

**CHALLENGES IN APPLYING HUMAN RIGHTS LAW TO ARMED  
CONFLICT: THE RELATIONSHIP BETWEEN INTERNATIONAL  
HUMAN RIGHTS LAW AND INTERNATIONAL  
HUMANITARIAN LAW.**

**Kandidatnr: 159512**

**Innleveringsfrist: 02/06/2009**

**Veileder: Kjetil Mujezinovic Larsen**

**Til sammen 14 994 ord**

**02/06/2009**

# **Contents**

## **PART I**

### **1. Introduction**

**1.1. Presentation of the problems**

**1.2. Delimitations**

**1.3. Legal sources and certain concerns regarding them**

## **PART II**

### **2. Does international human rights law apply in armed conflict?**

**2.1. The traditional view**

**2.2. Relevant international treaties and conventions related to international humanitarian law.**

**2.3. Derogation from International Human Rights in armed conflict – a sign that international human rights law is not applicable?**

**2.4. International jurisprudence – primarily the jurisprudence of the International Court of Justice**

**2.5. Summary**

## **PART III**

### **3. The Real Scope of Applicability – articulating the relationship between human rights law and humanitarian law in times of armed conflict.**

**3.1. *Lex Specialis Derogati Legi Generali* – defining the principle in international law and its relevance in the relationship between international humanitarian law and international human rights law.**

**3.2. The *Lex Specialis* principle in the International Court of Justice – is humanitarian law seen as an exception to human rights law in international armed conflict or do the two bodies of law converge?**

**3.2.1. The Nuclear Weapons Case (1996)**

**3.2.2. The Israeli Wall Case (2004)**

**3.2.3. DRC v. Uganda (2005)**

**3.3. Comments on the international jurisprudence of the ICJ regarding the use of the *lex specialis* principle**

**3.4. *Lex Specialis* in Non-International Armed Conflict – Common Article 3 and its relationship to international human rights law**

**3.5. Summary**

## **PART IV**

### **4. The Mandate of the European Court of Human Rights in discussing International Humanitarian Law**

**4.1. Article 15 of the European Convention**

**4.2. The European Court of Human Rights – an examination of case law**

### 4.3. Summary

*Index of literature*

## **PART I**

### **1. Introduction**

Today there are international- and non-international armed conflicts taking place in many different places of the world, often leading to severe breaches of the local population's human rights, and arguably also to breaches of combatants' human rights, e.g. under interrogation. Traditionally, however, human rights law has been seen as the law of peace governing the relationship between a state and its nationals, and has not been applied in armed conflict, while international humanitarian law, often referred to as the law of war, has been the applicable body of law. But in more recent times, this view has changed, following claims that international human rights law must also be applicable in times of armed conflict, even though this was not the intent when the states signed the different human rights conventions, starting a few years after World War II. However, when trying to apply human rights law in times of armed conflict, one encounters several problems and obstacles of an international legal character. This paper will look at some of these problems: Firstly, the question of the actual applicability of human rights law in armed conflict. Secondly, the relationship between these two bodies of law in times of armed conflict. If human rights law is found to be applicable, it is of the utmost importance to determine how these two bodies of law relate to each other. Finally it will address the mandate of one of the most important human rights bodies, the European Court of Human Rights, regarding its mandate to use and discuss humanitarian law under the European Convention of Human Rights.

#### **1.1. Presentation of the problems**

The problems raised in this paper are primarily these:

*Does human rights law apply in armed conflict?* An look at the traditional view of separation followed by the apparent use of human rights norms in certain humanitarian conventions and the derogation clauses encompassed in certain human rights treaties.

*Provided that human rights law is applicable, what is the relationship between human rights law and humanitarian law in times of armed conflict?* Different ways of articulating the relationship between the two bodies of law will be analysed, primarily focusing on the *lex specialis* principle.

*Provided that human rights law is applicable in times of armed conflict, what is the mandate of the European Court of Human Rights in discussing humanitarian law?* This relates to the fact that there are few, if any, remedies for individuals whose rights have been violated by a State breaching its humanitarian law obligations. Thus it will be analysed if the ECtHR can remedy this problem, by way of applying humanitarian law in the cases brought before it by individual complainants.

## **1.2. Delimitations**

This master thesis will investigate some of the general key problems concerning the applicability of human rights law in armed conflict and human rights law's relationship with humanitarian law in this context and will not go into details regarding special areas of these two bodies of law, except for the ones mentioned above in section 1.1.

The relationship between human rights law and humanitarian law in non-international armed conflict will be examined, but a full evaluation of all the problems surrounding this subject is not possible in this thesis. The extra-territorial application of human rights is also relevant, but will not be discussed here.

Among the various human rights bodies, this thesis will focus on the European Court of Human Rights, as this is the most relevant human rights body in this part of the world (Norway, Europe). Also, this thesis will concentrate on civil and political human rights, excluding the economic, social and cultural rights.

Case law will consist of international case law. That is not to say that national decisions are of no value, but because of space constraints the focus will be towards international bodies of law.

Although all these limitations are relevant when discussing human rights law in armed conflict, they will not be examined in this thesis due to space constraints. My thoughts behind these limitations are that rather than dealing briefly with many issues, it is better to deal with certain key issues in depth.

## **1.3. Legal Sources and certain concerns regarding them**

The Statute of the International Court of Justice outlines the applicable legal sources when dealing with issues in international law. Article 38 (1) states that the following sources are applicable:

- a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states
- b) international custom, as evidence of a general practice accepted as law
- c) the general principles of law recognized by civilized nations
- d) ...judicial decisions and the teachings of the most highly qualified publicists...as subsidiary means for the determination of rules of law.

Following this, the sources used in this paper include:

*\*Human Rights Conventions*

The Covenant on Civil and Political Rights (ICCPR) (1966)

The European Convention on Human Rights (ECHR) (1950)

*\*Humanitarian Conventions* (regarding the applicability of early human rights norms in armed conflict)

The Fourth Hague Convention (1907)

Article 3 Common to the Geneva Conventions (Common Article 3) (1949)

The Fourth Hague Convention (1907)

Additional Protocol I and Additional Protocol II of the Geneva Conventions (AD I & II) (1977)

*\*Customary International Law*

*\*The jurisprudence of relevant bodies of international law*

The International Court of Justice (ICJ) - The jurisdiction of the ICJ comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.<sup>1</sup>

The European Court of Human Rights (ECtHR) - The jurisdiction of the ECtHR extends to all cases concerning the interpretation and application of the ECHR.<sup>2</sup>

The United Nations Human Rights Committee (HRC) – The HRC’s jurisdiction extends to cases concerning breaches of the ICCPR.<sup>3</sup>

*\*State Practice*

and

*\*Legal Doctrine*

In contrast to most national legal systems, the legal system of international law does not have a clear hierarchical structure. This complicates the weighing of different arguments from different sources, regarding which source takes preference. No consensus has been reached regarding preference between treaty law and customary law; according to Cassese these are equal in validity.<sup>4</sup> Furthermore, according to the ICJ Statutes, it is clear that legal doctrine is of a supplementary character. Concerning the interpretation of treaties, the general rules in Section 3 of the Vienna Convention on the Law of Treaties (1969) will be applied, since this is the primary international treaty concerning the interpretation of treaties between States, with 109 contracting parties (as of May 2009).<sup>5</sup>

---

<sup>1</sup> Article 36 (1) of the Statutes of the International Court of Justice.

<sup>2</sup> Article 45 of the ECHR

<sup>3</sup> Article 1 of the First Optional Protocol to the ICCPR

<sup>4</sup> Antonio Cassese, *International Law*, Second edition (2005), Oxford University Press, p. 199, (hereinafter: Cassese)

<sup>5</sup> See UN database:

[http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en](http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en)



Another problem is the dynamic approach human rights bodies have taken when interpreting their respective conventions.<sup>6</sup> In this way, human rights law develop through case law, something that must be taken into account when analysing human rights bodies' jurisprudence. Humanitarian law, on the other hand, traditionally develops through the adoption of new treaties and conventions, which makes it more static than human rights law.

Finally, it should also be mentioned that while there is a lot of case law from human rights bodies, explaining and developing human rights, this is not the case for humanitarian law. Humanitarian law is mostly dealt with in national courts. That is not to say that international case law regarding humanitarian law is not available, only that it is available in a less degree than human rights case law. Because of this, certain issues might have been brought before human rights bodies several times, which might make it easier to understand and apply these rules compared to humanitarian rules.

## **PART II**

### **2. Does international human rights law apply in armed conflict?**

#### **2.1. The traditional view.**

International human rights law and international humanitarian law are two different bodies of law. While the former deals with the protection of the individual against any abusive power by the State, the latter deals with the proper conduct between two parties involved in an armed conflict.<sup>7</sup> As such, human rights law has traditionally been viewed as a set of norms that govern an internal relationship between a State and its citizens,<sup>8</sup> while humanitarian law has been referred to as the law of war, since it at the outset of its origin dealt with international armed conflicts between two sovereign states.

---

<sup>6</sup> E.g. The ECtHR stating, in *Ocalan v. Turkey* (2008), that “the Convention is a living instrument which must be interpreted in the light of present-day conditions”, see para.163.

<sup>7</sup> Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law In Situations of Armed Conflict*, ISR.L.REV. Volume 40, No. 2, p. 310 (2007) (hereinafter: Droege)

<sup>8</sup> *ibid*, p. 313, see also Doswald-Beck and Vité, *International Humanitarian Law and Human Rights*, 293 INT.REV. RED CROSS, pp. 94-119 (1993).

At the same time, the very foundations and motivations behind these two bodies of law differ. As mentioned above, human rights law is a matter between a State and its nationals, and was in the beginning a matter of national law and was not regulated internationally.<sup>9</sup>

Humanitarian law, on the other hand, was never based on a principle of rights, but on a notion of charity, primarily motivated by a principle of humanity<sup>10</sup> and “the idea of reciprocity between states in the treatment of the other states’ troops”.<sup>11</sup> This also meant that humanitarian law, since it regulated the actions and conducts between states, was a part of international law, separating it from early national human rights law. As such, they were seen as separated bodies of law.

To illustrate the early view on separation; The United Nations’ International Law Commission rejected any close connection between International Humanitarian Law and Human Rights Law in 1947, stating that any inclusion of the laws of war amongst its topics for codification could be interpreted as “showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace”.<sup>12</sup> The U.N. focussed on human rights, and human rights law was seen as the law of peace. Since the U.N. was an instrument for peace, any focus on humanitarian law was seen to be contrary to the purpose of the U.N., therefore human rights and humanitarian law had to be kept separated.

But after the World War II, human rights law gradually became a part of international law, starting with the adoption of the United Nations Declaration of Human Rights in 1948 and continuing with the adoption of subsequent major human rights treaties. This changed this early view of human rights law as being a national matter, moving it from a national level into becoming a part of international law. At the same time these treaties reinforced human rights on an international level and “changed this surgically clear division” between IHRL and IHL.<sup>13</sup>

It should, however, be pointed out that some still believe in a surgically clear division between the two bodies of law. Israel has made claims like the one mentioned above, although in different terms, regarding the relationship between international human rights law and international humanitarian

---

<sup>9</sup> Droege, p.313

<sup>10</sup> 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land refers in the preamble to the parties as “animated by the desire to serve...the interest of humanity”, in: Schindler and Toman, *The Law of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 4<sup>th</sup> edition (2004), p.55.

<sup>11</sup> Droege, p.313.

<sup>12</sup> ILC Yearbook (1949 – I), p.263-264, para. 20, cited in Nancie Prud’homme, *Lex Specialis: Oversimplifying a more complex and multifaceted relationship?* (2007), *ISR.L.REV*, Vol.40, No. 2, pp. 355-395, on page 359-360, *International Law Forum*, The Hebrew University of Jerusalem (hereinafter: Prud’homme).

<sup>13</sup> Hans-Joachim Heintze, *On the relationship between human rights law protection and international humanitarian law* (2004), 86 *IRRC*, p. 789, (hereinafter: Heintze).

law. In the *Israeli Wall Case* (ICJ Advisory Opinion),<sup>14</sup> the Israeli government denied that the ICCPR) and the International Covenant on Economic, Social and Cultural Rights were applicable in the occupied Palestinian territory, because, among other things, "humanitarian law is the protection granted in a conflict situation...whereas human rights treaties were intended for the protection of citizens from their own government in times of peace".<sup>15</sup> This is similar to the traditional view and again illustrates the *separation theory*: The two bodies of law shall, according to this theory, be completely separated and norms relating to human rights cannot be used to regulate conduct between two parties to an armed conflict. Thus, according to Israel's state practice, human rights law is not applicable in armed conflicts.

In section 2.2, some of the most important treaties relating to international humanitarian law will be analysed, to see if there is any indications in these treaties as to whether or not human rights are applicable in times of armed conflict. Most of these treaties were adopted before the significant human rights treaties and the focus when examining them will therefore be on human rights norms. It is important to separate between human rights *norms*, which are norms and principles of e.g. customary law, which were not encompassed in any human rights treaties at the time, and human rights *law*, which primarily are the human rights conventions and the meaning given to them by their respective bodies' dynamic approach.

After analysing humanitarian conventions, the focus will shift towards human rights conventions in section 2.3, in particular the derogation clauses contained in some of the major human rights treaties, to see if these hinder the use of human rights in armed conflict. Finally, in section 2.4, international jurisprudence will be analysed, focusing on the important advisory opinions set forth by the International Court of Justice.

## **2.2. Relevant international treaties and conventions related to international humanitarian law.**

As mentioned above, the 1907 Hague Convention refers to "the interest of humanity"<sup>16</sup> as a main motivation for drafting a convention that regulates the law of war on land. The use of the word "humanity" might suggest a common idea, a shared base for the two legal regimes, indicating that human rights may be applicable in armed conflicts. The reason for this interpretation is that human

---

<sup>14</sup> International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* (2004), (hereinafter: *Israeli Wall Case*).

<sup>15</sup> *Ibid*, para 102.

<sup>16</sup> *Op.cit*, note 10.

rights seek to protect every human being against abusive power, thus it might be said that it also seeks to protect humanity as a whole, since “humanity” must be understood as meaning the human race; all peoples, which also incorporates all human beings.

Furthermore, Common Article 3 of the 1949 Geneva Conventions, regulating non-international armed conflicts, such as civil wars, imposes legal obligations to all parties to a conflict. Seeing as the four Geneva Conventions of 1949 became the first treaties to be ratified by every state in the world, Common Article 3’s regulations are universal.<sup>17</sup> Common Article 3 secures the most basic individual rights such as the right to a fair trial<sup>18</sup> and the general right, in all circumstances, to “be treated humanely”.<sup>19</sup> This is significant, because by imposing these legal obligations to the parties to a conflict, Common Article 3 ensures the protection of some of the most crucial human rights in times of non-international armed conflict. Seeing as Common Article 3 regulates non-international armed conflicts, it does in fact regulate the treatment of a state’s own citizens. This differs from the traditional humanitarian law that mostly dealt with *international* armed conflicts, i.e. a war between two States. This added a new dimension to humanitarian law and at the same time drew it closer to the idea of human rights law, since human rights law specifically regulates the relationship between a State and its own nationals.

However, the Geneva Conventions were ratified before the adoption of the most significant human rights treaties, so one cannot argue that Common Article 3 was influenced by international human rights law per se, since human rights law, as codified in the different treaties, both regional and universal, was adopted later on. But it still seems clear that the States party to the Geneva Conventions were aware of fundamental rights like the right to a fair trial, so a few human rights norms were arguably applicable in non-international armed conflict at the time, even though they weren’t codified in any human rights treaties yet. Arguably, the reference to “humanely” in Common Article 3 also shows the existence of a more general principle of humanity and, as mentioned above, suggests that human rights norms are applicable in armed conflict. Therefore it seems clear that Common Article 3 indicates the applicability of human rights norms to situations of non-

---

<sup>17</sup> Steiner, Alston, Goodman, *International Human Rights in Context – Law, Politics, Morals*, Oxford University Press, 3rd edition (2008), p.395-396, (hereinafter: Steiner, Alston, Goodman)

<sup>18</sup> Article 3.1 d) Common to the Geneva Conventions of 1949

<sup>19</sup> *ibid*

international armed conflict, as Common Article 3 reflects “the few essential rules of humanity which all civilized nations consider as valid everywhere”.<sup>20</sup>

The 1977 Additional Protocols to the Geneva Conventions arrived after the adoption of the most significant human rights conventions<sup>21</sup> and it might therefore be easier to find a possible connection between these Protocols and, not only human rights norms, but human rights law. Additional Protocol I has been ratified by 168 states, while Additional Protocol II has been ratified by 164 states, with the United States and Israel as notable exceptions.<sup>22</sup> Article 72 of AD II which contains the treaty’s scope of application, states that the “provisions of this Section are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth convention...as well as to other applicable rules of international law relating to the protection of *fundamental human rights* during international armed conflict” (italics added).<sup>23</sup>

At the time when the 1977 Protocols were adopted, Professor Colonel G.I.A.D. Draper, issued a series of warnings regarding the Protocols and the convergence of human rights law and humanitarian law which he felt was implied in the Protocols. In an essay that, according to Steiner, Alston and Goodman still retains some influence 30 years later,<sup>24</sup> Draper stated that “hostilities and government-governed relationships are different in kind, origin, purpose and consequences. Accordingly, the law that relates to them, respectively, has the same differences...at the end of the day, the law of human rights seeks to reflect the cohesion and harmony in human society and must, from the nature of things, be a different and opposed law to that which seeks to regulate the conduct of hostile relationships between states or other organized armed groups, and in internal rebellion.”<sup>25</sup> Draper clearly felt that there was too much difference between the two bodies of international law, making it impossible to apply human rights in armed conflict.

However, if the rules in AD I & II were to be additional to international law relating to the protection of fundamental human rights, it must mean that the contracting states believed that fundamental human rights were applicable in armed conflict at the time, otherwise there would not have been

---

<sup>20</sup> Steiner, Alston, Goodman, p. 397.

<sup>21</sup> The European Human Rights Convention (1950), The Inter-American Human Rights Convention (1969), The International Covenant on Civil and Political Rights (1966) and The International Covenant on Economic, Social and Cultural Rights (1966)

<sup>22</sup> ICRC webpage:

[http://www.icrc.org/IHL.nsf/\(SPF\)/party\\_main\\_treaties/\\$File/IHL\\_and\\_other\\_related\\_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf), (last visited May 31 2009)

<sup>23</sup> 1977 Additional Protocol II of the Geneva Conventions, art. 72.

<sup>24</sup> Steiner, Alston, Goodman, p. 397.

<sup>25</sup> G.I.A.D. Draper, Humanitarian Law and Human Rights, *Acti Juridica* 193 (1979), cited in: Steiner, Alston, Goodman, p.398.

any reference to it in the text of Article 72 in AD II. When one also considers the fact that all the major human rights treaties had been adopted at the time, the protection of fundamental human rights would naturally be best protected through the use of the rules found in these treaties, however this is not specified in any of the Additional Protocols. So no conclusions can be drawn from the Additional Protocols as to the application of human rights treaty law, but it seems clear that fundamental human rights norms would definitely be applicable following these Protocols.

The Martens Clause should also be mentioned in the context of the applicability of human rights norms. If a question is posed and it is not regulated in applicable treaty law, the use of the Martens Clause is a way of filling in these “empty holes” in the treaty, relying on different principles of international law to create rules on the subject at hand. It was originally to be found in the preamble of the Fourth Hague Conventions, but is now also included in the main body of text of AD I and in the preamble of AD II. As to the applicability of the Martens Clause, the ICJ has confirmed its continuing importance in international law.<sup>26</sup> The Martens Clause “puts the ‘laws of humanity’ and the ‘dictates of public conscience’ on the same level as the ‘usage of States (State Practice)’ as historical sources of ‘principles of international law’”.<sup>27</sup> Providing that the “laws of humanity” refers to early human rights, this would mean that if a situation occurs in times of armed conflict, and it is not regulated by an applicable treaty, fundamental human rights principles can be used to regulate the situation, by using the “laws of humanity” as a test of lawfulness in an isolated situation. Arguably, if the Martens Clause refers to human rights principles as applicable in international law, it could arguably be said that fundamental human rights norms are applicable in their own right.

To sum up, it seems clear that several key treaties regarding humanitarian law encompass an interest in humanity as an important motivation for why these rules about warfare has been agreed upon by all parties to the treaties in question. With basis in humanity and the Martens Clause, one might even say that some of the most fundamental human rights arguably are applicable in their own right as well. It also seems that by adopting the Additional Protocols in 1977, states party to this convention showed that they would regard a use of human rights norms as relevant and applicable in armed conflicts. Some commentators and state practice differ from this opinion, but this seems to be a minority compared to the vast group of contracting parties to the 1977 Protocols.

---

<sup>26</sup> International Court of Justice, *The Legality of the threat or use of nuclear weapons, Advisory Opinion*, (1996), para 87(hereinafter: *Nuclear Weapons Case*): “[The Martens Clause] continuing existence and applicability is not to be doubted”.

<sup>27</sup> Cassese, p.160-161.

### 2.3. Derogation from International Human Rights in armed conflict – a sign that international human rights law is not applicable?

The most important human rights treaties all have derogation clauses and it is a well known fact that some human rights can be derogated from in times of severe public emergency. In this section it will be further analysed what these derogation clauses can reveal about the applicability of human rights law in armed conflict.

The European Human Rights Convention and the American Convention on Human Rights are two of the most developed regional human rights treaties in the world and they both contain derogation clauses referring to “time of war”.<sup>28</sup> The European Convention also lists the right to life as being non-derogable, “except in respect of deaths resulting from lawful acts of war”.<sup>29</sup> Furthermore, the Convention against Torture (CAT) expressly mentions that a state of war will permit derogation from some rights listed in the convention and prohibit derogation from other rights.<sup>30</sup>

When a human rights convention mentions a state of war as a reason for derogation, it is reason to believe that these conventions were meant to also be applicable in times of armed conflict, since the non-derogable rights that each of these conventions contain, such as the right not to be tortured in Article 3 of the ECHR and Article 7 of the ICCPR, still have to be upheld, otherwise there would be no point in making them non-derogable. An objection to this would be that some rights that are non-derogable might effectively be set aside by way of the *lex specialis* principle, so that the non-derogability might, in certain cases, not be as absolute as one would immediately think.<sup>31</sup> However, it is clear that some rights are completely non-derogable, in the sense that they can never be set aside by way of the *lex specialis* principle or anything else, no matter what kind of emergency might occur, an example is the above mentioned right not to be tortured.<sup>32</sup> This means that while some rights can be derogated from in armed conflicts, others will still be there regulating the proper means of conduct regarding e.g. interrogations. This is a clear sign that at least the non-derogable human rights law will be applicable in armed conflicts.

The ICCPR also has a derogation clause.<sup>33</sup> This derogation clause, however, does not mention a state of war as a reason for derogation and one might think that this weighs against its application in

---

<sup>28</sup> ECHR, article 15, and the American Convention on Human Rights (1978), article 27.

<sup>29</sup> ECHR, article 2.

<sup>30</sup> The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987), article 2,

<sup>31</sup> The use of the *lex specialis* principle will be examined in section 3.

<sup>32</sup> CAT, article 2.2., clearly states that “no exceptional circumstances whatsoever, whether a state of war or a threat of war... or any other public emergency, may be invoked as a justification of torture”.

<sup>33</sup> ICCPR, article 4.

armed conflicts. But this can be explained by the UN's reluctance to using phrases like "war" at the time of adoption, "in line with the dogmatic denial of the possibility of war after the adoption of the UN Charter, it was felt that the Covenant should not envisage, even by implication, the situation of war",<sup>34</sup> so any explicit mention of a state of war was withdrawn from the text.<sup>35</sup> It is, however, clear that the current formulation of Article 4 is understood to encompass armed conflicts.<sup>36</sup>

When it comes to the human rights that *are* derogable, a misconception sometimes found in legal literature is that these rights will then be completely dismissed and will no longer apply in a situation of armed conflict.<sup>37</sup> This is not, however, how these derogation clauses are meant to be understood. Requirements have to be met before any derogation can take place and any limitation is limited only to the extent strictly required by the exigencies of the situation, provided that any measures used by the derogating state are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of colour, sex, race, language, social origin or religion.<sup>38</sup> So the derogation clauses do, in fact, limit the possibilities for derogation.

Therefore, when it comes to situations of armed conflict, it is not possible to draw the conclusion that the human rights treaty in question ceases to apply because a derogation clause exists. In armed conflicts, the derogation clauses ensure that "human rights continue to apply and be respected, albeit in a modified manner".<sup>39</sup> To sum up, some obligations in both regional and universal human rights treaties will continue to apply in a situation of armed conflict and this is a clear indication of an overlap of both bodies of law.

## **2.4 International jurisprudence – primarily the jurisprudence of the International Court of Justice**

The European Court of Human Rights (ECtHR) has never applied international humanitarian law directly as a legal basis for breaches of the ECHR,<sup>40</sup> because its mandate only covers the European

---

<sup>34</sup> Droege, p. 318-319.

<sup>35</sup> See the Official Records of the Economic and Social Council, Eleventh Session, Supplement No. 5, UN Doc. E/1681, Annex I, Article 2.

<sup>36</sup> Steiner, Alston, Goodman, p. 396-397.

<sup>37</sup> Droege, p. 318.

<sup>38</sup> ICCPR, art.4, ECHR, art.15, ACHR, art.27, referenced in Droege, p.318.

<sup>39</sup> Droege, p. 320

<sup>40</sup> In *Korbely v. Hungary* and *Kononov v. Latvia*, both from 2008, the ECtHR did discuss IHL directly, but did it under Article 7 of the ECHR, to establish whether or not the applicants had been convicted for "war crimes" without a proper definition of the crime in law. In both these cases the law in question was international humanitarian law, thus the Court had to analyse the relevant parts of this body of law. The legal basis for the breaches found in these two cases was Article 7 of the ECHR.



Convention,<sup>41</sup> but seems to have recognized the application of the ECHR in situations of non-international armed conflicts<sup>42</sup> and in situations of international armed conflicts.<sup>43</sup>

The UN Human Rights Committee has applied the ICCPR in both non-international conflicts and international armed conflicts, both in its concluding observations on country reports and in the Committee's opinions on individual cases.<sup>44</sup>

The jurisprudence of both the ECtHR and the UNHRC shows a determination to apply human rights in armed conflicts, thus further establishing the application of human rights law in both international and non-international armed conflicts.

Furthermore, the International Court of Justice (ICJ) has re-affirmed this jurisprudence.<sup>45</sup> The Court provided "one of the most influential statements"<sup>46</sup> on the relationship between international humanitarian law and international human rights in the *Advisory Opinion on The Legality of the Threat of Use of Nuclear Weapons* of 1996 (Nuclear Weapons case) with respect to the right to life in article 6 of the ICCPR:

"The Court observes that the protection of the International Covenant on Civil and Political Rights *does not cease* in times of war, except by operation of Article 4...whereby certain provisions may be derogated from...respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities" (italics added).<sup>47</sup>

In 2004 the ICJ expanded this argument in the *Israeli Wall Case*, effectively saying that human rights law *in general* are applicable in armed conflict.<sup>48</sup> This statement was repeated in *the Case Concerning the Territory in Eastern Congo Occupied by Uganda*.<sup>49</sup>

---

<sup>41</sup> The mandate of the ECtHR to apply humanitarian law will be analysed in section 4.

<sup>42</sup> See e.g. *Isayeva v. Russia* (2005), paras. 172-178.

<sup>43</sup> *Loizidou v. Turkey* (1996), para. 43, regarding the human rights violations arising out of a military occupation on Cyprus. The complainant was not able to use her property in Northern Cyprus because of the Turkish invasion in 1974, and the ECtHR found that it was a breach of Article 1 of Additional Protocol I to the ECHR: A violation of her right to the peaceful use of her property.

<sup>44</sup> See e.g. Concluding Observations on: Democratic Republic of Congo, UN Doc. CCPR/C/COD/CO/3 (2006), United States of America, UN Doc. CCPR/C/USA/CO/NON ENCORE PUBLIE, *Sarma v. Sri Lanka*, UN Doc. CCPR/C/78/D/950/2000 (2003).

<sup>45</sup> Droege, p.322.

<sup>46</sup> Steiner, Alston, Goodman (2008), p.399.

<sup>47</sup> *Nuclear Weapons Case*, para. 25.

<sup>48</sup> *Israeli Wall Case* para. 106: "More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights."

<sup>49</sup> *Case Concerning Armed Activities on the Territory of the Congo* (hereinafter: *DRC v. Uganda*), 2005, I.C.J. 116, para. 119.

For the most part, states have not objected to the jurisprudence of these and other international bodies, with the exception of some states that seemingly support the theory of separation and therefore contest the application of human rights law in situations of armed conflict.<sup>50</sup>

However, it is questionable whether it is indeed possible, for States party to one of the major human rights conventions, to persistently object to the application of rights that are in fact non-derogable or applicable in their own right, such as e.g. the right not to be tortured, the right to a fair trial and the right to life. Also, if a state objects to the applicability of human rights law, and it is “seen as a reservation to the application of a given treaty to situations of armed conflict, it would be doubtful whether such an objection would be compatible with the object and purpose of human rights treaties, especially if the reservation is not formulated as a formal reservation”.<sup>51</sup>

## 2.5. Summary

To sum up, it is clear that both universal and regional bodies have accepted the application of human rights law in situations of both international and non-international armed conflict. By and large, through the development of treaties, resolutions and acceptance of jurisprudence, it can also be concluded that state practice has in general accepted this applicability as well. It is also clear that the application of human rights law is compatible with the drafting and wording of human rights treaties and, by way of already applicable human rights norms, compatible in principle to international humanitarian law, as seen in the preamble to the 1907 Hague Convention (IV), Common Article 3 of the Geneva Conventions and the two Additional Protocols to the Geneva Conventions.

However, Draper has a point<sup>52</sup>; there *are* several fundamental features that distinguish human rights law and humanitarian law. And in light of this it might be possible to take a more static approach and say that these two bodies of law are not compatible and therefore human rights law can't be applicable in armed conflict. However, the underlying principles of human rights law and humanitarian law is the safeguarding of the life, health and dignity of human beings, such as the prevention and punishment of torture and obligations regarding fundamental judicial guarantees. Furthermore, as shown above, jurisprudence and state practice points in the same direction, calling for a more dynamic approach in the relationship between human rights law and humanitarian law. These two systems are no longer seen as mutually exclusive, thus they can both be applied in times

---

<sup>50</sup> Op.cit., note 15, and Droege, p. 323.

<sup>51</sup> Droege, p. 324, see also Article 31 (1) of the Vienna Convention on the Law of Treaties.

<sup>52</sup> Op.cit, note 25

of armed conflict. It might be that this view is more of a legal policy rather than a legal nature<sup>53</sup>, but that is besides the point when discussing what is *de lege lata* today.

As so, the answer to the question posed in the beginning of this section must be that human rights law apply in armed conflicts.

## **PART III**

### **3. The Real Scope of Applicability – articulating the relationship between human rights law and humanitarian law in times of armed conflict.**

If it is so that human rights law can be applied in times of armed conflict, a very important question still remains: How does one define the relationship between international humanitarian law and international human rights law in situations of armed conflict?

Two somewhat different theories have been posited in order to define this relationship. The first, developed by the ICJ in the *Nuclear Weapons Case* and further defined in the *Israeli Wall Case*, is the use of the principle of *lex specialis* to determine the relationship between these two bodies of law in times of armed conflict. In what way the principle is used will be discussed below. The second approach is often referred to as the complementary theory, where the two bodies of law complement each other. This theory is based upon the notion that humanitarian law and human rights law do not contradict each other, but are built upon the same principles and values and can therefore mutually influence and reinforce each other.<sup>54</sup> In a way, this theory is similar to the method of interpretation encoded in Article 31(3)(c) of the Vienna Convention on the Law of Treaties. When interpreting an international rule, this article allows taking into account any “relevant rule of international law applicable in the relations between the parties”. Therefore, according to this theory, a relevant human rights norm can be used to interpret a humanitarian rule and vice versa. However, the relationship between these two bodies of law is most often described using the first approach mentioned above, as a relationship between *lex specialis* and *lex generalis*, something that will be analysed in the following sections.

---

<sup>53</sup> Droege, p. 337

<sup>54</sup> Droege, p. 337

### **3.1. *Lex Specialis Derogati Legi Generali* – defining the principle in international law and its relevance in the relationship between international humanitarian law and international human rights law.**

Before analysing the interplay between international humanitarian law and international human rights law through the *lex specialis* rule, a definition of this rule and a short discussion of the principle and how it applies in international law, is necessary.

A simple definition of the principle would be to say, as Nancie Prud'homme does, that “the maxim *lex specialis derogate legi generali*, conveys that specific law prevails over general law.”<sup>55</sup>

Traditionally, this principle was used as a tool to solve conflicts between two conflicting laws, meaning that the specific rule derogates from the general rule and might be seen as an exception to the general rule; the specific rule sets aside the general rule.

However, according to the same commentator, the “purpose and scope of *lex specialis* has been somewhat expanded”.<sup>56</sup> As Koskenniemi writes:

“There are *two* ways in which law takes account of the relationship of a particular rule to a general rule...A particular rule may be considered an application of the general rule in a given circumstance. That is to say, it may give instructions on what a general rule requires in the case at hand.

Alternatively, a particular rule may be conceived as an exception to the general rule. In this case, the particular derogates from the general rule. The maxim *lex specialis derogat lex generali* is usually dealt with as a conflict rule. However, it need not be limited to conflict” (italics added).<sup>57</sup>

As Koskenniemi displays in the former description of use, the specific rule does not have to exclude the general rule; it could be seen as an application, where the two rules complement each other, although the specific rule will be the primary one. In other words, the general rule does not necessarily cease to apply.

This is the case when the two norms are not in strict conflict, but “have a relationship in the sense that they must have the same characteristics, and the special rule must either supplement or displace one of the characteristics of the general rule”.<sup>58</sup> To put it simply, in some cases the principle of *lex specialis* can be used as something else than as a tool to solve a conflict between two

---

<sup>55</sup> Prud'homme, p. 367

<sup>56</sup> Prud'homme, p. 369

<sup>57</sup> Marti Koskenniemi, Study on the Function and Scope of the Lex Specialis Rule and the Question of 'Self-Contained Regimes', International Law Commission, UN Doc. ILC(LVI)/SG/FIL/CRD.1 and Add. 1 (2004), at 4, cited in Prud'homme, page 369.

<sup>58</sup> Anja Lindroos, Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis, 74 NORDIC J. INT'L L. 27 (2005) ,at 46, cited in Prud'homme, p. 367.

conflicting rules. As such, “*lex specialis* is invoked as the more specific norm which supplements the more general one without contradiction. The *lex specialis* and the *lex generalis* then simply accumulate.”<sup>59</sup>

It therefore seems that the *lex specialis* principle can be interpreted and used in two different ways, either as a tool to set aside the general rule or as a way to converge the two rules, where the *lex specialis* simply supplements the *lex generalis*. When it comes to the relationship between humanitarian law and human rights law, it seems like the *lex specialis* principle has been interpreted in both ways,<sup>60</sup> which will be further examined below in section 3.2.

Since this principle has its origin in national law, an important question is the relevance of the *lex specialis* rule in international law. The *lex specialis* principle is not mentioned in the Vienna Convention on the Law of Treaties (1969), something that might indicate that its relevance when dealing with international treaty law is low. As Prud’homme puts it, it is “in fact...difficult to assess the exact position or value of *lex specialis* amongst the many existing devices for treaty interpretation in international law”.<sup>61</sup> Another problem is the lack of hierarchy and institutional structures in international law<sup>62</sup>, which can make it difficult to assess which rule is in fact *lex specialis* in a certain case, a problem that doesn’t exist in the same way in national law.

On the other hand it is clear that the principle has been used several times at an international level, e.g. in the *Nuclear Weapons Case* and the *Israeli Wall Case*, where it was stated by the International Court of Justice that the principle applied in both cases. This shows that the principle is being applied in international law and must be said to have relevance on the international level. Furthermore, several commentators support this view. Abresch states that the *lex specialis* principle is a “canon of construction that is widely considered to be a general principle of law, as applicable in the international legal system as it is in national legal systems”<sup>63</sup>, while the International Law Commission found that the maxim *lex specialis derogate lege generali* “refers to a standard technique of legal reasoning, operative in international law as in other fields of law understood as systems”.<sup>64</sup> In regards to the relationship between International Humanitarian Law and International

---

<sup>59</sup> Joost Pauwelyn, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* (2003), pp. 385-439, at p. 410, (hereinafter: Pauwelyn), cited in Prud’homme, p. 369.

<sup>60</sup> Prud’homme, p. 369.

<sup>61</sup> Prud’homme, p. 368

<sup>62</sup> Lindroos, p. 40.

<sup>63</sup> William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 *Eur.J.Int.L.* 741 (2005).

<sup>64</sup> International Law Commission, Report of the Study Group, finalized by Martti Koskenniemi, *Fragmentation of International Law*, Fifty-eighth session (2006), para 119, cited in Steiner, Alston, Goodman, p.403.

Human Rights Law, the logic behind this reasoning is, according to Abresch, that many of the same states has negotiated and ratified the humanitarian law and the human rights law treaties, therefore there is a presumption that these treaties are consistent with each other.<sup>65</sup>

To sum up, it is clear that there are some problems relating to the use of *lex specialis* in international law. Nonetheless, it is equally clear that the principle is being used by the ICJ, a leading international body of law and one of the few that discusses humanitarian law explicitly, and “sits beside the other tools of treaty interpretation in the legal literature”.<sup>66</sup> It must thus be said to be relevant in international law, also when the relationship between international humanitarian law and international human rights law is to be decided.

### **3.2. The *Lex Specialis* principle in the International Court of Justice – is humanitarian law seen as an exception to human rights law in international armed conflict or do the two bodies of law converge?**

The International Court of Justice has been heavily involved in mapping out the way human rights law and humanitarian law relates to each other in armed conflict, and has in many ways lead the way for more and more attempts to describe and deal with the relationship between the two bodies of law.<sup>67</sup>

#### **3.2.1 The Nuclear Weapons Case (1996)**

The ICJ first set out the theory of using *lex specialis* to this purpose in the Nuclear Weapons Case. In this case some states had argued that the Court, when assessing the legality of the threat or use of nuclear weapons, should apply international human rights law, specifically Article 6 (1) of the International Covenant on Civil and Political Rights, which encompass the right not to be “arbitrarily deprived” of one’s life.<sup>68</sup> Other states had argued that international human rights law was irrelevant to this issue and had suggested that human rights law simply didn’t apply when it came to unlawful loss of life in hostilities.<sup>69</sup> In its advisory opinion the Court declared that the right to life enshrined in Article 6 of the ICCPR was a non-derogable right and that the protection found in that article did not

---

<sup>65</sup> Abresch, op.cit, note 63. He clarifies this by way of an example: “We should not think, for example, that it violates the right to liberty under the ICCPR or the ECHR to hold a combatant as a prisoner of war until the end of active hostilities when, after all, the same states that negotiated the ICCPR or ECHR also negotiated an entire treaty on prisoners of war that allows exactly that”.

<sup>66</sup> Prud’homme, p. 368

<sup>67</sup> *ibid*, p. 370

<sup>68</sup> *Nuclear Weapons Case*, para. 24

<sup>69</sup> *ibid*

cease in times of war,<sup>70</sup> but was applicable “in principle”.<sup>71</sup> However, when it came to the relationship between Article 6 and the law of war, the ICJ found that:

“The test of what is an arbitrary deprivation of life...falls to be determined by the *applicable lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself”.<sup>72</sup>

This statement has been interpreted in different ways regarding what it actually means for the real scope of application for human rights law in armed conflict.

Louise Doswald-Beck, commenting on the advisory opinion for the International Review of the Red Cross, found that it was significant that humanitarian law now seemed to be used to interpret human rights law, but at the same time she made another point; that in the context of the conduct of hostilities, with the principle of *lex specialis* in play, “human rights law cannot be interpreted differently from humanitarian law”.<sup>73</sup> Although the ICJ statement was said in the context of arbitrary deprivation of life, she could have interpreted it into being a general comment concerning the relationship between the two bodies, and found, thinking that the ICJ used the *lex specialis* principle as a conflict solving tool, that humanitarian law therefore would set aside human rights law every time they came in conflict with each other. In other words, according to this passage by Doswald-Beck; as long as there are no breaches of IHL, there cannot be a breach of human rights law either. If this is the case, the applicability of human rights law in armed conflict may in a lot of situations be there in name only, but in effect be displaced by international humanitarian law. As mentioned earlier, this argument is built upon the understanding that the ICJ applied the *lex specialis* principle to set aside the general rule (human rights law), applying humanitarian law as an exception to human rights law, which is understandable seeing as the use of the principle has been interpreted in different ways. Still it is hard to see how Doswald-Beck can come to the conclusion that this concerns the entire relationship between humanitarian law and human rights law and not just the relationship between the two systems when dealing with arbitrary deprivation of life. Such an assessment seems to be built on non-existing material.

---

<sup>70</sup> *ibid*, para. 25.

<sup>71</sup> *ibid*

<sup>72</sup> *ibid*

<sup>73</sup> Louise Doswald-Beck, *International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons* (1997), International Review of the Red Cross no. 316, p. 40, (hereinafter: Doswald-Beck)

The International Law Commission, however, stated that the two bodies of law were applied concurrently in this case, but also found that “from another perspective...the law of armed conflict – and in particular its more relaxed standard of killing – set aside whatever standard might have been provided under the practice of the Covenant”.<sup>74</sup> If the *lex specialis* principle is seen as a way of setting aside human rights law, the latter point of view seems to be more to the point than Doswald-Beck’s, since the Advisory Opinion clearly dealt with the standard of killing and not the relationship between these two bodies of law in general.

However, it might still be a timely question if this statement from the ICJ actually means that by applying the *lex specialis* principle, in cases concerning the relationship between humanitarian law and human rights law in armed conflict, it will in fact exclude human rights law from being applied at all in times of armed conflict.

Michael J. Dennis is of the opinion that the ICJ’s statement should be understood as a way of giving humanitarian law a wide primacy over human rights law in times of armed conflict. In his concluding remarks on the subject, he explains this by stating that human rights norms were never meant to replace the *lex specialis* of international humanitarian law and if human rights law are to be given a broader application during armed conflicts, it will only lead to confusion, and at the same time increase the gap between legal theory and state compliance.<sup>75</sup>

On the other hand, Doswald-Beck seems to think that both bodies of law should be able to be *lex generalis* and *lex specialis* in a given circumstance. This is in complete contrast to Dennis’ view of a wide primacy being given to humanitarian law. Doswald-Beck supports this argument by stating that in the context of arbitrary deprivation of life, it makes complete sense to use humanitarian law as *lex specialis*, because humanitarian law contains much more specific and purpose-built rules concerning the protection of life in armed conflict.<sup>76</sup> But according to her, that does not mean that humanitarian law would be the *lex specialis* in every other case concerning armed conflict: “it is less clear whether this [using humanitarian law as *lex specialis*] is also appropriate for human rights rules that protect persons in the power of an authority”.

Following Doswald-Beck’s approach to the subject, there can be situations where human rights law would be *lex specialis* and humanitarian law *lex generalis*. A good example would be where one is dealing with judicial guarantees in armed conflict. Human rights law is much more specific when it

---

<sup>74</sup> Op.cit, note 64, International Law Commission, para. 96, cited in Steiner, Alston, Goodman, p.403.

<sup>75</sup> Michael J. Dennis, Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation (2005), p. 141, cited in: Prud’homme, p. 372-373.

<sup>76</sup> Doswald-Beck, p.41.



comes to judicial guarantees and what these guarantees encompass, therefore, following this second approach, human rights law should prevail over humanitarian law in a case concerning such guarantees.<sup>77</sup> In any case, this approach would still lead to an exclusion of one of the bodies of law, but which one would be excluded would be decided on a case-by-case basis, there would be no general primacy given to either of the two bodies of law.

The third approach to the *lex specialis* assessment in the Nuclear Weapons Case is an approach where one does not exclude one of the two bodies of law, but use both bodies of law as an interpretive device for the other, therefore using the *lex specialis* principle as an interpretive tool. Following this third approach, humanitarian law was, in the Nuclear Weapons Case, used to interpret the right to life, without dismissing or excluding human rights law.

According to the International Law Commission, commenting on the *Nuclear Weapons Case*, human rights were, *in casu*, set aside, but did “not vanish altogether”. Humanitarian law simply affected one aspect of it, “namely the relative assessment of ‘arbitrariness’”. Humanitarian law as *lex specialis* did not suggest that human rights were abolished in war”.

Furthermore, and on the same note, Pauwelyn found that the *Nuclear Weapons Case* is an instance where “*lex specialis* is used to interpret the terms of another, more general norm (*in casu*, the words ‘arbitrarily deprived’). It does not conflict with, nor, *a fortiori*, overrule the other norm. Thus, in this case both the *lex specialis* and the *lex generalis* could be applied side by side, the *lex specialis* playing the greater role of the two.”<sup>78</sup>

An effect of using the *lex specialis* principle in a complementary way would be that any gaps in protection of one regime, e.g. due to derogation, may be filled by the application of the other body of law,<sup>79</sup> something that must be seen as a positive thing, a way to secure the purpose and underlying principles common to both regimes. At the same time this would also secure the best possible protection, drawing on the strengths of both bodies of law at the same time.

---

<sup>77</sup> This is view supported by many commentators; see e.g. International Committee of the Red Cross, Summary Report, XVIIth Round Table on Current Problems on International Humanitarian Law, International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence (2003), p. 9: “Several participants pointed out that...as human rights law is more precise than IHL in certain domains, the relation of interpretation must also be able to operate in the other direction”.

<sup>78</sup> Pauwelyn, p. 410, cited in Prud’homme, p. 369

<sup>79</sup> Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 ISR. L. REV. 17, 57 (2003), cited in Prud’homme, p. 375.

### 3.2.2 The Israeli Wall Case (2004)<sup>80</sup>

In 2004, the International Court of Justice assessed its own statement concerning the relationship between humanitarian law and human rights law. In the Israeli Wall Case, regarding Israel's construction of a barrier through occupied Palestinian territory, the ICJ repeated the position taken in the Nuclear Weapons Case and confirmed the continued application of human rights law in times of armed conflict.<sup>81</sup> However, the Court made one distinction; it did not focus entirely on the right to life, as it did in the Nuclear Weapons Case. This time, the Court stated that: "the protection offered by *human rights conventions* does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights"(italics added).<sup>82</sup> This is an important difference because, as mentioned earlier, using humanitarian law as *lex specialis* made perfect sense when it came to the right to life in Article 6 of the ICCPR, but this time the Court was discussing human rights in general. Following this statement, the Court proposed three different ways of handling the parallel application of the two bodies of law:

"As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law".<sup>83</sup>

The Court thereby established three different categories, but "did not offer specific guidance on how to subdivide the rights into these categories".<sup>84</sup> However, it did move away from the more absolute statement regarding the right to life in the *Nuclear Weapons Case*, affirming that there are other ways to handle the relationship between these two bodies of law then using humanitarian law as *lex specialis*.<sup>85</sup>

---

<sup>80</sup> Op.cit, note 14.

<sup>81</sup> Ibid, para. 106

<sup>82</sup> ibid

<sup>83</sup> ibid

<sup>84</sup> Noelle Quenivet, *The ICJ Advisory Opinion on the Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory: The Relationship between Human Rights and International Humanitarian Law* (2004), cited in Prud'homme, p. 377.

<sup>85</sup> William A. Schabas, *Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum*, *Israel Law Review*, Vol. 40, No. 2, pp. 592-613 (2007), p. 596, (hereinafter: Schabas)

First of all, the Court makes it clear that the relationship between human rights law and humanitarian law cannot be decided in general, it must be evaluated separately in each case, because the answer to how the relationship should be articulated may vary from case to case. Secondly, after analysing the ICJ's statement, it seems like the first option available when dealing with the relationship between human rights law and humanitarian law is the same as the one the Court proposed in the Nuclear Weapons Case concerning the right to life. If some rights are to be exclusively matters of humanitarian law, it would mean that in those cases humanitarian law would be *lex specialis* and set aside human rights law in the current case, as seen in the Nuclear Weapons Case when there was a conflict between the two sets of rules.

Thirdly, when the Court states that in some cases human rights law may be exclusive on the matter, it suggests that international human rights law can also be *lex specialis* under given circumstances. This is an important statement, as it shows the potential of human rights law in armed conflict, suggesting that human rights law *can* exclude humanitarian law in a given case in times of armed conflict, and be the particular rule. At the same time, when saying that human rights have the potential to exclude "the law of war" in armed conflict, it firmly establishes international human rights law as a more powerful presence in hostilities.

Fourthly, the last option suggests that both branches of law can be used together in times of armed conflict. When the Court concludes that to answer the questions put to it, it has to use both bodies of law, it indicates that the Court wants to move towards a more complementary approach to the subject, promoting the complementarity of the two bodies of law, saying that in some cases the two will apply side by side.

However, the ICJ fell back on the *lex specialis* principle to shape its reasoning, affirming that both bodies of law applied *in casu*, but international humanitarian law was *lex specialis*. According to Hampson, the ICJ's statement in the *Israeli Wall Case* still makes it "clear that *lex specialis* is not being used to displace [human rights law]. It is rather an indication that human rights bodies should interpret a human rights norm in the light of [international humanitarian law]".<sup>86</sup> This is a valid point, since the Court clearly states that both bodies of law will be used when determining the case in question. Even though humanitarian law is *lex specialis* in the *Israeli Wall Case*, human rights law plays a significant role and this must mean that the Court uses the *lex specialis* principle in a complementary manner. This supports the complementary understanding of the *lex specialis*

---

<sup>86</sup> Françoise Hampson & Ibrahim Salama, *Working Paper on the Relationship between Human Rights Law and International Humanitarian Law*, para. 57, UN. Doc. E/CN.4/Sub.2/2005/14 (2001), cited in Schabas, p. 596.

principle as the best general starting point when determining the relationship between human rights law and humanitarian law in a given case.

### 3.2.3. DRC v. Uganda (2005)<sup>87</sup>

Lastly, the ICJ also assessed the relationship between these two bodies of law in 2005. In this case, concerning the operations of Uganda's military in the Democratic Republic of Congo, the Court repeated that human rights did apply in general in times of armed conflict, and also repeated what it had stated in the Israeli Wall Case concerning the three possible solutions on how to articulate the relationship between human rights and humanitarian law in a given case<sup>88</sup>, but left out the part about humanitarian law being *lex specialis*. The Court also stated that:

"Uganda at all times has responsibility for all actions and omissions of its own military force in the territory of the DRC in breach of its obligations under the rules of international human rights law *and* international humanitarian law which are relevant and applicable in the specific situation (italics added)".<sup>89</sup>

Seemingly, the ICJ did not address any potential conflict between humanitarian law and human rights law, or suggest that any violations of human rights law had to be "examined through the prism of international humanitarian law".<sup>90</sup> This latest case therefore suggests that the ICJ might have moved even further away from their apparent opinion in the Nuclear Weapons Case, towards a more complementary approach to the relationship between these two systems. In the words of William Schabas, the ICJ treated the two bodies of law as "two complementary systems, part of a whole".<sup>91</sup>

However, the Court didn't say anything about *when* international human rights law would be relevant and applicable. If one is to conclude that the Court moved further towards a complementary approach with this statement, it is important to establish whether or not the Court felt that human rights law were applicable in this case. The Court didn't give a clear answer to this, but it did state in both the *Nuclear Weapons Case* and the *Israeli Wall Case* that human rights law is applicable in armed conflict, so a natural conclusion would be that the Court still is of the same opinion. At the same time, why would the Court even mention international human rights law,

---

<sup>87</sup> Op.cit, note 49.

<sup>88</sup> Ibid, para. 216-217.

<sup>89</sup> Ibid, para. 180.

<sup>90</sup> Schabas, p. 597

<sup>91</sup> ibid

knowing that the statement concerned an important aspect of international law, if it didn't think it was applicable? The statement concerns Uganda's obligations in an occupied territory and is clearly related to armed conflict, so a mention of just humanitarian law would be enough if the Court felt that this was the only body of law applicable, but instead the Court stated that international human rights law applies in respect of acts done by a state in the exercise of its jurisdiction outside its own territory, particularly in occupied territory.<sup>92</sup>

But since the Court failed to be completely clear on the subject, it must be assumed that Schabas' comments above might be a bit too conclusive. However, assuming the application of human rights law, it seems like the Court regards the two bodies as applicable together. Furthermore, since no potential conflict between the two bodies of law was addressed, there is reason to believe that the Court took one step further in the direction of complementarity.

### **3.3. Comments on the international jurisprudence of the ICJ regarding the use of the *lex specialis* principle**

First of all, it seems clear through the practice of the International Court of Justice, that the Court agrees with the above mentioned commentators<sup>93</sup> when it comes to using the *lex specialis* principle not only as a conflict solving tool, but also as an interpretive tool, a method of determining the relationship between two norms that are not necessarily in conflict with each other.

This way of using *lex specialis* to complement/interpret *lex generalis*, as seen in the *Israeli Wall Case* and possibly in the *Nuclear Weapons Case* and in *DRC v. Uganda*, is very similar to the complementary theory, mentioned above in section 3.1, and seems to have close ties to Article 31(3)(c) of the Vienna Convention on Treaties (1969), something that gives this way of articulating the relationship between these two bodies of law credibility and weight. Furthermore it gives better protection and safeguards from any "holes" in each system. At the same time, if it is accepted that the principle of *lex specialis* can be used this way, it might not be necessary to separate between complementarity theory and *lex specialis*, only between the two different applications of the *lex specialis* principle; the special rule as an interpretation of the general rule and the special rule as an exception to the general rule.

---

<sup>92</sup> *DRC v. Uganda*, para. 119

<sup>93</sup> See e.g note 59.

However, some commentators feel that using the principle of *lex specialis* to interpret and complement *lex generali* is not a real application of the principle. William A. Schabas are among these commentators and he feels that “*lex specialis* was not really applied in determining the core issues in any of the three cases [*Nuclear Weapons Case, Israeli Wall Case, DRC v. Uganda*]”<sup>94</sup> and especially points to the two latter cases, saying that the ICJ treated humanitarian law and human rights law as “if they were purely complementary”.<sup>95</sup> However, it does not really matter if it is called using the *lex specialis* principle in an interpreting way or if it is called using the complementary theory, if the method used is the same and the final result is equal either way. The point is that the ICJ has moved towards a more complementary approach to the relationship between these two bodies of law; they are both applicable and they can both have an impact in a given case, by using one to interpret the other.

But the complementary approach has its limits, especially when facing humanitarian rules and human rights rules that are in direct conflict, e.g. when faced with the right to life in times of armed conflict. Under human rights law a planned operation with the purpose of killing someone is never lawful, killing is always the last resort and will only be lawful if it is strictly necessary to protect life, for example in a case of self-defence.<sup>96</sup> This is naturally a very different standard from a planned operation in armed conflict under humanitarian law. A complementary approach would therefore be difficult to apply, since certain killings that are justified under humanitarian law would be a breach of human rights law. In these situations the *lex specialis* principle should be applied in its narrow form, as a way of giving one of the bodies of law primacy, as a rule of exception. The object and purpose of both bodies will give guidance on which body of law is the *lex specialis*.<sup>97</sup>

### **3.4 *Lex Specialis* in Non-International Armed Conflict – Common Article 3 and its relationship to international human rights law**

As established above in section 2, international human rights law is applicable in armed conflict, including both international armed conflict and non-international armed conflict. However, in contrast to human rights law, humanitarian law was mainly developed to govern the conduct between two or several States in war, not the conduct of the State towards its own citizens, thus mostly of the rules in international humanitarian law applies to a state’s extra-territorial conduct. In

---

<sup>94</sup> Schabas, p. 597

<sup>95</sup> *ibid*

<sup>96</sup> Droege, p. 345

<sup>97</sup> Droege, p. 344.

regards to non-international armed conflict, the rules in humanitarian law relating to this type of conflict are comparatively sparse.<sup>98</sup> In light of this, one might argue that the application of human rights law to assist in the regulation of conduct in these situations should be more straightforward, that there is “more room” for human rights law on the playing field in non-international armed conflict. But how does this affect the use of the *lex specialis* principle in determining the relationship between these two bodies of law in non-international armed conflict?

Traditionally, the only universal rule of humanitarian law that always applies in non-international armed conflict is Common Article 3 of the Geneva Conventions. Additional rules concerning non-international armed conflict can be found in Additional Protocol I and II, but these are not universally ratified and a situation where these would not be applicable is not hard to imagine.

If both humanitarian law and human rights law should be applied in a situation where the only applicable humanitarian rule would be Common Article 3, human rights law would cover far more ground than Common Article 3. Therefore a lot of questions would be exclusive to human rights law.<sup>99</sup> However, what happens when Common Article 3 applies to the specific questions raised in a case in times of non-international armed conflict? Is it *lex specialis*?

Common Article 3 is part of humanitarian law and its sole purpose is to govern the conduct of both parties in a non-international armed conflict. It could thus be argued that Common Article 3 must be *lex specialis*, since it was made only for this reason. However, the purpose of Common Article 3 is to safeguard some of the most fundamental human rights in non-international armed conflict, such as the right not to be tortured and the right to a fair trial.<sup>100</sup> These rights are also contained in human rights law.<sup>101</sup> They are also much more comprehensive in human rights law and have been discussed and further developed by human rights bodies through case law. Therefore it is submitted here, even though it must in practice be decided on a case by case basis, that human rights law in most cases will be the *lex specialis* in such situations. Human rights law will be closer to the particular subject in question (e.g. the right to a fair trial) because it is more detailed and further developed than the protections encompassed in Common Article 3, and must therefore be found to be the most particular rule in most cases, especially when dealing with the two before mentioned rights.

---

<sup>98</sup> Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, International Review of the Red Cross, Vol. 87, No. 860 (2005) p. 746, (hereinafter: Lubell)

<sup>99</sup> Following the ICJ’s method in the Israeli Wall Case.

<sup>100</sup> Common Article 3 (1) (a) and (d).

<sup>101</sup> E.g. Article 3 and 6 of the ECHR and Article 7 and 9 of the ICCPR.

On the other hand, the humanitarian law rules applicable to non-international armed conflicts have widened in recent years<sup>102</sup>. According to the ICRC study, *Customary International Humanitarian Law*, 136 of 161 customary rules applicable to international armed conflicts are also applicable to non-international armed conflicts.<sup>103</sup> Combine this with jurisprudence from International Criminal Tribunals and, to some extent, the rules found in the Rome Statute, and it is suddenly not so clear whether or not human rights law has a greater scope after all. Although this can prove helpful when determining a state's obligations in non-international armed conflicts, it might also prove to increase the chances of potential conflict between the two bodies of law.

However, not all commentators agree that the ICRC study, which is the most comprehensive work done on the subject and the latest peak in the development of humanitarian law in internal armed conflict, does in fact contain the actual customary rules applicable in internal armed conflict, with two commentators suggesting that the study has built its findings on state's declarations rather than actual behaviour and that "some of the practice upon which those customary rules are based is that of human rights bodies applying human rights law", and so they disagree with several of the findings of customary provisions in the study.<sup>104</sup>

Even if there are uncertainties as to exactly how many of these customary rules that actually apply in non-international armed conflict, it is certain that several of them will be applicable in the future when faced with situations of non-international armed conflict. This provides new obstacles for the relationship between humanitarian law and human rights law in these situations, as many of the problems that surround this relationship in international armed conflicts will also be encountered in non-international armed conflicts in the future.

### 3.5. Summary

In summary, it seems like the best way of articulating the relationship between international humanitarian law and international human rights law is that in most cases, when they are not in direct conflict with each other, they must be assumed to be compatible, so that both bodies of law

---

<sup>102</sup> Lubell, p. 747

<sup>103</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (2005), referenced in Marco Sassoli and Laura M. Olson, *The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts*, *International Review of the Red Cross*, Vol. 90, No. 871 (2008), pages 599-627, p. 602, (hereinafter: Sassoli and Olson).

<sup>104</sup> Sassoli and Olson, p. 602



will apply and one can be used to interpret the other, depending on which body of law contains the particular rule and which one contains the general rule. When they are in conflict, however, the *lex specialis* can set aside the other body of law. Whether human rights law or humanitarian law should be the particular rule is a consideration that has to be made for each individual case.

## **PART IV**

### **4. The Mandate of the European Court of Human Rights in discussing International Humanitarian Law.**

At the international level, there are virtually no individual complaints procedures available to victims of violations of IHL.<sup>105</sup><sup>106</sup> If human rights law is applicable in times of armed conflict and this body of law can be used in conformity with humanitarian law or even sometimes be the *lex specialis* in the relationship between the two bodies of law, are there also room for human rights bodies to discuss international humanitarian law when they are confronted with a case where both systems apply? In other words, can human rights bodies be used to ensure compliance with international humanitarian law as well as human rights obligations, when dealing with breaches of human rights law in times of armed conflict?

#### **4.1. Article 15 of the European Convention**

The European Court of Human Rights is established under a treaty, namely the European Convention on Human Rights. Thus their mandate would at first glance appear to be limited to monitoring breaches of human rights contained in the ECHR, and not breaches of humanitarian law. However, Article 15 of the ECHR contains a derogation clause with reference to other international law. More precisely, any State that wants to derogate from an obligation in the ECHR cannot do this if its emergency measures are “inconsistent with [the State’s] other obligations under international law”.<sup>107</sup> As mentioned earlier in this paper, this reference to other international law implies that the ECtHR can consider other international law than the human rights contained in the ECHR,<sup>108</sup> as long

---

<sup>105</sup> Heintze, p. 800.

<sup>106</sup> The International Criminal Court can prosecute individuals for severe breaches of IHL, but the procedures cannot be instigated by an individual, see Article 13 of the Rome Statutes.

<sup>107</sup> Article 15(2) of the ECHR.

<sup>108</sup> Heintze, p. 801-802 and Lubell, p. 742.

as the State in question is a party to the relevant international treaty or if the relevant international law is regarded as customary international law. As mentioned above, the 1949 Geneva Conventions applies universally and are therefore part of the international law that can be considered by the ECtHR. In regard to the two Additional Protocols, they can be considered, as long as the State in question is a party to the relevant Protocol. To see how the ECtHR has dealt with its mandate concerning humanitarian law, a look at its practice will be necessary.

#### **4.2. The European Court of Human Rights – an examination of case law**

In *Brannigan & McBride v. UK*, a case concerning derogations adopted by the United Kingdom, the European Court did state that the Geneva Conventions were applicable,<sup>109</sup> but because of a lack of factual details, the Court didn't continue down this road, limiting the statements on humanitarian law to the above mentioned comment. This does, however, illustrate that it is possible to refer to international humanitarian law under the European Convention.<sup>110</sup>

On the other hand, the ECtHR has been hesitant to state a clear view on the subject, something that is clearly visible in its practice concerning human rights in times of armed conflict. In *Loizidou v. Turkey*, a case regarding human rights violations in the occupied territory of Northern Cyprus, where Turkey contended that the area in question was in fact established as the independent state "The Turkish Republic of Northern Cyprus (TRNC)".<sup>111</sup> Therefore, in Turkey's opinion, it was this new independent republic, and not Turkey, that was the rightful defendant. The complainant had been forced to move away from her property by the occupying power and was not allowed access to it at all. She claimed that this was a breach of her right to "peaceful enjoyment" of her property in Article 1 of Additional Protocol I of the ECHR. The Court found that a state's jurisdiction in Article 1 of the ECHR was not limited to the state's own territory and that the question of sovereignty was very important, concluding in the end that the occupation of Northern Cyprus was under Turkish jurisdiction. The Court also referred to Resolution 550 (1984)<sup>112</sup> of the United Nation Security Council, where the Security Council clearly speaks of the "occupied parts of the Republic of Cyprus".

---

<sup>109</sup> *Brannigan and McBride v. UK*, ECtHR Series A 258-B, 26 May 1993, paras. 67-73.

<sup>110</sup> See also Heintze, p. 806.

<sup>111</sup> The establishment of TRNC was condemned and declared legally invalid in 1983 by the UN Security Council, see Resolution 541 (1983).

<sup>112</sup> *Loizidou v. Turkey*, Application No. 15318/89, Judgement of 18 December 1996, para. 42.

<sup>113</sup>It ultimately found in the complainant's favour, basing this ruling merely on the European Convention.

In view of this, it seems pretty clear that the ECtHR acknowledged the fact that the case in question concerned an occupied territory, and therefore the Court could have applied international humanitarian law in the matter at hand. Furthermore, the ECtHR even pointed to the rules of treaty interpretation in Article 31 (3)(c) of the Vienna Convention on the Law of Treaties,<sup>114</sup> which in its own right could give the Court an opening to use humanitarian law in this case. Also, the Court would seemingly have reached the same conclusion using humanitarian law.<sup>115</sup>

However, the Court avoided any reference to humanitarian law at all. It seems clear that the ECtHR had an excellent opportunity to apply humanitarian law in this case, but chose not to.

Another case where the ECtHR had a chance to apply humanitarian law was in the *Bankovic* case.<sup>116</sup> This case concerned the aerial bombing of a broadcasting station in Belgrade, carried out by NATO members. Relatives of four of the civilians that had been killed in this bombing alleged that the attack violated, among other things, the right to life set forth in Article 2 of the ECHR. They also built their claim on international humanitarian law, both conventional and customary. The bombing happened during an armed conflict and the States were party to the relevant humanitarian conventions.

However, the ECtHR discarded the humanitarian law argument by not even considering it. Instead it focussed on narrowing the European Conventions scope of application, by way of a restrictive interpretation of the States' "jurisdiction". It found that jurisdiction in international law is primarily territorial and that any other grounds of jurisdiction must be considered "exceptional".<sup>117</sup> The applicants' claims were therefore deemed inadmissible by the Court.

If international humanitarian law would have been found to be applicable in this case, the States would have been responsible for their acts even if they had been committed outside of their own national territory. The fact that this regarded a military operation outside the borders of the

---

<sup>113</sup> UN Security Council, Resolution 550 (1984), in the introductory remarks.

<sup>114</sup> Op.cit, note 112, para. 43.

<sup>115</sup> Heintze (2004), p. 808. Heintze points to Article 49 of the Fourth Geneva Convention, which concerns an occupying power's duty to respect the property of civilians in occupied territories.

<sup>116</sup> *Bankovic v. Belgium and others*, Application 52207/99, Inadmissibility decision (12 December 2001).

<sup>117</sup> Ibid, see also the *Israeli Wall Case* concerning the application of ICCPR outside members' borders: "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions." Although the ECHR is regional, the object and purpose of the ECHR would still point in the same direction as they do for the ICCPR.

contracting states might have been the key reason why the ECtHR wanted to narrow its view on jurisdiction in this case, as it might not have been comfortable applying the ECHR on military operations conducted by the contracting states outside their own territory, on a mission sanctioned by NATO.<sup>118</sup> Thus this was also a good reason for discarding the applicability of humanitarian law in this case.

The *Ergi v. Turkey* case concerned the accidental killing of a civilian woman during a military operation. The Court established that in the planning and execution of such an operation, care must be taken to avoid, or at least minimise, “any incidental loss of civilian life”.<sup>119</sup>

When using the words “incidental loss” and “civilian life” to analyse the alleged human rights violation, the Court is using the wording of international humanitarian law.<sup>120</sup> Indeed it seems like the Court is, de facto, using humanitarian law when it is elaborating on the lawfulness and proportionality of the attack and whether the risk for civilian loss was proportionate to the military advantage the State was expecting to gain from the operation. The ECtHR’s choice of words seem heavily influenced by humanitarian law, one commentator has even gone as far as saying that the Court resorts to direct use of humanitarian law in this case.<sup>121</sup>

However, the Court never explicitly acknowledged any use of international humanitarian law and in the end it relied on the European Convention to establish responsibility for the state concerned. Thus it could be argued that the Court in this case applied the *lex specialis* principle implicitly, in its complementary form, using *lex specialis* (humanitarian law) to interpret *lex generalis* (human rights law). This would explain why the ECtHR laid down rules that closely resembles well known humanitarian law principles concerning lawful deprivation of life, but nevertheless anchored these rules in the European Convention on Human Rights.

The two final cases are *Isayeva v. Russia (Isayeva I)* and *Isayeva, Yusopova and Bazayeva v. Russia (Isayeva II)*, and they both concern, among other things, the right to life in Article 2 of the ECHR.

In *Isayeva I*, during a military operation, a Russian military plane dropped a bomb near the applicant’s minivan, killing her son and two of her nieces. The test to be applied, according to the Court, was one of “absolute necessity” and that any use of force must be strictly proportionate to

---

<sup>118</sup> Dinah Shelton has a similar view. Shelton argued that this narrow view of jurisdiction is “understandable” because the Court “would seek to limit its jurisdiction to exclude the extra-territorial military operations of its contracting states”, in Dinah Shelton, “The boundaries of human rights jurisdiction in Europe” (2003), p. 128, cited in Heintze, p. 809.

<sup>119</sup> *Ergi v. Turkey*, Application 23818/93 (1998), para. 79

<sup>120</sup> Heintze, p. 810

<sup>121</sup> *ibid.*, p 810

the achievement of the permitted military aim.<sup>122</sup> The Court also repeated what it had said in the *Ergi* case about the care that had to be taken when planning a military operation, concerning the avoidance, or at least the minimising, of any incidental loss of civilian life.<sup>123</sup>

Furthermore, the Court stated that the circumstances in Chechnya at the time were of the kind that called for “exceptional measures” and that these measures presumably could include employment of military aviation equipped with heavy combat weapons:

“The presence of a very large group of armed fighters in Katyr-Yurt, and their active resistance to the law-enforcement bodies...may have justified use of lethal force by the agents of the State, thus bringing the situation within paragraph 2 of Article 2.”<sup>124</sup>

After accepting that the use of force may have been justified, the Court goes on to say that “a balance must be achieved between the aim pursued and the means employed to achieve it”.<sup>125</sup>

This evaluation of proportionality is very similar to the one used in humanitarian law. Furthermore, the Court repeated what it had said in the *Ergi* case, again using the wording of humanitarian law to apply the test of lawfulness. However, although there was heavy fighting at the time between armed fighters and the Russian military, Russia had not made any derogation from the ECHR in accordance with its Article 15, nor had there been declared martial law or a state of emergency in Chechnya. Because of this, the Court could not base its judgement on humanitarian law, since it had not been established that this was in fact a non-international armed conflict. Thus the case had to be judged against a “normal legal background”.<sup>126</sup>

This indicates that the Court might have applied humanitarian law, at least indirectly as a tool of interpretation, had there been declared a state of emergency in Chechnya, a sign that Russia did not treat the situation as a situation of law enforcement.

However, this was not the case and the Court stated that using “this kind of weapon in a populated area, *outside wartime* and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a *law-enforcement body*” (italics added).<sup>127</sup>

---

<sup>122</sup> *Isayeva I*, para. 173: “Consequently, the force used must be strictly proportionate to the achievement of the permitted aims”. This test has been repeated in later cases, e.g. *Umayeva v. Russia* (2008), para. 82.

<sup>123</sup> *Isayeva I*, para. 176, see also note 101.

<sup>124</sup> *Ibid*, para. 180

<sup>125</sup> *Ibid*, para. 181

<sup>126</sup> *Ibid*, para. 191

<sup>127</sup> *ibid*

The Court in that way implies that it might have been more lenient concerning the weapons that were used in the attack, and to the criteria of proportionality and necessity,<sup>128</sup> if the situation had been classified as a military operation in wartime, because if humanitarian rules had been used to interpret the rules in the ECHR, it could have ended up with weighing the various criteria in the test differently.

In *Isayeva II*, Russian planes had bombed a civilian convoy of trucks using extremely powerful non-guided air-to-ground missiles, claiming that the people in the convoy had fired upon the Russian planes *before* the planes opened fire, giving the state agents a legitimate reason to bomb them. Just like in *Isayeva I*, the circumstances surrounding this case resembled a non-international armed conflict, but no declaration of martial law or state of emergency had been declared, nor had there been any attempts to derogate from the Convention in accordance with Article 15.

However, the ECtHR did not say anything about the case being judged against a normal legal background in *Isayeva II*. The Court concluded that “even assuming that the military were pursuing a legitimate aim...the Court does not accept that the operation...was planned and executed with the requisite care for the lives of the civilian population”,<sup>129</sup> seemingly because of the extremely powerful weapons that were used.<sup>130</sup>

In both these cases, “the consideration of proportionality and of necessity is remarkably similar to the test proposed by international humanitarian law in the case of “collateral damage””.<sup>131</sup> This indicates that the Court finds it easier to resort to the criteria set forth in international humanitarian law when it looks into the scale of the use of force used in these two cases and the legitimacy of the targets in question, because the rules in humanitarian law are much more particular when it comes to this area of international law. Had Russia declared a state of emergency in these two cases, and thereby removed the situation from being one of law enforcement, the rules of humanitarian law, used as *lex specialis* in an interpretive fashion, might have changed the conclusions on the lawfulness of Russia’s operations.

### 4.3. Summary

---

<sup>128</sup> Schabas, p. 606

<sup>129</sup> *Isayeva II*, para. 199

<sup>130</sup> *Ibid*, see also the Court’s examination of the weapons in para. 195.

<sup>131</sup> Schabas, p. 606

It seems like there is not enough support in the relevant case law to suggest that it falls within the mandate of the European Court of Human Rights to discuss and apply international humanitarian law directly in a given case concerning armed conflict. It can also be concluded that the Court will be extremely sceptical of using humanitarian law in cases concerning extra-territorial military operations.

However, it does seem like the ECtHR has been using humanitarian law in a complementary manner in several cases, to interpret human rights law in cases concerning armed conflict. With its more particular rules on, for example, lawful targeting, military objectives and the use of force, the ECtHR would do well to keep up this trend, since the use of humanitarian law in this complementary manner gives the Court more detailed rules to help guide it towards a rightful conclusion.

Another point worth making is that the ECtHR might not be comfortable deciding cases primarily using humanitarian law, since the primary requisite for membership in the ECtHR would be proficiency in human rights law, not in humanitarian law.<sup>132</sup> If the members of the Court do not feel they have adequate knowledge of humanitarian law, it is natural to focus on what they are experts in, namely human rights law. However, in recent years several publications and other material regarding humanitarian law have been made available which can assist the Court when cases concerning situations of armed conflict are brought before it.<sup>133</sup>

When dealing with humanitarian law, the ECtHR is walking down a narrow path, both legally and possibly also politically. For a regional human rights body like the ECtHR, it will take some time before it is comfortable applying humanitarian law explicitly, indeed it may never reach the conclusion that explicitly using humanitarian law as a legal basis for its decisions falls within its mandate. But if the goal is to ensure individual complaint procedures when humanitarian law is breached, and at the same time also find a way to ensure compliance with international humanitarian law in times of armed conflict, then the way the Court is seemingly using humanitarian law as an interpretive tool suggests, at least, a step in the right direction.

---

<sup>132</sup> Lubell, p. 743

<sup>133</sup> The ICRC study, *Customary International Humanitarian Law (2005)*, the Rome Statutes and case law from different International Criminal Tribunals are examples of this.

## Index of literature

Cassese, Antonio, *International Law*, Oxford University Press, 2<sup>nd</sup> edition, 2005.

Droege, Cordula, *The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, Israel Law Review, Vol. 40, No. 2, pp. 310-355, 2007; Hebrew University International Law Research Paper No. 14-07. Available at: <http://ssrn.com/abstract=1032149> (last visited 30 May 2009)

Prud'homme, Nancie, *Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?*, Israel Law Review, Vol. 40, No. 2, pp. 355-395, 2007; Hebrew University International Law Research Paper No. 15-07. Available at: <http://ssrn.com/abstract=1032156> (last visited 30 May 2009)

Heintze, Hans-Joachim, *On the relationship between human rights law protection and international humanitarian law*, International Review of the Red Cross No 856, p. 789-814. Available at: [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/692EUA/\\$File/irrc\\_856\\_Heintze.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/692EUA/$File/irrc_856_Heintze.pdf) (last visited 30 May 2009)

Steiner, Henry J., Alston, Philip, Goodman, Ryan, *International Human Rights in Context – Law, Politics, Morals*, Oxford University Press, 3<sup>rd</sup> edition, 2008.

Abresch, William, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, European Journal of International Law, Vol. 16, Issue 4, pp. 741-767, 2005. Available (for a fee) at: <http://ssrn.com/abstract=907201> (last visited 30 May 2009)



Doswald-Beck, Louise, *International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons*, International Review of the Red Cross no. 316, 1997. The version used for this thesis was printed in reading materials at the University of Sydney, Faculty of Law, in July 2008, but the article is also available (without page numbers) at: <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57jnmf?opendocument> (last visited 30 May 2009)

Schabas, William A., *Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum*, Israel Law Review, Vol. 40, No. 2, pp. 592-613, 2007; Hebrew University International Law Research Paper No. 20-07. Available at: <http://ssrn.com/abstract=1044281> (last visited 30 May 2009)

Lubell, Noam, *Challenges in Applying Human Rights Law to Armed Conflict*, International Review of the Red Cross, Vol. 87, No. 860 (2005) Available at: <http://ssrn.com/abstract=1366710> (last visited 30 May 2009)

Sassoli, Marco and Olson Laura M., *The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts*, International Review of the Red Cross, Vol. 90, No. 871 (2008), pages 599-627. Available at: <http://www.icrc.org/Web/eng/siteeng0.nsf/html/review-871-p599> (last visited 30 May 2009)

