

## Human Rights and Humanitarian Law

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### A. Definitions

- 1 The term → *human rights law* ('HRL') encompasses all fundamental freedoms and all basic social, economic and cultural rights recognized to each individual independently of → *nationality*. The term international humanitarian law ('IHL') is today used in a broad sense (→ *Humanitarian Law, International*). It covers all the rules protective of potential or actual victims of armed conflicts, all the rules on the conduct of warfare, and all the provisions relating to the rights and duties of the → *armed forces* towards the other party in case of armed conflict (→ *Armed Conflict, International*; → *Armed Conflict, Non-International*). IHL hence nowadays covers both so-called 'Geneva Law'—protection of victims of armed conflicts (→ *Geneva Conventions I–IV [1949]*)—and 'Hague Law'—regulations as to the means and methods of warfare (see also → *Hague Peace Conferences [1899 and 1907]*). It is doubtful if it also reaches to some specialized areas of → *naval warfare*, such as → *prize law*. Conversely, it seems to be accepted that it does not cover neutrality law (→ *Neutrality, Concept and General Rules*; see also → *Neutrality in Air Warfare*; → *Neutrality in Land Warfare*; → *Neutrality in Naval Warfare*). The terms 'law of armed conflicts' or 'law of war' are broader, precisely in that they cover all areas linked with wartime rights and duties of → *States* and to a certain degree also → *non-State actors*.
- 2 The relationship between IHL and HRL is generally analysed in the context of a narrow definition of humanitarian law. In effect, the mutual relations between the two areas are most manifest in the context of the protection of potential or actual war victims. In this context the law deals in both areas with fundamental protective rights of the individual as against a State organ—or, sometimes, powerful civilians—vested with preponderant power and thus jeopardizing the physical and moral integrity of the individual concerned (see also → *Individuals in International Law*). This entry thus addresses the core area of humanitarian law, whereas the relations between human rights and specific questions of sea warfare such as prizes, or with neutrality, shall be neglected, since there are no meaningful interactions to be studied. Hence, the position between the two branches of the law can be envisioned as that of two intersecting circles. There is an area of interaction, but there is also an area of mutual indifference.

### B. Historical Evolution of the Relationship

- 3 The precise relation of IHL and HRL and the reasons for their coming closer one to the other can be grasped only in the light of an historical analysis. This is particularly true since the closer ties witnessed today between the two branches of the law are not in any sense natural or necessary. They are the result of forces and interests, as well as profound ideological shifts, whose careful evaluation only allows giving the relationship found to exist today its full sense and its most articulate understanding.

#### **1. The Formative Stage of Human Rights Law (1945–50s)**

- 4 Before 1945 there was no meaningful body of international HRL (→ *History of International Law, 1648 to 1815*; → *History of International Law, 1815 to World War I* → *History of International Law, Ancient Times to 1648*). Some legal institutions can be considered as forerunners. First, there was the minimum standard of treatment for → *aliens*, protecting their

freedom, physical integrity, property, their right to access to a tribunal, etc. There were also some collective rights, such as minority protection → *Minority Protection System between World War I and World War II*, but these depended on the existence of a treaty. Hence, such a protection existed only discriminatorily, according to the chances of war and the → *peace treaties* having forced the regime upon some States. The minimum standard (→ *Minimum Standards*) was granted only to foreigners and precisely not to all human beings, thus opposing a fundamental aspect of HRL. The protection of minorities was based on political interests and was not equally applicable. It was only after the excesses witnessed in the 1930s under totalitarian rule, excesses still exacerbated by World War II that in 1945 time was ripe for a breakthrough. Thus, a matter which had theretofore always been considered as pertaining to the closest core of domestic jurisdiction, ie the relationship of the State with its own—apart from foreign—citizens, came to be regulated by international law (see also → *Domaine réservé*). The → *Universal Declaration of Human Rights (1948)* ('UDHR') is the most visible outward mark of this breakthrough.

- 5 During this formative time, HRL and IHL were neatly and completely separated, intellectually and in practice. Nothing illustrated this fact better than the almost complete lack of attention paid by the delegates to the contemporaneous conferences for the adoption of the UDHR and for the Geneva Conventions of 1949 to the efforts of the other body. Many reasons explain this situation.
- 6 First, IHL—then called law of war—was still essentially understood as military law. The Geneva Conventions of 1949, which were to spread the modern conception of humanitarian law, had still to operate their discreetly subversive action in order to change this deeply rooted conception and to make out of a body of military law a body of humanitarian law. It is clear that the ties between a military conception and human rights are less intense than the ties between a humanitarian conception and human rights.
- 7 Secondly, HRL had still to emerge out of its early formative stage. In 1949 there was hardly any positive human rights law. There were essentially some more or less vague and aspirational provisions in the UN Charter, and also the UDHR as a recommendation of the UN General Assembly. A customary law on human rights did not exist. Thus, HRL was at that time in *statu nascendi* and largely perceived as a still merely political-legal phenomenon. It is therefore understandable that a true legal interaction with the law of warfare, an ancient and well-settled branch of international law (notwithstanding its precariousness), could not at that time be envisioned.
- 8 Thirdly, the evolution of the two branches had hitherto been historically completely distinct. The law of war was one of the oldest branches of international law. Since the remotest times, contacts between tribes or States have been hostile before becoming at least partially peaceful. Hence, the first rules of international law shaped by these human groups were rules on warfare: armistices, truces, exchange of prisoners, prohibition of weapons, etc (→ *Armistice*; → *Prisoner Transfer*; → *Weapons, Prohibited*). Still at the times of the so-called fathers of international law—F de Vitoria, F Suárez, A Gentili, H Grotius—the treatment meted out for the rules of warfare quantitatively and qualitatively largely overshadowed the treatment given to the rules of peacetime. H Grotius still wrote a 'De lure Belli ac Pacis' and not a 'De lure Pacis ac Belli'. These rules on warfare gave rise to a distinct cast of profession, in the military departments of the States. These persons were intellectually and morally quite distant from the new human rights movement in 1945, if they were not outwardly hostile to it.
- 9 On the other hand, HRL has been the product of enlightenment and remained for centuries confined to the municipal law of the liberal Western world (→ *International Law and Domestic [Municipal] Law*). HRL has to do with the political shaping of a society (see also → *Human Rights, Role of Non-Governmental Organizations*). It touches upon the fundamental political-legal structure of a political body. Thus, if IHL—or the law of war—was essentially technical law, HRL was since its inception essentially political law. It is understandable that a certain time was required in order to bring such different plants together by carefully and repeatedly combining their seeds.
- 10 Fourthly, there were different ideological obstacles to the coming closer of the two branches. The respective guardians promoting HRL and IHL distrusted to some extent the law sponsored by the other side. The protector of IHL was the → *International Committee of the Red Cross (ICRC)*; the promoter of HRL, at the universal level, was the → *United Nations (UN)*. The ICRC feared that any contamination of IHL with HRL could politicize the former by the latter and hence bring about a significant decrease in the effectiveness of IHL. The UN itself was felt to be a highly political body, especially in the field of HRL. One of the main principles of humanitarian action is pronounced political neutrality, which is also among the main principles of the Red Cross Movement (see also → *International Red Cross and Red Crescent Movement*). IHL is thought to apply amidst the greatest ideological rift imaginable, namely war. If it does not keep ideologically neutral, confining itself to technical rules shaped around the equilibria of warfare, it will not be respected by the belligerents.
- 11 Conversely, the UN had ideologically little sympathy for the law of war. Like the → *League of Nations*, it had been created with the main aim to keep the peace (see also → *Peace, Breach of*; → *Peace, Right to, International Protection*;

→ *Peace, Threat to*). It therefore found it hard to care about a law which seemed to imply that it would be unable to keep the peace. The times of the law of warfare seemed past: thenceforward, there should be only police enforcement action by armies of the UN. It was for substantially the same reasons that the → *International Law Commission (ILC)* refused to put the law of war in the list of the subjects ripe for codification (see also → *Codification and Progressive Development of International Law*). It stated thus: 'public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace' ( UN ILC Report to the General Assembly [1949] para. 18). It is not relevant that this reason seems unrealistic and weak to us today. It must be understood in its historical context, after the end of World War II.

- 12 Fifthly, there was the conception, still completely dominating in 1948–49, that human rights applied in peacetime whereas IHL applied to armed conflicts and war. Peacetime law and wartime law were still thought to be mutually exclusive blocks, separated by a watershed: 'inter pacem et bellum nihil est medium' ('there is no middle ground between war and peace'; H Grotius 'De Iure Belli ac Pacis Libri Tres' in JB Scott [ed] *Reproduction of the Edition of 1646; The Classics of International Law* [WS Hein & Co New York 1995] vol 1, lib III, cap XXI, para. 1; translation in JB Scott [ed] *The Classics of International Law* [Oceana Publications New York Reprinted 1964] vol 3 The Translation Book 1 832). It is only because of the many civil wars taking place after 1945 that a coming closer and finally a partial merging of both branches became imaginable. This was the reason why the concept of 'human rights in armed conflict' took shape during the 1960s. It is true that to some extent HRL is ideally based on conditions prevailing during peacetime. Thus, HRL works normally with generic formulae granting fundamental subjective rights. These formulae will need concretization in context, and especially a process of balancing up of different interests and multiple social and individual aspects relevant to the point at issue. This is an open-ended legal-political process. A norm stating that the freedom of the press is guaranteed tells us little about the precise scope and limits of the right granted. Moreover there are constantly conflicts between fundamental rights, such as, for example, freedom of expression and rights of honour (→ *Opinion and Expression, Freedom of, International Protection*). The necessary balancing up and synthesis of these positions suppose regular social organs, namely tribunals, entrusted with the task of performing through individual decisions this constant process of concretization.
- 13 Conversely, IHL is essentially framed as objective law setting out in some detail the rules of behaviour of the different actors during an armed conflict. It cannot be expected that the military will balance up open-ended normative messages in context in order to shape more contextual rules. Quite on the contrary, the military must know with some degree of precision what is required from it in a situation of urgency such as that of armed conflict, where there is neither time nor resources for subtle legal-political weighing of positions. Consequently, HRL works with supreme subjective constitutional rights, whereas IHL works prevalently with objective rules of behaviour of an administrative law type. This difference was still clearly felt in the formative stage of HRL.
- 14 Sixthly, there were other differences felt between the two bodies of law, for example as to the State organs to which each of them directs its injunctions. As for HRL, it was held that it applied to all the organs of the State, being a sort of transversal or general law of unlimited permeating force. As for IHL, conversely, it was held that it applied specifically to one organ of the State, namely its military forces. This is not only a quantitative difference in reach. It is also a qualitative difference of focus, if one takes into account the particular position, which at that time and sometimes still today, was held by military forces within the organic structure of many States.
- 15 The net result of all these centrifugal forces of tradition, ideology and construction was a neat separation and a considerable intellectual and practical rift between the two areas of HRL and IHL. But this situation was not designed to last. Different silent forces operated underneath and progressively eroded and undermined the described segregation.

## **2. The Period of Breaking of the Ice (the End of the 1950s up to 1990)**

- 16 Two main tectonic forces slowly operated in overcoming the rift between the two branches of the law. The first was the intellectual and practical shift inaugurated by the adoption of the Geneva Conventions of 1949, which started to make itself felt in the 1950s. The second was the decrease in the number of international wars and the parallel explosion in the number of civil wars. In civil wars, a bridge between HRL and IHL has proved to be unavoidable under the pull of events.
- 17 First, there is what we previously called the 'discreetly subversive action' of the Geneva Conventions of 1949. Up to World War II, the main regulations on the law of war were to be found in the various Hague Conventions (1899, 1907). 1907 Hague Convention IV, with its annexed regulations respecting the law of land warfare, was the most important. The focus of these conventions is quite different than that of the Geneva codification of 1949. The work of the Hague is still permeated by conceptions of the 19<sup>th</sup> century. The concept of limited war in a liberal society still holds the top of the floor. One of the basic ideas is that the contacts of a foreign military force with adverse civilians will be very limited and

transient. Therefore, this area of the law of war does not need tight and detailed regulation. The quite fragmentary and short rules on the law of occupation in the quoted regulations testify to this (→ *Occupation, Belligerent*; → *Occupation, Military, Termination of*; see also → *Occupation, Pacific*). The small powers of Europe resisted any attempt to go further in regulating the matter, because they felt it unnecessary for the civilians and politically problematic. Their point was the following: should one anticipate thus openly military defeat? Hence, there was hardly a sufficient body for preserving the rights of civilians. One understands that the stress of the Hague Conventions is consequently on means and methods of warfare, ie on military law. In sum, the Hague Conventions are geared towards the 19<sup>th</sup> century; their regulations are too light and generic, and their general stand is to consider what the fighters ought to do or not to do among themselves.

- 18 With the atrocities committed by Axis Powers during World War II against civilians—eg in occupied territories—but also against other persons such as → *prisoners of war*, the focus changed radically. The Geneva Conventions thus concentrate on a humanitarian protection of a series of so-called → *protected persons*, ie the potential or actual victims of war. These protected persons are namely the sick, injured or shipwrecked → *combatants* (→ *Wounded, Sick and Shipwrecked*); the prisoners of war; the civilians of the hostile party and some related persons in need of protection (→ *Civilian Population in Armed Conflict*). Moreover, the regime is tightened up by a detailed regulation, aiming at leaving no gaps. This regulation is additionally locked up against any temptation of evasion by non-derogation clauses such as those to be found in Arts 6 and 7 Geneva Conventions (I)–(III) and Arts 7, 8 and 47 Geneva Convention (IV). The focus is now placed on the protection of certain individuals in need of it because they are opposed to powerful military organs of an adverse State. This protection is operated through rules of behaviour, but also by granting the protected persons fundamental subjective rights. Thus, Geneva Convention (IV), relating to the protection of civilians, is replete with such protective rights given to the civilian. One may just quote Art. 27 Geneva Convention (IV), which protects persons, their honour, their family rights, their religious convictions, etc (see also → *Family, Right to, International Protection*; → *Religion or Belief, Freedom of, International Protection*).
- 19 The bridge to human rights was then particularly easy to be erected. It was in particular under the guise of Geneva Convention (IV)—the one which by its structure is nearest to HRL—that since the 1950s interactions were progressively designed from IHL to HRL. The focus of the Geneva Conventions on the protection of persons, and especially civilians, opened up a potential common area, which was progressively populated as the new ‘Geneva approach’ prevailed. In the territories occupied by → *Israel* after the Six Days War this new approach of mixing HRL and IHL for the protection of civilians was applied for many years, up to the present time (→ *Israel, Occupied Territories*; see also → *Arab-Israeli Conflict*).
- 20 The second essential factor is the immense growth of the number of civil wars, non-international armed conflicts. It was another force pulling in the direction of a meeting ground between the two branches of HRL and IHL. In the wake of → *wars of national liberation* of colonial people, in consequence of the formation of many new States with a weak social cohesion and structure, a long series of civil wars broke out in Africa, Asia and the → *Middle East* (see also → *Decolonization*; → *New States and International Law*). Such wars loomed large even in Latin America. These wars were fought not by professional armies confronting each other. They were ‘total wars’ in the sense that all parts of society were driven into their dynamic. In particular, the civilians suffered massacres, starvation, displacement and many other deprivations (see also → *Gross and Systematic Human Rights Violations*; → *Internally Displaced Persons*). One may just evoke the terrible civil war in Nigeria–Biafra, 1967–70 (→ *Biafra Conflict*)—whose cruelty fuelled the request for relief actions in the Western world (see also → *Humanitarian Assistance, Access in Armed Conflict and Occupation*). In order to grant some protection to civilians in such contexts, IHL for non-international armed conflicts had to be developed. That happened with the adoption of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (‘Protocol II’; → *Geneva Conventions Additional Protocol II [1977]*). Moreover HRL could easily apply to such situations. Civil war takes place within a State. The State driven into civil war continues to be bound by human rights instruments. The only step that must be taken is to define which human rights are applicable only in peacetime, and which ones are applicable also in times of emergency (→ *Emergency, State of*) and civil war. From there, a doctrine of non-derogable human rights—rights which remain applicable in cases of armed conflict and other situations of emergency—was developed. It soon found a positive resonance in a series of UN Reports and in the case law (see L Doswald-Beck and R Kolb 427–56; see also M Oraá 87–127). The technical and intellectual distance between IHL for non-international armed conflicts—centred on the protection of civilians—and HRL for states of emergency—centred on the protection of the human person in wartime—was so thin that a merger of the two bodies was unavoidable rather than simply possible. Hence, it comes as no surprise that since the UN Conference on Human Rights held in Tehran in 1968—with its ‘Resolution XXIII on Human Rights in Armed Conflicts’ of 12 May 1968—the question of respect for human rights in armed conflicts has become a matter of constant study and action by the UN and other international bodies.



- 21 The link between IHL and HRL was thus firmly established. Moreover, HRL became the driving force for the further evolution of IHL within the framework of the UN. The ICRC itself was compelled to recognize this propelling force of HRL on IHL (see International Committee of the Red Cross 'La Croix-Rouge et les droits de l'homme' [September 1983] UN Doc CD/7/1/1 [Summary] 20).

### 3. The Period of Progressive Merger (1990 up to Today)

- 22 During this period, the signs of a progressive merger of IHL and HRL—based on the common ground of a fundamental protective aim for the human person—comes to an apogee. The extraordinary momentum HRL has gained since 1990 reinforces its lead in the evolution of the law. On the other hand, emergent → *international criminal law* ('ICL') also heavily impresses its stamp on IHL. IHL finds itself nourished by these two external sources.
- 23 Two main evolutions of this period may be highlighted. First, there is a characteristic two-tier approach, quickly imposing itself in practice. It is based on the idea that both sources, IHL and HRL, should be applied together to a situation so as to leave no gaps and to obtain a mutual strengthening. Second, there is an upgrading of the law of non-international armed conflicts towards the law of international armed conflicts. The frontier between both, previously so strict, progressively erodes. Practically this means that many rules theretofore applicable only in international armed conflicts now become applicable also in internal armed conflicts. This evolution is a joint venture of HRL and ICL.
- 24 As to the first point: when confronted with situations where civilians are subject to attacks—which is the prevalent problem in modern warfare—the → *international community* no longer accepts gaps in protection. It spans together HRL and IHL in order to reinforce the protections by an addition of the two branches in the hope of thus leaving no uncertainties or lacunae. The report of W Kälin on the human rights situation in occupied Kuwait presented to the UN Commission on Human Rights well expresses this new stance: IHL and HRL are so interwoven that they can no longer be disentangled (UN Commission on Human Rights Special Rapporteur W Kälin 'Report on the Situation of Human Rights in Kuwait under Iraqi Occupation' paras 33–34; see also → *Iraq-Kuwait War [1990–91]*; → *United Nations Commission on Human Rights/United Nations Human Rights Council*). The same two-tier approach can be observed today in the context of the Guantánamo Prison (→ *Guantánamo, Detainees*) or in the report of the UN Fact-Finding Mission to the Gaza Conflict ('Goldstone Report'). Aspects taken from Geneva Convention (III) of 1949 on prisoner of war status are intermingled with human rights issues. Finally, one may quote to the same effect the → *Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory)* ('*Israeli Wall Advisory Opinion*') and the → *Armed Activities on the Territory of the Congo Cases*. The → *International Court of Justice (ICJ)* applied side by side IHL and HRL, first to the occupied Palestinian territories (→ *Palestine*), and second to the situation created by the partial invasion of Democratic Republic of the Congo's territory by Ugandan armed forces (→ *Congo, Democratic Republic of the*).
- 25 As to the second point: when the UN Security Council (→ *United Nations, Security Council*) was faced with the massacres in the former Yugoslavia (1991–95), it called all the parties to respect IHL and HRL in general, without any qualification (see also → *Yugoslavia, Dissolution of*). According to traditional criteria, the conflict in the former Yugoslavia was a mixed armed conflict, ie a complicated net of relations having here the complexion of an international armed conflict, there the complexion of a non-international armed conflict. However, the international community found it shocking that a civilian should be entitled to a wholly different extent of legal protection dependent on the fortuitous fact whether some foreign involvement existed in an area, which accidentally made the conflict become international in that area. It preferred assuring a unique standard of protection. All civilians should be entitled to the same—maximal—protection, wherever they were located on the territory and whatever the formally correct qualification of the conflict in that area at the relevant moment. The → *International Criminal Tribunal for the Former Yugoslavia (ICTY)* fully endorsed this expansive position and shaped, in the → *Tadić Case* of 1995, the idea of → *war crimes* committed in non-international armed conflicts ( *Prosecutor v Tadić [Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction]* IT-94-1-AR72 [2 October 1995] paras 71–74). The ICTY then further built on this idea and gave it expansion in its case law. The pull in this direction came from HRL and ICL. HRL provided the intellectual backbone for the expansion: the protection of fundamental rights became an 'absolute' during the 1990s. This 'absolute' forced its way also into IHL. Through the jurisprudence of the ICTY, and thus through ICL, this new direction in the law became a practical reality. Once more, HRL proved to be a driving force in the evolution of IHL.
- 26 This historical sketch shows how there has been a complete legal, sociological and moral reshaping of the relations between the two areas of the law. In 1945, IHL and HRL were as distant as Scylla and Charybdis; today they are as inseparable as Castor and Pollux.

### C. Positions Taken in Legal Writings

- 27 All logically possible positions concerning a relationship between the two poles of IHL and HRL have been defended in legal writings. First, it has been said that IHL and HRL are completely separate and should remain so. Second, it has been affirmed that IHL and HRL law entertain specific relationships of complementarity. Third, it has been held that IHL and HRL are but two branches of the same tree and that they largely merge into one another. These doctrinal debates have been quite heated in the past (see also → *International Legal Theory and Doctrine*). Today, they appear to belong to a bygone age. The close ties between both branches are now universally recognized. Hence, our present survey may be short.
- 28 The 'separatists' cling to a traditional view of both branches as it existed immediately after World War II in 1945. They essentially fear a politicization of IHL by HRL and refuse any coming closer of both on that basis. One may here quote authors such as H Meyrowitz, KD Suter or M Mushkat (see the Select Bibliography). This is an old position, which has recently not been maintained.
- 29 The 'complementarists' base themselves on the idea that both branches have a different root, different approaches, different environments and different functions. However, they are ready to admit a complementarity between both on specific points where the one can be called in order to complete the other. Thus, if IHL makes reference to 'fair trial', it is obviously possible to take stock of human rights case law in order to give a more specific meaning to that concept (→ *Fair Trial, Right to, International Protection*). Authors belonging to this school of thought are D Schindler or E David.
- 30 Finally, the 'integrationists' are prepared to push further the merger between both branches. They envision them as belonging to a common branch, as a fork with two limbs. For some, the integration is pursued vertically, by subjecting one branch to the other. Thus, IHL is either a province of HRL writ large—AH Robertson—or HRL is a province of IHL writ large—J Pictet. For others, the integration is rather to be performed horizontally. There is a continuum between HRL, HRL in cases of emergency, and IHL. Hence, these three merge into one another in differing combinations according to the practical needs at stake. This is the approach of S MacBride, GIAD Draper, or W Kälin in the 'Report on the Situation of Human Rights in Kuwait under Iraqi Occupation' submitted to the UN Commission on Human Rights. If a very summary view of practice may be ventured, it seems to have progressively developed in this last sense.
- 31 To the foregoing, it must be added that the scope of application of HRL was broadened by admission of extraterritorial application of human rights at least wherever there is effective control by a State organ (→ *Human Rights, Treaties, Extraterritorial Application and Effects*). This extension allowed envisaging an application of HRL outside the territory of the State in areas of conflict abroad. This fact was important for a closer integration of HRL and the IHL of international armed conflicts (see General Comment No 31 of the → *Human Rights Committee* of 29 March 2004 ['General Comment 31']; *Israeli Wall Advisory Opinion* paras 101–13, 127; etc). It is to be noted that the United States of America ('US')—and to a lesser extent the United Kingdom—is reserved on this type of extraterritorial application of HRL. The main argument raised against that course is that the human rights guarantees are due essentially within the zone of jurisdiction of any State, which is its territory (→ *Jurisdiction of States*). This restrictive reading is justified neither on the facts—the US having intense 'public' activities beyond its borders—nor on the law, which is centred on the principle of → *effectiveness*, if no abusive gaps are to be opened.

### D. The Relations between International Humanitarian Law and Human Rights Law in Practice

- 32 Practice has shown two main ways of coordination or merger between IHL and HRL. The first is coordination by way of subsidiary application. The second is coordination by way of 'renvoi'. The third is a sort of merger by way of shaping new law permeated by both branches. Some short examples may be given for each approach.

#### 1. The 'Subsidiary Application' Approach

- 33 HRL is of universal—→ *ratione materiae*—and general—→ *ratione personae*—application (see General Comment 31). IHL is more specialized. Substantively, it applies to situations of armed conflict. In short: IHL is applicable in armed conflicts only, HRL is applicable in all situations. Thus, IHL does not apply, for example, in situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, terrorist attacks, etc (see also → *Insurgency*; → *Terrorism*). Conversely, HRL will apply also to such situations. In these cases, HRL displays much the same function as common Art. 3 Geneva Conventions (I)–(IV) of 1949 does within the body of IHL: it formulates a subsidiary rule, filling the gap in protection left open by IHL. The same applies when an armed force is no longer a belligerent occupant, but remains on a foreign territory at the invitation of the local government (→ *Governments*; see also → *Intervention on Invitation*). Again HRL may continue to apply to its acts and omissions whereas IHL will cease

to apply to it. Thus, one may say that HRL borders on all parts IHL and assures a humanitarian standard in all the cases where IHL does not apply. Once the borders of IHL are crossed, one ends up in the province of HRL assuring a subsidiary application of certain humanitarian standards. That is not to say that HRL applies only when IHL does not apply. We will see that both equally apply contemporaneously. However, a distinctive function of HRL is to remain the sole subsidiary body of applicable international rules when IHL is no longer applicable. The famous → *Martens Clause* can be read in a modern context as providing for such a function of human rights, when it recalls that 'in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of public conscience' (Preamble Protocol II). It has however to be recalled that IHL may also apply by way of special agreements where *ex lege* it would not automatically apply. The Parties can agree to take over some rule of IHL to situations beyond their formal scope of application (see Art. 6 Geneva Conventions [I]–[III] and Art. 7 Geneva Convention [IV]). Thus, the protections due to prisoners of war may be extended to the benefit of some captives in a non-international armed conflict, as was done in the → *Spanish Civil War (1936–39)*. In all these situations the scope of application of IHL is extended with effect limited to a single case. Then, rules of IHL and HRL may again apply in parallel, by a choice of the concerned Party.

- 34 Examples of the subsidiary application of HRL when IHL does not apply can be found in all cases of public emergency not amounting to an armed conflict, eg the Greek case (1967–69), after the coup d'état by a military junta, or the numerous Latin American situations of emergency, such as that in Uruguay in the 1970s.

## 2. The 'Renvoi' Approach

- 35 The technique of 'renvoi' is used mostly by IHL making indirect reference—a reference, which sometimes is just a matter of interpretation—to HRL. Thus, when IHL guarantees a 'fair trial' or otherwise institutes legal proceedings (see eg Art. 3 Geneva Conventions [I]–[IV] ; Arts 5 (2) and 99–108 Geneva Convention [III] ; Art. 43 Geneva Convention [IV] ), HRL experience may be invaluable in order to define more precisely the requirements of such a trial. When IHL provides for detention of persons (see Arts 21–48 Geneva Convention [III] ; and Arts 76, 78, 79–135 Convention [IV] ), HRL may help concretizing the rights and duties involved by offering its own rich experience. Sometimes the implicit 'renvoi' may be bolder. In the case of occupation, the fundamental guarantees of the civilians are a mix of IHL and HRL. Practice with respect to Israeli occupied territories shows that very clearly. We then come back to the two-tier approach already discussed.
- 36 The 'renvoi' can obviously also be reversed and go from HRL to IHL. Thus, according to the ICJ, the non-derogable 'right to life', enshrined in Art. 6 → *International Covenant on Civil and Political Rights (1966)*, continues to apply in times of armed conflict (→ *Life, Right to, International Protection*). However, its precise content is influenced by the war. According to the ICJ in its → *Nuclear Weapons Advisory Opinions*, IHL constitutes in this situation a *lex specialis* which must be taken into account in order to be able to define what constitutes an 'arbitrary deprivation of life' in this very context ( *Legality of the Threat or Use of Nuclear Weapons [Advisory Opinion]* para. 25; see also *Israeli Wall Advisory Opinion* para. 106). This idea of a → *lex specialis* is however not very precise. Both branches and their norms are here simply co-ordinated as a matter of interpretation (see also → *Interpretation in International Law*); they continue to apply simultaneously. It is thus not so much a matter of putting one source in the place of the other—which is the traditional meaning of the *lex specialis* rule—but rather of complementing both with each other in the context of a proper interpretation. The matter is more properly described as one of 'renvoi' rather than one of *lex specialis*. Such a course, whereby, for example, IHL serves the interpretation of HRL without taking the complexion of a *lex specialis*, can be found in the *Bámaca Velásquez Case* of the → *Inter-American Court of Human Rights (IACtHR)*.
- 37 Such 'renvois' take place in the area of rights protected by both sources, ie in the area of overlapping. Such double protected rights are, for example, the right to life—against arbitrary deprivation; the prohibition against inhumane and degrading treatment—assaults on physical and mental integrity; the rights against arbitrary arrest and detention (→ *Detention, Arbitrary*); rights related to judicial guarantees; rights related to the use of firearms by enforcement officials; rights related to medical assistance and ethics, etc.

## 3. The 'Merger' Approach

- 38 A by-product of the merger approach is that of the 'human rights in times of armed conflict'-movement which started in 1968. It produced various texts at the international level, namely a great series of relevant resolutions (the most important of them are quoted in D Schindler and J Toman 345–57). Thus, a sort of particular branch of HRL was developed, namely a HRL for emergency and armed conflict situations. The various HRL bodies soon had to consider applications for human rights violations in contexts of civil, and later of international, war. This has been the case for the UN Treaty Bodies (→ *Human Rights, Treaty Bodies*), namely the Human Rights Committee, the → *Inter-American*

*Commission on Human Rights (IACommHR)* and *IACtHR*, the → *African Commission on Human and Peoples' Rights (ACommHPR)*, and even the → *European Court of Human Rights (ECtHR)*. For fear of too bold an action in a branch of law—IHL—on which these bodies lack subject-matter jurisdiction and expertise, the regional human rights bodies showed studied restraint in directly applying IHL. They normally held that their jurisdiction was limited to the rights enshrined in the human rights treaty whose application they have to control, and did not extend their scrutiny to IHL. A converse example is the *Juan Carlos Abella v Argentina* case at the IACommHR. There, IHL was directly applied, namely common Art. 3 Geneva Conventions of 1949 (see *Juan Carlos Abella v Argentina* Case 11.137 [18 November 1997] para. 156; overruled by the IACtHR). However, to a large extent the body of 'human rights in armed conflicts' simply took the place of IHL in non-international armed conflicts. The merger is thus only partial, if it exists at all: often it added up to the contents of both branches rather than to further substantive inter-penetration. But that substantive development can still occur in the future.

- 39 Conversely, a much more pronounced 'substantive' merger took place in UN reports on extra-judicial executions or on specific armed conflicts—such as Iraq (→ *Iraq-United States War [2003]*) or → *Sudan*: UN organs are not constrained by the same treaty restrictions as to the material scope of their jurisdiction.
- 40 'Human rights in times of armed conflicts' were applied in many cases (see Meron [2003] 73–81). The precise conditions of their derogability and of their scope in such contexts were progressively spelled out. One may quote, as for the ECtHR, the Cyprus cases, the Turkish cases and nowadays the Chechnya cases, eg *Isayeva v Russia*. At the inter-American level, one may quote such cases as *Coard, Tablada* or *Las Palmeras* (see Sassòli and Bouvier vol II 1387–98, 1670–81, 2281–87). For the ACommHPR, see eg the case *Commission Nationale des Droits de l'Homme et des Libertés v Chad* of 1995.
- 41 Additionally, in these last years, international armed conflicts—and not only non-international armed conflicts—have progressively found their way into the case law of human rights bodies. One may recall the *Case of Banković v Belgium* at the ECtHR, a case which arose from the bombing by the → *North Atlantic Treaty Organization (NATO)* in → *Serbia*, or the various follow-ups concerning Guantánamo. One may also think of the remedies granted to Iraqis against acts of the occupying forces in Iraq (→ *Iraq, Occupation after 2003*).
- 42 Finally, one must take notice of the emergence of 'minimum humanitarian standards' based on a complex mix of IHL and HRL. The starting point of these developments was a paradox. In cases of emergency which do not amount to an armed conflict—ie which remain internal disturbances and tensions—the derogations from, and suspensions of, human rights applicable in peacetime may bring about standards of protection which are lower than those which would prevail if a full-fledged armed conflict had arisen. Emergency HRL—non-derogable rights—proved in some cases weaker than IHL for non-international armed conflicts. This is paradoxical in two aspects: first, essential protections can be escaped; second, the law is more protective in the situation—armed conflict—which, on account of its gravity, would seem to allow for greater State freedom, rather than the reverse. Moreover, other gaps were observed. A treaty may not have been ratified, it may be burdened with reservations (→ *Treaties, Multilateral, Reservations to*), → *non-State actors* may not be bound by it, etc. Hence, there has been a movement trying to set up minimum rules applicable in any situation—peacetime, emergency, armed conflict. These minimum rules consist of a complex merger of HRL and IHL. The heyday of this effort was reached with the Declaration of Minimum Humanitarian Standards of 2 December 1990 ('Turku Declaration') adopted by an expert meeting in Finland and proposed as a model to be taken into consideration by the UN and other international organizations. The Turku Declaration is concerned with issues of fair trial, of limitations on means and methods of combat, with prohibition of displacement and deportation, and with guarantees of humane treatment. It has not yet had the success which its drafters had hoped it would have. But such minimum standards based on a merger approach are likely to be fuelled by recent events having revealed the uncertainties in intermediate situations of peace and war: Afghanistan (→ *Afghanistan, Conflict*) and Iraq spring to mind.
- 43 Recent practice thus reveals a rich array of relationships between IHL and HRL. These relationships are designed to reinforce each branch of the law by combined action with the other. The evolution since 1945 has thus been one from mutual suspicion and disinterest to one of mutual cooperation and progressive inter-penetration of IHL and HRL.

## E. Conclusion

- 44 The relationship of HRL and IHL has undergone major changes since 1945. From a situation of segregation and mutual disinterest, there has been a move towards a situation of progressive interpenetration, if not merger. The correct way of conceiving the mutual relationships of the two areas is not to imagine any fusion of both. It is rather to work out with precision areas and questions where the co-ordinated application of provisions of both branches of the law



leads to satisfactory—if not innovative—solutions, securing progress of the law or filling its gaps. This complex task is inadequately described by the often quoted principle of the → *lex specialis*. The point is not one of derogation by priority, as the maxim of the *lex specialis* could suggest, but rather one of complex case-by-case mutual reinforcement and complement always on concrete issues. Thus, rather than stressing mutual exclusiveness, be it speciality or priority, it would be better to focus on two aspects: a) gap filling and development of the law by co-ordinated application of norms of HRL in order to strengthen IHL and vice versa; b) interpretation allowing an understanding of one branch in the light of the other normative corpus in all situations where this is necessary, ie in armed conflict or occupation. Consequently, for example, the ECtHR could improve its case law in situations of non-international armed conflicts if it more directly took account of IHL provisions in the interpretation of its HRL instrument's rights, the ECHR. Its reluctant attitude in this respect is probably due to political considerations—the effort of not venturing into qualifying situations as being an 'armed conflict' and fighting entities as being 'parties' to the conflict—and possibly also to lack of expertise in IHL. In view of the fact that much older IHL has recently been developed by newer HRL cases, that is a somewhat disquieting factor.

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