

On the relationship between human rights law protection and international humanitarian law

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As States tend not to be willing to push for the further codification of international humanitarian law and, especially, of mechanisms of implementation, the question is posed as to which developments have been made in the abutting bodies of law and how they influence international humanitarian law.¹ Particular attention must be paid to international human rights law, as today human rights are an integral part of international law for the common welfare of humanity and represent common values that no State may revoke, even in times of war.² While international humanitarian law and human rights law vary in terms of origin and the situations in which they apply, the two bodies of law share the objective of protecting and safeguarding individuals in all circumstances.

Relationship between international humanitarian law and human rights law

Classic international public law recognized the separation between the law of peace and the law of war. Depending on the state of international relations, either the *corpus juris* of the law of peace or that of the law of war was applied. The adoption of the United Nations Charter in 1945 and of subsequent major human rights documents changed this surgically clear division. Since then there have been norms which are valid both in peacetime and in times of war. As with every innovation, this development was not immediately accepted by all. In particular, those who subscribed to the so-called separation theory rejected the application of human rights norms during armed conflicts with the argument that they and the norms of the *jus in bello* were two separate fields, which could not be applied at the same time.³ This position is rather surprising because, in classic international public law, human

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rights considerations — on the basis of natural law — were taken into account. In this vein, *Bluntschli* argued in 1872 that the declaration of war did not rescind the legal order but “on the contrary, we recognize that there are natural human rights that are to be recognized in times of war as in peacetime ...”.⁴ Furthermore, the 1907 Hague Convention on Land Warfare refers to the parties to the treaty as “[a]nimated by the desire to serve, even in this extreme case, the interests of humanity”.⁵ In the light of these statements one can have doubts about the justification of the separation theory.

Yet the separation theory seems to have supporters even nowadays. For instance, the well-known *Handbook of Humanitarian Law* does not deal at all with the topic “human rights in armed conflicts”.⁶ In this regard, it may be argued that the handbook lags behind the leading opinion expressed by the International Court of Justice in the “Nuclear Weapons Advisory Opinion”⁷ and “Legal Consequences Advisory Opinion”.⁸ In these Advisory Opinions the Court clearly rejected the position that the International Covenant on Civil and Political Rights (ICCPR) of 19 December 1966 could only be applied in peacetime. The wording of relevant human rights treaties supports the ICJ jurisprudence on the subject. Indeed, these treaties contain clear stipulations concerning the observance of human rights obligations by States Parties in times of armed conflict. For example, Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4 November 1950 deals with the fate of human rights norms in situations in which the life of a nation is threatened by war or other public emergencies.

1 This approach is in line with the ICRC’s *Avenir* statement, which stresses that “the relationship between humanitarian law and human rights law must be strengthened.” See David Forsythe, “1949 and 1999: Making the Geneva Conventions relevant after the Cold War”, *International Review of the Red Cross*, Vol. 81, No. 834, 1999, p. 271.

2 Christian Tomuschat, “Obligations arising for States against their will”, *Recueil des Cours*, No. 241, Vol. IV/1993, Nijhoff, The Hague, 1994, p. 195.

3 See Otto Kimminich, *Schutz der Menschen in bewaffneten Konflikten*, Beck, München, 1979, p. 28.

4 Johann Caspar Bluntschli, *Das moderne Völkerrecht der civilisierten Staaten*, 3rd ed., Beck, Nördlingen 1878, para. 529.

5 Preamble, Convention (IV) respecting the Laws and Customs of War on Land, signed at The Hague, 18 October 1907, in: Dietrich Schindler and Jiri Toman (eds.), *The Law of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 4th ed., Nijhoff, Leiden, 2004, p. 55.

6 Dieter Fleck (ed.), *Handbook of Humanitarian Law in Armed Conflict*, Oxford University Press, Oxford, 1995.

7 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, para. 26.

8 *Legal consequences of the construction of a wall in the Occupied Palestinian Territory, Advisory Opinion*, 9 July 2004, paras. 102-106. Not yet published but available at the website of the ICJ:

<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> (last visited 25 October 2004).

Under such circumstances the respective State Party is allowed to “take measures derogating from its obligations under this Convention”. However, the human rights enshrined in the ECHR may be limited only to the extent strictly required by the exigencies of the situation. Some of the rights explicitly mentioned in the foregoing articles may not be derogated from (*inter alia* the right to life, the freedom of belief and the prohibition of torture). These human rights are called non-derogable, which means that they are to be applied in all circumstances, without exception. The traditional impermeable border between international humanitarian law, which applies during armed conflicts, and the law of peace is thereby crossed. This “crossing of the border” is further supported by Article 3 common to the Geneva Conventions of 12 August 1949 containing a list of rights which are to be protected in all circumstances. Interestingly, these rights broadly cover the non-derogable human rights. This very configuration is what led academics to draft the “Turku Declaration”,⁹ which called for the legal grey zones — in the border areas of the law of peace and the law of war — to be filled by the cumulative application of human rights law and international humanitarian law, thereby guaranteeing at least minimum humanitarian standards.¹⁰

The ECHR is not the only instrument referring to the applicability of human rights in wartime. A further regional human rights instrument, the American Convention on Human Rights of 22 November 1969, lists in its Article 27 non-derogable rights which cannot be abrogated in times of war. Universal human rights treaties also refer to non-derogable rights. For example, Article 4 of the ICCPR includes an emergency clause similar to that formulated in regional instruments.

All these human rights instruments show that human rights are an intrinsic part of the legal rules governing wars and other emergency situations. Taking into account the obligation of States to respect non-derogable rights in all circumstances, according to human rights instruments and the final document of the First World Conference on Human Rights in Teheran in 1968, Cerna concluded in 1989 that international public law had already been “transformed into a branch of human rights law and termed ‘human rights in armed conflicts’”.¹¹

⁹ UN Doc. E/CN.4/Sub.2/1991/55.

¹⁰ See Allan Rossas and Theodor Meron, “Combatting lawlessness in grey zone conflicts through minimum humanitarian standards”, *American Journal of International Law*, Vol. 89, No. 2, 1995, p. 215.

¹¹ Christina M. Cerna, “Human rights in armed conflict: Implementation of international humanitarian law norms by regional intergovernmental human rights bodies”, in Frits Kalshoven and Yves Sandoz (eds.), *Implementation of International Humanitarian Law*, ICRC, Geneva, 1989, p. 39.

The Convention on the Rights of the Child (CRC) adopted in 1989 impressively corroborates this view. Here the substantial overlap between international human rights protection and international humanitarian law becomes obvious. Article 38(1) of that Convention obliges the States Parties to undertake to respect and ensure respect for rules of international humanitarian law that deal with the protection of children. Thus a human rights treaty, normally applicable in peacetime, contains provisions that are not only applicable in armed conflicts but are also enshrined in the law regulating armed conflicts. The regulations are even more detailed because Article 38 (2), (3) and (4) repeats the standards laid down in Article 77 of Additional Protocol I to the Geneva Conventions that restricts the recruitment and participation of children in armed conflicts. Those standards, adopted in 1977, permit the recruitment and direct participation of children from the age of fifteen onwards.

This undoubtedly unsatisfying standard in the CRC of 1989 runs counter both to the progressive codification of international public law and to the goal of the Convention, which, according to Article 3, is to ensure that the “best interests” of the child (defined in Article 1 as a person below the age of eighteen years) are protected. It is most unlikely that it is in the interest of a child aged fifteen to take direct part in hostilities.

This contradiction has been severely criticized in legal literature. Particularly at issue is why the 1989 Convention on the Rights of the Child, which was drawn up more than a decade after the adoption of the Additional Protocols to the Geneva Convention and marks considerable progress in codification of the protection of the individual, contains no protection exceeding that of Article 77 of Additional Protocol I.¹² This failure is all the more regrettable because, when the CRC was being negotiated, the opponents of the relevant improvement in child protection (in particular the USA, Iran and Iraq) had not put forward a very sturdy legal argument. As a matter of fact, the USA was of the opinion that neither the General Assembly nor the Human Rights Commission were suitable fora for the revision of existing international humanitarian law.¹³

However, the American argument, which is based on the aforementioned traditional separation of the law of peace and the law of war, is not

¹² Hans-Joachim Heintze, “Children need more protection under international humanitarian law — Recent developments concerning Article 38 of the UN Child Convention as a challenge to the International Red Cross and Red Crescent Movement”, *Humanitäres Völkerrecht — Informationsschriften*, Vol. 8, No. 3, 1995, p. 200.

¹³ UN Doc. E/CN.4/1989, p. 55, Add.1, p. 6.

convincing, for the CRC was intended to be a new, independent treaty and not a revision or amendment of international humanitarian law. It can moreover also be argued that obligations over and above the general standards should have been laid down for the States party to the new instrument, as is definitely possible in treaty law. Since many feared a lowering of standards, the American argument was not further discussed. The USA later departed from its (untenable) position when, in 1992, it signed the Optional Protocol on the involvement of children in armed conflict to the CRC. This Protocol, adopted in 2000 through Resolution 54/263 of the UN General Assembly, obliges the States Parties to take all feasible measures to ensure that children under the age of 18 do not take a direct part in hostilities. It entered into force on 12 February 2002 and has to date been ratified by 52 States. This means that, at least where these States are concerned, the standard of protection is higher than that propounded in international humanitarian law.¹⁴

The example of the CRC demonstrates not only that the law of peace and the law of war overlap but also that, when examining which duties are incumbent on a State in times of armed conflict, it is not possible to avoid taking international human rights law into consideration. This situation alone justifies speaking of a convergence of both bodies of law which is more far-reaching than only “a natural convergence of humanitarian principle underlying these two bodies of law.”¹⁵ Convergence here means an overlap in terms of the scope of protection. However, the distinction between the two areas of law, which is primarily procedural, must be borne in mind.¹⁶ The convergence approach opens the possibility for the cumulative application of both bodies of law.

¹⁴ This aspect was not taken into consideration by Matthe Happold, “The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict”, in: Horst Fischer (ed.), *Yearbook of International Humanitarian Law*, Vol. 3, 2000, Asser Press, The Hague, 2002, p. 242.

¹⁵ Dale Stephens, “Human rights and armed conflict: The Advisory Opinion of the International Court of Justice in the Nuclear Weapons case”, *Yale Human Rights & Development Law Journal*, Vol. 4, No. 1, p. 2.

¹⁶ According to Melysa H. Sperber, “John Walker Lindh and Yaser Esam Hamdi: Closing the loophole in international humanitarian law for American nationals captured abroad while fighting with enemy forces”, *American Criminal Law Review*, Vol. 40, Winter 2003, p. 239, human rights law is invoked by an individual against a State. However, humanitarian law is not at present enforced against a State by individuals. See also Noëlle Quéinivet, “The *Varvarin* case: The legal standing of individuals as subjects of international humanitarian law”, *Journal of Military Ethics*, Vol. 3, No. 2, 2004, pp. 181-187.

The cumulative application of human rights law and humanitarian law

Some obligations in human rights treaties remain in force during armed conflicts. The result is undoubtedly a substantial overlap of both bodies of law. However, the response of legal opinion to this situation differs. Some authors argue against “advocating a merger of the two bodies of international law” and speak of the theory of complementarity.¹⁷ According to this theory, human rights law and international humanitarian law are not identical bodies of law but complement each other and ultimately remain distinct. This is undoubtedly true, but the point is that they do overlap.

Although the ICRC has in the past approached the subject cautiously, it is nowadays involved in the establishment of common values that transcend legalistic arguments and distinctions. For example, it has published a special edition of the *Review* on the convergence of international humanitarian and human rights law.¹⁸ The somewhat more assertive convergence theory is gaining in influence. It goes further than mere complementarity and aims at providing the greatest effective protection of the human being through the cumulative application of both bodies of law. Reference can consequently be made to one unified complex of human rights beneath different institutional umbrellas.¹⁹

A glance at the most recent State practice shows that this is not merely theory. Examples are Kuwait in 1991 and Iraq in 2003-2004. The cumulative application of both bodies of law during the armed conflict in Kuwait was both “feasible and meaningful” and clarified the practical meaning of the convergence theory applied to the occupying regime in Kuwait in 1990/91.²⁰ Parallels can be drawn between this and the situation in Iraq in 2003-2004. Security Council Resolution 1483 (2003), which lays down the basic principles for the occupation and reconstruction of Iraq, requires all “involved” to fulfil their obligations under international law, especially those according to the Geneva Conventions (para. 5), and requests the Secretary-General’s Special Representative for Iraq to work for the promotion of human rights protection

¹⁷ Hans-Peter Gasser, “International humanitarian law and human rights law in non-international armed conflict: Joint venture or mutual exclusion?”, *German Yearbook of International Law*, Vol. 45, Duncker & Humblot, Berlin, 2002, p. 162.

¹⁸ See e.g. David Forsythe, *op. cit.* (note 1), p. 271. The Human Rights Sub-Commission of the UN Commission on Human Rights also refers in its Resolution 1989/26 to “Convergence”.

¹⁹ Theodor Meron, *Human Rights in Internal Strife: Their International Protection*, Cambridge University Press, Cambridge, 1987, p. 28.

²⁰ Walter Kälin (ed.), *Human Rights in Times of Occupation: The Case of Kuwait*, Stimpfli, Bern, 1994, p. 27.

(para. 8 g)). It goes without saying that such duties require the cumulative application of international humanitarian law and human rights law. With regard to cumulative application, three points need to be underscored:

- (i) The interpretation of rights and duties must refer to both areas of law. It is, for example, difficult to interpret the term “inhuman treatment” found in human rights law in any other way than according to the requirements of the Third Geneva Convention, as it has a specific meaning in the context of a prisoner-of-war camp. On the other hand the requirements of paragraph 1(c) of Article 3 common to the four Geneva Conventions could not be fulfilled, after considering “the legal guarantees deemed imperative by civilized nations” in criminal proceedings, without applying the human rights instruments.
- (ii) Human rights law strengthens the rules of international humanitarian law by providing a more exact formulation of State obligations. Thus the duties arising from Article 55 of the Fourth Geneva Convention and pertaining to health care have to be applied in the light of the right to health contained in the International Covenant on Economic, Social and Cultural Rights.²¹ In the separation of rape, as a method of war and as prohibited by international humanitarian law, from torture, the human rights law provisions of the UN Convention against Torture must necessarily be resorted to.²²
- (iii) International humanitarian law brings human rights law into effect by spelling out, for example, the duties regarding missing persons. Even though “disappearances” undoubtedly represent a serious human rights violation, the relevant law regarding the obligations of States in such cases is very underdeveloped. In times of armed conflict, the occupying power is obliged by the Third and Fourth Geneva Conventions to provide information about detained persons, including notification of the death of detained persons and the possible causes thereof, and to search for persons whose fate is unknown.²³

In a report to the Security Council entitled “On the Protection of Civilians in Armed Conflict”,²⁴ the UN Secretary-General voiced his opinion

²¹ UNTS, Vol. 993, p. 3.

²² UNTS, Vol. 1465, p. 85. See Deborah Blatt, “Recognizing rape as a method of torture”, *New York University Review of Law and Social Change*, Vol. 19, No. 4, 1994, p. 821.

²³ Walter Kälin, *op. cit.* (note 20), p. 27.

²⁴ UN Doc. S/1999/957.

on the cumulative application of all norms which protect the individual, at least those civilians as defined in the Geneva Conventions and their Protocols. He recommended States to ratify equally the relevant instruments of international humanitarian law, international human rights law and refugee law, as all three are “essential tools for the legal protection of civilians in armed conflicts”.²⁵

From a practical point of view the growing recourse to international humanitarian law protection is, of course, also a result of the increased occurrence of civil conflicts, which often take place in a grey zone in terms of that law owing to its relatively few rules governing such situations. Its practical importance for parties to conflict has been convincingly pointed out in legal literature.²⁶

International humanitarian law as *lex specialis*

The cumulative application of human rights law and international humanitarian law inevitably raises the question of the reciprocal relationship. The ICJ had to answer this question in the Nuclear Weapons Advisory Opinion²⁷ because the advocates of the illegality of the use of nuclear weapons had argued that such use violated the right to life laid down in Article 6 of the ICCPR.²⁸ Article 6 of the ICCPR stipulates that: “No one shall be arbitrarily deprived of his life.” The ICJ established in its Opinion that Article 6 is a non-derogable right and consequently also applies in armed conflict, and that even during hostilities it is prohibited to “arbitrarily” deprive someone of their life. In the same Opinion, the ICJ recognizes the primacy of international humanitarian law over human rights law in armed conflicts, thereby designating the former as *lex specialis*. The term “arbitrarily” is, therefore, to be defined according to international humanitarian law.

The 2004 Advisory Opinion concerning the wall in the occupied Palestinian territory tends to show even more clearly that the right to life in times of armed conflict is only to be interpreted according to international

²⁵ *Ibid.*, para. 36.

²⁶ Dieter Fleck, “Humanitarian protection against non-State actors”, in: Jochen A. Frowein *et al.* (eds.), *Verhandeln für den Frieden, Liber Amicorum Tono Eitel*, Springer, Berlin, 2003, p. 78.

²⁷ *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* (note 7), p. 26.

²⁸ According to Greenwood this viewpoint was taken by Malaysia, Salomon Islands and Egypt. See Christopher J. Greenwood, “*Jus bellum* and *jus in bello* in the Nuclear Weapons Advisory Opinion”, in: Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge University Press, Cambridge, 1999, p. 253.

humanitarian law.²⁹ The Human Rights Committee, too, stresses in its General Comment on Article 2 that the ICCPR applies also in situations of armed conflicts to which the rules of international humanitarian law are applicable. However, the Human Rights Committee is not as crystal clear as the ICJ because it avoids touching on the *lex specialis* issue: “While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be especially relevant for the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”³⁰ The *lex specialis* character of international humanitarian law is nevertheless essential. In certain circumstances human rights law cannot be considered; for example a combatant who, within the scope of a lawful act during an armed conflict, kills an enemy combatant cannot, according to *jus in bello*, be charged with a criminal offence.³¹

The evaluation given in the ICJ Opinion has been welcomed by academics, mainly for its clarification that the norms developed for peacetime, i.e. human rights law, cannot be applied “in an unqualified manner” to armed conflicts. Human rights have instead to be inserted into the structure of international humanitarian law in a sensitive manner.³² The primacy of international humanitarian law is herewith emphasized. It must, however, be noted that the provisions of human rights law as a whole remain valid as prescribed in Article 4 of the ICCPR (and the analogous regional treaties) and are consequently of importance. The ICJ in its Advisory Opinions therefore supports the need to regard the *protection* granted by international humanitarian law and human rights law as a single unit and to harmonize the two sets of international rules.

Admittedly, such a viewpoint inevitably raises the *lex specialis derogat legis generalis* objection. It can be refuted by reference to the Martens Clause, which is accepted both in international treaties and in customary international law. This clause confirms that the rules of the laws pertaining to armed conflicts cannot be regarded as the final regulation of the protection of human beings, but can be supplemented with human rights law protection.³³

²⁹ *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, *op. cit.* (note 8), para. 101.

³⁰ UN Doc. CCRP/C/74/CPR.4/Rev.6.

³¹ Laurence Boisson de Chazournes and Philippe Sands, *op. cit.* (note 29), p. 253.

³² Michael J. Matheson, “The opinions of the International Court of Justice on the threat or use of nuclear weapons”, *American Journal of International Law*, Vol. 91, No. 3, 1997, p. 423.

³³ See Heinrich B. Reimann, “Menschenrechtsstandard in bewaffneten Konflikten”, in: Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC and Nijhoff, Geneva and The Hague, 1984, p. 773.

Article 72 of 1977 Additional Protocol I also proves the “openness of the international laws of armed conflicts”,³⁴ as it specifies with regard to the treatment of persons who find themselves in the power of a party to conflict that “[t]he provisions of this Section are additional to (...) other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict”.

The interpretation of the right to life by human rights law in times of armed conflict becomes more obvious in regional human rights instruments than in the ICCPR. In Article 15 of the ECHR, for instance, it is made clear that cases of death as a result of legal acts of war are not to be regarded as a violation of the right to life spelled out in Article 2 of the ECHR.

Implementation mechanisms of human rights law protection

Legal literature aptly points out that human rights protection not only shares a common philosophy with international humanitarian law, but can also be used to compensate for the deficits of international humanitarian law.³⁵ The underdeveloped implementation mechanisms of international humanitarian law, which have to be described as fairly ineffective, are among its great weaknesses. So it comes as no surprise that both the ICRC and academics have on numerous occasions attempted to use the implementation mechanisms of the UN human rights treaties, disarmament treaties and environmental treaties as examples of possible systems to ensure compliance with international humanitarian law and to make them appealing to States. Central to these implementation mechanisms are the State reporting procedures.³⁶

The amazing thing about these suggestions is that academics advocate new reporting procedures and therefore support the proliferation of such mechanisms. This is not convincing because it is already difficult enough today, with the sheer number of such reporting procedures in the human rights field, to keep an overview of the content and avoid endless repetitions. Nor should it be forgotten that many governments are unable to submit their periodical reports on time, mainly because of a serious lack of resources. For example, Suriname

³⁴ Silja Vöneky, *Die Fortgeltung des Umweltvölkerrechts in internationalen bewaffneten Konflikten*, Springer, Berlin, 2001, p. 286.

³⁵ Judith Gardam, “The contribution of the International Court of Justice to international humanitarian law”, *Leiden Journal of International Law*, Vol. 14, No. 2, 2001, p. 353.

³⁶ See Krzysztof Drewicki, “The possible shape of a reporting system for international humanitarian law: Topics to be addressed”, in: Michael Bothe (ed.), *Towards a Better Implementation of International Humanitarian Law*, Berlin Verlag, Berlin, 2001, p. 73.

owes four State reports to the Human Rights Committee and eight State reports to the Anti-discrimination Committee. In all, 44 member States have not provided the Human Rights Committee with a report due every five years, and 68 of those reports are over five years late.³⁷ In view of this dilemma the UN General-Secretary has been requested to compile methods for tightening up (“streamlining”) the State reporting procedure. In this connection a brainstorming meeting that focused on the strengthening and consolidation of the reporting procedure took place in early 2003.³⁸

In view of these problems regarding UN reporting procedures, the proposal to create a new reporting procedure for international humanitarian law seems impracticable. As things stand today, it seems vital to make multiple use of the procedures that already exist. Since human rights law protection and international humanitarian law overlap, such a multiple use would appear possible.³⁹ The following paragraphs, which describe actual practice, will prove this point.

Information in the case of a public emergency

It is well known that, especially in conditions of war or other public emergencies in which the life of the nation is threatened, particularly serious human rights violations or mass killings can occur.⁴⁰ The observance of human rights in these situations is therefore of crucial importance. This challenge of emergency situations is met by the ICCPR in that the States Parties which declare an emergency are obliged, under Article 4(3), to inform the UN Secretary-General of the human rights law obligations they are derogating from and their reasons for doing so. The Human Rights Committee is allowed to check the conditions for the existence of a state of emergency and, if necessary, to demand special reports. As early as 1981 the Committee adopted a “General Comment” on the interpretation of State duties as enshrined in Article 4. Emphasizing the extraordinary and temporary nature of the emergency law, it requested States to submit a report immediately after the declaration of a state of emergency and to guarantee

³⁷ UN Doc. HRI/ICM/2003/3, para. 15.

³⁸ UN Doc. HRI/ICM/2003/4.

³⁹ Hampson recommended such an approach already in 1992: Françoise J. Hampson, “Using international human rights machinery to enforce the international law of armed conflict”, in: *Revue de Droit Militaire et de Droit de la Guerre*, Vol. 31, No. 1, 1992, p. 118.

⁴⁰ Vera Gowlland-Debbas, “The right to life and genocide: The Court and the international public policy”, in: Laurence Boisson de Chazournes and Philippe Sands, *op. cit.* (note 29), p. 324.

that non-derogable rights would be upheld.⁴¹ The Committee furthermore stresses that the benefit of derogable human rights may be abrogated only if absolutely necessary in the light of the given circumstances. In this regard the ICCPR applies the principle of proportionality, which is also one of the core principles of international humanitarian law.

The ECHR also recognizes a duty to inform. According to Article 15(3), the Secretary-General of the Council of Europe must be informed about emergency measures. This duty is to be taken seriously because an individual may lodge a complaint against a State that may have violated his/her rights. If the State has informed the Secretary-General about the derogations, an individual may not complain about infringements of his/her derogable rights. The information provided by the member State concerning the declaration of emergency is published by the Council of Europe. This European procedure was later emulated in Article 27(3) of the Inter-American Convention on Human Rights, which also requires the member State to inform the Secretary-General of the Organization of American States.

The obligation to inform provides a mechanism that can be used to ensure compliance with both human rights law and international humanitarian law (insofar as both bodies of law overlap). This is clarified in one of the most recent reports of the Human Rights Committee to the UN General Assembly, which states that “[w]hen faced with situations of armed conflicts, both external and internal, which affect States Parties to the Covenant, the Committee will necessarily examine whether these Parties are complying with all their obligations under the Covenant”.⁴² The advantage of this procedure can be seen especially in the fact that the parties to that treaty have to justify derogations from human rights law. The disadvantage is that the Human Rights Committee, owing to the overload of periodical reports, hardly has time to examine notifications of emergency measures. In sum, effective supervision is not reached through new procedures but through a better organization of the work.

Individual complaints procedures

There are no individual complaints procedures available to the victims of violations of international humanitarian law at the international level. This once again underscores the fact that Ms Doswald-Beck considers a “truism”:

⁴¹ Manfred Nowak, *CCPR-Commentary*, Engel, Kehl, 1993, p. 81.

⁴² UN Doc. A/57/40, para. 29.

international law is primarily aimed at regulating relations between States.⁴³ Yet human rights law does impose constraints upon States inasmuch as it envisages international complaint procedures.

Of the 149 States party to the ICCPR, 104 have also ratified the Optional Protocol to the ICCPR, which permits victims of human rights violations to file a complaint with the Human Rights Committee after they have exhausted all domestic remedies. The Human Rights Committee then considers whether the complainant's human rights have been violated. According to Article 1 of the Optional Protocol the test is limited to "any of the rights set forth in the Covenant", i.e. international humanitarian law cannot be directly applied. This procedure is useful in the light of the exceptionally numerous and serious human rights violations which can be registered in most emergency situations.⁴⁴ Hence international supervision is of the utmost relevance. In addition, such human rights procedures make it possible to check whether the curtailment of the complainant's rights is compatible with the requirements laid down in Article 4 of the ICCPR.⁴⁵ The procedure ends with the formulation of an opinion by the Committee,⁴⁶ which, with the publicity given to the procedure, puts pressure on the State that has breached human rights law ("public blame effect"). This pressure is all the more intense in procedures introduced by regional human rights treaties inasmuch as these procedures are court-like. Even more interesting are regional complaints procedures, because they take place before human rights courts and their judgments are binding upon the State that has acted in contravention of the regional human rights treaty. Consequently these procedures deserve further consideration.

The question arises whether human rights law procedures can make up for the lack of complaints procedures available to victims of violations of international humanitarian law. It should be noted that the cumulative and direct application of international humanitarian law has already been recognized in these individual regional complaints procedures. This is due to the wording of Article 15 of the ECHR specifying that emergency measures

⁴³ Louise Doswald-Beck, "Implementation of international humanitarian law in future wars", in: Michael N. Schmitt and Leslie C. Green (eds.), *The Law of Armed Conflict into the Next Millennium*, American Naval Academy, Newport, 1998, p. 52.

⁴⁴ See Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception*, Kluwer, The Hague, 1998, pp. 392 et seq.

⁴⁵ UN Doc. A/57/40, para. 31.

⁴⁶ Rüdiger Wolfrum, "The reporting system under international human rights agreements: From collection of information to compliance assistance", in: Michael Bothe (ed.), *op. cit.* (note 37), p. 25.

cannot be “inconsistent with [the State’s] other obligations under international law”. Article 27 of the American Convention on Human Rights is similarly formulated. A glance at practice shows the advantages and disadvantages.

The Inter-American human rights protection system

At the beginning it was contentious whether the American human rights bodies were allowed to use international humanitarian law when deciding upon the legality of certain activities and/or measures. The first time the Inter-American Commission on Human Rights was confronted with such a question was in the case of *Disabled Peoples’ International et al. v. United States* relating to the intervention by the USA in Grenada in 1987 in which 16 inmates of a psychiatric clinic were injured. The US government argued that the Commission was not the responsible authority to adjudicate upon the allegations of improper conduct. In the opinion of the USA, the Commission was not allowed to consider the application of the Fourth Geneva Convention because its mandate was limited to the “examination of the enjoyment or deprivation of the rights set forth in the American Declaration of the Rights and Duties of Man”.⁴⁷ The position of the USA was criticized at the time by academics, because the principles of international humanitarian law are applicable to a military operation.⁴⁸

Later practice confirmed this view. In this regard, particular attention should be paid to the report of the Inter-American Commission on Human Rights in the *Tablada* case. This case concerned the attack by 42 armed persons on the La Tablada barracks of the Argentine armed forces on 30 October 1997. During the 30-hour battle, 29 of the attackers and many soldiers were killed. Surviving attackers applied to the Commission, complaining that Argentina had violated the Inter-American Convention on Human Rights and international humanitarian law. The Commission examined whether it could directly apply international humanitarian law and finally decided that it was entitled to do so. Great importance was attributed by academics to the decision, as it determined that an international organ responsible for the protection of human rights could directly apply international humanitarian law to a State party to a human rights treaty.⁴⁹ The Commission explained its

⁴⁷ See <http://www.wcl.American.edu/pub/humanright/digest/Inter-American/app9213.htm>. (last visited 25 October 2004).

⁴⁸ See David Weisbrodt and Beth Andrus, “The right to life during armed conflict: Disabled Peoples’ International v. United States”, *Harvard International Law Journal*, Vol. 29, No. 1, 1988, p. 59.

reasoning for the application of international humanitarian law by saying that it was the only manner in which it could do justice to situations of armed conflict. Even though the Inter-American Convention on Human Rights is formally applicable in times of armed conflict, it contains no regulations on the means and methods of conducting war. In order to be able to establish what constituted a (prohibited) deliberate taking of life under conditions of war, the Commission had to resort to international humanitarian law.⁵⁰

In this regard, the Commission's argument is accurate: the human rights provisions of the Inter-American Convention on Human Rights alone are not sufficient to determine who is legally permitted to take part in hostilities and carry out harmful acts. At the same time, however, the Convention does not contain any provision requiring the Commission to use international humanitarian law. The Commission based its approach on:

- (i) the overlapping of the scope of application of human rights law and international humanitarian law: according to the said Convention, States have the duty to fulfil the standards laid down in Article 3 common to the Geneva Conventions;
- (ii) Article 29(b), which does not allow for an interpretation according to which the enjoyment or the execution of rights that are guaranteed by another agreement binding the State may be limited;
- (iii) Article 25, which spells out that everyone has a right to a suitable legal remedy for the violation of his or her basic rights;
- (iv) Article 27, which states that derogations from duties entrenched in the Convention may not stand in the way of other international legal duties;
- (v) the report of the Inter-American Human Rights Court, which declared that the Commission may use treaties that did not emerge from the Inter-American system.⁵¹

The reasons provided by the Commission appear to be sound. It thus directly applied international humanitarian law and did not use it merely as an aid in interpretation.

⁴⁹ Liesbeth Zegveld, "The Inter-American Commission on Human Rights and international humanitarian law: A comment on the *Tablada* case", *International Review of the Red Cross*, Vol. 80, No. 324, 1998, p. 505.

⁵⁰ "...the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of this and other kinds of claims alleging violations of the American Convention in combat situations". Case 11.137. Inter-Am. C.H.R., No. 55/97, para. 161 (1997).

⁵¹ Advisory Opinion OC-1/82, 24 September 1982.

The Inter-American Court did not follow the position of the Commission in its decision in the *Los Palmeras* case,⁵² for it decided that it was not competent to apply international humanitarian law directly, in particular Common Article 3 of the Geneva Conventions. The Court conceded that it could only use the Geneva Conventions for the purposes of a better interpretation of the Human Rights Convention. It therefore argued in the *Los Palmeras* case, which concerned the execution of six unarmed civilians by the Colombian police, that the Convention “has only given the Court competence to determine whether the acts and norms of States are compatible with the Convention itself and not with the 1949 Geneva Conventions”.⁵³ The main ground for the non-application of international humanitarian law was the argument propounded by the Colombian government, i.e. that the State Parties to the Inter-American Convention had only accepted the contentious jurisdiction of the Court concerning the rights listed in the Convention itself. The Court admitted the objections, thereby rejecting the viewpoint of the Commission that international humanitarian law could be applied as customary international law or as *lex specialis*.

The decision gave rise to an impressive number of comments in legal literature. Ms Martin examined it and concluded that it “overturns” the position taken by the Inter-American Commission.⁵⁴ Kleffner and Zegveld, too, consider the decision to be a proof of how problematic the Commission’s assertion was, namely that international humanitarian law could be directly applied. The authors argue that, since it is highly questionable whether the Court can apply international humanitarian law, it is necessary to establish an individual complaints procedure for violations of that law.⁵⁵ However desirable such a procedure may be, the likelihood of it being implemented in the nearest future is fairly slight. In order to stress the importance and relevance of international humanitarian law, it is therefore expedient to call upon human rights law treaty bodies to pave the way in a manner similar to that of the Commission in its *Tablada* decision. According to Zwanenburg, such courts may use international humanitarian law indirectly as authoritative

⁵² Inter-Am.Ct.H.R. (Ser.C), No. 67 (2000).

⁵³ *Op. cit.* (note 52), para. 33.

⁵⁴ Fanny Martin, “Application du droit internationale humanitaire par la Cour interaméricaine des droits de l’homme”, *International Review of the Red Cross*, Vol. 83, No. 844, 2002, p. 1066.

⁵⁵ Jann K. Kleffner and Liesbeth Zegveld, “Establishing an individual complaints procedure for violations of international humanitarian law”, in: Horst Fischer (ed.), *Yearbook of International Humanitarian Law*, Vol. 3, 2000, Asser, The Hague, 2002, p. 388.

guidance in interpreting human rights norms.⁵⁶ Even in the *Los Palmeras* case the Court did not exclude the possibility, though it stopped short of applying international humanitarian law directly. Furthermore, if the parties to a conflict agree that international humanitarian law applies directly, then the Inter-American bodies may ensure compliance with that *corpus juris*. It is consequently submitted that there is no need to establish new procedures, but instead to disseminate further the available existing mechanisms.

In light of this evaluation the more recent practice of the Inter-American Court is encouraging. The *Bamaca-Velasquez* case⁵⁷ in particular relativizes the criticism of Kleffner and Zegveld. This judgment concerned a guerrilla fighter who fell into the hands of the Guatemalan military during a battle and was tortured and murdered by them. In this case international humanitarian law could be applied, as Guatemala and the Commission had agreed to its application and to the use of Article 3 common to the Geneva Conventions in interpreting the duties enshrined in the Inter-American Convention. The Court contended that in order to avoid an unlawful restriction of human rights law and for the sake of the interpretation, Article 29 of the Convention permits reference and resort to other treaties to which Guatemala is a party. The Court clearly concluded that the undeniable existence of an internal armed conflict meant that “instead of exonerating the State from its obligations to respect and guarantee human rights, this fact obliged it to act in accordance with such obligations.”⁵⁸ This judgment ascertained the direct applicability of international humanitarian law by human rights courts.⁵⁹

European Court of Human Rights

Pursuant to Article 15 of the European Convention on Human Rights, derogations from duties under the Convention are permitted only if concurrent with other international legal duties. The obligations spelled out in the Geneva Conventions are therefore to be observed. In the *Northern Ireland*⁶⁰

⁵⁶ Marten C. Zwanenburg, *Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations*, Proefschrift, Leiden, 2004, p. 291.

⁵⁷ Inter-Am. Ct.H.R. (Ser.C) No. 70 (2000).

⁵⁸ *Op. cit.* (note 57), para. 207.

⁵⁹ See Richard J. Wilson and Jan Perlin, “The Inter-American human rights system: Activities from late 2000 through October 2002”, *American University International Law Review*, Vol. 18, No. 3, 2002, p. 670.

⁶⁰ See David J. Harris, Michael O’Boyle and Colin Warbrick, *Law of the European Convention on Human Rights*, Butterworth, London, 1995, pp. 489 et seq.

case the European Court of Human Rights (ECtHR) investigated whether the derogations adopted by the United Kingdom were in conformity with its obligations under public international law. In particular, the Court examined whether the British legislation in Northern Ireland was in accordance with the Geneva Conventions. As the Irish side failed to provide further factual details, the investigation was limited to a statement that the Geneva Conventions were also applicable.⁶¹ This example clearly illustrates that referral to international humanitarian law is generally possible under the ECHR.

Practice has nonetheless shown that the bodies of that Convention are hesitating to subscribe to a clear position in this regard. Frowein made this point concerning the first State complaint in *Cyprus v. Turkey*, where the European Commission of Human Rights allowed the application of the Third Geneva Convention of 1949 regarding prisoners of war, but nonetheless found it necessary to investigate whether there had been a violation of Article 5 of the ECHR (right to liberty and security).⁶² This uncertainty is to be observed throughout the decisions of the ECHR bodies.⁶³

In *Loizidou v. Turkey*⁶⁴ the ECtHR did not apply international humanitarian law, even though the case pertained to human rights violations arising out of a military occupation: the Cypriot complainant was not able to use her property in Northern Cyprus after the Turkish invasion of 1974. In 1989 she lodged a complaint in which she asserted that the continual refusal to allow her access to her property was a violation of her right to the peaceful use of her property according to Article 1 of Additional Protocol I to the ECHR. In the end the ECtHR found in her favour and on 28 July 1998 pronounced the awarding judgment according to Article 50 of the ECHR.

Crucial for the case was the question as to who was sovereign over Northern Cyprus, for Turkey contended that it was not the correct defendant, and that the correct defendant was in fact the “Turkish Republic of Northern Cyprus”, an independent State responsible for its actions under international law. In its judgment the ECtHR determined that the definition

⁶¹ See *Brannigan and McBride v. UK*, ECtHR Series A 258-B, 26 May 1993, paras. 67-73.

⁶² Jochen A. Frowein, “The relationship between human rights regimes and regimes of belligerent occupation”, *Israel Yearbook of Human Rights*, Vol. 28, 1999, Nijhoff, The Hague, 1999, p. 10.

⁶³ Aisling Reidy, “The approach of the European Commission and Court of Human Rights to international humanitarian law”, *International Review of the Red Cross*, Vol. 80, No. 324, 1998, p. 519.

⁶⁴ Case *Loizidou v. Turkey*, Application No. 15318/89, Judgement of 18 December 1996, para. 43, available at <http://cmiskp.echr.coe.int> (last visited 16 November 2004).

of jurisdiction in Article 1 of the ECHR was not limited to one's own national territory. The question of sovereignty was far more important, as it could have implications both inside and outside the State's national territory. A State could thus have effective control over another "entity" outside its own national territory with the use of military measures, it being unimportant whether this control is carried out by its own armed forces or by a subordinate local administration.⁶⁵ As the complainant was unable to use her property owing to the occupation by Turkish troops, these measures came under the jurisdiction, according to Article 1 of the ECHR, of Turkey.

At the same time the ECtHR avoided establishing that the case of the "Turkish Republic of Northern Cyprus" concerned an occupied territory to which international humanitarian law applies. This did not, however, hold the Court back from referring to Resolution S/550/1984 of the United Nations Security Council, which clearly speaks of the "occupied part of the Republic of Cyprus". Yet this contradiction did not pass without comment.⁶⁶ In a dissenting opinion Judge Pettiti objected to the fact that the whole situation regarding the Turkish intervention in Cyprus had not been sufficiently clarified. In particular, neither the problems relating to the annexation and occupation nor the necessity to apply international humanitarian law had been thoroughly discussed.⁶⁷

In brief, the whole judgment suffers from the fact that the judges avoided dwelling upon the complicated status of the "Turkish Republic of Northern Cyprus". Although the Court pointed out that the ECHR must be interpreted in the light of the rules of interpretation set out in the Vienna Convention on the Law of Treaties and that Article 31, paragraph 3(c), of that treaty indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties",⁶⁸ it did not apply international humanitarian law. Instead the Court determined only whether Turkey is responsible for the alleged violation of the rights of Ms Loizidou under Article 1 of Additional Protocol I with respect to her

⁶⁵ *Op. cit.* (note 65), para. 49.

⁶⁶ It is surprising that the ECtHR in *Ilascu v. Moldova and Russia* refers to occupation, Application No. 48787/99, Judgement of 8 July 2004 available at <http://cmiskp.echr.coe.int> (last visited 16 November 2004). The Court argues that in exceptional circumstances the State may be prevented from exercising its authority in part of its territory and goes on: "That may be as a result of military occupation by the armed forces ...". As an example the Court mentioned the *Loizidou* case (*Op. cit.* note 64), para. 312.

⁶⁷ Individual dissenting opinion, Series A, No. 310, pp. 43-44.

⁶⁸ *Op. cit.* (note 64), para. 43.

possessions in Northern Cyprus. The legal position in the applicant's submission, namely whether the local administration is illegal in that it is the consequence of the illegal use of force, or whether it is lawful as in the case of a protected State or other dependency, was not considered by the Court. This issue is, however, connected to the law of occupation.

The Court argued that the establishment of State responsibility under the ECHR did not require enquiries concerning the military intervention and confined itself to stating that international human rights law protection was a "matter of international concern". It was therefore necessary to find a pragmatic clarification (*effet utile*). At the same time the question must be posed as to whether it would have been possible to reach the same result with resort to international humanitarian law. That law is, of course, also "a matter of international concern". The application of the Fourth Geneva Convention would have supported the finding of the ECtHR, as Northern Cyprus is an occupied territory and Ms Loizidou, contrary to the said Convention's Article 49, was forced to leave the occupied territory although there were no compelling interests of security or military necessity to justify that act. This contravenes the duty to respect the property of civilians in occupied territories. It is thus incomprehensible why the Court did not make use of this line of reasoning.

According to the Geneva Conventions, the parties to an armed conflict are bound even if their acts have been committed outside the borders of their national territory. In the light of the *Loizidou v. Turkey* judgment, it is understandable that a State can exercise jurisdiction even outside its own national territory. It is therefore all the more surprising that the ECtHR was not able to apply a broader interpretation of the term "jurisdiction" in the *Bankovic v. Belgium*⁶⁹ case.⁷⁰ Relatives of four citizens of the Federal Republic of Yugoslavia who had been killed in the NATO attacks on the broadcasting station of Belgrade had lodged a complaint against several States that were NATO members. The complainants notably alleged that the attack violated the right to life, the right to freedom of expression and the right to an

⁶⁹ Case *Bankovic v. Belgium*, Application 52207/99, Inadmissibility Decision of 12 December 2001, available at <http://cmiskp.echr.coe.int> (last visited 16 November 2004).

⁷⁰ For comments on the decision, see *inter alia* Francisco Forrest Martin "Colloquy on the law of armed conflict: The unified use of force and exclusionary rules: The unified use of force rule - amplifications in light of the comments of Professors Green and Paust", *Saskatchewan Law Review*, Vol. 65, 2002, pp. 462-467; Bernhard Schäfer, "Der Fall Bankovic oder wie eine Lücke geschaffen wird", *Menschenrechtsmagazin*, Vol. 3, 2002, pp.149-163.

effective legal remedy as laid down in the ECHR. They further based their claim on States' duties arising from international humanitarian law, which they contended was applicable on the one hand because the NATO States were party to the Geneva Conventions and the relevant rules of Additional Protocol I and on the other because both these sets of rules contained norms of a customary nature. The Court did not consider the international humanitarian law argument and concentrated solely on limiting the scope of application of the ECHR by providing a restrictive definition of the term "jurisdiction". It unanimously found that jurisdiction in international law is primarily territorial,⁷¹ and that other grounds of jurisdiction must be considered "exceptional". The claim of Bankovic was consequently declared inadmissible. 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."⁷² However, in the light of the *Loizidou* case this interpretation cannot convince completely. The doubts have been aggravated by the latest judgment in *Ilascu v. Moldova and Russia*, in which the Court held both States responsible for human rights violations in Transnistria.⁷³

There are other judgments of the ECtHR with a strong relationship to international humanitarian law. The military operations in the Kurdish territories of Turkey have led to countless casualties amongst the civilian population and have caused tremendous material damage, resulting in a plethora of cases brought before the human rights bodies in Strasbourg. The said cases have clearly demonstrated the limits of international jurisdiction, which is applied only when all national remedies have been exhausted and only for the reparation of violations of individual human rights.⁷⁴ These procedures are not in fact suitable for taking effective action against large-scale human rights violations.

Yet the latter do simultaneously have an individual dimension. The case of *Ergi v. Turkey*⁷⁵ concerned the accidental killing of an uninvolved

⁷¹ See also "The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", *op. cit.* (note 8), para. 109.

⁷² Dinah Shelton, "The boundaries of human rights jurisdiction in Europe", *Duke Journal of Comparative & International Law*, Vol. 95, No. 1, 2003, p. 128.

⁷³ *Op. cit.* (note 66).

⁷⁴ See Aisling Reidy, Françoise Hampson and Kevin Boyle, "Gross violations of human rights: Invoking the European Convention on Human Rights in the case of Turkey", *Netherlands Quarterly of Human Rights*, Vol. 15, 1997, p. 161.

⁷⁵ Case *Ergi v. Turkey*, Application No. 23818/93, Judgment of 28 July 1998, available at <http://cmiskp.echr.coe.int> (last visited 16 November 2004).

woman in a military operation. After analysing the facts of the case the Court confirmed the findings of the European Commission of Human Rights, which established that in the planning and execution of such an operation care must be taken, not only as regards the apparent targets of an operation but also and especially where the use of force is envisaged in the vicinity of the civilian population, to avoid incidental loss of life and injury to others. Measured against these standards, the Commission found that the planning of the above-mentioned operation had not been careful enough to prevent casualties amongst the civilian population and avoid an extension of the conflict.

In its judgment the ECtHR argued that the State had failed “to take all feasible precaution in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding or, at least, minimising incidental loss of civilian life”.⁷⁶ It must be stressed that in order to analyse the alleged human rights violations the Court used the wording of international humanitarian law, e.g. by referring to “civilian life” and “incidental loss”. On the one hand this demonstrates the cumulative application of both legal texts. On the other it also corroborates the decision of the ICJ that international humanitarian law is *lex specialis*, namely the binding law in armed conflicts which is meant to be used to regulate the conduct of hostilities. In other words, like the ICJ when it was examining the legality of nuclear weapons, the ECtHR was unable to avoid checking the compatibility of the weapons systems with both international human rights and humanitarian law; the ECtHR also had to refer to international humanitarian law to determine the lawfulness of the measures taken by the Turkish security forces in the Kurdish areas. In the *Ergi* case the ECtHR resorts directly to international humanitarian law, in that it elaborates on the lawfulness of the target, on the proportionality of the attack and on whether the foreseeable risk regarding civilian victims was proportionate to the military advantage. It is clear merely from the list of points to be checked that international humanitarian law needs to be taken into account, as it can be of utmost importance for the implementation of human rights law.

In *Gülec v. Turkey*,⁷⁷ concerning an incident in which shots were fired from a tank at violently protesting demonstrators and the main complainant's

⁷⁶ *Op. cit.* (note 75), para. 79.

⁷⁷ Case *Gülec v. Turkey*, Application No. 21593/93, Judgment, 27 July 1998, available at <http://cmiskp.echr.coe.int> (last visited 16 November 2004).

son was fatally injured, the Court examined whether the use of violence was permissible according to Article 2. 2 (c) of the ECHR. The Court ruled that the use of force must be proportional to the aim and the means used. In the case under consideration, the armed forces had obviously not weighed up the situation in that respect, as they had used battlefield weapons, although they were equipped with the necessary equipment (water cannon, protective shields, rubber bullets or tear gas) for the fighting of demonstrators. This was all the more reprehensible in that Sirnak Province was located in an area where a state of emergency had been declared and public disturbances could have been expected. The government could show no proof for its assertion that there had been terrorists amongst the protestors. The massive use of armed force, which had caused the death of *Güleç*, was not found to have been absolutely necessary within the meaning of Article 2. Turkey was therefore found guilty of violating the ECHR.

The Court's reasoning once again shows many parallels with international humanitarian law, beginning with the fact that, in the relevant area, a state of emergency had already been declared and public disturbances were to be expected at any time.⁷⁸ Such situations, the Court pointed out, highlighted the lack of education and equipment and the insufficient "rules of engagement" of the armed forces. Finally, the Court also mentions that the numerous losses of human lives in south-east Turkey could be blamed on the "security situation" there, emphasizing at the same time that the frequent "violent armed clashes" did not release the State from observance of the ECHR's Article 2.⁷⁹ The cases at hand demonstrate that in the practice of the Strasbourg human rights bodies there are considerable overlaps between human rights law and international humanitarian law, particularly concerning the obligations laid down in Article 3 common to the Geneva Conventions and those characterized as non-derogable in Article 15 of the ECHR. It must be stressed that the use of armed force (in the sense of Article 2 (2) (c)) in emergency conditions or under war conditions is found to be permissible if States have recourse to it to suppress tumult and revolt. This includes the use of force to the point of causing death. Apart from the fact that the article is "unhappily formulated",⁸⁰ the question still remains as to which circumstances allow the use of force. The

⁷⁸ Under these circumstances it can be presumed that the hostilities reached the threshold of common Article 3, which is the lowest threshold in international humanitarian law. Therefore the norms of international humanitarian law could be applied.

⁷⁹ *Op. cit.* (note 77), paras. 71 et seq.

⁸⁰ Jochen Frowein and Wolfgang Peukert, *EMRK Kommentar*, Engel, Kehl, 1996, p. 34.

above-mentioned cases show that in this regard the constraints upon the use of force are much looser in human rights law protection than in international humanitarian law. When adjudicating on the actual scale of the use of force, the bodies in Strasbourg would find it much easier if they resorted to the criteria set forth in international humanitarian law, especially the principles of proportionality and distinction, and the standards developed in criminal law. It is also entirely conceivable that situations could occur during an armed conflict in which human rights instruments would have no ready criteria for the legality of the use of force. In such cases international humanitarian law would automatically have to be consulted. This calls for agreement with the views expressed in legal literature that approve of the ECtHR having a limited "potential for the future application of international humanitarian law".⁸¹

The *Engel v The Netherlands* case, in which the ECtHR explicitly refers to international humanitarian law, shows that there are no theoretical legal objections to the direct application of international humanitarian law.⁸² This case concerned the unequal treatment of different military ranks in disciplinary punishments. Academics welcomed the reference to Article 8 of the First Geneva Convention because this treaty is "so well accepted".⁸³ In view of this decision it appears obvious that the ECtHR has been held back until now from applying international humanitarian law only by political grounds.

Conclusion

Research shows that there is a convergence between the protection offered by human rights law and that of international humanitarian law. Both bodies of law can be applied in armed conflicts in order to achieve the greatest possible protection in the sense of the Martens Clause. The most important practical consequence of this is the possibility to enforce international humanitarian law. As the implementation mechanisms of that law are insufficient and the elaboration of State reports and individual complaints procedures is not to be expected for it in the very near future, the existing human rights procedures gain in practical importance. Initial timid decisions in which international humanitarian law was applied have shown that:

⁸¹ Andreas Laursen, "NATO, the war over Kosovo, and the ICTY investigation", *American University International Law Review*, Vol. 17, No. 4, 2002, p. 804.

⁸² Case *Engel v. The Netherlands*, Application No. 5370/72, Judgment of 23 November 1976, available at <http://cmiskp.echr.coe.int> (last visited 16 November 2004).

⁸³ See John G. Merrills, *The Development of International Law by the European Court of Human Rights*, 2nd ed., Manchester University Press, Manchester, 1993, p. 225.

“In sum, although the practice of human rights bodies described above is still limited, it provides a welcome addition to the admittedly limited array of international means to enforce compliance with international humanitarian law by parties to armed conflicts.”⁸⁴ This clearly demonstrates the practical and useful consequences of the convergence of human rights law and international humanitarian law.

84 Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, ICRC, Geneva, 2001, p. 201.

Résumé

De la relation entre le droit international humanitaire et la protection qu'assure le droit des droits de l'homme

Hans-Joachim Heintze

Il est notoire que les mécanismes de mise en œuvre du droit international humanitaire sont moins intrusifs et donc moins efficaces que ceux du droit des droits de l'homme. Toutefois, les champs d'application de ces deux branches du droit se chevauchent à certains égards. Dans ce contexte, l'auteur décrit les domaines où un chevauchement existe et analyse les conséquences juridiques de cet état de fait pour les mécanismes d'application. La mise en œuvre cumulée du droit des droits de l'homme et du droit international humanitaire soulève inévitablement la question de la relation réciproque. La Cour internationale de Justice y a répondu en reconnaissant la primauté du droit international humanitaire sur le droit des droits de l'homme dans les conflits armés, faisant ainsi du DIH une *lex specialis*. L'examen des décisions de la Commission interaméricaine/Cour interaméricaine des droits de l'homme et de la Cour européenne des droits de l'homme révèle que ces instances ont tendance à appliquer le droit international humanitaire. Bien que la pratique des instances des droits de l'homme soit limitée, elle apporte un complément bienvenu à la panoplie, sans conteste limitée, des moyens internationaux disponibles pour contraindre les parties à un conflit armé à respecter le droit international humanitaire. Voilà qui met clairement en évidence les effets pratiques et utiles de la convergence des droits de l'homme et du droit international humanitaire.