The Role of International Human Rights Law in Improving the Law of Internal Armed Conflict

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Both human rights law and international humanitarian law stem from the general principle of respect for human dignity and is the very raison d'être of human rights law and international humanitarian law; indeed in modern times this principle has become of such paramount importance as to permeate the whole body of international law.[1]

Abstract

Sometimes international humanitarian law (IHL) seems incompatible, if not contrary to internal war because rules designed for international conflict may not be applied straightforwardly to internal armed conflicts. To rectify this legal problem, international and regional tribunals have recently decided various cases concerning internal conflicts by applying international human rights law (IHRL). This implies that we should reconsider the role of human rights in improving the law of internal armed conflict. In some regions, including much of Europe, routine compliance with IHRL has been achieved. Parallel to this global trend, commentators such as the International Committee of the Red Cross (ICRC) are strongly advocating that human rights law have a role in filling gaps in the law concerning internal armed conflict.

Key Terms: Armed conflict, Geneva Conventions, Protocol II, Human rights, Humanitarian law

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[1] International Criminal Court for Yugoslavia (ICTY), *Prosecutor v. Dusko Tadic,* Decision on the Defense Motion for Interlocutory Appeal on jurisdiction, IT-94-1-AR72, 2 Oct. 2005, Para. 127.

Introduction

Arguments about the application of international human rights law have often focused on the question of whether this body of law applies during armed conflict, and if so, how the two bodies of law, i.e. IHL and IHRL can complement each other? While some states did not acknowledge the application of human rights to conduct of internal conflict, different practices indicate that human rights law is broadly accepted as a legitimate basis on which the international community can supervise and respond to interaction between a state and its citizens.[2]

This article takes the increasing applicability of human rights law as a starting point and proceeds to lay out some of the challenges and obstacles encountered during the application of IHRL, as these still need to be addressed. Despite the challenges, this article supports the role of IHRL in improving the law of internal conflict. The first section of the article will introduce the definition of internal armed conflict and explain the existing applicable laws. This section also discusses the challenges of these laws in regulating internal conflict and their gaps. The second section will examine the interplay between IHL and IHRL. The third and fourth sections will

[2]T. Meron, 'The Humanization of Humanitarian Law,' *American Journal of International Law , Vol. 94,* 2000, p. 272. The UK acceded to the Geneva Conventions of 1949 on 23 Sept.1957 and to Protocols I and II on 28 Jan. 1998 (but with a reservation undercutting Protocol I's application to national liberation movements). See http://www. icrc.org/ihl; M Jenks, *The Conflict of Law-Making Treaties*, 1953, p . 450.

discuss the general application and court enforcement of human rights law in internal armed conflict. The article will end with concluding notes.

1. General Overview of the Conceptual and Legal Framework of Internal Armed Conflict

1.1. Internal Armed Conflict: An Overview of the Concept

There are many definitions of internal conflict and civil war.[3] Protocol II addition to the four Geneva conventions provides that to constitute an internal armed conflict:

> *[The conflict] must 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.*[4]

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[3] The characterization of the situation in Croatia was dealt with in the judgments of both Trial Chamber and the Appeal Chamber in the *Kunarac* case. The ruling of the Trial Chamber on the status of the situation as one of armed conflict was upheld by the Appeal Chamber. Both chambers refer to the *Tadic* definition of non-international armed conflict in discussions relating to the applicability of Article 3 of the ICTY Statute. See ICTR, *Prosecutor* v. *Kunarac* , *Kovac and Vukovic* , Trial Chamber Judgment, 22 February 2001, Case No. IT-96-23. Para. 402. The status of the situation in Croatia was also dealt with in the *Furundzija* case. Here, the *Tadic* definition of non-international armed conflict was applied in determining the existence of armed conflict between the Croatian Defense Council and the Army of Bosnia and Herzegovina during May 1993. See Anto Furundzija, *Prosecutor* v. *Furundzija* , Trial Chamber Judgment, 10 December 1998, Case No. IT-95-17/1, para. 59.

[4] Protocol II Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, article 1 (1), Dec. 12, 1977, art. 1(1),1125 U.N.T.S. 609 (entered into force Dec. 7, 1978)

The ICTY Appeals Chamber has further refined this definition, *inter alia*, in its landmark decision, Prosecutor v. Dusko Tadic a/k/a “Dule”.[5] Among other things, the ICTY Appeals Chamber provided useful clarifications regarding the appropriate geographic and temporal frames of reference for internal armed conflicts. Moreover, one widely accepted definition comes from the Peace Research Institute, Oslo and its research partner, the Uppsala Conflict Data Program. They define internal conflict as contested incompatibility between a state and internal opposition concerning government or territory, where the use of armed force between the parties results in at least 25 battle-related deaths per year, civilian and military.[6] Internal wars or civil wars, by contrast, are larger intrastate conflicts with at least 1,000 battle-related deaths per year.[7] Therefore, the term internal armed conflict refers to all armed conflicts that cannot be characterized as either international armed conflicts Or Internationalized Internal Armed Conflicts or wars of national liberations.

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[5] *Prosecutor v. Dusko Tadic,* supra note 1, paras. 66-70 (2 Oct. 1995).

[6]Nicholas Sambanis, What is Civil War?: Conceptual and Empirical Complexities of an Operational Definition, *Law Journal*, Vol. 48, 2004, P. 814.

[7] Nils Petter Gleditsch, Armed Conflict 1946-2001: A New Dataset, *Law Journal,* Vol. 39, 2002, P. 619. The research institute expressed that “In our survey, we include studies of civil war, and we also consider some research on large-scale political violence, which is measured by deaths (in the context of political action), but with no requirement of an organized opposition group. Different definitions matter enormously in statistical studies, often yielding very different findings.” See, *ibid,* Nicholas Sambanis,

1.2. The Legal Framework Governing Internal Armed Conflicts

Generally, international laws applicable to internal armed conflicts include:

- Article 3 common to the Geneva Conventions of 1949 as basic principles of internal humanitarian law;[8]
- Protocol II and all other conventions applicable to non-international armed conflicts;[9]
- Customary principles and rules of international humanitarian law on the conduct of hostilities and the protection of victims applicable to internal armed conflicts;[10]

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[8] The International Court of Justice held that "article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity'." See ICJ, Nicaragua v. United States of America, Merits, Judgment*, 1986*, Para. 218.

[9] Protocol II to the Geneva Conventions, pertaining to internal armed conflict, arguably resolved much of the controversy surrounding the definition of armed conflict in Common Article 3. Because of clear deficiencies in the international legal machinery regulating internal armed conflict, the ICRC and many states party to the Geneva Conventions undertook efforts to reaffirm and develop the scope and substance of humanitarian law. These efforts culminated in two additional protocols to the Geneva Conventions. Protocol I expanded the definition of international armed conflict to include internal wars of national liberation; and clarified many important substantive provisions of the Geneva Conventions. In an effort to develop and supplement Common Article 3, Protocol II expanded the rules applicable in internal armed conflicts. See supra note 2.

[10] Customary international law is one of the main sources of international legal obligations. As indicated in the Statute of the International Court of Justice, international custom is defined as evidence of a general practice accepted as law. Thus, the two components in

- The principles and rules of international law guaranteeing fundamental human rights;[11]
- The principles and rules of international law applicable in internal armed conflicts, relating to war crimes, crimes against humanity, genocide and other international crimes ;[12] and
- The principles of international law "derived from established custom, from the principles of humanity and from dictates of public

customary law are State practice as evidence of generally accepted practice, and the belief, also known as *opinio iuris,* that such practice is obligatory. See in this respect the decision of the International Court of Justice on the *North Sea Continental Shelf Cases, Federal Republic of Germany v. Denmark; Federal Republic of Germany v.The Netherlands, Reports 1969*, p. 3. For a detailed analysis of customary rules of international humanitarian law, see Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, International Committee of the Red Cross, Cambridge University Press, 2005, pp. 244-256.

[11] Ian Brownlie, for instance, explains that a subject of the law is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims". Ian Brownlie, *Principles of Public International Law*, 6th ed. ,Oxford, Oxford University Press, 2003, p. 57. See also ICJ, *Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion, Reports 1949, p. 174.

[12] See, for example, resolution 1894, 2009, in which the Security Council, while recognizing that States bear the primary responsibility to respect and ensure the human rights of their citizens, as well as all individuals within their territory as provided for by relevant international law, reaffirms that parties to armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of civilians, and demands that parties to armed conflict comply strictly with the obligations applicable to them under international humanitarian, human rights and refugee law. Certain gross or serious violations of international human rights and humanitarian law have been considered of such gravity by the international community that they have been regulated under international criminal law, establishing individual criminal responsibility for such acts. International criminal law is a body of international rules designed to proscribe certain categories of conduct and to make those persons who engage in such conduct criminally liable. See Antonio Cassese, *International Criminal Law*, 2nd ed. Oxford, Oxford University Press, 2008, p. 3.

conscience. [13]

As a reflection of a historical bias in IHL towards the regulation of inter-state warfare, the1949 Geneva Convections and the 1977 Protocols contain close to 600 articles, of which only Article 3 common to the 1949 Geneva Convections and the 28 articles of Protocol II apply to internal conflicts.[14]

1.2.1. Common Article 3 of the Geneva Conventions

Common article 3 requires parties to the Conventions to respect the integrity of persons who are not directly involved in the hostilities. The Article is virtually a convention within a convention. It imposes fixed legal obligations on the parties to an internal conflict for the protection of persons not, or no longer, taking an active part in the hostilities.[15]

Unlike human rights law**,** which restrains violations inflicted by a government and its agents, the obligatory provisions of article 3 expressly bind both parties to the conflict, i.e., government and dissident forces.[16] Moreover, the

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[13]The Special Rapporteur indicated that it is increasingly understood, however, that the human rights expectations of the international community operate to protect people, while not thereby affecting the legitimacy of the actors to whom they are addressed. The Security Council has long called upon various groups that Member States do not recognize as having the capacity to formally assume international obligations to respect human rights. See E/CN.4/2006/53/Add.5, Paras. 25–27.

[14] Henckaerts and Doswald-Beck, *supra* note 10.

[15] T Junod, Additional Protocol II: History and Scope*, American University Law Review*, Vol. 29, 1983, p.30

[16] M Lysaght, The Scope of Protocol II and Its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments*, American University. Law.*

obligation to apply article 3 is absolute for both parties and independent of the obligation of the other party.[17] Although article 3 automatically applies when a situation of internal armed conflict objectively exists, the International Committee of the Red Cross (ICRC) is not legally empowered to compel the warring parties to acknowledge the article's applicability.[18]

Significantly, article 3 is the only provision of the four Geneva Conventions that directly applies to internal armed conflicts. Here, the conflicting parties have no legal obligation to enforce, or comply with the well developed protections of the other articles of the Conventions that apply exclusively to international armed conflicts.[19]

1.2.2. Additional Protocol II

The prevalence of internal conflicts in place of international ones made more apparent the need for an adequate body of law governing such conflicts. In

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Review. Vol. 29/12, 1983, p. 33. The generic term "dissidents" is used in this article to designate the party opposing governmental authorities in an internal conflict.

[17] Junod, *supra* note 15.

[18] Although the expression an armed conflict of a non-international character is not defined in the Geneva Conventions, Pictet states that "[t]he conflicts referred to in Article **3** are armed conflicts, with armed forces on either side engaged in hostilities conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country." See J. Pictet, Commentary on the Geneva Conventions, Geneva Convention Relative to the Treatment of Prisoners of War, article 3, Vol. 111, Aug. 12, 1949.

[19] Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, P. 89.

1974 the ICRC convened a diplomatic convention to develop additional, more detailed rules for internal and international armed conflict.[20]

Protocol II develops and supplements article 3 without modifying the article's existing conditions of application. Thus, in those conflicts satisfying the conditions for its application, Protocol II applies cumulatively and simultaneously with article 3 because the scope of Protocol II is included in the broader scope of article 3.[21] Protocol II's threshold of application, however, is different and clear from that of article 3**.**[22] Protocol II introduces objective qualifications not found in article 3, such as the requirements that a state party's armed forces must participate in the conflict and dissident armed forces or other organized armed groups must exercise control over a part of its territory.[23] Hence, the objective situation that ought to be fulfilled to trigger Protocol II's application regard as a situation of civil war essentially akin to a state of belligerency under customary international law.[24]

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[20] *Ibid*

[21] ICRC, Commentary on the Two 1977 Additional Protocols, para. 1. New Rules, the qualifications of the armed conflict, contained in the last part of the sentence

[22] Junod, *supra* note 15 , pp. 35-38 (discussing the scope of Protocol **11** in relation to article 3)

[23] G Fleck, *The Law of Non- International Armed Conflict*, Cambridge university press, Cambridge, p2003, P. 612

[24] *Ibid*

1.3. Contemporary Challenges Facing the Law of Internal Armed Conflict

1.3.1. Common Article 3 of the Geneva Conventions

Much of the Geneva Conventions simply cannot be applied in civil conflicts because their operation turns on the notion of belligerent occupation of territory and enemy nationality, concepts that are alien to civil conflicts. The problematic issue of defining internal armed conflict was circumvented by negative definition that rendered common article 3 applicable in armed conflict not of an international character.[25] Even if one of the most assured thing that may be said about the words ‘ not of international characters’ is that no one can say with assurance precisely what they were intended to express.[26] Although the substance of common article 3 defines principles of the conventions and stipulates certain imperative rules, the article doesn't contain specific provisions. The article 3 contains no rules regulating the means and methods of warfare. The methods employed may be closer to counterterrorism, or riot control than what is considered the means and

[25]In contrast to Protocol II, Common Article 3 to the Geneva Conventions does not provide a definition of internal armed conflicts, but simply refers to them as armed conflict(s) not of an international character occurring in the territory of one of the High Contracting Parties. Thus, Common Article 3 appears to establish a threshold for application that is lower than that found in Protocol II. For an analysis of the conditions of application of Common Article 3, see Nicaragua case, supra note 8, paras. 215-220.

[26]Sonja Boelaert-Suominen, ‘The ICRC commentary to Common Article 3, and especially the criteria suggested by the ICRC for its application, do not cater for the hypothesis of conflicts between non-State entities,’ ‘Yugoslav Tribunal’, 2005, p. 633.

methods envisaged by IHL.[27] In addition, the terms "civilian" and "combatant" do not appear in any of the provisions of article 3.[28]

Many countries have continuously resisted the application of Common Article 3 to internal conflicts, arguing that extending IHL to internal conflicts lends unjustified legitimacy to insurgent groups and interferes with sovereign authority.[29] Especially in the face of such criticism, the ICRC recognized that Common Article 3 inadequately regulated internal armed conflict. This is largely due to the Article's ambiguity, incomplete protections, and lack of strong use and enforcement.[30]

The American Court of Human Rights expressed the problem under article 3 that the most difficult problem regarding the application of Common Article 3 is not at the upper end of the spectrum of domestic violence, but rather at the lower end. The line separating especially violent situation of internal disturbances from the lowest level Article 3 armed conflict may sometimes be

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[27] Arturo Carillo, Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict, *American University International Law Review*. Vol. 15, No.1, 2008, pp. 69.

[28] Pictet, *supra* note 18 at p. 48.

[29] Aslan Abashidze, The Relevance from the Perspective of Actors in Non-International Armed Conflicts, Address Before the Euro-Atlantic Partnership Council-Partnership for Peace Workshop on Customary International Humanitarian Law , March 9-10, 2006, *available at* http://pforum.isn.ethz.ch/events/ index.cfm?action=detail&eventID=258 ("The inclusion of the Art 3 in all the four Geneva Conventions of 1949 was the decisive move towards the legal intrusion of international humanitarian law into the traditional sphere of internal affairs of sovereign states. . .").

[30] Schneider, Jr., Geneva Conventions, Protocol II: The Confrontation of Sovereignty and International Law, The American Society of International Law. Newsletter, Nov. 1995.

blurred and, thus, not easily determined. When faced with making such a determination, what is required in the final analysis is a good faith and objective analysis of the facts in each particular case.[31]

1.3.2. Additional Protocol II

A more limited development concerning the applicable law in the non-international armed conflicts was continued by additional protocol II, which sought to develop and supplement article 3 common to the Geneva Convention of 1949.[32] While providing greater clarity to the broad principles identified in common article 3, Additional protocol II sets a significantly threshold for its own application [33]

The Additional Protocol II did not receive as widespread support as the Geneva Conventions of 1949.[34] Like Common Article 3, many developing

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[31]American Court of Human Rights, *Juan Carlos Abella v. Argentina,* Report No. 55/97 Case 11.137, November 18, 1997, Para. 153. at www.cidh.oas.org/annualrep/97eng/Argentina11137.htm.

[32]Additional protocol II to the Geneva Conventions, supra note 2, article 1; ICRC, Commentary on the Additional Protocols, supra note 21, Para. 4461. In this context ICRC has indicated that Protocol II 'develops and supplements' common article 3 'without modifying its existing conditions of application'. This means that this restrictive definition is relevant for the application of Protocol II only, but does not extend to the law of [non-international armed conflicts] in general; cited in http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf

[33] W. Abresch, A Human Right Law of Internal Conflict :ECtHR's, in Chechnya, *The European Journal of International Law,* Vol. 16, No.4, 2005, p. 28; J Watkin, Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflicts, *American Journal of International Law,* Vol. 98, No. 1, 2004, pp. 32–33.

[34] One hundred and ninety-two countries are parties to the Conventions of 1949, but only 162 and 159 states are parties to Additional Protocols I and II, respectively. ICRC, States party to

states opposed the Additional Protocols. [35] This is because of a view that the protocols granted too much legal legitimacy to non-state belligerents and to the use of guerilla warfare.[36]

Moreover, the Second Protocol[37] recognizes the sovereign authority of a state to put down insurrection as an internal matter.[38] Instead of prohibiting the prosecution of insurgents, this body of law establishes minimum protections for insurgents facing criminal prosecution.[39] As a result, states have long

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the Geneva Convention and their additional protocols, Apr. 12, 2005, *at* http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList492/

[35] One hundred and ninety-two countries are parties to the Conventions of 1949, but only 162 and 159 states are parties to Additional Protocols I and II, respectively. ICRC, State party to the Geneva Conventions and their Additional Protocols, Apr. 12 , 2005.

[36] Nathan A. Canestaro, Small Wars and the Law: Options for Prosecuting the Insurgents in Iraq*, COLUM. J. TRANSNAT'L L.,* Vol.73, 2004, pp. 90-91.

[37] Additional protocol II, supra note 4, articles 1-6.

[38] ICRC Commentary on the Additional Protocols, supra note 21, Para. 1332 (Combatant status for insurgents would be incompatible, first, with respect for the principle of sovereignty of States, and secondly, with national legislation which makes rebellion a crime).

[39] L. Moir, *International Armed Conflict*, Cambridge university press, Cambridge, 2000, p. 89; T. Meron, *Human Rights and Humanitarian Norms as Customary Law,* 1989, pp. 73–74. Meron argues that other features of Protocol II 'strengthen the proposition that beyond the express provisions of Protocol II, regulation of internal armed conflicts is relegated to the domestic law of states'. Meron points in particular to the failure of Protocol II, Art. 13(1) to include the reference to 'other applicable rules of international law' in contrast to Protocol I, Art. 51(1), the absence of an obligation for other states to 'ensure respect' for Protocol II in contrast to Protocol I, Art. 1(1)), and the 'especially strong prohibition of intervention in the affairs of the state in whose territory the conflict occurs' in Protocol II, Art. 3.

opposed this interference with affairs they perceive to be wholly of domestic concern. [40]

To improve these problems facing the law of internal conflict; therefore, it is strongly suggested by different commentators that applying human rights law is possible solution in addition to the existing legal framework. In view of that, the next sections will examine the role of international human rights law in improving and filling the gap of law of internal armed conflict.

2. The Interplay between International Humanitarian Law and International Human Rights Law

Fostered by respect for human dignity, IHRL and IHL enjoy a symbiotic relationship.[41] Although the two bodies are distinct fields of law which are governed by distinct rules, they are both concerned with humanity and thus it is argued that both human rights law and humanitarian law should have application in conflict situations.

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[40]*Ibid*, P.1325. *See also* ICRC, *The Relevance of IHL in the Context of Terrorism*, http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/ 8C4F3170C0C25CDDC1257045002CD4A2 ("In non-international armed conflict combatant status does not exist. Prisoner of war or civilian protected status under the Third and Fourth Geneva Conventions, respectively, do not apply. Members of organized armed groups are entitled to no special status under the laws of non-international armed conflict and may be prosecuted under domestic criminal law if they have taken part in hostilities.").

[41] Michael Howard, *The Laws of War: Constraints on Warfare in the Western World*, eds., 1994, pp. 35-38. Contradictory provisions should be regulated according to the principle of *lex specialis.* As international humanitarian law was specially designed to be applied in armed conflicts it represents the specific law that should prevail over certain other general rules.

A convergence of the two bodies of law can also be seen at an institutional level.[42] The United Nations clearly signaled the applicability of human rights and humanitarian law during the conduct of hostilities at the Tehran International Conference on Human Rights when it called on Israel to respect the Universal Declaration of Human Rights and the Geneva Conventions.[43] It is also now common for some treaties to embody both principles of human rights as well as humanitarian law in a single instrument.[44]

In relation to the protections afforded by IHRL in the context of internal armed conflicts, there is a much wider variety of relevant and applicable sources to draw from. The primary IHRL instruments are the UN Charter, and

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[42] Violations of Human Rights was the focus of the United Nations debates on certain situations such as the Korean Conflict (1953), the invasion of Hungary by the Soviet Union (1956) and the SiDay War (1967).

[43] It should be noted that the 1993 Vienna World Conference on Human Rights recommended that "the United Nations assume a more active role in the promotion and protection of human rights in ensuring full respect for international humanitarian law in all situations of armed conflict," A/CONF.157/23, Para. 96. For example, the transfer of an individual out of occupied territory would appear to be a "grave breach" of Geneva Conventions art. 47 and 49 (1949). Nevertheless, it does not appear ever to have been contemplated to bring proceedings against Israeli officials, including Ministers, who ordered or implemented such transfers. There was, however, a legal obligation to do so.

[44] For example, International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, entered into force March 23, 1976, article . 4/2 (No derogation from articles 6, 7, 8 (para. 1 and 2), 11, 15, 16 and 18 may be made under this Article). It should also be noted that all such derogation clauses, including Article 4 of the ICCPR, stipulate that that the derogating states may not adopt measures that would be "inconsistent with their other obligations under international law". Some have argued that this stipulation means that states that have ratified IHL treaties such as the Geneva Conventions would be precluded in circumstances of armed conflict from suspending rights whose enjoyment is guaranteed by such IHL treaties. Although this reasoning is persuasive, state practice does not appear to support this interpretation.

the consolidated corpus of IHRL known as the International Bill of Human Rights, which encompasses the Universal Declaration, the ICESCR, the ICCPR, and the Optional Protocol to the ICCPR.[45]

Furthermore, various approaches have been taken by international bodies to show the interaction between these two bodies of international law. Accordingly, three major theories have developed. The leading theory is that humanitarian law is *lex specialis*[46] to human rights law in situations of armed conflict. The most influential statement of this doctrine was given by the International Court of Justice (ICJ) in its 1996 Advisory Opinion.[47]

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[45]In addition to these instruments, there are many other relevant instruments including, *inter alia*, the Genocide Convention, the Slavery Convention, the Torture Convention, the CRC, the CEDAW, the CERD and the Refugee Convention. There are also a variety of relevant regional instruments including, *inter alia*, the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter of Human and Peoples' Rights.

[46]In the report to the Human Rights Council on the outcome of the expert consultation on the human rights of civilians in armed conflict, some experts explained that bodies of law as such did not function as *lex specialis*. It was recalled that the *lex specialis* principle meant simply that, in situations of conflicts of norms, the most detailed and specific rule should be chosen over the more general rule, on the basis of a case-by-case analysis, irrespective of whether it was a human rights or a humanitarian law norm (A/ HRC/11/31, Para. 13) ; *Yearbook of the International Law Commission, 2004*, vol. II, Part II (United Nations publication, forthcoming), Para. 304.

[47]Dale Stephens, Human Rights and Armed Conflict-The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case, *YALE HUM. RTS. & DEV. L.J*. Vol.4, No. 1, 2001, p. 1 (suggesting that "the Advisory Opinion is a significant statement on the convergence of humanitarian principles between the law of armed conflict and international human rights law").

As of the International Court of Justice, there are three situations that indicate the relationship between international humanitarian law and international human rights law and it states:

> *As regards the relationship between international humanitarian law and human rights law, there are thus three possible solutions: 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.*[48]

Thus, contradictory provisions should be regulated according to the principle of *lex specialis.* As international humanitarian law was specially designed to be applied in armed conflicts, it represents the specific law that should prevail over certain other general rules.

A second approach, known as the complementary and harmonious approach**,** is identified by the UN Human Rights Committee in General Comment No. 31, which states:

> The *Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While,*

[48]ICJ, *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion*, Reports 106, 9 Jul. 2004.

> *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.*[49]

The Human Rights Committee does not use the term *lex specialis* but refers to the more specific norms of IHL. By avoiding the *lex specialis* approach the Human Rights Committee seems to indicate that there is no need to choose one branch of law over the other, but rather to look for their simultaneous and harmonizing application.

A third approach, called interpretive approach, is also proposed by Professor Marco Sassòli. This approach is proposed as an alternative to the *lex specialis* and the complimentarily approaches mentioned above. Sassòli states that the relationship between human rights law and humanitarian law "must be solved by reference to the principle lex specialis derogat legi general… The reasons for preferring the more special rule are that the special rule is closer to the particular subject matter and takes better account of the uniqueness of the context."[50] However, Sassòli points out that using the *lex specialis* paradigm

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[49] UN Human Rights Committee, *General Comment No. 31*, CCPR/C/21/Rev.1/Add.13 (26 May 2004), at § 11.

[50] Marco Sassòli and Laura Loson, *The legal relationship between international humanitarian law and human rights law where it matters: admissible killing and internment of fighters in non international armed conflict,* International Review of the Red Cross, Vol. 870, September 2008, p.24.

does not necessarily result in humanitarian law prevailing over human rights law.

3. The Application of Human Rights Law in Internal Armed Conflict

The applicability of human rights law to armed conflict has been the subject of extensive discussion over the past few decades.[51] During the 1970s the UN General Assembly adopted a series of resolutions in which it reaffirmed the need to secure the full observance of human rights in armed conflicts.[52] The fact that IHL treaty law dealing with non-international armed conflicts is comparatively sparse also points towards use of human rights law to assist in the regulation of conduct during such conflicts. Indeed, the few existing treaty

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[51]Amongst others, see G.I.A.D. Draper, The relationship between the human rights regime and the laws of armed confl ict, *Israel Yearbook on Human Rights*, Vol. 1, 1971, p. 191; L. Doswald-Beck and S. Vité, International humanitarian law and human rights law, *International Review of the Red Cross*, No. 293, March-April 1993, p. 94; R.E. Vinuesa, Interface, correspondence and convergence of human rights and international humanitarian law, *Yearbook of International Humanitarian Law*, Vol. 1, T.M.C. Asser Press, the Hague, 1998, pp.69–110; R. Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, Cambridge, 2002; H. Heintze, On the relationship between human
rights law protection and international humanitarian law, *International Review of the Red Cross*, Vol. 86, No. 856, December 2004, p. 798.

[52] See resolutions 2597 (XXIV), 2675 (XXV), 2676 (XXV), 2852 (XXVI), 2853 (XXVI), 3032 (XXVII), 3102 (XXVIII), 3319 (XXIX), 3500 (XXX), 31/19 and 32/44. It should be noted that since the 1990s the Security Council has considered that human rights and humanitarian law obligations are to be observed in armed conflicts. For example, in its resolution 1019 (1995) on violations committed in the former Yugoslavia, it "condemn[ed] in the strongest possible terms all violations of international humanitarian law and of human rights in the territory of the former Yugoslavia and demand[ed] that all concerned comply fully with their obligations in this regard". See also its resolution 1034 (1995).

rules can be compared and likened to non-derogable human rights, and where IHL treaties are silent, human rights law might be offered as an answer.[53]

Rather than seeking to simply apply IHL to all armed conflicts, it has been argued that the application of IHRL would be more appropriate in some circumstances.[54] In contrast to IHL which generally regulates conduct between states, IHRL is a system that regulates the relationship between the state and its citizens. For example, a party to the conflict may take part in violations that are unrelated to the conflict and to which IHRL applies because they are simply not governed by IHL. Similarly, even in a country affected by an armed conflict, law enforcement is always governed by IHRL.[55]

During internal war, the sate maintains its right to fight those who challenge state authority, but the way in which it does so is regulated by IHRL. It is no coincidence that efforts to control the power of the state and its impact on

[53] L. Moir, *supra* note 39, pp. 193–231;C. Greenwood, *Rights at the Fontier: Protecting the Individual in Time of War*, Law at the Centre: The Institute of Advanced Legal Studies at Fifty, Kluwer, Dordrecht, 1999, p. 288

[54] Abresch , *supra* note 33, p. 18

[55] For example, the Eleventh periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan, 23 January 2009, dealing with the killing and injuring of civilians on 25 August 2008 by Government security forces in the Kalma camp for internally displaced persons (IDPs) in South Darfur, Sudan. Despite the fact that at the time Darfur was in a situation of internal armed conflict and that the alleged violations were carried out by Sudanese security forces, it was found that the Government of the Sudan had failed to respect its obligations under international human rights law, at www.ohchr.org/Documents/Countries/11thOHCHR22jan09.pdf.

individual citizens spawned human rights norms. Human rights are generally "concerned with the organization of State power vis-à-vis the individual" and, as such, "found their natural expression in domestic constitutional law."[56] Besides, by applying IHRL, there is less of a concern that it will confer States up on internal rivals as there is with IHL.[57]

With respect to the provisions on humane treatment, humanitarian law and human rights law are consistent, often redundant. However, Common article 3 does not regulate the conduct of hostilities at all,[58] and Protocol II only does so with respect to civilians, and then only in general terms.[59] Neither instrument, for example, provides any guidance on the legality of attacks that are likely to unintentionally kill persons not taking part in hostilities.[60] As ICRC has recognized, there are circumstances in which provisions of IHRL,

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[56]Robert Kolb, The Relationship between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions, *International Review RED CROSS*, Vol. 38, 1998, p. 410.

[57]M. Dennis, ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Application of human rights treaties extraterritorially in times of armed conflict and military occupation, *American Journal of International Law*, Vol. 99, 2005, p. 119.

[58] ICRC, Commentary on the Additional Protocol of 8 June CHRGJ, Working Paper No .4, 2005.

[59] Antonio Cassese , *Means of Warfare : The Traditional and the New Law* , In Cassese (ed) the Humanitarian Law in Armed Conflict, 1979, 195.

[60] *Ibid*

such as Common article 3 of the Geneva Conventions, "must […] be given specific content by application of other bodies of law in practice."[61]

However, some argues that it is not enough for the direct application of human rights law to internal armed conflicts to be appropriate and desirable; it must also be possible.[62] Gasser notes the substantial overlap between the humane treatment provisions of the ICCPR and Protocol II, but suggests that it is Protocol II that fills the conduct of hostilities gap in the ICCPR.[63] Matheson assert that the import of applying operative peacetime human rights concepts, such as the right to life, would undermine the integrity of the existing rules and only promote numerous reservations and declarations to current and future law of armed conflict regimes.[64]

Further they argue that although there is a good argument to apply IHRL to some internal conflicts, there are some apparent problems with the application. Firstly, although it has been argued that IHRL equally applies to non – state actors such as rebel groups as it does to states, it has proved

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[61]Jakob Kellenberger, President of the International Committee of the Red Cross, International humanitarian law and other legal regimes: interplay in situations of violence, statement to the 27th Annual Round Table on Current Problems of International Humanitarian Law, San Remo, Italy, 4–6 September 2003. Available from www.icrc.org.
[62]Robert Kolb, *Supra* note 56.
[63] Gasser, International Humanitarian Law and Human Rights Law in Non-international Armed Conflict: Joint Venture or Mutual Exclusion, *German YIL, Vol. 45,* 2002, p. 149.
[64]Michael J. Matheson, The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons, *American Journal of International Law,* Vol. 91, 1997, pp. 417-420.

difficult to apply the IHRL to non – state groups. This is in contrast to IHL, which establishes right and duties up on both sides.[65] Secondly, arguments in support of the first assertion are also touted as realistic by recognizing the ease from which States may derogate obligations contained within human rights treaties.[66] IHRL is capable of derogation in times of public emergency and war,[67] whereas IHL only applies in times of war, and can, therefore, be seen as a specialized form of IHRL that applies during armed conflict as *lex specialis*[68].

These arguments may become less of a concern since there is a growing view among experts that IHL and IHRL are able to co –exist but are not mutually exclusive areas of law. Many of the views supporting the applicability of IHRL are focused primarily upon explaining how in the situation of internal conflict the two bodies of law can work concurrently, complement (or perhaps even converge with) each other in times of need. In certain areas, it is clear how and why IHL and human rights law could complement and

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[65]N. Tomuschat, *The Applicability of Human Right Law to Insurgent Movement, In Crisis Management and Humanitarian*, Berliner Wissenschafts – Verlag, 2004. Pp. 581-588.

[66]G.I.A.D. Draper, The Relationship Between The Human Rights Regime and the Law of Armed Conflicts, *ISR. Y.B. on human rights,* Vol. 1, 1971, pp. 194-197.

[67]Derogation clauses found not only in international human rights laws but also in regional treaties, for instance, in the American Convention on Human Rights, article 27 and in the European Convention for the Protection of Human Rights and Fundamental Freedoms, article 15.

[68]Human Rights Watch and Amnesty International have increasingly applied humanitarian law rather than human rights law in reports on armed conflicts. See Bennoune, Toward a Human Rights Approach to Armed Conflict: Iraq 2003, *UC Davis J Int'l L & Pol'y* , Vol. 11, 2004, pp. 216–219.

reinforce each other — most notably where the issues of deprivation of liberty and judicial guarantees are concerned.[69]

The challenge is to apply the broad principles of human rights law to the conduct of hostilities in a manner that is persuasive and realistic.[70] Human rights law must be realistic in the sense of not categorically forbidding killing in the context of armed conflict or otherwise making compliance with the law and victory in battle impossible to achieve at once.[71] These realistic rules must be persuasively derived from the legal standard of human rights law.[72]

Despite the difficulties**,** IHRL is appropriate for the regulation of many internal conflicts simply because states routinely dismiss the application of IHL to their internal conflicts. For instance, United Kingdom,[73] Turkey and

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[69]See the Fundamental guarantees chapter in ICRC study, *op. cit.* (note 1), Vol. 1 pp. 299–383. For an example of a comprehensive publication devoted to this subject, see F. Coomans and M. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, Antwerp, 2004.

[70] See Interim Resolution DH 105 concerning the Judgment of the European Court of Human Rights of 28 July
1998 in the case of Louizidou against Turkey, adopted by the Committee of Ministers on 24 July 2000 at the
716th Meeting of the Ministers` Deputies, at http://www.coe.int/T/CM/WCD/humanrights_en.asp#.

[71] B.G. Ramcharin, 'The Role of International Bodies in the Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Armed Conflicts', *American University Law Review*, Vol. 33, 1983, p. 103.

[72] Abresch, *supra* note 33, p. 19.

[73]Meron, *supra* note 39. The UK acceded to the Geneva Conventions of 1949 on 23 Sept.1957 and to Protocols I and II on 28 Jan. 1998 (but with a reservation undercutting Protocol I's application to national liberation movements). See http://www. icrc.org/ihl.

Russia – have denied the application of IHL, but IHRL was still able to regulate the conflicts through applications to the European Court of Human Right. [74]

The human rights framework does operate in accordance with certain traditional limits that may bear on the role it can play in governing armed conflict. For example, the fact that human rights law is designed to function in peacetime, contains no rules governing the methods and means of warfare, and applies only to one party to a conflict has led at least one human rights non-governmental organization to look to IHL to provide a methodological basis for dealing with the problematic issue of civilian casualties and to judge objectively the conduct of military operations by the respective parties.

4. The Application of International Human Rights Law in Internal Armed Conflict by International and Regional Courts

4.1. The International Court of Justice

Since the ICJ held that humanitarian law is *lex specialis* to human rights law in 1996, it has been widely accepted that 'human rights in armed conflict' refers to humanitarian law.[75] While the ICJ in its Nuclear Weapons Advisory

[74] ECtHR, *McCann and Other's V. United Kingdom,* App. No. 18984/91, Sept. 27, 1995; *.Isayeva, Yususpova and Bazayeva v. Russia*, App. No. 21593/93, Jul. 27, 1998. See McCarthy, *The International Law of Human Rights and States of Exception: With Special Reference to the Travaux Preparatoires and Case-Law of the International Monitoring Organs,* 1998, p. 378.

[75] The Wall Advisory Opinion, *supra* note 48, paras. 102-103.

Opinion[76]did state the applicability of human rights law, the use of the term *lex specialis* might have been construed as support for a claim that whereas human rights law then does not disappear, it nevertheless is in effect displaced by IHL.

The more recent Advisory Opinion in the Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory[77] together with the views of UN human rights bodies,[78] have clarified that human rights law is not entirely displaced and can at times be directly applied in situations of armed conflict.[79] Here, the trend is for human rights to give precedence to IHL, in the context of armed conflict. It is pertinent to note that the ICJ recognized the applicable law in situations of armed conflict clearly extends beyond IHL. Thus, in the Wall case it stated:

> *More generally, the Court considers that the protection offered by Human Rights Conventions does not cease in case of armed conflicts save through the effect of provisions for derogation of the*

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[76]ICJ, Legality *of the Threat or Use of Nuclear Weapons*, Advisory opinion, 8 July 1996, Reports 1996, Para. 25.

[77] The Wall Advisory Opinion, *supra* note 48, Para. 163.

[78]*Ibid*; Human Rights Committee, General Comment 29, States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11 (2001) Para. 3; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel; 31/08/2001. E/C.12/1/Add.69.

[79] In the words of the Court "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." See Wall Advisory Opinion, supra note 48, para.106.

> *kind to be found in Article 4 of the International Covenant on Civil and Political Rights.*[80]

Arbitrarily depriving of one's life is wrongful act under humanitarian law as civilians are a protected class of people during hostilities and it is a violation of human rights to deprive a person of their life arbitrarily.[81] However, under IHL, combatants who are directly participating in hostilities may be lawfully targeted and killed.[82]After noting that the "right not to be arbitrarily deprived of one's life" is non-derogable, the ICJ explained:

> *The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant [ICCPR], can only be decided by reference to the law*

[80] The Wall Advisory Opinion, *supra* note 48, Para. 106.

[81] D. Nsereko, *Arbitrary Deprivation of Life: Controls on Permissible Deprivations*, *in The Right To Life In International Law*, ed., 1985, p. 85; Yoram Dinstein, *The Right to Life, Physical Integrity, and Liberty*, *in* The International Bill of Rights: The Covenant on Civil And Political Rights, ed., 1981, p. 114; D. Weissbrodt, *Protecting the Right to Life: International Measures Against Arbitrary or Summary Killings by Governments*, in The Right to Life, 2000, pp. 297- 298.

[82]"Targeted Killings," IHL Premier Series - Issue 3, International Humanitarian Law Research Initiative, Programme on Humanitarian Policy and Conflict Research, Harvard University, at < www.IHLresearch.org>

> *applicable in armed conflict and not deduced from the terms of the Covenant itself.*[83]

Thus, the jurisprudence of the ICJ reflects an approach of cautious assimilation of principles of human rights law into situations of armed conflicts.

4.2. The International Criminal Tribunals: ICTR and ICTY

The International Criminal Tribunal for Rwanda (ICTR) has relied on human rights instruments and norms to interpret and lend greater specificity to the prohibitions contained in IHL. As the Trial Chamber noted in *Kunarac case*, because of the paucity of precedent in the field of IHL, the tribunals have often resorted to human rights norms to determine the content of customary IHL.[84] In the *Furundzija case,* the Trial Chamber of International Criminal Tribunal for the former Yugoslavia (ICTY) drew on human rights norms, such as human dignity and physical integrity, in its discussion – demonstrating just how important human rights have become to the development of humanitarian law.[85]

In *Krnojelac case*, the Trial Chamber of ICTR considered the requirements of imprisonment as a crime against humanity. Although the right of an

[83] The Wall Advisory Opinion, *supra* note 48, Para. 25.
[84] Kunarac case, *supra* note 3, Para. 467.
[85] Furundzija case, supra note 3, paras. 168-183. The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia emphasized that the general principle of respect for human dignity was the "basic underpinning" of both human rights law and international humanitarian law.

individual not to be deprived of his or her liberty arbitrarily is enshrined in a number of human rights instruments, the relevant instruments do not adopt a common approach to the question of when a deprivation of liberty become arbitrary.[86] After consideration of the different approaches taken in the Universal Declaration of Human Rights, the ICCPR, and the Convention on the Rights of the Child, among others, the ICTR Trial Chamber concluded that a deprivation of an individuals' liberty will be arbitrary and unlawful if no legal basis can be called upon to justify the initial deprivation of liberty.[87]

4.3. The European Court of Human Rights

The ECtHR has directly applied human rights law to the conduct of hostilities in internal armed conflicts. The rules it has applied may be controversial, but humanitarian law's limited substantive scope and poor record of achieving compliance in internal armed conflicts suggest the importance of this new approach. Abresch makes the convincing argument that in certain situations, IHRL may be more capable of applying to an internal conflict than IHL**,** giving the example of the ECtHR's use of the 'right to life' article in case of

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[86]ICTR, *Prosecutor v. Krnojelac,* Trial Judgment, 1998, paras. 110-114; Marco Sassòli and Laura M. Olson, The relationship between international humanitarian law and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflict, *International Review of the Red Cross*, vol. 90, No. 871, September 2008, pp. 613–615. The authors asserted that: The delicate interplay between international human rights and international humanitarian law can also be seen in the Tribunals' elucidation of crimes against humanity. Crimes against humanity are inhumane acts of a very serious nature – such as willful killing, torture or rape – which are committed as part of a widespread or systematic attack against a civilian population.

[87]*Ibid*, *Prosecutor v. Krnojelac,*

armed conflict within the Council of Europe:

> *The ECtHR's approach has the potential to induce greater compliance. It applies the same rules to fight with common criminals, bandits, and terrorists as to fight with rebels, insurgents and liberation movements. To apply human rights law does not entail admitting that the situation is 'out of control' or even out of the ordinary.*[88]

In contrast to humanitarian law's principle of distinction, the ECtHR's permits the use of lethal force only where capture is too risky, regardless of whether the target is a 'combatant' or a 'civilian'.[89] These rules are not perfect, but given the resistance States have shown to applying humanitarian law to internal armed conflicts, the ECtHR's adaptation of human right law to this end may prove to be the most promising basis for the international community to supervise and respond to violent interactions between the states and its citizens.[90]

Moreover, the specific aspects of the interchangeability of international human rights law and international humanitarian law at the example of the right to life is demonstrated by the judgments of the ECtHR related to armed

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[88]Abresch, *supra* note 33, P. 2

[89] N. Heintze, The European Court of Human Rights and the Implementation of Human Rights Standards During Armed Conflicts, *German Yearbook Int'l L, Vol. 45,* 2002, p. 60.

[90]L. Reidy, The Approach of the European Commission and Court of Human Rights to International Humanitarian Law, 80 *IRRC,*1998, p. 513.

conflicts, notably in the Chechen Republic of the Russian Federation.[91] Accordingly, the case of *Khashiyev v Russia* has dealt with the claims of unlawful deprivation of life in the context of the non-international armed conflict.[92] The Court found that the part of Grozny where the relevant persons were killed had been under the control of Russian forces, that is, there were no actual hostilities going on in that area. The Court asserted that the case could be governed presumably by human rights law only, as the hostilities were over in the relevant area and the application of humanitarian law was not strictly necessary despite the general context of an armed conflict.[93]

The human rights organizations and different commentators intervening in *Isayeva* cases suggested that the stricter standard of human rights law should

[91] Russia acceded to the Geneva Conventions of 1949 on 10 May 1954; Protocols I and II on 29 Sept. 1989. See http://www.icrc.org/ihl. In 2000 the Russian Minister of Justice informed the then UN High Commissioner for Human Rights, Mary Robinson, that Russia regards 'the events in Chechnya not as an armed conflict but as a counter-terrorist operation. And in 2004 Russia succeeded in getting a report of the UN Secretary-General amended to state that Chechnya 'is not an armed conflict within the meaning of the Geneva Conventions' and to refer to 'Chechen illegal armed groups' rather than 'Chechen insurgency groups': Lederer, 'U.N. Seeks to Stop Use of Child Soldiers', *Associated Press*, 23 Apr. 2004. During the First Chechen War, in 1995, the Russian Constitutional Court indicated that the conflict was governed by Protocol II; however, inasmuch as the Court found that it lacked competence to apply Protocol II, the view of the executive is here more important than that of the judiciary. See Gaeta, The Armed Conflict in Chechnya before the Russian Constitutional Court, *European journal of international law, Vol. 7,* 1996, p. 563; cited in Abresch, *supra* note 33, foot note 44.

[92]ECtHR, *Khashiyev and Akayeva v Russia*, Judgment, Nos. 57942/00 & 57945/00, 2005, Para. 16ff.

[93] However, the standard of the right to life applied in this case in terms of human rights law confirms at least the same degree of protection that would have to be afforded to civilians under humanitarian law, had it been applicable. See *Ibid*.

apply. Standards of IHL, among them the principle of proportionality, should be interpreted in the light of the stricter human rights requirements.[94]

4.4. The Inter- American Court of Human Rights

As shown above, despite the theoretical possibility of joint application, there are also instances in case law demonstrating that the parallel application of human rights law and humanitarian law can face procedural impediments. In *Juan Carlos Abella* v. *Argentina* the Inter-American Commission on Human Rights stated that its authority to apply IHL could be derived from the overlap between norms of the American Convention on Human Rights and the 1949 Geneva Conventions. The Commission stated that the "provisions of common article 3 are pure human rights law […] Article 3 basically requires the State to do, in large measure, what it is already legally obliged to do under the American Convention."[95]

The *Las Palmeras* case before the Inter-American Court of Human Rights involved a situation of internal conflict; while the applicant requested the Court to rule that the respondent state had breached both the 1969 American Convention and Common Article 3 of the 1949 Geneva Conventions, the respondent state objected that the Court was not competent to apply humanitarian law, because its competence was limited to the American

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[94] *Isayeva case*, *supra* note 74.

[95] *Juan Carlos Abella v. Argentina*, supra note 30, Para. 161, at www.cidh.oas.org/annualrep/97eng/Argentina11137.htm

Convention.[96] At the same time, the respondent did not contest that the internal conflict was the subject-matter of the case and that conflict was covered by Common Article 3. The Inter-American Commission called upon the Court to adopt pro-active methods of interpretation enabling it to examine Article 4 of the American Convention regarding the right to life in conjunction with Common Article 3.[97] The latter provision was instrumental in interpreting the former.[98] The Court found that the American Convention has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions.[99]

Generally, it can be said that despite the existence of some challenges in the

[96]Inter-Am CtHR, Las Palmeras, Judgment, Series C, No. 67, 2000, para. 28. Besides, According to the decision of the Inter-American Commission on Human Rights in the *La Tablada* case(*Juan Carlos Abella v. Argentina)*, Common Article 3 is generally understood to apply to low intensity and open armed confrontations between relatively organized armed forces or groups that take place within the territory of a particular State. See *Ibid*, Para. 152.

[97]Inter-American Commission on Human Rights, Case No. 11.137, Report No.55/97, 30 October 1997, Annual Report of 1997, paras. 157.

[98] That means, the American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123.

[99] The Inter-American Court of Human Rights has thus far rejected the *lex specialis* application of humanitarian law on jurisdictional grounds, but continues to refer to and consider humanitarian law provisions: Las Palmeras case, supra note 95, para. 33. However, The Commission continues to apply humanitarian law as *lex specialis*: see the letter from Juan E. Méndez, President of the Commission, to attorneys for those requesting provisional measures (13 Mar. 2002) (quoting letter notifying the US of the imposition of provisional measures), at http://www.ccr-ny.org/v2/ legal/september_11th/docs/3-13-02%20IACHRAdoptionofPrecautionaryMeasures.pdf. See also Zegvel, The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case', *IRRC,* Vol. 80*,* 1998, p. 505.

joint application of IHL and IHRL, the innovations of both international and regional courts fill the gap in humanitarian law by beginning to develop a human rights law of the conduct of hostilities in internal armed conflicts.[100]

Concluding Notes

As discussed throughout this article, certain aspects of internal armed conflicts may not be covered by IHL, yet individuals remain under the protection of international law guaranteeing fundamental human rights. IHRL is appropriate in regulating many internal conflicts simply because states routinely dismiss the application of IHL to their internal conflicts.[101] Hence, applying human rights is an alternative solution to promote compliance with a set of legal norms during armed conflict, whether states and rebels have determined that they are bound by IHL or not.

For the better protection of civilians, prisoners and combatants in internal armed conflicts in which non-state entities are parties, states and pertinent international bodies of a humanitarian character shall cooperate in order to take measures to verify and oversee the application of IHRL in internal armed conflicts. Particularly, the state which faces internal conflict shall cooperate and accept any authorization given to the United Nations or any other

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[100] Helfin and Slaughter, Toward a Theory of Effective Supranational Adjudication, *Yale Law Journal,* Vol. 107, 1997, p. 273

[101] Abresch, *supra* note 33.

competent regional or international organization to establish impartially whether IHRL is applicable.

Moreover, as proposed by various commentators and ICRC studies, the 1949 Geneva Conventions and Additional Protocol II are not sufficiently broad in scope to cover all armed conflicts.[102] Thus, the world needs additional international humanitarian conventions, or possible revision of the existing conventions, providing a clear reference for the application of human rights law in cases when gaps are created, particularly in the law of internal conflicts.

[102] Kellenberger, *supra* note 61.