 7, art 2(7) states: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”
88 Ibid., art 1(3).
89 Ibid., art 55(c). For more details on this provision see Simma and others (n 86) 917-940.
mechanisms to ensure States’ compliance with human rights law;\(^90\) and it mandated the Economic and Social Council to “set up commissions […] for the promotion of human rights”.\(^91\) In sum, the Charter of the United Nations encompassed provisions from which a universal system for the protection of human rights could be built.

Significantly, by identifying human rights as one of the four founding purposes of the United Nations and incorporating provisions dealing with human rights, the Charter gave an international legal status to human rights. The Charter proclaimed that human rights were no longer part of the exclusive jurisdiction of each member of the United Nations but a subject of international concern and part of public international law.

Building on the human rights provisions included in the Charter, the United Nations took the central role in the establishment of an international legal corpus for the protection of human rights. Despite the fact that States had rejected in San Francisco the proposal to include a catalogue of rights within the Charter, the wish to adopt detailed substantive provisions on the protection of human rights was reiterated at the first meeting of the UN. With that in mind, the new Commission on Human Rights, created under article 68 of the Charter, was allocated the task of drafting an international bill of rights.\(^92\) Anticipating difficulties in reaching a consensus on a binding document, the Commission first worked on a declaration establishing goals, rather than a treaty with applicable norms and binding standards. As a result, the Universal Declaration of Human Rights\(^93\) (UDHR) was adopted by the United Nations’ General Assembly in December 1948, with the dual purpose of providing “a common understanding of [the human] rights and freedoms”,\(^94\) and serving “as a common standard of achievement for all peoples and all nations”.\(^95\)

\(^90\) Charter of the United Nations, ibid., art 56. For more details on this provision see Simma and others, ibid., 941-943.
\(^91\) Charter of the United Nations, ibid., art 68. For more details on this provision see Simma and others, ibid., 1027-1056.
\(^92\) ECOSOC Res 5 (I) (16 February 1946) para 2 states: “The work of the Commission shall be directed towards submitting proposals, recommendations and reports to the [Economic and Social] Council regarding: (a) an international bill of rights […]”. It was foreseen that this international bill of rights would include an international declaration on human rights, an international convention, and deal with issues of implementation. On that subject see UN Doc E/600 (17 December 1947), chap II ‘Plan of work in regard to the Bill of Human Rights’.
\(^93\) Universal Declaration of Human Rights (10 December 1948) GA Res 217A (III), UN Doc A/810, 71.
\(^94\) Ibid., Preamble.
\(^95\) Ibid.
Briefly, the concern for equality is omnipresent in the UDHR\(^{96}\) and the document calls for the protection of two broad categories of rights: civil and political rights and freedoms;\(^{97}\) and economic, social and cultural rights.\(^{98}\) Despite being a non-binding document and not a treaty, the Universal Declaration was a fundamental step for the international protection of human rights. As noted by Eide, the adoption of the UDHR was “[t]he major breakthrough in the internationalisation of human rights”.\(^{99}\) The Universal Declaration obtained an authoritative status throughout the years and has served as a basis for the creation of many other human rights instruments.\(^{100}\)

### 1.5.2. The Adoption of the 1949 Geneva Conventions

At the same period as the emergence of human rights law in the international sphere, the legal framework dealing with armed conflicts saw a major development in the laws on protection: the birth of international humanitarian law as we know it today. While instruments were already developed prior to this, it is only following World War II that the modern comprehensive international legal framework of humanitarian law was truly established. The horrendous events of World War II created an impetus to act, and brought together the delegates of 48 States for another diplomatic conference in Geneva. With States’ representatives eager to strengthen the law applicable during armed conflicts, the international conference concluded its work with the unanimous adoption, on August 12, 1949, of the four Geneva Conventions.\(^{101}\) The Geneva Conventions are now the underpinning for the

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\(^{96}\) The Preamble of the Universal Declaration affirms that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world [...]”. See also arts 1 and 2 which protect against discrimination.

\(^{97}\) The Universal Declaration provides for the protection of civil and political rights and fundamental freedoms such as the right to life, liberty and security; the prohibition of slavery; the prohibition of torture or to cruel, inhuman or degrading treatment; the right to a fair trial; freedom of speech, of religion, of association and movement. See Universal Declaration of Human Rights (n 93) arts 3-5, 10, 13, 18, 20.

\(^{98}\) The instrument includes economic, social and cultural rights such as the right to social security, work, rest and leisure; the right to adequate standard of living; the right to education; the right to participate in the cultural life of the community as well as the right to enjoy arts and to share in scientific advancement and its benefits. See Universal Declaration of Human Rights, ibid., arts 22-27.

\(^{99}\) Eide (n 25) 679.


\(^{101}\) Convention relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 31 [First Geneva Convention]; Convention relative to the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at
protection of victims of armed conflict; they transformed humanitarian rules and practices into a comprehensive legal framework. In addition to developing and strengthening existing protections, the 1949 Conventions introduced new important safeguards, including protection for victims of non-international armed conflicts previously without international legal protection.

As explained, subsequent to the publication of A Memory of Solferino, the adoption of the Lieber Code and the initiatives taken by Tsar Alexander II of Russia, international norms for the regulation of armed conflicts multiplied. The regulations of war occurred through the development of two separate legal frameworks, namely Hague Law, the part of international law that regulated the conduct of hostilities and limited the means and methods of warfare, and Geneva Law aiming at the protection of victims of armed conflicts. Over the years, the distinction between Hague Law and Geneva Law has become less pronounced due to the inclusion of both types of rules in the 1977 Additional Protocols. Today, international humanitarian law encompasses both branches of law within the same instruments, with rules on the conduct of hostilities and on the protection of victims of war included in the Additional Protocols to the 1949 Geneva Conventions.

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102 First and Third Geneva Conventions, ibid., respectively revised and developed the 1929 Geneva Convention on the Wounded and Sick in Armed Forces in the Field (n 56) and the 1929 Convention on Prisoners of War (n 57). The Second Geneva Convention, ibid., revised and developed the 1907 Hague Convention (X) (n 70). As for the Fourth Geneva Convention, ibid., it supplemented the 1899 Hague Convention (II) (n 69) and the 1907 Hague Convention (IV) (n 70).

103 The two legal frameworks were in actual fact never totally separated from one another. While the focus of Hague Law was on the regulation of the conduct of hostilities, it also encompassed humanitarian principles. For instance, the humanitarian aspect of Hague Law was particularly apparent in the “Martens Clause”, first introduced in the Preamble of The Hague 1899 Convention (II) (n 69). In addition to this, the Regulations concerning the Laws and Customs of War on Land annexed to the 1899 Convention (II), as well as Convention (IV) and its Annex (n 69) included provisions on the treatment of prisoners of war, provisions of a humanitarian nature. As for Geneva Law, it incorporated also many provisions on the conduct of hostilities, including the prohibition to attack the wounded, sick, civilians and object of a non-military nature. For more details on the commonalities of Hague Law and Geneva Law see Djiena Wembou and Fall (n 5) 35; Haug (n 4) 501-502; Bugnion (n 39) 907; L Doswald-Beck, ‘International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons’ (1997) 316 IRRC 35.

Justice confirmed the unity of all rules regulating armed conflicts, saying that “[t]hese two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law.”

According to the International Committee of the Red Cross, international humanitarian law consists of:

international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict.

1.5.3. The Position of the United Nations’ International Law Commission on International Humanitarian Law

By including human rights within its framework and purposes, the Charter of the United Nations made human rights an integral part of the UN system and established the evolving law of human rights as a branch of public international law. The establishment of human rights law as an international legal framework raised the question of its application during armed conflict and its relation to the law of armed conflict during such time. The co-existence of international human rights and humanitarian law brought about many questions and also potential legal problems. The international community started to inquire whether international human rights law and international humanitarian law could or should work side by side, or hand in hand, similarly for instance to civil and criminal law in many domestic jurisdictions. Likewise, the United Nations started to reflect on how it should deal with armed conflicts and whether it should consider the law of armed conflict, and the International Movement of the Red Cross and Red Crescent started to examine how it should relate to international human rights law.

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107 See section 1.5.1.
Within the United Nations it is the International Law Commission (ILC) in the 1940s which first dealt with the law of armed conflict and touched upon issues linked with the relationship between international human rights law and the laws of war as they were then known. The United Nations Charter provided the General Assembly (GA) with the responsibility to “initiate studies and make recommendations for the purpose of […] encouraging the progressive development of international law and its codification”.\textsuperscript{108} In November 1947, the General Assembly established the International Law Commission to carry out this responsibility.\textsuperscript{109} Following its Statute, the function of the International Law Commission is “the promotion of the progressive development of international law and its codification.”\textsuperscript{110} To fulfil this task the fifteen members of the International Law Commission first discussed the topics to be considered in their codification work. Following their first session in June 1947, the members identified twenty-five topics to be codified; topics which included the laws of war.\textsuperscript{111}

Upon further discussion, the International Law Commission ultimately reduced the number of topics to be considered for codification to fourteen and excluded the laws of war.\textsuperscript{112} The International Law Commission’s justification for rejecting the laws of war among the topics for codification lies in the provisions of the United Nations Charter. More specifically, the Charter includes a prohibition of the use of force and, to support such prohibition, creates a collective security regime for the peaceful settlement of dispute.\textsuperscript{113} It affirms in its Article 2:

\begin{itemize}
  \item[3.] All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
  \item[4.] All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.\textsuperscript{114}
\end{itemize}

\textsuperscript{108} Charter of the United Nations (n 87) art 13.
\textsuperscript{109} ‘Establishment of an International Law Commission’, GA Res 174 (II).
\textsuperscript{111} Yearbook of the International Law Commission 1949, UN Doc A/CN.4/SR.31 (1956) 224, para 47.
\textsuperscript{112} Ibid., 225, para 65.
\textsuperscript{113} See Charter of the United Nations (n 87) Chapter VII.
\textsuperscript{114} Ibid., art 2 (3) and (4).
While protecting the “right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations”\textsuperscript{115}, the United Nations Charter is an instrument of peace. By outlawing the use of force and creating a system of peaceful resolution of conflicts, the Charter formulated the \textit{jus ad bellum} or \textit{jus contra bellum} that is the law on the use of force or law on the prevention of war. This legal framework and the \textit{ethos} behind the creation of the United Nations— that of peace— was perceived as diametrically opposed to the \textit{jus in bello}, that is the law in war or international humanitarian law as it became known. The law of armed conflict was in that respect seen by many as contradictory to, or even an infringement of, the United Nations Charter. For these reasons, it seemed to some extent not feasible or at least problematic in the 1940s to associate the two bodies of law, one being concerned with the regulation of war and the other with outlawing war.\textsuperscript{116} This logic was at the basis of the decision of the International Law Commission to exclude the laws of war from their codification process. The members of the International Law Commission expressed the opinion that the inclusion of the laws of war among the topics of codification “could undermine the force of \textit{jus contra bellum}, as proclaimed in the Charter [of the United Nations] and would affect the confidence in the ability to maintain peace”.\textsuperscript{117}

Despite its final decision to discard the subject from its list of future codification work, the International Law Commission gave particular attention to the laws of war during its First Session. In that respect, the ILC members considered including in the Draft Report to the General Assembly on the Work of their First Session the following paragraph, explaining the reasons for the exclusion of the topic from the codification work:

\begin{quote}
18. The Commission considered whether the laws of war should be selected as a topic for codification, and decided in the negative. It was suggested that the horrors of the Second World War were fresh in the memory of the peoples of the world and that if the Commission took up the
\end{quote}

\textsuperscript{115} \textit{Ibid.}, art 51.
subject of the laws of war, its action might have unfortunate psychological
effect upon world opinion.\textsuperscript{118}

The opinion of the ILC was split on the necessity of including this explanatory
paragraph in the final report to the General Assembly.\textsuperscript{119} The deletion of paragraph
18 was proposed but rejected with five votes in favour and five against. Following
this decision the Chairman requested the redrafting of the text.\textsuperscript{120} While the first draft
of paragraph 18 was a very swift and almost uninteresting explanation for the
rejection of the laws of war among the list of topics put forward for codification, the
discussion surrounding the redrafting of the text and its final version were much
more informative, showing that the relation between the laws of war and the United
Nations and its Charter was a lot more complex than at first glance.

Following an amendment based on the premise “that the paragraph should be
explained in more detail”,\textsuperscript{121} the Rapporteur of the meeting prepared the final version
of the explanatory text which read:

\begin{quote}
The Commission considered whether the laws of war should be selected as
a topic for codification. It was suggested that, war having been outlawed,
the regulation of its conduct had ceased to be relevant. On the other hand,
the opinion was expressed that although the term ‘laws of war’ ought to be
discarded, a study of the rules governing the use of armed force-legitimate
or illegitimate- might be useful. The punishment of war crimes, in
accordance with the principles of the Nürnberg Charter and the judgment
of the Nürnberg tribunal would necessitate a clear definition of those
crimes and consequently, the establishment of rules which would provide
for the case where armed force was used in a criminal manner, especially
in view of the obsolescence of the Hague Conventions.

The majority of the Commission declared itself opposed to the study of the
problem at the present stage. It was considered that if the Commission, at
the very beginning of its work, were to undertake this study, public opinion
might interpret its action as showing lack of confidence in the efficiency of
the means at the disposal of the United Nations for maintaining peace. This
argument was felt to be the stronger because of the decision of the
Commission not to retain among the topics for codification that of the
‘peaceful settlement of international disputes’.\textsuperscript{122}
\end{quote}

The members of the International Law Commission were highlighting therein that
the United Nations would eventually have to deal with the laws of war. While the

\textsuperscript{118} Yearbook of the International Law Commission 1949 (n 111) 225, n 5.
\textsuperscript{119} See n 118 and its accompanying text.
\textsuperscript{120} Ibid., 227, para 76.
\textsuperscript{121} Ibid., 226, para 67.
\textsuperscript{122} Yearbook of the International Law Commission 1949, UN Doc A/CN.4/SR.37 (1956) 263-264,
para 20.
historical context – the aftermath of World War II – demanded the rejection of the topic to ensure faith in the system of peaceful resolution of conflict, it was evident that, despite the adoption of the UN Charter, conflicts would still emerge. In the same vein, since the Charter itself allowed the use of force for the purpose of self-defence, it was clear that the laws of war would be a topic of interest for the UN. In line with that, the members of the ILC did not exclude the future possibility of studying the laws of war.\textsuperscript{123} The ILC, as well as other UN bodies, could not simply dismiss the relevance of the laws regulating armed conflicts to its overall mandate, which was defined with respect to international law in general.

Clearly, the legal framework of the UN Charter cannot be equated with human rights law, and the International Law Commission’s discussions on the possibility of codifying the laws of war were not directly examining the concurrent application or interplay between international humanitarian law and international human rights law. That being said, the early work of the International Law Commission and its decision not to codify the laws of war is directly relevant to the interplay between international human rights and international humanitarian law. The work done by the ILC in its First Session had a certain impact on the relationship between the disciplines, and illustrated well some of the difficult questions regarding their interplay. The Commission’s decision to exclude the laws of war from its subjects to be codified had the effect of estranging the law of armed conflict from United Nations law-making and ensured or provoked at an early stage of their relationship a certain division between international human rights law and international humanitarian law. Human rights law was an inherent part of the Charter and the fact that the United Nations would have to deal with the laws of war was undeniable, and acknowledged by the ILC. From the outset, when questions related to the concurrent application of international humanitarian and human rights law first emerged, there was, through the work of the ILC, an opportunity to develop and regulate the laws of war within the UN system. Such work could have perhaps even ensured a more coherent development of the laws of war in relation to international human rights.

\textsuperscript{123} See \textit{ibid.}, 264, para 24. The members of the ILC voted against a proposal for deletion of the words ‘at the present stage’ in the following part of the redrafted paragraph 18 “[t]he majority of the Commission declared itself opposed to the study of the problem [of codification of the laws of war] at the present stage”.

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1.5.4. The Position of the International Committee of the Red Cross on its Relationship with the United Nations and International Human Rights Law

While the United Nations had a significant role in the development and implementation of human rights protections by virtue of their inclusion in the UN Charter, the International Committee of the Red Cross was given over the years the somewhat equivalent role as regards to international humanitarian law. The role of the ICRC was confirmed in 1949 with the adoption of the four Geneva Conventions. With the function of guarantor of international humanitarian law, the ICRC was afforded important tasks such as visiting and interviewing prisoners of war and civilian internees; serving as substitute for the Protecting Powers; and the opportunity to offer its services to parties to non-international armed conflicts. Given the possible application of international human rights law during armed conflict and the establishment of the United Nations which could also deal with armed conflicts, the ICRC, with its central role during armed conflicts, had to consider what would be its relationship with the United Nations and its position on the interplay between international humanitarian law and international human rights law.

Early on, from the adoption of the 1949 Geneva Conventions, the International Committee of the Red Cross adopted the position that international humanitarian law and international human rights law should be construed separately. The institution was keen not to share its role of protector and custodian of international humanitarian law. Hence, at the same time as the International Law Commission took the decision not to codify the laws of war, the ICRC decided to deal solely with its own field of expertise and stay as far as possible from the United Nations and international human rights law. The main justification for the unwillingness of the ICRC to develop close links with international human rights law and the United Nations can simply be summarized in one word: politics. The ICRC forms one of the components of the International Movement of the Red Cross and

125 Third Geneva Convention (n 101) art 126.
126 Fourth Geneva Convention (n 101) art 143.
127 First Geneva Convention (n 101) art 10; Second Geneva Convention (n 101) art 10; Third Geneva Convention (n 101) art 10; Fourth Geneva Convention (n 101) art 11.
128 The four Geneva Conventions (n 101) art 3.
Red Crescent.\textsuperscript{129} It is within the role of the ICRC “to maintain and disseminate the Fundamental Principles of the Movement”.\textsuperscript{130} Since 1921, the activities of the International Movement have been guided by certain fundamental principles; the Statutes of the Movement provide for the unconditional respect of the principles of humanity, impartiality, neutrality, independence, voluntary service, unity and universality.\textsuperscript{131} It is based on the incompatibility of those principles with the inevitable politics surrounding the field of human rights and the United Nations, that the ICRC favoured the division of international human rights law and international humanitarian law in the early days of their relationship.

The principles of neutrality and independence are at the core and guide the activities of the ICRC. It is mostly because of those two principles that the institution can “maintain its credibility in the eyes of the government and the public which provide support for its activities”.\textsuperscript{132} Because of those principles, for instance, delegates are allowed entry into countries to provide help to victims of armed conflict. The Statutes of the Movement affirm the principle of neutrality, stating that: “[i]n order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.”\textsuperscript{133} The respect of the principle of independence is also embedded in the work of the ICRC.\textsuperscript{134} The meaning of this principle was explained as follows:

\begin{quote}
In its broadest sense, the principle of independence means that the Red Cross and Red Crescent institutions must resist any interference, whether political, ideological or economic, capable of diverting them from the course of action laid down by the requirements of humanity, impartiality and neutrality. No National Red Cross or Red Crescent Society could, for
\end{quote}

\textsuperscript{129} The International Movement is formed of the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies, and the National Red Cross and Red Crescent Societies.
\textsuperscript{130} Statutes of the International Committee of the Red Cross <www.icrc.org/Web/eng/siteeng0.nsf/html/icrc-statutes-080503>, art 4 (1) a).
\textsuperscript{131} Statutes of the International Red Cross and Red Crescent Movement, 31 October 1986, 25th International Conference of the Red Cross <www.icrc.org/Web/Eng/siteeng0.nsf/iwpList126/C5FFEE6255B8DDEB5C1256B6605BBCC>, Preamble.
\textsuperscript{133} Statutes of the International Red Cross and Red Crescent Movement (n 131) Preamble.
\textsuperscript{134} \textit{Ibid:} “The Movement is independent. The National Societies, while auxiliaries in the humanitarian services of their governments and subject to the laws of their respective countries, must always maintain their autonomy so that they may be able at all times to act in accordance with the principles of the Movement.”
example, accept financial contributions from any source that are granted only on condition that they be used for a specific category of persons chosen according to political, ethnic or religious criteria, to the exclusion of any other group of people whose needs might be more imperative. Similarly, in order to merit the trust of all and to enjoy the credibility essential to carrying out their mission, Red Cross and Red Crescent institutions must on no account appear to be instruments of government policy.\textsuperscript{135}

Kolb further explained the reasons underlying the reluctance of the ICRC to be affiliated with international human rights law and its direct consequence on the relationship between the disciplines:

Human rights, which were seen as being within the purview of the United Nations and bodies specifically set up to promote and develop those rights, were [...] distanced from the concerns of the ICRC, which continued to work solely in the area of the law of war. These institutional factors affected the development of the rules: the United Nations, the guarantor of international human rights, wanted nothing to do with the law of war, while the ICRC, the guarantor of the law of war, did not want to move any closer to an essentially political organization or to human rights law which was supposed to be its expression. The result was a clear separation of the two branches.\textsuperscript{136}

Consequently, just as the International Law Commission did in its early days, the International Committee of the Red Cross was reluctant to create formal links with the United Nations and to an association between international humanitarian law and international human rights law.

1.6. 1960s Onwards: Parallel Development and First Steps towards the Relationship of International Human Rights Law and International Humanitarian Law

1.6.1. The Adoption of the International Human Rights Treaties and the Emergence of Regional Systems for the Protection of Human Rights

Following World War II, human rights and humanitarian law had both become important branches of public international law. At that period the two disciplines had also encountered each other for the first time, and the international community expressed reluctance to see links between the two legal frameworks. In this context, after questions regarding the co-existence and articulation of the concurrent application of international human rights and humanitarian law were first raised, the two bodies of law continued to develop - but independently from one another.

\textsuperscript{135} ICRC (n 132) 10.
\textsuperscript{136} Kolb (n 117).
Following the adoption of the Universal Declaration of Human Rights, the Commission on Human Rights began to work on a treaty that would transform the aspirations of the UDHR into legal norms. Initially, the purpose of the codification work was to expand upon the provisions found in the Declaration, give them a precise legal meaning and incorporate them into one single binding document. Because of the political context of the Cold War, the attempt to create a single binding document failed; the United States and the United Kingdom rejected the proposal to include economic and social rights into a future document, and the Socialist and developing countries had no interest in a human rights instrument that would omit such rights. A compromise solution led in 1966 to the adoption of two separate documents: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). Following the completion of these instruments, many other international human rights treaties were drafted and adopted. For instance, two optional protocols to the ICCPR were adopted, one enabling the Human Rights Committee to consider individual communications and the other providing for the abolition of the death penalty. The two Covenants and optional protocols, coupled with the Universal Declaration of Human Rights, formed the International Bill of Rights. With the assistance of the United Nations, States have also adopted over the years several specialised human rights treaties and treaty-based mechanisms.

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These treaties address specific human rights issues such as racial discrimination, discrimination against women, torture, the rights of the child, the rights of migrant workers and more. In sum, from the inclusion of human rights provisions in its Charter, the United Nations developed a rich body of law, a comprehensive universal system providing for the protection of human rights at the international level.

In parallel with the work of the United Nations, regional organisations also developed human rights protections after World War II. The European regional system was established in 1949, with the Council of Europe founded “to promote democracy, the rule of law, and greater unity among the nations of Western Europe.” To meet these aims, the Council of Europe adopted the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR). The European Convention represented a very important step in the establishment, and later in the development, of international human rights law. As noted by Steiner and Alston:

The ECHR is of particular importance within the context of international human rights for several reasons: it was the first comprehensive treaty in the world in this field; it establishes the first international complaints procedure and the first international court for the determination of human rights matters; it remains the most judicially developed of all the human rights systems; and it has generated a more extensive jurisprudence than any other part of the international system.


Steiner and Alston (n 145) 786.
In a similar manner to the United Nations, the Council of Europe drafted several more specialised human rights instruments over the years. In parallel with the Council of Europe, the European Union (EU) and the Organisation for the Security and Co-operation in Europe (OSCE) have also been involved in the adoption of human rights instruments in the European context.

In the Americas, the Organization of American States (OAS) developed several human rights instruments. The Charter of the organisation declared as being part of its purposes “to strengthen the peace and security of the continent”; “to promote and consolidate representative democracy”; and “to promote […] their economic, social, and cultural development”. In 1948, the Ninth International Conference of American States adopted the American Declaration of Human Rights. In 1969, the Member States adopted the American Convention on Human Rights, the main human rights instrument in the Inter-American system. The American Convention provides for the protection of civil and political rights and includes a provision on the protection of economic and social rights. In 1988 and 1990 two Additional Protocols to the Convention were adopted to reinforce, 

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148 See eg, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (26 November 1987) ETS 126; Framework Convention for the Protection of National Minorities (10 November 1994).
149 The main role of the European Union is to see to the economic and political integration of its members. While not primarily concerned with human rights, the EU has been increasingly involved in their protection and promotion over the years. Main instruments of the EU dealing with human rights included the Treaty of Maastricht and the Amsterdam Treaty which amended the Maastricht Treaty. In 2000 the Member States of the EU also adopted a Solemn Proclamation establishing the Charter of Fundamental Rights of the European Union. In 2009 the Lisbon Treaty came into force, amending the Maastricht treaty and among other things made the Charter of Fundamental Rights legally binding: Treaty of Amsterdam (2 October 1997); Treaty on European Union (29 July 1992); Charter of Fundamental Rights of the European Union (7 December 2000); Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (13 December 2007).
150 The main instrument of the OSCE is the Helsinki Final Act which established the organisation and encompasses a catalogue of rights and guarantees. The Act is not a binding treaty with legal obligations but rather represents political commitments with moral obligations. While there is no OSCE treaty per se, the Copenhagen Document specifies a list of rights and incorporate the so-called “Human Dimension” obligations of OSCE members. Helsinki Final act (1 August 1975). Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (June 1990).
152 American Declaration of the Rights and Duties of Man (2 May 1948) OAS Res XXX, Final Act, Ninth International Conference of American States.
154 Ibid., art 26.
respectively, the protection of economic, social and cultural rights[^155] and to abolish the death penalty[^156]. The OAS has also adopted specialized human rights treaties on matters such as torture, forced disappearances, violence against women and the rights of persons with disabilities[^157].

In Africa, the Organisation of African Unity (replaced in 2002 by the establishment of the African Union) adopted in 1981 the African Charter on Human and Peoples’ Rights[^158]. The African Charter bears resemblance with the other regional instruments as well as with the two international covenants, and includes many of the rights provided for in other human rights instruments. More interestingly, the African Charter contains some different and new rights, so-called third generation rights, including the right to peace and to a satisfactory environment[^159]. In addition to including ‘solidarity rights’, the African Charter also specifies in more detail the content of the right to self-determination of peoples[^160] and encompasses a specific and unique section on the duties of individuals in the society[^161]. Finally, similarly to its European and American counterparts, the African system has adopted over the years specialized conventions dealing for instance with the subject of children and refugees[^162].

There exist in the world no other human rights systems equivalent to those of Europe, Africa and the Americas[^163]. That being said, in the Arab world the Organization of the Islamic Conference adopted the Cairo Declaration on Human

[^156]: Protocol to the American Convention on Human Rights to Abolish the Death Penalty (8 June 1990) OAS TS 73.
[^159]: Ibid., arts 23-24.
[^160]: Ibid., art 20.
[^161]: Ibid., arts 27-29. The American Declaration of the Rights and Duties of Man (n 152), chap 2 also includes duties.
[^163]: In Asia, no regional human rights system has been established. The Association of Southeast Asian Nations has, however, inaugurated in 2009 the ASEAN Intergovernmental Commission on Human Rights (AICHR). For more details on the AICHR see ASEAN <www.asean.org/22769.htm>.
Rights in 1990. Interestingly, in contrast with the other regional instruments, the Islamic religion and its respect are at the core of the Cairo Declaration, and the instrument recognizes only human rights that are in accordance with the Shari’ah. In 1994, the League of Arab States adopted the Arab Charter on Human Rights, but problems were identified regarding the instrument.

In 2002, a revision process was initiated “to bring [the Arab] Charter provisions into compliance with international standards for human rights”. Following consultations and expert meetings, a revised Arab Charter was adopted in May 2004. In addition to the complete redrafting of the 1994 instrument, the 2004 Charter now includes new rights providing, for instance, for equality between men and women, for the protection of children and of persons with disabilities. Unlike other regional bodies, the Arab Charter does not include individual or inter-state complaints mechanisms. While the Arab Charter which entered into force in March 2008 constitutes an improvement from the 1994 instrument, it has been said that the Charter still does not comply with international human rights standards.

1.6.2. The Adoption of the Additional Protocols to the 1949 Geneva Conventions

In parallel with the further development of human rights law at the international and regional levels, efforts were made to strengthen international humanitarian law. The codification work and the adoption of the four Geneva Conventions in 1949 represented great progress for the protection of the military wounded and sick, shipwrecked, prisoners of war and civilians. Yet, soon after, there existed a general feeling that more protection was needed for victims of armed conflicts, especially during non-international armed conflicts. In that respect, steps to adopt additional rules to protect the civilian population were taken by the International Committee of the Red Cross. In 1956, the organisation “submitted to the governments the Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War”.

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166 Ibid., art 3(3).
167 Ibid., art 34(3).
168 Ibid., art 40.
169 See Rishmawi (n 166) esp 371-376.
of War.”172 Despite the sentiment that more protection was necessary, the impetus to adopt additional international instruments on the given topic was absent and appeared only later in time. Following cooperation between the ICRC and the United Nations, two conferences of experts in 1971 and 1972, and other private consultations, the ICRC published two draft Additional Protocols to the 1949 Geneva Conventions.173 In parallel, the Swiss Federal Council organized the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts and from 1974-1977 held four yearly sessions with over one hundred States represented each time.174 As a result of these efforts, two Additional Protocols to the 1949 Geneva Conventions were adopted, providing respectively for the protection of victims of international and of non-international armed conflicts.175 The adoption of these two Additional Protocols, which encompassed both Geneva Law and Hague Law, formed the next main step in the development of international humanitarian law.

Briefly, the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I)176 developed and supplemented the provisions of the 1949 Geneva Conventions concerning situations of international armed conflicts. Additional Protocol I notably adapted its norms to new types of conflicts and broke new grounds by assimilating to international armed conflicts: “armed conflicts which peoples are fighting against colonial domination and alien occupation and against

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173 Ibid: “In 1965, the International Conference of the Red Cross adopted a resolution urging the ICRC to pursue the development of international humanitarian law. In 1968, the International Conference on Human Rights at Teheran, convened by the United Nations General Assembly, emphasized the need for additional humanitarian conventions, and in the same year, the General Assembly supported this request. In 1969, the International Conference of the Red Cross asked the ICRC to work out proposals for the completion of the humanitarian law and to convene government and other experts for consultation on such proposals.”

174 Ibid.

175 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (8 June 1977) 1125 UNTS 3 [thereafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977) 1125 UNTS 609 [thereafter Protocol II].

176 Protocol I, ibid.
racist regimes in the exercise of their right of self-determination [...]”

As a result, the potential for legal protection broadened significantly, although with little consequence in practice. In addition to this, many other innovative provisions were incorporated in Additional Protocol I; the ICRC succinctly summarized them as follows:

Part III and several chapters of Part IV (Articles 35-60) deal with the conduct of hostilities, i.e. questions which hitherto were regulated by the Hague Conventions of 1899 and 1907 and by customary international law. Their reaffirmation and development is important in view of the age of the Hague Conventions and of the new States which had no part in their elaboration. Article 43 and 44 give a new definition of armed forces and combatants. Among the most important Articles are those on the protection of the civilian population against the effects of hostilities. They contain a definition of military objectives and prohibitions of attack on civilian persons and objects. Further Articles (61-79) deal with the protection of civil defence organizations, relief actions and the treatment of persons in the power of a party to a conflict.

Part V (Articles 80-91) brings some new elements to the problem of the execution of the Conventions and the Protocol.

Regarding the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), it extended the fundamental guarantees of international humanitarian law to victims of non-international armed conflict. In that respect it became a keystone for the protection of victims of non-international armed conflicts who, until then, were protected solely by article 3 common to the 1949 Geneva Conventions (Common Article 3). Briefly, Additional Protocol II strengthened the protection available during non-international armed conflict and developed new humanitarian protections and norms. Despite not succeeding in adopting as far-reaching and comprehensive a framework as Additional Protocol I, Additional Protocol II constituted a great achievement as it pushed States, which were very reluctant to be bound by international regulations, to accept some sort of control over

177 Ibid., art 1(4).
178 The States at whom this provision was largely aimed did not rush to ratify the Protocol.
180 Protocol II (n 175).
their internal affairs. At the same time, it contained a higher threshold of applicability than Common Article 3, and consequently the latter remained of crucial importance.

In sum, while the relationship between international humanitarian law and international human rights law was previously at a standstill, their individual development was ensured by the adoption of important treaties and, in the case of human rights law, also with the adoption of whole new systems for the protection of human rights. The adoption of the two Additional Protocols also saw the direct reference to human rights within humanitarian law instruments which would prove to be a significant step in building the relationship between the two bodies of law.

1.6.3. The United Nations Revisits its Position on International Humanitarian Law

In the 1940s discussions on the relationship of international humanitarian law and international human rights law were generally accompanied by resistance and arguments rejecting wide interaction between the disciplines; the “literature relating to the law of war […] never failed to stress the continuing cleavage between the two branches […].” With the later development of international human rights law and international humanitarian law some links were being created between the disciplines and the international community was slowly accepting the construction of bridges between the two fields of law. Despite the initial reluctance to bring the two fields closer, what was already apparent in the summary records of the International Law Commission’s first session was ultimately affirmed: it is impossible to keep international human rights law and international humanitarian law separate in two

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181 Because of the unwillingness of States to be under tight international control the content of Protocol II was in actual fact abridged from its previous version. On that topic see ICRC, “Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977” <www.icrc.org/ihl.nsf/25ea9da0ca98df37c12563140043817a/aa0c5bcbab5c4a85c12563cd002d6d09?OpenDocument>: “The fear that the Protocol might affect State sovereignty, prevent governments from effectively maintaining law and order within their borders and that it might be invoked to justify outside intervention led to the decision of the Diplomatic Conference at its fourth session to shorten and simplify the Protocol. Instead of the 47 Articles proposed by the ICRC the Conference adopted only 28. The essential substance of the draft was, however, maintained.”

182 For a discussion on threshold of application see below section 2.2.2.

183 Protocol I (n 175) arts 72 and 75. See chapter 3.3.1.

184 Kolb (n 117).
tight compartments. From the 1960s international human rights law and international humanitarian law clearly moved to a second phase in the development of their relationship, that of the establishment of links between them. From this period the international community started to believe that the two legal frameworks could not exist as serious fields of international law without being at least open to interaction with each other. The actors in charge of applying and implementing the disciplines adopted the view that dialogue would have to be put in place between them in order to ensure effectiveness. This process was especially reflected in the work of the United Nations and the International Committee of the Red Cross which dissociated themselves from their earlier positions supporting the compartmentalisation of international human rights and humanitarian law, to advocate a relationship between the disciplines.

From its very establishment, the different bodies of the United Nations had been concerned to some degree with international humanitarian law, and referred to it. From the 1960s the organisation started to appear truly committed to the matter. From that period the United Nations has continuously been involved in the field of international humanitarian law contributing to its development, and the implementation of international humanitarian law by, for instance, reaffirming existing norms, enforcing them through various means and, in other cases, elaborating new rules of a humanitarian nature. The different UN bodies have

185 See section 1.6.1.
participated in strengthening the protection for situations of armed conflict through, for example, reports, recommendations, resolutions, declarations and international treaties linked to or on humanitarian law topics. From the 1960s, the United Nations also directly acknowledged for the first time the growing necessity to facilitate the creation of closer links and interaction between international human rights law and international humanitarian law.

The aftermath of the Arab-Israeli conflict in 1967 had a strong impact on the involvement of the United Nations in the field of international humanitarian law. As noted by Michael Bothe, “the issue of “Human rights in occupied territories” prompted the pressure in the United Nations towards a further development of IHL in the late 60s and early 70s.” At that time international human rights law was still considered a new emerging discipline, and international humanitarian law an established, stronger framework more fitted to deal with the situation in occupied territories. This prompted the United Nations to use international humanitarian law in a way it never had before. The fact that it was this specific conflict that had this particular impact on the rapport of the United Nations with international humanitarian law is perhaps not so surprising today. The Israeli-Palestinian conflict has been given much attention (disproportionate attention according to some) and this continues to generate debate. The practices of Israel have provoked the emergence of an important number of humanitarian law related documents.


Other factors contributed to the developments in the 1960s. Other conflicts, such as the Vietnam War and the conflict between the Biafran and Nigerian forces, were ongoing. As will be discussed in chapter 3.4 the decolonisation and changing nature of conflicts were also a crucial impetus for the United Nations to start referring to international humanitarian law.

Bothe (n 188) 219.


For instance, see UN Doc A/RES/2443 (XXIII) (1968); UN Doc A/RES/2851 (XXVI) (1972); UN Doc A/37/698 (1982); UN Doc A/45/613 (1990); UN Doc S/RES/799 (1992); UN Doc A/55/571 (2000); UN Doc A/RES/ES-10/7 (2000); UN Doc A/57/315 (2002); UN Doc A/58/156 (2003). Other documents on the issue include ‘Peaceful Settlement of the Question of Palestine. Report of the Secretary-General’, UN Doc A/60/539 – S/2005/701 (2005); ‘Applicability of the Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including East Jerusalem, and the other Occupied Arab Territories’, UN Doc A/RES/59/122 (2005); ‘Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem, and the Occupied Syrian Golan’, UN Doc A/RES/59/123 (2005); ‘Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem, and the Occupied Syrian Golan’, UN Doc
starting with the adoption of Resolution 237 by the UN Security Council.\textsuperscript{193} After asserting that human rights “should be respected even during the vicissitudes of war” and that the Third Geneva Convention “should be complied with by the parties involved in the conflict”,\textsuperscript{194} Resolution 237 appealed for the direct application of humanitarian norms in Israel:

The Security Council […]

1. \textit{Calls upon} the Government of Israel to ensure the safety, welfare and security of the inhabitants of the areas where military operations have taken place and to facilitate the return of those inhabitants who have fled the areas since the outbreak of hostilities;

2. \textit{Recommends} to the Governments concerned the scrupulous respect of the humanitarian principles governing the treatment of prisoners of war and the protection of civilian persons in time of war contained in the Geneva Conventions of 12 August 1949;

3. \textit{Requests} the Secretary-General to follow the effective implementation of this resolution and to report to the Security Council.

This resolution, providing for the protection of human rights in times of armed conflict as well as calling for respect of international humanitarian law, reflected what was becoming evident for the United Nations and others: the necessity to build bridges between international human rights and humanitarian law and between the actors involved in implementing these legal frameworks.

Shortly after the adoption of Resolution 237, the United Nations began to discuss more seriously the respect of human rights in times of armed conflict and how the relationship between international human rights and international humanitarian law should be tackled. As opposed to considering international humanitarian law and international human rights law as two different areas that should not interact with each other, emphasis was put on the similarities between the disciplines and how they could be beneficial to one another.

To celebrate the 20\textsuperscript{th} anniversary of the Universal Declaration of Human Rights, the United Nations proclaimed 1968 as the ‘International Human Rights

\textsuperscript{193} UN Doc S/RES/237 (1967).
\textsuperscript{194} Ibid., Preamble.
Year’.\footnote{On the designation of 1968 as the International Year for Human Rights, see UN Doc A/RES/1961 (XVIII) (1963); UN Doc A/RES/2081 (XX) (1965); UN Doc A/RES/21/2217 (1966).} For this occasion an ‘International Conference on Human Rights’ was convened in Tehran in April and May, aiming “to review the progress made in the twenty years since the adoption of the Universal Declaration of Human Rights and to formulate a programme for the future […].”\footnote{‘Proclamation of Tehran’, Final Act, International Conference on Human Rights, Tehran, 22 April-13 May 1968, UN Doc A/CONF. 32/41 (1968), Preamble.} The Tehran Conference discussed at length the application of human rights in times of armed conflict and became a decisive event for the relationship between international human rights law and international humanitarian law. In its proclamation the international conference linked the existence of armed conflicts with human rights violations; the Conference highlighted the impact of conflicts on human rights and called upon the international community to react to those situations affirming:

Massive denials of human rights, arising out of aggression or any armed conflict with their tragic consequences, and resulting in untold misery, engender reactions which could engulf the world in ever growing hostilities. It is the obligation of the international community to co-operate in eradicating such scourges […]\footnote{Ibid., para 10.} The importance of the Tehran Conference for the relationship between international human rights law and international humanitarian law was noted by many including Louise Doswald-Beck and Sylvain Vité who observed:

The true turning point, when humanitarian law and human rights gradually began to draw closer, came in 1968 during the International Conference on Human Rights in Tehran, at which the United Nations for the first time considered the application of human rights in armed conflict. […] Humanitarian law thus branched out from its usual course of development and found a new opening within the UN […]\footnote{L Doswald-Beck and S Vité, ‘International Humanitarian Law and Human Rights Law’ (1993) 293 IRRC 94.} In addition to the Proclamation, the Conference adopted another important document. Resolution XXIII elaborated on the impact armed conflicts have on human rights and also touched upon many contemporary problems in the application of international humanitarian law.\footnote{‘Human Rights in Armed Conflicts’, Resolution XXIII, International Conference on Human Rights, Tehran, 12 May 1968, Preamble.} The resolution finally requested the United Nations General Assembly, the Secretary-General and States to secure better protection of human rights during armed conflicts:
The International Conference on Human Rights,

1. Requests the General Assembly to invite the Secretary General to study:
   a) Steps which could be taken to assure the better application of existing humanitarian international conventions and rules in all armed conflicts, and
   b) The need for additional humanitarian international conventions or for possible revision of existing Conventions to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare.

2. Requests the Secretary-General, after consultation with the International Committee of the Red Cross, to draw the attention of all States members of the United Nations system to the existing rules of international law on the subject and urge them, pending the adoption of new rules of international law relating to armed conflicts, to ensure that in all armed conflicts the inhabitants and belligerents are protected in accordance with "the principles of the law of nations derived from the usages established among civilized peoples, from the laws of humanity and from the dictates of the public conscience;"

3. Calls on all States which have not yet done so to become parties to the Hague Conventions of 1899 and 1907, the Geneva Protocol of 1925, and the Geneva Conventions of 1949.

First in a series of similar UN initiatives, Resolution XXIII remains to this day a key document for the relationship between international humanitarian law and international human rights law; it paved the way for the adoption of subsequent documents providing for the protection of individuals during armed conflicts.

Subsequent to its adoption in Tehran, Resolution XXIII was acknowledged and confirmed by the United Nations General Assembly in Resolution 2444 (XXIII) entitled ‘Respect for Human Rights in Armed Conflicts’. The General Assembly asserted therein “that the provisions of [the Tehran] Resolution need[ed] to be implemented effectively as soon as possible”. In addition to this, General Assembly Resolution 2444 affirmed and reiterated the humanitarian principles incorporated in another resolution, Resolution XXVIII adopted at the XXth International Conference of the Red Cross in Vienna. In a similar manner to the Tehran Resolution, General Assembly Resolution 2444 invited the United Nations Secretary-General to study the possibility of adopting new humanitarian norms and to improve the implementation of international humanitarian law. Interestingly, as

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202 Ibid., Preamble.
203 ‘Protection of Civilian Populations against the Dangers of Indiscriminate Warfare’, Resolution XXVIII, XXth International Conference of the Red Cross, Vienna, 1965. For instance, this resolution affirms “that the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited” and “that it is prohibited to launch attacks against the civilian populations".
noted by Bennoune “though the resolution [2444] is entitled "Respect for Human Rights in Armed Conflicts,“ it makes no specific mention of human rights law or standards, but focuses exclusively on IHL”. That alone seems to illustrate the growing conviction of the General Assembly in 1968 that international human rights and humanitarian law were intertwined.

General Assembly Resolution 2444 led the way to many United Nations initiatives contributing to the creation of bridges between international humanitarian law and international human rights law. Since 1968 the respect for human rights in armed conflict has been included every year on the agenda of the General Assembly and has been the object of many more documents from this organ. In fact, as will be discussed in more length in subsequent chapters, from 1968 onwards United Nations bodies have shown increasing interest in international humanitarian law and the involvement of the organisation has been extremely wide and varied on this subject.

1.6.4. The International Movement of the Red Cross and Red Crescent

In parallel to the United Nations’ new position advocating interaction between international humanitarian law and international human rights law, a similar transition occurred within the International Movement of the Red Cross and Red Crescent, especially the International Committee of the Red Cross. The organisation was facing difficulties in responding adequately to conflicts and other types of violence. This, coupled with its role in the promotion of peace, brought the institution to accept the creation of closer links between the two disciplines and to take initiatives affirming its commitment to the respect and promotion of international human rights law.

While resisting the creation of links between the two frameworks, the International Committee of the Red Cross was dealing with and was influenced by international human rights law at least to some degree already at the beginning of the

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206 See chap 5.1.
207 See chap 1.5.4.
1940s during the drafting process of the Geneva Conventions. The XVII\textsuperscript{th} International Conference of the Red Cross in Stockholm in 1948 was one of the first events showing the interest of the International Movement of the Red Cross and Red Crescent in international human rights law. There the Movement stated its commitment to peace, and by the same token to human rights. During this event, and at every subsequent international conference, the International Movement proclaimed its dedication to the cooperation and sustainable peace between peoples.\textsuperscript{208} As noted by Haug, the International Movement specified more clearly at the Stockholm Conference its position and role in the maintenance of peace:

Over the years, the International Movement reiterated its commitment to peace in similar language to that used in Stockholm. In Prague, in 1961, the Council of Delegates of the International Movement declared the principle of humanity as one of the seven fundamental principles of the Red Cross and Red Crescent. The text explaining this principle was adopted in 1965 by the 20\textsuperscript{th} International Conference of the Red Cross as follows:

[The] International Red Cross and Red Crescent Movement, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours, in its international and national capacity, to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, cooperation and lasting peace amongst all peoples.\textsuperscript{210}


\textsuperscript{209} Haug (n 4) 595. ‘The 1948 International Red Cross Conference in Stockholm confirmed the commitment of the institution in working to promote an international understanding able to bring true and lasting peace between nations. It declared for the first time that peace is not merely the absence of war and that the Red Cross has a dual function: on the one hand, to alleviate human suffering and, on the other hand, to contribute to a better understanding between men and nations, which because of their diversity and different interests often live in tension or even hostility.’ [Translated by the author]

\textsuperscript{210} ICRC (n 132) 2. See also J Pictet, ‘The Fundamental Principles of the Red Cross: Commentary’ (1979)
The commitment to peace of the International Movement was also confirmed in the *Per humanitatem ad pacem*\(^{211}\) motto adopted by the Council of delegates of the International Red Cross in Prague. In his commentary on the fundamental principles of the Red Cross and Red Crescent, Pictet explained the motto and the interest of the institution in peace as follows:

> The founders of the Red Cross, Henry Dunant in particular, considered at the very beginning that the ultimate objective of the work they set in motion and the Convention they inspired was none other than that of universal peace. They understood the fact that the Red Cross, by pressing its ideal to its logical outcome, would be working for its own abolition, that a day would come when, men having finally accepted and put into effect its message of humanity by laying down and destroying their arms and thus making a future war impossible, the Red Cross would no longer have any reason for being. This is the meaning of the motto, *Per humanitatem ad pacem* which stands before the Constitution of the League of Red Cross Societies, along with the traditional slogan, *Inter arma caritas* [‘In war, charity’].\(^{212}\)

The reference to the wish to provide assistance without discrimination, protect life and health and promote “mutual understanding, friendship, cooperation and lasting peace amongst all peoples”\(^{213}\) echoed without a doubt international human rights instruments including the Universal Declaration of Human Rights. These references indicated quite clearly how the International Movement of the Red Cross and Red Crescent, and especially the ICRC, were dissociating themselves from their earlier stance on the relationship with international human rights.

In September 1969, probably also influenced by the International Conference on Human Rights in Tehran, the International Movement of the Red Cross and Red Crescent showed at its 21\(^{st}\) International Conference in Istanbul a clear desire to work more closely and build a partnership with international human rights law and the actors involved in its protection and implementation. As summed up by Robertson:

> The 21\(^{st}\) International Conference of the Red Cross in Istanbul in September 1969 requested the United Nations to pursue its effort in this field and encouraged the International Committee of the Red Cross to maintain and develop its cooperation with the United Nations, so that the recognition of convergent interests was now apparent on both sides. The

\(^{211}\) ‘Through humanity towards peace’.

\(^{212}\) Pictet (n 210).

\(^{213}\) See note 210 and accompanying text.
Istanbul Conference also echoed the Tehran resolution and invited the ICRC to pursue its work designed to propose new rules to supplement the existing rules of humanitarian law and recommended the convocation of a diplomatic conference for the purpose.\textsuperscript{214}

In addition to the Istanbul Conference, two other international conferences were held - in Belgrade in 1975 and in Aaland and Stockholm in September 1984. The two World Conferences of the Red Cross on Peace contributed greatly to the acknowledgment and weaving of closer links between international humanitarian law and international human rights law. For instance, the Programme of Action of the Red Cross as a Factor of Peace emerging from the Belgrade conference encompassed a proposal for the International Movement of the Red Cross and Red Crescent to work directly towards achieving peace. The preamble of the Programme of Action included the respect for human rights in its definition of peace. Following this, lasting peace “is not simply the absence of war, but is a dynamic process of cooperation among all States and peoples, cooperation founded on respect for freedom, independence, national sovereignty, equality, human rights, as well as on a fair and equitable distribution of resources to meet the needs of peoples.”\textsuperscript{215} The Second World Conference on Peace brought an equivalent contribution and open-mindedness to the possibility of multiplying the links between human rights and international humanitarian law. The Conference adopted the Fundamental Guidelines for the Contribution of the Red Cross and Red Crescent Movement to a True Peace in the World and reaffirmed therein the inclusion of human rights within the definition of peace.\textsuperscript{216}

Many initiatives followed the World Conferences of the Red Cross on Peace, initiatives which strengthened in effect the commitment of the organisation to human rights. As such, in 1977 the XXII International Conference of the Red Cross held in Bucharest established the Commission on the Red Cross, Red Crescent and Peace.

\begin{itemize}
\item \textsuperscript{214} A H Robertson, ‘Humanitarian Law and Human Rights’ in C Swinarski (ed), \textit{Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet} (ICRC/Martins Nijhoff, Geneva/The Hague 1984) 796. See also Haug (n 4) 635.
\item \textsuperscript{215} ICRC, ‘25th International Conference of the Red Cross, Geneva, 23 to 31 October 1986, Resolution 4’ (1986) <www.icrc.org/eng/resources/documents/misc/57jmd7.htm>. Haug, \textit{ibid.}, 599. The Statutes of the International Red Cross and Red Crescent Movement (n 131) also confirmed this definition in its Preamble by declaring that “the Movement promotes a lasting peace, which is not simply the absence of war […].”
\end{itemize}
Geneva, in 1983, the Council of Delegates gave the Commission the responsibility to study the subject further and examine in what manner the Red Cross and Red Crescent Movement could contribute to the respect and implementation of human rights. A report emerged from the study in 1989 and affirmed the growing dedication of the movement to human rights.  

The Commission on the Red Cross, Red Crescent and Peace convened in 1995 presented a final report in its last meeting, which included proposals concerning the protection of human rights in times of armed conflict:

The Commission [...] made proposals on various other subjects. Its recommendations included:

- Further study of the Movement’s contribution to respect for the rights of the child, with special emphasis on the need to pursue efforts being made for street children and exploited children (forced labour, child prostitution); and an analysis of what the Movement in general and the National Societies in particular were doing in that area and of what practical steps could be taken.

- Implementation of the conclusions of the study carried out by the Henry Dunant Institute on the role of National Societies in preventing tension and conflicts involving minorities.

- Support for the work done by the Federation on the question of health and AIDS in connection with respect for human rights.

Finally, the Commission pointed out that the Movement was also working for peace through its activities and its spirit of tolerance, which were conducive to preventing disregard for human rights and tension arising from differences of culture or ethnic background.

The Council of Delegates entrusted the Standing Commission with the task of pursuing the study and work on the prevention of conflicts and the Movement’s contribution to peace.

In parallel to other activities of the International Movement, the International Committee of the Red Cross also directly acknowledged in 1983 the existence of links between international humanitarian law and international human rights law.
noted by Robertson, that year the ICRC published an important document tackling its relationship with international human right law:

In October 1983 the ICRC presented to the Council of Delegates of the Red Cross a very interesting and important report on “The Red Cross and Human Rights” which had been prepared by the International Committee in collaboration with the Secretariat of the League of Red Cross Societies. This report devotes a separate section to the question of relationship between international humanitarian law and human rights.²¹⁹

As will be discussed in more detail in later chapters, the International Movement of the Red Cross and Red Crescent, and most particularly the ICRC, have been involved in many other initiatives concerning human rights issues over the years. For instance, documents on discrimination and torture have been adopted at different International Conferences of the Red Cross; the ICRC has presented reports to the United Nations General Assembly on the protection of environment and undertaken activities on issues related to detention, right to life, and other subjects of joint concern to human rights and humanitarian law; the ICRC has also been granted observer status at the United Nations and has produced a study on customary international humanitarian law which encompasses both human rights and humanitarian principles.²²⁰ In sum, just as was the case for the United Nations, the International Committee of the Red Cross and the International Movement more generally, became from the 1960s more open to discussing the concurrent application of international humanitarian law and international human rights law and increasingly engaged in the protection and promotion of this latter discipline.

Recent decades confirmed the existence and establishment of a lasting relationship between international human rights and international humanitarian law. This has not, however, solved the many doubts and uncertainties about the functioning of the concurrent application and interplay between the two fields of law. The following chapters will address some of those doubts and uncertainties, and examine how the relationship between international humanitarian and human rights law has developed and continues to develop since its establishment.

²¹⁹ Robertson (n 214) 800-801.
²²⁰ See chap 5.3.
2. Understanding the Scope of Application of International Humanitarian Law and International Human Rights Law

The scope of application of international humanitarian law and international human rights law dictates the applicable norms in situations of armed conflict. The scope of application of each discipline also has a direct impact on their concurrent application and interplay. In the context of armed conflicts, the scope of application of international humanitarian law and international human rights law raises complex issues, including questions on the threshold for the application of the different humanitarian treaties and norms, the qualification of armed conflicts and the basis for deciding the status of individuals involved in conflicts. In the ambit of this work, what needs to be considered are not necessarily these questions but rather what are the main jurisdictional issues related to, and likely to have an impact on, the relationship between international humanitarian law and international human rights law and the articulation of their interplay. The scope of application of the disciplines converges and diverges, and has provided arguments both in favour and against the creation of a partnership between them. This chapter explores the jurisdictional aspects of each discipline which continue to create natural links and, in contrast, obstacles to their concurrent application. It will examine to what, for whom, where and when, are international humanitarian law and international human rights law applicable.

2.1. Jus ad bellum and Jus in bello

When examining the jurisdictional aspects of international humanitarian law it is important to understand that the reasons behind armed conflicts, the justification for launching hostilities, should not affect the applicability of this legal framework. Under public international law, armed conflicts can be examined through two different angles, the *jus ad bellum* (law on the resort to war) and the *jus in bello* (law in war). These two aspects are distinct under international law. The *jus in bello* regulates the conduct of hostilities and provides protection during armed conflicts. The *jus in bello* is formed by all international humanitarian law instruments, including the 1949 Geneva Conventions and their Additional Protocols, and customary international humanitarian law. The *jus ad bellum* regulates the legal
grounds for entering into armed conflicts; it lays out the circumstances in which it would be justified for a State to use force against another State. The primary instrument of *jus ad bellum* is the Charter of the United Nations.¹

Since September 11, 2001, there have been new attempts to link the *jus ad bellum* and the *jus in bello*. It has been asserted by some that the motives behind conflicts and the way States initiate them can have an impact on the applicability of the law regulating the conduct of hostilities and the humanitarian protection of persons. The concept of just/unjust war has resurfaced and been used to justify disregard of international humanitarian law obligations in cases of alleged acts of terrorism and aggression. This re-opened the debate on the independent application of the *jus ad bellum* and the *jus in bello* and raised vital questions for the protection of individuals during armed conflict. In that context, Bugnion asked:

Can a belligerent set aside his obligations under international humanitarian law and refuse to respect its rules on the grounds that he is the victim of an aggression?

This question raises a broader issue: are the rules governing relations between belligerents (*jus in bello*) autonomous, or is their application conditioned by the rules prohibiting the recourse to force (*jus ad bellum*)? Can the fact that one side has launched a war of aggression alter the conditions of application of *jus in bello* and, more specifically, the conditions of application of the humanitarian rules?²

The linkage of the *jus ad bellum* and the *jus in bello*, and the reference to the illegal use of force by a State to excuse or justify disrespect of international humanitarian law by other States, have to be rejected on many grounds. First, the humanitarian purpose behind international humanitarian law entails that the legal protections embedded in the instruments apply to all parties to a conflict without

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¹ Charter of the United Nations (26 June 1945) Can TS 1945 No 7. While allowing in article 51 the use of force in certain circumstances, the United Nations Charter asserts in article 2(4) that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” The Covenant of the League of Nations and the Kellogg-Briand Pact were the first instruments to restrict the use of force. In the preamble of the Covenant the High Contracting Parties accepted the “obligations not to resort to war”. The Kellogg-Briand Pact stipulates in article I: “The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.” Covenant of the League of Nations (Including Amendments Adopted to December 1924) (28 April 1919); Kellogg-Briand Pact (27 August 1928) 94 LNTS 57.

distinction between the aggressor and the victims of aggression. As reiterated by Greenwood, the opposite would in fact go against the role of international humanitarian law in the protection of victims of armed conflict:

[T]he overwhelming majority of the laws of war seek to benefit and protect not the belligerent States themselves but individuals caught up in the conflict. Even if the State to which they owe allegiance has acted unlawfully in resorting to force, the population of that State cannot be regarded as responsible for that illegality and should not, therefore, be deprived of the protection which the laws of war afford. 3

The second reason supporting the dissociation of the *jus ad bellum* and *jus in bello* is of a more practical nature. Simply, identifying in an armed conflict which State is the aggressor and which one is the victim is undoubtedly a contentious issue and will always be problematic. In fact, considering who are the aggressor and the victim States before deciding upon the application of international humanitarian law would be harmful. 4 Such a move also risks being legally unsound, going against article 1 common to the 1949 Geneva Conventions, as well as Additional Protocol I. Common Article 1 affirms that: “[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” This provision indicates clearly that international humanitarian law is detached from the *jus ad bellum*. This article emphasizes that the Geneva Conventions are disconnected from the concept of reciprocity and that the reasons beneath a conflict or the nature of a conflict should have no impact on the application of international humanitarian law. The Commentary on the First Geneva Convention confirms this by specifically asserting:

The words “in all circumstances” mean that, as soon as one of the conditions of application for which Article 2 provides is present, no Power bound by the Convention can offer any valid pretext, legal or other, for not respecting the Convention in all its parts. The words “in all circumstances” mean in short that the application of the Convention does not depend on the character of the conflict. Whether a war is “just” or “unjust”, whether it is a war of aggression or of resistance to aggression, the protection and

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4 See for instance Greenwood, *ibid.*, 178; “If the application of the laws of war varied as between the aggressor and the victim of aggression, the scope for abuse would be enormous. Each State would claim that it was not subject to the obligations of the laws of war and would deny the benefits of those laws to its opponent on the ground that that opponent was the aggressor. Indeed, a State keen to portray itself as the victim of aggression- whether or not with justification- might feel that it had to deny the applicability of the laws of war, since to accept that they applied might be taken as weakening its stance on the question of aggression.”
care due to the wounded and sick [or other protected persons] are in no way affected.\(^5\)

The Preamble of Additional Protocol I reiterates that principle.\(^6\) In sum, it is safe to say that international humanitarian law has a distinct existence, and its application should not be influenced by the *jus ad bellum*; international humanitarian law applies and should always continue to apply irrespective of the causes of armed conflicts.

The link, or rather the lack of link, between the *jus ad bellum* and the *jus in bello* is almost exclusively discussed in the context of the application of international humanitarian law, to highlight how this field of international law is disconnected from the *jus ad bellum* and from the reasons behind the fighting. In a paper on the concurrent application of international human rights law and the law of armed conflict,\(^7\) Schabas discusses the *jus ad bellum* and *jus in bello* in another context, that of international human rights law. He posited that the way human rights law views the *jus ad bellum* and the *jus in bello* is a notable divergence with the framework of international humanitarian law. Schabas asserts that there is “a fundamental difference in conception between the two systems, namely the attitude they take to aggressive war.” He puts forward that while international humanitarian law rejects violation of the *jus ad bellum* as having an impact on the *jus in bello*, this is not the case for international human rights law. He suggests that, influenced by the human right to peace, international human rights law considers that violations of the *jus ad bellum* have an effect on the application of the *jus in bello*. The argument proposed by Schabas suggests that to decide upon whether a certain act constitutes a violation of international human rights law during an armed conflict there would first need to be a decision on whether a violation of the *jus ad bellum*, an act of aggression, has

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\(^6\) The preamble asserts that “the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict […]”

been committed. Schabas sees this difference as an obstacle in the current efforts to bring international human rights and international humanitarian law closer: “No solution to the problem of compatibility can be found because the two regimes have a fundamental incompatibility, rooted in their differing attitudes to the jus ad bellum.”

2.2. Jurisdiction Ratione Materiae: To what does it apply?

2.2.1. International Humanitarian Law and International Human Rights Law

The precondition for the applicability of international humanitarian law is the existence of an armed conflict. Once a conflict is ongoing, the type of protection offered to individuals under international humanitarian law will depend on the character of the armed conflict - whether it is of an international or a non-international nature. These two different categories of conflicts were created after long discussions during the preparatory phase of the Geneva Conventions and following the rejection of the establishment of a single humanitarian legal framework for the protection of individuals in all armed conflicts. Under international humanitarian law each type of conflict now has its own legal regime and sets of norms. The separation of substantive norms according to the type of conflict means that protected persons who find themselves in a situation of international armed conflict can receive the protection of the whole of the Geneva Conventions and of Additional Protocol I. In contrast, in a non-international

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8 Ibid., 593
9 Ibid., 612. See also ibid., 610: “To the extent that international human rights law views aggressive war as a violation of the right to peace, there is a point where efforts to reconcile it with international humanitarian law can go no further.”
10 See Common Article 2 of the projects of conventions presented in Stockholm at the XVIIth International Red Cross Conference; this draft article on the material scope of application of international humanitarian law included both international and non-international armed conflict: ‘Projets de conventions révisées ou nouvelles protégeant les victimes de la guerre’, XVII Conférence internationale de la Croix-Rouge (Stockholm, August 1948) (ICRC, Geneva 1948) 5-6, 35-36, 53-54, 156-157. For the debates on this provision see ‘Rapport sur les travaux de la Conférence d’experts gouvernementaux pour l’étude des Conventions protégeant les victimes de la guerre’ (Geneva, 14-26 April 1947) 105, 285-287.
11 Convention relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 31 [First Geneva Convention]; Convention relative to the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 75 UNTS 85 [Second Geneva Convention]; Convention relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135 [Third Geneva Convention]; Convention relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287 [Fourth Geneva Convention].
armed conflict, individuals will be protected only by article 3 common to the 1949 Geneva Conventions and possibly by Additional Protocol II (depending on its applicability threshold being crossed), as well as by customary international law.\textsuperscript{13} Practically, there exist five types of situations capable of triggering the application of international humanitarian law: international armed conflict falling under the protection of the Geneva Conventions and Additional Protocol I; occupation falling under the protection of the four Geneva Conventions and Additional Protocol I; “wars of national liberations” meeting the threshold of application of Additional Protocol I; non-international armed conflict subject to article 3 common to the four Geneva Conventions; and non-international armed conflict subject to Additional Protocol II.

In contrast, international human rights law is applicable in all situations or, as put by a former Secretary-General of the United Nations, human rights are applicable “always, everywhere”\textsuperscript{14}. As opposed to international humanitarian law, the application of international human rights law is not dependent on the existence or not of an armed conflict. The International Covenant on Civil and Political Rights stipulates that: “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”\textsuperscript{15}. The European Convention, the American Convention, the African Charter and Arab Charter also include similar provisions.\textsuperscript{16}

The material scope of application of specialised human rights treaties includes provisions to the effect that States agree to respect and ensure respect of the rights enshrined in the given treaties. For instance the Convention on the Rights of the Child affirms: “States Parties shall respect and ensure the rights set forth in the

\begin{thebibliography}{9}
\bibitem{12}Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (8 June 1977) 1125 UNTS 3, art I(3) [Protocol I].
\bibitem{13}Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977) 1125 UNTS 609 [Protocol II].
\bibitem{14}UN Secretary-General, ‘Respect for Human rights in armed conflicts’, UN Doc A/8052 (1970) 13, para 25.
\bibitem{15}International Covenant on Civil and Political Rights (16 December 1966) GA Res 2200A (XXI), UN Doc A/6316 (1966), 999 UNTS 171, art 2(1).
\end{thebibliography}
present Convention to each child within their jurisdiction”. While it provides for continued application, international human rights law in certain circumstances sanctions limitations and derogations to some human rights.

The material scope of application of international human rights law and international humanitarian law both diverge and converge. They diverge in so far as the material scope of application of international humanitarian law is based on the existence of an armed conflict and that its protection is divided according to the different types of armed conflicts. Conversely, the jurisdiction ratione materiae of international human rights and international humanitarian law converge. Since the application of human rights treaties is not dependent on the existence of conflict, human rights law will apply and its jurisdiction might overlap with that of international humanitarian law.

2.2.2. International Humanitarian Law: Categories of Conflict

*International Armed Conflict*

The 1949 Geneva Conventions were the first humanitarian law instruments to stipulate the conditions of application within their framework. Article 2 common to the Geneva Conventions (Common Article 2) states that:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The drafters of the Conventions used the term ‘armed conflict’ on the basis that it would be more difficult to circumvent or question the material scope of application of the instruments with the term ‘armed conflict’ than with the word ‘war’. While

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18 See section 2.4.2.
19 Pictet (n 5) vol I, 28: “The earlier Conventions were silent as to the conditions calling for their application. They were obviously intended for use in time of war [and their title suggest so]. In the absence of any other indication, it was generally agreed that this meant only international war, regularly declared, with recognition on either side that a state of war existed.” See also Pictet (n 5) vol II, 27; de Preux (n 5) 19; Uhler and Coursier (n 5) 17.
20 Geneva Conventions (n 11) Common Article 2(1).
21 Pictet (n 5) vol I, 32: “The substitution of this much more general expression [armed conflict] for the word “war” was deliberate. One may argue almost endlessly about the legal definition of “war”. A State can always pretend, when it commits a hostile act against another State, that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression
Common Article 2 asserts that the Conventions apply as soon as an armed conflict occurs between two High Contracting Parties, it does not include a definition of international armed conflict. The Commentaries to the First, Third and Fourth Geneva Conventions explain that the delegations at the Diplomatic Conference leading to the adoption of the Conventions understood that:

Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims. Nor, incidentally, does the application of the Convention necessarily involve the intervention of cumbersome machinery. It all depends on circumstances. 22

Thus, without needing agreement on the situation, “[i]nternational armed conflicts exist whenever there is resort to armed force between two or more States.”23

In 1949 it was agreed that international armed conflicts would include two things, situations of conflict between two States, as well as situations of belligerent occupation.24 In that respect, Common Article 2(2) of the Geneva Conventions included within its material scope of application “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.”25 The earlier version of article 2, which was perhaps even clearer, stated that the Geneva Conventions would apply to “cases of occupation of territories in the absence of any state of war”.26 Common Article 2(2) does not relate to territories occupied during a conflict, as a result of a conflict or after hostilities have taken place. In such cases the protection of international humanitarian law would already be in effect through Common Article 2(1) and apply from the beginning of hostilities. Rather, Common Article 2(2) was adopted to

22 Pictet (n 5) vol I, 32-33. See also Pictet (n 5) vol II, 28; Uhler and Coursier (n 5) 20.
24 Article 42(1) of the Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (18 October 1907) specifies that: “Territory is considered occupied when it is actually placed under the authority of the hostile army.”
25 Geneva Conventions (n 11) art 2(2).
ensure that people offering no resistance to an occupier, as had been the case in World War II, would also benefit from the protection of the Conventions. As a result, when there is a lack of armed response to an occupation, the Geneva Conventions apply to protected persons as soon as a territory of a High Contracting Party is occupied.27

In the years following the adoption of the 1949 Geneva Conventions there was a general sentiment that the legal protection of victims of armed conflicts should be better developed to respond to new types of conflicts. That resulted in the adoption of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts. Additional Protocol I “supplements the Geneva Conventions of 12 August 1949”28 and applies to the “situations referred to in Article 2 common to those Conventions.”29 The delegations involved in the preparatory work leading to the adoption of Additional Protocol I debated the possibility of broadening the material scope of application of the instrument to include wars of national liberation within the definition of international armed conflict. By 1949 the nature of armed conflicts had changed considerably and the right to self-determination had also been recognized within the United Nations Charter and other human rights instruments. With that as background, the inclusion of wars of national liberation was agreed upon, and Additional Protocol I expanded its field of application to encompass:

armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.30

This inclusion secured the application of the whole of the Geneva Conventions to peoples, in the specified circumstances, engaging in armed conflict to implement their right of self-determination.

27 For more details on the inclusion of this paragraph see Pictet (n 5) vol I, 33; Pictet (n 5) vol II, 28-29; de Preux (n 5) 23; Uhler and Coursier (n 5) 21.
28 Protocol I (n 12) art 1(3).
29 Ibid.
30 Ibid., art 1(4)
Non-international Armed Conflict

Within the framework of international humanitarian law individuals in situations of non-international armed conflicts could be protected by article 3 common to the Geneva Conventions and by the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts. The preparatory work preceding the adoption of the 1949 Geneva Conventions almost completely excluded humanitarian protection for conflict not of an international character. The Diplomatic Conference reached an impasse on that subject and, before the French delegation put forward a new proposal, an agreement on the adoption of rules applicable to non-international armed conflicts seemed unachievable. The French delegation discarded the proposal to apply the whole of the Geneva Conventions to situations of non-international armed conflict. Instead, it suggested the adoption of a single provision which would apply to that type of conflict and provide for the application of the principles included in the preamble to the Geneva Conventions. Common Article 3 was developed from this proposal and now stipulates that “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply” the minimum provisions included in the article.

Common Article 3 does not provide a definition of the situations it seeks to regulate. Yet, a consecutive reading of Common Article 3 and Common Article 2 shows that:

[a] non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions within its territory.

During the Diplomatic Conference leading to the adoption of the 1949 Conventions many delegations expressed concerns that in a non-international context armed conflict could be interpreted as covering “any form of anarchy, rebellion, or even...
plain banditry”.

With that in mind the delegations requested the inclusion in Common Article 3 of at least some sort of definition of non-international armed conflict. The request was rejected and as a result non-international armed conflict is not defined within the Geneva Conventions. The series of amendments made during the drafting of article 3, however, provided examples of situations or criteria which can facilitate the identification of non-international armed conflicts. As summarized in the Commentary to the First Geneva Convention, the conditions triggering the application of Common Article 3 were thought to be:

(1) That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.

(2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.

(3) (a) That the de jure Government has recognized the insurgents as belligerents; or
(b) that it has claimed for itself the rights of a belligerent; or
(c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
(d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.

(4) (a) That the insurgents have an organisation purporting to have the characteristics of a State.
(b) That the insurgent civil authority exercises de facto authority over persons within a determinate territory.
(c) That the armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war.
(d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.

As opposed to international armed conflict, as well as non-international conflict under Additional Protocol II, the material scope of application of Common Article 3 does not necessitate State involvement. The material scope of application of Common Article 3 is such that this provision applies to armed conflict between non-state actors. This is particularly important nowadays, when there are an

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34 Pictet (n 5), vol I, 49.
35 Ibid, 49-50. As Provost notes, however, these criteria were discussed in a broader context than that of article 3, when the option of applying the whole of the Geneva Conventions was on the table. Thus, these conditions cannot really be used to restrict the scope of application of Common Article 3. R Provost, International Human Rights and Humanitarian Law (Cambridge University Press, Cambridge 2002) 266.
increasing number of conflicts of this form. To reach judicial decisions, the International Criminal Tribunal for the former Yugoslavia (ICTY) analysed and defined more precisely what would amount to situations of non-international armed conflicts. In 1995 in the first case before them, and subsequently in other cases, the judges of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia asserted that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”

The ICTY has also indicated that the basic threshold required to confirm the existence of a non-international armed conflict under Common Article 3 “focuses on two aspects of a conflict; the intensity of the conflict and the organisation of the parties to the conflict.” As summed up by the ICRC, following the first criterion to assess whether a situation constitutes a non-international armed conflict within the framework of the 1949 Geneva Conventions: “the hostilities must reach a minimum level of intensity. This may be the case, for example, when the hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces.” Secondly, it has been stated that “non-governmental groups involved in the conflict must be considered as “parties to the conflict”, meaning that they possess organized armed forces. This means for example that these forces have to be under a certain command structure and have the capacity to sustain military operations.”

The 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts “develops and supplements Article 3 common to the Geneva Conventions”. The material field of application of Additional Protocol II differs from that of Common


37 Prosecutor v. Tadić (Judgment) Case No. IT-94-1-T (7 May 1997) para 562. See also Prosecutor v. Fatmir Limaj and others (Judgment) Case No. IT-03-66-T (30 November 2005) para 84. For more details on these requirements see A Cullen, The Concept of Non-International Armed Conflict in International Humanitarian Law (Cambridge University Press, Cambridge 2010).

38 ICRC (n 23) 3.

39 ICRC, ibid.

40 Protocol II (n 13) art 1(1).
Article 3. The discussions on the material scope of application of this Protocol were particularly arduous during the preparatory phase of the instrument. But consensus on this issue was vital, and “the fate of the Protocol as a whole depended on it”. Ultimately, the Diplomatic Conference agreed upon the material scope of application of Additional Protocol II and established that:

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

This provision answered the main demands of the delegations during the preparatory work, that is “1) to establish the upper and lower thresholds of non-international armed conflict; 2) to provide the elements of a definition; 3) to ensure that the achievements of common Article 3 would remain intact.”

Additional Protocol II explicitly excludes international armed conflicts from its material scope of application. In contrast with Common Article 3, Additional Protocol II is not applicable to all non-international armed conflicts. The treaty encompasses a higher threshold for its application which “restricts the applicability of the Protocol to conflicts of a certain degree of intensity.” According to article 1, Additional Protocol II does not apply to conflicts solely between two dissident forces or groups. Additional Protocol II also describes situations not reaching the minimum threshold for its application and falling outside the scope of international humanitarian law. Additional Protocol II does not provide a real definition of “internal disturbances and tensions” but gives in its article 1 a few examples of situations that should not be considered armed conflicts. At the Diplomatic

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41 Sandoz, Swinarski and Zimmermann (n 33) 1348.
42 Protocol II (n 13) art 1.
43 Sandoz, Swinarski and Zimmermann (n 33) 1349.
44 Ibid.
Conference, the International Committee of the Red Cross provided their opinion on what constitutes internal disturbances and tensions not reaching the threshold of violence required to qualify as a non-international armed conflict. As summed up by the Commentary on Additional Protocol II, the ICRC put forward that:

there are internal disturbances, without being an armed conflict, when the State uses armed force to maintain order; there are internal tensions, without being internal disturbances, when force is used as a preventive measure to maintain respect for law and order.\textsuperscript{45}

Many questions can be and have been raised concerning the material scope of application of international humanitarian law. For instance, the question of what level of control by dissident groups is needed to reach the threshold of application of Additional Protocol II has been debated. The meaning of sustained and concerted military operations has also been questioned. Another question is whether the formulation used in the Rome Statute of the International Criminal Court clarified or further complicated the classification of non-international armed conflict.\textsuperscript{46} For the purpose of this section it suffices to remember that Additional Protocol II has a higher threshold of application, and to understand that this threshold excludes many current situations where non-State actors are involved in armed conflict.

2.2.3. Qualification of Armed Conflict and Impact on the Application of International Humanitarian Law and International Human Rights Law

The qualification of an armed conflict has a direct impact on victims, combatants and individuals hors de combat in the field. Because international humanitarian law differentiates between international and non-international armed conflict, the legal norms applicable in hostilities may depend entirely on how a situation is qualified. Many legal consequences arise from qualifying a conflict in one direction or another. To begin, the provisions available in Additional Protocol II for non-international

\textsuperscript{45} Ibid., 1355.
\textsuperscript{46} The Rome Statute of the International Criminal Court (17 July 1998) UN Doc A/CONF.183/9, art 8(2)(f) stipulates: “Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.” For a discussion of the concept of non-international armed conflict in the Rome Statute see S Vité, ‘Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations’ (2009) 873 IRRC 69, 80-83; A Cullen, ‘The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)’ (2007) 12 J Conflict Security Law 419.
armed conflicts are, for instance, far less detailed and offer less protection than the legal framework applicable to international armed conflicts. This is even more so for conflicts where only Common Article 3 applies, ensuring the protection of only basic humanitarian principles.\textsuperscript{47} The legal framework available for situation of non-international armed conflict lacks detailed treaty provisions on the means and methods of warfare and precautionary measures for military attacks. For belligerents, the type of conflict also determines whether they can be afforded prisoner of war status and protection and, for instance, whether they will be shielded from prosecution related to the conflict at the end of hostilities.\textsuperscript{48} The qualification of an armed conflict also indicates the regime of accountability to respond to violations of international humanitarian law, with stronger treaty obligations in the case of international armed conflict.

Since the 1990s, attempts have been made to tackle the problems linked with the substantive divide between international and non-international armed conflicts. The International Criminal Tribunal for Rwanda (ICTR) was given the competence “to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens”,\textsuperscript{49} including violations of Common Article 3 and Additional Protocol II.\textsuperscript{50} The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the Tadić case interpreted its Statute as to include serious violations of Common Article 3 within its material scope of application. The judges concluded that “customary international law imposes criminal liability for serious violations of common Article 3”\textsuperscript{51} and that the Tribunal had jurisdiction “regardless of whether [the acts alleged in the case] occurred within an internal or an international armed conflict.”\textsuperscript{52} Finally, the Rome

\textsuperscript{47} Many of the areas lacking treaty rules, however, are said to be covered by customary international law.
\textsuperscript{48} See Third Geneva Convention (n 11). The prisoner of war status does not exist for situation of non-international armed conflict.
\textsuperscript{50} Ibid., art 4.
\textsuperscript{51} Tadić Jurisdiction Decision (n 36) para 134.
\textsuperscript{52} Ibid., para 137.
Statute of the International Criminal Court included serious violations of Common Article 3 within its definition of war crimes.\textsuperscript{53}

Efforts to lessen the divide between international and non-international armed conflicts have also been made through other initiatives. These efforts include, for instance, the work to establish minimum humanitarian standards applicable in all circumstances undertaken since the 1990s.\textsuperscript{54} The International Committee of the Red Cross study on customary rules of international humanitarian law is another more recent example of such initiatives which, if followed, would broaden the legal protections for situations of non-international armed conflict.\textsuperscript{55} These initiatives have highlighted the continuing problems and proposed solutions to fill the gaps related to the division of international humanitarian law into the different categories of conflict.

There are many obstacles to face when qualifying or classifying armed conflicts. Three main issues can be identified as challenging the qualification of armed conflict. To start with, qualification is not left to the parties to a conflict. In practice several actors will be qualifying armed conflicts, and for different purposes. The United Nations, for example, will qualify a conflict in order to apply the proper rules or call for the application of international humanitarian law. The International Committee of the Red Cross will qualify a situation for the same reasons as the United Nations, but also to tackle the different roles they have been given under international humanitarian law, depending on the type of conflicts. Various institutions and organisations will debate the question of qualification when discussing the implementation of international humanitarian law or the establishment of implementing mechanisms for a specific situation. Qualification will be done on a case by case basis.

Whether before international criminal institutions or in national prosecution of war crimes, or in cases before the International Court of Justice related to armed conflict, qualification will be necessary to decide on the applicable legal framework. Thus, the first important challenge regarding the qualification of armed conflict is that no single institution has been given the competence or mandated to decide upon the qualification of conflict. One of the problems with the range of institutions involved in the interpretation of the material scope of application of international humanitarian law is the possibility of creating confusion, erroneously interpreting international humanitarian law and adopting contradicting conclusions. More importantly, the fact that there is no dedicated institution where States, non-State actors or organisations can request a decision on the type of conflict occurring in a given situation - and that qualification of armed conflict by international institutions is often made *ipso facto* - create uncertainties about the protections to apply and provide during an armed conflict.\(^{56}\)

Armed conflicts are situations that are always very politically charged and accompanied by power struggles. The political aspect and position taken by States regarding armed conflicts form the second challenge to the qualification of armed conflicts. How a State behaves during an armed conflict can have much impact on the international front and consequences for their international relations. In that respect, for a wide range of reasons and following their interest, States might argue that there is no conflict; that there is a non-international armed conflict; or that there is an international armed conflict. For instance, in some circumstances States will reject the existence of an armed conflict, fearing that the opposite would provide legitimacy to a rebel group. States might also deny the existence of a conflict to avoid providing humanitarian safeguards to combatants and prisoner of war protection. In other circumstances a State might affirm that a situation reaches the threshold of armed conflict to justify derogation from its human rights obligations. In a nutshell, States often take political stances of self-interest and qualify situations in a manner that is not necessarily legally sound and fitted to what is really happening.

\(^{56}\) For a more comprehensive analysis of the issues related to the qualification of armed conflict by different actors and institutions see Provost (n 35) 277-337.
on the ground.\textsuperscript{57} The so-called ‘war on terror’ is a good example of this, of the obstacles that States can create and how they can interpret the material scope of application of international humanitarian law in a questionable manner.\textsuperscript{58} In this case and in many situations, States which are directly concerned by or involved in armed conflict, and the international community more generally, often qualify the legal nature of some acts on the basis of their own interest rather than on legal and factual grounds.

Inter-State hostilities, clear-cut international armed conflict between two States, have long ceased to be the norm and the main type of conflict. In recent years, non-international armed conflicts have unfolded much more frequently than inter-State conflicts. This reality represents the third challenge to the qualification of armed conflicts. Armed conflicts are not static situations and this makes the qualification of conflicts almost always very difficult. The hostilities in the former Yugoslavia and the jurisprudence emerging from the ICTY explicitly show that this is the case. The institution had to deal with a range of violations occurring in the former Yugoslavia, but in different regions and between different factions, with the involvement of many actors. In the case of Tadić, the first accused before the tribunal, the ICTY concluded “that the conflicts in the former Yugoslavia have both internal and international aspects”.\textsuperscript{59} Indeed, in some situations a conflict can be strictly international. In some cases an internal and an international armed conflict can unfold and exist side by side. In other instances a conflict can start as a non-international armed conflict and transform into an international one. Because of the bifurcated approach of international humanitarian law (international and non-international conflict) the identification of the moment or the circumstances that

\textsuperscript{57} As noted by Vité (n 46) 94: “The classification of situations of armed violence is also often linked to political considerations, as the parties involved endeavour to interpret the facts in accordance with their interests. On the basis of the margin of discretion allowed by the general terms of the legal categories, it is not unusual, for instance, for States to refuse to admit that they are involved in an armed conflict. They prefer to play down the intensity of the situation by claiming to carry out an operation to maintain public order. In so doing, they deny the applicability of humanitarian law. This tendency is encouraged by the fact that there is no independent international body authorized to decide systematically on cases that are likely to relate to one or other form of armed conflict.”

\textsuperscript{58} For an exhaustive study and legal assessment of the “war against terror” see H Duffy, \textit{The ‘War on Terror’ and the Framework of International Law} (Cambridge University Press, Cambridge 2005), esp 249-270; see also N Lubell, \textit{Extraterritorial Use of Force Against Non-State Actors} (Oxford University Press, Oxford 2010), chap 5.

\textsuperscript{59} Tadić Jurisdiction Decision (n 36) para 77.
transform a non-international armed conflict into an international one is important. In that context much attention has been given to what is known as internationalized armed conflicts, a subject of great complexity. The academic literature as well as the International Criminal Tribunal for the former Yugoslavia have analysed the question of internationalized armed conflicts differently and reached a range of solutions to classify that type of conflict and determine the applicable legal regime under international humanitarian law. As explained by Schöndorf:

There are different approaches in the literature regarding the classification of internationalized non-international armed conflicts and the law that should apply to them. Some scholars argue that once an international component is introduced into an intra-state armed conflict the conflict as a whole becomes an international armed conflict and hence the laws of inter-state armed conflicts apply. [...] Others believe that an internationalized non-international armed conflict should be analyzed as though it involves separate, bilateral armed conflicts. Each of these conflicts should be analyzed separately; hence, it may be that different bodies of international humanitarian law will apply to different components of the internationalized non-international armed conflict.

According to James Stewart, three types of situations can be identified as internationalized armed conflicts, situations that would transform a non-international armed conflict into an international one to which the four Geneva Conventions and Additional Protocol I would apply if ratified:

- war between two internal factions both of which are backed by different States; direct hostilities between two foreign States that militarily intervene in an internal armed conflict in support of opposing sides; and war involving a foreign intervention in support of an insurgent group fighting against an established government.

This discussion is only a sample of the many difficulties in analysing the facts and characterizing situations of armed conflict under international humanitarian law. Conflicts between States and non-State actors outside their territory also require close examination to determine their classification. The question of whether certain acts of terrorism and counter-terrorism operations reach the threshold of application of international humanitarian law, and if so what part of the legal discipline applies,

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60 Ibid., para 84.
62 J Stewart, ‘Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict’ (2003) 850 IRRC 313, 315. Stewart’s article examines each cases and supports them with jurisprudence from the ICTY.
63 For detailed analysis see Lubell (n 58) chaps 4, 5; see also Schöndorf (n 61) 3.
is also not a simple one. Challenges in this context include the identification of the parties to the conflict (i.e. identifying specific organised groups as opposed to a war against ‘terrorism’), and debates over the violence considered having reached the threshold of intensity to qualify as armed conflict. Ultimately, despite various terms being used to describe a wide array of factual circumstances, international humanitarian law contains two recognized categories of armed conflict: international armed conflict and non-international armed conflict.

For the purpose of this work what needs to be remembered on the subject of the material scope of application of international humanitarian law is that: there exist different types of conflicts with specific thresholds of application; conflicts can change nature over time; and there exists academic material and jurisprudence which can serve as tools for a more coherent qualification of conflicts. Also, it should be remembered that attempts are often made to use the qualification process to suit specific interests other than the protection of individuals during armed conflicts. Finally, it should be understood that qualification of conflict will have an impact not only on the protection available to individuals during armed conflicts, but also on the concurrent application and interplay between international human rights and humanitarian law.

The existence of an armed conflict has a direct impact on both the application of international human rights and international humanitarian law. Armed conflicts legitimize the use of force against combatants and military objects within the limits of humanitarian law. The existence of an armed conflict allows the commission of some acts that would otherwise be illegal during peace time and can trigger derogations from human rights obligations. The qualification or classification of a conflict is also central to the concurrent application of international humanitarian and international human rights law because it moulds the interplay between the disciplines. Whether a conflict is classified as an international or non-international armed conflict, and whether it reaches the threshold of application of Additional Protocol II, will potentially influence the role played by human rights law during a conflict and its interaction with international humanitarian law. As noted in chapter

64 For some examples of contentious classification of armed conflicts see Vité (n 46) 83-93.
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3, the substantive content of Common Article 3 overlaps in many ways with international human rights law. In that respect, for instance, it could be argued that when a conflict is qualified as non-international, international human rights law will apply with less friction. Regarding international armed conflicts some might argue that international humanitarian law provides sufficient protection and that its provisions are more adapted to those situations than human rights law. International humanitarian law and international human rights law each have strengths and weaknesses in dealing with the different types of conflicts and, as a result, their concurrent application may be articulated differently depending on how a conflict is qualified.

2.3. Jurisdiction Ratione Personae: To whom does it apply?

2.3.1. International Humanitarian Law and International Human Rights Law

The personal scope of application of international and regional human rights treaties is quite straightforward as compared to that of the 1949 Geneva Conventions and their Additional Protocols. The specialised human rights treaties evidently focus on the rights of specific groups of individuals, for instance children and women. The general human rights instruments on the other hand do not focus and target their protection on categories of persons but rather apply to all persons within the jurisdiction of ratifying States. As such the States parties to the International Covenant on Civil and Political Rights undertook to implement the rights enshrined in the instrument “to all individuals within its territory and subject to its jurisdiction”. Similarly, State Parties to the European Convention on Human Rights must provide protection “to everyone within their jurisdiction”. Hence, in order to decide whether a human rights treaty is applicable to a given individual, there will be a need to determine whether this person was or is within the jurisdiction of the State

66 For more details see chap 3.3.1
68 Convention on the Rights of the Child (n 17).
70 International Covenant on Civil and Political Rights (n 15) art 2(1).
71 European Convention on Human Rights (n 16) art 1.
involved. The question of jurisdiction does not link to personal characteristics, such as being a civilian or combatant, but rather territorial questions and issues of State control over individuals which will be addressed in section 2.5.2 of this chapter.

International humanitarian law is one of the most complex fields of international law and its personal scope of application reflects that reality. The protection of the 1949 Geneva Conventions and their Additional Protocols are in fact organized under two pillars. The first pillar is the existence of an armed conflict, which is a prerequisite for the application of international humanitarian law. The second pillar, or premise of international humanitarian law, is that the protection it provides will depend on the category of persons to which an individual belongs. The concept of ‘protected persons’ is embedded in international humanitarian law. Under this legal framework an individual in a situation of international armed conflict is either a combatant or a civilian. International humanitarian law protects persons and victims of armed conflict who do not take part in hostilities and individuals who are hors de combat and have ceased to take direct part in fighting. More precisely, the personal scope of application of the 1949 Geneva Conventions and the Additional Protocols extends to: wounded and sick members of armed forces in the field;\(^{72}\) wounded, sick and shipwrecked members of armed forces at sea;\(^{73}\) prisoners of war;\(^{74}\) and civilians.\(^{75}\) International humanitarian law protects these individuals against the consequences of armed conflict in many different ways depending on the category to which they belong. The persons protected by the Geneva Conventions and their Additional Protocols are defined within the treaties.

### 2.3.2. Protected Persons under IHL: Wounded, Sick and Shipwrecked

The protection afforded to the members of armed forces wounded and sick in the field, and to the wounded, sick and shipwrecked members of armed forces at sea are very similar but dealt with in two different instruments, the First and Second Geneva

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\(^{72}\) First Geneva Convention (n 11); Protocol I (n 12) Part II; Protocol II (n 13) Part III.

\(^{73}\) Second Geneva Convention (n 11); Protocol I (n 12) Part II; Protocol II (n 13) Part III.

\(^{74}\) Third Geneva Convention (n 11); Protocol I (n 12) Part III; Protocol II (n 13) art 5 provides for the protection of "persons deprived of liberty for reasons related to the armed conflict".

\(^{75}\) Fourth Geneva Convention (n 11); Protocol I (n 12) Part IV; Protocol II (n 13) Part IV.
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Conventions. The definition or the details of what conditions should be fulfilled to be considered a wounded, sick and shipwrecked member of armed forces and afforded the protection of the First and Second Conventions are provided for in these instruments. The wounded, sick or shipwrecked individuals will fall within the scope of these instruments and benefit from their protection providing that they are: members of armed forces of a Party to the conflict, including their militias or volunteer corps; members of other militias and volunteer corps, on condition that they meet certain criteria; members of regular armed forces who profess allegiance to a Government or an authority not recognized by the Detaining Power; persons who accompany the armed forces without actually being members thereof; or members of crews of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment. The First and Second Geneva Conventions also include levée en masse within their personal scope of application, i.e. inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Once wounded, sick and shipwrecked members of armed forces at sea reach land, the Second Geneva Convention is no longer applicable, and the First Convention will protect them instead. Additional Protocol I has broadened the personal scope of application of international humanitarian law with regard to the wounded, sick and shipwrecked. Additional Protocol I does not differentiate between land and sea, and deals with the sick, wounded and shipwrecked members of armed

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76 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (n 11); and the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (n 11).
77 First and Second Geneva Conventions, ibid., art 13.
78 Ibid., art 13(1).
79 Ibid., art 13(2). These conditions are: “(a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.”
80 Ibid., art 13(3).
81 Ibid., art 13(4).
82 Ibid., art 13(5).
83 Ibid., art 13(6).
84 Second Geneva Convention, ibid., art 4.
forces together. In addition to members of armed forces, Additional Protocol I also includes in its personal scope of application all individuals who might need medical assistance such as persons with disabilities, pregnant women and new-born babies.\footnote{Additional Protocol I (n 12) art 8a) and b).} Additional Protocol I considers as wounded and sick, and capable of triggering its application, individuals “who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility.”\footnote{Ibid., art 8a).} As for shipwrecked individuals, Additional Protocol I defines them as being persons “who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility.”\footnote{Ibid., art 8b).}

### 2.3.3. Protected Persons under IHL: Prisoners of War

Under international humanitarian law combatants “have the right to participate directly in hostilities.”\footnote{Ibid., art 43(2).} Combatants can be legitimately targeted and will not be prosecuted for acts related to the conflict which are in conformity with international humanitarian law.\footnote{They can, however, be prosecuted for war crimes.} When captured, combatants are entitled to receive prisoner of war status and benefit from the protection of the Third Geneva Convention relative to the treatment of prisoners of war, and of Additional Protocol I.\footnote{Third Geneva Convention, ibid., art 4A: Protocol I, ibid., art 44(1).} Following article 4 of the Third Convention, prisoners of war are persons who have fallen in the power of the enemy and belong to a few categories, such as “[m]embers of armed forces of a Party to the conflict including their militias or volunteer corps”;\footnote{Third Geneva Convention, ibid., art 44(1).} and “[m]embers of other militias and volunteer corps” providing that they fulfil certain conditions.\footnote{Ibid., art 4A(2).} Combatants who are in the hand of the enemy fall within the personal scope of application of the Third Geneva Convention and should be afforded prisoner of war status and protection. In that respect, the Additional Protocol I to the Geneva Conventions affirms that “[a]ny combatant, as defined in Article 43, who falls into

\footnote{\textit{Ibid.}, art 4A(2). These conditions are: “(a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.”}
the power of an adverse Party shall be a prisoner of war.”93 This Protocol defines combatants as “[m]embers of the armed forces of a Party to a conflict (other than medical personnel and chaplains)”94 and further indicates that those armed forces:

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consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.95
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Providing that a Party to a conflict informs the other Parties to that conflict, the paramilitaries or armed law enforcement agencies incorporated in the Party’s armed forces will also be recognized as combatants.96

Combatants can forfeit their privileges, risk penal prosecution and lose their prisoners of war status if they do not abide by certain rules. For instance, to be recognized as prisoners of war and fall within the scope of the Third Geneva Convention, members of militias not belonging to the armed forces of a Party to the conflict will need a distinctive sign, such as a uniform, and must bear arms openly.97 Along the same lines, Additional Protocol I states that “to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.”98 To make room for “the guerrilla fighter who relies on his civilian attire and lack of distinction to take advantage of his adversary in preparing and launching an attack”,99 Additional Protocol I has controversially allowed exceptions to the combatants’ obligation to distinguish themselves. In that respect, it acknowledged “that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself” and affirmed that in such circumstances protection should be conserved providing that the combatant “carries arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary

93 Protocol I (n 12) art 44.
94 Ibid., art 43(2).
95 Ibid., art 43(1).
96 Ibid., art 43(3).
97 Third Geneva Convention (n 11) art 4(2).
98 Protocol I (n 12) art 44(3).
99 Sandoz, Swinarski and Zimmermann (n 33) 529.
while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.”

Failure to respect these minimum conditions will “forfeit [the combatant] right to be a prisoner of war”. Finally, under international humanitarian law, spies will not be afforded prisoners of war status when captured and a mercenary will “not have the right to be a combatant or a prisoner of war.”

2.3.4. Protected Persons under IHL: Non-Combatants

The scope of application of international humanitarian law extends to persons who are not taking part in hostilities. For the main part this group is formed of civilians. These non-combatants are protected by the Fourth Geneva Convention relative to the protection of civilian persons in time of war, together with the Additional Protocol I to the Conventions. The Fourth Geneva Convention defines its protected persons as “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” The Fourth Geneva Convention focused most of its rules on specific groups of civilians in particular circumstances, and Additional Protocol I broadened the protection for the wider civilian population. Additional Protocol I defines civilians as individuals other than members of armed forces and leee en masse. The scope of application of Part II of the Fourth Geneva Convention is wider and secures protection to persons other than those meeting the definition of protected persons under the treaty. The provisions of Part II of the Convention “cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.”

Similarly, article 75 of Additional Protocol I ensures the humane treatment and some minimum protection to persons affected by armed conflict “who are in the power of

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100 Protocol I (n 12) art 44(3).
101 Individuals who fail to respect these minimum conditions will nevertheless be afforded some procedural and substantive protections. See ibid., art 44(4) and Sandoz, Swinarski and Zimmermann (n 33) 537-539.
102 Protocol I (n 12) art 46. For more details see Sandoz, Swinarski and Zimmermann, ibid., 561-570.
103 Protocol I, ibid., art 47(1). For the definition of mercenaries see Protocol I, art 47(2) and for more details see Sandoz, Swinarski and Zimmermann, ibid., 571-581.
104 Fourth Geneva Convention (n 11) art 4.
105 Protocol I (n 12) art 50 (1).
107 Ibid., art 13.
a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol”.

The Fourth Geneva Convention specifies that nationals of neutral States or co-belligerent States will “not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.” Persons protected by any of the three other Geneva Conventions will not be considered protected person under the Fourth Convention and will fall outside its personal scope of application. Other individuals might also be excluded from the personal scope of application or lose the protection of the Fourth Convention. For instance, the Convention affirms that a person who “is definitely suspected of or engaged in activities hostile to the security of the State […] shall not be entitled to claim such rights and privileges under the [Fourth] Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.” Similarly, Additional Protocol I will not ensure “general protection against dangers arising from military operations” to civilians “for such time as they take a direct part in hostilities.” This rule on loss of protection has been one of the most debated rules in all of international humanitarian law, with numerous commentators and States engaging in a series of meetings aimed at clarifying the rule. There was, and on some elements continues to be, disagreement over the precise acts that constitute direct participation in hostilities, as

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108 Protocol I (n 12) art 75(1).
109 Fourth Geneva Convention (n 11) art 4. This provision also affirms that “[n]ationals of a State which is not bound by the Convention are not protected by it.” In August 2006 the four Geneva Conventions have reached universal recognition. See J-P Lavoyer, ‘A milestone for international humanitarian law’ <www.cicr.org/eng/siteeng0.nsf/html/geneva-conventions-statement-220906>; ICRC, Information on State Parties <www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P#ratif >.
110 Ibid., art 4. For more details on the definition of protected persons under the Fourth Geneva Convention see Uhler and Coursier (n 5) 45-49.
111 Fourth Geneva Convention, ibid., art 5, para 1. Uhler and Coursier, ibid., 56: “The idea of activities prejudicial or hostile to the security of the State, is very hard to define. That is one of the Article’s weak points. What is meant is probably above all espionage, sabotage and intelligence with the enemy Government or enemy nationals. The clause cannot refer to a political attitude towards the State, so long as that attitude is not translated into action.”
112 Protocol I (n 12) art 51(1).
113 Ibid., art 51(3).
114 See reports from the ‘ICRC clarification process on the notion of direct participation in hostilities under international humanitarian law (proceedings)’, available at <www.icrc.org/eng/resources/documents/article/other/direct-participation-article-020709.htm>
well the duration of time during which protection is lost. The ICRC has in 2008 released its own interpretive guidance on the issue, which has since become an additional talking point for debate.

According to international humanitarian law, some non-combatants will fall within the personal scope of application and be protected by the First, Second and Third Geneva Conventions. Medical and religious personnel, the staff of National Red Cross Societies and of other Voluntary Aid Societies, for instance, could be afforded protection under these three treaties. Along the same lines, Additional Protocol I protects civilian and religious personnel. To secure protection under those treaties, these individuals will have to respect some rules regarding their identification, including the use of a distinctive emblem. Civilian and religious personnel could cease to be protected if they commit “acts harmful to the enemy”. Journalists engaged in professional missions during conflict will also be protected by international humanitarian law, providing that they do not take part in hostilities. Refugees and stateless persons will be considered “protected persons within the meaning of Parts I and III of the Fourth Convention, in all circumstances and without any adverse distinction.” Finally, it is worth noting that the Geneva Conventions and their Additional Protocols ensure the protection of some objects which are mainly linked with protected persons. As such, for instance, medical units, hospitals, cultural objects, objects of worship and other civilian objects will receive protection during armed conflict. Just like protected persons, these objects could also risk losing their protection if used for military purposes.

115 Ibid.
117 First Geneva Convention (n 11) Chap IV; Second Geneva Convention (n 11) Chap IV; Third Geneva Convention (n 11) Chap IV. See also Protocol I (n 12) art 8 c) for a definition of medical personnel and 8d) for a definition of religious personnel. Article 33 of the Third Convention specifies that “[m]embers of the medical personnel and chaplains while retained by the Detaining Power with a view to assisting prisoners of war, shall not be considered as prisoners of war. They shall, however, receive as a minimum the benefits and protection of the present Convention”.
118 Protocol I (n 12) art 15.
119 Ibid., art 15(5); art 18.
120 Ibid., art 13(1). This article specifically concerns the discontinuance of protection of civilian medical units. For examples of what does not constitute such harmful acts see art 13(2). See also articles 65(1) and art 67(1)c) on the cessation of protection of civil defence organisations personnel.
121 Ibid., art 79.
122 Ibid., art 73.
2.3.5. Protected Persons under IHL: Non-International Armed Conflicts

The personal scope of international humanitarian law for situation of non-international armed conflict differs slightly from that of international armed conflict, just examined. Non-international armed conflicts are regulated by Common Article 3 to the four Geneva Conventions, as well as by Additional Protocol II. The personal scope of application of Common Article 3 extends to “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause”. Additional Protocol II stipulates in its article 4:

> All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction.

Additional Protocol II also includes within its personal scope of application and specifically calls for the respect and protection of: wounded, sick and shipwrecked individuals; medical and religious personnel; the civilian population and civilian objects; and relief societies such as the Red Cross. Common Article 3 and Additional Protocol II do not articulate protection for, nor include, combatants and prisoners of war within their personal scope of application. They do, however, provide for the protection of “persons deprived of liberty for reasons related to the armed conflict”.

Under international humanitarian law, the definition of, and rules related to, combatants and prisoners of war only exist in the framework regulating international armed conflict. This decision to exclude these terms in the context of non-international armed conflict was taken during the drafting of the Geneva Conventions, on the basis that adopting a similar framework in such a context could be perceived in some situations as giving legal recognition to insurgents, which

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123 Four Geneva Conventions (n 11) art 3.
124 Protocol II (n 13) Part III.
125 Ibid., arts 9-12.
126 Ibid., Part IV.
127 Ibid., art 18.
128 Ibid., art 5.
“would hamper the Government in its measures of legitimate repression.”

This decision created a number of difficulties. To this day, there exist problems in defining the status of individuals who take part in hostilities in non-international armed conflict, the protection applicable to these individuals, their treatment once captured and in deciding whether to prosecute them for fighting in hostilities. As noted by Lubell, the question to be asked in situations of non-international armed conflict “is whether members of armed and organized non-state groups should be viewed as either (i) civilians taking a direct part in hostilities, or (ii) as some form of category of fighters, akin to combatants in international armed conflict, albeit without the entitlement to prisoner of war status.”

The ICRC suggests that “[m]embers of organized armed groups belonging to a non-State party to the conflict cease to be civilians for as long as they remain members by virtue of their continuous combat function.” In its ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’, the organisation concludes that:

Under customary and treaty IHL, civilians directly participating in hostilities, as well as persons assuming a continuous combat function for an organized armed group belonging to a party to the conflict lose their entitlement to protection against direct attack. As far as the temporal scope of the loss of protection is concerned, a clear distinction must be made between civilians and organized armed actors. While civilians lose their protection for the duration of each specific act amounting to direct participation in hostilities, members of organized armed groups belonging to a party to the conflict are no longer civilians and, therefore, lose protection against direct attack for the duration of their membership, that is to say, for as long as they assume their continuous combat function.

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129 J de Preux (n 5) 32.
130 The debate mentioned in relation to what acts constitute direct participation in hostilities is also relevant to non-international armed conflict.
131 Lubell (n 58) 147. For a complete explanation of the categorization of members of non-state groups see Lubell, ibid, chap 6, section 1.5.
132 ICRC (n 116) 1036.
133 ICRC, ibid., 1037. See also Lubell (n 58) 147: “An alternative position is that in the absence of a defined status for members of armed groups in non-international armed conflicts the individuals fighting against the state, including within organized armed groups, are defined as civilians taking a direct part in hostilities. According to this approach, discussion over the question of when individuals can be targeted by the state, in the context of existing rules of non-international armed conflict, thus revolves around the question of civilians losing their immunity. As with the case of the debate over ‘unlawful combatants’, defining these persons as civilians does not necessarily mean adopting a position which overly restricts the state forces since […] the debate over loss of civilian protection encompasses a wide range of positions.”
While the ICRC provides guidance as to the rules applicable for “civilians directly participating in hostilities, as well as persons assuming a continuous combat function”,\textsuperscript{134} it remains that under international humanitarian law, there exists in non-international armed conflict no such category of combatant or something akin to that, and the advancement of new interpretations and categories of individuals is a matter of debate:

> Although they are clearly linked there must be differentiation between the debate over the name or category we assign to members of armed groups, as opposed to the debate over reaching a workable approach to implementing the rules on the ground. States are able to accept the existence of the civilian-combatant dichotomy, and that certain fighters might fall into the legal category of civilians, without it preventing them from advancing the laws and policies they consider necessary. It may be that discomfort will remain over labelling members of armed groups as legally belonging to the civilian category but that practical interpretations for implementing existing rules could nevertheless be found. A possible interpretation that would satisfy some concerns is one by which individuals who take an ongoing active part in the hostilities, whilst remaining within the IHL category of civilians, lose their protection for so long as they continue to be regularly engaged in these actions.\textsuperscript{135}

As with many problems regarding the application of international humanitarian law, practical solutions are needed to deal with the perceived gaps in the legal framework covering the status of individuals in situations of non-international armed conflict.

> Just as is the case with the material scope of application, the personal scope of application of international human rights and humanitarian law both differ and overlap. Their jurisdictional scope differs given that the application of humanitarian norms is dependent upon which categories or group individuals belong to. If an individual falls outside the definition of one of the group of protected persons or commits or omits certain acts he/she can lose some of the privileges and protections of the Geneva Conventions and their Additional Protocols. Human rights law is completely different in that respect, since the main human rights treaties include no such criterion or category of persons. Rather, human rights protection will have to be afforded to all individuals within the jurisdiction of a State party without almost any

\textsuperscript{134} See note 133 and accompanying text.

\textsuperscript{135} Lubell, \textit{ibid.}, 154-155. Lubell, however, adds at 155: “The risk of this interpretation is that it blurs the distinction between combatants and civilians and exposes civilians to greater danger of being unjustifiably targeted. The ICRC’s proposed solution attempts to alleviate this concern, but ultimately faces similar obstacles when it comes to determining whether an individual loses protection as a result of continuous combat function, and may have inadvertent repercussions on the debates over post-capture status as well as during hostilities.”
distinction between types of individuals. With that in mind, and the protection of international human rights law covering all individuals, including the protected persons under international humanitarian law, within the jurisdiction of ratifying States, it is clear that the personal scope of application of international humanitarian law and international human rights law overlap.

2.4. Jurisdiction Ratione Temporis: When does it apply?

2.4.1. International Humanitarian Law

The Geneva Conventions and their Additional Protocols specify their temporal scope of application, i.e. the start and end of their protection. Concerning the beginning of their application, Common Article 2 indicates:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.136

From the 12th Century it was customary for States to officially declare war, often through a diplomatic ceremony, before taking up arms. During the drafting of the Geneva Conventions, the inclusion of a formal requirement or compulsory declaration of war to trigger the application of the Geneva Conventions was rejected. Had such a declaration been required, non-compliance and the denial of a state of war by a High Contracting Party could have automatically precluded the humanitarian protection of individuals in situations of conflict. The Diplomatic Conference considered this possible outcome contrary to the humanitarian purpose of the Geneva Conventions.137 This was especially true with the outlawing of the use of force by the Charter of the United Nations in 1945, which made it more likely that parties to a conflict would be reluctant to officially declare that they were engaged in hostilities.

According to Common Article 2 there is no official mechanism to trigger the application of international humanitarian law; the 1949 Geneva Conventions and

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136 Geneva Conventions (n 11) Common Article 2(1). For examples of provisions which apply in peacetime, before or after an armed conflict, see Protocol I (n 12) arts 33-34, 74, 78, 80-84.
137 See Pictet (n 5) vol I, 28-29. The Commentary to the Fourth Geneva Convention notes that while the Convention only mentions denial of the state of war by one party, denial by both parties to a conflict would similarly not affect the applicability of the Conventions. Uhler and Coursier (n 5) 21.
their Additional Protocols apply as soon as an armed conflict begins or as noted by Sassòli and Bouvier “as soon as the first (protected) person is affected by the conflict, the first portion of territory occupied, the first attack launched, etc.”\textsuperscript{138}

While this explanation may seem simple, the definition of armed conflict and the identification of situations triggering the application of international humanitarian law are far more complex. The temporal scope and start of application of international humanitarian law are closely linked with the material scope of application of the instruments; the Conventions and their Additional Protocols only apply if a situation can be defined as an international or a non-international armed conflict. In that respect, the main challenge in identifying the beginning of the application of humanitarian law will arise from the factual interpretation of situations by the different parties, the disputes concerning the threshold of violence and whether a situation can be qualified as an armed conflict - and if so what type of conflict.

The Geneva Conventions and their Additional Protocols specify the conditions for the end of the application of international humanitarian law. In contrast with the only condition for the beginning of their application - the start of an armed conflict - different situations can terminate the application of international humanitarian law. In a situation of international armed conflict the protection of the Geneva Conventions and Additional Protocol I will cease upon “the general close of military operations”\textsuperscript{139} “one year after the general close of military operations”\textsuperscript{140} or “the termination of the occupation”.\textsuperscript{141} When armed conflicts started with declarations of war, their end was much clearer. Decades ago, capitulation, armistice and even truce or peace treaties marked the end of a conflict and application of international humanitarian law.


\textsuperscript{139} Fourth Geneva Convention (n 11) art 6(2); Protocol I (n 12) art 3(b). During the drafting of the Fourth Geneva Convention the members of the Diplomatic Conference decided to drop the wording used in the Third Geneva Conventions – the cessation of hostilities. They chose instead the expression “general close of military operations” to mark the end of application. This choice was made to ensure that the protection would continue until the real end of the conflict and not the end through domestic procedural or legal means. See Actes de la Conférence diplomatique de Genève de 1949, ‘Rapport de la Commission III à l’Assemblée Plénière’ (Département Politique Fédéral, Berne), tome II-A, 799: “Si nous avons employé les termes "fin générale des opérations militaires" et non plus "fin des hostilités", c’est pour éviter toute confusion dans les pays qui, comme la France, fixent "la fin des hostilités" par décret, ce qui a pour effet de supprimer la législation interne de guerre.”

\textsuperscript{140} Fourth Geneva Convention, \textit{ibid.}, art 6(3).

\textsuperscript{141} Protocol I (n 12) art 3.
treaties related to such situations.\textsuperscript{142} The way conflicts were fought largely explains the effectiveness of these means to conclude armed conflicts; capitulation, armistice, and other formal procedures were most successful when hostilities were mainly conducted between two States. Today, armed conflicts often occur between several entities, and peace treaties are very often followed by recurrence of violence. It is in that context that the end of armed conflict was redefined as the “general close of military operations”. The Commentary to article 3 of Additional Protocol I to the Geneva Conventions defines military operations as “the movements, manoeuvres and actions of any sort, carried out by the armed forces with a view to combat.”\textsuperscript{143}

Following Colonel-div Du Pasquier, Rapporteur at the Geneva Diplomatic Conference for the plenary assembly for the Civilian Convention: “[l]a fin générale des opérations militaires, c’est le dernier coup de canon.”\textsuperscript{144} The Commentaries to the Fourth Geneva Convention and to Additional Protocol I put forward that, in situations of armed conflict where more than two States are involved, the general close of military operations “will be the final end of all fighting between all those concerned”\textsuperscript{145} or “could mean the complete cessation of hostilities between all belligerents, at least in a particular theatre of war.”\textsuperscript{146}

As with the beginning of it, the main challenge in identifying the end of a conflict or the cessation of hostilities and of international humanitarian law protection will lie in assessing the facts of a situation.

The end of the application of the Fourth Geneva Convention in a situation of occupation was the subject of much discussion at the 1949 Diplomatic Conference. During the Conference it was put forward that the Convention on the protection of civilians should apply until the end of an occupation.\textsuperscript{147} Several delegations were of the opposing opinion that in cases of lengthy occupation the application of the Convention would eventually become unwarranted before the end of the

\textsuperscript{142} Uhler and Coursier (n 5) 62; Sandoz, Swinarski and Zimmermann (n 33) 67.
\textsuperscript{143} Sandoz, Swinarski and Zimmermann, \textit{ibid.}, 67.
\textsuperscript{144} Actes de la Conférence diplomatique de Genève de 1949 (n 139) tome II-A, 799. “The general end of military operations is the last cannon fire.” [Translated by the author]
\textsuperscript{145} See Uhler and Coursier (n 5) 62.
\textsuperscript{146} Sandoz, Swinarski and Zimmermann (n 33) 67-68.
occupation. The Diplomatic Conference finally agreed that the application of the Fourth Convention would “cease one year after the general close of military operations”. Exceptions were however made for some provisions of the Convention, according to which an occupying power will be compelled under certain circumstances to provide protection during the whole time of the occupation.

Years after the adoption of the Fourth Convention, the drafters of Additional Protocol I pushed further the temporal scope of application for situations of occupation; they adopted to some extent what was initially proposed for the Fourth Convention and dismissed by the Diplomatic Conference in 1949. As a result, Additional Protocol I provides that in situations of occupation the Geneva Conventions and Additional Protocol I will end “on the termination of the occupation”. Similarly to the ending of armed conflicts, the end of an occupation might be challenged at the factual level. This is because the manner in which such situations will come to an end might be various and controversial.

The termination of occupation may occur a long time after the beginning of that occupation, and can come about in various ways, de facto or de jure, depending on whether it ends in the liberation of the territory or in its incorporation in one or more States in accordance with the right of the people or peoples of that territory to self-determination.

For most protected persons, during an international armed conflict the Geneva Conventions and Additional Protocol I will cease to apply at: the end of hostilities or the termination of occupation. Individuals deprived of their liberty, however, will be protected beyond such time, until their “final release, repatriation or

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149 Fourth Geneva Convention (n 11) art 6(3). For more details on the end of occupation see Uhler and Coursier (n 5) 62-63. This period of one year was decided on the basis that it would be unwise in cases of occupation to end the application of the Geneva Conventions at the general close of hostilities since experience had shown that occupation can last longer than military operations. See Actes de la Conférence Diplomatique de Genève de 1949 (n 139) tome II-A, 799.
150 See Fourth Geneva Convention (n 11) art 6(3) which specifies that “the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.”
151 Protocol I (n 12) art 3(b).
152 The question of whether the Gaza Strip remains occupied after the withdrawal of stationed Israeli troops and settlements exemplifies the debates. See for example, Y Shany, ‘Binary Law Meets Complex Reality: The Occupation of Gaza Debate’ (2008) 41 Isr L Rev 68.
153 Sandoz, Swinarski and Zimmermann (n 33) 68.
re-establishment”. The provision regarding the extension of protection for wounded and sick military personnel detained, prisoners of war or civilians detained or interned were drafted with the experience of World War II in mind. This war showed that “[i]t is indeed quite possible that some wounded and medical personnel will be retained by their captors after military operations have ended.” It appeared obvious that humanitarian protection should be extended beyond the end of conflict and occupation to ensure that persons deprived of their liberty will be protected by international humanitarian law until they are free and safely back home. The First Geneva Convention provides that the protection of the wounded and sick will continue until their final repatriation which “excludes the subterfuge of releasing the wounded as prisoners of war and replacing them in captivity under some other name”. The Third Geneva Convention asserts that prisoners of war will be protected “until their final release and repatriation.” According to this treaty, release and repatriation should take place “without delay after cessation of hostilities.” The drafters of the Third Geneva Convention decided to fix the time of repatriation and release following the cessation of hostilities as opposed to the general close of armed conflict. It was decided that, to better protect prisoners of war, the time of repatriation should be disconnected from the moment peace occurs and military operations are completely over.

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154 Protocol I (n 12) art 3(b). See also First Geneva Convention (n 11) art 5; Third Geneva Convention (n 11) art 5; Fourth Geneva Convention (n 11) art 6.
155 See Pictet (n 5) vol I, 65.
156 See for instance Uhler and Coursier (n 5) 64: “The time when the Convention as a whole ceases to apply, both in the territory of the Parties to the conflict and in occupied territory, may quite conceivably come before the protected persons have been able to resume a normal existence, especially if they have to be repatriated or assisted to resettle. In the territory of the Parties to the conflict, for example, if internees are not immediately released, the rules laid down in the Convention must obviously continue to apply to them, and if the State decides to repatriate certain enemy nationals, whether interned or not, their repatriation must be carried out in accordance with the Convention. Similarly, in occupied territories, where an Occupying Power considers it necessary to prolong the internment of certain persons after the time limit of one year has expired, the persons concerned will continue to enjoy all their rights under the Convention.”
157 Pictet (n 5) vol I, 65.
158 Third Geneva Convention (n 11) art 5.
159 Second Geneva Convention (n 11) art 118. However, State practice may have modified this obligation in order to prevent situations of forcible repatriation which would place the individuals at risk.
160 Pictet (n 5), vol I, 68: “The general close of military operations may occur after the "cessation of active hostilities" referred to in Article 118 of the Third Convention: although a ceasefire, even a tacit ceasefire, may be sufficient for that Convention, military operations can often continue after such a ceasefire, even without confrontations. Whatever the moment of the general close of military operations, repercussions of the conflict may continue to affect some persons[…].” See also Actes de
The end of the application of international humanitarian law is far less detailed for situations of non-international armed conflict. In fact, Common Article 3 and the Additional Protocol II protecting victims of non-international armed conflicts provide no detail regarding the general end of their application. In that respect it is understood that in a situation of non-international armed conflict the protection afforded by Common Article 3 and Additional Protocol II will cease to apply when the conditions for their application no longer exist; the protection of these instruments will cease when the non-international armed conflict is over. Similarly to the four Geneva Conventions and Additional Protocol I, Additional Protocol II extends the protection of persons deprived of their liberty beyond the end of the non-international armed conflict. Article 2(2) provides:

At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty.161

In situations of non-international armed conflict, persons deprived of their liberty or restrained will receive some protection under international humanitarian law. Until these persons regain their liberty, the High Contracting Parties will have to ensure that the conditions of detention162 and the “prosecution and punishment of criminal offences related to the armed conflict”163 respect international humanitarian law.

2.4.2. International Human Rights Law: Limitations and Derogations

Like many of the other jurisdictional components, the temporal scope of application of international human rights law both diverges and converges with that of international humanitarian law and has been used to promote links and conversely to sustain separation of the disciplines. The starting point of international human rights law is that it applies always, at all times from the date of coming into force of each given treaty. This constitutes a marked difference from the humanitarian law framework which only applies during armed conflict. There are in the scope of

161 Protocol II (n 13) art 2(2).
162 Ibid., art 5.
163 Ibid., art 6.
application of international human rights two exceptions to the continuous application of the framework. These exceptions are the limitation and derogation clauses embedded in most main human rights treaties. In *International Human Rights in Context* Steiner, Alston and Goodman introduce these clauses and explain their purpose as follow:

Limitation and derogation clauses in treaties have a similar function in the sense that both provide legal avenues for states to break free of obligations that would ordinarily constrain their actions. They are also similar in that neither permits states to ignore their human rights obligations altogether. However, one significant difference between the two is that derogations were designed to be applicable only in the exceptional case of a grave threat to the survival and security of a nation. The implication is that derogations were intended to be invoked as temporary measures. In contrast, limitation clauses apply across the spectrum, from everyday public order maintenance and policing strategies to national security and large-scale military actions.164

There exist within human rights treaties in-built possibilities for States, clauses that permit them to limit the application or implementation of certain treaty rights. In order to be acceptable, however, these limitations need to be both legal and necessary. For instance, the International Covenant on Civil and Political Rights provides for the protection of the right to freedom of religion or beliefs, but states that the freedom to exercise this right can be subjected to such “limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”165 Along the same lines the Covenant stipulates:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression […].
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   (a) For respect of the rights or reputations of others;
   (b) For the protection of national security or of public order (ordre public), or of public health or morals.166

In addition, similar limitations exist under this treaty, for instance, in the provisions on the right to freedom of movement and freedom to choose residence,167 the right of

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165 International Covenant on Civil and Political Rights (n 15) art 18(3). See also European Convention on Human Rights (n 16) art 9(2).
166 International Covenant on Civil and Political Rights, *ibid.*, art 19.
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peaceful assembly, and the right to freedom of association. The raison d’être of these in-built limitations is to provide States with some flexibility in implementing some of the treaty rights, and answer the need for balancing contrasting rights of individuals and society at large. The in-built restrictions do not change the applicability of the human rights instruments; rather, they affect the level of protection given to specific rights in particular circumstances.

These in-built limitations are perhaps more present in human rights treaties, but similar notions also exist in the international humanitarian law framework. In some of its provisions, international humanitarian law foresees limits to the protection it offers. In that respect article 53 of the Fourth Geneva Convention prohibits the “destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations” with the exception, however, of situations “where such destruction is rendered absolutely necessary by military operations.”

The Third Geneva Convention affirms:

Representatives or delegates of the Protecting Powers shall have permission to go to all places where prisoners of war may be, particularly to places of internment, imprisonment and labour, and shall have access to all premises occupied by prisoners of war; they shall also be allowed to go to the places of departure, passage and arrival of prisoners who are being transferred. They shall be able to interview the prisoners, and in particular the prisoners' representatives, without witnesses, either personally or through an interpreter.

Representatives and delegates of the Protecting Powers shall have full liberty to select the places they wish to visit. The duration and frequency of these visits shall not be restricted. Visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure.

As for Additional Protocol II, it also provides for exceptions regarding, for instance, the prohibition of forced movement of civilians, affirming that “[t]he displacement of the civilian population shall not be ordered for reasons related to the conflict

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167 Ibid., art 12.
168 Ibid., art 21.
169 Ibid., art 22.
170 Fourth Geneva Convention (n 11), art 53.
171 Third Geneva Convention, ibid., art 126. See also First and Second Geneva Convention (n 11) art 8; Fourth Geneva Convention (n 11);
unless the security of the civilians involved or imperative military reasons so demand.”  

Derogations are an additional way in which rights may be restricted. Under the International Covenant on Civil and Political Rights and the European and American instruments, human rights law allows States to derogate from specific human rights obligations in certain circumstances, e.g. in time of war or other public emergency. The possibility to derogate gives States a wider margin of manoeuvre in situations of emergency, such as armed conflicts, where the maintenance of the full spectrum of rights might be difficult. Meyer and McCoubrey explained the rationale for allowing derogations, noting that “[h]ose [human] rights operate in times of normality, on the basis of harmony and cohesion between government and governed and are neither designed for nor adequate to control an armed conflict between government and dissident, armed or unarmed, elements of the population.”

Derogation does not imply withdrawing from the treaty obligations as a whole. Derogations are made in relation to specific rights in a given treaty, and other human rights obligations within that treaty remain applicable. Moreover, there exist a number of non-derogable human rights. These non-derogable rights, which vary slightly in the different human rights treaties, include the prohibition of arbitrary killing; the prohibition of torture and of inhuman or degrading treatment or punishment; the prohibition of slavery or servitude; and freedom from ex post facto laws. In addition to these, the American Convention on Human Rights declared as non-derogable the rights of the family, the right to a name, the rights of the child and

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172 Protocol II (n 13) art 17(1).
175 International Covenant on Civil and Political rights (n 15) art 4(2); European Convention on Human Rights and Fundamental Freedoms (n 16) art 15(2); American Convention on Human Rights (n 16) art 27(2).
the judicial guarantees necessary for the protection of the non-derogable rights.\footnote{American Convention on Human Rights, ibid., art 27(2).} Over time, the right to a fair trial has, at least in part, also acquired \textit{de facto} non-derogable standing in relation to the \textit{International Covenant on Civil and Political Rights}.\footnote{See for instance ‘General Comment No. 29: States of Emergency (article 4)’, UN Doc CCPR/C/21/Rev.1/Add.11 (2001), para 16.}

While derogations are permitted under human rights law, restrictions and requirements (including procedural ones) are attached to this option and States must follow them in order to derogate. For instance article 4 of the \textit{International Covenant on Civil and Political Rights} provides:

\begin{quote}
In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.\footnote{International Covenant on Civil and Political rights (n 15) art 4(1).}
\end{quote}

The Human Rights Committee in its General Comment on States of Emergency further developed the boundaries related to derogations during such times (which include armed conflicts), discussing, for instance, limits to the length and place for the implementation of derogation measures.\footnote{See ‘General Comment No. 29’ (n 177) On the length and extent of derogation measure see para 4.}

The possibility of derogating from some human rights provisions constitutes a marked difference between the scope of application of international human rights law in comparison to that of international humanitarian law. International humanitarian law has been drafted and conceived to apply in emergencies and situations of exception. As such, perhaps with only one exception,\footnote{See Protocol I (n 12) art 54: “2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.[…] 5. In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.”} international humanitarian law does not allow for derogation (as opposed to the aforementioned
in-built limitation clauses) from its framework and, rather, calls for continued humanitarian protection during the whole duration of an armed conflict. The possibility of derogation does not only constitute a difference with the scope of international humanitarian law. Human rights clauses which facilitate derogations also create a situation of overlap with the international humanitarian legal framework, and have an impact on the concurrent application of international human rights and humanitarian law. This overlap and effect on the interplay between the disciplines will be further explored in the following chapters.

2.5. Jurisdiction Ratione Loci: Where does it apply?

2.5.1. International Humanitarian Law

The question of the geographical or territorial scope of application of international humanitarian law is much simpler than it is for the field of international human rights law. As explained by Kellenberger, international humanitarian law applies extraterritorially:

Another distinguishing feature of international humanitarian law is the extraterritorial applicability of its norms. There is no question, either as matter of logic or of law that the parties to an armed conflict remain bound by their humanitarian law obligations regardless of where the hostilities triggering humanitarian law application may be taking place. Effective control over territory is not a precondition for parties' compliance with treaty or customary norms governing the conduct of hostilities or the treatment of persons belonging to the adverse party who may have fallen into their hands.

Indeed, as already examined, international humanitarian law does not focus its application on territorial grounds but rather on the existence of armed conflicts and protected persons. Following Common Article 2, the Geneva Conventions “apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties”. International humanitarian law applies notwithstanding where a conflict takes place. As already reviewed, international humanitarian law also applies to “all cases of partial or total occupation

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181 See section 2.5.2.
183 Geneva Conventions (n 11) art 2(1).
of the territory of a High Contracting Party”. Regarding non-international armed conflicts, Common Article 3 applies “in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”. There may be debate over extraterritorial armed conflicts against non-state actors (e.g. Israel and the Hezbollah), but this relates to the question of qualification of conflict (international or non-international), rather than to the applicability of international humanitarian law. With the Geneva Conventions having reached universal ratification, Common Article 3 now applies in all territories where there exists an armed conflict meeting its threshold of application. Along the same line, Additional Protocol II applies to conflicts “which take place in the territory of a High Contracting Party”.

The Commentary to Additional Protocol II to the Geneva Conventions discussed the territorial scope of application of the instrument and affirmed:

Persons affected by the conflict […] are covered by the Protocol wherever they are in the territory of the State engaged in conflict. The situation may only affect a small part of the territory; this is why the Diplomatic Conference did not provide that the Protocol should automatically apply to the territory as a whole. No criterion ‘ratione loci’ was adopted. […] [T]he applicability of the Protocol follows from a criteria related to persons, and not to places.

The International Criminal Tribunal for the former Yugoslavia also examined the territorial scope of application of international humanitarian law. The judges of the Appeals Chamber found in the Tadić decision on jurisdiction:

that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized 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

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184 Ibid., art 2(2).
185 Ibid., art 3.
186 See Lubell (n 58) chap 4.
187 See n 109.
188 Protocol II (n 13) art 1(1).
189 Sandoz, Swinarski and Zimmermann (n 33) 1359-1360.
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.\textsuperscript{190}

In sum, international humanitarian law does not rely on territorial elements to trigger its application. Instead, its application is triggered by its material scope and the applicable substantive norms depend on its personal jurisdiction.

2.5.2. International Human Rights Law

The issue of extraterritorial applicability of human rights and whether States must respect and ensure respect for human rights law outside their borders is an important question when looking at the concurrent application of human rights and international humanitarian law. Indeed, as noted by Hampson, “the importance of the relationship between IHL and human rights law is very significantly reduced if the latter is not applicable extraterritorially.”\textsuperscript{191} The question of extraterritorial applicability of human rights is, however, a separate question from that of the concurrent application of international human rights and humanitarian law. Whether human rights law can apply extraterritorially is a question relevant to both armed conflict and situations where there exists no conflict. Applicability and concurrent application are too often confused with one another, with some authors arguing that human rights law is not applicable extraterritorially when there is an ongoing armed conflict as international humanitarian law supersedes international human rights law in such situations.\textsuperscript{192} These questions are in fact independent. In situations of armed conflict where States are involved extraterritorially, the question as to whether human rights law applies should first be examined. Issues related to the interplay between international human rights and humanitarian law can subsequently be assessed separately.

\textsuperscript{190} Tadić Jurisdiction Decision (n 36) para 70. Whether we looked at wounded or sick, the prisoners of war or civilians, it is clear that under international humanitarian law these individuals are protected whether or not they are in the area of hostilities where combat actually takes place. See also Tadić Jurisdiction Decision, paras 68-69; Celebići case (n 36) para 185; Prosecutor v. Blaškić (Judgment) Case No. IT-95-14-T (3 March 2000) para 64; Prosecutor v. Kordić and Čerkez (Judgement) Case No. IT-95-14/2-T (26 February 2001) para 27; Prosecutor v. Radoslav Brđanin (Judgement) Case No. IT-99-36-T (1 September 2004) para 123. See also from the International Criminal Tribunal for Rwanda Prosecutor v. Akayesu (Judgment) Case No. ICTR-96-4-T (2 September 1998) para 635.


\textsuperscript{192} See note 206 and accompanying text.
In contrast with international humanitarian law, the territorial scope of application of international human rights law is not straightforward. The question of whether human rights obligations of States extend outside their borders has been the object of continuous discussion for decades. Following calls for the application of international human rights law in places where conflicts unfold, and given the increasing presence and involvement of armed forces and other State actors abroad, the question of the extraterritorial applicability of the main international and regional human rights treaties has become increasingly important. The issue of extraterritorial applicability of human rights law is obvious in international armed conflicts but can also arise in non-international armed conflicts. When addressing the extraterritorial applicability of human rights three questions need to be asked. First, can human rights apply extraterritorially considering the jurisdiction *ratione loci* of the different human rights treaties? Second, if this possibility exists, in what circumstances can human rights law apply extraterritorially? Finally, if human rights law is applicable outside States’ borders, what range of obligations must States implement extraterritorially?

**Can Human Rights Apply Extraterritorially?**

Human rights treaties include jurisdictional clauses which are the basis on which the territorial applicability of human rights law has been examined. Specialised human rights treaties include jurisdictional provisions specifying that States agree to respect and ensure respect of the rights enshrined in the given treaty. The Convention on the Rights of the Child stipulates for instance that “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction”\(^\text{195}\). The European Convention on Human Rights stipulates that “High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”\(^\text{196}\) Similarly, the American Convention on Human Rights indicates that “States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and

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\(^{193}\) This includes for instance occupation, foreign intervention or military operations, led by the United Nations or conducted by Multinational Forces outside UN mandate.

\(^{194}\) On the possibility of extraterritorial non-international armed conflict, see Lubell (n 58) chaps 4-5.

\(^{195}\) Convention on the Rights of the Child (n 17) art 2(1) (emphasis added).

\(^{196}\) European Convention on Human Rights (n 16) art 1 (emphasis added).
freedoms”. The International Covenant on Civil and Political Rights also includes a jurisdictional clause specifying that “[e]ach State Party […] undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”.

Much discussion has taken place on the extraterritorial applicability of the International Covenant on Civil and Political Rights. In contrast with the other treaties noted above, the ICCPR indicates that its provision should be implemented by States Parties and ensured to all persons “within its territory and subject to its jurisdiction”. This legal construction led to debates on whether the jurisdictional requirements of being ‘within the territory’ and ‘subject to the jurisdiction’ of a State were disjunctive or cumulative criteria. Otherwise said, are territory and jurisdiction two requirements that both need to be met for the Covenant to apply or should the instrument be implemented in the presence of only one of these criteria?

The UN Human Rights Committee has submitted on several occasions that the International Covenant on Civil and Political Rights can apply outside a State Party’s borders in cases where individuals are found within the jurisdiction of that State. The Committee unambiguously reaffirmed this approach in its General Comment 31 stating that:

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

The International Court of Justice, the Human Rights Committee, the Inter-American Commission and Court of Human Rights, and the European Commission and Court of Human Rights have all indicated that international human rights law can apply

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197 American Convention on Human Rights (n 16) art 1(1) (emphasis added).
198 International Covenant on Civil and Political Rights (n 15) art 2(1).
199 Ibid.
extraterritorially and, in the specific case of the ICCPR that its jurisdictional clause does not require an individual to be both within a State jurisdiction and territory to benefit from its human rights protection.

For many years, Michael J. Dennis, Attorney-Adviser at the U.S. Department of State, has been one of the main supporters of the cumulative interpretation of article 2 of the International Covenant on Civil and Political Rights and has been advocating against the extraterritorial applicability of the instrument. In his tri-fold argument Dennis has rejected the conclusions of the Human Rights Committee arguing that such conclusions conflict with “the plain meaning of Article 2(1) [of the ICCPR], the original intent of the negotiators, and the practice of states that have ratified the Covenant”, which are recognised interpretation tools following the Vienna Convention on the Law of treaties. Dennis argued that the ICCPR must be interpreted following its ordinary meaning, which entails that “a state party is required to ensure the rights in the Covenant only to individuals who are both within the territory of a state party and subject to its sovereign authority.” Dennis further argued that the travaux préparatoires of the ICCPR support the conjunctive interpretation and clarify possible ambiguities as regards to the jurisdiction clause. Dennis explained that article 2 of the ICCPR, which initially only included the terms “within its jurisdiction”, was changed to add the current territorial clause following a suggestion by Eleanor Roosevelt. “[T]he U.S. amendment was adopted without change at the 1950 session by a vote of 8-2 with 5


204 M J Dennis, ‘Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Conflict Armed Conflict’ (n 201) 461-467.

205 Resort to preparatory work of a treaty has been recognised as a supplementary means of treaty interpretation that can be used to confirm the meaning when the general rule of interpretation: “a. Leaves the meaning ambiguous or obscure; or b. Leads to a result which is manifestly absurd or unreasonable.” Vienna Convention (n 203) art 32.

206 M J Dennis, ‘Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Conflict Armed Conflict’ (n 201) 476.
abstentions”\(^{207}\), constituting for Dennis evidence that the provision includes cumulative jurisdictional requirements. Dennis finally contended that State practice, more specifically the lack of derogation by States during armed conflict, indicates the lack of support for the extraterritorial applicability of civil and political rights during such times.\(^{208}\)

Dennis’ various arguments have been subjected to detailed analysis by scholars in the field, and on most counts have been firmly rejected.\(^{209}\) On the question of derogation, Dennis’ arguments conflate the question of extraterritorial applicability with that of concurrent applicability of human rights and humanitarian law. As Dennis himself has noted:

What explains the lack of notice of derogations by states concerning the extraterritorial application of the Covenant and the European Convention during periods of armed conflict and military occupation as discussed above? Two possible legal theories suggest themselves: that states believe that the obligations assumed under these instruments apply only within their territory and not to acts of armed forces executed outside their territory; or that the *lex specialis* of humanitarian law suspends the extraterritorial application of the instruments during periods of armed conflict and military occupation.\(^{210}\)

While the second theory could offer one explanation as to why States do not formally derogate from some of their obligations under the ICCPR when involved in situations of armed conflict or of occupation, this explanation does not lead to the conclusion that the Covenant cannot apply extraterritorially. As explained, the questions of extraterritorial applicability of human rights and concurrent application of international human rights law and international humanitarian law must be dealt with separately. As stated by Lubell:

A lack of derogations for extraterritorial measures taking place during armed conflict must […] be considered in light of the debate regarding the relationship between international human rights law and IHL […], and the lack of derogations for extraterritorial operations against individuals not in

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\(^{208}\) Dennis, *ibid.*, 477-481.

\(^{209}\) N Rodley, ‘The Extraterritorial Reach and Applicability in Armed Conflict of the International Covenant on Civil and Political Rights: A Rejoinder to Dennis and Surena’ (2009) 5 EHRLR 628, 628-636; Lubell (n 58) 197-207.

the context of armed conflict is unlikely to point to anything other than a reluctance to draw attention to these operations.\footnote{Lubell (n 58) 198. Indeed, as further put forward, outside of armed conflict it appears that this lack of derogation to the ICCPR by States could perhaps be better explained by the fact that “certain types of operations, such as abductions and killings carried out by secret service agents, are activities which states are extremely unlikely to announce their prior intention to carry out, or even admit to post-facto.”}

As for the matter of treaty interpretation, the Vienna Convention stipulates as a general rule of interpretation that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”\footnote{Vienna Convention (n 203) art 31(1).} The Human Rights Committee has stated that to interpret the ICCPR terms “within its territory” in such a way as to “excluding any responsibility for conduct occurring beyond the national boundaries would […] lead to utterly absurd results.”\footnote{Delia Saldias de Lopez v. Uruguay, Communication No 52/1979, UN Doc CCPR/C/OP/1 (1984) 88, Appendix - Individual Opinion Appended to the Committee’s Views at the Request of Mr. Christian Tomuschat; Lilian Celiberti de Casariego v. Uruguay, Communication No 56/1979, UN Doc CCPR/C/OP/1 (1984) 92, Appendix - Individual Opinion Appended to the Committee’s Views at the Request of Mr. Christian Tomuschat.} The Committee also affirmed that: “it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”\footnote{Delia Saldias de Lopez v. Uruguay, ibid., para 12.3; Lilian Celiberti de Casariego v. Uruguay, ibid., para 10.3.} Indeed, such an interpretation would go against the object and purpose of the ICCPR which, as noted by Rodley, “were laid down clearly in the preamble to the Covenant and consisted in protecting humans from the overreaching power of States”.\footnote{Human Rights Committee, ‘Consideration Of Reports Under Article 40 Of The Covenant (continued), Second and Third Periodic Reports of the United States Of America (continued)’, Summary Record of the 2380\textsuperscript{th} Meeting, UN Doc CCPR/C/SR.2380 (2006) para 65.} This conclusion has been supported by several authors including Manfred Nowak who stipulated that “[w]hen States parties […] take actions on foreign territory that violate the rights of persons subject to their sovereign authority, it would be contrary to the purpose of the Covenant if they could not be held responsible”.\footnote{M Nowak, \textit{UN Covenant on Civil and Political Rights} (2nd edn NP Engel, Germany 2005) 44. See also T Meron, ‘The 1994 U.S. Action in Haiti: Extraterritoriality of Human Rights Treaties’ (1995) 89 AJIL 78, 80–1; J Frowein, ‘The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation’ (1998) 28 IsrYHR 1, 6; O Ben–Naftali and Y Shany, ‘Living in Denial: The Application of Human Rights in the Occupied Territories’ (2003–04) 37 Isr L Rev 17.} Likewise Antonio Cassese submitted that the extraterritorial applicability of human rights “is consistent with the object and purpose of human
rights obligations: they aim at protecting individuals against arbitrariness, abuse, and violence, regardless of the location where the State conduct occurs.”

According to the Vienna Convention, resort to the preparatory work of a treaty can also be used to confirm the meaning of a treaty when the general rule of interpretation “[l]eads to a result which is manifestly absurd or unreasonable.” The drafting history of article 2 has also been discussed by several authors and human rights bodies who disagree with the contention that the travaux préparatoires reject the extraterritorial applicability of the ICCPR. More specifically, the International Court of Justice stated that:

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

Hence, by adopting a final text which included a territorial requirement, the drafting Committee of the ICCPR only “wished to avoid the risk that the Covenant would create positive duties outside the scope of a state’s authority and ability to execute such obligations.” This is a separate question from that of accountability of States for actions which they actively choose to take extraterritorially.

Circumstances in which International Human Rights Law is Applicable Extraterritorially

It is clear from the preceding discussion that international human rights law can apply extraterritorially. The circumstances in which States must ensure human rights protection abroad, however, is the subject of ongoing debate. The International Court of Justice, the Human Rights Committee, as well as the European Commission and Court of Human Rights have specified that a State’s human rights obligations apply extraterritorially when that State has effective control over a territory. As explained:

218 Vienna Convention (n 203) art 32.
220 Lubell (n 58) 201.
[t]his approach can be based on certain situations of effective control being analogous to territorial jurisdiction, at least with regard to the power and authority to enforce rules, primarily since, in this type of situation, the state takes on responsibilities on a governmental scale and the circumstances are in many ways analogous to the state’s own territory.221

Occupying powers must accordingly implement international human rights law extraterritorially and can be held accountable for human rights violations in the occupied territories. Under the law of armed conflict, the Hague Regulations stipulate that: “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army.”222 The instrument also specifies that “occupation extends only to the territory where such authority has been established and can be exercised.”223 Different human rights bodies have examined alleged violations occurring during occupation and interpreted the meaning of control over territory specifically under international human rights law.

In 1995 in the Loizidou case,224 the European Court of Human Rights discussed the extraterritorial applicability of the European Convention of Human Rights and the ensuing human rights obligations of Turkey in the occupied area of Northern Cyprus. The complaint lodged in this case concerned the arrest and detention of Mrs Loizidou225 (a citizen of Cyprus who grew up in Northern Cyprus and moved to Nicosia in 1972), as well as the denial of access to her property in Northern Cyprus.226 In this case the Turkish government raised preliminary objections, stating that the situation examined did not occur within Turkey’s territorial jurisdiction considering that: “the right of petition extends only to allegations concerning acts or omissions of public authorities in Turkey performed within the boundaries of the territory to which the Constitution of the Republic of Turkey is applicable”.227 The European Court of Human Rights rejected this argument and affirmed:

Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence

221 Ibid., 211.
222 Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (n 24) art 42(1).
223 Ibid., art 42(2).
224 Loizidou v. Turkey (Preliminary Objections), App no 15318/89 (23 March 1995).
225 Ibid., para 12.
226 Ibid., para 11.
227 Ibid., para 15.
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.\(^{228}\)

This approach was repeatedly adopted in subsequent cases at the European Court of Human Rights and before other bodies. In 2001 the European Court followed the Loizidou approach in the case of Cyprus v. Turkey which examined the alleged violation of the: "rights of Greek-Cypriot missing persons and their relatives; […] home and property rights of displaced persons; […]rights of enclaved Greek Cypriots in northern Cyprus; […]rights of Turkish Cypriots and the Gypsy community in northern Cyprus."\(^{229}\) In response to Turkey’s argument regarding its lack of jurisdiction over the alleged violations, the European Court noted Turkey’s "overall control over northern Cyprus"\(^{230}\) and reaffirmed the extraterritorial applicability of the European Convention to situations of occupation where States exercise such control over a territory.\(^{231}\)

In relation to other situations of occupation, the Human Rights Committee has from 1998 discussed the extraterritorial applicability of the International Covenant on Civil and Political Rights and resulting obligations of Israel in the occupied territories.\(^{232}\) The Committee stipulated that "the Covenant must be held applicable to the occupied territories and those areas of southern Lebanon and West Bekaa where Israel exercises effective control."\(^{233}\) Similarly in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the International Court of Justice stipulated that international human rights law applies outside Israel’s borders.\(^{234}\) In 2005 the International Court of Justice

\(^{228}\) Ibid., para 62.
\(^{229}\) Cyprus v. Turkey (Judgment), App no 25781/94 (10 May 2001) para 18.
\(^{230}\) Ibid., para 6
\(^{231}\) Ibid., paras 5-6.
\(^{233}\) Ibid., para 10.
\(^{234}\) Wall Advisory Opinion (n 219) paras 107-111. Therein the Court examined whether the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child apply in the Occupied Palestinian territories. It noted the constant position of the Human Rights Committee on the extraterritorial applicability of the International Covenant on Civil and Political Rights, including specifically as regards to the applicability of the instrument in the Occupied Palestinian Territory and the ensuing obligations of Israel. The International Court of Justice concluded that the ICCPR is applicable extraterritorially.
reiterated in the Democratic Republic of the Congo v. Uganda case the general approach taken in the Wall Advisory Opinion indicating that international human rights law is applicable “particularly in occupied territories”.\(^{235}\) The Court concluded in the DRC v. Uganda case that:

> Uganda is internationally responsible for violations of international human rights law and international humanitarian law committed by the UPDF and by its members in the territory of the DRC and for failing to comply with its obligations as an occupying Power in Ituri in respect of violations of international human rights law and international humanitarian law in the occupied territory.\(^{236}\)

The International Court of Justice in that case appeared in fact to also conclude that Uganda was responsible for human rights violations which took place outside the territory occupied by Uganda in the DRC.\(^{237}\) Following the case-law, international human rights law applies to situations where States exercise effective control over another territory. Such situations trigger the human rights obligations of a State outside its borders. The European Court of Human Rights further clarified its definition of effective control over territory submitting that a State does not need to be occupying an entire territory for its obligations under the European Convention on Human Rights to be applicable extraterritorially;\(^{238}\) a State only needs to have overall control over a territory to trigger the application of human rights law.

As previously discussed, the Human Rights Committee in its General Comment 31 submitted “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.”\(^{239}\) Human rights bodies and authors have stated that, in addition to control over a territory, State control or power over individuals outside its borders can bring such persons within

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\(^{236}\) *Ibid.*, para 220.


\(^{238}\) *Loizidou v. Turkey* (Judgment), App no 15318/89 (18 December 1996) para 11; *Cyprus v. Turkey* (Judgment) (n 229) para 315; *Ilaşçu and others v. Moldova and Russia* (Judgment) App no 48787/99 (8 July 2004) paras 314-316.

\(^{239}\) General Comment 31 (n 200) para 10.
the jurisdiction of a State. While the extraterritorial applicability of human rights for situations in which a State has control over territory has become fairly uncontroversial, the meaning of effective control over individuals and what level of control over these persons is necessary to trigger extraterritorial jurisdiction is not so clear. These matters have been examined in many contexts, including cases involving consular and diplomatic agents, detention cases, situations of deprivation of liberty outside the context of formal detention, as well as cases where a State does not physically hold individuals but interacts with these persons in such a way as to affect their rights. These three situations will be discussed briefly here.

For decades now, the European Commission and Court of Human Rights have asserted that: “authorised agents of a State, including diplomatic or consular agents bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property.”\textsuperscript{240} The European Court of Human Rights, in the Bankovic case which rejected a wide notion of extraterritorial applicability of the European Convention, acknowledged that:

\begin{quote}
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. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State.\textsuperscript{241}
\end{quote}

In addition to these situations and cases where States have control over a territory, the European Commission and Court of Human Rights concluded that situations where individuals are formally detained can also trigger extraterritorial human rights obligations for States. As early as 1975 the European Commission, for instance, examined the United Kingdom’s human rights obligations in a case regarding the detention of Rudolf Hess (former ‘deputy of the Führer’ of the Nazi party) in the

\textsuperscript{240} X. v. United Kingdom (Decision on the Admissibility of the Application), App no 7547/76 (15 December 1977) 74.
\textsuperscript{241} Bankovic and others v. Belgium and others (Grand Chamber Decision as to the Admissibility of the Application), App no 52207/99 (12 December 2001) para 73 \{thereafter: Bankovic case\}. The Lords in the Al–Skeini case before the UK High Court also recognized that human rights could apply extraterritorially in cases where a violation “occurs by reason of the exercise of state authority in or from a location which has a form of discrete quasi-territorial quality, or where the state agent’s presence in a foreign state is consented to by that state and protected by international law; such as diplomatic or consular premises, or vessels or aircraft registered in the respondent state.” Al–Skeini and ors v. Secretary of State for Defence [2004] EWHC 2911, 14 December 2004, para 270.
Allied Military Prison in Berlin-Spandau.\textsuperscript{242} The Commission submitted that: “there is in principle, from a legal point of view, no reason why acts of the British authorities in Berlin should not entail the liability of the United Kingdom under the Convention.”\textsuperscript{243} More recently, in the Al-Saadoon and Mufdhi admissibility decision\textsuperscript{244} regarding individuals arrested and detained by British forces in Iraq, the European Court decided that:

\begin{quote}
\textit{given the total and exclusive \textit{de facto}, and subsequently also \textit{de jure}, control exercised by the United Kingdom authorities over the premises in question, the individuals detained there, including the applicants, were within the United Kingdom’s jurisdiction […]}.\textsuperscript{245}
\end{quote}

The Inter-American Commission on Human Rights in a case concerning the detention of individuals by the United States armed forces in Grenada also concluded that human rights law applies extraterritorially.\textsuperscript{246} Hence, it appears that the question of whether human rights law can apply extraterritorially is becoming fairly uncontroversial in such cases of detention.

Human rights bodies further indicated that human rights law can apply extraterritorially to cases of deprivation of liberty beyond detention in formal detention facilities. The European Court of Human Rights in the Öcalan v. Turkey case,\textsuperscript{247} concerning Abdullah Öcalan, who “was arrested by members of the Turkish security forces inside an aircraft registered in Turkey in the international zone of Nairobi Airport”,\textsuperscript{248} stated that:

\begin{quote}
It is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the “jurisdiction” of that State for
\end{quote}

\textsuperscript{242} \textit{Hess v. United Kingdom} (28 May 1975) 2 DR 72.
\textsuperscript{243} \textit{Ibid.}, 73.
\textsuperscript{244} \textit{Al-Saadoon and Mufdhi v UK} (Decision on Admissibility), App no 61498/08 (30 June 2009).
\textsuperscript{245} \textit{Ibid.}, para 88.
\textsuperscript{246} \textit{Coard et al. v. United States}, Case 10.951, Report No 109/99 (29 September 1999) para 37: “Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state’s territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter’s agents abroad.”
\textsuperscript{247} \textit{Öcalan v. Turkey} (Judgment), App no 46221/99 (12 May 2005).
\textsuperscript{248} \textit{Ibid.}, para 91.
The purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory.249

The detention in this case did not occur in a formal detention facility but “concerned a formalized measure, taking place in accordance with some form of official policy openly acknowledged by the state.”250 What is the situation of other cases of detention where individuals are detained outside formal facilities and/or illegally? In the case of Issa v. Turkey concerning the alleged detention and killings of Iraqi shepherds by Turkish forces in the hills surrounding the village of Azadi in Iraq, the European Court of Human Rights reaffirmed its jurisprudence noting that:

a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully - in the latter State […]251

The Human Rights Committee, in two earlier cases of abduction and secret detention by Uruguayan agents of individuals outside its borders in Argentina252 and Brazil,253 submitted that:

Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant 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. […] [I]t would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.254

The above case-law suggests that in addition to official detention, and detention in formal facilities, States human rights obligations apply extraterritorially when State agents physically hold individuals, notwithstanding the type of premises or the legality of detention.

Human Rights bodies have suggested that human rights obligations can also be applicable extraterritorially in cases where States do not physically hold or detain

249 Ibid.
250 Lubell (n 58) 219.
251 Issa and others v. Turkey (Judgment), App no 31821/96 (16 November 2004) para 71.
252 Delia Saldias de Lopez v. Uruguay (n 213).
253 Lilian Celiberti de Casariego v. Uruguay (n 213).
254 Delia Saldias de Lopez v. Uruguay (n 213) para 12.3 ; Lilian Celiberti de Casariego v. Uruguay, ibid., para 10.3.
individuals. The Inter-American Commission on Human Rights, for instance, examined “complaints brought against the Republic of Cuba […] according to which a MiG-29 military aircraft belonging to the Cuban Air Force (FAC) downed two unarmed civilian light airplanes belonging to the organization ‘Brothers to the Rescue’.”\(^\text{255}\) In this case, where a missile was fired in international airspace and destroyed the civilian aircraft and killed civilians, the Commission reiterated that: “when agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state's obligation to respect human rights continues--in this case the rights enshrined in the American Declaration.”\(^\text{256}\) The European Court of Human Rights decided differently in the Bankovic case, in which NATO forces launched an air missile on Radio Televizije Srbije, leading to the killing of sixteen persons and another sixteen being seriously injured. After discussing previous jurisprudence and presenting a number of arguments,\(^\text{257}\) the judges rejected the extraterritorial applicability of human rights in that case and ultimately concluded:

> The Court is not […] persuaded that there was any jurisdictional link between the persons who were victims of the act complained of and the respondent States. Accordingly, it is not satisfied that the applicants and their deceased relatives were capable of coming within the jurisdiction of the respondent States on account of the extra-territorial act in question.\(^\text{258}\)

The Bankovic case has been referred to, and continues to be quoted, in cases dealing with the extraterritorial applicability of human rights law. Yet, the Bankovic case stands out as not being in line with previous and subsequent case-law of the European Commission and Court of Human Rights, as well as other human rights bodies. As suggested by Ben-Naftali and Shany:

> [w]hile Bankovic represents a regrettable withdrawal from the ‘effective control’ or ‘direct effect’ approach and opts for a narrower view of ‘jurisdiction’ than hitherto advanced by the ECHR, it is important to delineate its effect. The Court in Bankovic held that mere causation of injury to individuals does not entail the extra-territorial application of the Convention. Since it did not regard the NATO extra-territorial bombing operations as a manifestation of effective control, it concluded that the


\(^{256}\) Ibid., para 25.

\(^{257}\) Bankovic case (n 241) paras 54-81.

\(^{258}\) Ibid., para 82.
Convention is inapplicable. It does not, however, follow that other belligerent situations fall short of manifesting effective control.259

Indeed some of the reasoning and conclusions in the Bankovic case appear flawed and could also lead to undesirable effects as highlighted by Hampson:

The approach of the European Court gives rise to apparently arbitrary results. If a person is surrounded by armed forces of a foreign state (de facto detention) and shot dead, the victim is within its jurisdiction. If a person is shot at a distance of fifty metres, when no other forces are in the vicinity, the victim is again presumably under the control of the forces in question and therefore within the attacking state’s jurisdiction. How many metres away must the person be to cease to be under the control of the attacking state? It seems surprising that if an aircraft drops two bombs close to but inside the border of an attacked state, those killed within the state will be ‘within the jurisdiction’ but those killed on the other side of the border will not.260

In contrast with the other situations reviewed, the issues around and the parameters of the extraterritorial applicability of human rights in cases of killings from a distance remains controversial.

There is ongoing debate on how to assess the level of control over individuals necessary to trigger extraterritorial human rights obligations. Scheinin has submitted that, when discussing the targeting of individuals by agents abroad, the necessary control that can trigger the extraterritorial applicability of human rights can be achieved by many means: “assassination of a targeted individual with a cruise

259 Ben-Naftali and Shany (n 216) 83. See also Lubell (n 58) 222-223: “The Bankovic decision appears to suggest that aerial bombardment does not bring the affected individuals into the jurisdiction of the bombarding state(s). In fact, it is possible to read this decision as negating the whole authority or control test, and limiting extraterritorial applicability only to effective control of territory and the diplomatic exceptions. This approach is, however, in conflict with […] the extensive case-law supporting the use of authority or control test. While some may take the view that any conflicts within the case-law should be resolved in favour of Bankovic, others would disagree with parts of the Court’s conclusions. It is suggested here that this one decision on admissibility cannot easily override all other European cases before it and—more importantly—after it, which made clear use of the authority or control test, as well the pronouncements of other bodies.”

260 Hampson (n 191) 570. See also Lubell, ibid, 224: “Denying the applicability of international human rights law to cases of killing from a distance, by claiming that it does not involve control, creates an incentive for states to evade applicability of obligations by choosing one method of killing over another. Moreover, it means that while a state that detains an individual must adhere to human rights law, if it kills him/her without first detaining, it might avoid any such scrutiny. This approach means, for example, that should a suspected terrorist be on the high seas and a state sends out a naval vessel, by boarding the individual’s vessel and detaining him/her, they would bring the person within their jurisdiction but should they torpedo the individual’s boat and sink it (killing all on board) there would be no violation of human rights law. This result shows why such limitations cannot stand and that authority and control should be interpreted to include not only situations in which an individual is physically in the hands of the state agents. The key is not the physical distance between the agents and the individual, but rather the power over the individual that is exercised by the agents. Killings, such as some of those dealt with here, can answer the requirements of the authority or control test.”
missile, an anthrax letter sent from the neighbouring country, a sniper’s bullet in the head from the distance of 300 meters, or a poisoned umbrella tip on a crowded street all constitute ‘effective control’.” Following the wide case-law, what is then the test to assess the level of control that brings individuals abroad within the jurisdiction of a given State and engage its human rights obligations? Hampson suggested that “the appropriate test is [...] control over the effects said to constitute a violation, subject to a foreseeable victim being foreseeably affected by the act.”

Lawson puts forward that “if there is a direct and immediate link between the extraterritorial conduct of a state and the alleged violation of an individual’s rights, then the individual must be assumed to be ‘within the jurisdiction’ [...] of the state concerned.”

Scheinin posited “the issue of extraterritorial effect under the approach ‘facticity created normativity’”. For Ben-Naftali and Shany “a sensible interpretation of the term ‘jurisdiction’ would equate it with the actual or potential exercise of governmental power vis-à-vis affected individuals. This approach is conduct-oriented.”

Finally, Lubell proposes that “the appropriate test [...] is the exercise of authority or control over the individual in such a way that the individual’s rights are in the hands of the state.” He further argued that “[i]f state agents, even if acting from a distance, are able to carry out their plan to target individuals with intent to take life, this might amount to a form of authority or control over the life of the individual.”

**Range of Extraterritorial Human Rights Obligations**

As examined, extraterritorial applicability of human rights is possible in a variety of situations where States have control over territory or over individuals abroad. The

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262 Hampson (n 191) 570.
264 Scheinin (n 261) 80. He further noted at 81: If the methodology is ‘facticity creates normativity’ and the governing rule under public international law is that permissible exercise of extraterritorial jurisdiction is exceptional and requires special justification, then the applicability of human rights law in relation to the acts performed by a state outside its territory should not be exceptional but, on the contrary, based on a broad reading and full responsibility for such exceptional actions.”
265 Ben-Naftali and Shany (n 216) 62-63.
266 Lubell (n 58) 223
267 Ibid., 223
nature or range of extraterritorial obligations in such cases is a different question. In the Wall Advisory Opinion the International Court of Justice decided that:

the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. 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. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.\(^{268}\)

In the case of Cyprus v. Turkey, the European Court of Human Rights discussed the responsibility and range of obligations of Turkey under the European Convention vis-à-vis the applicants; it stated:

Having effective overall control over northern Cyprus, its responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey's "jurisdiction" must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey.\(^{269}\)

Following these two examples, the extraterritorial human rights obligations of States appear to be a mixture of positive and negative obligations.\(^{270}\) The range of obligations which must be implemented by States abroad will vary. The assessment of the applicable protection needs to be done on a case by case basis. In that vein, Lawson stated:

that there is a good deal to be said in favour of 'gradual’ approach to the notion of 'jurisdiction’": the extent to which contracting parties must secure the rights and freedoms of individuals outside their borders is proportionate to the extent of their control over these individuals. Accordingly, if a state exercises effective overall control over an area, it is in a position to secure 'the entire range’ of Convention rights — which includes positive obligations — and thus it should do so. In other situations, where no effective control is exercised, a lower standard applies.\(^{271}\)

\(^{268}\) Wall Advisory Opinion (n 219) para 112.

\(^{269}\) Cyprus v. Turkey (Judgment) (n 229) para 77.

\(^{270}\) Hampson (n 191) 567: “‘Negative obligations ’ refers to the obligation of a state not to violate human rights norms itself, also known as the obligation to respect. ‘Positive obligations’ refers to the state’s obligation to protect the individual from foreseeable harm at the hands of third parties, also known as the obligation to protect.”

\(^{271}\) Lawson (n 263) 120. See also C Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 Isr L Rev 310, 330-331: “Indeed, human rights obligations are flexible: with varying degrees of control, the state has varying obligations, going from the duty to respect to the duties to protect and fulfil human rights. The
As submitted by Lubell, when assessing the range of extraterritorial obligations of States, obligations are to be found “with regard to those rights for which the individual is directly dependent on the power exercised by the agents. Extraterritorial abductions would, for instance, create obligations with regard to the rights to liberty and humane treatment.”

As discussed in this chapter, the scope of application of international human rights and international humanitarian law both converge and diverge in a number of ways. Understanding the separate scopes of application, how they operate, and the difficulties within each discipline is essential to clarifying their interplay. The following chapter will discuss some of the difficulties and arguments in favour and against their concurrent application.

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

Lubell (n 58) 230-1.
PART II: ARTICULATING THE INTERPLAY
3. Approaches to the Interplay between International Humanitarian Law and International Human Rights Law

Questions on the interplay between international humanitarian law and international human rights law have been asked since 1945, the year of the emergence of human rights in the realm of public international law through the United Nations Charter. The framework of the relationship that exists between international humanitarian law and international human rights law – whether the two fields of law converge or diverge, are complementary or collide – is highly complex. It has been said about their relationship that “there is no rational or organized convergence between the two systems of law, […] similitude and correspondence are sometimes overwhelmed by diversity, and […] gaps and overlaps between their rules are a common feature of their interrelations”¹. For more than half a century, scholars and judges have elaborated theories, provided suggestions and argued over whether and how the two disciplines should be linked. The following question encapsulates the dilemma:

[Les droits de l’homme et le DIH entretiennent-ils des rapports ? y-a-t-il une parenté, une attirance mutuelle entre ces deux branches du droit international? En d’autres termes, vivent-ils en symbiose en se pénétrant mutuellement? ou alors, constituent-il un couple antithétique?]²

This chapter introduces different positions on the interplay between international human rights and international humanitarian law, as well as the main arguments supporting these stances. It concludes by highlighting some of the apparent reasons leading to the mainstream support of the partnership of international human rights and humanitarian law, rather than their compartmentalisation.

3.1. Theoretical Approaches

In 1983, the International Committee of the Red Cross issued a report entitled The Red Cross and Human Rights. Besides acknowledging the existence of links between

² M-C Djiena Wembou and D Fall, Le Droit International Humanitaire: Théories et Réalités Africaines (L’Harmattan, Paris 2000) 62. ‘Are human rights and IHL related? Is there an affiliation, a mutual attraction between these two branches of international law? In other words, are they living in symbiosis penetrating each other mutually? Or else, are they forming an antithetical couple?’ [Translated by the author]
international human rights law and international humanitarian law, the report was especially interesting in that it identified three approaches regarding the interplay between the disciplines. As explained by Arthur Henri Robertson, after assessing the two international legal frameworks, the report:

The report distinguishes three schools of thought, which are called “integrationist”, “separatist” and “complementarist”. The first theory favours a merger; the second believes that the two branches are completely different and that their rapprochement is confusing and harmful; the third theory is that the two systems are distinct but complement each other.

Throughout the years, each approach found at least some support. Whether international human rights law and international humanitarian law should be merged together, totally separated, or articulated in another manner, continues to be a subject of lengthy discussions, to which experts and institutions are still trying to provide a clear answer.

The separatist approach supports the segregation of international humanitarian law and international human rights law. This strict division or compartmentalisation of the two disciplines was strongly advocated before the 1960s. The late Professor Colonel Draper, a leading scholar and humanitarian law expert who wrote widely on the relationship between human rights and humanitarian law, supported this position. He asserted among other things that “[t]he attempt to confuse the two regimes of law is unsupportable in theory and inadequate in practice. The two regimes are not only distinct but are diametrically opposed.”

The reasons for advocating the separation of international humanitarian law and international human rights law, which are explained in more details in the next sections, are rooted at many different levels. On the one hand, the fact that the two fields became part of public international law at different times, and until more recently developed independently of one another, has been repeatedly invoked to dissociate the two legal disciplines. In addition to their historical background, commentators have highlighted more significant divergences between international humanitarian and

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3 The preferred term in this study, and used thereafter, is ‘complementary approach’.
human rights law, and noted several difficulties and dangers in linking them

Incompatibility in the objectives, scope of application, substantive
framework, implementing norms and mechanisms, as well as the different
environment within which each discipline operates, have been mentioned to support
the argument that human rights and humanitarian law are two distinct branches of
international law that should be keep apart in two tight compartments and not
interact.⁶

In contrast with the separatist approach, the integrationist and complementary
approaches advocate links between international human rights and humanitarian law,
even if to varying extents and from distinct angles. The supporters of the integrationist
approach are of the opinion that the separation of the two fields is in fact purely
fictitious and that the disciplines are already, or at least should be, merged into a
single legal framework. More precisely, some advocates of the integrationist theory
believe that international humanitarian law in fact incorporates international human
rights law; the others share the view that international humanitarian law is in fact
merely the discipline protecting human rights during armed conflicts, and that it is
international human rights law which encompasses both disciplines.⁷ In all cases, the
defenders of the integrationist approach reject the idea that there exist two different
frameworks for the protection of individuals in times of armed conflict. While Pictet
appeared later clearly in favour of a complementary approach,⁸ in his book

*Humanitarian Law and the Protection of War Victims* he included human rights
within what he called a broad definition of international humanitarian law:

International humanitarian law, in the broad sense, is constituted by all the
international legal provisions, whether of statute or common law, ensuring

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⁶ See Djiena Wembou and Fall (n 2) 66-67; H Gros Espiell, ‘Human Rights: Concept and Standards’
Vinuesa (n 1) 70; D Schindler, ‘The International Committee of the Red Cross and Human Rights’,
(1979) 208 IRRC 3; Draper, *ibid.*, 145.

⁷ Djiena Wembou and Fall (n 2) 65.

⁸ He affirmed in J Pictet, *Development and Principles of International Humanitarian Law* (Martinus
Nijhoff, Dordrecht 1985) 3: “In conclusion, the two systems international humanitarian law and
international human rights law] are close – but distinct – and should remain so. […] Should we wish
to bring them together under a common name, we might imagine the term ‘humane law’, which could
be defined as follows: Humane law comprises the totality of the international legal provisions which
ensure for the humane person respect and fulfillment".
respect for the individual and promoting his development. Humanitarian law now comprises two branches: the law of war and human rights.9

In September 1970, the Congress on Human Rights as the Basis of International Humanitarian Law was held in San Remo. A great deal of material regarding the relationship between international human rights and international humanitarian law emerged from this conference. As the title of the Congress suggests, the participants put forward and discussed the idea that humanitarian law derives from human rights. While acknowledging the chronological primacy of international humanitarian law, the participants opined that human rights are at the basis of international humanitarian law. Along that line, Arthur Henri Robertson made a statement, which has since been quoted repeatedly by experts examining the relationship between international humanitarian and international human rights law. He affirmed that “human rights law is the genus of which humanitarian law is a species.”10 At greater length, Robertson asserted:

[W]hen we look at the substance of the two disciplines from an analytical point of view, […] [w]e then see that human rights law is the genus of which humanitarian law is a species. Human rights law relates to the basic rights of all human beings everywhere, at all times; humanitarian law relates to the rights of particular categories of human beings- principally, the sick, the wounded, prisoners of war- in particular circumstances, i.e. during periods of armed conflict.11

While some in San Remo showed a certain interest in the integrationist concept, there was definitely stronger support for the complementary approach at the Congress. In fact, from 1970, the number of supporters of the separatist and integrationist approaches has never ceased to diminish in favour of the complementary approach which has grown stronger.

The advocates of the complementary approach believe that international human rights and humanitarian law should be brought closer and interact more, but also acknowledge the specificities of each discipline. The complementary position is the middle ground approach when discussing the relationship between the

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9 J Pictet, _Humanitarian Law and the Protection of War Victims_ (Henry Dunant Institute, Geneva 1975), 13. See also 14 where Pictet highlights that his definition of humanitarian law does not propose a merger of the two fields of law but is solely “a term which might cover two undoubtedly closely connected, yet independent disciplines on equal footing.”


11 _Ibid._
disciplines; it is the approach preferred by the International Movement of the Red Cross and Red Crescent in The Red Cross and Human Rights report already discussed. The complementary approach underscores that international human rights and humanitarian law are already involved together inasmuch as they are both inspired by a common objective (the protection of individuals) and apply concomitantly. On the other hand, as opposed to the integrationist theory, this third school of thought acknowledges the differences between international human rights law and international humanitarian law and the many difficulties that can come in the way of their full association. Because of that, the advocates of the complementary approach reject the merger of the disciplines and instead believe that there is a “necessity of maintaining two distinct yet complementary systems”, and that “the two systems are close – but distinct – and should remain so. They are mutually complementary, and admirably so.”

In sum, the proponents of the separatist approach believe that international human rights and international humanitarian law cannot be linked together, and must be applied in isolation from one another. In contrast, the defenders of the integrationist and the complementary approaches believe in the need of linking, albeit to different extent, the two fields. The following sections propose to examine the main arguments put forward to reject, and promote, the relationship and interplay between the two legal frameworks.

3.2. Objectives of the Frameworks – An Argument used to Promote and Reject the Interplay

The objectives and aims of international humanitarian and human rights law are one of the first elements noted by experts examining the relationship, or issues related to the interplay, between the disciplines. Those in favour of building bridges between the two branches assert that the purpose of the legal frameworks made it clear from the start that both fields of law would not only function in parallel, but also interact with each other on many levels. Along those lines, Arthur Henri Robertson noted that international humanitarian law and international human rights law aim towards a comparable goal:

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12 See for instance Robertson (n 4) 795, 800-801; Djiena Wembou and Fall (n 2) 63.
13 Robertson, ibid., 801.
14 Pictet (n 8) 3.
[T]he fundamental objectives of the two subjects are closely similar, if not identical: to protect the basic rights of the human person from abuse, oppression or violence, usually in circumstances where he is unable to secure his protection himself.\textsuperscript{15}

Likewise, in the Furundzija case, the judges of the ICTY highlighted the similarities between the objectives of the two disciplines; they asserted that “[t]he general principle of respect for human dignity is the basic underpinning and indeed the very raison d’être of international humanitarian law and human rights law”\textsuperscript{16}. In 2003, Jakob Kellenberger, then President of the International Committee of the Red Cross, similarly affirmed:

The common underlying purpose of international humanitarian and international human rights law is the protection of the life, health and dignity of human beings. While one of the specific aims of international humanitarian law is to ensure the protection of persons affected by armed conflict and, in particular, of those who find themselves in the hands of the adversary, the purpose of human rights law is to govern relations between states and individuals. In either case, the guiding principle is that individuals have the right to be protected from arbitrariness and abuse because they are human […].\textsuperscript{17}

In addition to having similarities in their objectives, the reasons underlying the existence of each discipline, and of the institutions overseeing their implementation, are intertwined. Both systems are involved in the regulation of conflicts, while at the same time working towards peace.\textsuperscript{18} International humanitarian law works towards the regulation of conflict, and international human rights law works towards preventing such situations or intervening when they arise. In actual fact, it can be said that war, peace and human rights are not only interrelated but are, to some extent, co-dependent. Respect for human rights by States is a precondition for peace and their violation is conducive to the emergence of armed conflicts.\textsuperscript{19} For those reasons it has been asserted by the proponents of the association of international

\textsuperscript{15} Robertson (n 4) 795. On the similar goals of the two disciplines, see also AH Robertson, \textit{ibid.}, 800-801; AS Calogeropoulos-Stratis, \textit{Droit Humanitaire et Droits de l’Homme: La Protection de la Personne en Période de Conflit Armé} (Institut Universitaire de Hautes Etudes Internationales, Geneva 1980) 48.

\textsuperscript{16} Prosecutor v Furundzija (Judgment) IT-95-17/1-T (10 December 1998) para 183.

\textsuperscript{17} J Kellenberger, ‘Protection through Complementarity of the Law’ (Official Statement, 6 September 2003) <www.icrc.org/Web/Eng/siteeng0.nsf/iwpList575/D75203C5C3CFB78CC1256DA300427813>.

\textsuperscript{18} For more details on the role of the ICRC in the promotion of peace, see section 1.6.4.

\textsuperscript{19} As noted in the UN Secretary-General report ‘Respect for Human Rights in Armed Conflicts’, UN Doc A/7720 (1969), para 16: “The Second World War gave conclusive proof of the close relationship which exists between outrageous behaviour of a Government towards its own citizens and aggression against other nations, thus, between respect for human rights and the maintenance of peace.”
humanitarian law and international human rights law that the two fields of law have no choice but to work hand in hand if they are to be effective. Essentially, since the strengthening of one discipline necessarily has a positive impact on the other, any attempt to fully dissociate them or their implementing institutions would seem both futile and illogical.

Interestingly, the objectives of international human rights and international humanitarian law have been used over the years to both support and reject a relationship between the disciplines. While the similarity appears true regarding the general protective purpose of the two disciplines, the precise objectives of international humanitarian law have also been said to be incompatible, or even diametrically opposed, to that of international human rights law. As such, the objective of international humanitarian law was bluntly, or ironically, described as: “How to kill your fellow human beings in a nice way.”

It is unnecessary to embark on a long discussion in order to reach the conclusion that such an aim indeed diverges from that of human rights law. Simply, even if today the laws of war have become humanitarian in nature and often protect individuals in a manner similar to human rights law, it remains that the ethos behind international humanitarian law is not one of peace but one of conflict and fighting. Along those lines, Draper further noted:

Today, the whole emphasis is in the humanitarian aspects of the law of war, on the principle of humanity which are quite other than those of Human Rights. In its origin the law of war engendered nothing analogous to our modern humanity- perhaps stemming from the ideas in Rousseau’s Contrat Social. Originally, and even today, the primary norms of the law of war are far from humanitarian. This law tends to be a series of prohibitions but they are bound upon the primary norm which allows belligerents to kill, wound, maim, capture and destroy. Those are the supreme non-humanitarian activities. The restraints upon how those essential and primary acts of war are conducted may well be humanitarian today, and it is doubtless that they are increasing. Such restraints are meaningless out of the context of the great primary power of right of belligerents to kill, wound, etc., embedded at the very centre of the law of war, if not expressed.

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Ultimately, the discourse on the incompatible objectives of the two fields of law is quite simple. This position claims that, while international humanitarian law strives at protecting human beings, its objectives are also paradoxical and at odds with international human rights law.

In *Principles of International Humanitarian Law*, Jean Pictet described international humanitarian law as “the compromise between two opposing considerations: That of ‘necessity’ and that of ‘humanity’”. Those two principles are at the core of international humanitarian law and, as such, have developed into substantive norms and been included in the 1949 Geneva Conventions and their Additional Protocols. The description of the principle of military necessity in the Lieber Code supports the argument that the international humanitarian and international human rights legal frameworks are intrinsically different:

Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist.

The clashes between the objectives and substantive norms of international humanitarian and human rights law are numerous, and make it difficult to disregard entirely the argument of those in favour of the dissociation of the two disciplines.

As noted by Meron, many norms found in the framework of international humanitarian law, such as those concerned with the regulation of methods of killing or wounding individuals, are difficult to associate with the human rights of individuals, which should be respected at all time:

> Not surprisingly, it has become common in some quarters to conflate human rights and the law of war/international humanitarian law. Nevertheless, despite the growing convergence of various protective norms found in the framework of international humanitarian law, such as those concerned with the regulation of methods of killing or wounding individuals, are difficult to associate with the human rights of individuals, which should be respected at all time.

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trends, significant differences remain. Unlike human rights law, the law of war allows, or at least tolerates, the killing and wounding of innocent human beings not directly participating in an armed conflict, such as civilian victims of lawful collateral damage. It also permits certain deprivations of personal freedom without convictions in a court of law. It allows an occupying power to resort to internment and limits the appeal rights of detained persons. It permits far-reaching limitations of freedoms of expression and assembly.24

While the concept of humanity is compatible with the objectives of human rights law, the principle of military necessity and the norms emerging from this concept in international humanitarian law have been seen as clashing with international human rights law. This approach, however, might be said to misrepresent human rights law. In fact, while international humanitarian law may be more permissive, international human rights law, nevertheless, also displays a balancing act between protection of individuals and the needs – including security needs – of the State. For example, the law enforcement approach of human rights law allows for police to use force, and even lethal force in some circumstances.25 Similarly, the derogation clauses of human rights law demonstrate an element of balancing individual rights and security concerns.26 In that respect, both international humanitarian law and international human rights law seek to protect individuals from unnecessary harm, while recognizing the security concerns of the State.

3.3 Overlap of Substantive Content – An Argument Supporting the Interplay

The substantive content of international humanitarian law and international human rights law has been repeatedly used to highlight the existence of links between the disciplines and promote their relationship. With analogous objectives and parallel fields of application, the substantive overlap of the two disciplines is unsurprising:

The similarity of purpose between international law norms dealing with the protection of persons is mirrored by the similar, albeit not identical, content of many of their norms. Like international human rights, international humanitarian law aims, among other things, to protect human life, prevent and punish torture and ensure fundamental judicial guarantees to persons subject to criminal process.27

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26 See earlier discussion on limitations and derogations, section 2.4.2.
27 Kellenberger (n 17).
Indeed, the substantive content of international humanitarian law and international human rights law intertwines on numerous issues, and provisions offering comparable protection are found in each system. Many authors have elaborated on the substantive similarities between the disciplines and given examples of their resemblance and interconnection. The subject has been tackled from different perspectives and, for example, Doswald-Beck and Vité have given what they called “an impressionistic overview of the most important provisions of humanitarian law that help to protect the most fundamental human rights in practice.”\(^{28}\) Kolb has, among other things, reviewed the commentaries on the four Geneva Conventions to find therein references to human rights.\(^{29}\) The current section proposes to examine the main examples of substantive overlap of international humanitarian and human rights law. More specifically, the following will look at: 1) the existence of human rights standards within the framework of international humanitarian law, and 2) references to international humanitarian law in human rights provisions on derogation.

### 3.3.1. Parallelism of Content: Presence of Human Rights Standards in International Humanitarian Law

On 10\(^{th}\) December 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights.\(^{30}\) The proclamation of the Universal Declaration created a new legal reality, with a human rights system which would operate concomitantly with international humanitarian law. The 1949 Geneva Conventions and the Universal Declaration of Human Rights came into being virtually at the same period of time, with the Declaration adopted a few months before the humanitarian conventions. This temporal reality made it impossible for the drafters of the Geneva Conventions to ignore the emerging human rights system in the completion of their work.\(^{31}\) Those participating in the drafting of the 1949 Geneva Conventions acknowledged the entry of human rights law on the


\(^{30}\) Universal Declaration of Human Rights (10 December 1948) GA Res 217A (III), UN Doc A/810, 71.

\(^{31}\) Kolb (n 29).
international scene; they considered the inclusion of some human rights standards in the humanitarian law framework and the compatibility of the Geneva Conventions with international human rights law.

One of the first noticeable signs of the influence of human rights was possibly the choice of term – international humanitarian law – for the legal framework. The subject of international human rights law and the incorporation of some human rights standards in the framework of international humanitarian law were discussed on many occasions during the drafting of the four Geneva Conventions. As noted by Kolb, debates on the inclusion of human rights already occurred at the outset when discussing the preamble of the Geneva Conventions:

The representative of the Holy See, Msgr Compte, wanted the preamble to contain an appeal to the “divine principle” on which the rights and duties of man were based, or a call for “respect for the human person and for human dignity”. In the end it was proposed that a reference to “universal human law” be included in the preamble. The borrowing from the 1948 Declaration is particularly evident here. Several delegates also emphasized that the Fourth Geneva Convention, on the protection of civilians, should be taken together with the Universal Declaration, and that the establishment of such a link in the preamble would be welcome. The Australian delegate, Hodgson, said it would be sufficient to refer to the preamble of the Declaration, without drafting a new one for the Convention on prisoners of war. He made similar comments regarding the preamble for the Convention on civilians, adding dryly that the Conference “was not called upon to re-write” the 1948 Declaration.

During the signing ceremony of the 1949 Conventions, Max Petitpierre, President of the Conference, further underlined the similarities between international human rights law and international humanitarian law, and the need to consider closer links between them:

[H]e spoke of the parallelism between and the common ideal of the Geneva Conventions and the Universal Declaration. He noted that the text of the Conventions incorporated and expressed in concrete terms some of the rights proclaimed by the Declaration. [Petipierre said] “The day after tomorrow, we shall celebrate the anniversary of the Universal Declaration of the Rights of Man which was adopted by the General Assembly of the United Nations on December the 10th, 1948. It is, we think, interesting to compare that Declaration with the Geneva Conventions. Our texts are

based on certain of the fundamental rights proclaimed in it—respect for the human person, protection against torture and against cruel, inhuman or degrading punishments or treatment. [...] The Universal Declaration of the Rights of Man and the Geneva Conventions are both derived from one and the same ideal [...].

The substantive overlap of international humanitarian law and international human rights law, and the influence and presence of human rights standards in the humanitarian treaties, are especially evident when comparing non-derogable human rights with article 3 common to the four Geneva Conventions and norms in their two Additional Protocols.

While allowing derogation in times of public emergency from certain human rights norms, international human rights law acknowledges that some rights are so fundamental to individuals that they cannot be derogated from in any circumstances, even in time of war or other public emergencies. The European Convention on Human Rights, the International Covenant on Civil and Political Rights and the American Convention on Human Rights prohibit States from abdicating from their obligations relating to certain rights. Those rights, which vary slightly in the different instruments, include the right to life; the prohibition of torture, inhuman or degrading treatment or punishment; the prohibition of slavery or servitude; and freedom from ex post facto laws. As discussed by Vinuesa, albeit in a different form, provisions protecting those non-derogable human rights have also found their way into international humanitarian law:

[The possibility of ensuring at least minimum standards of humane treatment during these extreme situations [i.e. armed conflicts] becomes a paramount objective, common and fundamental to both systems.]

The safeguarding of elemental principles of humanity relates humanitarian law with human rights. Both systems recognise a minimum of level of protection that all human beings should have, irrespective of circumstances of peace or war.

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34 Kolb, ibid.
36 International Covenant on Civil and Political Rights, ibid., art 4(2); European Convention on Human Rights, ibid., art 15(2); American Convention on Human Rights, ibid., art 27(2).
37 Vinuesa (n 1) 72-73.
38 Ibid., 76.
Accordingly, the main substantive overlap between international humanitarian law and international human rights law regards those non-derogable rights. Common Article 3 provides for the protection of those fundamental or core human rights. This provision stipulates:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) Taking of hostages; (c) Outrages upon personal dignity, in particular humiliating and degrading treatment; (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.39

This article has actually a dual resemblance to human rights norms. As highlighted by Gros Espiell and many others, on the one hand:

The wording of Article 3 is identical or similar to that used in the 1948 Universal Declaration of Human Rights, and adopted again in the 1966 International Covenants on Human Rights and, at a regional level, in the European Convention on Human Rights and the African Charter of Human and Peoples’ Rights.40

On the other hand, Common Article 3 can also be compared to human rights in that it not only includes protections of a human rights nature but additionally applies to non-international armed conflict, going outside the conventional field of application of international humanitarian law:

[C]ommon Article 3 lays down the basic rules which States are required to respect when confronted with armed groups on their own territory. It thus diverges from the traditional approach of humanitarian law, which, in principle, did not concern itself with the relations between a State and its


nationals. Such a provision would be more readily associated with the human rights sphere […] 41

The parallelism of content and the presence of human rights standards in the framework of international humanitarian law are not exclusive to Common Article 3. In fact, many other references to human rights are found within the Geneva Conventions. As explained by Kolb, several provisions of the Convention relative to the Protection of Civilian Persons in time of War (Fourth Convention) have been associated with the human rights legal framework “because they concern the protection of individuals who do not have any military status”. 42 In fact, out of the four instruments, the Fourth Convention makes the widest use of human rights standards. For instance, in a similar fashion to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, article 27 of the Fourth Convention stipulates that:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. 43

Additionally, this provision provides for the protection of women, and affirms that all protected persons must be treated “without any adverse distinction based, in particular, on race, religion or political opinion.” 44

The presence of human rights standards in international humanitarian law is even clearer in the two Additional Protocols to the Geneva Conventions. First, human rights law appears to have had an important influence on the material scope of application of Additional Protocol I; its jurisdiction ratione materiae has been extended to include:

armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly

41 Doswald-Beck and Vité (n 28).
42 Kolb (n 29).
43 Fourth Geneva Convention (n 39) art 27, para 1.
44 Ibid., art 27.
Relations and Co-operation among States in accordance with the Charter of the United Nations.\textsuperscript{45}

The infiltration of human rights standards in the 1977 Protocols was succinctly summarized by Theodor Meron in the following paragraph:

The post-Charter human rights instruments had an influence on the humanitarian character of the Geneva Conventions of 1949. The 1977 Additional Protocols also reveal the influence of international human rights, both in taking those rights into consideration, and in referring explicitly to them. In matters such as the prohibitions of torture and cruel, inhuman, or degrading treatment of punishment, arbitrary arrest and detention, discrimination on grounds of race, sex, language, or religion, and the guarantee of due process, a very large measure of convergence and parallelism exists between norms stated in human rights instruments and those stated in instruments on international humanitarian law. There is also growing convergence in the \textit{ratione personae} and \textit{ratione materiae} applicability of these two systems.\textsuperscript{46}

Article 75 of Additional Protocol I grants the rights enumerated by Meron; it provides for the protection of fundamental guarantees of protected persons in situations of international armed conflicts.\textsuperscript{47} In the same instrument, article 10 provides for the respect and protection, supply of medical care and humane treatment of “[a]ll the wounded, sick and shipwrecked, to whichever Party they belong”.\textsuperscript{48} Article 11 provides for the protection of “[t]he physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty […]”.\textsuperscript{49}

Analogous provisions to those aforementioned of Additional Protocol I also exist in international humanitarian law for non-international armed conflicts to guard the fundamental guarantees of individuals. As such, Part II of Additional Protocol II (entitled humane treatment) provides, in article 4, 5 and 6 respectively, for: the protection of “fundamental guarantees”; the protection of “persons whose liberty has been restricted”; and the protection of due process guarantees for “penal prosecutions”. In sum, the substantive overlap and similarities between international humanitarian law and international human rights law are numerous. In addition to

\textsuperscript{45} Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (8 June 1977) 1125 UNTS 3 [Protocol I], art 1(4).
\textsuperscript{47} Ibid., art 75.
\textsuperscript{48} Ibid., art 10(1).
\textsuperscript{49} Ibid., art 11(1).
the said provisions, many humanitarian norms are also *de facto* protecting human rights. For instance, as noted by Kellenberger:

> International humanitarian law rules on the conduct of hostilities and on the treatment of persons who find themselves in enemy hands are designed to safeguard the right to life. Basic international humanitarian law tenets such as the principle of distinction, the prohibition of direct attacks against civilians and the prohibition of indiscriminate attacks are meant to protect the lives of persons not taking a direct part in hostilities. Many other international humanitarian law norms serve the same purpose, among them provisions on the treatment of persons *hors de combat*, on internees and detainees, on humanitarian assistance to populations in need. […]

Apart from similarity of norms in the areas just mentioned, international humanitarian law also facilitates the realization of a certain number of economic and social rights in situations of armed conflict. Even though international humanitarian law does not, for example, explicitly mention the right to food, many of its provisions are aimed at ensuring that civilians and other persons are not denied food or access to food in armed conflict. Thus, humanitarian law rules on the conduct of hostilities prohibit both starvation of the civilian population as a method of warfare and attacks against or destruction of objects indispensable to the survival of the civilian population.

As is well known, humanitarian law also contains rather detailed provisions on humanitarian assistance to civilian populations when basic needs, including food, are inadequately provided for.\footnote{Kellenberger (n 17).}

In 2005, the International Committee of the Red Cross, in its study on customary international humanitarian law, has confirmed the overlap of many fundamental guarantees in the two international legal frameworks.\footnote{J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, Cambridge 2005). For more details, see chap 5.3.}

### 3.3.2. Substantive Intertwining: Derogation under Human Rights Law and International Humanitarian Law

In addition to the substantive similarities between international human rights law and international humanitarian law, the derogation clauses incorporated in the main human rights instruments have been used to highlight the links between the two disciplines and to affirm the futility of clinging to the idea that they should remain totally separate and apart from one another. The European Convention on Human Rights asserts:

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the...
The reference to war strengthens the argument for continued applicability – albeit with derogations – of human rights law during armed conflict. The International Covenant on Civil and Political Rights and the American Convention on Human Rights also include derogation provisions. Given that international humanitarian law is a branch of international law, the aforementioned provisions included in the human rights instruments prohibit States from derogating from their human rights obligations in a manner that would be incompatible with their obligations under international humanitarian law. Simply, the derogation provisions embedded in the human rights instruments link international human rights and humanitarian law, inasmuch as they, at least in principle, oblige or enable the human rights mechanisms to examine whether a derogation is consistent with international humanitarian norms. Addressing the issue of derogation following article 4 of the International Covenant on Civil and Political Rights, the Human Rights Committee confirmed the linkage of international human rights and international humanitarian law, more specifically in the context of the right to a fair trial. Through the linkage or complementary application of international human rights and humanitarian law, the Human Rights Committee made certain elements of the right to a fair trial in armed conflicts and emergencies de facto non-derogable, affirming that:

As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations.

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53 International Covenant on Civil and Political Rights (n 35) art 4 (1) reads: “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.” American Convention on Human Rights (n 35) art 27(1) affirms: “In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.”
54 Whether they actually conduct such examinations in practice will be discussed in chap 5.
55 ‘General Comment No. 29: States of Emergency (article 4)’, UN Doc CCPR/C/21/Rev.1/Add.11 (2001), para 16.
While permitting derogation in times of public emergency for certain human rights norms, international human rights law prohibits States from derogating from a number of rights. The most famous of the non-derogable rights is probably the right to life. One of the particularities of this core right lies in the fact that it directly links international humanitarian law and international human rights law. The European Convention on Human Rights provides in its article 15 that no derogation from the right to life is permitted “except in respect of deaths resulting from lawful acts of war”. The International Covenant on Civil and Political Rights and the American Convention on Human Rights affirm that “[n]o one shall be arbitrarily deprived of his life.” These provisions make it difficult for human rights mechanisms to resolve claims of right to life violations arising from an armed conflict solely by referring to human rights law. In fact, in the context of a violation of the right to life arising from an armed conflict, there exists a need to link the two disciplines; international humanitarian law is essential in such cases to interpret or define more precisely the right to life which is silent as regards to its application in situations of armed conflicts. This position was confirmed by the United Nations system as well as by the European and the Inter-American systems.

The interconnection of international humanitarian and human rights law in the context of the right to life was first addressed in relation to the European system. Colonel Draper succinctly explained the impact of article 15 of the European

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56 For a more detailed study on the right to life during armed conflict see University Centre for International Humanitarian Law, ‘Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation’ (University Centre for International Humanitarian Law, Geneva, 1-2 September 2005).
57 European Convention on Human Rights (n 35) art 15(2). For more details on this provision see chap 5.2.3, section on conclusion. As noted by Hampson, however, “[n]o State has ever derogated from Article 2 of the Convention, whether involved in a non-international armed conflict or international armed conflict and whether the conflict was in national territory or extraterritorial.” F Hampson, ‘Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?’ in M Schmitt (ed) The War in Afghanistan: A Legal Analysis (US Naval War College, International Law Studies, 2009) vol 85, 496. Kretzmer advanced that the lack of derogation can be explained by the fact that: “[w]hile States that are party to the Convention have been involved in armed conflicts since the Convention came into force, in no case have such States thought they needed to derogate from their Convention obligations in order to cater for acts on the battlefield that are compatible with the laws and customs of war.” D Kretzmer, ‘Rethinking Application of International Humanitarian Law in Non-International Armed Conflicts’ (2009) 42 Isr L Rev 1, 9.
58 American Convention on Human Rights (n 35) art 4(1); International Covenant on Civil and Political Rights (n 35) art 6(1).
59 See chaps 5.1, 5.2.2 and 5.2.3.
Convention on Human Rights on the relationship between international human rights law and international humanitarian law:

It is to be noticed that in Article 15(2) of the European Convention, dealing with derogation from the right to life— the most fundamental of human rights, the whole of the law of war as to killing has been incorporated by reference. That law of war will have to be considered by the European Commission and possibly by the Court. Further, it is suggested that that part of the law of war which relates to the taking of life during internal conflicts, e.g., in Article 3 (1) (a) common to the four Geneva Conventions of 1949, also falls for the like consideration. Much more arises here than the fact that part of the law of war may be so considered when operating the regime of human rights. It would appear that Article 15 of the European Convention, a prototype provision, spells out for us the essential juxtaposition of the Law of Armed Conflicts to the regime of human rights.60

The application of the right to life during armed conflicts was also discussed by the Inter-American Commission of Human Rights in the Tablada case. Similarly to Colonel Draper, the Commission affirmed:

[The Commission’s ability to resolve claimed violations of [the right to life] arising out of an armed conflict may not be possible in many cases by references to Article 4 of the American Convention alone. This is 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. Therefore, the 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.61

The International Court of Justice came to a similar conclusion in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. In response to the suggestion that the International Covenant on Civil and Political Rights “was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict”,62 the Court stated:

In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of

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60 Draper (n 20) 130.
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.³³

The question of lex specialis and the relationship of international human rights law and international humanitarian law through the right to life provision will be further discussed in greater length in the following chapters. For the purpose of this chapter, it should simply be noted at this stage that international humanitarian law and international human rights law do overlap at the substantive level; that there exist some provisions of a human rights nature in the Geneva Conventions and their Protocols; and that human rights law and humanitarian law are intertwined through the derogation and right to life provisions in the different human rights treaties.

3.4. Decisive Factors in Choosing Partnership over Compartmentalisation of the Disciplines

As examined in the previous chapter, and as will be discussed in more length in chapter 5, the relationship between international human rights law and international humanitarian law has evolved into a partnership, wherein the two fields should be concurrently applied. The rationale behind the change of ethos of the international community, or the motive for acknowledging the potential benefit of closer interaction between the two fields of international law, is multi-faceted. Many of the reasons, which have served to craft a favourable environment to the creation of closer links between international humanitarian law and international human rights law, have been noted in the previous sections of this chapter. The aims, fields of application and some substantive norms of international human rights law and international humanitarian law appeared at the outset too similar or connected to sustain a strict separatist approach. It is asserted that, taken cumulatively, the arguments examined in support of the relationship between the fields are stronger than those in favour of their compartmentalisation and disconnect. In addition to these arguments, there is a further reason that tilts the balance in favour of the building bridges between the two disciplines, as opposed to advocating their compartmentalisation. It appears that it is out of necessity that such partnership and closer interaction between human rights law and humanitarian law must be

³³ Ibid., para 25.
considered. The inadequacy of each discipline, taken individually, seems to require the further development of their partnership.

The strongest argument or *leitmotif* behind the association of the disciplines lies in the difficulty of international humanitarian law and international human rights law to respond to their own institutional and legal flaws; each discipline struggles to protect individuals adequately in isolation from one another. Co-operation between international humanitarian law and international human rights law has repeatedly been advocated, especially in recent years. Leading commentators have seen in the concurrent application of, or interplay between, the disciplines the opportunity to fill some of the many gaps in the two legal frameworks, and the possibility to maximize the protection currently available to individuals in times of armed conflict. The 1960s constituted a period replete with events that led the international community to work on the creation of bridges between international human rights law and international humanitarian law. As Schindler noted:

> For a long time no attention was paid to the relations between those two branches of international law. It was only towards the end of the 1960's, with the outbreak of a succession of armed conflicts at this period - wars of national liberation in Africa, the Middle East conflict, the wars in Nigeria and Vietnam - in which aspects of the law of war and aspects of human rights arose at the same time, that people became conscious of the relationship.\(^{64}\)

Essentially, from the 1960s, two interconnected issues emerged and had a direct impact on international humanitarian law and international human rights law – the advent of a new political context coming from the active period of decolonisation of the 1960s and the fast multiplication of intra-State conflicts made clear the inadequacies of both systems of international law. This new international environment supplied grounds to persuade the actors in charge of promoting and implementing international humanitarian law and international human rights law of the potential benefit of wider interaction between the disciplines.

### 3.4.1. Decolonisation

The emergence of new States through decolonisation had a dual impact on the relationship between international human rights law and international humanitarian

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\(^{64}\) Schindler (n 6).
law; this obliged the United Nations to pay closer attention to the laws applicable during armed conflict and, similarly, compelled the International Committee of the Red Cross to consider the creation of closer links with international human rights law and the UN system. Most of the new States created through decolonisation became members of the United Nations. In many cases, the independence of those States was obtained through violence and conflict, and in many other instances the process of decolonisation created unstable regimes. Thus, because armed conflict was the reality of many new United Nations members, the organisation seemed to have no choice but to consider a *rapprochement* between international human rights law and international humanitarian law. Because of this new international political context, the International Committee of the Red Cross also acknowledged the growing necessity to see international humanitarian and human rights law interact with each other. At the time, the decolonised States were more comfortable with the UN system than with the ICRC; those new States “ont le sentiment, par les résolutions des Nations Unies, de participer à la formation d’un droit international nouveau”. As a result, the ICRC faced problems with the ratification of The Hague Convention and the Geneva Conventions by those countries:

In response to this problem the ICRC revised its former stance and began to work more closely with the United Nations and international human rights law. As such, the ICRC involved the United Nations in its work for the adoption of the two Additional Protocols to the Geneva Conventions.

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66Ibid., 54: “This significant expansion of the international community, taking place from the 1960s, is reflected precisely at the UN General Assembly. The Red Cross did everything it could to ensure that the new States become parties to the Geneva Conventions but, from necessity, it is first through the United Nations much more than the international conferences of the humanitarian organization that those new States are represented.” [Translated by the author]
In sum, the emergence of new States created an impetus for the international community and the institutions overseeing the implementation of international humanitarian law and international human rights to start looking seriously into closer connections between the disciplines. Notably, the political context forced the United Nations and the International Committee of the Red Cross to move away from their initial stance, which kept international humanitarian and international human rights law far apart and ensured them exclusivity over their respective fields of expertise.

3.4.2. Changing Nature of Conflict

The nature of armed conflict changed immensely during the 20th century. From the 1960s and more especially with the end of the cold war, there has been an increase in the number of armed conflicts and new types of conflicts have emerged.67 Nowadays, armed conflicts are no longer fought solely between States and by professional armies, but mainly within State borders, with myriad actors such as armed rebel groups and private militias, and often for racial and ethnic reasons. Many assert that the change in the nature of conflicts not only had an impact on the relationship between international humanitarian and international human rights law but that it was the starting point of their rapprochement:

[L]e droit humanitaire d’une part, les droits de l’homme de l’autre, évoluent de façon distincte, jusqu’au moment où nous voyons se développer entre la guerre et la paix une gamme de situations de violence armée qui échappe aux systèmes juridiques établis.68

The multiplication of intra-State conflicts has been, and continues to be, a challenge to both fields of law. The proliferation of non-international armed conflicts highlights obstacles to the application and implementation of international humanitarian law and international human rights law, and enhances the pre-existing shortcomings of the disciplines and institutions overseeing their implementation. Along those lines Freeman wrote:

In recent years, many international lawyers and scholars have noted a substantial convergence between international human rights law (“IHRL”)

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68 Calogeros-Poulos-Stratis (n 15) 48: “[H]umanitarian law on the one hand, human rights law on the other, evolved in a distinct manner until we see between war and peace the development of a range of armed violence situations which elude the established legal systems.” [Translated by the author]
and international humanitarian law (“IHL”). This convergence is due in large measure to the distressing proliferation of violent internal armed conflicts in many parts of the world. Whether in Cambodia, El Salvador or Sierra Leone, these conflicts have served to highlight the chief inadequacies of IHRL and IHL and have, as a consequence, provoked discussion about how such inadequacies ought to be remedied so as to afford better protection to the millions of victims of such conflicts.\textsuperscript{69} The rise of intra-State conflicts highlighted some deficiencies in the legal protection offered by international humanitarian law. More clearly, in the sphere of international humanitarian law, the rise of intra-State conflicts mainly results in the proliferation of more non-international armed conflict not reaching the threshold for the application of Additional Protocol II to the Geneva Conventions. In these circumstances, although customary international law can be of importance, the protection offered by international humanitarian law treaties is very modest, and assistance from the human rights system could be highly valuable. In fact, some situations in which the International Committee of the Red Cross is involved barely reach the threshold of application of Common Article 3. In such cases, direct applicability of international humanitarian law becomes questionable. For those situations not clearly reaching the level of violence required for the application of international humanitarian law, the humanitarian legal framework can doubtless find important support in the human rights system:

\begin{quote}
[Q]uand les conditions d’application du droit des conflits armés s’avèrent fragiles, et permettent de ce fait de nombreuses échappatoires, comme cela se produit trop souvent, les droits de l’homme peuvent alors se révéler utiles pour combler les lacunes ainsi révélées.\textsuperscript{70}
\end{quote}

In short, it has been argued that international human rights law, especially the protection provided for the non-derogable rights, could minimise some of the legal gaps of international humanitarian law. It has also been asserted that a better implementation of international human rights law could fill some of the deficiencies of international humanitarian law, and that the development of this discipline could, to some extent, serve as a substitute for the revision of international humanitarian law:

\textsuperscript{70} Calogeropoulos-Stratis (n 15) 16. “[W]hen the conditions for the applicability of the laws of armed conflicts prove to be fragile, and thereby allow many ways out, which occurs too often, human rights can then prove useful to fill the imparted gaps.” [Translated by the author]
Within the space of the last decade there has been increasing awareness that where State revision of the law of war had failed, State responsiveness to augmenting the international regime of human rights could compensate and partly meet the need for revision in the law of war.\textsuperscript{71}

In addition to the legal framework of human rights, the importance of human rights institutions in the implementation of international humanitarian law has been acknowledged on many occasions.\textsuperscript{72} Human rights mechanisms have a clearly established range of monitoring bodies, which often receive cases arising from armed conflict.\textsuperscript{73}

Regarding international human rights law, the inadequacy of this system is likewise exponentially increased in non-international armed conflicts. Indeed, where States were previously the main actors in conflict situations, now we see a whole range of non-State actors participating in conflicts. Those actors are, arguably, not directly accountable for violations of human rights law and hardly concerned by the implementation of such rights.\textsuperscript{74} This situation constantly challenges the application of international human rights law and puts great strain on its enforcement. In that context, the support of international humanitarian law proves essential for the protection of individuals.\textsuperscript{75} More generally, armed conflicts and other types of violence directly affect the application and implementation of human rights in at least two respects. First, in the presence of armed conflicts, whether international or non-international, States are allowed to derogate from certain rights they have otherwise bound themselves to respect. The possibility of derogation weakens to a certain extent human rights law’s ability to respond to situations of violence.

Regarding the non-derogable rights included in the human rights instruments, while such rights have to be respected at all times, the reality of violent environments renders the implementation of these human rights difficult. Thus, whereas nobody can contest that international human rights norms have a positive impact on the

\textsuperscript{71} Draper (n20) 129.
\textsuperscript{72} For examples of such practice see chaps 5.1. and 5.2.
\textsuperscript{73} See chap 5.
\textsuperscript{74} However, for the debate on this point see A Clapham, Human Rights Obligations of Non-State Actors (Oxford, Oxford University Press 2006).
protection of individuals, in many instances it appears that this branch of international law is not fully adapted to situations of violence, which need swift implementation to protect individuals efficiently. Furthermore, on a number of issues such as defining prisoner of war status, human rights law simply does not contain rules addressing the situation adequately.

While questions on the interplay between international humanitarian law and international human rights law continue to be asked, it is clear from the above examination that there is now mainstream support for the relationship of the two legal frameworks. From debating whether the two disciplines should be brought closer or kept separate, the international community has moved into another phase regarding the relationship between international humanitarian and human rights law – that of developing an understanding of their interplay and advancing the concurrent application of the disciplines. The next chapters will address this new phase.
4. Concurrent Application by the International Court of Justice and Use of the Lex Specialis Principle to Articulate the Interplay

As was seen in previous chapters, over time, and especially from the 1960s, the separatist approach to international human rights and humanitarian law was rejected; it appeared no longer desirable or feasible to consider the legal frameworks as completely foreign to one another. Under the new paradigm, the concurrent application of international human rights and humanitarian law is advocated and the two legal frameworks are seen as bodies subject to interaction and overlap. The precise mode of application and how this interplay should work in practice, however, remains unresolved. The exact methods and legal basis behind the articulation of the concurrent application of the two fields are elusive. It is the debate over the method and basis that lies at the heart of this chapter.

Chapter 4 examines the articulation of the concurrent application of international humanitarian law and international human rights law by the International Court of Justice, as well as the use of the lex specialis principle by the ICJ and more generally. More specifically, this chapter explains the definition of the lex specialis principle. It examines the decisions of the International Court of Justice in the Advisory Opinions on the Legality of the Threat or Use of Nuclear Weapons\(^1\) and the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory\(^2\), and in the DRC v. Uganda case.\(^3\) The chapter highlights the Court’s failure to supply sufficient substance to better understand the co-existence of the disciplines and to properly articulate the lex generalis and lex specialis in armed conflict situations. It explores the application of the theory of lex specialis in international law and its characteristics, and strongly questions the ability of that theory to provide a coherent framework capable of clarifying the interplay between international humanitarian law and international human rights law.

\(^1\) International Court of Justice, Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion of 8 July 1996) [thereafter: Nuclear Weapons Advisory Opinion].

\(^2\) International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion of 9 July 2004) [thereafter: Wall Advisory Opinion].

\(^3\) International Court of Justice, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (Judgment of 19 December 2005) [thereafter: DRC v. Uganda case].
4.1. Defining Lex Specialis

Before discussing the use of the *lex specialis* principle to articulate the concurrent application of international humanitarian law and international human rights law, the notion must be defined and its functions explained. According to the maxim *lex specialis derogat legi generali* specific law prevails over general law. In their work on treaty interpretation, early writers such as Cicero, Grotius and Vattel developed this principle. Vattel, among other early international jurists, explained the rule as follows:

There is a collision or opposition between two laws, two promises, or two treaties, when a case occurs in which it is impossible to fulfil both at the same time, though otherwise the laws or treaties in question are not contradictory, and may be both fulfilled under different circumstances. They are considered as contrary in this particular case; and it is required to show which deserves the preference, or to which an exception ought to be made on the occasion. In order to guard against all mistake in the business, and to make the exception conformably to reason and justice, we should observe the following rules: […]

5. Of the laws of two conventions, we ought (all other circumstances being equal) to prefer the one which is less general, and which approaches nearer to the point in question: because special matter admits of fewer exceptions than that which is general; it is enjoined with greater precision, and appears to have been more pointedly intended. Let us make use of the following example from Puffendorf: -One law forbids to appear in public with arms on holidays; another law commands us to turn out under arms, and repair to our posts, as soon as we hear the sound of the alarm-bell. The alarm is rung on a holiday. In such case we must obey to the latter of the two laws, which creates an exception to the former.

The maxim *lex specialis derogat legi generali* did not find a place in the Vienna Convention on the Law of Treaties. In fact, it is difficult to assess the exact position

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5 E de Vattel, *The Law of Nations; or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (London, Robinson 1793) Book II, Chap XVII, paras 311, 313. See also H Grotius, *De Jure belli ac pacis*, Libri Tres, Book II, Chap 16, Sect. XXIX; “When there is any accidental collision between one part of a written document and another, Cicero, in the second book of his treatise on invention, has given rules for deciding which of them ought to have the preference. […] Among those treaties, which […] are equal, the preference is given to such as are more particular, and approach nearer to the point in question. For where particulars are stated, the case is clearer, and requires fewer exceptions than general rules do.”

or value of *lex specialis* among the many existing devices for treaty interpretation in international law. Nonetheless, the principle has been used repeatedly both domestically and at the international level, and sits beside other tools of treaty interpretation in the legal literature. Pauwelyn further explained the wide acceptance of the theory of *lex specialis* and the rationale for accepting the prevalence of the specific over the general. He wrote:

> [T]he principle of *lex specialis* is but a consequence of the contractual freedom of states, grounded in the idea that the ‘most closest, detailed, precise or strongest expression of state consent’, as it relates to a particular circumstance, ought to prevail. […] [T]he *lex specialis* principle thus attempt to answer one and the same question, namely: which of the two norms in conflict is the ‘current expression of state consent’?

At present, there are different ways to comprehend and operate the theory of *lex specialis*. In his outline on the function and scope of the *lex specialis* rule, Martti Koskenniemi, Chairman of the International Law Commission’s study group on the fragmentation of international law, asserted:

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

Traditionally, the principle of *lex specialis* was understood as a conflict-resolving tool. According to this conventional view, “a reference to *lex specialis* is meant to

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7 For more details, see Lindroos (n 4) 40-41: “The lack of a hierarchy and institutional structures may also limit the application of *lex specialis* in another way. There are a variety of rules of interpretation and other maxims that may be applied in conflict resolution, such as *lex prior, lex posterior, autonomous operation, and legislative intent, a contrario, acquiescence, contra proferentem, ejusdem generis, and expressio unius est exclusio alterius*. Priority may thus be established in a variety of ways. It will depend on the particular circumstances of the case which principle will be given priority. The relationship between such principles, however, remains particularly unclear in international law. And as Jenks points out, “no particular principle or rule can be regarded as of absolute validity”. In other words, these other principles may take precedence over *lex specialis*, or they may be applied concurrently.” See also Koskenniemi (n 4) 5, footnote 8, explaining that the rule stands among the general principles of international law.

8 For examples on the application of *lex specialis* in international law see Pauwelyn (n 4); Lindroos (n 4) 48-64.

9 Pauwelyn, *ibid.*, 387-388.

10 Koskenniemi (n 4) 4.

11 See Vattel (n 5) and accompanying text.
be one to *lex specialis* as a conflict rule.”\textsuperscript{12} In contemporary times, the purpose and scope of *lex specialis* has been somewhat expanded. Nowadays, there is no more need for contradictions between norms to arise for the *lex specialis* device to operate. As noted by Lindroos: “what is required is not so much a conflict, but that the two rules have a relationship in the sense that they must have the same characteristics, and the special rule must either supplement or displace one of the characteristics of the general rule.”\textsuperscript{13} This second feature of the *lex specialis* principle is perhaps less well understood. Following it, in some cases the *lex specialis* rule can be used for a purpose other than as a conflict solving mechanism. As such, “*lex specialis* is invoked as the more specific norm which supplements the more general one without contradiction. The *lex specialis* and the *lex generalis* then simply accumulate.”\textsuperscript{14} Koskenniemi, however, is more reluctant to affirm that the general and specific norms accumulate and specifies that “[i]n both cases – that is, either as an application of or an exception to the general law – the point of the *lex specialis* rule is to indicate which rule should be applied. In both cases, the special, as it were, steps in to replace the general.”\textsuperscript{15}

In the context of the articulation of the relationship between international human rights law and international humanitarian law, the *lex specialis* principle has been used and interpreted in both ways. On the one hand, *lex specialis* has been used as an interpretative tool to interpret human rights in light of international humanitarian law. On the other hand, the conflict-solving aspect of the *lex specialis* device has been employed to promote the primacy of humanitarian law over human rights, and the idea that in situations of armed conflict international humanitarian law should be applicable to the exclusion of international human rights law.

### 4.2. Jurisprudence of the International Court of Justice

Although few human rights bodies have provided thorough analysis or detailed opinions clarifying the approach to the interplay between international human rights and humanitarian law, the issue has been addressed both at the regional and international level, as will be discussed in Chapter 5. In fact, the International Court

\textsuperscript{12} Pauwelyn (n 4) 385.
\textsuperscript{13} Lindroos (n 4) 46.
\textsuperscript{14} Pauwelyn (n 4) 410.
\textsuperscript{15} Koskenniemi (n 4) 4.
of Justice has led the way, and was among the first bodies to attempt to articulate the relationship between the two disciplines and concurrently apply them.

4.2.1. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons

The first true attempt by the International Court of Justice at articulating the relationship between international humanitarian law and international human rights law was made in the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.\footnote{Nuclear Weapons Advisory Opinion (n 1).} The advocates of the illegality of the use of nuclear weapons argued before the Court “that such use would violate the right to life as guaranteed in Article 6 of the International Covenant on Civil and Political Rights, as well as in certain regional instruments for the protection of human rights.”\footnote{Ibid., para 24.} In contrast, the proponents of the legality of the use of those weapons asserted that “the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict.”\footnote{Ibid.} In response to the conflicting arguments, the Court settled the question of the applicable law as follows:

The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable \textit{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.\footnote{Ibid., para 25.}

The assertion of the ICJ is notable in that it confirmed what was becoming the main stance since the Teheran Conference, that although certain specific derogations are allowed, international human rights law as a whole continues to apply in times of armed conflict. Instead of approaching international humanitarian law and international human rights law as two different spheres that should not

\begin{footnotesize}
\footnote{Nuclear Weapons Advisory Opinion (n 1).}
\footnote{Ibid., para 24.}
\footnote{Ibid.}
\footnote{Ibid., para 25.}
\end{footnotesize}
interact with each other, the judges highlighted therein the intertwining of the disciplines. Perhaps more importantly, in the course of its Advisory Opinion, the Court provided some information on a virgin territory of interpretation – the issue of how international human rights and humanitarian law should relate to each other. In parallel with affirming the inter-connectedness of the two disciplines, the judges stated the *lex specialis* nature of international humanitarian law. The ICJ thereby proposed a model for the concurrent application of the two fields of law, a model acknowledging the continued application of human rights during armed conflict, but granting some form of primacy and prevalence to international humanitarian law over international human rights law.

Many questions and debates arose from the Advisory Opinion on Nuclear Weapons. The Court’s treatment of the *lex specialis* principle and the concurrent application of international humanitarian law and international human rights law have been mainly interpreted in three ways. First, yet infrequently, a wide – if not total – primacy of humanitarian law over human rights law has been inferred from the Advisory Opinion on Nuclear Weapons. As such, the *lex specialis* principle has been interpreted so as to afford an unqualified supremacy of international humanitarian law over international human rights law. In that vein, Dennis affirmed the prevalence of humanitarian law over both the International Covenant on Civil and Political Rights and “human rights treaties involving economic, social, and cultural rights” during times of armed conflict and military occupation.20 Dennis explained the rationale of his position, stating that:

> The obligations assumed by states under the main international human rights instruments were never intended […] to replace the *lex specialis* of international humanitarian law. Extending the protections provided under international human rights instruments to situations of international armed conflict and military occupation offers a dubious route toward increased state compliance with international norms. A judicial requirement of broader application of the peacetime protections provided under these instruments during periods of armed conflict and military occupation is likely to produce confusion rather than clarity and increase the gap between legal theory and state compliance.21


Dennis suggested that the primacy afforded to international humanitarian law by the International Court of Justice in the specific context of the right to life should be construed more broadly, and that, at least during international armed conflict and occupation, international humanitarian law should have precedence over international human rights law.

In complete contrast to Dennis’ argument in favour of the wide or absolute primacy of humanitarian law over human rights law, others have opined that the Advisory Opinion and its application of international humanitarian law as *lex specialis* was pertinent to the case at hand but not necessarily translatable to other situations. In other words, while it is accepted that international humanitarian law can be identified as *lex specialis* and international human rights law as *lex generalis* in the context of a right to life violation committed during armed conflict, the prevailing norm or applicable legal framework could change in other circumstances. Along those lines, Doswald-Beck observed about the conclusion of the ICJ on the relationship between international humanitarian law and international human rights law:

> This is a very significant statement, for it means that humanitarian law is to be used to actually interpret a human rights rule. Conversely, it also means that, at least in the context of the conduct of hostilities, human rights law cannot be interpreted differently from humanitarian law. Although this makes complete sense in the context of the arbitrary deprivation of life (a vague formulation in human rights law, whereas humanitarian law is full of purpose-built rules to protect life as far as possible in armed conflict), it is less clear whether this is also appropriate for human rights rules that protect persons in the power of an authority. This is particularly so when it is a human rights treaty body that is applying the text of the treaty. Practice thus far, in particular of the European Commission and Court of Human Rights, seems to show that such bodies apply the human rights text within its own terms.22

Following this second and more predominant approach, international humanitarian law and international human rights law could both be either the *lex specialis* or *lex"
generalis, depending on the situation at hand. Accordingly, *lex specialis* is to be used on a rule by rule basis, rather than as a justification for one framework of rules to completely supplant another. Practically speaking, *lex specialis* and *lex generalis* would be interpreted or applied in such a way that, for instance, human rights law would prevail over humanitarian law with regard to judicial guarantees. Conversely, perceived as the most precise and appropriate legal framework, international humanitarian law would be the applicable framework in situations concerning targeting during armed conflicts.

Finally, it has been construed from the Advisory Opinion on Nuclear Weapons that both bodies of law serve as an interpretative device for the other, and should therefore be interpreted in light of the other. Pauwelyn supported the view that the International Court of Justice has used the principle of *lex specialis* in such manner, as a tool of interpretation, where international humanitarian law interpreted the right to life without dismissing international human rights law:

This is an instance where *lex specialis* is used to interpret the terms of another, more general norm (*in casu*, the words 'arbitrarily deprived'). It does not conflict with nor, *a fortiori*, overrule the other norm. Thus, in this case both the *lex specialis* and the *lex generalis* could be applied side by side, the *lex specialis* playing the greater role of the two.23

In ‘Living in Denial: The Application of Human Rights in the Occupied Territories’, Ben-Naftali and Shany explained in more concrete terms the impact of interpreting international humanitarian law in light of international human rights law and vice-versa:

The thesis that the protection of human rights does not cease in time of war received a resounding confirmation by the International Court of Justice (ICJ) in the *Nuclear Weapons* Advisory Opinion. While the Court determined that in situations of armed conflict, primacy is given to IHL as the *lex specialis*, it suggested that this primacy does not remove human rights law from consideration. Indeed, the emphasis the Court placed on the humanitarian considerations that inform IHL, underscores the purpose and underlying principles common to both regimes as the rationale for their coapplication. The practical effects of this position would thus seem to suggest that gaps in protection of one regime, due to either derogation or inapplicability, may be bridged by the application of the other, and that each affects the interpretation of the other’s norms: international humanitarian law may be used to interpret a human right rule, and human rights’ law influences the proper application of IHL in tilting the balance

23 Pauwelyn (n 4) 410.
between military considerations and humanitarian concerns in favor of the latter.  

This interpretation of the Advisory Opinion on Nuclear Weapons sees human rights law and humanitarian law being closely linked to one another with both bodies of law relevant to the interpretation of the other. This excludes the rigid use of the *lex specialis derogat generalis* rule that gives priority to one discipline to the total exclusion of the other, and supports a concurrent application of international humanitarian law and international human rights law in a way that would complement each other.

### 4.2.2. Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, and the DRC v. Uganda Case

Since the publication of the Advisory Opinion on Nuclear Weapons the theory of *lex specialis* has been used time and again to articulate the relationship between human rights and humanitarian law. Notably, the question of the interplay between the two disciplines was directly raised a second time before the International Court of Justice in the case of the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Since its Second Periodic Report to the United Nations Committee on Economic, Social and Cultural Rights, Israel has been rejecting the application of a number of human rights treaties in the Occupied Territories on the basis that this situation was one pertaining to armed conflict. In its advisory


25 See also for instance D Stephens, ‘Human Rights and Armed Conflict: The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case’ (2001) 4 Yale H R & Dev L J 1, 15. Stephens argues that, relying repeatedly on the fundamental principles and consideration of humanity to support their conclusions, the International Court of Justice to some extent interpreted international humanitarian law in light of international human rights law: “Though the Court formally maintained the priority of the law of armed conflict, it interpreted that law in terms of the underlying principles of humanity. This emphasis elevated the humanitarian aspects and priorities of the law of armed conflict and ensured that these “weighted” humanitarian aspects must be considered when determining the legitimacy of military actions. In this way, the Court understands that the right to life envisaged by Article 6 applies as a non-derogable right and is to be interpreted only in accordance with the status quo of the prevailing law of armed conflict. Hence, the Court develops its reasoning by re-interpreting the law of armed conflict with a new-found emphasis on promoting humanitarian considerations.”

26 Wall Advisory Opinion (n 2).


28 ibid., para 102 citing the Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13, ‘Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory’, UN Doc A/ES-10/248, Annex I, para 4: “Israel denies that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and
function, the ICJ rejected the Israeli view, and applied both international humanitarian law and human rights treaties to reach its conclusions. The Court reiterated the position taken in the Nuclear Weapons Advisory Opinion and confirmed the continued application of human rights in times of conflict, with the distinction that it did not focus exclusively on the right to life. As such, the judges asserted that:

the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.29

Despite the obvious resemblance to its previous Advisory Opinion,30 the Advisory Opinion on the Wall proposed a slightly different approach to the articulation of the relationship between human rights and humanitarian law. The Court proposed that there are three options when considering the concurrent application of the two fields:

As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law.31

The exact stance of the Court on the interplay between human rights and humanitarian law is difficult to unscramble as the judges “did not offer specific guidance on how to subdivide the rights into these categories.”32 Seemingly, the Court proposed a somewhat novel approach, moving away from the Advisory Opinion on Nuclear Weapons, but refused to unveil it and ultimately relied on the lex specialis principle. The Court, on the one hand, appeared to be promoting the complementary application of international humanitarian law and international

Cultural Rights, both of which it has signed, are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace.” See Israel, ‘Implementation of the International Covenant on Civil and Political Rights, Second periodic reports submitted by States’, UN Doc CCPR/C/ISR/2001/2 (2001), para 8. See also Committee on the Rights of the Child, ‘Summary Record of the 829th meeting’, UN Doc CRC/C/SR.829 (2002), paras 39-42. Therein Israel also rejects the applicability of the Convention on the Rights of the Child to the West Bank and the Gaza Strip.

29 Ibid., para 106.
30 See note 19 and accompanying text.
31 Wall Advisory Opinion (n 2) para 106.
32 Dennis (n 20) 133.
human rights law, suggesting that both branches will govern concomitantly and will need to be considered in the assessment of the Court. On the other hand, the Court fell back on the *lex specialis* rule to shape its reasoning and affirm that both disciplines apply to the case in hand, with international humanitarian law as *lex specialis*.

The International Court of Justice revisited the question of the interplay between international humanitarian law and international human rights law in the *DRC v. Uganda* case in 2005. Interestingly, the judges recalled therein the position taken in the Wall Advisory Opinion but did not make mention of the *lex specialis* principle in the judgment.\textsuperscript{33} The ICJ appeared to abandon the theory of *lex specialis*. Dealing with the interplay between the two branches, the Court overlooked the Nuclear Weapons Advisory Opinion and omitted to quote the reference to the *lex specialis* principle which was included in the Wall Advisory Opinion. As such, the judges stated in the *DRC v. Uganda* case that:

> "The Court first recalls that it had occasion to address the issues of the relationship between international humanitarian law and international human rights law and of the applicability of international human rights law instruments outside national territory in its Advisory Opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. In this Advisory Opinion the Court found that:

> “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”

> It thus concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration.\textsuperscript{34}

The International Court of Justice appears in that statement to use a complementary approach to the concurrent application of international human rights and humanitarian law, whereby each field should inform, rather than displace, the other.

\textsuperscript{33} *DRC v. Uganda* case (n 3) para 216. For more details see below section 4.4.

\textsuperscript{34} *DRC v. Uganda* case, ibid.
As noted in this section, the case-law of the ICJ has been extremely important to the advancement of the relationship between international human rights and humanitarian law. Indeed, the ICJ supplied “the most authoritative determination that human rights provisions continue to apply in times of armed conflict”.\textsuperscript{35} Equally as important, the Court directly tackled the interplay between the two fields and highlighted the need to concurrently apply the two legal frameworks.\textsuperscript{36} The ICJ has, however, failed to provide a method or indication of how to articulate in practice the concurrent application of international humanitarian law and international human rights law, beyond situations concerning the right to life. The Court introduced what can be called the first theoretical framework of concurrent application, a model based on the \textit{lex specialis} principle. It is submitted, however, that the Court’s proffered solution was in fact a poisoned chalice. Indeed, the ICJ did not supply enough substance to better understand the co-existence of the disciplines and properly determine the \textit{lex generalis} and \textit{lex specialis} in armed conflict situations. The reasoning of the ICJ did not provide a framework capable of clarifying the interplay between international humanitarian law and international human rights law, and the mere fact that the Advisory Opinion on Nuclear Weapons was interpreted in opposite directions supports this amply.\textsuperscript{37} In fact, as will be discussed in the next section, it is doubtful that the \textit{lex specialis} principle could ever be used as an effective interpretative tool to address issues relating to the interplay between the two legal frameworks.

\textsuperscript{35}T Meron, ‘The Humanization of Humanitarian Law’ (2000) 94 AJIL 239, 266.
\textsuperscript{37}As noted earlier in this section, the Opinion was on the one hand interpreted as providing broad-if not total- primacy of international humanitarian law over international human rights law. In contrast, it was said that, following the Opinion, the \textit{lex specialis} nature could be afforded to either international human rights or humanitarian law depending on the context, and that each field of law should be interpreted in light of the other.
4.3. Critical Appraisal of the Use of the Lex Specialis Principle

This section questions the pertinence of using the *lex specialis derogat legi generali* maxim as a tool for the clarification of the concurrent application of international human rights law and international humanitarian law. While it was previously asserted that the International Court of Justice failed to provide a usable framework for the concurrent application of human rights and humanitarian law, this section discusses whether the *lex specialis* principle is in fact capable at all of providing a sound theoretical framework or foundation to regulate the co-existence of the two disciplines and their norms.

4.3.1. Lex Specialis and International Law

As noted earlier, the theory of *lex specialis* is well established, and has been used repeatedly both domestically and at the international level. Having said that, it has been shown that some circumstances are more conducive and suitable than others to the application of the theory of *lex specialis*. Along these lines, Lindroos contends that:

*Lex specialis* is [...] well-suited to the resolution of norm conflicts within a single treaty or between treaties that have a relationship to each other. It is equally useful to address conflicts between treaties which are part of the same system, for instance the system established by the European Convention on Human Rights and its protocols, or a system of treaties such as that governed by the World Trade Organization, where a single regime draws on a multitude of agreements. Often, some systematisation of earlier treaties occurs through new treaties or protocols, or with agreements specifying or providing further protection. In such a case, the maxim may be used either within one agreement or between several agreements within the same system. This application of *lex specialis* is appropriate, and the logic it embodies can be relied upon when a court or a decision making body are of the opinion that a logical relation exists between two rules: one as the more general, the other as the more specific rule.38

In contrast, uncertainties arise when attempts are made to apply the theory of *lex specialis* outside the abovementioned context, i.e. with the purpose of solving problems between norms pertaining to different instruments or to different legal frameworks with no pre-determined relationship between each other.

In light of the above, national legal systems seemingly provide the ideal environment for the application of the *lex specialis* principle. Because they are

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38 Lindroos (n 4) 27-28.
hierarchical systems with organized structures, institutions and legal frameworks, the theory of *lex specialis* proves a valuable conflict-solving device in domestic legal orders. Conversely, the relevance of the *lex specialis* doctrine has been robustly questioned in the context of international law. Because of its specific features, the international sphere appears *prima facie* a less conducive environment for the application of the *lex specialis* principle.

The international legal system is [...] a decentralised and fragmented legal system, in which the creation, application, and implementation of norms is built on a structure and logic that differs from domestic law. There is no centralised legislator in the international legal system. Norms are created by the subjects of international law themselves in a variety of fora, many of which are disconnected and independent from each other, creating a system different from the more coherent domestic legal order. Where national law is strongly based on hierarchy and institutional structures, the international normative order may be viewed from the perspective of bilateral state relations, something that does not easily lend itself to the establishment of systemic relations between norms. This lack of systemic relations and a centralised law-making process are essential differences between the domestic and the international legal order.39

These differences between the international and national systems explain why the principle of *lex specialis* can be a perfectly suitable device at the national level, but nevertheless fail to play an equivalent role at the international level. International legal instruments rarely include provisions or clauses foreseeing their relationship with one another. Rather, international treaties lack information from which the exclusion of one branch of international law to the benefit of another could be inferred. In that context, in a system that lacks legal hierarchy and where no logical relations exist between the legal frameworks and norms, it appears difficult if not impossible to identify what is general and specific and decide whether one field of law or norm should have prevalence over another.40

International law has become more specialised and multi-levelled as special regimes, systems, and sub-regimes have emerged. Each such

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39 Ibid., 28.
40 Legal literature also expressed doubts about the possibility of using *lex specialis* broadly to discard a legal framework in favour of another, as opposed to evaluating the *lex specialis* and *lex generalis* in specific contexts and about specific norms: “[L] ex specialis is in some sense a contextual principle. It is difficult to use when determining conflicts between two normative orders in abstracto, and is, instead, more suited to the determination of relations between two norms in a concrete case.” Also, “attention needs to be drawn to the technical nature of *lex specialis*. It is a rule where contextual sensitivity is given to a special rule in particular circumstances. An abstract determination of an entire area of law as being more specific towards another area of law is not, in effect, realistic. Therefore, the application of *lex specialis* to certain types of conflicts […] is limited.” Lindroos, *ibid.*, 42 and 44 respectively.
system or regime, such as the law of the sea, environmental law, human rights law, or trade law, functions in its own normative environment, with distinct particularities and often on the basis of differing institutional and legal rationales. There is no one goal, logic, or system to govern all possible situations. To some extent, therefore, these legal orders appear to exist in a normative jungle, where each system may create solutions entirely opposite to the solutions of another system, and where general international law may be interpreted and applied in different ways. […] Although these systems are part of the wider framework of international law, their relationship to it and to each other is far from clear.41

In sum, the inherent nature of international law makes it a poor environment for the application of the *lex specialis* principle. In fact, in this fragmented and unorganized system that is international law, the theory of *lex specialis* seems of less relevance.

### 4.3.2. Nature and Features of *Lex Specialis*

In addition to the difficulties of applying the *lex specialis* theory in the international context, some features of this principle bring further doubts about its relevance to the concurrent application of international humanitarian law and international human rights law. More precisely, the vagueness of the *lex specialis* principle generates serious reservations as to its ability to stand as a sound theoretical model that clarifies the co-existence of the two disciplines and articulates their interplay. As already pointed out, *lex specialis derogat legi generali* conveys that a special norm will prevail over a more general one. Yet, it does not provide any guidance to set apart the *lex specialis* from the *lex generalis*. The example of violations of the right to life during armed conflicts is often used to show the relevance of the theory of *lex specialis* in solving issues related to the concurrent application of international human rights and humanitarian law. While it is correct to assert that the use of the humanitarian law framework is crucial to the assessment of the taking of life between combatants during international armed conflict, the *lex specialis* principle seems of less assistance for many other problems of co-application. For instance, the application of the *lex specialis* principle in cases of potential violations of the right to life is not readily transposable to situations of non-international armed conflict, where there is less agreement on the definition of individual status and associated

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rules of targeting, and international humanitarian norms therefore become less clear.\textsuperscript{42}

Likewise, it is unclear how the \textit{lex specialis} principle could assist in articulating the interplay between international humanitarian law and some economic, social and cultural rights.\textsuperscript{43} For example, this theory raises questions related to the obligations concerning the right to health during occupation; although international humanitarian law contains health-related obligations, it is in international human rights law that the detailed understanding of the right to health is to be found.\textsuperscript{44} Probably because of the difficulty in discerning the \textit{lex specialis} and the \textit{lex generalis}, this method also appears of limited use when dealing with issues concerning detention during armed conflicts.\textsuperscript{45} In fact, it may be the case that in some instances where there is a supposed clash between the frameworks or a difficulty of concurrent application, the obstacle may lie in the lack of clarity of the rule within a particular framework – such as the debate over the status of fighters in non-international armed conflicts\textsuperscript{46} – rather than being a problem of the relationship between the frameworks.\textsuperscript{47} Thus, while in specific circumstances like the violation of the right to life during international armed conflict the \textit{lex specialis} principle might assist with the interplay between international human rights and humanitarian law, it is ineffective in dealing with the many other complex problems arising during armed conflict.\textsuperscript{48}

\begin{itemize}
\item \textsuperscript{42} N Lubell, ‘Challenges in Applying Human Rights Law to Armed Conflict’ (2005) 87 IRRC 737, 746-750; see discussion of non-international armed conflicts above in section 2.3.5.
\item \textsuperscript{43} For an analysis of the interplay between these rights and the law of occupation see S Vité, ‘The Interrelation of the Law of Occupation and Economic, Social and Cultural Rights’ (2008) 871 IRRC 629.
\item \textsuperscript{44} Lubell (n 42) 751-753.
\item \textsuperscript{45} University Centre for International Humanitarian Law, ‘Proceedings of the Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict’ (Graduate Institute of International Studies, Geneva, 24-25 July 2004).
\item \textsuperscript{46} See section 2.3.5.
\item \textsuperscript{47} N Lubell, \textit{Extraterritorial Use of Force against Non-State Actors} (Oxford University Press, Oxford 2010), chap 9. Sassòli and Olson also note that on the issues of detention and targetting of members of armed groups during non-international armed conflicts “which are crucial in practice, not only is the relationship between the two branches unclear but also the answer of humanitarian law alone.” M Sassòli and L M Olson, ‘The Relationship between International Humanitarian and Human Rights Law where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts’ (2008) 871 IRRC 599, 601.
\end{itemize}
In practice, no exhaustive interpretation of the principle has been made; *lex specialis derogat legi generali* “has been employed relatively rarely and rather mechanically by international tribunals, with no analysis of the maxim itself.”49 On account of the vagueness or flexibility of *lex specialis*, the International Court of Justice could, in the Nuclear Weapons Advisory Opinion, use this theory concomitantly to confirm continued application of international human rights law and grant priority to international humanitarian law. It was also able, in the Wall Advisory Opinion, to use this principle to conclude that the applicable legal framework will differ depending on the circumstances, and apply both disciplines with international humanitarian law as *lex specialis*. Because of its elusiveness, the *lex specialis* maxim was on the one hand interpreted so as to provide total primacy to international humanitarian law and exclude the application of international human rights law. In sharp contrast, the *lex specialis* principle was also construed as promoting the idea that international human rights and humanitarian law should be interpreted in light of each other and articulated to form a harmonious system where they complement each other. Simply, the vagueness of the *lex specialis* maxim, and its consequential broad scope, allows this theory to be interpreted in all directions. While this flexibility has been identified as a strength, because it allows the theory to apply in a wide range of situations and in different legal frameworks, it remains the biggest flaw of the principle of *lex specialis*.50 In practice this characteristic is dangerous. The elusiveness of *lex specialis* creates ambiguity as to the applicable law, which in turn brings legal uncertainty. Perhaps even more worrying is the fact that the breadth of this principle allows manipulation of the law and manoeuvring that supports diametrically opposed arguments from supporters who are both for and against the compartmentalisation of the two disciplines. Ultimately, the vagueness of the theory of *lex specialis* means that using it as a conflict-solving or interpretative device leads to decisions based on political or other motives rather than on sound

49 Lindroos (n 4) 48. See also 44. “The maxim of *lex specialis* does not provide any criteria to guide the decision whether one area of law is generally more important than another. And indeed, no tribunal seems to have attempted application of the doctrine to that effect […] . Thus, the maxim remains a juridical assumption that we may give priority to a special rule when a relationship exists between the special and the general. It is not a substantive rule of international law that might show which rule is special in relation to a more general rule.”

50 Ibid., 65-66.
legal grounds. This principle is “a widely formulated tool of judicial reasoning that leaves much discretion to the decision-maker.”

4.3.3. Inability of the Lex Specialis Principle to Assist in the Articulation of the Interplay

The examination of the theory of lex specialis, its characteristics and the environments in which it operates, leads quite easily to a clear conclusion as to its inability to articulate a legally sound theoretical model for the concurrent application of international humanitarian law and international human rights law. Mainly because of the difficulties in applying it within the fragmented international system, as well as its vague nature and malleability, it is capable neither of clarifying the interplay between international humanitarian law and international human rights law nor facilitating the co-existence of these bodies of law. While many still promote the use of lex specialis to solve the issue of concurrent application of the disciplines, the shortcomings of the lex specialis principle have in recent years convinced others to reject it altogether. The Human Rights Committee, for example, has left aside the lex specialis-based articulation of the relationship between international human rights law and international humanitarian law proposed by the Advisory Opinion on Nuclear Weapons. Rather, it affirmed that:

> the Covenant [on Civil and Political Rights] applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. 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.

While it ultimately asserted the lex specialis nature of international humanitarian law, the International Court of Justice in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory also moved away from the more traditional application of the lex specialis principle. As such, the Court proposed different alternatives to articulate the concurrent application of the disciplines – alternatives more likely to respect the nature of each field of law. This is further affirmed by the jurisprudential retreat from the principle

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51 Ibid., 64-65. See also 42.
of *lex specialis* in the decision of the International Court of Justice in the DRC v. Uganda case.

It is suggested that with no other basis but the criteria of generality and specificity, the theory of *lex specialis* proposes a potentially absurd answer to the concurrent application of international humanitarian law and international human rights law. In that vein, Kammerhofer rightly inquires “[i]s ‘special’ ‘true’ and ‘general’ ‘false’?” By restricting the matter to a general v. specific issue, the theory of *lex specialis* often offers an artificial solution to the co-existence of international humanitarian law and international human rights law – a solution that can be disconnected from the purpose of each discipline, their specific features and the context in which they apply. Accordingly, it is asserted that the theory of *lex specialis* is an inadequate model for the articulation of the concurrent application of international humanitarian law and international human rights law.

It is appropriate to inquire why the theory of *lex specialis* continues to be applied in articulating the interplay between the two legal frameworks, despite its numerous defects. Seemingly, three main reasons lie behind this practice. First, Kammerhofer explained the use of the *lex specialis* principle by stating that “[t]his apocryphal status of traditional resolving devices is a function of a falsely understood pragmatism of international lawyers, one that seeks to keep apart ‘theory’ from practice.” Simply, and especially in the field of international humanitarian law, international lawyers are reluctant to delve into the world of legal theory for fear of lacking pragmatism. In that sense, the option of applying the *lex specialis* principle is enticing; as a ready-made model, it allows economy of time and

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53 J Kammerhofer, ‘Unearthing Structural Uncertainty through Neo-Kelsenian Consistency: Conflicts of Norms in International Law’ (2005) <www.esil-sedi.org/francais/pdf/Kammerhofer.pdf> 7. For the reference to the *lex specialis* principle in the Wall Advisory Opinion note 31 and accompanying text. 54 See also for instance Sassoli and Olson (n 47) 627. While they discuss the *lex specialis* principle and its application to admissible killings and internment of fighters during non-international armed conflicts, Sassoli and Olson conclude that “[o]n both issues discussed in [their] article, the result of a formal application of the *lex specialis* principle is not entirely satisfactory.” See also I Scobbie, ‘Principle or Pragmatics? The Relationship between Human Rights Law and the Law of Armed Conflict’ (2009) 14 J Conflict Security Law 449, 457. For more authors and arguments rejecting the use of *lex specialis* in favour of a complementary approach to the interplay between international human rights and humanitarian law, see chap Concluding: Paving the Way for the Development of the Complementary Approach. 55 Kammerhofer (n 53) 4.
resources, and seemingly permits exclusive focussing on the practical aspects of the interplay between the disciplines.

The lack of understanding of the field of international humanitarian law by human rights experts, and vice versa, also appears as a significant reason for the continued support of the theory of *lex specialis*. This insufficient knowledge of both disciplines makes it extremely difficult to propose creative, and perhaps more complex, solutions to better articulate the relationship between the two. In both cases, the theory of *lex specialis* appears a perfect answer to the problems related with the co-application of the disciplines. *Lex specialis* is an established and long-used mechanism that seemingly answers the complex question of the concurrent application, and its uncritical acceptance saves the tedious elaboration of new foundations to clarify the interplay between the disciplines.

Finally, the main flaw of the *lex specialis* principle is perhaps the more significant explanation of its current use in the context of international humanitarian law and international human rights law. As noted above, the vagueness of *lex specialis* allows the principle to be interpreted in all directions, to the benefit of diametrically opposed stances. Because of this feature, the theory of *lex specialis* frequently evaded criticism, especially from those promoting the supremacy of international humanitarian law over international human rights law and, conversely, from those advocating a teleological approach and the application of the most protective rule available.

While the introduction of the *lex specialis* principle by the International Court of Justice and its subsequent use is problematic, the ICJ has been extremely important for the advancement of the relationship between international human rights and humanitarian law. It has confirmed the continuous application of human rights during armed conflict, and authoritatively stated the need to concurrently apply the two legal frameworks, despite lacking in its articulation of how this is to be applied. The next chapter will examine the ways in which international bodies have, in practice, advanced the concurrent application of the disciplines.
PART III: EXAMINING THE CONCURRENT APPLICATION IN PRACTICE
5. Interplay in Practice

The previous chapters have examined how a relationship was established between international humanitarian law and international human rights law, looking at the arguments supporting the concurrent application of the disciplines and those rejecting or creating obstacles to their interplay. They highlighted how a relationship is currently being built between international human rights and humanitarian law, as well as existing challenges to the articulation and clarification of the interplay between the disciplines. This chapter will examine the implementation and enforcement of international human rights and humanitarian law by various regional and international organisations. The chapter will discuss circumstances where the concurrent application of the two legal frameworks was implemented in a parallel but separate approach by various bodies, noting applicable norms in each system but without making them interact. Other instances examined will demonstrate how international human rights and humanitarian law have been applied concurrently in a complementary manner as to interpret one discipline in light of the other, and contribute to the harmonisation of their interplay. This chapter will establish the predominance of the complementary approach, demonstrating its implementation by a wide range of bodies. In particular, it will look at the United Nations human rights bodies (both treaty and Charter based bodies), the regional human rights bodies and the ICRC customary international humanitarian law study.

5.1. United Nations Human Rights Bodies

The United Nations has been discussing the application of international humanitarian law and of human rights during armed conflict for decades. As noted in chapter 1, from the 1960s United Nations bodies have shown increased interest in international

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3 As explained in the introduction, concurrent application is construed in this study as taking two forms – the parallel application and the complementary application of the two disciplines. Parallel application involves the simultaneous application of each body, but without them directly interacting, for instance through the separate assessment of violations under human rights and humanitarian law, without addressing the interplay of the disciplines. In contrast, the complementary application involves the use of the two frameworks in such a way as to ensure that their rules feed into each other, taking account of the circumstances in which they apply and working together to fill gaps in protection.
humanitarian law and have been involved with the application of human rights during armed conflict in a wide variety of situations. The organisation has in effect played a key role in many humanitarian law issues, including for instance the regulation of arms, the protection of vulnerable groups during armed conflicts and questions of individual criminal responsibility for violations of international humanitarian law. The UN treaty bodies and Charter bodies have dealt with violations of human rights occurring during armed conflict, as well as violations of international humanitarian law. Both treaty and Charter bodies have also discussed the relationship between international human rights and humanitarian law and clarified their position on the interplay between the disciplines. What follows presents a number of illustrative examples displaying the practice of UN Charter and treaty bodies and their treatment of the concurrent application of international human rights and humanitarian law.

5.1.1. Treaty Bodies

*Human Rights Committee*

Within the treaty bodies, the Human Rights Committee through its General Comments, as well as its concluding observations on periodic reports and cases, has provided most valuable material for explaining the applicability of the International Covenant on Civil and Political Rights\(^2\) during emergency situations including armed conflicts, on the territory of a State party and abroad, as well as clarifying the relationship between international human rights and humanitarian law.\(^3\) The Human Rights Committee has, in its General Comment 29, further developed the boundaries related to derogations during states of emergency, including armed conflicts. Therein the members of the Committee provided their interpretation of article 4 of the International Covenant on Civil and Political Rights and discussed the restrictions and requirements (including procedural ones) necessary for States to adopt


\(^3\) For further analysis of the circumstances in which the Human Rights Committee has used international humanitarian law see D Weissbrodt, ‘The Role of the Human Rights Committee in Interpreting and Developing Humanitarian Law’ (2010) 31 University of Pennsylvania Journal of International Law 1185.
derogation measures. The Committee experts also addressed the interplay between international humanitarian law and human rights law in a number of ways. In the first place, they stated that in situations of armed conflict “rules of international humanitarian law become applicable and help, in addition to the provisions [...] of the Covenant, to prevent the abuse of a State’s emergency powers.” The General Comment also submitted that “even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.”

The Committee further explained that, to respect article 4 of the Covenant, a State cannot adopt derogation measures that “may be inconsistent with the State party’s other obligations under international law, particularly the rules of international humanitarian law.” The Committee asserted that, following this rationale, it “has the competence to take a State party’s other international obligations into account when it considers whether the Covenant allows the State party to derogate from specific provisions of the Covenant”. It submitted that, accordingly, State parties wanting to derogate from the Covenant “should present information on their other international obligations relevant for the protection of the rights in question”, and that in doing so “States parties should duly take into account the developments within international law as to human rights standards applicable in emergency situations.” Interestingly, the Committee considered as part of these standards, the UN Secretary-General’s ‘Fundamental Standards of Humanity’, a statement of principles which represented a cross-fertilisation between international human rights and humanitarian law. The Committee also included, as an example of work in development which States should refer to when derogating from the

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4 ‘General Comment No. 29: States of Emergency (article 4)’, UN Doc CCPR/C/21/Rev.1/Add.11 (2001) [thereafter General Comment 29].
5 Ibid., para 3.
6 Ibid.
7 Ibid., para 9.
8 Ibid., para 10.
9 Ibid.
10 Ibid.
Covenant, the work of the International Committee of the Red Cross on customary international law, which also combines human rights and humanitarian standards.13

General Comment 29 included two additional statements relevant to the interplay between international human rights and humanitarian law. Therein the Human Rights Committee indicated that:

States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.14

The Committee also finally applied international human rights and humanitarian law in a complementary manner in relation to the right to a fair trial, stipulating:

As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party’s decision to derogate from the Covenant.15

Through this statement referring to the application of the right to a fair trial under international humanitarian law during armed conflict, the Committee has in practice made at least part of the right to a fair trial de facto non-derogable in all types of emergencies. This example demonstrates the capacity for the complementary approach for filling potential gaps in protection by using one body of law to strengthen the protection provided by the other.

The Human Rights Committee also provided an opinion relevant to the interplay between international human rights and humanitarian law in its General Comment 31 on the nature of the general obligation of States parties to the

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13 The customary international humanitarian law study, which was then only at its preliminary stage and an initiative just assigned to the ICRC, has developed into a seminal work. For more detail, see chap 5.3.
14 General Comment 29 (n 4) para 11.
15 Ibid, para 16.
Covenant.\textsuperscript{16} Therein the Committee discussed the jurisdiction of the International Covenant on Civil and Political Rights and the obligation under article 2 of the Covenant “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the […] Covenant”.\textsuperscript{17} The Committee submitted that “[a]s implied in General Comment 29 […] the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable.”\textsuperscript{18} The Committee also clarified the interaction between human rights and humanitarian law, stating that:

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.\textsuperscript{19}

With this statement, the Committee demonstrably did not follow the reference to \textit{lex specialis}, previously introduced by the International Court of Justice, thereby moving towards the adoption of a true complementary approach to the concurrent application of international human rights and humanitarian law. This statement has since been quoted and used by most bodies dealing with the interaction between human rights and humanitarian law. The Human Rights Committee, through its General Comment 31, has also made a significant contribution regarding the issue of the extraterritorial applicability of human rights, authoritatively reaffirming that the International Covenant on Civil and Political Rights can apply outside the borders of a State party.\textsuperscript{20}

Examples of further statements relevant to the assessment of the interplay between international human rights and humanitarian law include the Concluding Observations of the Human Rights Committee on the 2006 periodic reports of the

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\footnote{\textsuperscript{16} ‘General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant’, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) para 10 [thereafter General Comment 31].}
\footnote{\textsuperscript{17} International Covenant on Civil and Political Rights (n 2) art 2(1).}
\footnote{\textsuperscript{18} General Comment 31 (n 16) para 11.}
\footnote{\textsuperscript{19} \textit{Ibid}.}
\footnote{\textsuperscript{20} \textit{Ibid.}, para 10. The Committee states: “States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. […]This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.” For more details on the extraterritorial applicability of human rights see section 2.5.2.}
\end{footnotes}
United States\textsuperscript{21} and of Israel.\textsuperscript{22} In their conclusions the Committee reaffirmed the extraterritorial applicability of the Covenant as well as the application of the Covenant during armed conflict where international humanitarian law is applicable, and urged the United States and Israel to act in accordance with these statements.\textsuperscript{23}

Reviewing the periodic report of the Russian Federation, the members of the Human Rights Committee addressed another vital element of the implementation and enforcement of international human rights and humanitarian law. The Committee concluded that “[t]he State party should ensure that victims of serious violations of human rights and international humanitarian law are provided with an effective remedy, including the right to compensation and reparations.”\textsuperscript{24}


\textsuperscript{22} ‘Concluding Observations of the Human Rights Committee, Israel’, UN Doc CCPR/C/ISR/CO/3 (2010).

\textsuperscript{23} ‘Concluding Observations of the Human Rights Committee, Israel’, ibid., para 5: “[t]he Covenant is applicable in respect of acts done by a State in exercise of its jurisdiction outside its own territory. Furthermore, the applicability of the regime of international humanitarian law does not preclude accountability of States parties under article 2, paragraph 1, of the Covenant for the actions of their authorities or agents outside their own territories, including in occupied territories. The Committee therefore reiterates and underscores that, contrary to the State party’s position, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the occupied territories, including in the Gaza Strip, with regard to all conduct by the State party’s authorities or agents in those territories affecting the enjoyment of rights enshrined in the Covenant (arts. 2 and 40). The State party should ensure the full application of the Covenant in Israel as well as in the occupied territories, including the West Bank, East Jerusalem, the Gaza Strip and the occupied Syrian Golan Heights. In accordance with the Committee’s General comment No. 31, the State party should ensure that all persons under its jurisdiction and effective control are afforded the full enjoyment of the rights enshrined in the Covenant.” ‘Concluding Observations of the Human Rights Committee, United States of America’, UN Doc CCPR/C/USA/CO/3/Rev.1 (2006) para 10: “The Committee notes with concern the restrictive interpretation made by the State party of its obligations under the Covenant, as a result in particular of (a) its position that the Covenant does not apply with respect to individuals under its jurisdiction but outside its territory, as well as its restrictive approach to some substantive provisions of the Covenant, which is not in conformity with the interpretation made by the Committee before and after the State party’s ratification of the Covenant, (articles 2 and 40). The State party should review its approach and interpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in the light of its object and purpose. The State party should in particular (a) acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory, as well as its applicability in time of war; (b) take positive steps, when necessary, to ensure the full implementation of all rights prescribed by the Covenant; and (c) consider in good faith the interpretation of the Covenant provided by the Committee pursuant to its mandate.”

Several other treaty bodies have been involved in the implementation and enforcement of international humanitarian law and human rights during situations of armed conflict. For instance, through General Recommendations and Concluding Observations, the Committee on the Elimination of Discrimination against Women has for decades been examining issues related to the discrimination of women in the specific context of armed conflicts. In its General Recommendation 19 the Committee stated that gender-based violence infringes upon women’s enjoyment of “[t]he right to equal protection according to humanitarian norms in time of international or internal armed conflict”. In its General Recommendation 23 the Committee discussed the necessity of including women in all spheres of political and public life, including the international criminal justice system, and the importance of ensuring a gender input when addressing armed conflicts. In its General Recommendation 24 the Committee talked about health services, including mental health that should be provided for women during armed conflict. In its General Recommendation 28 on the obligations of State Parties, the Committee stipulated that:

The obligations of States parties do not cease in periods of armed conflict or in states of emergency due to political events or natural disasters. Such situations have a deep impact on and broad consequences for the equal enjoyment and exercise by women of their fundamental rights. States parties should adopt strategies and take measures addressed to the particular needs of women in times of armed conflict and states of emergency.

25 ‘Committee on the Elimination of Discrimination against Women, General Recommendation No. 19: Violence against Women’, UN Doc A/47/38 (1993) para 7, reprinted in ‘Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’, UN Doc HRI/GEN/1/Rev.9 (Vol II) at 331 (2003) [thereafter Compilation of General Comments]. The Committee further discussed the impact of armed conflict on women, submitting at para 40 that: “[w]ars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures.”


Finally, in its guidelines regarding States’ reporting obligations, the Committee specified that “the Convention-specific document should include information on the implementation of Security Council resolution 1325 (2000) and its outcomes.”

In parallel with its General Recommendations and its reporting guidelines, the Committee on the Elimination of Discrimination against Women has examined violations of international humanitarian law and human rights during armed conflict in its concluding observations to many periodic reports. In 1993, in response to the conflict in the territory of the former Yugoslavia, the Committee requested States to submit reports on an exceptional basis. Within these reports the Committee examined issues such as international criminal responsibility, rape, sexual violence and other abuses committed against women in violation of human rights and international humanitarian law. In 1998, examining the periodic report of Indonesia, the Committee expressed concern “that the information provided on the situation of women in areas of armed conflict reflects a limited understanding of the problem” and that the information “do[es] not address the vulnerability of women to sexual exploitation in conflict situations, as well as a range of other human rights abuses affecting women in such contexts.” In 2008, reviewing the periodic report of Myanmar, the Committee addressed “the high prevalence of sexual and other forms of violence, including rape, perpetrated by members of the armed forces against rural ethnic women” and pressed Myanmar to “take due account of Security Council resolutions […] on sexual violence in armed conflict”.

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29 ‘Report of the Secretary-General, Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties’, UN Doc HRI/GEN/2/Rev.6 (2009) at 64, chap V (Committee on the Elimination of Discrimination against Women) I.3. Resolution 1325 on women, peace and security was the first resolution specifically dealing with the protection of women in times of armed conflicts. It is a key document around which initiatives for the protection of women during conflict have been developed.


32 Ibid.


34 Ibid., para 25.
Burundi, the Committee among other things called on the State “to enhance access to justice for victims, including victims of armed conflict”,35

**Committee on the Rights of the Child**

The Committee on the Rights of the Child has also, over the years, monitored the implementation and enforcement of treaty obligations during situations of armed conflict, as well as applied international human rights and humanitarian law concurrently in their review of periodic reports. The Committee has been more particularly involved with issues relevant to the interplay between human rights and humanitarian law in its monitoring of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.36 The Optional Protocol which entered into force in 2002 recalls in its preamble “the obligation of each party to an armed conflict to abide by the provisions of international humanitarian law”.37 The Committee’s concluding observations on Columbia’s report in 2010 contained the following:

> The Committee urges the State party to take all preventive measures to stop illegal armed groups from recruiting children in schools, including improved protection schemes for teachers. The Committee urges the State party to immediately discontinue the occupation of schools by the armed forces and strictly ensure compliance with humanitarian law and the principle of distinction. The Committee urges the State party to conduct prompt and impartial investigations of reports indicating the occupation of schools by the armed forces [...].38

Similarly, in its review of Sri Lanka’s periodic report, the Committee called upon the State Party to cease the military use of schools and comply with international humanitarian law.39 In its concluding observations on Israel the Committee

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37 Ibid., preamble. It also stipulates in art 5: “Nothing in the present Protocol shall be construed as precluding provisions in the law of a State Party or in international instruments and international humanitarian law that are more conducive to the realization of the rights of the child.”
“underline[d] the concurrent application of human rights and humanitarian law”.\textsuperscript{40} It also submitted:

The Committee is concerned over the violations of the right to life, survival and development of children within the jurisdiction of the State party. [...] The Committee expresses grave concern for the serious violations suffered by children in Gaza during the Operation “Cast Lead” in December 2008 and January 2009 owing to the disproportionate violence, the lack of distinction for civilians and the obstruction of humanitarian and medical aid [...].”\textsuperscript{41}

The Committee among other things urged Israel to “[t]ake prompt measures to comply with the fundamental principles of proportionality and distinction enshrined in humanitarian law”.\textsuperscript{42}

The above examination represents only a sample of both implicit and direct involvement of the UN treaty bodies with the concurrent application of international human rights and humanitarian law, and the Human Rights Committee in particular appears to be doing so in a manner which clearly advances the complementary approach. With the entry into force in 2006 of the International Convention for the Protection of All Persons from Enforced Disappearance, which stipulates that State parties must take into account international humanitarian law,\textsuperscript{43} it is clear that the treaty bodies will continue to provide an increasing corpus relevant to the current study of the interplay between international human rights and humanitarian law.

\section*{5.1.2. Charter Bodies}

Within the United Nations, the Charter bodies have been very much involved with advancing the complementary approach and clarifying the interplay between international human rights and humanitarian law. From the 1968 Teheran Conference and the adoption of Resolution 2444,\textsuperscript{44} numerous Charter bodies – including the General Assembly, the Security Council, the Secretary-General, the International Law Commission, the International Court of Justice, the Office of the


\textsuperscript{41} Ibid., para 10.

\textsuperscript{42} Ibid., para 11.

\textsuperscript{43} International Convention for the Protection of All Persons from Enforced Disappearance, ‘Report to the General Assembly on the First Session of the Human Rights Council’, UN Doc A/HRC/1/L.10 (2006) 32; see preamble, arts 16(2) and 43.

\textsuperscript{44} For more detail see section 1.6.3
High Commissioner of Human Rights, the Human Rights Commission and the Human Rights Council – have been dealing with armed conflict and international humanitarian law in countless ways and areas. The International Court of Justice made important statements on the applicability of human rights during armed conflict, the concurrent application of human rights and humanitarian law, and on the application of international humanitarian norms in specific cases. Other Charter bodies have contributed to the development of international conventions which are relevant to armed conflicts, as well as urging the incorporation of international humanitarian norms in human rights treaties. The Charter bodies have also contributed to the establishment of an international criminal accountability system. The Charter bodies have among other issues been particularly involved in addressing violations and reinforcing the protection of civilians, women and children in situations of armed conflict. In addition, the United Nations Charter bodies have supported the deployment of peace-keeping forces, and more generally repeatedly denounced violations of international humanitarian law.

Clearly, the practice and significant role of the UN Charter bodies in the concurrent application of international human rights and humanitarian law is too extensive to have every single instance covered in this chapter. Rather, what follows proposes to illustrate this practice by discussing the work of the human rights Charter bodies relevant to this study, using examples from: 1) the thematic mandates of the special procedures; 2) the country mandates of the special procedures; 3) established fact-finding missions and commissions of inquiry; 4) the work on combined standards settings; and 5) specially convened expert reports.

**Special Procedures, Thematic Mandates – The Example of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions**

Some of the work emerging from the UN Special procedures has been central in advancing the protection and enforcement of human rights during armed conflict, as

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45 See chap 4.2.

46 As explained by the UN Office of the High Commissioner for Human Rights, ‘Special Procedures of the Human Rights Council’, <www2.ohchr.org/english/bodies/chr/special/index.htm>: “‘Special procedures’ is the general name given to the mechanisms established by the Commission on Human Rights and assumed by the Human Rights Council to address either specific country situations or thematic issues in all parts of the world. Currently, there are 31 thematic and 8 country mandates. The Office of the High Commissioner for Human Rights provides these mechanisms with personnel, policy, research and logistical support for the discharge of their mandates.”
well as in contributing to the clarification of the interplay between international humanitarian and human rights law. Among the thirty-one thematic mandates, the work of the Special Rapporteur on extrajudicial, summary or arbitrary executions exemplifies very well the role that special procedures could play in advancing the complementary approach to the application of international humanitarian and human rights law.

The first Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. S. Amos Wako, was appointed by the Commission on Human Rights in 1982.\(^{47}\) In his initial report he reviewed the legal framework applicable to the allegations of summary or arbitrary executions he received. These situations encompassed killings in armed conflicts and states of emergency,\(^{48}\) and as such he included in the applicable substantive framework the Geneva Conventions and their Additional Protocols. Discussing judicial guarantees he stated that:

> Common article 3 of the Geneva Conventions prohibits the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are recognized as indispensable by civilised peoples. Judicial guarantees cannot therefore be suspended in periods of armed conflict. Such judicial guarantees in times of war or armed conflict must have reference to Articles 84 and 105 of the Geneva Convention on Prisoners of War and Article 6 of the Additional Protocol II.\(^{49}\)

In defining the scope of the terms extrajudicial, summary or arbitrary executions, the Special Rapporteur further specified that these types of executions excluded “killings in armed conflict not forbidden under international humanitarian law.”\(^{50}\) It is therefore apparent that from the very inception of the mandate, international human rights and humanitarian law were viewed as being of joint concern and within the remit of examination by the Special Rapporteur.

Subsequent Special Rapporteurs have continued to examine specifically executions during armed conflict.\(^{51}\) In the initial report of his mandate, the fourth

\(^{47}\) ‘Summary or Arbitrary Executions’, UN Doc E/RES/1982/35.
\(^{49}\) Ibid., para 56.
\(^{50}\) Ibid., para 67.
\(^{51}\) The second Special Rapporteur included ‘violations of the right to life during armed conflict’ in within legal framework under it mandate is implemented. The third Special Rapporteur explained in her initial report that she examined situations of “[v]iolations of the right to life during armed
Special Rapporteur, Philip Alston, noted how “[r]ecent years have seen a growing number of civilians and persons hors de combat killed in situations of armed conflict and internal strife”\textsuperscript{52} and that there “has been a general lessening of respect for established and clearly binding international norms.”\textsuperscript{53} He submitted that a possible means to respond to such situation:

is to underscore the fact that efforts to eradicate terrorism must be undertaken within a framework clearly governed by human rights law as well as international humanitarian law, and executions occurring in the context of armed conflict that violate that framework fall squarely within the remit of the Special Rapporteur.\textsuperscript{54}

In the report the Special Rapporteur discussed the “alleged killing of six men by a “U.S.-controlled Predator drone aircraft” when they were travelling in a car in Yemen”;\textsuperscript{55} “reports that United States military personnel had used excessive force against civilians in the city of Fallujah, Iraq, in 2003”;\textsuperscript{56} and “reports that United States soldiers had been given orders to “shoot on sight” persons suspected of looting property in Iraq”.\textsuperscript{57} The United States objected to the examination by the Special Rapporteur of these and subsequent situations and allegations of violations of the right to life during armed conflicts. As summarized by Philip Alston, the objections of the United States were based on four arguments:

(a) the “war on terror” constitutes an armed conflict to which international humanitarian law applies; (b) international humanitarian law operates to the exclusion of human rights law; (c) international humanitarian law falls outside the mandate of the Special Rapporteur and of the Council; and (d) States may determine for themselves whether an individual incident is governed by humanitarian law or human rights law.\textsuperscript{58}
These arguments and objections of the United States led the Special Rapporteur to examine more closely the applicability of human rights during situations of armed conflict, and specifically discuss the relationship between international human rights and humanitarian law in his reports.

Discussing the applicability of the right to life to US troops in Iraq in 2003, the Special Rapporteur clarified the interplay between the disciplines indicating that “[t]he right to life in article 6 of the International Covenant on Civil and Political Rights, to which both the United States and Iraq are parties, is non-derogable. Thus, the existence of an armed conflict does not per se render the Covenant inapplicable in the territory of a State party.”59 Following a review of the positions of the International Court of Justice and the Human Rights Committee on the extraterritorial applicability of human rights,60 he concluded that “any case involving the arbitrary deprivation of life of Iraqi or other nationals by United States military personnel (or other authorized government agents) may amount to a violation of the Covenant and would thus fall squarely within the Special Rapporteur’s mandate.”61 The Special Rapporteur also clarified his position on the relationship between international human rights and humanitarian law affirming:

It is now well recognized that the protection offered by international human rights law and international humanitarian law are coextensive, and that both bodies of law apply simultaneously unless there is a conflict between them. In the case of a conflict, the lex specialis should be applied but only to the extent that the situation at hand involves a conflict between the principles applicable under the two international legal regimes.62

After reviewing the opinions of the International Court of Justice and the Human Rights Committee on the relationship between international human rights and humanitarian law,63 the Special Rapporteur finally concluded that: “the application of international humanitarian law to an international or non-international armed conflict

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60 Ibid., paras 46-47.
61 Ibid., para 47.
62 Ibid., para 50.
63 Ibid., paras 50-51.
does not exclude the application of human rights law. The two bodies of law are in fact complementary and not mutually exclusive.”

Throughout his mandate, the Special Rapporteur applied international human rights and humanitarian law in a concurrent manner and advanced the arguments for the complementary application of the disciplines. In one of the final reports of his mandate, Alston summarised his activities including his examination of various situations of armed conflict relevant to the current study. Therein Alston explained how in countries he visited during his mandate “armed conflicts have resulted in many unlawful killings. These include Afghanistan, the Central African Republic, Colombia, the Democratic Republic of the Congo, Israel, Lebanon, the Philippines and Sri Lanka.”

Alston also noted how “from the very beginning of the mandate, Special Rapporteurs have reviewed the legality of killings under international humanitarian law, and that the mandate covers, without exception, violations of the right to life in international and non-international armed conflicts.”

Between 2004 and 2010, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions assessed “the principles of distinction and proportionality; airstrikes; cluster bombs; raids; perfidy; suicide attacks; human shielding; issues arising in urban counter-insurgencies; and killings of persons hors de combat.” The Special Rapporteur throughout his mandate also explained “the responsibility of rebel or insurgent groups to observe international humanitarian law” and further addressed “the importance of human rights-based security sector reform […], military recruitment and vetting of military personnel for war crimes, humanitarian law training, killings by private security contractors, and the need for transparency and accountability mechanisms relating to right-to-life violations during armed conflict and occupation.”

Finally, the Special Rapporteur has applied international human rights and humanitarian law in his important study on targeted killings in
2010\textsuperscript{71} and his final report as Rapporteur where he discussed extrajudicial executions and new technologies.\textsuperscript{72} It is, as a result, abundantly clear that the Special Rapporteur applied both bodies of law in such a way as to complement one another. The mandate on extrajudicial, summary or arbitrary executions represents a prime example of the role of Special procedures in contributing to the advancement of complementary application of international human rights and humanitarian law, and that Charter bodies are at present deeply engaged in this endeavour.

**Special Procedures, Country Mandates – The Example of Somalia**

Independent experts and Special Rapporteurs, with country mandates in areas where armed conflicts have emerged, have examined over the years the application of international human rights and humanitarian law concurrently, at times in parallel and at other times in a complementary manner. In 1993, the Commission on Human Rights requested the appointment by the Secretary-General of an independent expert on Somalia, with the mandate:

> to assist the Special Representative of the Secretary-General for Somalia through development of a long-term programme of advisory services for re-establishing human rights and the rule of law, including a democratic constitution, as well as the eventual holding of periodic and genuine elections by universal suffrage and secret ballot.\textsuperscript{73}

Five independent experts on Somalia have been appointed between 1993 and 2011. They examined the country’s various surges of violence and the many challenges arising with the implementation of international human rights and humanitarian law.\textsuperscript{74}

\textsuperscript{71} ‘Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Addendum: Study on Targeted Killings’, UN Doc A/HRC/14/24/Add.6 (2010).


\textsuperscript{73} ‘Assistance to Somalia in the Field of Human Rights”, UN Doc E/CN.4/RES/1993/86, para 1.

In his initial report, the first independent expert on Somalia, Mr. Fanuel Jarientundu Kozonguizi, explained the difficulty of implementing his mandate during the transitional period with the non-existence of a central government or commitment by all sides to the Addis Ababa Agreement. While not including much detail on the scope or legal framework applicable to his mandate, the independent expert nevertheless addressed, in his first report, allegations of both human rights and humanitarian law violations. As such, the independent expert noted receipt of “allegations of human rights violations committed by the United Nations forces in Somalia” and further stated that:

> [t]hese allegations included conduct in violation of the principles of humanitarian law contained in the Geneva Conventions of 1949 and the Additional Protocols thereto of 1977, now considered to form part of customary international law.

In 1995, Mr. Mohamed Charfi was appointed as independent expert on Somalia, and took over the mandate. In his initial report he discussed violations of human rights directly related to armed conflict in the country, as well as violations of international humanitarian law. For instance, the independent expert wrote:

> As regards extrajudicial killings and arbitrary executions, hundreds of unarmed civilians, including women and children, have been deliberately killed during periods of fighting between opposing clan factions by members of armed political groups on account of their membership of a particular clan. There is also frequent, indiscriminate use of heavy weapons, resulting in heavy civilian casualties. Extrajudicial executions are widely reported to be used as a political tool to remove particular

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opposition leaders. Of grave concern is the apparently deliberate targeting of those clan elders involved in moves towards reconciliation.79

The independent expert addressed in his report additional human rights violations, including violations by militia groups against displaced persons, aid workers and women,80 as well as “human rights violations committed by United Nations troops”.81 In an addendum report, Charfi examined the context of the situation in Somalia, and focussed part of his examination on violations of human rights and the civil war.82 Therein he discussed allegations of violations, observed that ethnic cleansing appeared to have taken place in some areas,83 and that political and military leaders seemed to be responsible for killings, with some of their acts amounting to war crimes and crimes against humanity.84

The subsequent independent expert on Somalia, Ms. Mona Rishmawi, was appointed in 1996. From the very start of her mandate she clarified the legal framework applicable to the situation in Somalia and to her mandate. The independent expert defined the situation as one of armed conflict, to which the rules of international humanitarian law applied.85 She also broadly discussed some of the applicable norms and principles of the humanitarian legal framework relevant to situations of non-international armed conflict, including Common Article 3 and the obligations included therein.86 The discussion of the applicable legal framework by Rishmawi constituted important work for the country mandate, providing a basis upon which she and the subsequent independent experts on Somalia have supported their examination of the situation in the country.

In her second report Rishmawi reiterated the obligations under customary international law of all parties to the internal armed conflict in Somalia.87 She further examined many alleged violations and affirmed for instance:

79 UN Doc E/CN.4/1996/14 (n 74) para 17(b).
80 Ibid., paras 17(d), 17(e), 17(f) respectively.
81 Ibid., para 17(g).
82 UN Doc E/CN.4/1996/14/Add.1 (n 74) paras 8-14.
83 Ibid., para 12.
84 Ibid., para 13.
86 Ibid., paras 55-58.
and torture, is absolutely prohibited under common article 3 of the Geneva Conventions. This provision is absolutely binding on the Somali warring factions. The Independent Expert also takes this opportunity to recall that common article 3, which embodies the fundamental principles in international humanitarian law applied to internal armed conflicts, prohibits, inter alia, “the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording the judicial guarantees which are recognized as indispensable by civilized people”.

While not specifically addressing applicable human rights norms, the independent expert discussed the impact of the conflict on the human rights situation of, for instance, refugees and internally displaced persons, children, women and the justice system.

In her last report as independent expert on Somalia, Rishmawi examined more closely issues of international criminal accountability as applicable to the situation in Somalia. The independent expert further explained the importance of Common Article 3 and of the Rome Statute of the International Criminal Court as instruments that can provide guidance on potential crimes committed in the Somali context under customary international law. On that basis the independent expert reviewed violations of human rights and humanitarian law, more specifically “violence against life”, “intentional attacks against the civilian population and civilian objects”, “pillage”, “conscription of children under 15”, “rape and other forms of sexual violence”, “persecution”, “illegal ordering of the displacement of civilians”, and “denial of due process”. In relation to these issues the independent expert noted several potential violations of Common Article 3 and of the Rome Statute. As in previous reports, however, the independent expert mostly did not address specific human rights norms or violations of that framework. Rather, she discussed facts concerning the issues mentioned above under the overall heading of “respect for human rights and humanitarian law”.

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88 Ibid., para 22.
89 Ibid., paras 29-34.
90 Ibid., paras 35-38.
91 Ibid., paras 39-43.
92 Ibid., paras 44-52.
93 UN Doc E/CN.4/2000/110 (n 74).
95 Ibid., paras 40-64.
96 Ibid., part IV, paras 40-64.
A fifth independent expert, Mr. Shamsul Bari, was appointed to the country mandate in 2008. Between his appointment and the beginning of 2011 the independent expert produced four reports. Similarly to other reports produced by the former independent experts Bari’s reports all discussed violations of both international human rights and humanitarian law in different regions of Somalia, as well as specific categories of violations. The independent expert provided information on violations of human rights and humanitarian law occurring in the reporting period from March to August 2010 in Mogadishu and other part of south-central Somalia. He discussed among other things conflict-related violations, including the killing of dozens of civilians in a suicide bombing, and noted the death of hundreds of civilians and injury of thousands due to increased escalation of the fighting. As part of these deaths and injuries the independent expert mentioned that:

specific reports received by the United Nations from its partners listed more than 290 incidents during the period from January to June 2010 in which civilians were reportedly injured or killed as a result of failure of parties to the conflict, including TFG and AMISOM forces, to adhere to the principles of international humanitarian law relating to the protection of civilians. The waging of hostilities in urban areas – as provoked by Al–Shabaab – inevitably brings with it huge risks to the civilian population, particularly if the principles of international humanitarian law of proportionality, targeting of only military objects and the requirement to take precautionary measures to avoid civilian casualties are disregarded. Both TFG and AMISOM have suffered many fatal casualties as a result of attacks by Al–Shabaab.

Finally, the independent expert discussed, specifically as regards to Mogadishu and other parts of south–central Somalia, violations of the right to freedom of expression, displacement of population, sexual and gender–based violence, child rights, right to food, nutrition and health, right to education and right to justice.

The independent experts also discussed the international accountability for human rights and humanitarian law violations, and raised questions about the obligations and responsibilities under the two frameworks for different actors involved in the country. Somalia represents one of the most challenging country mandates within the UN Special Procedures, due among other things to the volatile

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97 UN Doc A/HRC/15/48 (n 74) para 14.
98 Ibid., paras 15-16.
99 Ibid., para 17.
100 Ibid., paras 23-36.
political situation, the varying state of violence in various parts of the country as well as involvement of many insurgent groups. With these components, the country mandate of Somalia exemplifies the vital need for independent experts and Special Rapporteurs to concurrently apply international human rights and humanitarian law. In sum, the experts generally noted the impact of armed conflict on the human rights situation in Somalia and on different vulnerable groups, including civilians, women and children. They urged the respect of both international humanitarian and human right law. They further examined human rights violations linked with armed conflict and violations of international humanitarian law in conflict zones.

The previous section on the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions showed the way in which mandate holders are actively engaged in developing the relationship between international human rights law and international humanitarian law. The Independent Experts on Somalia did not appear to engage in similar analysis explaining the interplay within the above reports. The approach they have taken in practice does, however, accept the inevitably of a human rights body needing to simultaneously examine both human rights and humanitarian law. In so doing, the Independent Experts on Somalia have in practice over the years used the two frameworks concurrently, but seemingly in a parallel manner not significantly relying on their interaction.

**Fact-Finding Missions – The Example of Gaza**

The United Nations has established over the years several fact-finding missions and commissions of inquiry. The Security Council established such mechanisms with different frameworks and mandates. Such mechanisms have included, for instance, a commission of investigation concerning Greek frontier incidents in the 1940s, an international commission of inquiry concerning Burundi in the 1990s and an international commission of Inquiry for Darfur in 2004.\(^{101}\) In recent years, the Human Rights Council has also established investigative mechanisms which have contributed to crystallising the complementary approach of the UN Charter bodies regarding the application of international human rights and humanitarian law. What

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\(^{101}\) For a list of commissions and investigative bodies established by the Security Council see Repertoire of the Practice of the Security Council, Subsidiary Organs <www.un.org/en/sc/repertoire/subsidiary_organs/commissions_and_investigations.shtml#cat5>.
follows presents one example of such practice, focussing on Israel and the Occupied Palestinian Territories, a situation which has been the object of much attention by the United Nations.

In 2009, the Human Rights Council established a fact-finding mission\(^{102}\) with the mandate of investigating “all violations of international human rights law (IHRL) and international humanitarian law (IHL) that might have been committed at any time, whether before, during or after, in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 to 18 January 2009.”\(^{103}\) On the basis of meetings in Geneva and three field visits to the region, the fact-finding mission submitted in September 2009 a 452-page report.\(^{104}\) The report discussed the applicability of international human rights and humanitarian law, as well as assessed their application and possible violations of the two frameworks.\(^{105}\)

The report confirmed the international humanitarian law treaty and customary obligations that apply to Israel.\(^{106}\) It also discussed the legal regime regulating situations of occupation, and determined its applicability to the situation, noting Israel’s “effective control over the Gaza Strip”.\(^{107}\) In assessing the applicability of international humanitarian law, the report of the fact-finding mission also touched upon the issue of the qualification of conflict as regard to the situation in Gaza.\(^{108}\) The report relied upon norms applicable both to situations of international and non-international armed conflict. It further noted that:

A convergence between human rights protections and humanitarian law protections is also in operation. The rules contained in article 75 of


\(^{104}\) Ibid., paras 268-310.

\(^{105}\) Ibid., paras 271-272.


\(^{108}\) Ibid., para 283.
Additional Protocol I, which reflect customary law, define a series of fundamental guarantees and protections, such as the prohibitions against torture, murder and inhuman conditions of detention, recognized also under human rights law.\footnote{Ibid., para 284.}

The report also considered “the rules and definitions of international criminal law as crucial to the fulfilment of its mandate to look at all violations of IHL and IHRL by all parties to the conflict.”\footnote{Ibid., para 286.}

The report explicitly considered the applicability of international human rights law from two angles; it examined the applicability of international human rights law during armed conflict, and discussed more specifically the obligations of Israel and the Palestinian authorities under the human rights framework. The report acknowledged the continued application of human rights treaties during armed conflict.\footnote{Ibid., para 295.} Noting the relevant jurisprudence of the International Court of Justice on this issue, the members of the fact-finding mission explained that:

> It is today commonly understood that human rights law would continue to apply as long as it is not modified or set aside by IHL. In any case, the general rule of human rights law does not lose its effectiveness and will remain in the background to inform the application and interpretation of the relevant humanitarian law rule.\footnote{Ibid., para 296.}

In examining the applicability of international human rights law in the context of Gaza, the mission also considered the issue of extraterritorial applicability of human rights as regards to Israel. It recalled the assessment of the International Court of Justice and the Human Rights Committee on that issue\footnote{Ibid., paras 297-298.} and concluded accordingly that “human rights treaties ratified by Israel are also binding in relation to Israeli conduct in the Occupied Palestinian Territory.”\footnote{Ibid., para 297.}

The report also looked more closely at the human rights obligations of Israel in the Occupied Palestinian Territory, considering its withdrawal from the Gaza strip in 2005 and the existence of the Palestinian Authority as self-government in place

\footnote{Ibid., para 288-293.}
since 1995.\textsuperscript{115} After briefly reviewing views of the International Court of Justice, a joint report about Gaza by several special procedures mandate holders, and Israel’s position on the subject, the report concluded that:

transferring powers and functions to self-governing bodies does not exempt Israel from its obligations to guarantee human rights to people within its jurisdiction or under its effective control. Israel would also have a duty to refrain from actions that obstruct efforts by Palestinian self-governing bodies to guarantee the enjoyment of human rights in the Occupied Palestinian Territory and should facilitate that action.\textsuperscript{116}

The report of the fact-finding mission also addressed “the human rights obligations of the Palestinian Authority, the de facto authority in the Gaza Strip and other political and military actors.”\textsuperscript{117} This was based on a view that there may be evolution towards human rights obligations of non-state actors who effectively govern territories, and in light of international and domestic legal commitments and declarations by Palestinian bodies.\textsuperscript{118}

On the basis of their assessment of the legal framework, the fact-finding mission examined alleged violations in the context of the military operations of 27 December 2008 to January 2009 committed by Israel in Gaza,\textsuperscript{119} in the West Bank\textsuperscript{120} and in Israel;\textsuperscript{121} by Palestinian armed groups;\textsuperscript{122} as well as by responsible Palestinian authorities.\textsuperscript{123} The fact-finding mission applied international human rights and humanitarian law concurrently throughout their investigation and conclusions. What follows provides a few interesting examples of the use of the two legal frameworks.

Within the report, the fact-finding mission examined many allegations of violations by Israel in Gaza 2008-2009. The members of the fact-finding mission investigated allegations of killing of civilians. The report for example considered the deliberate attack on police facilities which led to the death of 99 police officers.\textsuperscript{124} It examined more specifically whether the police in Gaza needed to be regarded as part

\textsuperscript{115} Ibid., para 302.
\textsuperscript{116} Ibid., para 303.
\textsuperscript{117} Ibid., para 304.
\textsuperscript{118} Ibid., paras 304- 310.
\textsuperscript{119} For a summary of these actions see ibid., paras 1919-1936.
\textsuperscript{120} For a summary of these actions see ibid., paras 1937-1947.
\textsuperscript{121} For a summary of these actions see ibid., paras 1948-1949.
\textsuperscript{122} For a summary of these actions see ibid., paras 1950-1953.
\textsuperscript{123} For a summary of these actions see ibid., paras 1954-1956.
\textsuperscript{124} Ibid., paras 33, 424-429.
of the civilian population under international humanitarian law, and whether Israel had respected the principle of distinction between civilians/civilian objects and combatants/military objectives as provided for under the international humanitarian law framework. The report also discussed the violation of the right to life and prohibition of arbitrary killings under international human rights law. The report concluded as regarding this incident:

that Israel, by deliberately attacking police stations and killing large numbers of policemen [...] during the first minutes of the military operations, failed to respect the principle of proportionality between the military advantage anticipated by killing some policemen who might have been members of Palestinian armed groups and the loss of civilian life (the majority of policemen and members of the public present in the police stations or nearby during the attack). Therefore, these were disproportionate attacks in violation of customary international law. The Mission finds a violation of the right to life (ICCPR, article 6) of the policemen killed in these attacks who were not members of Palestinian armed groups.125

This exemplifies the complementary approach in action. Not only are international human rights and humanitarian law determined to be jointly applicable to the situation in general, but the appropriate rules of each one are applied together in the specific case, while taking each other into account. The violations of the right to life under international human rights law are declared in the cases of those individuals killed who were not legitimate targets under international humanitarian law, and whose deaths came about in the context of a disproportionate attack under the latter body of law. The joint complementary application therefore produces a result in which there is no conflict of rules, but rather a mutually reinforcing conclusion.

Among the allegations of violations by Israel in Gaza, the members of the fact-finding mission investigated four cases of alleged use by the Israeli forces in north Gaza of Palestinian civilians as human shields to undertake house searches. Following their examination of the facts, the report assessed whether “the practice of using civilian men captured by the armed forces to search houses in which the invading army suspects the risk of ambushes or booby traps”126 violated international humanitarian law. More specifically, it examined whether these actions were in violation of the Fourth Geneva Convention, Additional Protocol I, as well as the

125 Ibid., para 1923.
126 Ibid., para 1096.
prohibition on the use of human shields included in the ICRC customary international humanitarian law study. The fact-finding mission concluded that the actions of the Israeli troops “violated article 28 of the Fourth Geneva Convention and the prohibition under customary international law that the civilian population as such will not be the object of attacks, as reflected in article 51 (2) of Additional Protocol I.”\textsuperscript{127} The members of the fact-finding mission further examined these violations in the context of international criminal accountability. They concluded that “the intentional use as human shields […] qualifies as inhuman treatment of and wilfully causing great suffering to protected persons under the Fourth Geneva Convention”\textsuperscript{128} and accordingly constitute grave breaches to the Convention. The mission further noted that “[t]he use of human shields is also a war crime under article 8 (2) (b) (xxiii) of the Rome Statute.”\textsuperscript{129} The fact-finding mission finally examined the use of human shields under the framework of international human rights law. The report observed that such practice:

put the right to life of the civilians concerned, protected in article 6 of ICCPR, at risk in an arbitrary and unlawful way. The anguish to which civilians who, blindfolded and handcuffed, are forced at gunpoint to enter houses which – this is the reason they are forced to enter the houses – might be booby-trapped or harbour combatants who might open fire on them, can only be described as cruel and inhuman treatment prohibited by article 7 of ICCPR. Furthermore, the witnesses were all deprived of liberty and the security of their person violated. This also constitute a violation of article 9 of ICCPR.\textsuperscript{130}

The report also examined the issue of detention of Palestinians by Israeli forces in Gaza. The fact-finding mission found among other things that after being rounded up by Israeli forces, large numbers of “[c]ivilians, including women and children, were detained in degrading conditions, deprived of food, water and access to sanitary facilities, and […] without any shelter.”\textsuperscript{131} In addition to this, some Palestinian men were taken outside Gaza to be detained in Israel. There, these civilians “were subjected to degrading conditions of detention, harsh interrogation, beatings and other physical and mental abuse. Some of them were charged with

\textsuperscript{127} Ibid., para 1097.
\textsuperscript{128} Ibid., para 1105.
\textsuperscript{129} Ibid., para 1105.
\textsuperscript{130} Ibid., para 1104.
\textsuperscript{131} Ibid., para 56.
being unlawful combatants.”

In assessing these facts, the fact-finding mission concluded that Israel had committed several violations under international human rights and humanitarian law:

The Mission considers that the severe beatings, constant humiliating and degrading treatment and detention in foul conditions allegedly suffered by individuals in the Gaza Strip under the control of the Israeli armed forces and in detention in Israel, constitute a failure to treat protected persons humanely in violation of article 27 of the Fourth Geneva Convention, as well as violations of articles 7 and 10 of the International Covenant on Civil and Political Rights regarding torture and the treatment of persons in detention, and of its article 14 with regard to due process guarantees. The treatment of women during detention was contrary to the special respect for women required under customary law as reflected in the article 76 of Additional Protocol I. The Mission finds that the rounding-up of large groups of civilians and their prolonged detention under the circumstances described in this report constitute a collective penalty on those persons in violation of article 33 of the Fourth Geneva Convention and article 50 of the Hague Regulations. Such treatment amounts to measures of intimidation or terror prohibited by article 33 of the Fourth Geneva Convention.

As will be returned to in a later section, the issue of detention provides a prime example not only of the possibility for complementary approach, but of the practical necessity of its utilisation.

In addition to the incidents in Gaza, the fact-finding mission also considered actions undertaken in the West Bank, including East Jerusalem. First, the report reiterated that Israel bears obligations in the West Bank under international humanitarian law and also, as an occupying power, under international human rights law. It also specified that “[t]he obligations under both bodies of law are complementary and mutually reinforcing, and provide a clear framework against

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132 Ibid., para 59.
133 Ibid., para 1927.
134 For an example of the complementary use of international human rights and humanitarian law to address the issue of detention see the discussion on the ICRC Customary International Humanitarian Law Study, chap 5.3.2. See also the discussion on Coard et al. v. United States, chap 5.2.2, section on the Inter-American Commission. For an extensive analysis of security detentions under international human rights law see D Cassel, ‘International Human Rights Law and Security Detention’ (2009) 40 Case W Res J Int’l L 383. For further examination of this issue under both international human rights and humanitarian law, see J Pejic, ‘Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence’ (2005) 858 International Review of the Red Cross 375.
135 ‘Report of the United Nations Fact-Finding Mission on the Gaza Conflict’ (n 103) paras 1373-1589. The fact-finding did so on the basis that “its mandate which included “violations “in the context” of the military operations in Gaza required it to go beyond the violations that occurred in and around Gaza.” Ibid., para 1373.
136 Ibid., para 1410.
which the facts […] may be analysed”.  

Thereafter the fact-finding mission examined alleged violations of international human rights and humanitarian law committed in the West Bank. For example, it addressed a number of allegations regarding “violence by settlers against Palestinians in the West Bank”\textsuperscript{137} The report affirmed Israel’s relevant obligations with regard to protecting individuals from violence, recalling a combination of rules from the Hague Regulations and the Fourth Geneva Convention, as well as the International Covenant on Civil and Political Rights and the Convention against Torture. The report also noted that, in light of the apparent acceptance by the Israeli security forces of the violence committed by settlers on Palestinian civilians “there is a strong argument that the behaviour of the security forces is in breach of the obligations of Israel to not discriminate on the basis of national origin under the International Covenant on Civil and Political Rights.”\textsuperscript{139} Finally the fact-finding mission determined that Israel violated the right to an effective remedy under article 2 of the Covenant due to the “the failure by Israel to adequately investigate allegations of the failure of the State to protect Palestinians, and of the acquiescence of state actors before the violence of private actors”\textsuperscript{140}

As reviewed, among other things, the fact-finding mission reaffirmed the continued applicability of human rights during armed conflicts; it confirmed the convergence of certain human rights and humanitarian norms or principles; it discussed killings of civilians, the use of human shields, the issue of detention, the treatment of civilians and the right to remedy under both international frameworks. The report applied international human rights and humanitarian law as regards to several other alleged violations. Hence, in the context of Israel, Gaza and the Occupied Territories, the fact-finding mission considered the main areas or circumstances where international human rights and international humanitarian law meet and have the potential to be applied in a complementary manner.\textsuperscript{141} In most

\begin{footnotes}
\item[137] \textit{Ibid.}, para 1410.
\item[138] \textit{Ibid.}, paras 1411-1418.
\item[139] \textit{Ibid.}, para 1416.
\item[140] \textit{Ibid.}, para 1418.
\item[141] For an opinion suggesting that a complementary application of international human rights and humanitarian law in the context of the Israeli occupation could in actual fact weaken the protection in Occupied Palestinian Territory, see A M Gross, ‘Human Proportions: Are Human Rights the Emperor’s New Clothes of the International Law of Occupation?’ (2007) 18 EJIL 1.
\end{footnotes}
cases, the report did apply international human rights and humanitarian law concurrently, including in some cases in a complementary manner.

**Combined Standard Setting – Fundamental Standards of Humanity**

The UN Charter bodies have worked on supporting the development of a number of instruments – including soft law – combining international human rights and humanitarian law. This work emerged from a need for pragmatic solutions to perceived gaps in the substantive frameworks, and application, of international human rights and humanitarian law. As noted in earlier chapters, the ways conflicts are fought have changed over the years. This has created additional obstacles and increased difficulties in ensuring protection and responding to violations during armed conflict, especially non-international armed conflicts. This reality led the United Nations to engage in a number of initiatives developing combined standards setting. Among such initiatives the development of the “fundamental standards of humanity” is most relevant as regards the work of the UN in advancing the complementarity of international human rights and humanitarian law.

In 1990, a group of independent experts convened by the Institute for Human Rights at Åbo Akademi University adopted the Declaration of Minimum Humanitarian Standards.\(^\text{142}\) The preamble of the Declaration highlighted the necessity of respecting international human rights and humanitarian law, as well as the inadequacy of these frameworks during “situations of internal violence, ethnic, religious and national conflicts, disturbances, tensions and public emergency”.\(^\text{143}\) It stated the need “to reaffirm and develop principles governing behaviour of all persons, groups, and authorities”\(^\text{144}\) in such times. The Declaration proclaimed minimum humanitarian standards, combining international human rights and humanitarian law. It called for the protection of these standards by all and for the prohibition of acts proscribed under these two frameworks. Soon after its adoption by the expert meeting, the Declaration entered the realm of the UN Charter bodies.

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\(^\text{143}\) Declaration of Minimum Humanitarian Standards, *ibid.*, 2.

\(^\text{144}\) *Ibid.*, 3.
through its consideration by the Sub-Commission on Prevention of Discrimination and Protection of Minorities. In 1994, the Sub-Commission transmitted the Declaration to the Commission on Human Rights, recommending it to “examine the Declaration with a view to its further elaboration and eventual adoption”. On the basis of the Declaration, the Commission on Human Rights engaged in a combined standard setting process and requested the Secretary General to transmit the document and consult with governments, non-governmental organisations and other relevant actors for comments. Following this first stage, the Commission on Human Rights invited the Secretary General, in consultation with the International Committee of the Red Cross, to prepare “an analytical report on the issue of fundamental standards of humanity, […] and identifying, inter alia, common rules of human rights law and international humanitarian law that are applicable in all circumstances”. This process produced a series of reports by the Secretary-General, submitted to the Commission on Human Rights and subsequently to the Human Rights Council.

The first analytical Secretary General’s report on fundamental standards of humanity was submitted to the Commission on Human Rights in 1998. The report explained how “[t]he discrepancy between the scale of the abuses perpetrated in situations of internal violence, and the apparent lack of clear rules, has been the inspiration for efforts to draw up "minimum humanitarian standards" or fundamental

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standards of humanity.”\textsuperscript{151} The analytical report principally aimed at examining “the necessity and desirability of identifying principles or standards for the better protection of the human person in situations of internal violence.”\textsuperscript{152} Therein the Secretary General identified a number of challenges within the international human rights framework, including the possibilities of derogation from human rights treaties; the lack of accountability for armed groups for violations of human right treaties; and the absence of details regarding the application of human rights norms in situations of violence.\textsuperscript{153} The report further noted the difficulty of qualifying a situation as armed conflict under international humanitarian law; the fact that some situations do not reach the threshold of violence necessary for the application of the international humanitarian law framework; and that, when applicable, international humanitarian norms often simply prove inadequate to respond to the situation at hand.\textsuperscript{154} The Secretary General also discussed in his report a number of additional points relevant to identifying what are the fundamental standards of humanity, including the interplay between international human rights and humanitarian law. He stated that:

\begin{quote}
the need to find rules \textit{common} to both branches of relevant law points to one of the most interesting aspects of the whole problem - namely, the need, where appropriate, to consider a fusion of the rules. For too long, these two branches of law have operated in distinct spheres, even though both take as their starting point concern for human dignity. Of course, in some areas there are good reasons to maintain the distinctness - particularly as regards the rules regulating international armed conflicts, or internal armed conflicts of the nature of a civil war. But in situations of internal violence - where there is considerable overlap and complementarity - this distinctness can be counter-productive. One must be careful not to muddle existing mandates, or to undermine existing rules, but within these constraints there is still considerable scope for building a common framework of protection.\textsuperscript{155}
\end{quote}

After examining the potential advantages and disadvantages of identifying fundamental standards of humanity, what such standards might encompass, as well as considering the problems noted above with the two legal frameworks, the Secretary-General concluded that: [i]nsofar as the development of fundamental standards of humanity.

\textsuperscript{151} \textit{Ibid.}, para 10.
\textsuperscript{152} \textit{Ibid.}, para 12.
\textsuperscript{153} \textit{Ibid.}, para 40.
\textsuperscript{154} \textit{Ibid.}
\textsuperscript{155} \textit{Ibid.}, para 99.
standards of humanity can overcome these problems, it is an initiative that deserves serious attention and support.\textsuperscript{156}

A series of further consultations followed the first Secretary-General’s analytical report on fundamental standards of humanity. Those consultations led to a “general agreement that there are no evident substantive legal gaps in the protection of individuals in situations of internal violence”\textsuperscript{157} as well as “broad-based agreement that there is no need for new standards.”\textsuperscript{158} On that basis it was decided that the aim of the fundamental standards of humanity process would be “to strengthen practical protection through the clarification of uncertainties in the application of international humanitarian and human rights law.”\textsuperscript{159} Developments examined over the years have included: the work at the International Criminal Tribunals for the former Yugoslavia and Rwanda; the work of the International Criminal Court; the Human Rights Committee, and in particular its General Comments 29, 31 and 32; the International Committee of the Red Cross Customary International Humanitarian Law Study; the International Court of Justice Advisory Opinion on the Wall, as well as its judgements in the \textit{DRC v. Uganda} case, and \textit{Bosnia and Herzegovina v. Serbia and Montenegro}; and the adoption of the Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.\textsuperscript{160}

The process regarding fundamental standards of humanity has evolved from an initial inquiry into the need to adopt a document with combined standards applicable to all situations and all state and non-state actors, to a process examining current problems under international human rights and humanitarian law and identifying developments within various mechanisms and organisations which offer practical solutions to these problems. This process on fundamental standards of humanity shows that international human rights and humanitarian law are not only

\begin{itemize}
\item\textsuperscript{156} \textit{Ibid.}, para 106.
\item\textsuperscript{157} UN Doc E/CN.4/2001/91 (n11) para 6.
\item\textsuperscript{158} \textit{Ibid.}
\item\textsuperscript{159} \textit{Ibid.}, para 7.
\item\textsuperscript{160} For a complete list of the developments examined by the Secretary-General in the reports on fundamental standards of humanity see UN Doc E/CN.4/2006/87 (n 149) para 4; UN Doc A/HRC/8/14 (n 149) paras 4-5.
\end{itemize}
used by the United Nations in a complementary manner, but also that the two fields of international law are construed, when used and studied together, as having the potential to form a complete framework that can enhance protection. Under the banner of the fundamental standards of humanity, the Commission on Human Rights, followed by the Human Rights Council, has promoted a more global approach to the implementation of international human rights and humanitarian law. This process suggests that these two branches of international law complement and reinforce each other through different mechanisms and form a joint framework of protection for situations of armed conflict.

5.1.3. Expert Reports and the Relationship between International Human Rights and Humanitarian Law

UN bodies have qualified the relationship between international human rights and humanitarian law, but most of them only briefly by simply noting the relevant views of the Human Rights Committee and the International Court of Justice without further discussion. Moreover, the UN Charter and treaty bodies have infrequently debated the existing difficulties with the concurrent application of international human rights and humanitarian law or discussed the reasons for, or importance of, applying the two frameworks in a complementary manner.\textsuperscript{161} Within the United Nations bodies, experts are regularly called to work on specific issues through the establishment of working groups or solicited studies. Such initiatives, that specifically address the relationship between international human rights and humanitarian law, have been undertaken in recent years. Expert reports have contextualised the relationship between international human rights and humanitarian law and considered the complementary approach.

**Background of Expert Reports**

The Commission on Human Rights and the Human Rights Council have adopted many resolutions calling for the respect of both international human rights and humanitarian law, as well as establishing initiatives with mandates directly on or relevant to situations of armed conflicts. The Commission and Council have also on occasion taken decisions and adopted resolutions explicitly discussing the

\textsuperscript{161} An exception to this is found in the ‘Fundamental Standards of Humanity’ initiative, discussed above in chap 5.1.2.
relationship between international human rights and humanitarian law, and striving
to clarify their interplay. As such, the Sub-Commission on the Promotion and
Protection of Human Rights decided in 2004 to request Françoise Hampson and
Ibrahim Salama to prepare “a working paper on human rights law and international
humanitarian law which should address, inter alia, the relationship between human
rights law and international humanitarian law, their enforcement systems and the
scope of the obligation of States to implement international humanitarian law
domestically”. The Hampson-Salama report was submitted at the fifty-seventh
session of the Sub-Commission and constitutes one of the three reports examined
in the sections below.

In 2005, the Commission on Human Rights adopted a resolution regarding
the protection of the human rights of civilians during armed conflicts. Therein the
Commission discussed the relationship between international human rights and
humanitarian law, affirming that the two frameworks “are complementary and
mutually reinforcing”. The Commission also considered “that all human rights
require protection equally and that the protection provided by human rights law
continues in armed conflict situations, taking into account when international
humanitarian law applies as lex specialis”. The resolution further noted “that
conduct that violates international humanitarian law […] may also constitute a gross
violation of human rights”. Likewise the Human Rights Council adopted in 2008 a
resolution which acknowledged “that human rights law and international
humanitarian law are complementary and mutually reinforcing”. The resolution
also requested “the Office of the High Commissioner for Human Rights to convene
[…] an expert consultation, open to the participation of Governments, regional
organizations, relevant United Nations bodies and civil society organizations, and in
consultation with the International Committee of the Red Cross, on the issue of

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Law by Françoise Hampson and Ibrahim Salama’, UN Doc E/CN.4/Sub.2/2005/14 (2005) [thereafter
Hampson-Salama report].
(2005).
165 Ibid.
166 Ibid.
167 Ibid.
protecting the human rights of civilians in armed conflict”. This led to an expert consultation and report which examined the application of international human rights during armed conflict; the relationship between international human rights and humanitarian law as well as questions of implementation, monitoring and accountability. In 2009, the Human Rights Council requested the convening of a second expert consultation which took place in 2010 and focussed on “the question of how different human rights mechanisms have implemented, in their practice, their respective human rights mandates in the context of armed conflict”. The outcome reports of those two rounds of consultation constitute the second basis for the examination below.

**Reasons for Complementary Application**

The Hampson-Salama report, as well as the 2009 and 2010 expert reports, examined some of the reasons behind the concurrent application of international human rights and humanitarian law. As was discussed throughout this work, several challenges exist in ensuring protection during armed conflict and implementing international human rights and humanitarian law in such time. These challenges highlight the practical importance of the complementary application of international human rights and humanitarian law. In examining the relationship between the two frameworks, the experts taking part in the above-mentioned initiatives discussed some of these challenges. For instance, the Hampson-Salama report addressed how the obstacles in ensuring protection and responding to violations related to armed conflicts “can increasingly be aggravated by scientific development, weapons of mass destruction, terrorism and many other modern transnational phenomena.” Indeed, as was noted in earlier chapters, the way conflicts are now fought has impacted on the ability of each discipline to deal adequately with armed conflict separately through their

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169 Ibid.


174 See chapter 3.4.2.
substantive norms and implementing mechanisms. In examining the relationship between the two frameworks, the Hampson-Salama and the 2009 expert reports also highlighted weaknesses and gaps in each international framework. Among these, the experts especially stressed the absence of monitoring mechanisms for international humanitarian law and the role that human rights mechanisms could play in monitoring humanitarian obligations as well as providing accountability for humanitarian law violations. The reports further noted the importance for human rights bodies to refer to international humanitarian law when dealing with situations linked to armed conflict. They noted for example the necessity for human rights bodies to do so in cases such as violations of article 6 of the International Covenant on Civil and Political Rights, for which the International Court of Justice decided that arbitrary deprivation of life must be interpreted in consultation with international humanitarian law in conflict situations. Finally, the Hampson-Salama report suggested that when assessing human rights violations which took place during armed conflict, a lack of consideration of international humanitarian law could lead to results that are impractical and disconnected from the reality on the ground.

**Lex Specialis and Complementary Application**

The Hampson-Salama, as well as the 2009 and 2010 expert reports examined the paradigms under which the concurrent application of international human rights and humanitarian law is or should be articulated. As such, the experts reviewed the positions of the International Court of Justice and the Human Rights Committee on the issue and discuss the complementary and *lex specialis* models. The three reports appear to be in agreement and support the view that the *lex specialis* principle does not exclude the application of international human rights law as a whole during armed conflict. This view is also broadly accepted by States, with the exception of the United States and Israel, who continue to argue the exclusive applicability of international humanitarian law during armed conflict. In defining or qualifying the

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175 See for instance UN Doc E/CN.4/Sub.2/2005/14 (n 163) paras 4, 6, 8; UN Doc A/HRC/11/31 (n 170) para 41.
177 *Ibid.*, paras 6, 57, 60, 76; UN Doc A/HRC/11/31 (n 170) paras 5, 6, 13; UN Doc A/HRC/14/40 (n 172) paras 28, 41.
178 UN Doc E/CN.4/Sub.2/2005/14, *ibid.*, para 69. Russia has also advanced a similar argument in International Court of Justice, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) (Request for the Indication of
relationship between international human rights and humanitarian law, the Hampson-Salama and the 2009 expert reports reiterated that the two fields are “complementary and mutually reinforcing”\(^{179}\) and similarly noted that their “dual and complementary application”\(^{180}\) is now recognized. The concept of “combined application” of international human rights and humanitarian law appears to be construed in two somewhat contradictory manners in the 2009 and 2010 expert reports. The 2010 expert report summarized the discussions of the first expert consultation round held in 2009, and recounted that:

Georges Abi-Saab introduced the meeting by recalling that during the first expert consultation of 2009, extensive reference was made to the combined application of international human rights law and international humanitarian law in situations of armed conflict. He noted that in practice only one norm applies to each concrete situation. When applicable international human rights norms and international humanitarian norms yield similar results, there is no need for a complex legal analysis. However, he noted that the international law system has evolved to greater specialization and that, therefore, in certain exceptional situations, principles such as that of lex specialis is required to determine which is [the] most detailed norm that applies to each concrete and individual case. Therefore, the combined application of international human rights law and international humanitarian law does not mean two norms are to be applied simultaneously, but rather that one should seek to identify the norm that provides the most specific answer for each particular situation.\(^{181}\)

While not endorsing the exclusionary \textit{lex specialis} interpretation of setting aside the whole body of human rights law, this statement appears to nevertheless endorse a rule by rule exclusionary approach. In other words, while this statement accepts that the most appropriate (specialised) applicable norms can either be a human rights or humanitarian norm, it appears to reject the complementary application of human rights and humanitarian law to a given situation.

The complementary paradigm differs from the exclusionary \textit{lex specialis} paradigm in that it promotes an approach whereby human rights and humanitarian law feed into each other. The overall complementary framework would accept that a human rights norm and an international humanitarian norm can be applied together.

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\(^{179}\) UN Doc E/CN.4/Sub.2/2005/14 (n 163) para 50; UN Doc A/HRC/11/31 (n 170) para 5.


\(^{181}\) UN Doc A/HRC/14/40 (n 172) para 14.
Despite the above quotation from one report, the full analysis provided in the two Human Rights Council expert consultation outcome reports and in the Hampson-Salama working paper suggests that such an overall complementary approach should ultimately be adopted in order to clarify the relationship between human rights and humanitarian law and articulate their application.

**Practice**

The three reports presented a brief review of current practice of United Nations bodies as well as regional human rights mechanisms regarding the concurrent application of international human rights and humanitarian law.\(^{182}\) They also discussed obstacles to the complementary application of international human rights and humanitarian law. Among these obstacles the experts have addressed existing difficulties in determining if a situation constitutes an actual armed conflict, and, if so, in qualifying what type of conflict (international or non-international) and which corresponding set of international humanitarian norms applies.\(^{183}\) The experts also noted areas where the complementary application of international human rights and humanitarian law is both relevant and much needed, included on the issue of right to life and arbitrary killings; detention; and economic, social and cultural rights.\(^{184}\) The experts additionally discussed implementing mechanisms with the potential of further advancing the complementarity of international human rights and humanitarian law and strengthening protection. As such, the experts noted how judicial bodies as well as UN Charter and treaty bodies should, whenever relevant, address both international human rights and humanitarian law. The Hampson-Salama report provided a number of suggestions for advancing the complementary approach, affirming for instance that:

> Those defenders of the solemn promise of “never again” can and should support the increasing tendency for the two traditions, HRsL and IHL, to converge in a technically sound and practically useful and feasible manner. In most cases both sets of norms are applicable in parallel, but in some cases they can be applicable in a complementary way.\(^{185}\)

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\(^{182}\) See especially second outcome report UN Doc A/HRC/14/40 (n 172).

\(^{183}\) UN Doc E/CN.4/Sub.2/2005/14 (n 163) paras 73-74; UN Doc A/HRC/11/31, para 23. For more details see chapter 2.2.3.


This statement usefully differentiates between parallel and complementary application, which are not one and the same. Parallel application can simply mean applying each body of law side by side, but without necessarily connecting the two. A truly complementary approach provides for a process by which the two sets of rules feed into each other, working together to fill gaps in protection, and by which one body of law may be used to interpret the other as required by the situation. The preceding sections have provided examples of how such an approach can exist in practice, and further analysis of this will take place in the next sections on regional human rights bodies.

5.2. Regional Bodies

With the ongoing political situation and armed violence for decades in Latin America, the Inter-American Commission and Court of Human Rights have addressed many cases linked to armed conflicts. These mechanisms have directly addressed the interplay between international human rights and humanitarian law and concurrently applied the two disciplines, at times in parallel and at others in a complementary manner. The European Commission and Court of Human Rights, albeit less frequently, have also examined cases arising from situations of armed conflict. Except perhaps in two cases, the European mechanisms did not overtly deal with the interplay between the disciplines, and used a scattered approach to this issue. The following sub-sections examine the case-law of the Inter-American and European systems in some detail. The examination of the African human rights system is much briefer. This is due to the fact that, while the African system has dealt extensively with situations of armed conflict and in some cases has used international humanitarian law, there are not enough examples to discern a pattern in how this legal framework is being used in its case-law.

5.2.1. African System

As discussed in chapter 1, the African Charter on Human and Peoples’ Rights186 was adopted in 1981 and the African Commission on Human and Peoples’ Rights was inaugurated in 1987. The Commission includes in its mandate the protection and promotion of human rights, and the interpretation of the African Charter on Human

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and Peoples’ Rights.  

The African system also includes the African Court on Human and Peoples’ Rights, which was established through the adoption of a Protocol to the African Charter, which entered into force in 2004. Similarly to the Inter-American and European system, the Court has the competence to make binding decisions on human rights violations by Member States of the African Union.

As noted, the African Commission has dealt extensively with situations of armed conflict but has very rarely used international humanitarian law in its work. In 1993, The Commission adopted the ‘Resolution on the Promotion and Respect of International Humanitarian Law and Human and Peoples’ Rights’. In several resolutions the Commission has made general statements calling for the respect of international humanitarian law obligations or generally noted violations of the framework in given situations. Likewise, Special Rapporteurs have broadly referred to international humanitarian law. The report of the Commission on their fact-finding mission in the Darfur region also mentioned international humanitarian law in their recommendations, for example urging the government to “undertake training programmes for the police and security forces on human rights and

187 Ibid., art 45.
188 Ibid., arts 46-59. To fulfil its mandate the African Commission has also established a number of special mechanisms, including for instance Special Rapporteurs on women, freedom of expression, extrajudicial executions and on prisons.
190 ‘Resolution on the Promotion and Respect of International Humanitarian Law and Human and Peoples’ Rights’, ACHPR/Res.7 (XIV) 93.
international humanitarian law principles” and “to abide by its international obligations under international human rights and humanitarian law”. Aside from these resolutions and reports, a few communications received by the Commission have addressed international humanitarian law, and as such are relevant for this study.

In 1995, in the communication brought by the Commission Nationale des Droits de l’Homme et des Libertés regarding human rights violations by Chad, the Commission did not address international humanitarian law but highlighted the continued applicability of human rights during armed conflicts. In 2009, another relevant communication was filed by a number of human rights organisations against Sudan. Among other allegations, the complaint alleged violations of the right to health on the basis that “that the Respondent State was complicit in looting and destroying foodstuffs, crops and livestock as well as poisoning wells and denying access to water sources in the Darfur region.” Addressing this allegation, the Commission noted the UN Committee on Economic, Social and Cultural Rights’ General Comment No. 14 on the right to health. More specifically, the Commission put forward that:

 violations of the right to health can occur through the direct action of States or other entities insufficiently regulated by States. According to General Comment 14, ‘states should also refrain from unlawfully polluting air, water and soil, … during armed conflicts in violation of international humanitarian law… States should also ensure that third parties do not limit people’s access to health-related information and services, and the failure to enact or enforce laws to prevent the pollution of water…[violates the right to health]’. Hence, using international humanitarian law to support its conclusion, the Commission decided that “the destruction of homes, livestock and farms as well as

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194 Ibid., para 151.
196 Sudan Human Rights Organisation and Centre on Housing Rights and Evictions v. Sudan, ACHPR Comm Nos 279/03 and 296/05 (2009), ACHPR Doc EX.CL/600(XVII), Annex V.
197 Ibid., para 207.
the poisoning of water sources, such as wells exposed the victims to serious health risks and amounts to a violation of Article 16 of the Charter.”

In 2003, in a rare example of such practice, the Commission used international humanitarian law concurrently with human rights law to examine a complaint lodged by the Democratic Republic of Congo against Burundi, Rwanda and Uganda. In addressing the alleged claims of aggression and human rights violations by Burundi, Rwanda and Uganda, the Commission qualified the situation as one of occupation. The Commission also put forward that “the series of violations alleged to have been committed by the armed forces of the Respondent States fall within the province of humanitarian law, and therefore rightly covered by the Four Geneva Conventions and the Protocols additional to them.” In their decision, the Commission explained their competence to draw-upon treaties other than the African Charter, affirming that:

The combined effect of Articles 60 and 61 of the African Charter enables the Commission to draw inspiration from international law on human and peoples’ rights, the Charter of the United Nations, the Charter of the Organisation of African Unity and also to take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules recognized by Member States of the Organization of African Unity, general principles recognized by African States as well as legal precedents and doctrine. By virtue of Articles 60 and 61 the Commission holds that the Four Geneva Conventions and the two Additional Protocols covering armed conflicts constitute part of the general principles of law recognized by African States, and take same into consideration in the determination of this case.

Relying upon articles 60 and 61, the Commission assessed the alleged violations on the basis of provisions of both the African Charter and the framework of

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200 Ibid., para 212.
202 Ibid., para 70. See also para 64. African Charter (n 186) art 60, provides that: “[t]he Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.” African Charter (n 186) art 61, provides that: “[t]he Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.”
international humanitarian law. Indeed, in addition to rights included in the African Charter, it examined whether the following acts were consistent with humanitarian law obligations: “killings, massacres, rapes, mutilations and other grave human rights abuses committed while the Respondent States' armed forces were still in effective occupation of the eastern provinces of the Complainant State”; 203 “mass transfer of persons from the eastern provinces of the Complainant State to camps in Rwanda”; 204 “raping of women and girls”; 205 “the indiscriminate dumping of and or mass burial of victims of the series of massacres and killings”; 206 “looting, killing, mass and indiscriminate transfers of civilian population, the besiege and damage of the hydro-dam, stopping of essential services in the hospital, leading to deaths of patients and the general disruption of life” 207. The Commission therein used the more detailed provisions of international humanitarian law to assess whether the alleged acts constituted violations of the African Charter. While not directly linking the human rights and humanitarian law norms it deemed relevant, the Commission nevertheless used humanitarian law to clarify the content of some provisions of the African Charter.

The African Commission has not, at this stage, produced enough material to advance the establishment of a practice, or clarify their approach to the concurrent application and interplay of the African Charter and international humanitarian law. That being said, the decision in the communication against Burundi, Rwanda and Uganda has most certainly shown an openness to use the two frameworks concurrently, and has also explicitly provided a basis to support the competence of the Commission to use international humanitarian law. In that regard, it can be hoped that the Commission will, in future decisions, draw upon this example and adopt the complementary approach to the two legal frameworks. As for the the African Court on Human and Peoples' Rights, its work is still in the early stages of development, having dealt only with two situations as of 2011. In the latest of these situations the Court has issued an Order for provisional measures against Libya following an application for the Court to consider “serious and massive violations of human

203 Democratic Republic of Congo v. Burundi, Rwanda and Uganda (n 201) para 79.
204 Ibid., para 81.
205 Ibid., para 86.
206 Ibid., para 87.
207 Ibid., para 88.
The case against Libya will most certainly raise interesting issues under both human rights law and humanitarian law. It will provide a substantial opportunity for the Court to concurrently apply the two legal frameworks and adopt a complementary approach in this coming case, and will merit close attention as it unfolds.

5.2.2. Inter-American System

With the political situation and armed violence ongoing for decades in Latin America, the Inter-American Commission and Court of Human Rights have addressed many cases linked to armed conflicts. They have applied international humanitarian law concurrently with the American Convention on Human Rights in their adjudication of many petitions. This section will review key cases of these Inter-American mechanisms addressing violations during armed conflicts, focussing upon how these two bodies have justified their competence to apply international humanitarian law as well as the scope of this attributed competence. It will further examine how the Commission and Court have in practice used international humanitarian law in these cases, as well as their evolving approach regarding the interplay between human rights and humanitarian law.

Inter-American Commission

In 1997, the Inter-American Commission on Human Rights addressed allegations of violations of the American Convention on Human Rights during conflict situations in a series of cases against Colombia (the Avilán case), Peru (the Saavedra case) and Argentina (the Abella case). Within these cases the Commission developed their approach to the application of humanitarian law and discussed their competence with regard to that branch of international law. The Commission contended in the Avilán, Saavedra and Abella cases that they had competence to apply international humanitarian law directly, as well as to use the legal framework to interpret

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provisions of the American Convention. While the use of international humanitarian law to interpret human rights law had already been accepted, for instance by the International Court of Justice in the context of the right to life during armed conflict, the Inter-American Commission advanced in those cases that it had competence to apply international humanitarian law independently, and could examine violations of this framework without referring or attaching such violations to a right protected in the American Convention on Human Rights. This statement of the Commission was de facto suggesting that it could serve as a monitoring mechanism for international humanitarian law. Being a body with a specific mandate to implement the American Convention on Human Rights, the Commission explained their competence and substantiated their reasons for applying international humanitarian law. The Commission based its position on six points in the Avilán, Saavedra and Abella cases.

First, the Commission argued in the Avilán and Abella cases that article 27 of the American Convention on Human Rights further supported their competence to apply international humanitarian law. Article 27, a provision regulating the boundaries of derogations, stipulates that in situations of armed conflict a State “may take measures derogating from its obligations under the present Convention […] provided that such measures are not inconsistent with its other obligations under international law […].” The provision also specifies that such derogation to the American Convention are not permitted in relation to certain rights, such as the right to life and the right to humane treatment, which can never be suspended. Article 27 does acknowledge the continued application of the American Convention on Human Rights during armed conflicts, especially non-derogable rights. It also precludes States from derogating from their obligations under the Convention during armed conflict in manners which would be inconsistent with their obligations under international humanitarian law. In actual fact, however, this provision has been of

212 Avilán v. Colombia (n 209) paras 132, 170; Saavedra v. Peru (n 210) para 59, footnote 7; Abella v. Argentina (n 211) para 157.
214 Avilán v. Colombia (n 209) para 135; Abella v. Argentina (n 211) para 168.
215 American Convention on Human Rights (22 November 1969) OAS TS 36, art 27(1) [thereafter American Convention].
216 Ibid., art 27(2).
little or no use in the Avilán, Abella and other cases reviewed, as those cases did not concern derogation measures taken by the States. Rather, as will be noted below, international humanitarian law has been used in these cases in relation to violations of non-derogable rights of the American Convention. Hence, this first argument used by the Commission to support their application of international humanitarian law appears of little relevance to the cases.

Second, in the Saavedra and Abella cases, the Commission relied on the right to judicial protection enshrined in article 25 of the American Convention. On the basis of this provision the Commission argued in the Abella case that:

> when the claimed violation is not redressed on the domestic level and the source of the right is a guarantee set forth in the Geneva Conventions, which the State Party concerned has made operative as domestic law, a complaint asserting such a violation, can be lodged with and decided by the Commission under Article 44 of the American Convention.

Thus, the American Convention itself authorizes the Commission to address questions of humanitarian law in cases involving alleged violations of Article 25.

This statement would de facto support the use of the Commission as an implementing mechanism to address separately and redress violations of international humanitarian law without the need to link it to other violations of the American Convention on Human Rights. The interpretation of article 25 as a provision that can be used to support the application of international humanitarian law appears overstretched. The ensuing competence for the Commission to adjudicate separately violations of international humanitarian law is, as will be further discussed in the next section, problematic for a body established with a specific mandate to implement a human rights instrument.

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217 Ibid., art 25: “1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b. to develop the possibilities of judicial remedy; and c. to ensure that the competent authorities shall enforce such remedies when granted.”

218 Ibid., art 44: “Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.”

219 Abella v. Argentina (n 211) para 163. See also Avilán v. Colombia (n 209) paras 176-178.
Third, the Inter-American Commission used article 29 of the American Convention,\textsuperscript{220} a provision imposing a number of restrictions as regards the interpretation of the Convention. More specifically in the Abella case, the Commission supported its competence to apply international humanitarian law by reference to article 29 b), which stipulates that the Convention cannot be interpreted in such a way as to “restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party.”\textsuperscript{221} Article 29 b) proposes a teleological approach, following which the Commission or Court, when confronted with another applicable framework that includes stronger protection, must apply that framework instead of that of the American Convention. Accordingly, as the Commission noted, following this “where there are differences between legal standards governing the same or comparable rights in the American Convention and a humanitarian law instrument, the Commission is duty bound to give legal effort to the provision(s) of that treaty with the higher standard(s) applicable to the right(s) or freedom(s) in question.”\textsuperscript{222} While this argument could be valid to explain the need for the Commission to examine international humanitarian law in order to determine whether it includes more protective provision than that of the American Convention, in many cases related to armed conflict where humanitarian law and the American Convention could apply concurrently the use of article 29 b) would be inappropriate. This is certainly the case in Abella in which the Commission concluded that some of the killings and woundings “were legitimately combat related and, thus, did not constitute violations of the American Convention or applicable humanitarian law rules.”\textsuperscript{223} To follow article 29 b) in this case the Commission would have had to give legal standing to the legal framework providing the ‘higher standard’ and as such to assess the use of force against the fighters through a human rights law enforcement.

\textsuperscript{220} American Convention (n 215) art 29: “No provision of this Convention shall be interpreted as: a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.”

\textsuperscript{221} Ibid., art 29 b).

\textsuperscript{222} Abella v. Argentina (n 211) para 165.

\textsuperscript{223} Ibid., para 188.
framework and not through international humanitarian law, where direct use of lethal force against persons taking part in hostilities and collateral damage are more easily permitted. Hence, the use of article 29 b) is a flawed argument to support the application of international humanitarian law by the Commission in this case. Rather, it is submitted that when applied in a complementary manner, decisions on how to apply international humanitarian law and human rights law will not be decided on the basis of what is most favourable but on the basis of what is most appropriate.

Fourth, the Commission argued in the Avilán and Saavedra cases that art. 29 d) supports the Commission’s competence to apply international humanitarian law, given the fact that it provides that the American Convention cannot be interpreted as “excluding or limiting the effect” of international instruments of a human rights nature, including humanitarian law. The Commission in Avilán and similarly in Abella noted that this argument had been confirmed by the Court in its advisory opinion on article 64. As highlighted by the Commission, the Court recognised in its advisory opinion the Commission’s practice of invoking treaties other than the American Convention. The Court also noted that the nature of the Convention:

militates against a strict distinction between universalism and regionalism. Mankind’s universality and the universality of the rights and freedoms which are entitled to protection form the core of all international protective systems. In this context, it would be improper to make distinctions based on the regional or non-regional character of the international obligations assumed by States, and thus deny the existence of the common core of basic human rights standards.

However, while the Court concluded that its competence could be exercised “with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral,” such conclusion related only to the consultative jurisdiction of the Court. This did not confirm the competence of the Court or

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224 American Convention (n 215) art 29 d).
225 Avilán v. Colombia (n 209) paras 132, 170; Saavedra v. Peru (n 210) para 59.
226 Inter-American Court of Human Rights, ‘Other Treaties’ Subject to the Advisory Jurisdiction of the Court (Article 64 of the American Convention on Human Rights), OAS Doc OC-1/82 (1982), Series B no 1 [thereafter Advisory Opinion on ‘Other Treaties’]; Avilán v. Colombia (n 209) para 132; Abella v. Argentina (n 211) para 171.
227 Advisory Opinion on ‘Other Treaties’, ibid., para 43.
228 Ibid., para 40.
229 Ibid., para 53.
Commission to apply provisions of any other treaty, such as international humanitarian law, in their adjudication functions.

The Commission put forward two additional arguments that address more intrinsically the interplay between international humanitarian law and the American Convention. As a fifth argument, the Commission noted the convergence of the American Convention on Human Rights and international humanitarian law. In the Abella case, the Commission correctly stated that:

> [t]he American Convention, as well as other universal and regional human rights instruments, and the 1949 Geneva Conventions share a common nucleus of non-derogable rights and a common purpose of protecting human life and dignity. These human rights treaties apply both in peacetime, and during situations of armed conflict.

In both the Abella and Avilán cases the Commission also noted how such convergence of norms in the two legal frameworks is particularly notable and needed with regard to non-international armed conflicts. The Commission indicated more specifically that given such convergence “as a practical matter, application of Common Article 3 by a State Party to the American Convention involved in internal hostilities imposes no additional burdens on, or disadvantages its armed forces vis-à-vis dissident groups.” The substantive overlap of international humanitarian law and international human rights law and the influence and presence of human rights standards in the humanitarian treaties are especially evident in Common Article 3. As such it would indeed be difficult to imagine a situation during non-international armed conflict where Common Article 3 would provide stronger protection or more stringent obligations upon States than the human rights framework. The argument of the Commission could therefore probably be used to rebut part of the objections with regard to its application of international humanitarian law, at least as an interpretative tool for the American Convention. While this argument of the Commission might not in itself be sufficient to justify its competence to apply international humanitarian law, the parallelism of content between international human rights and humanitarian law certainly constitutes one of the arguments at the

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230 Abella v. Argentina (n 211) para 158.
231 Avilán v. Colombia (n 209) para 274; Abella v. Argentina, ibid., para 160.
basis of the current movement towards the complementary use of the two disciplines and the development of their interplay.

The final argument used by the Commission to support its competence to apply international humanitarian law relates to the inadequacy of human rights law to interpret single-handedly situations arising from armed conflict. This final argument, perhaps the most straightforward and convincing one proposed by the Commission, is also at the basis of the development of the complementary approach to international human rights and humanitarian law. The Commission put forward in the Abella and Avilán cases how, despite the continued applicability of human rights law during armed conflict, this legal framework has primarily been intended to apply in time of peace, and accordingly is not fully adapted to situations of armed conflict. It notes that human rights treaties including the American Convention “do not include norms that govern the means and methods of such conflicts.” The silence of human rights law, as regards to what constitutes legitimate acts during armed conflicts, makes human rights bodies inadequate in many cases to address conflict-related issues. The Commission noted this being specifically true for adjudication of the right to life and physical integrity protected respectively by articles 4 and 5 of the American Convention on Human Rights, regarding which there would be a clear need to apply humanitarian law concepts such as the principle of distinction and proportionality to properly address these alleged violations arising from conflicts. Following this, the Commission in the Abella case, and similarly in Avilán, stated that:

[...] 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. To do otherwise would mean that the Commission would have to decline to exercise its jurisdiction in many cases involving indiscriminate attacks by State agents resulting in a considerable number of civilian casualties. Such a result would be manifestly absurd in light of the underlying object and purposes of both the American Convention and humanitarian law treaties.

233 Avilán v. Colombia, ibid., para 171; Abella v. Argentina, ibid., para 158.
234 Avilán v. Colombia, ibid., para 173; Abella v. Argentina, ibid., para 161.
235 Avilán v. Colombia, ibid., para 173.
236 Abella v. Argentina (n 211) para 161.
The Commission therein implicitly refers to the Vienna Convention on the Law of Treaties\textsuperscript{237} by noting the importance of respecting the object and purpose of the two legal frameworks. The Commission acknowledges that, without the complementary use of international humanitarian law and human rights, it would be unable to fulfil its duties adequately. The Commission also highlights here the need to deal with the relationship between international humanitarian law and human rights law and apply them together in such a way as to ensure that their application provides the maximum protection while not being disconnected from the reality of armed conflict.

In the Avilán, Saavedra and Abella cases the Commission applied international humanitarian law differently – directly and as an interpretative tool. The Avilán case concerned an armed confrontation between Colombian State actors, including members of the army and police, and armed dissidents. The petitioners put forward in that case that the armed confrontation led to the extrajudicial execution of eleven persons. Reviewing relevant norms to the case, the Commission found Common Article 3 to the Geneva Conventions applicable and discussed legal principles found in that provision. The Commission stated that the members of the dissident group M-19, involved in the armed confrontation with the Colombia State agents, were fighters and as such constituted legitimate military objectives. It observed, however, that among these individuals eleven did not die as a result of the conduct of hostilities and should have been protected by Common Article 3.\textsuperscript{238} While recognizing the right of the State actors to use force during armed conflict, the Commission emphasized that such act must be within the permitted boundaries and limits imposed by international humanitarian law. The Commission stated:

Once the members of the M-19 were hors de combat and in the custody of the Colombian authorities, the Colombian State had no right to attack them or kill them. These combatants who were wounded or defenseless, like any wounded civilian, had the absolute right to the guarantees of humane treatment provided for in the non-derogable guarantees of Common Article 3 of the Geneva Conventions and of the American Convention. The evidence submitted in this case supports the petitioners’ claim that the victims were executed extrajudicially by state agents in a clear violation of Common Article 3 of the Geneva Conventions as well as the American Convention.\textsuperscript{239}

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\textsuperscript{237} Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, art 31(1).
\textsuperscript{238} Avilán v. Colombia (n 209) para 133.
\textsuperscript{239} Ibid., para 134.
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The Commission further observed that due to the continued application of the non-derogable right to life during armed conflict “the summary execution of these persons not only violated Common Article 3, but also Article 4 of the American Convention.”

In its final conclusion the Commission held that Colombia violated the right to life, right to humane treatment, right to a fair trial and judicial protection together with its obligation to respect the rights of the American Convention on Human Rights. The Commission also found separate violations of international humanitarian law, more specifically of Common Article 3 as regards to humane treatment and the extrajudicial killings of the eleven individuals mentioned.

The Saavedra case concerned the killing of a journalist and the wounding of another by an agent of Peru. In this case the Commission discussed Common Article 3 and customary international humanitarian law, including the prohibition to attack civilians and the civilian population. The Commission observed that: “[f]rom the factual background laid out above it can be held that Hugo Bustíos Saavedra was extra-judicially executed by agents of the Peruvian State who arbitrarily deprived him of the right to life.” In relation to this, the Commission found a violation of the right to life of article 4 of the American Convention on Human Rights, as well as a violation of Common Article 3 of the Geneva Conventions. Similarly, regarding the journalist wounded by members of the Peruvian army, the Commission concluded that it was “a clear case of impact on personal integrity in the terms of the American Convention.” Hence, the Commission found that Peru had violated article 5 of the American Convention on the right to humane treatment. The Commission also found in that respect a violation of Common Article 3. The Inter-American Commission on Human Rights appears in the Saavedra case to have applied international humanitarian law directly and separately, in parallel with the American Convention on Human Rights.

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240 Ibid., para 135.
241 Ibid., para 200.
242 Ibid., para 202.
243 Saavedra v. Peru (n 210) paras 58, 61.
244 Ibid., para 60.
245 Ibid., paras 63, 88.
246 Ibid., para 65.
247 Ibid., paras 64-55, 88.
248 Ibid., paras 66, 88.
The Abella petition alleged the summary execution, disappearance and torture of individuals following combat at the La Tablada army barracks between Argentinian military and over 40 armed persons. The Commission explained therein the applicable legal framework and in light of the facts qualified the events at La Tablada as a non-international armed conflict which “triggered application of the provisions of Common Article 3, as well as other rules relevant to the conduct of internal hostilities.” The Commission discussed principles within Common Article 3 and customary international law with regard to the conduct of hostilities, including the prohibition of attacks against individuals not or no longer taking part in hostilities. Regarding the facts of the case, the Commission explained how civilians who took part in the attack lost their protection and became legitimate targets. The Commission observed that:

Because of the lack of sufficient evidence establishing that State agents used illegal methods and means of combat, the Commission must conclude that the killing or wounding of the attackers which occurred prior to the cessation of combat on January 24, 1989 were legitimately combat related and, thus, did not constitute violations of the American Convention or applicable humanitarian law rules.

The Commission also examined alleged violations of the right to humane treatment of those no longer taking part in hostilities. It put forward that Common Article 3 and article 5 of the American Convention applied to these individuals and that “[t]he intentional mistreatment, much less summary execution, of such wounded or captured persons would be a particularly serious violation of both instruments.” Similarly the Commission asserted that these individuals in the hand of Argentinian State actors were entitled to have their right to life protected under Common Article 3 of the Geneva Conventions and following the American Convention. In its conclusions, the Commission affirmed that Argentina violated the American Convention, more specifically its provision on the right to life, right to humane treatment, right to appeal and right to an effective remedy, together with the

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249 Abella v. Argentina (n 211) paras 149-153.
250 Ibid., paras 154-156.
251 Ibid., para 156. See also para 327.
252 Ibid., para 176-177.
253 Ibid., para 178.
254 Ibid., para 188. See also 328.
255 Ibid., para 189.
256 Ibid., para 189.
257 Ibid., paras 329, 332.
obligation to respect the rights of the Convention. In the Abella case the Commission appears to have used a complementary approach, and applied international humanitarian law and the American Convention concurrently. It used international humanitarian law to decide whether the alleged violations were legitimate under human right law, and on the basis of that answer ruled on violations of the American Convention. In their conclusions the Commission accordingly only stated violations of the American Convention, which were informed by the humanitarian law framework.

In 1999, in a petition lodged against the United States regarding a military operation conducted by American troops in Grenada, the Commission had opportunity to make use of international humanitarian law, this time in the context of an international armed conflict. As the United States had not ratified the Inter-American Convention on Human Rights, the petition was focused upon alleged violations of the American Declaration of the Rights and Duties of Man. As summarized by the Commission:

The factual predicate before the Commission, which is undisputed, is that on or about October 25, 1983, members of the armed forces of the United States arrested the 17 petitioners while participating in the military operation then being conducted in Grenada. The petitioners were detained for periods of 9 to 12 days, and were then turned over to Grenadian authorities. What is in dispute is the legal characterization of the treatment accorded to the petitioners once arrested and detained. The petitioners alleged that their arrest and detention violated, inter alia, Articles I, XVIII and XXV of the American Declaration. The State maintained that the matter was wholly and exclusively governed by the law of international armed conflict, which the Commission has no mandate to apply, and that the conduct in question was, in any case, fully justified as a matter of law and fact.

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258 Ibid., para 437.

260 American Declaration of the Rights and Duties of Man (2 May 1948) OAS Res XXX, Final Act, Ninth International Conference of American States. For the Commission’s justification of its competence to examine violations of the American Declaration see Coard et al. v. United States (n 259) para 9.

261 Ibid., para 35. For the arguments of the United States supporting the legitimacy of the conduct of their troops in Grenada, see ibid., paras 30-32.
The Inter-American Commission considered the applicable law, and reaffirmed its competence to use international humanitarian law, confirming that “the potential application of one [legal framework] does not necessarily exclude or displace the other.”

To support its statement, the Commission reiterated several of the arguments previously presented in the Avilán, Saavedra and Abella cases. As such, for instance, it noted the substantive overlap of the human rights and humanitarian law frameworks, and the lack of specific rules in the American Declaration to deal with acts undertaken during armed conflicts. The Commission put forward that “[b]oth normative systems may […] thus be applicable to the situation under study.”

In a situation of armed conflict, the test for assessing the observance of a particular right, such as the right to liberty, may, under given circumstances, be distinct from that applicable in a time of peace. For that reason, the standard to be applied must be deduced by reference to the applicable lex specialis. The American Declaration is drawn in general terms, and does not include specific provisions relating to its applicability in conflict situations. As will be seen in the analysis which follows, the Commission determined that the analysis of the petitioners’ claims under the Declaration within their factual and legal context requires reference to international humanitarian law, which is a source of authoritative guidance and provides the specific normative standards which apply to conflict situations. In the present case, the standards of humanitarian law help to define whether the detention of the petitioners was “arbitrary” or not under the terms of Articles I and XXV of the American Declaration.

On that basis, the Commission reviewed the protection of the right to liberty, as provided under the American Declaration, as well as the relevant provisions of the Fourth Geneva Convention. Assessing the facts in light of these principles, the Commission noted that the Fourth Geneva Convention may provide wide grounds and discretion for decisions to detain individuals as a security threat, thereby accepting the United States’ reliance on humanitarian law to a certain degree. However, the Commission expressed concern over the apparent lack of a formalised procedure to govern the detentions, observing that “[t]he requirement that detention

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262 Ibid., para 39.
263 Ibid., paras 40-43.
264 Ibid., para 39.
265 Ibid., para 42.
266 The Commission applied the Fourth Geneva Convention on the basis that the United States qualified the petitioners as “civilian detainees held briefly for military necessity”. Ibid., para 48. See also paras 30-32 for previous ambiguous statements of the United Stated on the legal status of the petitioners.
267 Ibid., para 53.
not be left to the sole discretion of the state agent(s) responsible for carrying it out is so fundamental that it cannot be overlooked in any context. The terms of the American Declaration and of applicable humanitarian law are largely in accord in this regard.”\textsuperscript{268} The Commission discussed the required review of the legality of detention under human rights and humanitarian law, noting that the delay in review was “not attributable to a situation of active hostilities or explained by other information on the record, was incompatible with the terms of the American Declaration of the Rights and Duties of Man as understood with reference to Article 78 of the Fourth Geneva Convention.”\textsuperscript{269}

Following this reasoning, the Commission concluded that “the deprivation of the petitioners’ liberty effectuated by United States forces did not comply with the terms of Articles I, XVII and XXV of the American Declaration of the Rights and Duties of Man.”\textsuperscript{270} The Coard et al v. United States case provides another example of the complementary use of human rights law and international humanitarian law by the Inter-American Commission, in this case in the context of an international armed conflict. The support for reliance on international humanitarian law in this case will have had to differ from the earlier mentioned cases, due to differences between the Convention and the Declaration. The latter does not have the same detailed built-in rules, explicitly dealing with interpretation and use of other rules of international law. It is not surprising, therefore, that the Commission primarily turned to one of the only readily and easily recognisable avenues – the International Court of Justice’s invocation of lex specialis. Nonetheless, although the Commission made reference to the lex specialis principle, it was not relied upon to exclude the human rights framework, and in fact the rules of international humanitarian law were applied concurrently with human rights law, serving as an interpretative and complementary tool.

The interplay between the two frameworks surfaced again with great attention in the context of the detainees held by the United States in the Guantanamo Bay detention facility. In 2002, the Inter-American Commission on Human Rights adopted precautionary measures requesting the United States government “to take

\textsuperscript{268} Ibid., para 55.
\textsuperscript{269} Ibid., para 57.
\textsuperscript{270} Ibid., para 60.
the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal”. \(^{271}\)

Relying on some of the above cases, the Commission noted that:

[i]n addition, while its specific mandate is to secure the observance of international human rights protections in the Hemisphere, this Commission has in the past looked to and applied definitional standards and relevant rules of international humanitarian law in interpreting the American Declaration and other Inter-American human rights instruments in situations of armed conflict.\(^{272}\)

The Commission presented similar reasoning for concurrent application on the issue of detention as in the earlier Coard case. The Commission also pointed to non-derogable human rights protections, as well the Martens clause from international humanitarian law, as requiring that individuals always remain under legal protection for their fundamental rights.

As detailed in the above range of cases, the Commission stated that it “is competent to directly apply norms of international humanitarian law, i.e. the law of war, or to inform its interpretation of the Convention provisions by reference to these norms.”\(^{273}\)

In some of the instances reviewed, the Commission directly applied international humanitarian law, i.e. used that framework without directly bridging or linking it to other provisions of the American Convention or Declaration. It also, on occasion, used international humanitarian law to interpret some of the provisions of the human rights instruments relevant to the cases examined, more specifically to interpret violations of the right to life and physical integrity/humane treatment during non-international armed conflicts, and right to liberty. The preceding analysis highlighted flaws in a number of arguments presented by the Commission in support of its competence to apply international humanitarian law, as well as inconsistencies of approach regarding the articulation of the interplay between international humanitarian law and the American human rights instruments. Nonetheless, through some of its arguments in these cases, the Inter-American Commission on Human Rights has most certainly set the stage for further discussion of the interplay and

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\(^{271}\) Inter-American Commission on Human Rights, Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba - March 12, 2002), reprinted in (2002) 41 ILM 532.

\(^{272}\) Ibid.

\(^{273}\) Avilán v. Colombia (n 209) para 132. Saavedra v. Peru (n 210) para 59, footnote 7; Abella v. Argentina (n 211) para 157.
complementary use of international humanitarian and human rights law within the Inter-American system.

**Inter-American Court**

The Inter-American Court of Human Rights has addressed international humanitarian law in several key cases in which the Court has specified or re-defined its stance on the application of international humanitarian law. The following also examines how the Court has dealt in practice with the interplay between international humanitarian law and the American Convention on Human Rights.

In the 2000 Las Palmeras case against Colombia, the Court rejected the view previously adopted by the Commission asserting a broad competence to apply international humanitarian law. The case concerned an armed operation close to a school by the national police, assisted by army troopers, in a place known as Las Palmeras in the municipality of Mocao. Following their examination of the Las Palmeras petition, the Commission had requested the Inter-American Court to:

“[c]onclude and declare that the State of Colombia ha[d] violated the right to life, embodied in Article 4 of the Convention, and Article 3, common to all the 1949 Geneva Conventions, to the detriment of six persons.” In response, Colombia submitted two preliminary objections, one concerning the competence of the Court to apply international humanitarian law, and the other regarding the competence of the Court to apply that framework. Discussing its objection regarding the competence of the Court, Colombia highlighted the difference between the use of international humanitarian law to interpret the American Convention and the separate application of the humanitarian treaties. It asserted that: “[t]he Court may interpret the Geneva Conventions and other international treaties, but it may only apply the American Convention.”

Addressing the competence of the Commission, Colombia similarly “agreed that the Convention should be interpreted in harmony with other treaties, but it did not accept that the common Article 3 could

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274 Las Palmeras v. Colombia (Preliminary Objections), Inter-Am Ct HR Series C no 67 (2000) [thereafter Las Palmeras v. Colombia].
275 Las Palmeras v. Colombia, ibid., para 12.
276 Ibid., para 16.
277 Ibid., para 31.
be applied as a norm infringed by Colombia in an individual case.” 278 The Court addressed and admitted these two objections. 279 It discussed as follows its own competence to apply instruments other than the American Convention:

The Court is also competent to determine whether any norm of domestic or international law applied by a State, in times of peace or armed conflict, is compatible or not with the American Convention. In this activity, the Court has no normative limitation: any legal norm may be submitted to this examination of compatibility. 280

In order to carry out this examination, the Court interprets the norm in question and analyzes it in the light of the provisions of the Convention. The result of this operation will always be an opinion in which the Court will say whether or not that norm or that fact is compatible with the American Convention. The latter has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions. 281

Likewise, concerning the competence of the Commission, the Court concluded that the Commission “should refer specifically to rights protected by that Convention”. 282 The decision on preliminary objections in the Las Palmeras case made it clear that the Inter-American Court and Commission do not have competence to separately apply and rule on violations of international humanitarian law. The statement of the Court did not, however, clarify the interplay between international humanitarian law and the American Convention on Human Rights nor lay the basis to argue that in some cases the American Convention should be interpreted in light of humanitarian law. 283 All the Court appears to have done was to observe that if a State seems to be acting in accordance with a different law, the Court can look at that law and say whether that domestic or international law is in line with the American Convention on Human Rights. In the ensuing Las Palmeras judgment on the merits, the Court was unable to further develop the interplay between international humanitarian law and the American Convention, due to the lack of evidence as regards to alleged violations of the Convention where international humanitarian law could have been

278 Ibid., para 34.
279 Ibid., paras 28-33 as regards to the competence of the Court and para 34 in relation to the competence of the Commission.
280 Ibid., para 32.
281 Ibid., para 33.
282 Ibid., para 34.
283 A contrario, the Court in subsequent cases used its decision on preliminary objections in the Las Palmeras case to support it use of international humanitarian law for interpreting provisions of the American Convention.
used to inform these provisions. Hence, it is only in subsequent case-law that the Court developed their approach to humanitarian law.

A few months after the Las Palmeras case, the Court considered a case regarding the secret imprisonment, torture and execution by the Guatemalan army of Efraín Bámaca Velásquez, leader of a guerrilla group. The Court specifically addressed international humanitarian law and its relationship with the American Convention in one section of the Bámaca-Velásquez judgment. Interestingly this section was entitled “Failure to Comply with Article 1(1) in relation to Article 3 Common to the Geneva Conventions (Obligations to Respect Rights)”, indicating a complementary use by the Court of international humanitarian law and the American Convention. The title of the section suggested that the Court was setting out to assess whether the alleged disregard by Guatemala of the obligation to respect rights enshrined in the American Convention (including right to life, right to humane treatment and deprivation of liberty) constituted in actual fact legitimate acts undertaken within the permitted limits under international humanitarian law (Common Article 3) during non-international armed conflict. The Court noted therein that the events examined unfolded during a non-international armed conflict in which Guatemala had a continued obligation to respect the rights enshrined in the American Convention. The Court also discussed the obligations of the State included in Common Article 3 with regard to the humane treatment of person not or no longer taking part in hostilities. It stated that “international humanitarian law prohibits attempts against the life and personal integrity of those mentioned above, at any place and time.” Regarding their competence to apply international humanitarian law, the Court explained:

Although the Court lacks competence to declare that a State is internationally responsible for the violation of international treaties that do not grant it such competence, it can observe that certain acts or omissions that violate human rights, pursuant to the treaties that they do have competence to apply, also violate other international instruments for the

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285 Ibid., para 207.
286 Ibid., para 207.
287 Ibid., para 207.
protection of the individual, such as the 1949 Geneva Conventions and, in particular, common Article 3.\(^{288}\) As a supporting argument, the Court noted the similarity between non-derogable human rights and Common Article 3.\(^{289}\) The Court put forward that it: “has already indicated in the *Las Palmeras Case* (2000), that the relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention.”\(^{290}\) While Colombia had stated in Las Palmeras that the Court could interpret the Convention in light of other treaties, the Court was not as clear.\(^{291}\) As such, the Bámaca-Velásquez case is important, since it constituted a new turning point in the case-law of the Inter-American Court, explicitly confirming that international humanitarian law can be used to interpret the American Convention. The Court finally found on the merits of the case that Guatemala had violated its obligation to respect several rights of the American Convention.\(^{292}\) In light of their observation that the Geneva Conventions can be used to interpret the American Convention, as well as their statement on the violation of Common Article 3, one could argue that the Court did take into account international humanitarian law in deciding whether the American Convention had been violated. This reasoning, however, should not need to be inferred but should have been developed and made explicit by the Court. With the absence of details as to how it construed the relation between Common Article 3 of the Geneva Conventions and article 1(1) of the American Convention, the Court missed in the Bámaca-Velásquez case the opportunity to clarify its position and inform on how the interplay between the two frameworks should be dealt with in subsequent cases.

The Inter-American Court of Human Rights returned to further discussion on the application of international humanitarian law in its preliminary objections’ decision in the Serrano-Cruz Sisters case.\(^{293}\) The case concerned violations linked to the abduction and forced disappearance of two girls by soldiers of the Salvadoran army, which occurred during a non-international armed conflict. El Salvador

\(^{289}\) *Ibid.*, para 209
\(^{290}\) *Ibid.*, para 209
\(^{291}\) See supra n 281 and accompanying text.
\(^{292}\) Bámaca-Velásquez v. Guatemala (n 284) para 230.
submitted that the Court lacked jurisdiction *ratione materiae* in the case, given that it concerned the application of international humanitarian law. To support its argument El Salvador noted some of the divergence between international humanitarian and human rights law including the fact that they developed separately and for different situations. El Salvador argued that the case: “should be examined in accordance with the applicable lex specialis, which is international humanitarian law, and this is outside the Court’s jurisdiction.” In response to the argument of El Salvador, the Court observed the complementarity of international humanitarian and human rights law. The Court noted the continued application of human rights law during armed conflict, and the overlap in protection and convergence of some international human rights and humanitarian norms. The Court also reiterated its competence “to interpret the norms of the American Convention in light of other international treaties.”

Discussing the issue of competence, the Court stated:

> In its case law, the Court has established clearly that it has the authority to interpret the provisions of the American Convention in light of other international treaties, so that it has frequently used provisions from other human rights treaties ratified by the defendant State to provide content and scope to the provisions of the Convention. In this regard, in its constant case law, this Court has decided that “for the purpose of interpreting a treaty, it does not only take into account the agreements and instruments formally relating to it (second paragraph of Article 31 of the Vienna Convention), but also the context (third paragraph of Article 31).” In its case law, the Court has indicated that this concept is particularly important for international human rights law, which has made substantial progress by the evolutive interpretation of the international protection instruments. These parameters allow the Court to use the provisions of international humanitarian law, ratified by the defendant State, to give content and scope to the provisions of the American Convention.

In that statement the Court introduced elements that go beyond what it had done in previous cases dealing with armed conflict and the use of international humanitarian law. Here the Court explicitly introduced another interpretative tool, the Vienna Convention on the Law of Treaties, to support more coherently its use of international humanitarian law and handle the interplay between that framework and the American Convention. This approach was not further developed in the judgement.

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on the merits as the alleged violations linked to the abduction and forced disappearance of two girls in this case occurred before El Salvador recognized the jurisdiction of the Court, and as such fell outside its temporal scope of application.\(^{301}\)

In the Mapiripán Massacre case against Colombia, the Court was requested by the Commission to examine the killing of around 49 victims allegedly committed in the municipality of Mapiripán by an armed group, with the assistance of Colombian State agents.\(^{302}\) Colombia acknowledged its responsibility with regard to violations for which members of the Colombian armed forces had collaborated with so-called self-defense groups.\(^{303}\) Colombia, however, rejected attribution of international responsibility for the acts committed by the self-defense groups, rejecting the idea that such groups could be considered as State actors or acting on behalf of the State.\(^{304}\) The State further argued the inability of the American Convention to address such a question of State responsibility and the ensuing need to apply other international standards.\(^{305}\) In turn, the Court reiterated some of the principles included in the Vienna Convention on the Law of Treaties which it had already introduced in the Serrano-Cruz sisters’ case, as well as the need for an evolutive interpretation of human rights treaties.\(^{306}\)

Following this, the Court asserted that in establishing the international responsibility of Colombia it “cannot set aside the existence of general and special duties of the State to protect the civilian population, derived from International Humanitarian Law”.\(^{307}\) The Court supported its application of the humanitarian law framework on the basis of article 29b) of the American Convention, advocating the

\(^{301}\) Ibid., para 120.

\(^{302}\) “Mapiripán Massacre” v. Colombia (Merits, Reparations, and Costs), Inter-Am Ct HR Series C no 134 (2005) [thereafter “Mapiripán Massacre” v. Colombia].

\(^{303}\) For more details on those “self-defense groups” see ibid., paras 96.1 ss.

\(^{304}\) Ibid., paras 97(e), 97(f), 97(g).

\(^{305}\) Ibid., para 97(c): “iii. since the American convention itself does not develop a theory of the internationally unlawful act, and therefore does not include all aspects involving the concept of international responsibility of the States, said instrument does not constitute lex specialis regarding this matter. Only Article 63 of the Convention refers to a concrete aspect of responsibility, the obligation to provide reparations or compensation; and iv. there are no provisions in the Convention that develop the topic of attribution of conduct to the State. Therefore, to establish the responsibility of the State for acts by individuals it is absolutely necessary to take into account international standards regarding the responsibility of the States, especially what has been codified by the International Law Commission and existing customary international law on this subject[…].”

\(^{306}\) Ibid., paras 105-106.

\(^{307}\) Ibid., para 114.
application of the most favourable norm, an argument which had already been introduced by the Commission in the Abella case. The Court stated more specifically that:

The obligations derived from said international provisions must be taken into account, according to Article 29.b) of the Convention, because those who are protected by said treaty do not, for that reason, lose the rights they have pursuant to the legislation of the State under whose jurisdiction they are; instead, those rights complement each other or become integrated to specify their scope or their content. While it is clear that this Court cannot attribute international responsibility under International Humanitarian Law, as such, said provisions are useful to interpret the Convention, in the process of establishing the responsibility of the State and other aspects of the violations alleged in the instant case.

The Court used therein a broad and evolutive interpretation of that provision, an interpretation which has since been adopted in further cases as grounds to apply international humanitarian law.

The Court in the Mapiripán Massacre used international humanitarian law in relation to two sets of violations of the American Convention. It examined alleged violation by Colombia of the right of the child, in combination with the right to life, right to humane treatment, freedom of movement and residence, enshrined in the American Convention. In assessing these violations, the Court stipulated that:

The content and scope of Article 19 [on the right of the child] of the American Convention must be specified, in cases such as the instant one, taking into account the pertinent provisions of the Convention on the Rights of the Child […] and of Protocol II to the Geneva Conventions, as these instruments and the American Convention are part of a very comprehensive international corpus juris for protection of children, which the States must respect.

The Court more specifically considered the inclusion in the Constitution of Colombia of a provision providing for the protection of international humanitarian law, as well as the following statement of the Constitutional Court noting that:

Article 4 of [Protocol II] grants privileged treatment to children, with the aim of providing them with the care and support they need, especially with regard to education and family unity. It also points out that minors under 15 will not be recruited by armed forces or groups and will not be allowed to participate in the hostilities.

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308 See note 222 and accompanying text.
309 Ibid., para 115.
310 Ibid., para 153
311 Ibid., para 153
In the Mapiripán Massacre case, the Inter-American Court appears to have used international humanitarian law to specify the rather vague provision on the right of the child of the American Convention, and to highlight that Colombia had specific obligations to protect children in the context of the armed conflict. The Court indeed appears to have assessed the facts of the case on the backbone of that provision of Additional Protocol II of the Geneva Conventions as well as on the Convention of the Rights of the Child. The Court ultimately found violations of the American Convention. In addition to this, the Court examined the right to freedom of movement and of residence in relation to the internal displacement of the next of kin of the victims. The Court found that:

the regulations on displacement included in Protocol II to the 1949 Geneva Conventions are also especially useful to apply the American Convention to the situation of domestic armed conflict in Colombia. Specifically, Article 17 of Protocol II prohibits ordering the displacement of civilian population for reasons related to the conflict, unless this is required by the safety of civilians or for imperative military reasons, and in the latter case “all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.”

Here again the Court appears to have used international humanitarian law and other norms, such as those included in the Guiding Principles on Internal Displacement, to complement or interpret article 22 of the American Convention on freedom of movement and residence. Following its findings, the Court specified that:

Through an evolutive interpretation of Article 22 of the Convention, taking into account the applicable provisions regarding interpretation and in accordance with Article 29.b of the Convention—which forbids a restrictive interpretation of the rights,—this Court deems that Article 22(1) of the Convention protects the right to not be forcefully displaced within a State Party to the Convention.

312 American Convention (n 215) art 19 stipulates: “Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.”
313 “Mapiripán Massacre” v. Colombia (n 302) paras 153-162.
314 Ibid., paras 164-189.
315 Ibid., para 172.
316 Ibid., para 171.
317 American Convention (n 215) art 22 stipulates: “1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.[…] 4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.”
318 “Mapiripán Massacre” v. Colombia (n 302) para 188.
The Ituango Massacres v. Colombia follows the reasoning adopted in Mapiripán regarding the use of international humanitarian law. The Ituango case concerned, as summarized by the Commission, alleged “acts of omission, acquiescence and collaboration by members of law enforcement bodies based in the Municipality of Ituango with paramilitary groups belonging to the United Self-Defense Forces of Colombia (AUC), which [allegedly] perpetrated successive armed raids in this Municipality, assassinating defenseless civilians, robbing others of their property and causing terror and displacement.” In its assessment of the case, the Court examined alleged violation of the right to property under the American Convention. It asserted that:

When examining the scope of the said Article 21 of the Convention in this case, the Court considers it useful and appropriate, in keeping with Article 29 thereof, to use international treaties other than the American Convention, such as Protocol II of the Geneva Conventions of August 12, 1949, relating to the protection of victims of non-international armed conflicts, to interpret its provisions in accordance with the evolution of the inter-American system, taking into account the corresponding developments in international humanitarian law.

The Court further discussed the humanitarian norms relevant to the case, more specifically regarding the protection of civilians and objects necessary for their survival. Following this the Court considered that:

setting fire to the houses in El Aro constituted a grave violation of an object that was essential to the population. The purpose of setting fire to and destroying the homes of the people of El Aro was to spread terror and cause their displacement, so as to gain territory in the fight against the guerrilla in Colombia […]. Therefore, the effect of the destruction of the homes was the loss, not only of material possessions, but also of the social frame of reference of the inhabitants, some of whom had lived in the village all their lives. In addition to constituting an important financial loss, the destruction of their homes caused the inhabitants to lose their most basic living conditions; this means that the violation of the right to property in this case is particularly grave.

Once again the Court thereby used the humanitarian law framework to supplement and assist its interpretation of the provision of the American Convention on the right

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320 Ibid., para 2.
321 Ibid., para 169.
322 Ibid., para 179.
323 Ibid., para 180.
324 Ibid., para 182.
to property.\textsuperscript{325} The Court found that Colombia violated the right to property with regard to 59 individuals.\textsuperscript{326} In addition, as it did in the Mapiripán Massacre case, the Court deemed in the Ituango Massacre case necessary “to examine […] the problem of forced displacement in light of international human rights law and international humanitarian law”.\textsuperscript{327} Assisted by the provisions of Additional Protocol II to the Geneva Conventions,\textsuperscript{328} the Court also found Colombia responsible for violation of the right to freedom of movement and residence under the American Convention as regards to 702 individuals displaced.\textsuperscript{329}

\textit{Conclusion}

As examined, the Inter-American Commission and Court have applied international humanitarian law concurrently with the American Convention on Human Rights in their adjudication of many petitions. The work of the Commission and Court in that regard can be described as having gone through two phases – the first phase emerging in the 1990s when the Commission asserted that it could directly apply international humanitarian law, and the second one starting in 2000 with a judgment of the Court, affirming that international humanitarian law could be used to interpret and inform the application of human rights law, but not directly applied to determine facts and violations brought in front of the Court. In contrast with what it would seem at first glance, it is suggested that this shift (from asserting a competence to directly apply international humanitarian law to restricting the use of that framework to the interpretation of the American Convention) has in fact strengthened the potential and future role of the Inter-American system in dealing with situations of armed conflict. Indeed, in practice, this shift has meant that the Inter-American system went from applying international humanitarian law and the American Convention in parallel but separately, to applying them concurrently in a complementary manner. The last cases examined suggest that this approach will continue to be used by the Inter-American system in the future, joining and assisting

\begin{footnotes}
\footnote{American Convention (n 215) art 21 stipulates: “1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law […].”}
\footnote{Ituango Massacres \textit{v.} Colombia (n 319) para 200a.}
\footnote{Ibid., para 208.}
\footnote{Ibid., para 209.}
\footnote{Ibid., para 235.}
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the development of the wider movement promoting the complementary use of international human rights and humanitarian law, so as to ensure protection without gaps and in a pragmatic manner.

5.2.3. European System

In contrast with the Inter-American Commission and Court of Human Rights’ dealings with armed violence ongoing in Latin America, the European human rights system has had a lower proportion of its overall case-law focusing on situations of armed conflict but nevertheless had a significant amount of such cases.

Indeed, for instance, the European Commission and Court of Human Rights addressed cases concerning the occupation of northern Cyprus by Turkey, a situation categorised as international armed conflict and subject to international humanitarian law. As of 1 January 2010, the European Court of Human Rights had delivered 2,295 judgments in relation to Turkey, representing almost 19% of its case-law, with 13,100 pending cases before the European system. Among its case-law, the European Commission and Court also examined situations of violence potentially reaching the threshold of applicability of international humanitarian law. More specifically, the Commission and Court have examined cases related to the situation in south-east Turkey and fighting with the Kurdistan Workers' Party (PKK), an armed group fighting for the independence or autonomy of Kurdistan, and considered by some a terrorist organisation. While the existence of a conflict in south-east Turkey has been disputed at times, including by Turkey, some of the cases examined by the Commission and Court concerned the use of force against alleged terrorists, as well as events linked with armed violence and appear to constitute a non-international armed conflict that could trigger the application of Common Article 3 of the Geneva Conventions.

As of 1 January 2010, the European Court of Human Rights had delivered 862 judgments in relation to Russia, representing 7% of its case-law, with over

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33,500 pending cases before the European system. Among these cases, the European Court examined complaints of human rights violations by Russia emerging from the conflict in Chechnya. This section will review the approach of the European Commission and Court of Human Rights in key cases addressing human rights violations which arguably occurred in situations of armed conflict in northern Cyprus, south-east Turkey, and Chechnya.

**European Convention on Human Rights**

As will be examined below, when dealing with situations of conflict, the European Commission and Court of Human Rights have adopted a significantly different approach and have not overtly applied international humanitarian law concurrently as have the Inter-American system and United Nations bodies. In fact, in most cases seemingly linked to conflict situations, the European Commission and Court based their reasoning mainly, if not exclusively, on the European Convention of Human Rights. When compared to the other human rights mechanisms reviewed, one reason could at least partly explain this approach and must be noted before exploring how the Commission and Court have dealt with the interplay between international human rights and humanitarian law.

A major difference of the European system lies in the wording of some of the provisions of the European Convention, especially regarding the right to life and deprivation of liberty, which had been addressed in the cases reviewed above. The American Convention on Human Rights and the International Covenant on Civil and Political Rights provide that “[n]o one shall be arbitrarily deprived of his life.” As discussed in this chapter and previous ones, it has been accepted that, in situations of armed conflict, the assessment of what constitutes an arbitrary deprivation of life must be made by turning to the international humanitarian law framework. The provision of the European Convention, however, already details the specific grounds

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333 ‘50 years of Activity: The European Court of Human Rights, Some Facts and Figures’ (n 330) 4-5.
336 See above chapters 3.3.2 and 4.2.
legitimising deprivation of life in the European human rights system.\textsuperscript{337} According to the provisions of the European Convention, beyond these accepted grounds, deprivation of life could be accepted in the context of an armed conflict only if the State formally derogates from the right to life following article 15 of the Convention.\textsuperscript{338} Similarly the American Convention and the International Covenant respectively provide that “[n]o one shall be subjected to arbitrary arrest or detention”\textsuperscript{339} and “[n]o one shall be subject to arbitrary arrest or imprisonment.”\textsuperscript{340} The Covenant, and the American Convention in similar terms, further specifies that “[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” In contrast the European Convention details specifically the accepted grounds for deprivation of liberty. Hence, for the Court to find no violation where the grounds of detention is not included in article 5 but is recognized under international humanitarian law, the State would have had to previously derogate. The Inter-American and UN bodies can, conversely, allow for the introduction of international humanitarian law via an approach that considers acts during armed conflict that are in accordance with humanitarian law, not to be arbitrary.

The understanding of this specific difference between the European Convention and other human rights instruments is important. Yet, as will be examined, this difference alone cannot fully justify the resistance of the European Commission and Court of Human Rights to adopt a complementary approach when dealing with situations of armed conflict.

\textsuperscript{337} European Convention on Human Rights (n 334) art 2(2): “Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: a) in defence of any person from unlawful violence; b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

\textsuperscript{338} As noted by Hampson “[n]o State has ever derogated from Article 2 of the Convention, whether involved in a non-international armed conflict or international armed conflict and whether the conflict was in national territory or extraterritorial.” Hampson (n 178) 496. Kretzmer advanced that State practice shows that States do not think that they must derogate from the European Convention for ‘battlefield acts’: “While States that are party to the Convention have been involved in armed conflicts since the Convention came into force, in no case have such States thought they needed to derogate from their Convention obligations in order to cater for acts on the battlefield that are compatible with the laws and customs of war.” D Kretzmer, ‘Rethinking Application of International Humanitarian Law in Non-International Armed Conflicts’ (2009) 42 Isr L Rev 1, 9.

\textsuperscript{339} International Covenant on Civil and Political Rights (n 335) art 9(1).

\textsuperscript{340} American Convention on Human Rights (n 335) art 7(3).
Chapter 5

*European Commission and Court*

The occupation in northern Cyprus led to several inter-state complaints. In the first such application, Cyprus alleged that Turkey had committed a number of violations of the European Convention as a result of its invasion and occupation of northern Cyprus.\(^{341}\) In its second application Cyprus argued that “by acts unconnected with any military operation, Turkey had, since the introduction of the first application, committed, and continued to commit, further violations […] in the occupied territory.”\(^{342}\) The two applications were joined and examined together by the European Commission, which addressed two issues of particular interest for this study – that of detention and the right to property. More specifically, the Commission addressed the detention of military personnel and highlighted that Turkey and Cyprus were subject to the Third Geneva Convention. The Commission also stated that “Turkey in particular assured the International Committee of the Red Cross (ICRC) of its intention to apply the Geneva Convention and its willingness to grant all necessary facilities for humanitarian action […]”\(^{343}\)

The Commission found a violation of article 5, since Turkey had not derogated from its obligations regarding the provision on deprivation of liberty. As a result, as Hampson noted: “[t]he Commission applied Article 5 of the ECHR as it stands and, on that basis, found the detention of prisoners of war to be unlawful. It is submitted that such a result is absurd.”\(^{344}\) Indeed such a result shows the flaw of an exclusive human rights approach in situations of armed conflict. A complementary approach with international humanitarian law would have led to a different conclusion, recognising that detention of prisoners of war in accordance with international humanitarian law is not a violation of their rights under international law.\(^{345}\) In addition to the issue of detention, the Commission also found Turkey

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\(^{341}\) *Cyprus v. Turkey*, Report of the Commission (1976) 4 EHHR 482, para 1 [thereafter *Cyprus v. Turkey*].


\(^{343}\) *Ibid.*, para 313.


\(^{345}\) This was acknowledged in *Cyprus v. Turkey* (n 341) in the Dissenting Opinion of Mr. G. Sperduti, joined by Mr. S. Trechsel, on Article 15 of the Convention, para 7, stating that: “measures which are in themselves contrary to a provision of the European Convention but which are taken legitimately under the international law applicable to an armed conflict, are to be considered as legitimate measures of derogation from the obligations flowing from the Convention.”
responsible for violation of article 8 of the European Convention, as well as article 1 of Protocol 1, on the basis that they evicted Greek Cypriots from their homes in northern Cyprus, precluded their return home, and by displacing individuals, caused the separation of families. While the majority did not address international humanitarian law regarding that issue, Commissioner Sperduti highlighted separately the existence of a humanitarian norm relevant to the case as follows:

One can cite, for example, Article 49 of the Fourth Geneva Convention, which article related to the prohibition of forced transfers in the occupied territories whether en masse or individually, and also to other obligations on the occupying power in relation to the displacement of persons.

In 1998, the European Court of Human Rights delivered another judgment with regard to the situation in south-east Turkey exemplifying the approach of the European human rights system to humanitarian law. The case of Güləç v. Turkey concerned the alleged killing of the applicant’s son by security forces during a demonstration, as well as the lack of investigation into that event. Turkey claimed that violence escalated during the demonstration “owing to the presence of masked PKK terrorists who had fired at random, using women and children as a human shield,” that in such a context force was used appropriately and that the applicant’s son had been killed by the PKK. The Court acknowledged in its judgement that “the demonstration was far from peaceful”, a situation previously described by the Commission as “as a riot within the meaning of Article 2 of the Convention”. It accepted that use of force by Turkey might have been necessary, but stated: “that a balance must be struck between the aim pursued and the means employed to achieve it” which had not been the case in light of the fact that security forces “used a very powerful weapon because they apparently did not have truncheons, riot shields, water cannon, rubber bullets or tear gas.” The Court pointed out that the absence of such crowd control equipment in that case was “all the more incomprehensible

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346 Cyprus v. Turkey, ibid., paras 207-211.
347 Ibid., para 486.
348 Güləç v. Turkey (Judgment), App no 21593/93 (27 July 1998) [thereafter Güləç v. Turkey].
349 Ibid., para 63.
350 Ibid., para 67.
351 Ibid., para 67.
352 Ibid., para 70.
353 Ibid., para 68.
354 Ibid., para 71.
355 Ibid., para 71.
and unacceptable because the province […] is in a region in which a state of emergency has been declared, where at the material time disorder could have been expected.\textsuperscript{356} It concluded that Turkey violated the right to life under the European Convention “on account of the use of disproportionate force and the lack of a thorough investigation into the circumstances of the applicant’s son’s death.”\textsuperscript{357} Authors have argued that in this case references by the Court to the need for balancing the aim and means of the use of force to assess its legitimacy, as well as the mention of the existence of a state of emergency by the Commission and the Court and the conclusion of use of disproportionate force show “many parallels with international humanitarian law”\textsuperscript{358} and that, while there has been no specific use of humanitarian norms, the Güleç case “accepts the logic”\textsuperscript{359} of that framework.

The Ergi v. Turkey case\textsuperscript{360} delivered almost at the same time as the Güleç case, also needs to be examined when considering the approach of the European Commission and Court of Human Rights to international humanitarian law. The Ergi case concerned the “alleged unlawful killing [of the applicant’s sister, Havva Ergi] by security forces, planning and conduct of their operation and alleged failure of authorities to carry out effective investigation into circumstances of death.”\textsuperscript{361} The State argued that while their security forces had indeed “carried out an ambush operation in the vicinity of the village to catch the PKK members who were active in the area,”\textsuperscript{362} they could not have fired the fatal shot due to their location.\textsuperscript{363} They further argued that “[t]he death of Havva Ergi had been caused during a clash with terrorists occurring in the course of lawful acts taken by the State to protect the lives of its citizens from terrorism.”\textsuperscript{364} Due to lack of evidence, the Court stated that it could not conclude that the alleged victim was “intentionally killed by the security forces in the circumstances alleged by the applicant.”\textsuperscript{365} The Court concluded,

\textsuperscript{356} \textit{Ibid.}, para 71
\textsuperscript{357} \textit{Ibid.}, para 83.
\textsuperscript{360} \textit{Ergi v. Turkey} (Judgment), App no 23818/94 (28 July 1998) [thereafter Ergi v. Turkey].
\textsuperscript{361} \textit{Ibid.}, summary.
\textsuperscript{362} \textit{Ibid.}, para 16.
\textsuperscript{363} \textit{Ibid.}, para 16.
\textsuperscript{364} \textit{Ibid.}, para 74.
\textsuperscript{365} \textit{Ibid.}, para 78.
however, that Turkey had violated the right to life enshrined in the European Convention “on account of the defects in the planning and conduct of the security forces’ operation and the lack of an adequate and effective investigation.” To support that conclusion the Court argued, in agreement with the Commission, that State responsibility “may also be engaged where [security forces] fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of civilian life.” The Court further noted that “[t]here was no information to indicate that any steps or precautions had been taken to protect the villagers from being caught up in the conflict” and accordingly found “that insufficient precautions had been taken to protect the lives of the civilian population.” While again the Court did not make any mention of international humanitarian law, it has been argued that, in the Ergi case, the Commission and Court in actual fact used principles found in international humanitarian law. As such, Reidy put forward that: “[t]he Court's reference to means and methods in the conduct of a military operation is one of the clearest examples of the Court borrowing language from international humanitarian law when analysing the scope of human rights obligations.” Heintze went one step further and stated that in this case the Court “resorts directly to international humanitarian law, in that it elaborates on the lawfulness of the target, on the proportionality of the attack and on whether the foreseeable risk regarding civilian victims was proportionate to the military advantage.”

The case of Ahmet Özkan and Others is another example of the work of the Commission and Court in relation to situations of armed conflict in south-east

366 Ibid., para 86.
367 Ibid., para 79.
368 Ibid., para 80.
369 Ibid., para 81.
372 Heintze (n 358) 810.
373 Ahmet Özkan and Others v. Turkey (Judgment), App no 21689/93 (6 April 2004).
Turkey. The case concerned an attack by the security forces of the village of Ormaniçi and resulting deaths. It also addressed *inter alia* the alleged burning of houses by security forces.\(^{374}\) In assessing alleged violations of the right to life enshrined in article 2 of the European Convention, the Court stated that:

> The circumstances in which deprivation of life may be justified must [...] be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective [...].\(^{375}\)

Similarly to the Ergi case, the Court also noted in Ahmet Özkân and Others that it must examine deprivation of right to life beyond the issue of whether such deprivation was intentional, and address circumstances where use of force is permissible.\(^{376}\) On that basis, the Court reiterated that States must “take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising incidental loss of civilian life”.\(^{377}\) Noting the existence of an “armed conflict between the security forces and members of the PKK” and the fact that PKK armed groups were active in the area where the attack occurred, the Court established that:

> the security forces' tactical reaction to the initial shots fired at them from the village on 20 February 1993 cannot be regarded as entailing a disproportionate degree of force. In so finding, the Court has also taken into consideration the fact that, apart from Abide Ekin, no civilians were injured as a result of the security forces' intensive firing.\(^{378}\)

Accordingly the Court considered that “the security forces' choice to open intensive fire [...] was “absolutely necessary” for the purpose of protecting life”\(^{379}\) and as such decided that Turkey had not violated the right to life provision as enshrined in the European Convention.\(^{380}\) In addition, the Court examined the conduct of the security forces once fighting had stopped, and asserted that at such time when they “had taken control of Ormaniçi and had assembled its entire population in the village square, the security forces failed to make any attempt to verify whether there were

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\(^{378}\) *Ibid.*, para 305.


any civilian casualties”. 381 On that basis the Court found “that the callous disregard displayed by the security forces as to the possible presence of civilian casualties amounted to a breach of the ‘Turkish authorities’ obligation to protect life under Article 2 of the Convention” 382 regarding the daughter of one of the applicants.

Authors have noted that the Court appeared to have adopted, in the case of Ahmet Özkan and Others, a reasoning echoing international humanitarian law. More specifically, in relation to its decision to find no right to life violation by Turkey as regards to fighters killed during the attack, it was noted that the assessment of the Court differs from a purely human rights reasoning. Along those lines Droege argued that in the case:

The Court has accepted that injury to civilians might be a result of the use of force against members of organized armed groups, without qualifying that use of force as disproportionate. [...] This test differs somewhat from that in human rights law in that it neither requires that force may only be used as a last resort or that force must be avoided, to the extent possible, to spare not only innocent civilians but also the targeted person. 383

At first glance the reasoning of the Court could be seen as having adopted a humanitarian law approach, having taken into account the existence of the armed conflict and distinguishing between civilian and fighter casualties. The consideration by the Court of the fact that “no civilians were injured as a result of the security forces' intensive firing” 384 could, however, suggest the opposite, as civilians casualties could be permitted under such circumstances under international humanitarian law. Hence, it is unclear whether the Court was using the international humanitarian law concept of proportionality or the proportionality requirement under human rights law. 385 The approach of the Court appears clearer in its assessment of the violation of right to respect for private and family life, related to the alleged

381 Ibid., para 307.
382 Ibid., para 308.
384 Ahmet Özkan and Others v. Turkey (n 373) para 305.
385 For more detail on the difference between the concept of proportionality under international human rights and humanitarian law see N Lubell, ‘Challenges in Applying Human Rights Law to Armed Conflict’ (2005) 87 IRRC 737, 745-746.
setting on fire of houses by the security forces in the Ahmet Özka and Others case.\textsuperscript{386} The Court argued that:

Although no conclusive findings could be made as to whether the houses of eleven other villagers that were destroyed by fire on 20 February 1993 were deliberately set on fire by the security forces or whether they had caught fire as a result of the security forces’ intensive firing on the village in the early morning, the Court has found it established that the houses […] were destroyed by fire resulting from acts of the security forces […] \textsuperscript{387}

On that basis the Court found that Turkey had violated article 8 of the Convention in relation to these eleven homes.\textsuperscript{388} The Court thereby did not take into account in its decision the argument of Turkey that the fire was unintentional and the result of fighting. Clearly, the Court in that regard did not conduct an assessment based upon international humanitarian law, which would have required an examination of whether destruction of the houses might have been lawful as collateral damage.

In 2005, the European Court of Human Right delivered two cases against Russia relevant to the current study. The case of Isayeva, Yusupova and Bazayeva v. Russia\textsuperscript{389} concerned the alleged “indiscriminate bombing by Russian military planes of a civilian convoy on 29 October 1999 near Grozny”\textsuperscript{390} and the resulting death and wounding of applicants’ children and destruction of cars and belongings.\textsuperscript{391} On the basis of the facts, the Court examined violations of the European Convention including, more specifically, violation of article 2. Among the documents submitted with regard to the investigation of the alleged killings, the applicants included a Human Rights Watch report which used treaty and customary international humanitarian law applicable to non-international armed conflict, and pointed out in the case reviewed “that civilians may have been targeted intentionally or that the force used was not proportionate to the military advantage pursued”.\textsuperscript{392} In addressing the alleged failure of Russia to protect life, the applicants considered the bombing “as an indiscriminate attack on civilians, which could not be justified under

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\textsuperscript{386} Ahmet Özkan and Others v. Turkey (n 373) paras 402-403. \\
\textsuperscript{387} Ibid., para 406. \\
\textsuperscript{388} Ibid. \\
\textsuperscript{389} Isayeva, Yusupova and Bazayeva v. Russia (Judgment), App nos. 57947/00, 57948/00 and 57949/00 (6 Jul 2005). \\
\textsuperscript{390} Ibid., para 3. \\
\textsuperscript{391} Ibid., para 3. \\
\textsuperscript{392} Ibid., para 102.
\end{flushleft}
international humanitarian law”, referring more specifically to Common Article 3 of the Geneva Conventions. Notably, a third party submission by Rights International proposed that the Court should use international humanitarian law in its assessment of violation of the right to life and more specifically proposed that it should use a combined human rights and humanitarian law test. In turn, the Court examined the alleged failure of Russia to protect life. In so doing, the Court reiterated in the case that “Article 2 covers [...] situations where it is permitted to “use force” which may result, as an unintended outcome, in the deprivation of life.” It put forward that “any use of force must be no more than "absolutely necessary" for the achievement of one or more of the purposes set out in subparagraphs (a) to (c).” It added that “it is necessary to examine whether the operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force. The authorities must take appropriate care to ensure that any risk to life is minimised.” On the one hand, these statements suggest the use of a human rights test to assess the alleged killings resulting from the bombardment, as it does not seem to consider direct use of lethal force against legitimate military targets. On the other hand, the Court stated that:

the situation that existed in Chechnya at the relevant time called for exceptional measures on behalf of the State in order to regain control over the Republic and to suppress the illegal armed insurgency. These measures could presumably include employment of military aviation equipped with heavy combat weapons. The Court is also prepared to accept that if the planes were attacked by illegal armed groups, that could have justified use of lethal force, thus falling within paragraph 2 of Article 2.

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393 Ibid., para 157.
394 Ibid., para 167; “The submission argued that the law of non-international armed conflicts as construed by international human rights law established a three-part test. First, armed attacks on mixed combatant/civilian targets were lawful only if there was no alternative to using force for obtaining a lawful objective. Second, if such use of force was absolutely necessary, the means or method of force employed could only cause the least amount of foreseeable physical and mental suffering. Armed forces should be used for the neutralisation or deterrence of hostile force, which could take place by surrender, arrest, withdrawal or isolation of enemy combatants – not only by killing and wounding. This rule required that States make available non-lethal weapons technologies to their military personnel. Furthermore, the authorities should refrain from attacking until other non-lethal alternatives could be implemented. Third, if such a means or method of using force did not achieve any of its lawful objectives, then force could be incrementally escalated to achieve them.”
395 Ibid., para 169.
396 Ibid., para 169.
397 Ibid., para 171.
398 Ibid., para 178.
The Court accepted that an armed conflict existed in Chechnya at the time of the event, and “assuming that the use of force could be said to have pursued the purpose [of defending any person from unlawful violence] set out in paragraph 2 (a) of Article 2” it decided to “consider whether such actions were no more than absolutely necessary for achieving that purpose.” In contrast with the earlier statement, the Court, by this, could be perceived as using a humanitarian law approach. The Court concluded on the issue of the right to life that:

even assuming that that the military were pursuing a legitimate aim in launching 12 S-24 non-guided air-to-ground missiles on 29 October 1999, the Court does not accept that the operation near the village of Shaami-Yurt was planned and executed with the requisite care for the lives of the civilian population.

The Court accordingly found that Russia violated the “obligation to protect the right to life of the three applicants and of the two children of the first applicant, Ilona Isayeva and Said-Magomed Isayev.”

In the case of Isayeva v. Russia, decided on the same day as the previous Isayeva and Others case, the applicant alleged violations of the right to life and the right to an effective remedy following a bombing by the Russian armed forces and resulting death of her son and three nieces. Among the documents submitted, the applicant included the Human Rights Watch report which had been submitted in the previous Isayeva and Others case, as well as referring to the third party submission made by Rights International in that case, which “summarised for the Court the relevant rules of international humanitarian law governing the use of force during attacks on mixed combatant/civilian targets during a non-international armed conflict.” Examining the alleged failure of Russia to protect the right to life the Court first adopted the human rights approach taken in the previous Isayeva and Others case, asserting that “any use of force must be no more than ‘absolutely

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399 Ibid., para 181.
400 Ibid., para 182.
401 Ibid., para 182.
402 Ibid., para 199.
403 Ibid., para 202.
404 Isayeva v. Russia (Judgment), App no 57950/00 (6 July 2005).
405 Ibid., paras 113-115.
406 Ibid., para 167.
necessary’’ and highlighting the necessity of examining the planning of the operation to assess whether it was done in such a way as to keep the use of lethal force to a minimum. Echoing the case of Ergi v. Turkey, the Court further stated that:

State’s responsibility is not confined to circumstances where there is significant evidence that misdirected fire from agents of the state has killed a civilian. It may also be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, minimising, incidental loss of civilian life.

This statement appears to suggest that it would be acceptable to attack such an opposing group in so far as the proportionality test under international humanitarian law is met. The Court further discussed the lack of consideration and precautions taken by the armed forces in deploying “aviation equipped with heavy combat weapons within the boundaries of a populated area”. The Court ultimately stated: “[t]o sum up, accepting that the operation in Katyr-Yurt on 4-7 February 2000 was pursuing a legitimate aim, the Court does not accept that it was planned and executed with the requisite care for the lives of the civilian population.”

Among the cases addressing the situation in northern Cyprus, the case of Varnava and Others v. Turkey delivered in 2009 by the Grand Chamber is perhaps the most interesting to the study of the relationship between human rights and humanitarian law in the European system. The case addressed the disappearance of 18 Cypriot individuals during the invasion of Northern Cyprus by Turkey in 1974. Therein the applicants’ allegations included violation by Turkey of the provision on the protection of the right to life. The Chamber of the Court in its decision preceding that of the Grand Chamber put forward that Turkey had “an obligation under Article 2 to take due measures to protect the lives of the wounded, prisoners of war or civilians in zones of international conflict and this extended to providing an effective

407 Ibid., para 173.
408 Ibid., para 175.
409 Ibid., para 176.
410 Ibid., para 189.
411 Ibid., para 200.
412 Varnava v. Turkey (Judgment), App nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (18 September 2009).
investigation for those who disappeared in such circumstances.”\(^{413}\) The Chamber added that such effective investigation had not been undertaken.\(^{414}\) In turn, Turkey argued that the Court had not reached their burden of proof in their assessment of article 2 of the Convention or, alternatively, “that they had not failed to comply with its requirements [under article 2].”\(^{415}\) More interestingly for the purpose of this study, the intervening government of Cyprus stated that:

> The applicants had provided sufficient evidence that the missing men were last seen in territory which at the time or immediately afterwards was under the de facto control of the invading Turkish forces or forces for whom they were responsible. At a time of international armed conflict, this meant that those men were in a life-threatening situation and it was the responsibility of the Government in charge of those forces to determine what happened to them. Such responsibility was also imposed by international humanitarian law, which could be used to clarify the scope of existing Convention obligations. Given that the men did not make it back to their own lines, they were wounded, sick, dead or detained. The respondent Government had been under the obligation to seek them out, provide treatment if sick or, in the case of the dead, to bury them; and in all cases, to provide information about their fate.\(^{416}\)

In assessing the burden of proof the Court also addressed international humanitarian law stating that “Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict”.\(^{417}\) Accordingly the Court added that it:

> concurs with the reasoning of the Chamber in holding that in a zone of international conflict Contracting States are under obligation to protect the lives of those not, or no longer, engaged in hostilities. This would also extend to the provision of medical assistance to the wounded; where combatants have died, or succumbed to wounds, the need for accountability would necessitate proper disposal of remains and require the authorities to collect and provide information about the identity and fate of those concerned, or permit bodies such as the ICRC to do so.\(^{418}\)

Therein the Court also referred to the 1949 Geneva Conventions and their Additional Protocols.\(^{419}\) The reasoning of the Grand Chamber in Varnava and Others v. Turkey

\(^{413}\) Ibid., para 174.
\(^{414}\) Ibid., para 174.
\(^{415}\) Ibid., para 177.
\(^{416}\) Ibid., para 178.
\(^{417}\) Ibid., para 185.
\(^{418}\) Ibid., para 185.
\(^{419}\) Ibid., para 185, footnote 1.
Chapter 5

is, with rare exception – another of which will be discussed below\footnote{420} – the nearest the Court ever came to supporting or advancing the complementary approach to the application of international humanitarian law in the European human rights system.

In 2011 the European Court of Human Rights delivered another relevant judgment to the current study in the case of Esmukhambetov and Others v. Russia. The applicants argued that:

an aerial strike on the village in which they had been living resulted in the deaths of the family members of the first, second, third, thirteenth and twenty-second applicants and in the destruction of all applicants' houses and property. They also complained of the moral suffering they had endured in connection with those events, the lack of an investigation into the matter and the lack of effective remedies in respect of the alleged violations.\footnote{421}

When discussing the relevant legal framework to the case, the European Court explicitly mentioned international humanitarian law. More specifically the Court noted article 13 of Additional Protocol II providing for the protection of the civilian population, article 14 ensuring the protection of objects indispensable to the survival of the civilian population, as well as article 17 on the prohibition of forced movement of civilians.\footnote{422} These provisions, however, do not appear to be subsequently relied upon by the Court in its assessment of the case - at least not overtly. In addressing the alleged violation of the right to life and considering the use of force by Russia the Court appears first to have applied a human rights test. Taking into account the argument of Russia that there existed a terrorist base where the attack was launched, the Court noted that:

\footnote{420} See note 421 and accompanying text. 
\footnote{421} Esmukhambetov v. Russia (Judgment), App no 23445/03 (29 March 2011). 
\footnote{422} Ibid., para 76.
itself, grossly disproportionate to the purpose of effecting the lawful arrest of a person. 423

Interestingly the Court included therein the risk of loss of lives of fighters, confirming the use of a human rights approach and the fact that they referred to the concept of proportionality as construed under human rights law. Similarly to the other two cases reviewed relating to the situation of Chechnya, the Court nevertheless also used what could be seen as international humanitarian law principles, assessing for example issues of the targeting. For example, the Court found:

unconvincing the Government's assertions to the effect that the strike performed by the federal air forces in the vicinity of Kogi (Runnaye) was of a "pinpoint" nature and that it was directed against military targets, their designation and the degree of danger having been "obvious", in the Government's submission. The Government failed to name any of those targets. Moreover, their statements are not corroborated by any evidence and contradict the detailed description of the incident given by the applicants and the officially recorded results of the attack attesting the deaths of five civilians - three women and two minor children - and the destruction of about thirty houses, that is, almost the entire village [...]. Against this background, the Court cannot but agree with the applicants that their home village did in fact come under indiscriminate bombing by the federal air forces. 424

Similarly to Isayeva v. Russia, the Court added that not enough consideration had been given to the limits and constraints on the indiscriminate use of weapons within a populated area. 425 It also pointed out the lack of evidence of actions taken to reduce danger to the villagers’ lives to a minimum and steps taken “to informing the villagers of the attack beforehand and to securing their evacuation.” 426 This statement appears to look at the international humanitarian law concepts of precaution in attack and at the proportionality test under that framework. The Court concluded that:

the indiscriminate bombing of a village inhabited by civilians - women and children being among their number - was manifestly disproportionate to the achievement of the purpose under Article 2 § 2 (a) invoked by the Government. It therefore finds that the respondent State failed in its obligation to protect the right to life [...]. 427

423 Ibid., para 146.
424 Ibid., para 148.
425 Ibid., para 149.
426 Ibid., para 149.
427 Ibid., para 150.
Conclusion

Clearly, the European Commission and Court of Human Rights have taken a significantly different approach to that of the Inter-American system and some United Nations bodies, almost completely avoiding the direct discussion of international humanitarian law or explicit application of humanitarian norms to assist their adjudication of cases.

Examining the use of international humanitarian law by the European human rights system, Abresch asserted that:

The use [in the case-law] of a vocabulary that overlaps with the vocabulary of humanitarian law tells us little. The important question is whether the [European Court] has adopted the legal rules and standards of humanitarian law. Comparison between the [Court’s] holdings and the rules of humanitarian law reveals that if the [Court] is attempting to apply humanitarian law, it is doing so in a highly imprecise manner. 428

Indeed the approach of the European Court, and the Commission before, has been both inconsistent and confusing. While the Court stated in Varnava v. Turkey that the right to life provision “must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law”, 429 and included humanitarian law as part of the relevant legal framework in the case of Esmukhambetov and Others v. Russia, the European human rights bodies have not, in those cases and others, used a clear complementary approach to human rights and humanitarian law nor openly applied the latter legal regime concurrently with the European Convention.

Unlike the Inter-American mechanisms, the European system has not sought, or perhaps deliberately avoided, to articulate its approach to situations in which international humanitarian law applies alongside the European Convention. The cases reviewed above appear to show that the European Commission and Court were not always blind to the existence of additional rules, but ignored the need to develop a solution taking them into account. As a result, the cases demonstrate a mixture of approaches which, depending on how one wishes to interpret them, can be deemed recognition of international humanitarian law principles, or as a failure to incorporate

428 Abresch (n 332) 746.
429 Varnava v. Turkey (n 412) 185.
them into its decision making process. While this flawed approach could partly be explained by the substantive difference of the European Convention, such an approach is puzzling in light of the wider case-law of the European Commission and Court. As observed by Hampson, “[s]ince the law of armed conflict is not applicable by virtue of its being invoked but by virtue of the facts, it might be open to the European Court of Human Rights to choose to use the law of armed conflict as a frame of reference.” Indeed, in assessing situations of armed conflict, the European Commission and Court could have, as the Inter-American system did, supported a use of international humanitarian law on the basis of the Vienna Convention on the Law of treaties, reiterating for instance as it did in the Bankovic case that:

the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law [...] The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part[...].

Similarly, to argue the need to consult international humanitarian law to interpret certain provisions of the European Convention, the Court could have considered concepts or interpretation techniques it previously developed, such as the ‘living instrument doctrine’ according to which “the Convention is a living instrument which [...] must be interpreted in the light of present-day conditions.”

The approach of the Commission or Court, or lack of a stated approach, when assessing cases arising from armed conflict is also questionable on the basis of the potential consequences. For instance, as seen in the Cyprus v. Turkey case examined, the decision not to use international humanitarian law to interpret the right to liberty enshrined in the European Convention can lead to peculiar conclusions of violation of the European Convention regarding the detention of prisoners of war, otherwise permitted under international humanitarian law. While in many of the cases reviewed a complementary use of humanitarian law would have most probably also led to violations of the European Convention, it remains that this might not be the case in

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430 Hampson (n 178) 496.
431 Bankovic and others v. Belgium and others (Grand Chamber Decision as to the Admissibility of the Application), App no 52207/99 (12 December 2001) para 57.
432 Tyrer v. The United Kingdom (Judgment), App no 5856/72 (25 April 1978) para 31.
all circumstances. Hence, as will be further discussed in the overall conclusion of this study, the European Court of Human Rights should follow the current trend and take the leap of developing a complementary application of human rights and humanitarian law in its future case-law.

5.3. ICRC Customary International Humanitarian Law Study

The major role of the International Movement of the Red Cross and Red Crescent, and more specifically of the International Committee of the Red Cross, in the development of international humanitarian law was explored in chapter 1 of this work. Likewise, their change of position regarding cooperation with the United Nations, and on the relationship between human rights and humanitarian law, has been examined in some detail. The ICRC has been involved in many initiatives concerning human rights issues over the years. These have included for instance the presentation of reports to the United Nations on subjects of joint concern to human rights and humanitarian law, and the ICRC involvement in initiatives such as the ‘Fundamental Standards of Humanity’ previously discussed in this chapter. In 1995, the 26th International Conference of the Red Cross and Red Crescent tasked the ICRC with producing a study on customary international humanitarian law applicable in international and non-international armed conflicts. The customary international humanitarian law study was first published in 2005 following numerous experts’ consultations and years of research on State practice and *opinio juris* around the world. The ICRC study includes 161 rules, and has become an influential document of great practical relevance. In addition to stating their position on customary international humanitarian rules, the study explains the basis upon which each rule is established.

The ICRC study is also relevant to the current work for a number of reasons. First, it sets out to clarify customary international humanitarian law and thereby bring more legal certainty about applicable humanitarian norms which, as noted in previous chapters, can in turn contribute to the ability to articulate the relationship

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435 This follows the requirements included in art 38(1) b) of the Statute of the International Court of Justice which stipulates that: “international custom, as evidence of a general practice accepted as law”. The Statute is annexed to the Charter of the United Nations (26 June 1945) Can TS 1945 No 7,
between international human rights and humanitarian law. Parts of the ICRC study also constitute examples of a concurrent, and in several cases complementary approach to international human rights and humanitarian law. By basing some of their rules on both frameworks, and explicitly explaining how it does so, the ICRC study not only acknowledges the co-existence of the disciplines but appears to show that it strives to articulate humanitarian law in light of human rights law where it deems necessary. Hence, it contributes to the advancement of the complementary approach, and in a very systematic way, on an issue by issue (rule by rule) basis as will be shown through a number of examples. The use or role of human rights law in the ICRC study and establishment of the customary rules is clearly explained in their introduction, stating that:

Where relevant, practice under international human rights law has been included in the study. […] This study does not purport, however, to provide an assessment of customary human rights law. Instead, human rights law has been included in order to support, strengthen and clarify analogous principles of international humanitarian law. In addition, while they remain separate branches of international law, human rights law and international humanitarian law have directly influenced each other, and continue to do so […].

As several human rights bodies used international humanitarian law to inform their interpretation of human rights law, this statement posits that the ICRC study intends to use international human rights law to interpret international humanitarian norms, and accordingly establish existing customary humanitarian norms. While this indicates that human rights will be used to clarify analogous humanitarian principles, the ICRC study in fact goes further than that. For instance, it appears to have drawn some principles from human rights law that are more or less absent from international humanitarian law but relevant to conflict situations, in order to establish some of the customary rules. Examples of this are presented below.

The customary rules of the study are presented in six parts, respectively addressing: I) The principle of distinction; II) Specifically protected persons and objects; III) Specific methods of warfare; IV) Weapons; V) Treatment of civilians and persons hors de combat; VI) Implementation. While human rights law was raised in rules included in other parts, it is mainly in Part V, within the rules on the treatment of civilians and persons hors de combat, that human rights law is used in

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436 ICRC study (n 434) xxxvi-xxxvii.
the ICRC study.\footnote{ICRC study (n 434) 297-492. Part V includes the following chapters: 32) Fundamental Guarantees; 33) Combatants and Prisoner-of-War Status; 34) The Wounded, Sick and Shipwrecked; 35) The Dead; 36) Missing Persons; 37) Persons Deprived of Their Liberty; 38) Displacement and Displaced Persons; 39) Other Persons Afforded Specific Protection.} This is more especially the case in chapter 32 gathering rules on fundamental guarantees. The concept of fundamental guarantees, as discussed in chapter 3.3.1, was included in article 75 of Additional Protocol I to the Geneva Conventions and in article 4 of Additional Protocol II.\footnote{Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (8 June 1977) 1125 UNTS 3, art 75.; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977) 1125 UNTS 609, art 4.} These norms were tagged in the customary study as “human–rights type provisions”.\footnote{ICRC study (n 434) xxxvii.} Introducing the chapter on fundamental guarantees, the customary study explained the continued applicability of human rights law during conflict. It also noted the existence of State practice calling for the respect of human rights during situations of conflict, as well as the extraterritorial applicability of human rights in certain circumstances. On that basis the ICRC study developed 19 rules protecting fundamental guarantees which “apply to all civilians in the power of a party to the conflict and who do not take a direct part in hostilities, as well as to all persons who are \textit{hors de combat}.”\footnote{Ibid., rule 89 at 311.} Among these, several rules are of particular interest to the examination of the relationship between international human rights and humanitarian law.

\subsection*{5.3.1. Deprivation of Life}

The issue of deprivation of life has been examined in the two previous sections of this chapter in the context of the work of various UN human rights bodies, as well as the work of the Inter-American and European human rights systems. Within the fundamental guarantees chapter of the ICRC study this issue is addressed by rule 89 on ‘violence to life’. Applying to both international and non-international armed conflicts, the rule stipulates that “[m]urder is prohibited.”\footnote{Ibid., 299.} In addition to noting relevant humanitarian treaty norms supporting this customary rule, the ICRC study notes that:

\begin{quote}
The prohibition of “arbitrary deprivation of the right to life” under human rights law […] also encompasses unlawful killing in the conduct of hostilities, i.e., the killing of civilians and persons \textit{hors de combat} not in
\end{quote}
the power of a party to the conflict not justified under the rules on the conduct of hostilities.\textsuperscript{442}

The study thereby highlights that on this particular issue of murder or deprivation of life, it is human rights law that must be interpreted or informed by humanitarian law, as confirmed by the International Court of Justice’s Nuclear Weapons’ Advisory Opinion. The study further indicates:

unlawful killings can result, for example, from a direct attack against a civilian (see Rule 1), from an indiscriminate attack (see Rule 11) or from an attack against military objectives causing excessive loss of civilian life (see Rule 14), all of which are prohibited by the rules on the conduct of hostilities.\textsuperscript{443}

This statement, and the rules referred to, are relevant to the interplay between international human rights and humanitarian law as they could be used to assist their complementary application. For example, a human rights adjudicating body or organisation could use these rules to decide whether alleged cases of deprivation of life during conflict occurred in violation of customary international humanitarian law, and accordingly constituted violations of the right to life under human rights law.\textsuperscript{444}

\textbf{5.3.2. Arbitrary Deprivation of Liberty}

Another interesting issue for the purpose of the current work is found in rule 99 which provides that “[a]rbitrary deprivation of liberty is prohibited”\textsuperscript{445} in international as well as non-international armed conflict. The wording of rule 99 is particularly noteworthy, as it uses terms that are found in the human rights framework rather than in humanitarian treaty law. It is, however, the supporting material presented in the ICRC study regarding the existence of such a prohibition in non-international armed conflict which is more significant for the examination of the interplay between international human rights and humanitarian law. Indeed, the concept of deprivation of liberty does not explicitly exist in humanitarian norms applicable in non-international armed conflict.\textsuperscript{446} As explained in the ICRC study,

\textsuperscript{442} Ibid., 313-314.
\textsuperscript{443} Ibid., 314.
\textsuperscript{444} See for example the discussion of the killing of policemen in the ‘Report of the United Nations Fact-Finding Mission on the Gaza Conflict’, chap 5.1.2 note 125 and accompanying text.
\textsuperscript{445} Ibid., rule 99 at 344.
\textsuperscript{446} Ibid., 344. As it is noted in the ICRC study, Common Article 3 to the Geneva Conventions and Protocol II rather provide for the humane treatment of civilians and persons \textit{hors de combat}. 

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“[t]he prohibition of arbitrary deprivation of liberty in non-international armed conflicts is established by State practice in the form of military manuals, national legislation and official statements, as well as on the basis of international human rights law”.\textsuperscript{447} The study already states thereby the need to rely upon human rights law to interpret the meaning of arbitrary deprivation of liberty in the context of non-international armed conflict. Indeed, human rights law is used in the ICRC study to assess both the acceptable grounds for deprivation of liberty, as well as the necessary procedural requirements. Examining the practice, the study observes that “human rights treaties recognize the right to liberty and security of person and/or provide that no one may be deprived of his or her liberty except for reasons and under conditions previously provided by law.”\textsuperscript{448} It further adds that “[d]etention which continues beyond that provided for by law is a violation of the principle of legality and amounts to arbitrary detention.”\textsuperscript{449} The ICRC study also draws upon human rights law to feed procedural requirements into the issue of deprivation of liberty in humanitarian law. Before expanding upon these requirements, the study states:

Since the adoption of the Geneva Conventions, there has been a significant development in international human rights law relating to the procedures required to prevent arbitrary deprivation of liberty. Human rights law establishes (i) an obligation to inform a person who is arrested of the reasons for arrest, (ii) an obligation to bring a person arrested on a criminal charge promptly before a judge, and (iii) an obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention (so-called writ of habeas corpus).\textsuperscript{450}

Hence, the customary study clearly uses human rights law to interpret international humanitarian law in such a way as to include the principle of legality, as well as the stated procedural requirements otherwise absent from humanitarian treaty law. The ICRC study fills the lack of available humanitarian norms in non-international armed conflict to address the issue of deprivation of liberty, providing again a strong example of a complementary application of human rights and humanitarian law.

5.3.3. Fair Trial Guarantees

There exists a definite substantive overlap with regard to the protection of fair trial guarantees in international human rights and humanitarian law. Human rights law,
however, provides more detail on several of these guarantees which can inform the interpretation of international humanitarian law. As such, rule 100 of the ICRC study provides another example which highlights a complementary use of international human rights and humanitarian law. Rule 100 stipulates that “[n]o one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees.” For a trial to be fair, it must ensure that many judicial guarantees are respected. Such requirements include a “trial by an independent, impartial and regularly constituted court”. Concerning the constitution of the court, the ICRC study explains that:

[w]hereas common Article 3 of the Geneva Conventions and Article 75 of Additional Protocol I require a “regularly constituted” court, human rights treaties require a “competent” tribunal, and/or a tribunal “established by law”. A court is regularly constituted if it has been established and organized in accordance with the laws and procedures already in force in a country.

The study thereby appears to suggest that the human rights requirement should be used to shed light on the meaning of ‘regularly constituted court’. Similarly, the ICRC study heavily relies on human rights practice to define the meaning of independent and impartial tribunal. It observes that:

The meaning of an independent and impartial tribunal has been considered in case-law. In order to be independent, a court must be able to perform its functions independently of any other branch of the government, especially the executive. In order to be impartial, the judges composing the court must not harbour preconceptions about the matter before them, nor act in a way that promotes the interests of one side. In addition to this requirement of subjective impartiality, regional human rights bodies have pointed out that a court must also be impartial from an objective viewpoint, i.e., it must offer sufficient guarantees to exclude any legitimate doubt about its impartiality.

The need for independence of the judiciary from the executive, as well as subjective and objective impartiality, has meant that in a number of cases, military tribunals and special security courts have been found not to be independent and impartial. While none of these cases concluded that military tribunals inherently violate these requirements, they all stressed that military tribunals and special security courts must respect the same requirements of independence and impartiality as civilian tribunals.

451 Ibid., rule 100 at 352.
452 Ibid., 354.
453 Ibid., 355.
454 Ibid., 355-356.
The ICRC study specifies that the Third Geneva Convention provides for the holding of trials of prisoners of war by military courts and that the Fourth Convention addresses trials in occupied territories. The study stresses that “[r]egional human rights bodies have found, however, that the trial of civilians by military courts constitutes a violation of the right to be tried by an independent and impartial tribunal.” It may be that the answer to this difference will be resolved by evolving practice, which might indicate a change via the human rights standards whereby civilians cannot be tried by military courts.

Several other judicial requirements for which human rights law can provide interpretative assistance are addressed in the ICRC study. For example, “[t]he requirement that an accused must have the necessary rights and means of defence” is coined in very general terms and some of its components are at best only implicitly included in the humanitarian treaties. Hence, the ICRC study presents human rights criteria that can be used to complement the humanitarian law framework on that issue. The requirement of “[a]dvising convicted persons of available remedies and of their time-limits” is an additional judicial requirement, whereby a complementary use of human rights and humanitarian law could be useful to fill an existing substantive gap. Indeed, while some international humanitarian norms “provide that convicted persons are to be advised of their judicial or other remedies and the time-limits within which they may be exercised”, such norms do not provide for the right to appeal. In fact, during the drafting of the Additional Protocols this issue was raised and it was reported in the Commentary to the Protocols that “at the time of the adoption of the Protocols in 1977 not enough national legislation provided for the right to appeal in order to make this an absolute requirement – even though no one should be denied the right to appeal where it

455 Ibid., 356.
456 Ibid., 356.
457 Ibid., 359.
458 Ibid., 369.
459 Ibid., 369.
460 Ibid., 369.
exists.” The ICRC study notes that practice, however, has evolved on that issue, especially in the human rights framework and concludes that: “the influence of human rights law on this issue is such that it can be argued that the right of appeal proper – and not only the right to be informed whether appeal is available – has become a basic component of fair trial rights in the context of armed conflict.”

5.3.4. Other Rules

The ICRC study has used international human rights and humanitarian law in a complementary manner in order to establish several additional customary rules protecting fundamental guarantees. This is the case for instance with rule 98 prohibiting enforced disappearance. Indeed, such a prohibition does not explicitly exist under international humanitarian law. The ICRC study notes the existence of several humanitarian rules which would in effect be violated by such acts of enforced disappearance, including for example the rules on murder and arbitrary deprivation of life previously examined. The ICRC study on that basis states that “[t]he cumulative effect of these rules is that the phenomenon of “enforced disappearance” is prohibited by international humanitarian law.” In addition to examining the prohibition of enforced disappearance under international criminal law, the ICRC study reviews human rights treaties, such as the Inter-American Convention on the Forced Disappearance of Persons, as well the UN Declaration on Enforced Disappearance. It also notes case-law from the Inter-American and European systems as well as UN human rights bodies. It affirms that “although it is the widespread or systematic practice of enforced disappearance that constitutes a crime against humanity, any enforced disappearance is a violation of international humanitarian law and human rights law.”

In addition to the rules protecting fundamental guarantees in the ICRC study, other rules have been established in Part V addressing the treatment of civilians and

461 Ibid., 369.
462 Ibid., 369-370.
463 Ibid., rule 98 at 340.
464 Ibid., 340.
465 Ibid., 340-341.
466 Ibid., 342.
467 Ibid., 342-343.
468 Ibid., 343.
persons *hors de combat*. For example, chapter 38 on displacement and displaced persons also advances the practice of the complementary application of international human rights and humanitarian law. As such, rule 132 provides that “[d]isplaced persons have a right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist.” While article 49 of the Fourth Geneva Convention provides that “[p]ersons thus evacuated [by the Occupying Power] shall be transferred back to their homes as soon as hostilities in the area in question have ceased”, it is in human rights law that the right to return can be found. As noted in the ICRC study, the right to return was first included as such in the Universal Declaration of Human Rights and “[t]he UN Security Council, UN General Assembly and UN Commission on Human Rights have on numerous occasions recalled the right of refugees and displaced persons to return freely to their homes in safety.” The ICRC study also notes the role of the human rights framework in developing measures and calling upon relevant actors to take steps to facilitate return and reintegration.

Finally, chapter 39 addressing other persons afforded specific protection also offers more examples of the complementary use of human rights and humanitarian law in the establishment of the customary international humanitarian rules. Among such examples, rule 135 provides that “[c]hildren affected by armed conflict are entitled to special respect and protection.” As explained in the study, the protection offered in the Fourth Geneva Convention and Additional Protocol I “relate to the provision of food, clothing and tonics, care of children who are orphaned or separated from their families, treatment during deprivation of liberty and the distribution of relief consignments.” Other international humanitarian norms only provide for the protection of children in very general terms. The ICRC study suggests that the human rights framework can assist in interpreting the content of this special protection to children, highlighting for instance that:

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469 Ibid., rule 132 at 468.
470 Convention relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287, art 49(2).
471 ICRC study (n 434) 469.
472 Ibid., 470-471.
473 See ibid., rules 134-138 which specifically provide protection for women, children, elderly, disabled and infirm persons.
474 Ibid., 479.
475 Ibid., 479.
The UN Committee on the Rights of the Child recalled that provisions essential for the realization of the rights of children affected by armed conflict include: protection of children within the family environment; ensuring the provision of essential care and assistance; access to food, health care and education; prohibition of torture, abuse or neglect; prohibition of the death penalty; preservation of the child’s cultural environment; protection in situations of deprivation of liberty; and ensuring humanitarian assistance and relief and humanitarian access to children in armed conflict.\footnote{476}{Ibid., 481.}

The ICRC study also notes the differences between international human rights and humanitarian law on the definition of children with human rights using the age of 18 as the measure and, in contrast, international humanitarian law having “different age-limits with respect to different protective measures for children, although 15 is the most common.”\footnote{477}{Ibid., 482.}

The above examples from the ICRC study demonstrate the need to apply international human rights and humanitarian law in a complementary manner, and that the implementation or use of the complementary approach is indeed possible. As some human rights bodies use international humanitarian law to interpret human rights provisions, sometimes implicitly and at other times explicitly, the ICRC study used the human rights framework to interpret international humanitarian law and to fill substantive gaps. The ICRC study overtly explained the human rights and humanitarian norms which they co-applied to establish their customary rules. It thereby provided an example of a clearer method of the use of the complementary approach to human rights and humanitarian law - a method which could be useful for other bodies addressing violations arising from armed conflict situations.

\footnote{476}{Ibid., 481.}
\footnote{477}{Ibid., 482.}
6. Moving Forward with the Development of the Complementary Approach

As suggested by its title, Chapter 6 seeks to provide some guidance to progress with developing the complementary approach and clarifying the interplay between international human rights and humanitarian law. As such, this Chapter will discuss the current top-down approach used to articulate the interplay between the disciplines, and show why this concept is not adequate. It will explain what constitutes the complementary approach, how it can be applied in practice and what components should be taken into account in developing a coherent method of implementing this approach. Chapter 6 will also analyse a number of examples in which clarification of the interplay between the two disciplines is essential, and provide suggestions aimed at assisting concurrent application. The final section of Chapter 6 will then seek to identify the type of process that could be used to develop the complementary approach.

6.1 Problems with the Vertical Approach to the Interplay

At present there exists much ambiguity and uncertainty regarding the articulation of the interplay between international human rights and humanitarian law. Part of this uncertainty arises within each discipline. Indeed, there undoubtedly exist areas where the difficulty in clarifying the interplay may have its roots in a lack of clarity within one of the bodies of law. For example, the debates under international humanitarian law over the status of members of armed groups in non-national armed conflicts necessarily makes the interplay with international human rights law in these circumstances an even greater challenge.\(^1\) Another area creating obstacles for the concurrent application is the issue of the threshold for non-national armed conflict. Clearly, it will remain difficult to interpret the interplay between the disciplines when there is much uncertainty over the qualification of a particular situation as an armed conflict, and where States are reluctant to openly affirm the existence of a conflict.\(^2\) Likewise, the lack of understanding of international humanitarian law by human rights experts and vice-versa creates an additional

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\(^1\) See chapter 2.3.5.

\(^2\) See chapter 2.2.3.
difficulty in developing guidance to better articulate the interplay between international human rights and humanitarian law.

Aside from the problems noted, the use of a vertical or top-down approach has been a clear hindrance for the development of a coherent approach to articulate the interplay between international human rights and humanitarian law. What is meant here by top-down or vertical approach to the interplay is the practice by which a single general rule is said to provide the answer to all situations of concurrent application. The *lex specialis* principle is the main illustration of a vertical approach in the context of the concurrent application of international human rights and humanitarian law, and demonstrates the problems with attempting to use a general rule to fit all situations where the interplay between the disciplines could be relevant.

In Chapter 4, various problems with the use of the *lex specialis* were identified and examined, including the vagueness of the principle and its malleability, which have led experts and mechanisms to reach completely different conclusion all the while seemingly utilising the same principle.\(^3\)

In the 2010 report of the Expert Consultation on the Issue of Protecting the Human Rights of Civilians in Armed Conflict, Georges Abi-Saab noted that following the *lex specialis* principle, a combined application of international human rights and humanitarian law does not entail that norms of human rights and humanitarian law are applied simultaneously, but that on the basis of the principle we should identify the norm that provides the most specific answer for a situation.\(^4\) In practice, however, this cannot always work. For example, the right to demonstrate (through the freedom of association and expression) exists in international human rights law but not in international humanitarian law. As such, human rights law would be identified as the *lex specialis* as it contains specific rules on the issue. Yet,

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\(^3\) As outlined in chapter 4, *lex specialis* has for example been used by the United States, Israel and Russia to say that in situation of armed conflict international humanitarian law applies exclusively, displacing or excluding the whole international human rights framework. The principle has also been used to state that it is the most protective rule between international human rights and humanitarian law that must apply in situations of armed conflicts. Yet again, it has been said that following the *lex specialis* principle, human rights norms need to be applied in light of international humanitarian law and vice-versa. In short, it has been used to interpret the relationship between international human rights and humanitarian law in many ways.

such a conclusion might not be adequate in the context of a situation where there is fighting on the ground. Likewise, on issues regarding detention during armed conflict, the decision on how to articulate the interplay between international human rights and humanitarian law in such cases cannot be taken by comparing one rule from international humanitarian law with another rule of international human rights law. Matters such as the status given to the detainee, and whether we are examining a situation of administrative or preventive detention or detention for a crime must be taken into account. Such analysis cannot be prompted or done by relying on the *lex specialis* principle, because the rule either leads to the exclusion of one legal framework over the other, or demands choosing one rule over another. Many of the problems with using *lex specialis* have been addressed in Chapter 4 and do not require repetition here. At this stage it is necessary to understand that the *lex specialis* principle forces a vertical approach, a ‘one size fits all’ solution to the articulation of the interplay, which is problematic and unhelpful for the development of a practical approach to the clarification of the interaction.

Other top-down approaches present similar difficulties and lack of certainty. For example, it might be suggested that the interplay between international human rights and humanitarian law could be articulated and decided upon on the basis of the intensity of violence. Should there be a shift to sole automatic application of international humanitarian law whenever the level of violence reaches the applicability threshold of that legal framework? Such a general assertion would be problematic, especially during non-international armed conflicts. As noted in Chapter 2.2.2, there exist difficulties with the qualification of armed conflicts, including the reluctance of States to acknowledge the applicability of international humanitarian law, especially non-international armed conflict not reaching the threshold of Additional Protocol II. Hence, a top-down or vertical approach where the level of violence would dictate the applicable framework would not assist in solving problems of concurrent application. Similarly, it might be said that the status of the affected individuals could be used to decide which norm between international human rights and humanitarian law applies. Following this, the use of force against a combatant would be regulated by the international humanitarian law framework. Again, such a black and white approach would be problematic, for instance in relation to fighters during non-international armed conflicts, or civilian casualties.
caused as collateral damage. While the level of violence and status of individuals could certainly serve as useful criteria within an integrated process of interpretation of the interplay, each criterion alone cannot provide the solution; neither of them will give us a rule that will always work. Rather, it is an analysis of a number of components which will lead to the clarification of the interplay and to a coherent concurrent application of the disciplines. This analysis needs to stem from first understanding the situation on the ground as opposed to a top-down approach or application of a general rule meant to fit all situations; there exists no all-inclusive single-principle solution.

It is submitted that the use of vertical approaches, especially the *lex specialis* principle, has slowed progress in the clarification of the interplay and development of the complementary application of international human rights and humanitarian law. As long as experts continue to state that there exists a principle around which the relationship between the two disciplines can be articulated, it will be difficult to move forward to establish a useful process which will cut across issues and provide more certainty to stakeholders on the concurrent application of the disciplines.

This is not a question of semantics. Many issues during armed conflicts, especially non-international armed conflicts, do not lend themselves to be articulated around one principle. Rather, it is a type of blending of international human rights and humanitarian law that needs to be done. When confronted with issues where the two disciplines can apply concurrently, it is a case by case analysis of the facts that should command which norm or norms will be applied. This is crucial in moving forward in clarifying the interplay between the disciplines and why abandonment of top-down approaches appears necessary. What is needed instead is an additional option to apply international humanitarian law and international human rights law in a complementary manner, following a non-rigid approach taking into account the context of the issue and additional practical components. Such an approach is also more suitable for implementation on the ground. If asked which rule should apply between a rule of international humanitarian law and international human rights law in a given situation, military commanders are likely to choose international humanitarian law. This is despite the fact that in practice commanders – although not always seeing this as belonging to the sphere of human rights – might recognise that certain circumstances call for acting in a manner more in line with human rights or
law enforcement. What is needed is a sort of ‘complementary compendium,’ with options to fit the complex environment of armed conflict. Such a tool could inform actions on the ground and ensure that rules of engagement are human rights compliant where necessary, without disregarding the reality of conflict. This is in contrast with lex specialis which in practice leads to choosing one field or rule over another.

The above demonstrates the hazard of opting for vertical approaches or ‘one size fits all’ solutions to articulate the concurrent application of international humanitarian law and international human rights law. A well-coordinated application of the disciplines is vital to ensure adequate protection during armed conflict. Confusion over the applicable norms necessarily opens the door to wide manipulation of the legal systems in ways that could be detrimental both to the protection of persons on the ground and to the credibility of the two fields of law. Ambiguity and legal uncertainty are likely to enhance the belief that international humanitarian law and/or international human rights law are of little pertinence in times of armed conflict, and possibly generate further lack of respect for the legal frameworks.

The relationship between international human rights and humanitarian law requires a complex cross-fertilisation which might need to combine a number of elements and rules from both fields simultaneously. In its discussion on lex specialis the report of the Study Group of the International Law Commission on the fragmentation of international law noted that:

What [International Court of Justice’s cases] leave open, like the opinion in the Legality of Nuclear Weapons case, is on what basis the relevant facts are singled out, what justifies the choice of the interpretative framework. To what extent does fact-description “armed conflict” influence the sense of the expression “arbitrary deprivation of life” in article 6 of the International Covenant on Civil and Political Rights? Here there is no single formula. A weighing of different considerations must take place and if that weighing is to be something else than the expression of a preference, then it must seek reference from what may be argued as the systemic objectives of the law, providing its interpretative basis and milieu.\(^5\)

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A horizontal approach is needed. The intricacy of the relationship is such that no single principle can be developed to articulate the interplay between international human rights and humanitarian law. This is not to say that there cannot be any certainty about the concurrent application of the two disciplines. What is needed is an integrated approach that would facilitate the concurrent application of the two bodies so as to have them feed into each other and take one another into account. The following sections will provide suggestions for progress in this direction.

6.2 Agreeing on the Complementary Approach

Following the previous discussion, it is suggested that the complementary approach provides the appropriate foundation to clarify the relationship between international human rights and humanitarian law and problems relating to their concurrent application. The complementary approach brings international humanitarian law and international human rights law closer, while acknowledging the specificities of each discipline. This model is a middle ground approach when we talk about the relationship between international humanitarian law and international human rights law. The approach underscores the fact that the two disciplines are already involved together inasmuch as they both contain an objective of protecting individuals from unwarranted harm, and apply concurrently. On the other hand, as opposed to an integrationist model, the complementary approach acknowledges the differences between the two fields of law and the many difficulties that would come in the way of full integration. Consequently, this approach rejects the merger of the disciplines. Along the lines of Robertson, the theory supports “the necessity of maintaining two distinct yet complementary systems”.

The complementary approach also embraces the sentiments of Pictet that “the two systems are close – but distinct – and should remain so. They are mutually complementary, and admirably so.”

This complementary approach has also been referred to as the convergence, confluence, harmonisation, as well as the cross-fertilization of international

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humanitarian law and international human rights law. It has, however, remained in much need of further clarification and examination, something this study seeks to address. In 1983 the International Committee of the Red Cross advocated the articulation of the concurrent application of the disciplines through the complementary theory, conveying that “the two systems are distinct but complement each other.”

In recent years scholars have advocated a complementary application of international human rights and international humanitarian law. In terms of jurisprudential development, in *Armed Activities on the Territory of the Congo*, the International Court of Justice clearly made a step towards the complementarity of the legal frameworks. To some extent the same can be said about the Nuclear Weapons and the Wall Advisory Opinions as they promoted, albeit in different language, the idea that international human rights and humanitarian law should be interpreted in light of each other. Following an examination of the two Advisory Opinions, it has been asserted that “IHL is *lex specialis complementa* (complementary) and not

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9 Robertson (n 6) 800-801.


11 International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgment of 19 December 2005), para 216. For more details see chap 4.2.2.

12 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion of 8 July 1996); International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion of 8 July 1996). For more details on the Nuclear Weapons Advisory Opinion, see chap 4.2.1. For more details on the Wall Advisory Opinion, see chap 4.2.2.
derogata (derogatory) of human rights law.”13 Here we see even more clearly the complementary concept becoming embedded in the context of the concurrent application of the disciplines. While the term lex specialis is used here, what is promoted is much closer to the complementary approach camouflaged under the name of lex specialis.

It is interesting to note that, while it did not incorporate the theory of lex specialis, the canons of interpretation found in the Vienna Convention on the Law of Treaties does give legitimacy to the theory of harmonisation.14 In its provision on the general rule of interpretation, the Convention affirms that: “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”15 Further, it asserts: “There shall be taken into account, together with the context: […] Any relevant rules of international law applicable in the relations between the parties.”16 The importance of this last provision for treaty interpretation in international law is increasingly acknowledged.17 In its study on the fragmentation of international law, the International Law Commission studied different “existing structures and procedures for dealing with conflicts of norms and determining how they could be adopted to fill the existing gap in the hierarchy of international norms.”18 In one of its last reports on fragmentation, the International Law Commission studied article 31 (3) (c) of the Vienna Convention and confirmed its relevance in international law:

It was recalled that according to article 31 (3) (c) of the Vienna Convention, treaties were to be interpreted within the context of “any relevant rules of international law applicable in the relations between the parties”. The provision thus helped to place the problem of treaty relations in the context of treaty interpretation. It expressed what could be called a

15 Ibid., art 31 (1).
16 Ibid., art 31 (3) (c).
Thus, in contrast with the theory of *lex specialis*, the complementary approach not only provides an adequate theoretical model for the concurrent application of international humanitarian law and international human rights law, but also finds support in the Vienna Convention on the Law of Treaties and its general rules of treaty interpretation.

In order to have value, the concurrent application of international human rights and humanitarian law cannot be disconnected from the reality of armed conflict. The concurrent application will only serve its purpose of better articulating the interplay between the two fields of law if it takes into account the complexity and specific aims of both disciplines, and if such application is considered practical enough in conflict situations. It is believed that a complementary approach to the concurrent application can meet this pre-requisite; such an approach would provide a solid basis to articulate the concurrent application of international human rights and humanitarian law in a manner that respects the specificities of each discipline and the reality of armed conflict.

At the Expert Meeting on the Supervision of the Lawfulness of Detention during Armed Conflict, Doswald-Beck asserted in her background paper that “[r]ather than being locked in sterile arguments over whether humanitarian law is the *lex specialis* for armed conflict, a more constructive approach is to examine the way to ensure the proper balance between security/military needs and individual liberty in the light of modern standards.” It is with this in mind that the examination of potential avenues for the complementary application of international human rights and international humanitarian law must be initiated, through a horizontal approach in a process that can cut across issues and be used on a case by case basis. To say that the complementary application of international human rights and international

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humanitarian law is still a work in progress is evidently an understatement. Much toil lies ahead on that subject. Some of the challenges were seen in the examination of the practice of UN human rights bodies as well as the Inter-American and European systems in chapter 5 of this study. The following sections will explore this “unexploited potential of complementarity”\(^\text{21}\) and provide further suggestions for the way forward.

The complementary approach appears capable of setting the stage for a harmonious and optimal co-existence of international human rights law and international humanitarian law. Admittedly, difficulties are likely to arise when attempting to articulate the concurrent application through this approach. Questions as to how to ensure that the complementary approach is applied and implemented ought to be raised. In reality, there may never be a perfect approach, accepted by most and applied by all. Yet, more clarity on potential approaches or models is as essential to this topic as for any other branch of international law:

\textit{Any} doctrine of international law is automatically based on \textit{a} theory, even if the writer does not consciously realise it. He who does not explicitly argue for one theoretical basis simply implies a theory- and since that implied theory is not expressed and discussed, it is much more likely to be incoherent, inconsistent or simply false.\(^\text{22}\)

It is necessary to work on new avenues, more adapted to the subject at hand and capable of providing solutions and better articulating the complex and multifaceted relationship between international humanitarian law and international human rights law. The complementary approach seems apt to provide a meaningful basis to frame the co-existence of these two branches of law and articulate their interplay.

It is suggested that a number of steps could assist in developing the complementary approach. To fully develop the complementary application of the two disciplines, international and regional institutions as well as States must, as a first step, accept the inevitability of the complementary approach. Indeed as seen in practice, this approach is already becoming the main trend regarding the interplay between the two disciplines, whether directly coined as such, implicitly used, or


concealed under the *lex specialis* theory. The complementary approach must be adopted in its complete sense, that is to concurrently apply the disciplines in such a way as to ensure that the two sets of rules feed into each other, take account of the circumstances in which they apply, and work together to fill gaps in protection.

It is clear from the preceding study that articulating the complementary application of international human rights and humanitarian law is not as simple as is sometimes made out. Often the question of the interplay between them is synthesised in a few words, and the use of the complementary approach is stated without explanation or evidence of how the two frameworks are indeed applied in a complementary manner. A more comprehensive examination shows that these questions are not straightforward. The regular lack of details with regard to the method employed appears to suggest that there might have been a leap or jump that has taken place prematurely. From questioning whether the two disciplines should be applied together, the majority now agree to such a partnership. This change of ethos took place in the space of about fifty years. Yet, the shift of approach in construing the relationship between international human rights and humanitarian law has not been grounded on a solid basis. At present, in many cases where the interplay between the two disciplines is being dealt with, there appears to be a lack of reasoning or disregard of essential questions before applying them concurrently.

Clearly, the complementary approach is the general direction where almost all are headed – how to get there however has not been sufficiently developed. Addressing the practice and isolating the logic used to support a complementary application of international human rights and humanitarian law is another step needed in order to advance. As will be further examined below, it is submitted that the establishment of a formal process is also essential to develop the complementary approach.

**6.3 Operationalising the Complementary Approach**

The practice examined in this study addressed some of the dangers of ignoring the complementary approach, and highlighted practical reasons to apply the disciplines in such a manner. The examination of the work of the United Nations, the European, Inter-American and African systems, as well as the ICRC study on customary law led to a better understanding of various analyses that can be used to apply
international human rights and humanitarian law in a complementary manner. Through their application of both disciplines, and their assessment of situations of armed conflict, the cases studied provide trends or patterns that could assist the future application of the disciplines, and lead to their more coherent and effective coexistence.

Within organisations who have applied both legal frameworks concurrently, there appear to have been two trends forming. First, there have been cases where international human rights and humanitarian law have been applied in parallel, i.e. in such a way that relevant norms of each fields are presented but without actually harmonising the applicable norms. In other words, many implementing bodies have shown and continue to show that they are aware of the relevant norms in specific cases, and of the importance of considering both legal frameworks, but do not use the relationship between the disciplines nor explain how the norms should interact and how their interplay should be operationalised. For example, as examined in more detail in Chapter 5, the Independent Experts on Somalia have, throughout their mandates, continuously acknowledged the relevance of international human rights and humanitarian law and examined norms from each field applicable to specific issues. Independent Experts have also qualified the situation in Somalia as a non-international armed conflict and addressed violations and accountability of different actors under both frameworks. Similarly, the Fact-Finding Mission on the Gaza conflict discussed both sets of norms, as well as violations under the two legal frameworks in relation for instance to the use of human shields and to the detention of Palestinians by Israeli forces in Gaza. Likewise, the African Commission Special Rapporteurs have broadly referred to international humanitarian law in addition to human rights law. The report of the African Commission on their fact-

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26 See chapter 5.1.2.
27 See for example ‘Report of Activities by Commissioner Bahame Tom Nyanduga, Special Rapporteur for Refugees, Asylum Seekers, IDPs and Migrants in Africa during the Intersession Period of November 2007 to May 2008’
finding mission in the Darfur region also mentioned international humanitarian law in their recommendations, for example urging the government to “undertake training programmes for the police and security forces on human rights and international humanitarian law principles”\textsuperscript{28}, and “abide by its international obligations under international human rights and humanitarian law”.\textsuperscript{29} In the Saavedra case, the Inter-American Commission on Human Rights appears to also have applied international humanitarian law in parallel with the American Convention on Human Rights, finding separate violations by Peru of the right to humane treatment under the American Convention and Common Article 3 of the Geneva Conventions.

Many organisations have thus used international human rights and humanitarian law concurrently, but in a parallel manner not putting the interplay between the two disciplines to practice or explaining how they should be articulated on specific issues. This parallel application of the two legal frameworks has been important in cementing the stance that one body of law cannot be overlooked and that both must be considered in situations dealing with armed conflict. The parallel application of the two also highlighted what norms must be taken into account in specific cases, and this practice can undoubtedly assist a process which would be established to clarify the interplay between them. Indeed, before clarifying the interplay between the two disciplines it is essential to identify what in each field are the norms applicable to specific issues or scenarios. As such, while they have stopped short of embracing a full complementary approach and proposing a form of blending of the two bodies of law, organisations that applied the two disciplines in parallel have produced essential material to move forward with operationalising the complementary approach and harmonisation of international human rights and humanitarian law.


\textsuperscript{29} \textit{Ibid.}, para 151.
A closer complementary application of international human rights and humanitarian law represents the second trend, and there are an increasing number of cases where the two are being applied in a manner as to interpret one discipline in light of the other. Decisions by implementing bodies are now reached or statements made on the basis of the interaction between international human rights and humanitarian law. To better articulate the interplay between the two fields and further advance their relationship there is a need to accept that different institutions can have divergent ways of implementing the complementary approach. There can be various roads to arrive at complementarity, and more than one avenue may be valid. As seen in Chapter 5, different bodies may need to take diverging routes as a result of their mandate or the wording of a treaty under which they operate.

The intricacy of the relationship is such that no single top-down model can be developed to articulate the complementary application of international human rights and humanitarian law. This is not to say that there cannot be any certainty in the complementary approach. Indeed, the complementary approach should be construed as facilitating the concurrent application of the two legal frameworks so as to have them feed into each other and take each other into account. Addressing different types of situations that occur on the ground, so as to reduce clashes of law by adopting clear interpretations for specific scenarios, should constitute the next step in clarifying the interplay and complementary approach to the two bodies of law. This should be accomplished by advancing interpretations that allow for harmonious co-existence through a process which would include all relevant stakeholders. It is submitted that a blueprint of questions to be asked to determine the interplay between international human rights and humanitarian law in specific situations can be developed. As such, through the establishment of a process which will be discussed in section 6.4, steps could be identified which would assist stakeholders to operationalise the complementary approach and concurrently apply the two legal frameworks on the ground.

Evidently, as a first step towards the operationalisation of the complementary approach and harmonisation of international human rights and humanitarian law, stakeholders will need to assess whether international humanitarian law applies at all to a given case. As discussed in Chapter 2.2.2, this will be done by examining the facts and considering whether the situation qualifies as an international or non-
international armed conflict. If the answer is that the situation at hand is not one of armed conflict, there will be no need to further examine the interplay as there will be no concurrent applicability of international human rights and humanitarian law. If the situation addressed is one of armed conflict, the second step in assessing the interplay between the disciplines will be to identify the rules of international human rights and humanitarian law that could potentially apply to the given situation. If relevant, issues related to the extraterritorial application of human rights would also need to be examined here.  

Thirdly, once the rules have been identified, the interplay of these specific rules of international human rights and humanitarian law, and potential for blending or harmonious co-existence, must be closely examined. This examination will lead to one of three different routes where the norms of the two legal frameworks will: clash, be equivalent in each discipline, or overlap with one field possibly being more specific than the other. The fourth step leading to the harmonisation and complementary application of the two disciplines will be dependent upon the answer given to the previous step. The fourth step leading to such harmonisation will encompass a series of questions, some of which are identified below. Developing further questions will be at the core of the proposed process.

If the rules of international human rights and humanitarian law are equivalent in each field, and would lead to the same results, there exists little problem with the interplay and international human rights and humanitarian law can be harmoniously applied without having the need to perform an intricate balancing act between the two sets of norms. In such situations the norms simply accumulate. This is for example the case with the issue of torture which will be discussed below.

If there is a perceived contradiction or a clash between the two fields on a given issue, there is in such cases a need to do a balancing act between the competing norms to apply them in a complementary fashion. Neglecting to take into account international humanitarian law can lead to nonsensical results such as finding Turkey in violation of the European Convention on Human Rights’ provision on deprivation of liberty in relation to the detention of prisoners of war. In situations where international human rights and humanitarian law appear to be clashing it is

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30 See chapter 2.5.2 for discussion on the extraterritorial application of human rights law.
necessary to take into account the environment in which the norms are being applied; understanding the background and needs of military operations is essential. Questions must be asked as to the practicality of utilising human rights rules in the specific type of military operations, and whether human rights law could instead assist international humanitarian law in enhancing protection and implementation in a way that is practical for stakeholders on the ground. These are but some of the type of questions that should be asked through a harmonisation process, and further points of consideration will be elaborated below. Essentially, what must be done is a combination of understanding the relevance of specific rules in a particular case and the practical context in which the rules are being applied.

In relation to norms of international human rights law and humanitarian law which overlap on the issue and have different content but in which the different rules do not directly clash, it is submitted that generally the most protective norm could in most cases be applied. Likewise, it is also suggested that the most protective rule within either of the two disciplines could be applied when one field is silent on a given issue - providing of course that the rule in question does not clash with the other framework.

It is submitted that to harmonise international human rights and humanitarian law, stakeholders must identify in relation to specific scenarios multiple criteria balancing the reality of conflict with the respect of humanity and protection of individuals. Several criteria or premises should be identified to facilitate a better articulation of the interplay between international humanitarian law and international human rights law and their complementary application. It is suggested that the type of conflict and proximity to the combat zone, the status of individuals affected, the behaviour in which they are engaged, and the type of right (derogable or non-derogable) could, for instance, assist in assessing how the interplay between the disciplines should be articulated. Indeed, stakeholders should question whether the category of conflict at hand should influence decisions. They should consider if the interplay between the two fields should be articulated differently depending on whether the armed conflict is of a non-international or international nature, and if so in what type of situations. The perceived gaps (at least in treaty rules) in non-international armed conflict in matters such as grounds for detention or status of individuals may tilt the balance towards the use of human rights based interpretations
in certain circumstances. Proximity to the combat zone may also have an impact and assist in determining the interplay and interpretation of the applicable rules. In relation to the status of individuals, stakeholders could ask whether international human rights law is the more suitable legal framework when civilians are involved and conversely, whether international humanitarian law will generally be more relevant to situations where members of armed forces are involved. Room must be left, however, for recognising the need for relying upon international humanitarian law rules that impact upon civilians, such as the notion of proportionality and legitimate collateral damage. An additional question which could be examined is whether the type of rights at play should influence the interplay between the disciplines; decisions on complementary application of international human rights and international humanitarian law may be different whether the right discussed is of a derogable or non-derogable nature.

What follows provides a summary of the type of questions and steps that can be used by stakeholders to operationalise the interplay between international human rights and humanitarian law. The following section offers examples of how these steps and questions would apply to particular types of scenarios. Clearly, any process of clarification may wish to add or modify these questions, and the conclusions of a process may differ, based on the views of those taking part in the process.
### Operationalising the Complementary Approach

#### Summary of Suggested Steps

1) **Does international humanitarian law apply at all/ are we in a situation of armed conflict?**

   - If no: No concurrent applicability of international human rights and humanitarian law, examination of interplay stops here.
   - If yes: Continue to step 2.

2) **Identify the relevant rules of international human rights and humanitarian law.**

   If relevant, address issues related to the extraterritorial application of human rights law. Assess if situation is an international or non-international armed conflict and identify treaty and customary humanitarian rules. Continue to step 3.

3) **Compare the rules**

   Assess if the identified norms in the two legal frameworks:
   - Are equivalent
     - If so, international and humanitarian law are in harmony and lead to same conclusion.
     - Clash or Overlap
     - If so, continue to step 4.

4) **Perform balancing act of competing norms**

   Guiding questions for this assessment could include:
   - **Type of conflict**
     - on some issues, perceived gaps in treaty rules for non-international armed conflict might necessitate more use of human rights rules; the type of conflict will also be relevant to the question below on individual status, for example in the case of prisoners of war.
   - **Proximity to combat zone**
     - close proximity to the combat zone might tilt the balance towards greater reliance on international humanitarian law due to better suitability in certain combat contexts.
   - **Status of individuals affected**
     - international human rights law might be more suitable in certain circumstances when civilians are involved and vice-versa if members of armed forces are involved.
   - **Behaviour individual is engaged in**
     - balance could tilt in favour of international humanitarian law when the individual is involved in combat-like behaviour and vice-versa.
   - **Type of rights**
     - non-derogable nature of a relevant international human rights norm might tilt the balance towards that framework.
6.4. Applying the Complementary Approach to Specific Scenarios

This section illustrates how harmonisation of international human rights and humanitarian law could be operationalised by applying the steps discussed above to the issue of the use of lethal force in different contexts, as well as cases of torture and fair trial.

6.4.1 Use of Lethal Force between Combatants during an International Armed Conflict

1) Does international humanitarian law apply? Yes, the situation is one of international armed conflict to which international humanitarian law applies.31

2) What are the rules relevant to the issue at hand?

International Human Rights Law: International human rights law applies but, if the State involved is acting extraterritorially, the scope of obligations may depend on the precise circumstances of the case.32 The primary rule of concern, as found in the International Covenant on Civil and Political Rights, is that “[n]o one shall be arbitrarily deprived of his life.”33

International Humanitarian Law: Under this framework use of force is permitted against combatants, but methods and means of warfare are regulated. International humanitarian law allows targeting of combatants but not intentional targeting of civilians and other protected persons.34 The First Additional Protocol to the Geneva Conventions contains an obligation “to distinguish between the civilian population and combatants and between civilian objects and military objectives”.35

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31 See chapter 2.2.2 for discussion on the qualification of armed conflicts.
32 See chapter 2.5.2 for more details.
34 Wilful killing of protected persons is prohibited and constitute a grave breach of the Geneva Conventions: Convention relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 31, art 50 [thereafter First Geneva Convention]; Convention relative to the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 75 UNTS 85, art 51 [thereafter Second Geneva Convention]; Convention relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135, art 130 [thereafter Third Geneva Convention]; Convention relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287, art 147 [thereafter Fourth Geneva Convention].
35 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (8 June 1977) 1125 UNTS 3, art 48 [thereafter Protocol I]. See also arts 51(2) and 52(2).
humanitarian law also includes rules on precautions in attacks,\textsuperscript{36} on the principle of proportionality\textsuperscript{37} and a prohibition of indiscriminate attacks.\textsuperscript{38}

3) Rules Comparison

There exists a potential clash between international human rights and humanitarian law in relation to the use of lethal force. Indeed, the permitted intentional killing of combatants under international humanitarian law might be seen as clashing with the right to life, and allowing civilian deaths as collateral damage may also clash with the protection of the right to life.

4) Balancing Act

Type of conflict: The rules applicable during an international armed conflict are clear and detailed on the use of force between combatants, and on the protection of civilians – while accepting that a certain number of civilian casualties may occur. Hence, the fact that the situation is one of international armed conflict could tilt the balance towards following humanitarian law standards.

Proximity to combat zone: The use of force between combatants, as well as collateral civilian casualties, take place in a combat zone in this scenario, again tilting the balance towards the international humanitarian law approach to the use of force in this context.

Status of individuals affected: The status of individuals is clearly defined under international humanitarian law in situations of international armed conflict.

Behaviour of individual: In this scenario combatants are engaged in fighting, civilians are not engaged in fighting but they are in close proximity to the combat zone.

Type of right: The right to life is a non-derogable right, but international and regional bodies have acknowledged that what is an arbitrary deprivation of life

\textsuperscript{36} Protocol I, \textit{ibid.}, arts 57-58.
\textsuperscript{37} \textit{Ibid.}, art 51(5)b).
\textsuperscript{38} \textit{Ibid.}, art 51(4).
should be assessed by reference to international humanitarian law during armed conflict.\textsuperscript{39}

\textbf{Conclusion}

There exist clear rules on the use of force under international humanitarian law for situations of international conflict. The clarity of these rules and proximity to the combat zone in this scenario would tilt towards interpreting human rights law in line with international humanitarian law in these circumstances. Respecting the rules on the use of force under international humanitarian law would, therefore, not lead to violations of international human rights law. Indeed, the difference between the humanitarian law rules on the use of force and the protection of the right to life under international human rights law can be solved by interpreting killings in such contexts as non-arbitrary, as was done by the International Court of Justice and other bodies. In relation to the provision on the right to life under the European Convention on Human Rights,\textsuperscript{40} which details the specific grounds legitimising deprivation of life in the European human rights system instead of prohibiting arbitrary deprivation of life, human rights could also be interpreted in light of international humanitarian law as discussed in Chapter 5.2.3.\textsuperscript{41} Civilian casualties occurring within the accepted confines of the humanitarian law principle of proportionality would not be considered in violation of human rights law, as the proximity to the battle zone could be interpreted as affecting the State’s capability to protect them. Intentional or disproportionate civilian casualties would, however, be a violation of the right to life.\textsuperscript{42} Applied in this way, assisted by the steps proposed above, the complementary application of international human rights and humanitarian law produces a result where there is no conflict of rules but a mutually reinforcing conclusion.

\textsuperscript{39} See conclusion of chapter 5.2.3.
\textsuperscript{40} Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 222, amended by Protocols No 3, 5, 8, and 11, art 2(2) [thereafter European Convention on Human Rights]: “Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: a) in defence of any person from unlawful violence; b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; c) in action lawfully taken for the purpose of quelling a riot or insurrection.”
\textsuperscript{41} See conclusion of chapter 5.2.3.
\textsuperscript{42} See example of this approach as demonstrated in the Goldstone report, chapter 5.1.2.
6.4.2 Use of Lethal Force between State Armed Forces and Members of Armed Groups in the Combat Zone during a Non-International Armed Conflict

1) **Does international humanitarian law apply?** Yes, the situation is one of non-international armed conflict to which international humanitarian law applies.\(^{43}\)

2) **What are the rules relevant to the issue at hand?**

    **International Human Rights Law:** International human rights law applies. As this is a non-international armed conflict, extraterritorial application of human rights law will not be a concern in most cases.\(^{44}\) As noted in the previous example, arbitrary deprivation of life is prohibited under international human rights law.\(^{45}\)

    **International Humanitarian Law:** International humanitarian law prohibits attacks on the civilian population in non-international armed conflicts.\(^{46}\) There is a debate over the rules applying to the targeting of members of armed groups. Much of this debate centres upon the status of these individuals and whether or not they should be seen as civilians directly participating in hostilities or as some form of non-civilian fighters,\(^{47}\) making them legitimate targets in non-international armed conflicts.

3) **Rules Comparison**

    There exists a potential clash between protection of life under international human rights and the possibility of direct recourse to lethal force under humanitarian law.

4) **Balancing Act**

    **Type of conflict:** The rules applicable during a non-international armed conflict are not as clear as in situations of international armed conflict due, above all, to the uncertainties around the status of members of armed groups.

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\(^{43}\) See Chapter 2.2.2 for discussion on the qualification of armed conflict.

\(^{44}\) See chapter 2.2.1 but note the possibility for extraterritorial non-international armed conflict, see chapter 2.5.2 note 194 and accompanying text.

\(^{45}\) International Covenant on Civil and Political Rights (n 33) art 6(1).


\(^{47}\) See chapter 2.3.5
Proximity to combat zone: The use of force in this scenario takes place in a combat zone, tilting the balance towards the international humanitarian law approach to the use of force.

Status of individuals affected: As noted above and in Chapter 2.3.5, there is a lack of clarity about the status of members of armed groups in non-international armed conflicts. The ICRC has suggested in its ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’ that “[m]embers of organized armed groups belonging to a non-State party to the conflict cease to be civilians for as long as they remain members by virtue of their continuous combat function.” 48 Under international humanitarian law treaties, there exists in non-international armed conflict no category of combatant, and the advancement of new interpretations and categories of individuals is a matter of debate.

Behaviour of individual: In this scenario the members of the armed groups are engaged in fighting.

Type of right: The right to life is a non-derogable right, but international and regional bodies have acknowledged that what is an arbitrary deprivation of life should be assessed by reference to international humanitarian law during armed conflict.

Conclusion

The harmonisation of international human rights and humanitarian law is more complex in this scenario because of the lack of clarity in international humanitarian law in relation to the status of individuals. While this uncertainty makes it more difficult to have a straightforward recourse to an international humanitarian law-based interpretation in this scenario, most interpretations (whether through the ICRC continuous combat function or the notion of civilians directly participating in hostilities) would allow here for the use of force. The proximity to the combat zone and the behaviour of the individuals would suggest that the international humanitarian law approach would be better suited to the situation. Hence, the

conclusion would ultimately be the same as in the previous scenario. The use of force in this case would not lead to violations of international human rights law. Likewise, the difference between the humanitarian law rules on the use of force and the protection of the right to life in human rights law can be solved by interpreting killings in such a context as non-arbitrary, while intentional killing of protected civilians would still be a violation of the right to life.

6.4.3 Use of Lethal Force between State Armed Forces and Members of Armed Groups away from the Combat Zone during a Non-International Armed Conflict

Steps 1-3) Answers to the applicable rules and potential clashes of the two legal frameworks are the same as the previous example. The crucial factual differences here are that the use of force is occurring away from the combat zone and the members of armed groups are not at that moment engaged in fighting.

4) Balancing Act

Type of conflict: Same answer as previous example.

Proximity to combat zone: This scenario is taking place away from a combat zone, for example in the context of State armed forces confronting a member of an armed group sleeping in his/her home or in a shop in an area where there is no fighting.

Status of individuals affected: Same as previous example.

Behaviour of individual: In this scenario the member of the armed group is not actively engaged in fighting at that moment.

Type of right: Same as previous example.

Conclusion

A strict application of international humanitarian law might conclude that, as in the previous example, the use of force is permissible against members of the armed group regardless of the distance from the battlefield and therefore allow for targeting in those circumstances. The ICRC Interpretive Guidance tried to limit force in such situations by claiming that the principles of military necessity and humanity in international humanitarian law restrict the use of force in these circumstances. The Guidance put forward that:
In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.\(^{49}\)

Such an interpretation is debatable, and many would say not reflective of international humanitarian law as generally understood through the times.\(^{50}\) In effect, the ICRC interpretation was more in line with international human rights law. Rather than introducing human rights law through the back door by dressing it up as international humanitarian law, a complementary approach that explicitly recognises the influence of human rights could and perhaps should have been utilised. Indeed, it is suggested here that when we have debates over the status of members of an armed group, no proximity to the combat zone, and no current combat behaviour, the combination of all three can shift the balance to a result different from the previous combat zone example. The influence of human rights would require an international humanitarian law interpretation that does not view individuals in these circumstances as legitimate targets.\(^{51}\) The complementary approach in this case would limit the direct resort to lethal force and require an attempt to detain, using only a gradual scale of force.

### 6.4.4 Case of Torture of Members of Armed Forces in International Armed Conflict

1) **Does international humanitarian law apply?** Yes, the situation is one of international armed conflict to which international humanitarian law applies.

2) **What are the rules relevant to the issue at hand?**

**International Human Rights Law:** International human rights law applies.\(^{52}\) The International Covenant on Civil and Political Rights stipulates that “No one shall be

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\(^{49}\) *Ibid.*, 1040


\(^{51}\) See debates over direct participation in hostilities and status of members of armed groups, chapter 2.3.5.

\(^{52}\) See Chapter 2.5.2. Human rights bodies support the applicability of the prohibition also in extraterritorial circumstances, and the Convention against Torture places obligations on States with regard to accountability for their nationals committing violations of this prohibition abroad.
subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was also adopted by the United Nations in 1984. It states:

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

International Humanitarian Law: Torture in situations of international armed conflict is prohibited by the four Geneva Conventions and Additional Protocol I. Humanitarian law treaties do not provide a definition of torture. In the Kunarac case, the International Criminal Tribunal for the former Yugoslavia put forward that:

the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law. In particular, the Trial Chamber is of the view that the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law.

3) Rules Comparison

While the ICTY has stated that a State official or other authority presence is unnecessary for an act to constitute torture, this does not create a clash with the prohibition of torture under human rights law in the current circumstances. The difference is very much linked to the fact that international humanitarian law is


Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 52) art 1.

First Geneva Convention (n 34) art 12; Second Geneva Convention (n 34) art 12. Third Geneva Convention (n 34) art 17; Fourth Geneva Convention (n 34) art 32. Protocol I (n 35) art 75(2). Torture is also prohibited in situations of non-international armed conflict through the Geneva Conventions (n 34) Common Article 3, and Protocol II (n 46) art 4(2).

considered to bind non-state actors, and this must therefore be reflected also in the way international humanitarian law addresses cases of torture. While it widens the list of potential perpetrators, it does not alter the definition of the act of torture itself. Moreover, the second paragraph of Article 1 of the Convention against Torture accepts the possibility of wider application in other instruments. The definition of torture under the Convention against Torture has been described as reflecting customary international law, applicable also during armed conflict.

4) Balancing Act

**Type of conflict:** International armed conflict; the rules applicable during an international armed conflict to cases of torture are clear: torture is always prohibited.

**Proximity to combat zone:** Torture would be prohibited both within and away from the combat zone.

**Status of individuals affected:** The status of individuals is clearly defined and, moreover, torture would be prohibited regardless of status.

**Behaviour of individual:** In this scenario the members of the armed forces were engaged in fighting before being captured. This however does not affect the clear prohibition of torture.

**Type of right:** The prohibition of torture is absolute and non-derogable.

**Conclusion**

In the ICTY Furundzija case, the Trial Chamber examined the issue of torture under both international human rights and humanitarian law and stated that:

The prohibition of torture laid down in international humanitarian law with regard to situations of armed conflict is reinforced by the body of international treaty rules on human rights: these rules ban torture both in armed conflict and in time of peace. In addition, treaties as well as resolutions of international organisations set up mechanisms designed to ensure that the prohibition is implemented and to prevent resort to torture as much as possible.

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57 See chapter 2.2.2.
59 *Prosecutor v Furundzija* (Judgment) IT-95-17/1-T (10 December 1998) para 143.
In addressing the definition of torture, the ICTY examined international humanitarian law, as well as human rights treaties and jurisprudence on the issue of torture. The judges for example refer to human rights jurisprudence before providing that “under international criminal law rape may acquire the status of a crime distinct from torture”. Indeed, there is cross-reliance on the definition of torture between international and regional bodies covering armed conflicts and human rights cases. In practice, the prohibition of torture is equivalent under international human rights and humanitarian law, and norms simply accumulate in the case of torture – whether the torture takes place in an international or non-international armed conflict, in or outside the combat zone or involves individuals engaged or not in hostilities. The harmonisation of international human rights and humanitarian law is straightforward in this scenario due to the clarity of the rule in both fields and the fact that the prohibition is absolute.

6.4.5 Protection of Fair Trial Guarantees (the Element of Impartial Tribunal) in a Situation of International Armed Conflict

1) Does international humanitarian law apply? Yes, the situation is one of international armed conflict to which international humanitarian law applies.

2) What are the rules relevant to the issue at hand?

International Human Rights Law: International human rights law applies, but if the State involved is acting extraterritorially the scope of obligations may depend on the precise circumstances of the case. Article 14(1) of the International Covenant on Civil and Political Rights provides for the protection of basic fair trial guarantees and stipulates that:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

60 Furudzija, para 164. See also 165 ss.
61 International Covenant on Civil and Political Rights (n 33) art 14(1).
There is also wide human rights jurisprudence which defines what constitutes “a competent, independent and impartial tribunal established by law.” The Human Rights Committee for instance noted in relation to military courts that:

As far as the alleged violation of article 14 of the Covenant is concerned, the Committee recalls its general comment No. 13, in which it states that, while the Covenant does not prohibit the trial of civilians in military courts, nevertheless such trials should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. It is incumbent on a State party that does try civilians before military courts to justify the practice. The Committee considers that the State party must demonstrate, with regard to the specific class of individuals at issue, that the regular civilian courts are unable to undertake the trials, that other alternative forms of special or high-security civilian courts are inadequate to the task and that recourse to military courts is unavoidable. The State party must further demonstrate how military courts ensure the full protection of the rights of the accused pursuant to article 14.

International Humanitarian Law: Under this framework, article 75 of the First Additional Protocol to the Geneva Conventions provides for the protection of fair trial guarantees. This includes the protection of rights before trial such as the presumption of innocence and the right to be informed of one’s offence, as well as rights during trial including the rights to a defence and to be tried within reasonable time. The issue of concern in this scenario is found in article 75(4) stating that:

No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure […].

Article 84 of the Third Geneva Convention relative to the Treatment of Prisoners of War stipulates that:

A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.

64 Protocol I (n 36) art 75(4).
In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized [...].  

Article 66 of the Fourth Geneva Convention states that:

In case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64 the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country.

3) Rules Comparison

There exists a clear substantive overlap between international human rights and humanitarian law in relation to fair trial guarantees. International human rights law generally provides more details on several of these guarantees, including on what is needed to meet the requirement of an independent and impartial tribunal. There could, however, be some clash as interpretations by human rights bodies restrict the use of military courts or judges in certain circumstances, whereas the Third Geneva Convention specifically stipulates that prisoners of war must be tried by military courts, and the Fourth Convention allows for this with regard to civilians in occupied territory.

4) Balancing Act

Type of conflict: International armed conflict, in which there are rules applicable under international humanitarian law but lacking the details on fair trials which have been established through human rights instruments and jurisprudence.

Proximity to combat zone: The trial takes place outside a combat zone in this scenario. In the case of the Fourth Geneva Convention, the fact that a trial occurs within occupied territory is linked to the use of military courts.

Status of individuals affected: The status of individuals as prisoners of war or civilians is clearly defined under international humanitarian law in situations of international armed conflict.

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65 Third Geneva Convention (n 34) art 84.
66 Fourth Geneva Convention (n 34) art 66.
Behaviour of individual: In this scenario individuals are not engaged in fighting.

Type of right: Elements of the right to a fair trial, at least in part, acquired *de facto* non-derogable standing in relation to the International Covenant on Civil and Political Rights.68

**Conclusion**

There exist fair trial guarantees under international humanitarian law for situations of international conflict. Human rights practice provides more details and should be used to interpret fair trial guarantees under international humanitarian law, including the meaning of the notion of ‘impartial tribunal’. Although not listed in the ICCPR provision on non-derogable rights, the *de facto* non-derogability of certain fair trial guarantees is bolstered by their inclusion within international humanitarian law;69 this understanding is one more example of complementarity in action. A complementary approach that explicitly recognises the difference in individual status could be utilised here. The civilian status would tilt the balance toward the human rights practice and require that, as a general rule, civilians be tried in civilian courts.70 Although the Human Rights Committee recognises other possibilities in exceptional circumstances, it appears to lean towards the approach preferred by regional human rights bodies, which restricts the use of military courts for trials of civilians.71 Prisoners of war could still be tried in military courts which would otherwise ensure the protection of fair trial rights – including impartiality and independence from the chain of command to the extent possible within the military framework – and would thus be considered acceptable in these specific circumstances under human rights law. Once again, the complementary application of international human rights and humanitarian law would produce results where there is no conflict of rules but a mutually reinforcing conclusion.

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69 Ibid.
70 An alternative view might be to accept that in exceptional circumstances total separation from the military might be unrealistic, but certain safeguards would be required, such as complete independence from the military chain of command.
6.5. Establishing a Process

It is suggested that, as a further and vital step for advancing the complementary approach, human rights and humanitarian law experts must recognise the different problems with the concurrent application of the two fields and join forces to address them together, with each one taking into account the ramifications for the other. This must occur in a consultative process which includes States, the International Committee of the Red Cross, human rights bodies and independent experts. This constitutes a central phase in moving forwards in a practical manner. As noted in the Hampson-Salama working paper, “[i]n an expanding international community deprived of legislative authority and faced with existential challenges, such structured interdisciplinary debates are more important than ever.”\(^\text{72}\) Indeed, the importance of establishing a mechanism, initiative or process to advance the complementary approach and clarify the relationship between international human rights and humanitarian law at the practical level cannot be overstated. The outcome of such a process, combined with emerging case-law from international bodies, could potentially not only supply further theoretical foundations for the complementary approach, but also include practical guidelines based on specific sets of circumstances, such as differentiating between situations in which force is used, or in detention cases.\(^\text{73}\)

One suggestion, for instance, is that a working group or advisory unit could be established at the UN level “to deal with the multidisciplinary questions arising from IHL in relation to human rights law and to serve as an advisory unit to enhance complementary and structured dialogue with Member States, the ICRC and NGOs to that end.”\(^\text{74}\) Various additional formats should also be considered. Different models could be used to operationalise the complementary approach and harmonise international human rights and humanitarian law. Looking at practice in related areas in recent years, the formats of the Copenhagen Process and of the ICRC meetings of experts stand out as models worthy of consideration and will therefore be examined as potential formats for a new process.

\(^{72}\) Hampson and Salama (n 21) para 35.


\(^{74}\) Hampson and Salama (n 16) para 35.
The Copenhagen process on the Handling of Detainees in International Military Operations was established in 2007. Denmark initiated the process to clarify the issues relevant to the handling of detainees recognizing that *ad hoc* solutions were not an acceptable way to deal with such issues and that legal certainty was essential “to ensure both the protection of the detainees in all types of military operations and the effectiveness of the military operations.”\(^{75}\) In the Non-Paper on Legal Framework and Aspects of Detention, the Ministry of Foreign Affairs of Denmark identified one of the questions at the core of the Copenhagen Process, stating that:

The main challenge is a basic one: how do troop-contributing States ensure that they act in accordance with their international obligations when handling detainees, including when transferring detainees to local authorities or to other troop-contributing countries?\(^{76}\)

The reasoning behind this process could also be applied to issues for which the clarification of the interplay between international human rights and humanitarian law is needed. As noted by the Ministry of Foreign Affairs:

There is a risk that military forces adopt an *ad hoc* approach - considering a mixture of applicable international and domestic laws - which may lead to confusion and uncertainty on some issues. Although the handling of detainees in international military operations is not a new issue, there is not one specific legal system or political framework that applies to all situations relating to detainees. It is therefore very important to have both a clear mandate on the right to detain and clear rules for soldiers (Rules of Engagement and operational orders and procedures) on how to handle and treat detainees. Otherwise such uncertainties may lead to unacceptable treatment of detainees and may at the same time restrain the conduct of the military operation.\(^{77}\)

The Copenhagen Process has consequently developed with the aim to “form a common platform and framework for the handling of detainees in military situations.”\(^ {78}\) To start the Process, a first Copenhagen Conference on Detention was held in October 2007 with “representatives from Argentina, Australia, Belgium, etc.”

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Canada, Denmark, France, Germany, ICRC, the Netherlands, NATO, New Zealand, Nigeria, Norway, Pakistan, South Africa, Sweden, United Kingdom, the UN and the United States of America.”

To support this first event, the Non-Paper on Legal Framework and Aspects of Detention was produced and it examined several aspects, including legal and operational, of the handling of detainees. In May 2008 a Seminar was organised to identify best practice in relation to handling of detainees. A Second Copenhagen Conference was held in 2009, which led to the production of an outcome document aiming “to produce a catalogue of best practices guidelines, which will provide guidance for balancing international humanitarian law and human rights law governing persons detained in military operations.” It is foreseen that another Copenhagen Conference will be held in 2012 before concluding the Process.

Twenty States involved in international military operations have been involved in the Copenhagen Process, as well as the United Nations, the European Union, the African Union, NATO and the ICRC. While a few representatives have been invited to contribute, the Copenhagen Process has been criticised for excluding civil society and human rights organisations from its work. According to Ambassador Winkler, legal adviser at the Ministry of Foreign Affairs of Denmark, the Copenhagen Process “is a ‘closed process’, but it is not secret.” Nonetheless, most of the results and material yielded by the process are not yet public.

The work of the International Committee of the Red Cross has been vital in clarifying complex issues in international humanitarian law. The ICRC has for years now been organising meetings of experts on a number of topics relevant to their mandate, including security detention, multinational peace operations, direct

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79 Ministry of Foreign Affairs of Denmark (n 75) 2.
80 Winkler (n 78) 2-3.
83 Winkler (n 78) 3.
participation in hostilities and occupation. The ICRC often holds these meetings of experts in collaboration with other institutions, which have included for instance the International Law Center at Case Western Reserve University, the University Centre for International Humanitarian Law, Chatham House and the TMC Asser Institute.

The format of the different ICRC meetings of experts is often similar from one initiative to the other. Indeed, a series of meetings is usually organised on one specific theme over a period of months or years. These meetings involve “academic experts, military legal advisors, representatives of international organisations and ICRC lawyers.” Specific issues related to the main theme, and their legal and operational ramifications are discussed by the expert participants usually over two-day meetings. These meetings lead to reports examining the relevant applicable legal frameworks and rules, the problems of applicability and implementation, as well as the interplay between international humanitarian law and other legal regimes (including international human rights law where deemed relevant). The reports present the positions (usually without direct attribution in order to maintain confidentiality and ensure open discussion) of the different participants in the meetings. The expert meetings can also lead to the production of guidelines.

Both the Copenhagen Process and the ICRC expert meetings have included various matters that could be considered by a process on the clarification of the interplay between international human rights and humanitarian law. But before the substantive issues can be addressed, it is vital that a format for the process is decided upon, in which all stakeholders are involved. This format is essential as it is only with the involvement of all stakeholders and common agreements on solutions that such a complementary approach can be operationalised. Any other model, proposed and implemented without such consultation, will remain conceptual, and will not have the necessary credibility and impact.

It is submitted that three questions should be asked to determine what should be the appropriate format of the clarification process in the interplay between international human rights and humanitarian law. These questions are: (i) what themes should be addressed; (ii) who should take part; and (iii) what should be the outcome(s) of such process. As suggested in the previous sections of this Chapter, although it cannot cover every potential future case, a clarification process can identify types of circumstances or scenarios for which general guidelines can be produced in advance. Issues in need of clarification have been discussed all through this study. These include amongst others: the use of force against individuals (differentiating between situations involving combatants and civilians, in combat zone or away from it, and, for instance, situations of crowd control during riots); fair trial guarantees; administrative and security detention; the administration of occupied territories; and the question of investigation and accountability for violations.

To ensure the credibility of the outcomes, the clarification process would need to include recognised experts from all areas in law and practice. To ensure that the process will have an impact, it must involve representatives of the bodies that are expected to implement the complementary approach. The ICRC has had processes on some of the topics identified above as being in need of clarification. However, there are a number of reasons for the ICRC meetings not being sufficient for the current objective of operationalising the complementary approach and harmonising international human rights and humanitarian law. The ICRC is by definition a humanitarian law organisation. Hence, their discussions are focussed on the clarification of international humanitarian law, even when recognising the relevance of human rights law. Following this, although there is some representation of the human rights world, the participation in the ICRC meetings of experts is weighted in favour of international humanitarian law experts and ICRC participants, with a primary objective of providing guidance to the work of the ICRC. Accordingly, while many of the topics addressed by the ICRC for their expert meetings are in line with some of the topics in need of clarification in relation to the interplay between international human rights and humanitarian law, a different format must be chosen. In fact, it is submitted that the format of such a harmonisation process could be
closer to the model of the Copenhagen Process, but should be more inclusive and fully involve human rights bodies.

The purpose of establishing a clarification process and developing a complementary approach to the interplay between international human rights and humanitarian law has been addressed throughout this study. As noted, the purpose of the clarification process is quite similar to that of the Copenhagen Process. Simply put, lack of legal certainty in situations of armed conflicts is undesirable for combatants and commanders on the grounds, for individuals caught in the middle of fighting and for international bodies involved in assessing violations and reviewing situations of armed conflict. Such uncertainties necessarily lead to ad hoc decisions and confusion on the obligations States must uphold. It is submitted that an all-inclusive group of experts could be established to participate in thematic expert meetings over a period of years. It is suggested that the same core group of experts should take part in all meetings in order to ensure continuity in the Process. A number of additional thematic experts could be invited when different themes are examined. The outcomes of this Process could include best practice, guidelines and/or booklets for each theme addressed. As suggested in the previous section, these documents should provide a blueprint of questions to ask when faced with the different issues where the interplay between international human rights and humanitarian law is concerned. Rather than attempting to negotiate and formally ratify the documents (such attempts are more likely to backfire or lead to watered-down formulations), the aim should be the production of tools, much like soft law, used to shape practice and policies, which would evolve into accepted practice and become widely recognised as the correct interpretations of the law.

The choice of lead institution(s) for the clarification process should be guided by the need for the process to encompass all views. As such, it is suggested that it may be better to avoid having a humanitarian law organisation such as the ICRC or a human rights non-governmental organisation leading the process. One possibility which would be seen as more neutral could be that an academic institution, a group of academic institutions, or an independent think-tank (such as Chatham House) could direct the process, although there is a risk of such a format carrying less weight with States. State-led initiatives, similar to the Copenhagen Process, could also be considered. Lastly, having a UN-led process could be a desirable option. Indeed the
establishment of a process along the lines of the Fundamental Standards of Humanity initiative could be considered. As discussed in Chapter 5, this initiative followed on from the Declaration of Minimum Humanitarian Standards which was developed by a group of independent experts convened by the Institute for Human Rights at Åbo Akademi University. Following this experience, the United Nations could be a possible host for the clarification process. The risk that would have to be addressed, and has sometimes been associated with aspects of the UN Human Rights Council, is that the process could become politicised. Careful attention would have to be given to the formation of a UN-led process and its rules of operation, in order to minimise jeopardising the process.

The process of harmonising international human rights and humanitarian law needs to take account of what is capable of being applied on the ground. In order to have value, the complementary application of the two fields cannot be disconnected from the reality of armed conflict. Such an approach will only serve its purpose of better articulating the interplay between the two if it takes into account the complexity and specific aims of both disciplines, and if it is considered practical enough to be applied in conflict situations.

Unlike the vertical approach previously discussed, the complementary approach applied in the fashion presented in this chapter would mean that the balance and interplay between international human rights and humanitarian law will never be exactly the same in each case, since the answers to the questions and steps that have and will be identified can differ in various types of situations. What will remain the same for all cases or scenarios will be the acceptance that both branches of international law apply concurrently, and that the interplay is determined on the basis of the same questions and concerns each time. In effect, what is proposed is not a requirement that human rights law gives way to humanitarian law or vice-versa on account of a top-down principle of legal theory. Rather, it is that human rights law or humanitarian law, when necessary, are interpreted in such a way as to take the realities on the ground into account, and thus find their rules naturally aligned with the other body of law. Once this is accepted, the same guiding questions will be used in order to determine the most suitable interpretation for any type of situation, and

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solutions that can be implemented in practice. Although there are virtually endless potential scenarios, it is still possible – and vital – to identify in advance certain types of circumstances, such as those mentioned. A process can be created in which all stakeholders can consider these guiding questions in light of the types of situations which may occur, and agree in principle about solutions to be adopted. Ultimately, what is most important is that the process produces tools that can guide the complementary application of international human rights and humanitarian law and assist with the implementation of the two frameworks by all stakeholders.
Since the entry of human rights into the realm of public international law, much has been written and said on the relationship between international human rights and humanitarian law. It has been agreed over time that it is no longer desirable or feasible to consider international humanitarian law and international human rights law completely separately from one another. Wide agreement, even if not universal, exists as to the need to apply both fields concurrently. The precise mode of application and how this interaction is to work in practice remains, however, unresolved. The challenges in addressing this question have been increasingly highlighted in the past decade. While much material has been produced on the interplay between the two international legal frameworks, wide gaps remain in our understanding of the issues and in the literature on this topic. In part, such gaps arise from the complexity of the relationship between the two disciplines, as well as the existing problems within each legal framework. This can be overcome, as demonstrated in this study, through an in-depth analysis of the interplay providing a coherent direction for the development of a complementary approach.

Part I provided the background upon which the relationship between the disciplines can be understood and their complementary application can be built. It addressed how the two disciplines evolved separately and explained how, over time, a consensus was built on the need to bring international humanitarian law and international human rights law closer together. It showed that from the 1960s, this shift of ethos was put into action and important steps were taken towards developing the relationship between international human rights and humanitarian law; from then on, bridges started to be built between the two legal frameworks. Part I also examined to what, for whom, where and when, international humanitarian law and international human rights law are applicable. It explained the preconditions for the applicability of each discipline, discussed the jurisdictional overlap and difference between the disciplines, and the ensuing need to articulate their relationship. It highlighted how the classification of armed conflict and type of protected person under international humanitarian law, as well as the extraterritorial application of international human rights law, have a direct impact on the concurrent application and interplay of the two fields.
Part II of this study introduced the different positions that emerged over the years on the interplay between the disciplines, i.e. the separatist, integrationist and complementary approach. It discussed the arguments supporting these stances and some of the apparent reasons leading to the mainstream support of the partnership between international human rights and humanitarian law instead of their compartmentalisation. It explained the movement towards a new phase of the relationship between international humanitarian and human rights law: that of developing an understanding of their interplay and concurrent application. Part II also examined the articulation of the concurrent application of international humanitarian law and international human rights law by the International Court of Justice. It discussed the use of the *lex specialis* principle by the International Court of Justice, and explored the characteristics of the theory of *lex specialis*, while providing critical appraisal of its application in international law. It questioned the idea that the *lex specialis* principle, which has been for many years the main theoretical model used, can actually clarify the interplay and facilitate the co-application of international human rights and international humanitarian law. It further highlighted how problems remain overlooked by implementing bodies, as well as authors, especially in relation to the mechanics of the interplay and its legal and theoretical underpinnings.

Part III examined how the concurrent application of international human rights and humanitarian law unfolded and continues to unfold in practice. It addressed the work of various UN human rights and regional bodies, as well as the ICRC study on customary international humanitarian law. It discussed circumstances where the concurrent application of the two legal frameworks was implemented in a parallel manner and other instances where they have been applied in a complementary manner in such a way as to interpret one discipline in light of the other. Part III offered a comparative analysis assessing practice. It highlighted commonalities and differences, as well as challenges faced by institutions in the articulation of the interplay. It further discussed how the complementary movement and partnership between the two legal frameworks is currently developed. Part III also sought to pave the way for the use of the complementary approach in practice. It demonstrated why vertical top-down approaches, relying on single general principles, cannot provide an adequate solution to the interplay between the regimes.
It clarified what is in fact meant by the complementary approach and how it can be implemented with due regard to the multiplicity of widely varying circumstances. It stressed the need for a flexible approach capable of remaining true to the objectives of each body of law while recognizing the reality on the ground. Part III offered a number of steps that could assist in operationalising the complementary approach through an outline of guiding questions and examples of how this could work in practice.

The study sought to contribute to the clarification of the relationship between international human rights and humanitarian law by examining their interplay in a holistic manner. It examined where each discipline comes from, how their interplay has been articulated and how different institutions have co-applied the legal frameworks. It sought to assist in developing a more coherent approach to their concurrent application, positioning the complementary approach to international human rights and humanitarian law as the best basis for the interplay. This study examined the relationship between international human rights and humanitarian law through different angles, and addressed challenges that must be considered in moving forward to advance the practice of the complementary application of the two frameworks. Throughout the study it was stressed that in order to have value, the interplay between the disciplines cannot be disconnected from the reality of armed conflict; there is a need to take into account the specific aims of both disciplines. The study offered guiding points to implement the co-existence of the disciplines in a manner which is consistent and practical.

Over four decades have now passed since the Tehran Conference and the shift of ethos by which the international community realised that international human rights and humanitarian law cannot be applied in such a way as to ignore the ramifications of their co-existence and interplay. Stakeholders must now meet again to agree on workable solutions for concrete scenarios already occurring in conflict situations, where both legal frameworks apply. The analysis and suggestions provided in this study clearly demonstrate that the complementary approach goes beyond a conceptual notion, and is in fact a feasible and practicable approach that incorporates the objectives of both bodies of law, as well as the realities of implementing them in practice. The complementary approach must now be fully operationalised and consistently adopted.
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