# HUMAN RIGHTS AND HUMANITARIAN LAW: A DICHOTOMY TRANSCENDED?

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*"The convergence of human rights law and humanitarian law can be described as two poor crutches on which disarmed victims can lean simultaneously".*[1]

The relationship between Human Rights Law (HRL) and International Humanitarian Law (IHL) has evolved from a state of distinct autonomy[2] to a position of close proximity,[3] which position has a direct impact on the normative content[4] and the conceptual perceptions of

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[1] Vasak, K., "Pour une troisiéme génération des droits de l'homme", in Swinarski, (ed.), Studies and Essays on International Humanitarian law and Red Cross Principles, inHonour of Jean Pictet, (Geneva/The Hague: ICRC/Nijhoff, 1984), p. 837, at p. 837.

[2] Kimminich, O., *Schutz der Menschen in bewaffneten Konflikten*, (München: Beck, 1979), at p. 28; Draper, G.I.A.D., "Humanitarian Law and Human Rights", (1979) *Acta Juridica* 193, at pp. 205-06; Fleck, D., (ed.), *Handbook of Humanitarian Law in Armed Conflict*, (Oxford: OUP, 1995): no reference made to human rights.

[3] On 'convergence' see Heintze, H.J., "On the Relationship Between Human Rights Law Protection and International Humanitarian Law", (2004) 856 *IRRC* 789, at pp. 791-96; Draper, G.I.A.D., "The Relationship Between the Human Rights Regime and the Law of Armed Conflicts", (1971) *Isr. Yearbook on Human Rights* 198: compare with Daper, *Ibid.*, for a conflicting view.

[4] On substantive content see Schindler, D., "Human Rights and Humanitarian Law: Interrelationship of the Laws", (1982) 31 *American University Law Review* 935, at pp. 939-40; Kolb, R., "The Relationship Between International Humanitarian Law and human Rights Law: A Brief History of the 1948 UDHR and the 1949 Geneva Conventions", (1998) 324 *IRRC* 409; Draper, G.I.A.D., "The Relationship Between the Human Rights Regime and the Law of Armed Conflicts", (1971) *Isr. Yearbook on Human Rights* 198, at p. 206. In relation to internal armed conflict norms, see Moir, L., *The Law of Internal Armed Conflict*, (Cambridge: CUP, 2002), at pp. 197-231; Abi-Saab, R., "Human Rights and Humanitarian Law in Internal Conflicts", in Warner, D., (ed.), *Human Rights and Humanitarian Law: The Quest for Universality*, (Dordrecht: Martinus Nijhoff Publishers, 1997), p.107, at pp. 110-23.

both legal spheres.[5] The motivating force behind this shift has been an amalgam of pragmatic and directional factors. The former factor refers to the unfortunate continuity of the destructive pattern of armed conflicts, combined with the accelerated pace of inflicting suffering on individuals.[6] The directional factor that has facilitated the merging of IHL and HRL refers to the shared objective of ensuring the "protection of the individual and the respect for human dignity",[7] which has also been labelled as "the principle of humanity".[8]

The repositioning of the relationship between IHL and HRL has implications beyond the academic sphere in terms of practical consequences ranging from the formation of new norms,[9] to the interpretation of existing rules[10] and the adaptation of enforcement

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[5] Meron, T., "Convergence of International Humanitarian Law and Human Rights", in Warner, D., (ed.), *Human Rights and Humanitarian Law: The Quest for Universality*, (Dordrecht: Martinus Nijhoff Publishers, 1997), p.97; Doswaltd-Beck, L. & Vitè, S., "International Humanitarian Law and Human Rights Law", (1993) 293 *IRRC* 94, at pp. 105-11.

[6] David, S., "The Primacy of Internal War", in Nueman, S., (ed), *International Relations Theory and the Third World*, (London: MacMillan, 1998), p. 77; *Analytical Report of the Secretary-General*, submitted pursuant to Commission on Human Rights resolution 1997/21, UN Doc.E/CN.4/1998/87, at para. 18.

[7] Meurant, J., "Humanitarian Law and Human Rights: Alike Yet Distinct", (1993) 293 *IRRC* 89, at p. 89. Points to that effect also in Koroma, A.G., "Forward", (1998) 324 *IRRC* 403, at p. 403; Abi-Saab, *op. cit.*, note 4, at p. 122.

[8] Provost, R., *International Human Rights and Humanitarian Law*, (Cambridge: CUP, 2002), at p. 5. On types of 'humanity' see Meyrowitz, H., "Reflexions sur le fondement du droit de la guerre", in Swinarski, C., *Studies and Essays on International Humanitarian law and Red Cross Principles, in Honour of Jean Pictet*, (Geneva/The Hague: ICRC/Nijhoff, 1984), p. 419, at pp. 426-31.

[9] E.g. 1989 Convention on the Rights of the Child, <http://www.unhchr.ch/html/menu2/6/crc/treaties/crc.htm>; for analysis see: Heintze, H.J., "Children need more protection under international humanitarian law – Recent Developments concerning Article 38 of the UN Child Convention as a challenge to the International Red Cross and Red Crescent Movement", (1995) 8 (3) *Humanitäres Völkerrecht – Informationsschriften* 200; Happold, M., "The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict" (2000) 3 *Yearbook of International Humanitarian Law* 226.

[10] E.g. Torture: Kälin, W., "The Struggle Against Torture", (1998) 324 *IRRC* 433. On Interplay and ECHR see Reidy, A., "The Approach of the European Commission and Court of Human Rights to International Humanitarian Law", 1998) 324 *IRRC* 513.

and implementation mechanisms.[11] From that perspective, the purpose of this paper is threefold: to consider the philosophy and the origins of IHL and HRL in order to offer a descriptive analysis of the nature of the preceding branches of law, to assess the emerging patterns of similarities and differences between IHL and HRL, and to examine whether, and to what extent, there exists a repositioning of the relationship between the two and the nature of such correlation.

In terms of the paper's title, the two branches of law remain distinct procedurally, despite the existence of considerable and growing overlap. A transcending of the formalistic dichotomy has occurred and the nature of the existing framework can be described as an amalgam of provisions and approaches of the coexisting legal systems. The influencing is interpenetrating both IHL and HRL. Finally, there is a spectrum of protection depending on the nature of the situation and possibilities of cumulative application of standards and reformation of the meaning of specific obligations and rights. It is submitted that emphasising the distinction between IHL and HRL or regarding it as obsolete is nothing but an oversimplification; a middle way exists that takes the form interpenetration and resultant redefinition of standards and perceptions.

In terms of structure, the paper is divided into two parts. The first part focuses on the philosophical perspectives and origins of the two legal frameworks; The second part centres on the description of substantive law as supporting evidence for the confined convergence.

## 1. IHL and HRL: Different Roots and Routes but A Common Destination

### *1.1 Origins and Philosophical Underpinnings*

A useful starting point for understanding the relationship between IHL and HLA can be found in the origins and philosophical foundations that underpin the two regimes. It has been argued that

[11] Dugart, J., "Bridging the Gap Between Human Rights and Humanitarian Law: the Punishment of Offenders", (1998) 324 *IRRC* 445; Heintze, *op. cit.*, note 3, at pp. 798-812; Moir, L., "Law and the Inter-American Human Rights System", (2003) *HRQ* 182; Schindler, *op. cit.*, note 4, at pp.940-41.

a corollary, the view that prevailed approached IHL and HRL as applying during war and peacetime respectively, thus leading to the establishment of a dichotomy implying mutual exclusion of application.[27] It is from that angle that Draper was arguing that

> *"the law of war determines who may do what to whom... [it is] a series of prohibitions",*[28] *while "human rights are based upon social civic solidarity and harmony within a society".*[29]

Thirdly, there is difference between IHL and HRL in terms of priorities, with the guiding idea for the former being the regulation of warfare in respect of humanity and in reflection of the necessary action for achieving military objectives. IHL therefore applies in extreme emergency situations in order to offer protection to those mostly vulnerable.[30] The provisions of IHL are mandatory and non-derogable since they are applicable in intense situations where normal State control is not present or endangered, hence leaving no further room for going below that essential standard that IHL imposes. HRL is not mandatory in the same manner since there are derogation clauses[31] allowing for the suspension of specific rights in exceptional circumstances,[32] thus reflecting the idea of application between government and governed and with the national good as a principal parameter.[33]

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[27] Draper, *op. cit.*, note 2, at p. 205.

[28] Draper, *op. cit.*, note 2, at p. 193 (emphasis in the original).

[29] *Ibid.*, at p. 196.

[30] Meurant, *op. cit.*, note 7, at p. 91.

[31] E. g. Art. 4 (1) *International Covenant on Civil and Political Rights 1966* <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm>; Art. 15 *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950* <http://www.pfc.org.uk/legal/echrtext.htm>; Art. 27 *American Convention on Human Rights 1969*, <http://www.hrcr.org/docs/American_Convention/oashr.html>. Hereafter ICCPR, ECHR and ACHR respectively.

[32] Moir, *op. cit.*, note 4, at pp. 195-96; Oraá, J., *Human Rights in States of Emergency in International Law*, (Oxford: OUP, 1992); Heintze, *op. cit.*, note 3, at p. 790-91; Dinstein, *op. cit.*, note 25, at pp. 350-52 (refers to derogations as part of "variation one").

[33] Hence inappropriate for armed conflicts *per* Draper, *op. cit.*, note 2, at p. 203.

In conclusion, the different aims and priorities of the two regimes resulted in the creation of a notion that regarded the separate and parallel development of their content as evidence for the lack of a nexus that creates a proximity relationship between IHL and HRL. Nonetheless, that nexus had been created as a result of the developments after the World War II.

### *1.2 The Breakthrough: Common Destination Identified*

The the breakthrough moment that brought IHL and HLA may be seen as a corollary of a plethora of defining events;[34] it is submitted that the appreciation and understanding of the mutual relationship can be promoted if a synthesis of the significant events is provided.

The most influential factor in the convergence of the two legal regimes has been the alteration in hierarchy of values of the international community after witnessing the atrocities of World War II.[35] Therefore, there was a cultural change that facilitated the shift from recourse to war as permissible conduct, to the prohibition of the use of force under Art. 2 (3) and (4) of the United Nations Charter. The immediate consequences were "the drawing with magnetic force by the humanitarian texture created post-1945 of HLA and the inexorable progress of that regime".[36] Therefore, developments at the level of *jus scriptum* are to be understood in the light of the general *mentalitè* of that period, thereby offering an exegesis for the rapid codification of human rights that started with the 1948 Universal Declaration of Human Rights.[37] The same *mentalitè* was relevant to the codification of IHL taking place around the same period and leading to the adoption of the Four Geneva Conventions 1949. It was at this time that Scindler invoked the change in terminology of the Geneva Conventions, referring to humanitarian law rather than to the law of war; this evidenced the new approach.[38]

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[34] For an excellent analysis see Schindler, *op. cit.*, note 4, at pp. 936-37.

[35] Draper, *op. cit.*, note 2, at p. 194.

[36] *Ibid.*

[37] General Assembly Resolution 217 A (III), U.N. Doc. A/810, at 71 (1948).

[38] Schindler, *op. cit.*, note 4, at p. 937.

For the benefit of completeness, it has to be clarified that irrespective of the new impetus, the drafting procedures leading to the UDHR and the Geneva Conventions that took place within the same time frame[39] were institutionally separate[40] due to the potential danger of the legitimacy and authority of the UDHR being undermined in case it examined issues related to the law of war. The emphasis was now on *jus contra bellum*.[41] As the United Nations International Law Commission stated "public opinion might interpret its action [undertake a study on the laws of war] as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace".[42] From the perspective of IHL, the International Committee of the Red Cross was eager to maintain its independence from the United Nations' institutional structure and avoided any intervention in the establishment and monitoring of HRL.[43] The convergence was not in any way visible at that stage.

The second important step[44] in the process of convergence has been the 1968 International Conference on Human Rights, convened by the United Nations at Teheran and resulting in the adoption of the homonymous resolution[45] calling expressly for the meaningful

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[39] The Review, "A Note from the Editor", (1998) 324 *IRRC* 400, at p. 401.

[40] Kolb, R., "The Relationship Between International Humanitarian Law and human Rights Law: A Brief History of the 1948 UDHR and the 1949 Geneva Conventions", (1998) 324 *IRRC* 409, at pp. 409-10.

[41] Schindler, D., "The International Committee of the Red Cross and Human Rights", (1979) 208 *IRRC* 3, at p. 7; Robertson, A.H., "Humanitarian law and Human rights", in C. Swinarski (éd.), *Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge/Studies and essays on international humanitarian law and Red Cross principles, en l'honneur de/in honour of Jean Pictet*, CICR/Martinus Nijhoff, Genève/La Haye, 1984, p. 793, at p. 794; Migliazza, A., "L'évolution de la réglementation de la guerre à la lumière de la sauvegarde des droits de l'homme", (1972) 137 *RCADI* 143, at pp. 164-65.

[42] *Yearbook of the International Law Commission* (1949), at p. 281, para.18.

[43] Lossier, J.G., "The Red Cross and the International Declaration of Human Rights", (1949) 5 *IRRC* 184. Note that the author was referring to the UDHR.

[44] Schindler, *op. cit.*, note 4, at pp. 936-37.

[45] Resolution XXIII, "Human Rights in Armed Conflicts", adopted by the International Conference on Human Rights, Teheran, 12 May 1968, <http://www.icrc.org/ihl.nsf/FULL/430?OpenDocument>.

application of existing conventions on the law of armed conflict and for the adoption of further agreements under the mandate of the General Assembly.[46] Here, the reference to the law of war as applying to armed conflicts (during a conference oriented towards the human rights realm) has been instrumental in publicising the potential for establishing a close connection between IHL and HRL, which reference was restated in 1969 by the Secretary-General of the United Nations.[47]

The third step was the rise in political importance of the right of self-determination, which was a dominant theme of armed conflicts taking place in the 1960's. Schindler characterised these conflicts as the "immediate catalysts"[48] for convergence, because self-determination formed an integral part of HRL.[49] Consequently, the 1977 Additional Protocol I to the Geneva Conventions[50] internationalised armed conflicts of decolonisation, against occupation, and against racist regimes.[51] Specific types of armed conflicts that were previously classified as internal have been brought within the reach of the legal regime applying to international armed conflicts. The nexus with self-determination, a basic human right, had now been established in codified form and marked the turning point for the fusing of the two systems.

As an interim conclusion, the historical and philosophical differences of IHL and HRL have been minimised in terms of importance and have been partially sidelined as a result of the identification of the nexus that establishes a functional relationship between them and which refers to the common objective of

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[46] Schindler, *op. cit.*, note 4, at pp. 936-37; Draper, *op. cit.*, note 2, at p. 194.

[47] Respect for Human Rights in Armed Conflicts: Report of the Secretary-General, 24 U.N. GAOR Annex (Agenda Item 61) at 10, U.N. Doc. A/7720 (1969).

[48] Schindler, *op. cit.*, note 4, at p. 937.

[49] Arts. 1 (2) & 55 U.N. Charter; Art. 1 ICCPR; Art. 1 ICESCR; 1970 Declaration on Principles of International Law Concerning Friendly Relations, General Assembly Resolution 2625 (XXV); Art. 20 ACHPR 1981.

[50] 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079>.

[51] Art. I (4) Additional Protocol I.

maintaining the "principle of humanity".[52] What must be assessed is whether the substantive law offers supporting evidence for the emergence of relationship of proximity.

## 2. Analysis of the Substantive law: Evidence and Manifestations of Convergence

The purpose of this section is to offer an analysis of the substantive law and to establish whether the journey to a common destination by IHL and HRL is fictional or not, and if the latter applies to provide an exegesis of the different manifestations that the proximity of the relationship creates. Therefore, the textual parallels between IHL and HRL are examined and the bridging provisions that are instrumental in the relationship are identified. In addition, the different application fields for IHL and HRL are also identified. Within those variations, the different manifestations of the proximity of the relationship are explained as having a cumulative effect, an interpretative function, a supplementing effect and a separate application based on *lex specialis*.

### *2.1 The Textual Parallels of IHL and HRL and the Bridging Provisions*

The substantive content of IHL and HRL is considered to be, in certain respects, analogous, thus setting the framework for the development of an exchange of influences. Such examples include primarily those rights[53] that are non-derogable under HRL and simultaneously guaranteed under IHL. This class of rights includes the right to life, health or physical or mental well being of persons; torture and other inhuman treatment; slavery; rape and the

[52] Provost, R., *International Human Rights and Humanitarian Law*, (Cambridge: CUP, 2002), at p. 5. On types of 'humanity' see Meyrowitz, H., "Reflexions sur le fondement du droit de la guerre", in Swinarski, C., *Studies and Essays on International Humanitarian law and Red Cross Principles, in Honour of Jean Pictet*, (Geneva/The Hague: ICRC/Nijhoff, 1984), p. 419, at pp. 426-31.

[53] Doswald-Beck & Vitè, *op. cit.*, note 5, at p. 106.

guarantees against retroactive penal prosecution.[54] Moreover, there is mutual protection of certain other rights that include non-discrimination, rights of children and hostage taking.[55]

The starting point is the right to life that enjoys protection under IHL and includes prohibition against violence to life and person as well as arbitrary executions under Common Art. 3 of the Geneva Conventions of 1949 and Art. 4 Additional Protocol II. HRL also affords protection to the right to life directly and through the prohibition of arbitrary killing under Art. 3 UDHR, Art. 6 ICCPR and Art. 2 ECHR. Moreover, Art. 2 of the Statute of the ICTR 1994[56] prohibits the killing or inflicting of serious harm on a national, ethnic, racial or religious group with intent to destroy the group with reference to genocide. Widespread or systematic killing of the civilian population on national, political, ethnic, racial or religious grounds is also prohibited under the provision referring to crimes against humanity and covered by Art. 3 (a) & (b). The 1998 Statute of the International Criminal Court[57] outlaws the killing or inflicting of serious harm on a national, ethnic, racial or religious groups with intent to destroy the groupwith reference to genocide under Art. 6. Moreover, the widespread or systematic murder and extermination of civilians is classified as a crime against humanity under Art. 7 (1) (a) & (b), with an analogous provision referring to war crimes under Art. 8 (2) (c) (i).

The "hard core" rights include prohibition of torture and other inhuman treatment. Under IHL torture is forbidden by the Geneva Conventions, in cases of internal conflicts (Convention I, Art. 3 (1)(a)), wounded combatants (Convention I, Art. 12), civilians in occupied territories (Convention IV, Art. 32), civilians in international conflicts (Protocol I, Art. 75 (2) (a) (i)) and civilians

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[54] Schindler, *op. cit.*, note 4, at p. 939; Doswald-Beck & Vitè, *op. cit.*, note 5, at pp. 105-11.

[55] Moir, *op. cit.*, note 4, at pp. 197-231.

[56] *Statute of the International Criminal Tribunal for Rwanda*, <http://www.un.org/ictr/statute.html>.

[57] *Statute of the International Criminal Court*, UN doc. A/Conf.183/9, 17 July 1998, (1998) 37 *International Legal Materials* 1002. For analysis see Moir, *op. cit.*, note 4, at pp. 160-88, 119-25; Triffterer (ed.), *Commentary on the Rome Statute of ICC: Observers Notes, Article by Article*, (Baden: Nomos, 1999).

in internal conflicts (Protocol II, Art. 4 (2) (a) and Common Art. 3). HLA offers analogous protection under Art. 5 UDHR, Art.7 ICCPR, Art. 3 ECHR, while the Statute of the ICC prohibits widespread or systematic torture, rape or other forms of sexual violence against civilians and classifies those actions as crimes against humanity under Art. 7 (1) (g) and (h) and as war crimes under Art. 8 (2) (c) (i) and (ii). Finally, rape is prohibited under IHL through Convention IV, Art. 27, Protocol I, Art. 76 (1), Protocol I, Art. 75 and Protocol II, Art. 4 (2) (e) and in an implied manner in Common Art. 3 through the medium of prohibiting outrages upon personal dignity.

In addition, the mutual influence extends to non-discrimination, which is provided for under IHL in Arts. 4, 5, 6 of Protocol II in relation to internal conflict and in Common Art. 3 and Art. 27 Fourth Geneva Convention[58] and which also forms part of human rights instruments, as Art. 14 ECHR and Art. 26 ICCPR illustrate.

There is considerable overlap[59] in the substantive provisions between IHL and HRL protection, thus offering the field for the emergence of converging patterns. However, the mere textual repetition or reflection of provisions in either IHL or HRL is not, *ab initio*, evidence of the existence of a close relationship[60] between the two since there exists a need for those 'bridging' provisions that would establish and enable the passing of influence from one area to the other. In other words, the existence of analogous provisions, especially in relation to hard-core rights in both IHL and HRL merely affirms the parallel existence of relative norms. The transition from parallel existence to coexistence is possible through certain key bridging provisions and those are to be found mainly in HRL.

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[58] Doswald-Beck & Vitè, *op. cit.*, note 5, at pp. 107-08.

[59] Conclusion reached by numerous commentators: Doswald-Beck & Vitè, *op. cit.*, note 5, at pp. 117-18; Moir, *op. cit.*, note 4, at p. 230; Gasser, H.P., "International Humanitarian Law", in Haug, H. (ed.), *Humanity for All: the IRC and Red Crescent Movement"*, (Berne: Henry Dunant Institute, Paul Haupt Publishers, 1993), p. 491, at p. 566.

[60] Calogeropoulos-Stratis, A., *Droit Humanitaire et Droits De L'Homme*, (Geneva: Institut universitaire de hautesetudes internationales,1980), at p. 139: hard core rights as the epicentre for both HRL and IHL.

The main bridging set of provisions flow from the derogation clauses of HRL and in Moir's view "although they may be seen as a limiting factor in the protection of civilians, the inclusion of derogation provisions in human rights instruments actually serves to underline that human rights continue to apply in times of armed conflict".[61] Therefore, the inclusion of derogation clauses is coupled by sets of non-derogable rights that include those aforementioned hard-core rights.[62] The crucial step is thus taken since in times of war there can be derogations from human rights not forming part of the hard-core rights mentioned, thus leading to questions as to whether HRL ceases to apply in armed conflicts.[63] This is an inaccurate view, because derogations are limited under conditions that must apply and can be used for specific rights in specific situations and in compliance with other international obligations of the State making use of them. It is this latter point that completes the process of bridging; the derogations are not applicable to hard-core rights that are also protected under IHL, thus creating a common point of reference. Moreover, the derogations have to comply with the specific conditions set out in HRL instruments and which under Art. 15 ECHR include the condition that such measures are not inconsistent with other obligations under international law. In the same light, Art. 27 ACHR allows for the suspension of rights provided that such measures are not inconsistent with the State's other obligations under international law, while identical wording is used in Art. 4 ICCPR. Consequently, even in situations when States derogate under HRL, such derogation occurs in exclusion of hard core rights and must comply with the international obligations of that State, thus creating the bridge that connects HRL with obligations under IHL applicable in the circumstances.

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[61] Moir, *op. cit.*, note 4, at p. 196.

[62] Art. 15 (2) ECHR, Art. 4 (2) ICCPR, Art. 27 (2) ACHR.

[63] For judicial rejection of the view see *Advisory Opinion on the Legality of the Treat or Use of Nuclear Weapons*, ICJ Reports 1996, 225 at para. 25; Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm.>,
at paras. 102-106.

In conclusion, the existence of parallel textual provisions becomes the first step for convergence of the two regimes, but the transition into coexistence is made possible through the bridging provisions contained in HRL and relating to derogations. This creates a paradox in the sense that the main criticism against HRL turns out to be the safety clause that ensures adequate protection through the utilisation of IHL. Finally, it must be clarified that the preceding description is not suggesting that the influence is mono-directional, namely from IHL to HRL. There are bridging elements that enable influence from HRL to IHL and those relate to implementation and enforcement mechanisms that IHL lacks[64] and which are analysed *infra*.

### *2.2 Different Application Fields and Manifestations of the Proximity*

The application of IHL and HRL has been described as a continuum consisting of four aspects.[65] There is the situation during peacetime where HRL applies fully and IHL is inapplicable, the problematic situation of disorder and unrest where IHL is inapplicable because of tensions falling below the threshold of Common Art. 3[66] and HRL is partly applicable after the derogations are applied.[67] The third situation refers to internal armed conflicts where IHL and HRL apply at a minimum level since for the latter the derogations apply and for the former the narrow scope of Common Art. 3 and the high threshold of Additional Protocol II are

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[64] On enforcement see Kälin, W., "The Struggle Against Torture", (1998) 324 *IRRC* 433; Bank, R., "Preventive measures against torture: An analysis of standards set by the CPT, CAT, HCR and Special Rapporteur", in Association pour la prévention de la torture, *20 ans consacrés à la réalisation d'une idée, Recueil d'articles en honneur de Jean-Jacques Gautier*, (Genève: APT, 1997), p. 129.

[65] Moir, *op. cit.*, note 4, at pp. 230-31.

[66] Abi-Saab, *op. cit.*, note 4, at p. 116; Meron, T., *Human Rights in Internal Strife: Their International Protection,* Hersch Lauterpacht Lectures, (Cambridge: Grotius Publications Limited 1987), at p. 172.

[67] Gasser, H. P., "A Measure of Humanity in Internal Disturbances and Tensions: A Proposal for a Code of Conduct", (1988) 262 *IRRC* 38; Eide, A., "Internal Disturbances and Tensions", in UNESCO, *International Dimensions of Humanitarian Law,* (Dordrecht: Nijhoff, 1988), p. 241.

pertinent.[68] Finally, during international armed conflicts HRL applies at a minimum because of derogations while IHL applies fully.[69]

Moreover, there are different manifestations of the proximity of the relationship during the preceding application fields. Those manifestations include a cumulative effect, an interpretative function, a supplementing effect and a separate application based on *lex specialis*.

The cumulative effect of the proximity can be seen in relation to the 1989 Convention on the Rights of the Child, where there is considerable overlap since Art. 38 (1) imposes an obligation to respect the rules of IHL that deal with the protection of children[70] and repeats Art. 77 Additional Protocol I. The argument is that a human rights treaty makes express reference to the IHL standard, merges that with HRL and means "an overlap in terms of the scope of protection".[71] 'Cumulative', therefore, refers to the provision of greatest effective protection of the human being through the summing of both applicable standards of IHL and HRL, or in Meron's words "one unified complex of rights beneath different institutional umbrellas".[72] Another example[73] of this manifestation is the Security Council Resolution 1483 (2003)[74] on the situation between Iraq and Kuwait, where there was an aggregate of standards with requests for respect of IHL[75] and calls for the promotion of the protection for human rights.[76]

The interpretative element of the relationship can be seen in relation to the prohibition against torture with the ICTY referring

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[68] Moir, *op. cit.*, note 4, at pp. 193-231; Momtaz, D., "The Minimum Humanitarian Rules Applicable in Periods of Internal Tension and Strife", (1998) 324 *IRRC* 455.

[69] Dinstein, *op. cit.*, note, at pp. 350-54 where a different model of six variants is proposed.

[70] Heintze, *op. cit.*, note 3, at p. 792.

[71] *Ibid.*, at p. 793.

[72] Meron, T., *Human Rights in Internal Strife: Their International Protection*, (Cambridge: CUP, 1987), at p. 28.

[73] Heintze, *op. cit.*, note 3, at p. 794.

[74] Security Council Resolution, 1483 (2003), 22 May 2003, <http://daccessdds.un.org/doc/UNDOC/GEN/N03/368/53/PDF/N0336853.pdf?OpenElement>

[75] *Ibid.*, at para. 5.

[76] *Ibid.*, at para. 8 (g).

to Art. 1 of the 1984 Torture Convention[77] in order to supplement the protection against torture as found in the Geneva Conventions,[78] where it is nonetheless undefined. In addition, HRL is to be used as an interpretative guide for IHL in relation to the right to health provided for under Art. 55 Fourth Geneva Convention, on the basis of Arts. 11-12 ICESCR.[79] Finally, the approach of the ECtHR offers a practical case in point. Firstly, in relation to derogations under Art. 15 ECHR, the Court examined[80] whether the conditions giving rise to derogations existed and whether the measures adopted complied with the international obligations of the State and the Geneva Conventions specifically;[81] it answered in the affirmative.[82] In the landmark *Loizidou v Turkey* decision the ECtHR refused to apply IHL in a context involving military invasion and occupation[83] and focused narrowly on the violation of rights protected under the ECHR.[84] A similar approach was adopted in *Bankovic v Belgium*[85] and in *Ilascu v Moldova*[86] but there are also examples of reference to IHL as was the case in *Engel v The Netherlands*[87] where express reference to Art. 8 First Geneva Convention was made. In *Ergi v Turkey*[88] the Court stated that Turkey had failed "to take all feasible precaution in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding or, at least, minimising incidental loss of civilian life", thus utilising terminology of IHL.

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[77] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)].

[78] *Prosecutor v Furundzija*, (1999) 38 ILM 312.

[79] Heintze, *op. cit.*, note 3, at p. 795.

[80] *Lawless v. Ireland*, (1960) ECHR 1; *Ireland v U.K.*, (1978-97) EHRR 25.

[81] *Brannigan and McBride* v. *UK*, ECtHR Series A 258-B, 26 May 1993.

[82] *Ibid.*, at paras. 67-73.

[83] *Loizidou v Turkey*, Application No. 15318/89, Judgement of 18 December 1996, (1997) 23 E.H.R.R. 513, at para. 43.

[84] Heintze, *op. cit.*, note 3, at p. 807.

[85] *Bankovic v Belgium* (2001) 11 BHRC 435.

[86] *Ilascu v Moldova* (2004) ECHR 318.

[87] *Engel v The Netherlands* (1976) ECHR 4.

[88] *Ergi v Turkey* (1998) ECHR 59.

In *Gülek v Turkey*[89] the ECtHR stated that the extensive use of force and the means deployed were disproportionate to the declared state of emergency and the specific situation, thus impliedly reflecting the threshold element of Art. 1 (2), Additional Protocol II. Thus, as illustrated, the interpretative manifestations have practical implications.

The analysed case law also points to the reluctance of the ECtHR to make rulings on IHL, thus corresponding to the manifestation of a separate application based on *lex specialis*. The classic illustration of this manifestation centres on the question whether HLA stops to apply in armed conflicts.[90] In the Advisory Opinion *on Nuclear Weapons*, the ICJ held that Article 6 ICCPR is a non-derogable right, hence it applies in armed conflict; even during hostilities it is prohibited to arbitrarily deprive someone of his/her life. Moreover, in the Advisory Opinion *on the Construction of a Wall* the ICJ confirmed the application of HRL and the ICCPR specifically during armed conflicts.[91] The *lex specialis* point in the *Nuclear Weapons* Opinion refers to the possible concurrent application of IHL and HRL,[92] but in the context of a potential conflict, the primacy or priority of application would rest with the specialised body. The ICJ stated that "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".[93]

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[89] *Gülek v Turkey*, Application 21593/93, 27 July 1998, <http://cmiskp.echr. coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=21593/93&sessionid=6837317&skin=hudoc-en>.

[90] For judicial rejection of the view see *Advisory Opinion on the Legality of the Treat or Use of Nuclear Weapons*, ICJ Reports 1996, 225 at para. 25; Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm.>, at paras. 102-106.

[91] *Ibid.*, at para. 106.

[92] Heintze, *op. cit.*, note 3, at pp. 796-98; Greenwood, C.I., "*Jus bellum* and *jus in bello* in the Nuclear Weapons Advisory Opinion", in Boisson de Chazournes, L. & Sands, P. (eds.), *International Law, the International Court of Justice and Nuclear Weapons*, (Cambridge: CUP, 1999), p. 253.

[93] *Op cit.*, note 90, at para. 25.

Moreover, the supplementing manifestation is also present with reference to the punishment of offenders. As a background, HLA focuses primarily on individual rather than systematic violations and enforcement is perceived as a preventive task rather than as being punishment oriented.[94] On the other hand, IHL was feeble in imposing criminal liability during internal conflicts[95] as a result of the definition of grave breaches in the Geneva Conventions and the gap in Common Art. 3 and Additional Protocol II in such respect. The supplementing and interpenetrating manifestations are evident in this area because the gap of IHL for internal conflicts has now been filled through the broadening of the scope of international crimes and mainly through the decision in *Tadić Jurisdiction*.[96] There it was established that "It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed (...) customary international law may not require a connection between crimes against humanity and any conflict at all".[97] In relation to the inability of HRL to deal with systematic abuses, the preceding expansion of individual criminal liability and of the definition of international crimes can address the systematic violations lacuna and refocus HRL on punishment of offenders in mass violations.[98]

The supplementing effect is present in relation to torture where "the two sets of norms reinforce each other"[99] with the plethora of substantive provisions analysed previously regarded as being

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[94] Dugart, *op. cit.*, note 11, at pp. 445-46; World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/24 (Part 1), 13 October 1993, para. 28; in *International Legal Materials*, Vol. 32, 1993, p. 1661.

[95] See *Judgment of the Nuremberg International Military Tribunal*", reported in (1947) 41 *AJIL* 172.

[96] In relation to the *Tadić* saga, the chronology is: *Prosecutor v. Tadić* , Appeal on Jurisdiction, Case IT-94-1-AR72, (2 October 1995), 35 ILM 32 (1996), hereafter *Tadić Jurisdiction*; *Prosecutor v. Tadić* , Opinion and Judgment, Case IT-94-1-T, (7 May 1997), 36 ILM 908 (1997), hereafter *Tadić Judgment; Prosecutor v. Tadić,* Judgment of the Appeals Chamber, Case IT-94-1-A (15 July 1999) 38 ILM 1518 (1999), hereafter *Tadić (Appeal Judgment).*

[97] *Tadic Jurisdiction, Ibid.,* (1996) ILM 32, at p. 35.

[98] Dugart, *op. cit.,* note 11, at pp. 450-53.

[99] Kälin, *op. cit.,* note 64, at p. 434.

founded on common basic themes.[100] The issue of prevention of torture is one such guiding principle that has been present in IHL[101] and not to the same practical effect in HLR.[102] The main contribution of IHL has been the strong preventive practice of visits[103] to places of detention contained in the Geneva Conventions.[104] The influence has materialised in the 1987 ECPT,[105] where in the Preamble and Arts. 1,2, and 7 the practice of visits as a preventive measure is centrally placed.[106] Moreover, the methodology for visits under IHL emphasised open access to all premises, interviewing and frequency of visits[107] which has also filtered to HRL and Art. 8 ECPT. At the same time, the reverse influencing has also taken place whereby the reporting,[108] investigating[109] and complaints procedures[110] of HRL in

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[100] Meron, *op. cit.*, note 72, at p. 28.

[101] Cf. Art. 2 (1) UN Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment 1984, < http://www.hrweb.org/legal/cat.html>.

[102] Kälin, *op. cit.*, note 64, at p. 434.

[103] Haug, H., *Humanity for all – The International Red Cross and Red Crescent Movement*, (Berne: Henry Dunant Institute, Paul Haupt Publishers, 1993), at pp. 97-162; Comtesse, F., "Activities of the ICRC in respect of visits to persons deprived of their liberty: conditions and methodology", in Association for the Prevention of Torture (Eds), *The implementation of the European Convention for the prevention of torture and inhuman or degrading treatment or punishment (ECPT) – Assessment and perspectives after five years of activities of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)*, (Geneva, 1994), p. 239

[104] Art. 143 Fourth Geneva Convention; Art. 126 Third Geneva Convention; Common Art. 3 (2).

[105] *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1984*, < http://conventions.coe.int/Treaty/en/Treaties/Html/126.htm>.

[106] On the ECPT 1984 see Malcolm Evans and Rod Morgan, "The origins and drafting of the ECPT — a salutary lesson?", in Association pour la prévention de la torture, *20 ans consacrés à la réalisation d'une idée, Recueil d'articles en honneur de Jean-Jacques Gautier*, (Genève: APT, 1997), p. 85.

[107] Art. 143 Fourth Geneva Convention; Art. 126 Third Geneva Convention.

[108] Art. 19 (9) *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)]; Arts. 7 & 40 ICCPR.

[109] Art. 20 Convention Against Torture, *ibid.*

[110] Arts. 21 &22 Convention Against Torture, *ibid.*

relation to torture have contributed to the protection against the same.

In conclusion, the protection against torture offers a paradigm of the supplementing manifestation of the relationship between IHL and HRL, since prison visits rules under IHL have influenced HRL for the prevention of torture. HLA has significantly contributed to the development of mechanisms for the enforcement through reporting, investigating and complaints procedures. The *lex specialis* principle reminds the analyst that the relationship between IHL and HRL maintains the procedural distinction and the considerable overlap in substantive provisions, the mutual interpretative influence and the cumulative effect are mere manifestations of the broader spectrum that makes up the nature of the relationship.

## 3. Conclusion

The relationship between IHL and HRL is evolving, changing and complex enough to consist of different manifestations depending on the area. Their journey has started from different roots and followed different routes but a common destination had been identified in the form of the principle of humanity. That destination surfaced as a result of combination of factors with a catalyst function and was solidified through the parallel existence of substantive protection that offered a point of reference. The crucial role of the bridging elements enabled the transition from the parallel existence of similar provisions to the state coexistence. Nonetheless, the overlap resulted in a non-uniform relationship that consisted of different application situations akin to a spectrum of possible coexistences and significantly in the differing manifestations of such coexistence. Therefore, there is no unified descriptive label for the relationship between IHL and HRL because the relationship fluctuates depending on the subject matter and the circumstances. It is submitted that it is an oversimplification to either emphasise the distinction between IHL and HRL or to regard it as obsolete; a middle way exists that takes the form of interpenetration and resultant redefinition of standards and perceptions.