The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?

Alexander Orakhelashvili*

Abstract

The principal question in terms of assessing the interaction between human rights applicable both in peacetime and war and humanitarian law applicable only to armed conflicts is whether the protection accorded to individuals under the latter is lower than that under the former. The clarification of this question requires the accurate assessment of the available evidence, and not the preconceived approach that tends to conceive one of these two fields as lex specialis *that excludes or curtails the protection under the other field. This contribution examines the various aspects of this problem, such as the general interaction between human rights law and humanitarian law, and the relevance of particular human rights in the context of armed conflicts. The evidence dealt with in the course of this analysis exposes the fallacy of the argument that the humanitarian law protection may be lower than that under human rights law.*

1 Introduction

The interaction between international human rights law and international humanitarian law raises multiple problems.[1] The principal question arising is whether the

* LLM (Leiden); PhD (Cantab.); Fellow, Jesus College, Oxford. This article is a revised version of the presentation given by the author at the New York University on 20 Feb. 2007 as part of the NYU International Human Rights Law Colloquium. For their comments and feedback the author would like to thank Professor Philip Alston, Natasha Balendra, Jason Morgan-Foster, and other participants in the Colloquium.

[1] See, for instance, T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) and *Human Rights in Internal Strife: Their International Protection* (1987).

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two fields of law develop in a way of fragmenting the legal framework that protects the individual; whether their requirements conflict with each other; or whether they develop towards forming the common legal ground for the protection of individuals in the context of an armed conflict. In practical terms, the crucial issue is whether the protection provided to individuals under humanitarian law is less than that under human rights law. While there are numerous instances where the norms of humanitarian law set out the position required under human rights law and *vice versa*, this contribution focuses only on areas revealing the claim that the level of protection in one field can be lower than in the other.

The essence of fragmentation relates to 'the splitting up of the law into highly specialized "boxes" that claim relative autonomy from each other'.[2] Fragmentation can take place through the conflicting interpretation of general law, the emergence of special law diverging from the general law, or the existence of two different bodies of special law.[3] Thus, a related problem is that of normative conflict between the rules that relate to the same subject-matter, yet require different outcomes in relation to it, for instance by virtue of one of them being *lex specialis*. As the NAFTA Arbitral Tribunal has most pertinently emphasized in the *Loewen* case, normative conflict can arise in situations where, for instance, express stipulations 'are at variance with the continued operation of the relevant rules of international law'.[4] Whether these phenomena characterize the interaction between the two fields examined here must be clarified by reference to the normative framework and the evidence relating to its application, as opposed to clichés or preconceived attitudes. With this priority in mind, this contribution will examine the general aspects of interaction between the two fields, focus on the range of specific human rights, and then offer the conclusion that can be derived from such analysis.

2 The Scope of Application of the Two Bodies of Law

The common background is that while humanitarian law applies only to armed conflicts, as stipulated, for instance, in Common Article 2 of the 1949 Geneva Conventions, human rights law applies in both peace and war. According to the European Union Guidelines on promoting compliance with international humanitarian law, 'IHL is applicable in time of armed conflict and occupation. Conversely, human rights law is applicable to everyone within the jurisdiction of the State concerned in time of peace as well as in time of armed conflict. Thus while distinct, the two sets of rules may both be applicable to a particular situation.'[5] The UN Report on the situation

[2] *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, A/CN.4/L.682, 13 Apr. 2006, at 13–14.

[3] *Ibid.*, at 31–34.

[4] *The Loewen Group, Inc. and Raymond L. Loewen and United States of America* (Award, Case No ARB(AF)/98/3), 26 June 2003, 42 ILM (2003) 811, at 837.

[5] European Union Guidelines on promoting compliance with international humanitarian law [2005] OJ C327/04, at para. 12.

concerning the detainees in Guantánamo Bay also emphasizes the applicability of the two bodies of law, especially in terms of human rights in wartime.[6]

The interdependence between these two fields is confirmed in the jurisprudence of the International Court of Justice. As the Court emphasized in the cases of the *Construction of the Wall in the Occupied Palestinian Territory* and *DRC v. Uganda*, human rights treaties continue to apply in wartime. They apply together with humanitarian law.[7] The parallel applicability of the two fields of law is witnessed in particular in the legal regime of belligerent occupation. As Article 42 of 1907 Hague Regulations determines, the territory is under occupation if effectively taken under control. The acts of the occupying power which violate the applicable humanitarian law and human rights law provisions are null and void.[8] In the *Palestine Wall* case the starting-point for the applicability of humanitarian law to the construction of the Wall lay with the fact that Palestinian territory is under belligerent occupation.[9] In this context, the Court observed that the construction of the Wall led to the destruction or requisition of properties in violation of Articles 46 and 52 of the 1907 Hague Regulations and Article 53 of the IV Geneva Convention. The Court pointed out that these destructions were not justified by military necessity.[10]

The Court observed that the construction of the Wall and its associated regime 'impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living' under the ICESCR. As for the violations of civil and political rights, the Court observed that the construction of the Wall had deprived a significant number of Palestinians of their freedom to choose the place of their residence, thus impeding the freedom of movement under Article 12(1) ICCPR.[11]

The similar approach of parallelism was displayed in the *Congo-Uganda* case, where the Congo claimed that serious and widespread human rights and humanitarian law violations were committed by the Ugandan forces in the occupied parts of the Congo, against the lives and property of the Congolese population.[12] The Court observed that Uganda was responsible for violations of human rights law and humanitarian law.[13] This confirms that the two bodies of law not only apply in the same situations, but can also outlaw the same conduct. The Court's findings constitute a warning that even if the protection in one of the fields is found to be less than in the other field, the applicability of the latter will thus not be prevented.

6 Situation of Detainees at Guantánamo Bay, E/CN.4/2006/120, at 10.

7 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, General List No. 131[2004] ICJ Rep 136 at 178, para. 106; *Case Concerning the Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 Dec. 2005, General List No. 116, at para. 216.

8 Dinstein, 'Belligerent Occupation and Human Rights', 8 *Israel Yearbook of Human Rights* (1978) 142.

9 *Wall in OPT*, *supra* note 7, Opinion, at para. 89.

10 *Ibid.*, at paras 132–135.

11 *Ibid.*, at paras 133–134.

12 *Congo-Uganda*, *supra* note 7, at paras 181–195.

13 *Ibid.*, at para. 220.

As the International Criminal Tribunal for the Former Yugoslavia (ICTY) has decided, human rights law and humanitarian law are mutually complementary and their use for ascertaining each other's content and scope is both appropriate and inevitable. Because of the resemblance of the two bodies of law, 'in terms of goals, values and terminology', the recourse to human rights law 'is generally a welcome and needed assistance to determine the content of customary international law in the field of humanitarian law. With regard to certain of its aspects, international humanitarian law can be said to have fused with human rights law.'[14] At the same time, the Tribunal specified that 'notions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law'.[15]

In terms of the applicability of humanitarian law, the ICTY noted that once the existence of an armed conflict has been established, international humanitarian law continues to apply beyond the cessation of hostilities.[16] Similar findings have been made by the UN Security Council regarding the territories occupied by Israel, including Jerusalem and the Golan Heights.[17] But one should be careful to note that this continuous applicability of humanitarian law relates to only those provisions that are by their nature suitable for being applied after the cessation of hostilities. This may relate, as was the case with the above-mentioned instances, to the prosecution of international crimes, or to the duties and rights of the occupying power. The principle of continued applicability would not cover the provisions relating to combat actions and ensuing military necessity. Among others, this approach is followed by the *Palestine Wall* case, in which the Court approached the pertinent issues of humanitarian law by affirming the customary law status of the 1907 Hague Regulations regarding the conduct of hostilities.[18] The Court ruled out the relevance of Article 23(g) of the Regulations which deals with the seizure of property because it does not fall within the category of norms applicable to belligerent occupation.[19] This view has been opposed,[20] but it is logically and normatively consistent. The law of occupation applies to the areas over which the occupying power exercises effective control. It does not apply to situations where the adversary's army is still capable of fighting, thereby precluding the exclusive control of the would-be occupying power.[21] Therefore, the situation in Palestine cannot be subjected to the law applicable to hostilities if it is governed by the law of belligerent occupation, because no territory can legally be the occupied territory and area of hostilities at the same time. Furthermore, the independent relevance of the

[14] *Kunarac*, IT-96-23-T, Judgment of 22 Feb. 2001, at para. 467.
[15] *Ibid.*, at para. 471.
[16] *Ibid.*, at para. 414.
[17] See, e.g., SCR 592 (1986).
[18] *Wall in OPT*, *supra* note 7, Opinion, at para. 89.
[19] *Ibid.*, at para. 24.
[20] Kretzmer, 'The Advisory Opinion: The Light Treatment of International Humanitarian Law', 99 *AJIL* (2005) 96.
[21] Gasser, 'Protection of Civilian Population', in D. Fleck (ed.), *Handbook of the Law of Armed Conflicts* (1995), 242–243.

human rights provisions is increased in the context of military occupation where considerations of military necessity are no longer as pressing as in the case of hostilities.

Human rights treaties consider the state of war, in which humanitarian law applies, as the condition which justifies derogation from treaty obligations. Under Article 4 ICCPR and Article 15 ECHR, in an officially proclaimed public emergency which threatens the life of the nation, the states parties may derogate from their obligations under the relevant treaty to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law.

These other obligations include humanitarian law. While administering Article 15 ECHR, the European Court of Human Rights is duty-bound to test whether the conduct and measures of the derogating state are in accordance with humanitarian law.[22] Measures derogating from other treaties, such as ICCPR, have also to be in accordance with humanitarian law, a fact which was also clearly affirmed by the UN Human Rights Committee in its General Comment No. 29.[23] The requirements of humanitarian law, especially the essence of the distinction between civilian and military targets, necessity and proportionality, and humane treatment of protected persons represent the bottom line below which derogation from human rights treaties cannot justify the freedom of action of states parties. In other words, while emergency derogations from human rights law are possible, they are not from humanitarian law, because humanitarian law applies precisely to those situations which are among those justifying the emergency derogations from human rights treaties.

Humanitarian law is obviously based on the balance between military necessity and humanitarian considerations. But these criteria on their own are vague and undefined, and they themselves cannot constitute the criteria for the rights and duties of the occupying power; more is required in order to determine whether the action of the occupying power is lawful or not.[24] Therefore, the proper way is not to refer to such indeterminate categories *per se*, but to ascertain the legality of the occupying power's action by reference to its impact in terms of the requirements embodied in the specific norms of humanitarian law. This is even more obvious as the relevant actions of the state frequently take place in the context in which human rights law applies together with humanitarian law. Therefore, judging the legality of the relevant conduct of the state just in terms of the general requirements of necessity, proportionality, or humanity can result in prejudicing the requirements not only of humanitarian law, but also of human rights law.

For instance, the Israeli High Court's decision in *Beit Surik* addresses the legality and legal consequences of the wall constructed in the Occupied Palestinian Territory.[25]

[22] P. van Dijk *et al.*, *Theory and Practice of the European Convention on Human Rights* (2006), 1067–1068.

[23] According to the Committee, states may in no circumstances invoke Art. 4 ICCPR for acting in violation of humanitarian law: see General Comment No. 29 (2001), CCPR/C/21/Rev.1/Add.11, 31 Aug. 2001, at 5 (para. 11).

[24] Pellet, 'The Destruction of Troy Will Not take Place', in E. Playfair (ed.), *International Law and the Administration of Occupied Territories* (1992), at 169, 171–172, 197.

[25] *Beit Surik Village Council v. The Government of Israel*, HCJ 2056/04, 30 June 2004.

Although the High Court mentions on several occasions the norms of humanitarian law applicable in this situation, the decision does not really address the impact of the action by the occupying power on the integrity of specific norms of applicable international law, which bind the occupying power as a matter of both humanitarian law and human rights law. In general, an examination of specific norms will demonstrate that the 'gap' between the two fields of law is not as large as made out in some cases.

In some cases, humanitarian law is considered relevant where it is understood as less of a barrier than human rights law. Above all this approach is present in the context of anti-terrorist activities which are claimed to be justified under humanitarian law. This can be seen in the judgment of the Israeli Supreme Court on the lawfulness of the targeted assassination of suspected terrorists.[26] The two principal concerns raised by this judgment relate to the law that applies to targeted assassinations; and the definition of the category of combatants that can be attacked. With regard to the first issue, the Supreme Court finds that the starting point is that between Israel and the various terrorist organizations active in Judea, Samaria, and the Gaza Strip where a continuous and constant armed conflict exists.[27] However, it is unclear how humanitarian law applies in such situations, because there is no armed conflict in the legal sense as determined under Article 2 of 1949 Geneva Conventions and Additional Protocol I of 1977 – that is a conflict between two or more states, and the existence of terrorism does not by itself make humanitarian law applicable. Thus, while the applicability of humanitarian law is doubtful in this situation, human rights law certainly applies in terms of the prohibition of the arbitrary deprivation of life.[28] But the Supreme Court's judgment does not come to terms with this position.

This brings us to the second issue of concern in the Supreme Court's judgment, which is that even if humanitarian law were the only or dominant applicable law it would still not justify the targeted assassinations. One striking point is that, having considered humanitarian law to be applicable, the Supreme Court pays no attention to Common Article 3, which prohibits violence to life and the person 'at any time'. In addition, having avoided the analysis of human rights law, the Supreme Court examines the issue of whether suspected terrorists can be legitimate targets under Article 51(3) of Additional Protocol I of 1977 according to which civilians enjoy protection from attack 'unless and for such time as they take a direct part in hostilities'. This is a key provision serving the Protocol's overall framework of distinguishing between legitimate and illegitimate targets in hostilities. Having confronted the provision, which is as clear in its meaning as it could possibly be, the Supreme Court surprisingly asserts that 'regarding the scope of the wording "and for such time" there is no consensus in the international literature. ... With no consensus regarding the interpretation of the wording "for such time", there is no choice but to proceed from case to case'.[29] In the end, the Supreme Court accepts that targeted assassinations in situations not

[26] *The Public Committee against Torture in Israel et al. v. The Government of Israel*, HCJ 769/02, 11 Dec. 2005.
[27] *Ibid.*, paras 16–20.
[28] See further *infra* Section 3.
[29] *Public Committee against Torture, supra* note 26, at para. 39.

subsumed within Article 2 of the 1949 Geneva Conventions can in relevant cases be lawful under humanitarian law – the applicability of which has nothing to do with these situations.

This approach on the one hand contradicts the applicable principles of interpretation, as embodied in Article 31 of the 1969 Vienna Convention on the Law of Treaties. According to the Vienna Convention regime, the plain meaning of the treaty provision alone constitutes sufficient consensus and there is no need to find the additional consensus in literature, which moreover has no authoritative force. On the other hand, the Supreme Court's approach undermines the careful balance drawn in humanitarian law regarding the operability of the concept of military necessity. The temporal limitation included in Article 51(3) of Additional Protocol I is absolutely crucial to maintaining intact the entire system of the civilian/military targets distinction. In order to be workable, this distinction must draw straightforward distinction in terms of which targets can be attacked and which cannot. This, in its turn, is possible only if such distinction is clear at the moment of attack. If anything or anybody that is potentially or prospectively viewed as a military target or unlawful combatant can be attacked, then any civilian target can be attacked because it can always potentially become or has in the past been part of combat action.

This is not an outcome that humanitarian law can accept. The flaws in the Supreme Court's reasoning confirm the principle that when the subject-matter of human rights law is examined from the humanitarian law perspective, the plain meaning of humanitarian law norms will not normally allow them to depart from the standard of human rights law.

The examination of interaction and parallelism between the two fields of law also calls for the examination of the institutional and procedural conditions and constraints that may be present in situations where both fields potentially apply and prescribe the outcome with regard to the same subject-matter. The decision of the Inter-American Commission on Human Rights in the *Abella* case regarding the events on the La Tablada military base in Argentina is very significant in this context.[30] In this case, the Inter-American Commission decided that it had the competence directly to apply humanitarian law even though its competence is normally limited to the American Convention on Human Rights. Significantly enough, having pointed out that human rights norms do not regulate the conduct of warfare or define the objects which can be attacked in combat, the Commission observed that 'the provisions of conventional and customary humanitarian law generally afford victims of armed conflicts greater or more specific protections than do the more generally phrased guarantees in the American Convention and other human rights instruments'.[31]

Furthermore, the Commission referred to Article 29 of the American Convention, which precludes that Convention being interpreted in a way 'restricting the enjoyment or exercise of any right or freedom recognized … by virtue of another convention to which one of the said states is a party'. This enabled the Commission to apply that

[30] *Juan Carlos Abella v. Argentina*, Case 11.137, 18 Nov. 1997, OEA/Ser.L/V/II.98.

[31] *Ibid.*, at paras 159, 161.

standard which was more favourable to the individual, and consider that '[i]f that higher standard is a rule of humanitarian law, the Commission should apply it'.[32] This approach not only demonstrates the parallelism between the two fields of law, but also proves that the question of which of these fields provides a higher degree of protection cannot be conceived in a one-sided and preconceived way.

There are also instances in case law demonstrating that the parallel application of human rights law and humanitarian law can, in certain cases, face procedural impediments. The *Las Palmeras* case before the Inter-American Court of Human Rights involved a situation of internal conflict; while the applicant requested the Court to rule that the respondent state had breached both the 1969 American Convention and Common Article 3 of the 1949 Geneva Conventions, the respondent state objected that the Court was not competent to apply humanitarian law, because its competence was limited to the American Convention.[33] At the same time, the respondent did not contest that the internal conflict was the subject-matter of the case and that conflict was covered by Common Article 3. The Inter-American Commission called upon the Court to adopt pro-active methods of interpretation enabling it to examine Article 4 of the American Convention regarding the right to life in conjunction with Common Article 3. The latter provision was instrumental in interpreting the former.[34] The Court replied that the American Convention 'has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions'.[35]

The general conclusion therefore seems to be that each of the two bodies of law can apply to the relevant armed conflict, and do so individually. Each of these bodies of law can provide standards for the assessment of the relevant conduct of the state. The subjects governed by one body of law are frequently also governed by the other body of law, and whatever the formal and procedural constraints on the powers of national and international decision-making bodies, in the exercise of their mandate they are expected, at least by implication, to consider the impact of both human rights law and humanitarian law, to reach the outcomes permissible at the level of international law. This demonstrates that in the final analysis the protection under humanitarian law is not substantially lower than that under human rights law. It remains to be seen how this process works in terms of specific individual rights.

3 Freedom from Arbitrary Deprivation of Life

The relationship between human rights law and humanitarian law in terms of the right to life has been determined, by the International Court of Justice in the *Nuclear*

[32] *Ibid.*, paras 164–165.
[33] *Las Palmeras*, Judgment of 4 Feb. 2000, Series C, No. 67, at para. 28.
[34] *Ibid.*, at paras 29–31.
[35] *Ibid.*, at 33.

Weapons Advisory Opinion, as the relationship between *lex generalis* and *lex specialis*. As the Court put it:

> the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what constitutes an arbitrary deprivation of life, however, then must be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[36]

Thus, the Court could not say more on the basis of human rights norms *per se* about whether or not the use of nuclear weapons would be unlawful as causing the arbitrary deprivation of life. The real question, however, relates not to the use of Latin phrases, but to whether the essence of *lex specialis* is to curtail the protection under human rights law or provide more detailed regulation of it.

The UN Special Rapporteur on Human Rights in the Occupied Palestinian Territories, John Dugard, further clarified the interaction between the two sets of international legal norms. Under this approach, humanitarian law complements Article 6 with more detailed regulation related to the distinction between civilian and military targets and limiting attacks to the latter, and the avoidance of civilian casualties in line with Article 51 of Additional Protocol I.[37] In addition, Article 57 of the Protocol requires that the commanders verify whether the relevant attack will bring about more civilian casualties than absolutely necessary for ensuring a tangible military advantage, and if the answer is negative, cancel the attack. Thus, humanitarian law serves as further elaboration of the parameters of the right to life in armed conflict, and defines circumstances in which the deprivation of life is or is not arbitrary.

As we have seen, in its preliminary objections judgment the Inter-American Court of Human Rights in *Las Palmeras* refused to examine the compatibility of the deprivations of life involved in that case from the perspective of Common Article 3 of the 1949 Geneva Conventions. At the merits stage of the same case, the Inter-American Court concluded, by the use of human rights standards only, that the deprivation of life of the relevant persons contravened Article 4 of the Inter-American Convention.[38] This approach confirms that human rights law can at times be self-sufficient in dealing with the relevant violations, without needing assistance from humanitarian law. Such independent standing of human rights law is both understandable and indispensable – human rights law is designed to respond to the situations it applies to in an autonomous way, if needed.

The specific aspects of the interchangeability of human rights law and humanitarian law in the example of the right to life is demonstrated by the judgments of the European Court of Human Rights relating to armed conflict, notably in the Chechen Republic of the Russian Federation. The principles relating to the observance of the right to life in armed conflicts used by the Court in these cases have the same

[36] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* [1996] ICJ Rep 226, at 240.
[37] Report of 17 Dec. 2002, E/CN.4/2003/30, at 5; see further Dinstein, *supra* note 8, at 117.
[38] *Las Palmeras*, Judgment of 6 Dec. 2001, Series C, No. 90 (2001).

background as those embodied in the Court's jurisprudence in terms of the general aspects of the use of lethal force by state agents; for instance the *McCann* case where the European Court found that the use of force by British security agents in Gibraltar fell short of being absolutely necessary.[39] 'Having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire', the Court concluded that the right to life under Article 2 of the European Convention was violated.[40]

In *Kelly*, the European Court stated that '[t]he text of Article 2, read as a whole, demonstrates that it covers not only intentional killing but also the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is only one factor however to be taken into account in assessing its necessity. Any use of force must be no more than "absolutely necessary" for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c)' of Article 2. Furthermore, the force used must be strictly proportionate to the achievement of the permitted aims.[41]

It should also be noted that had the Israeli Supreme Court in the above-mentioned *Targeted Assassinations* case correctly applied the test of legitimate target in humanitarian law, it would have achieved the same result as was achieved in *McCann* through the analysis of the necessity of the use of force under Article 2 of the European Convention.

The European Court of Human Rights ruled in *Güleç v. Turkey* that states should make non-lethal weapons available to their forces for use against mixed targets. The Court, dealing with the use of lethal force to quell a not quite peaceful demonstration, accepted that:

> the use of force may be justified in the present case under paragraph 2 (c) of Article 2, but it goes without saying that a balance must be struck between the aim pursued and the means employed to achieve it. The gendarmes used a very powerful weapon because they apparently did not have truncheons, riot shields, water cannon, rubber bullets or tear gas. The lack of such equipment is all the more incomprehensible and unacceptable because the province of Sırnak, as the Government pointed out, is in a region in which a state of emergency has been declared, where at the material time disorder could have been expected.[42]

This gives the impression that the standards of protection of human life are, from the perspective of the European Convention, generally the same both in peacetime and war and the use by the Court of the Convention-based criteria of legitimate aim, necessity and proportionality largely considers the specificity of armed conflicts.

The case of *Khashiyev v. Russia* dealt with claims of unlawful deprivation of life in the context of non-international armed conflict, namely the operation of Russian armed forces in taking control of Grozny from the Chechen rebels. The Court found it established

[39] App. No. 18984/91, *McCann and Others v. United Kingdom*, (27 Sept. 1995), paras 199–201, 213.
[40] *Ibid.*, at para. 213.
[41] App. No. 30054/96, *Kelly v. UK*, 4 May 2001, at para. 93.
[42] *Güleç v. Turkey*, Judgment of 27 July 1998, *Reports* 1998-IV, at para. 71.

that the part of Grozny where the relevant persons were killed had been under the control of Russian forces,[43] that is there were no actual hostilities going on in that area. In terms of the legal framework applicable to the case, the Court began by observing that the circumstances in which deprivation of life may be justified must be strictly construed.[44] The government had not claimed that any of the exceptions under Article 2 applied, and domestic authorities had admitted that deaths were unlawful. The Court also found it established that the relevant persons were killed by servicemen.[45]

A more complex situation concerning an ongoing armed conflict was presented in *Isayeva v. Russia*, where the European Court dealt with the claims of deprivation of the life of civilian persons in the context of the special operation by Russian forces to round up the rebels with the purpose of destroying or disabling them, and the consequent aerial bombardment. As the rebels were enticed from Grozny, they arrived in Katyr-Yurt village, unexpected by the civilian population. In the course of the unexpected bombing several individuals were killed or maimed. The rebels present in the village either escaped or were killed in the course of the operation which lasted three days.[46] The applicant claimed that the use of force which resulted in the deaths was neither absolutely necessary nor strictly proportionate and thus violated Article 2. Indiscriminately lethal weapons were used and the civilian population was neither warned nor provided with a safe exit. Most rebels and their leaders had escaped the bombardment, and hence no tangible military advantage was gained by the state.[47] It is significant that the substance of these claims raises issues under international humanitarian law, namely under a number of provisions of Additional Protocol I of 1977 (which is not strictly applicable to internal conflicts), and also under Common Article 3 of the 1949 Geneva Conventions.

The government pleaded the exception under Article 2(2), that is the use of force 'absolutely necessary in the circumstances for protection of a person from unlawful violence ... necessary and proportionate to suppress the active resistance of the illegal armed groups, whose actions were a real threat to the life and health of the servicemen and civilians'. Most civilian casualties had occurred in the area and in the period of the most severe fighting between the federal troops and the rebels.[48] The Court considered it necessary 'to examine whether the operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force' and whether 'the authorities were not negligent in their choice of action'.[49]

Significantly enough, the Court accepted the starting-point justification of legitimacy of the military action by the Russian federal forces. As the Court put it:

> the situation that existed in Chechnya at the relevant time called for exceptional measures by the State in order to regain control over the Republic and to suppress the illegal armed

[43] *Khashiyev and Akayeva v. Russia*, Judgment of 24 Feb. 2005, Nos 57942/00 & 57945/00, at para. 16ff.
[44] *Ibid.*, at paras 131–132.
[45] *Ibid.*, at paras 140, 147.
[46] *Isayeva v. Russia*, Judgment of 24 Feb. 2005, No. 57950/00, at paras 13ff., 103.
[47] *Ibid.*, at paras 163–165.
[48] *Ibid.*, at para. 169.
[49] *Ibid.*, at paras 173–175.

> insurgency. Given the context of the conflict in Chechnya at the relevant time, those measures could presumably include the deployment of army units equipped with combat weapons, including military aviation and artillery. The presence of a very large group of armed fighters in Katyr-Yurt, and their active resistance to the law-enforcement bodies, which are not disputed by the parties, may have justified use of lethal force by the agents of the State, thus bringing the situation within paragraph 2 of Article 2.[50]

The real question was, however, *how* and *in what manner* this military operation, including the bombing, was conducted. The Court required that fair balance must be struck between the above-mentioned legitimate aim and the means employed to achieve it. Although the Court had no information from the Russian government as to the planning and execution of this operation, it held that the arrival of the rebel fighters in Katyr-Yurt could not have been unexpected as far as the military commanders were concerned, and that they had done nothing to warn the population of impending military operation. This operation was not spontaneous.[51] There was some degree of informing the population on the day of operation and information was presumably broadcast about the humanitarian corridor the population could use for an exit, but only after the bombing had started. In addition, the inhabitants were prevented from using their exits since the relevant roadblocks were closed for some days.[52] Russia had not argued that divulging the details of military operation to the civilian population could have endangered the success and efficiency of this operation, and thus the failure to inform the population could be justified in terms of military necessity.

The Court also adjudicated upon the issue of the use of weapons in the context of Article 2. The military had not considered the effect of the use of air power on civilians in the area in which both a significantly large population and refugees lived. The general who called in the air force did not specify what weapons they should carry, and they carried large bombs by default. The Court evaluated this process in a way that can also be relevant in terms of the assessment of state conduct in terms of international humanitarian law:

> using this kind of weapon in a populated area, outside wartime and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society. ... Even when faced with a situation where, as the Government submit, the population of the village had been held hostage by a large group of well-equipped and well-trained fighters, the primary aim of the operation should be to protect lives from unlawful violence. The massive use of indiscriminate weapons stands in flagrant contrast with this aim and cannot be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents.[53]

Thus, although the operation was itself legitimate for crushing the rebellion, the manner of its performance did not adequately consider the needs to protect human lives.

[50] *Ibid.*, at para. 180; but see also Art. 2(3) of the Convention, justifying the use of lethal force for quelling insurrection.
[51] *Ibid.*, at paras 181–188.
[52] *Ibid.*, at paras 193–194.
[53] *Ibid.*, at paras 189–191.

The case of *Issayeva, Yusupova, and Bazayeva* dealt with the bombing of a civilian convoy by the air force in October 1999. The applicants had expressly referred to Common Article 3 of the 1949 Geneva Conventions as prohibiting indiscriminate attacks on civilians. The government argued that the actions of the air force were necessary for protecting the population from the danger of rebellion, in terms of Article 2(2).[54]

As the previous case, the Court accepted that the situation existing in Chechnya at the relevant time justified exceptional measures to regain control over the Republic and to suppress the illegal armed insurgency, including the use of military aeroplanes equipped with heavy combat weapons. The Court was also prepared to accept that if the planes were attacked by illegal armed groups, that could have justified use of lethal force, thus falling within Article 2(2).[55] The government failed to produce evidence enabling the Court to make such a finding.

It is noteworthy that in this case, in addition to what it said in *Isayeva*, the Court qualified the legality of the use of air power in cases where planes are attacked by rebels. Thus the Court seems to suggest that the use of planes against rebels as such does not satisfy the requirements of Article 2. It does not seem that humanitarian law accepts such a qualification, and the Court's reasoning is dubious. What the Court says here is that the military cannot attack the rebels first or, if it can, it cannot use certain weaponry, and leaves open the question of what ought to be done if the context of the relevant military operation necessitates the use of those weapons.

As for the actual circumstances of the attack, the Court assumed 'that the military reasonably considered that there was an attack or a risk of attack from illegal insurgents, and that the air strike was a legitimate response to that attack'.[56] However, the authorities knew or ought to have known that the road was full of civilian vehicles and they should have alerted officers to the need for extreme caution in using lethal force. The Military used an extremely powerful weapon for whatever aims it was trying to achieve.[57] Therefore, the operation was not executed with the necessary care for civilians and was illegal under Article 2 because of its lack of proportionality. This reference to proportionality and the implied reference to the need to take precautions in attack resemble the regulation under Additional Protocol I of 1977. Although this instrument did not apply to this internal conflict, the European Court's response comes close to the application of its principles by analogy.

In general, the decisions of the European Court of Human Rights on the matter of the right to life in armed conflict demonstrates that even though Article 2 of the Convention, drafted as a general clause, does not elaborate upon the specific conduct that may be expected by the Military in such contingencies, in terms of precaution, proportionality, and necessity, it can nevertheless be applied as having an effect on armed conflict comparable to that which the consistent application of the

[54] *Issayeva, Yusupova, and Bazayeva v. Russia*, Judgment of 24 Feb. 2005, Nos. 57947/00, 57948/00, and 57949/00, at paras 15ff., 155–160.

[55] *Ibid.*, at paras 175, 178.

[56] *Ibid.*, at paras 180–181.

[57] *Ibid.*, at paras 186, 195.

detailed provisions of the 1977 Additional Protocol would have in internal armed conflicts. The European Court's approach allows it to secure the legal outcome required under both human rights law and humanitarian law, even though it does not directly apply the provisions of the latter body of law, as norms falling outside its competence. The application of Article 2 by reference to the established Convention standards such as legitimacy of aim, necessity, and proportionality is undoubtedly useful, and helps the Court to arrive at sound decisions. But in broader terms of legal policy, the legitimacy of the Court's findings in the cases involving armed conflicts will always be conditional upon the compliance of these findings with the standards of international humanitarian law – another body of international law that also governs the same subject-matter by reference to humanitarian considerations and necessity. Therefore, the Court's approach should be based, as it mostly is, on the implicit application of the standards of humanitarian law, albeit cloaked in the Convention-specific categories of legitimacy, necessity, and proportionality.

4 Freedom from Torture

The prohibition of torture has proved to be the standard the interpretation and application of which in practice requires the cross-analysis of international human rights law and international humanitarian law. In a number of cases, such as *Furundzija*, *Delalic,* and *Kunarac*, the International Criminal Tribunal for the Former Yugoslavia performed the comparative analysis of the two bodies of law to clarify the content of that part of the standard of prohibition of torture that is applicable as an element of the crimes over which the Tribunal has jurisdiction.[58] As *Furundzija* affirmed, 'international law, while outlawing torture in armed conflict, does not provide a definition of the prohibition', and thus that it was necessary to resort to human rights law to clarify the meaning of this prohibition.[59] The *Delalic* case in particular confirms that in order to understand the content of the prohibition of torture as part of the war crimes [again, I don't understand how the prohibition of torture can be a crime] under the ICTY Statute and hence of international humanitarian law, especially as embodied in Common Article 3 of the 1949 Geneva Conventions, extensive analysis of the content of the prohibition of torture under human rights treaties is required. In this field, human rights law effectively serves as the interpretive guide of the relevant aspects of humanitarian law. As the ICTY affirmed repeatedly in both *Delalic* and *Furundzija*, the definition of torture under the 1984 UN Convention against Torture included those contained in the 1975 UN Declaration against Torture or the 1985 Inter-American Convention against Torture, and thus it constituted a consensus representative of customary international law. The Torture Convention did not, unlike other instruments, refer to torture as an aggravated form of ill-treatment.[60]

[58] See, in general, *Prosecutor v. Furundzija*, Case IT-95-17/1-T, Judgment of 10 Dec. 1998, at paras 134–146; *Delalic*, case no. IT-96-2-T, Judgment of 16 Nov. 1998, at paras 440ff.

[59] *Furundzija*, *supra* note 58, at para 159.

[60] *Delalic*, *supra* note 58, at paras 458–459; *Furundzija*, *supra* note 58, at para. 160.

Therefore, the ICTY in *Delalic* adopted, for the prosecution of torture as a violation of international humanitarian law under Articles 2 and 3 of its Statute, the following definition of the elements of torture:

> (i) There must be an act or omission that causes severe pain or suffering, whether mental or physical,
>
> (ii) which is inflicted intentionally,
>
> (iii) and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind,
>
> (iv) and such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.[61]

This definition mirrors that included in Article 1 of the 1984 Convention. In *Kunarac*, the Tribunal, having emphasized the different purposes of human rights law and international criminal law, stated that the Torture Convention definition can apply only to international criminal proceedings *mutatis mutandis*, and affirmed that the Convention definition can provide an interpretational aid to the Tribunal.[62]

This is similar, for instance, to the use by the European Court of Human Rights in *Selmouni* of the UN Convention definition of torture to determine the meaning of torture under Article 3 of the European Convention on Human Rights.[63] The fact that a similar exercise has been performed by the ICTY Tribunal across the different fields of international law only confirms their growing convergence.

In addition, *Kunarac* elaborates upon the different definition of the elements of torture, excluding the requirement of the involvement of state officials,[64] and for this purpose refers to a general, and broader, customary international law prohibition of torture. The unclear issue was whether customary law limited the prohibition of torture to the acts committed by state agents, and whether the purposes for which torture must be perpetrated in order to fall within the scope of Article 1 of the 1984 Convention were *in toto* part of customary law. The Tribunal was unable to give an affirmative answer to the first question. With regard to the second question, the Tribunal stated that '[t]here is no requirement under customary international law that the conduct must be solely perpetrated for one of the prohibited purposes. … the prohibited purpose must simply be part of the motivation behind the conduct and need not be the predominating or sole purpose'.[65] The reference to this broader general prohibition of torture applicable in both relevant fields of law is yet another confirmation of the convergence of these fields under customary, or general, international law, and the impact of such

[61] *Delalic*, *supra* note 58, at para. 494; see also the definition included in *Furundzija*, *supra* note 58, at para. 162.

[62] *Kunarac*, *supra* note 14, at para. 482.

[63] *Selmouni*, 29 EHRR (2000), at paras 97–98.

[64] *Kunarac*, *supra* note 14, at para. 497.

[65] *Kunarac*, *supra* note 14, at para. 486.

convergence on the application of the relevant treaty provisions. This also seems to respond to the need to adapt the definition of torture to the context of armed conflicts, where the human rights definition of torture, putting the emphasis on the relationship between the state and the individual in terms of defining the perpetrator and motives, may not be the only acceptable one.

5 Freedom from Arbitrary Detention

The UN Report on Guantánamo Detainees explains the relationship between human rights and humanitarian law provisions on the detention of individuals as the relationship between general and special law in the following terms:

> any person having committed a belligerent act in the context of an international armed conflict and having fallen into the hands of one of the parties to the conflict (in this case, the United States) can be held for the duration of hostilities, as long as the detention serves the purpose of preventing combatants from continuing to take up arms against the United States. Indeed, this principle encapsulates a fundamental difference between the laws of war and human rights law with regard to deprivation of liberty. In the context of armed conflicts covered by international humanitarian law, this rule constitutes the *lex specialis* justifying deprivation of liberty which would otherwise, under human rights law as enshrined by Article 9 of ICCPR, constitute a violation of the right to personal liberty.

The crucial question was whether the continued detention of the Guantánamo Bay detainees as 'enemy combatants' does in fact constitute arbitrary deprivation of the right to personal liberty. In this context, the Report emphasizes that the global struggle against international terrorism does not, as such, constitute armed conflict for the purposes of the applicability of international humanitarian law.[66] It further specifies that the regime of detention of both lawful and unlawful combatants must be the same: as detention under humanitarian law is merely protective custody, unlawful combatants must be tried or released at the end of hostilities. However, 'the objective of the ongoing detention [was] not primarily to prevent combatants from taking up arms against the United States again, but to obtain information and gather intelligence on the Al-Qaeda network'.[67] Furthermore, while US forces continue to be engaged in combat operations in Afghanistan, 'they are not currently engaged in an international armed conflict between two Parties to the Third and Fourth Geneva Conventions. In the ongoing non-international armed conflicts involving United States forces, the *lex specialis* authorizing detention without respect for the guarantees set forth in article 9

[66] UN Report, *supra* note 6, at 12–13, at paras 19–21. The UN Report refers to the attitude of the International Committee of the Red Cross, according to which the 'war on terror' as such cannot trigger the applicability of humanitarian law, and this body of law will in any event apply only to actual hostilities as opposed to the broader notion of the 'war on terror'. On the notion of 'war on terror' see generally Lowe, 'Security Concerns and National Sovereignty in the Age of World-Wide Terrorism', in R. Macdonald and D. Johnston, *Towards World Constitutionalism. Issues in the Legal Ordering of the World Community* (2005), at 655.

[67] UN Report, *supra* note 6, at 13, para. 22.

of ICCPR therefore can no longer serve as basis for that detention.'[68] In other words, the general law of human rights continues to govern and outlaw the detention of the Guantánamo detainees.

6 Procedural Safeguards

The rights to a fair trial and due process are regulated and recognized by both human rights and humanitarian law.[69] These rights are embodied in Article 14 ICCPR, Articles 105 and 106 of the Third Geneva Convention, and Article 75 of Additional Protocol I. In addition, Article 5 of the Third Geneva Convention stipulates that persons detained in the course of armed conflict have the right to have their status verified by the competent tribunal. Articles 68 to 78 of the Fourth Geneva Convention list a number of procedural due process and fair trial guarantees that have to be afforded to individuals in occupied territories. These provisions largely overlap with safeguards provided in human rights treaties. Furthermore, the fair trial safeguards under Common Article 3 apply to all armed conflicts, and it is hardly possible to justify derogation from the right to a fair trial in a less grave emergency situation.[70]

In *Al-Jedda*, the English Queen's Bench Division Divisional Court dealt with the situation where an individual detained in Iraq complained about the illegality of his detention because it was not accompanied by the proper procedure for reviewing the legality of the detention, as required under Article 5(4) of the European Convention on Human Rights. This provision requires that the review must be performed by a court, while Article 78 of the Fourth Geneva Convention requires that the review must be performed by the competent body set up by the detaining power, and the possibility of appeal must be provided for. These requirements were not observed. The detainees in this case were to be brought before the Divisional Internment Review Committee (DIRC), which is not a court. The court held that '[a]lthough the Commander and the panel [i.e. DIRC] do not have the qualities of independence and impartiality sufficient to meet the requirements of Article 6 ECHR, we do not think that complaint could properly be made of them in the context of Article 78'.[71]

Thus, the court held that if the procedural requirements of due process under the Fourth Geneva Convention are lower than those under Articles 5 and 6 of the European Convention on Human Rights, it is absolved from the duty to apply the European Convention standards properly. This fails in the face of the fact that human rights law and humanitarian law provide separate standards for the conduct of states and

[68] *Ibid.*, at 13–14, para. 24.

[69] On convergence between the two fields of law in this context see ICRC, *Customary International Humanitarian Law* (2005), i, 344.

[70] Stavros, 'Fair Trial in Emergency Situations', 41 *ICLQ* (1992) 343, at 349.

[71] *Regina (Al-Jedda) v. Secretary of State for Defence* (QBD Div Ct) [2005] EXHC 1809 (Admin), Judgment of 12 Aug. 2005, not yet reported, at paras 128–140; a similar approach was adopted by the Court of Appeal in the same case, though on slightly different grounds: see *R (Al-Jedda) v. Secretary of State for Defence* [2006] EWCA Civ 327, *per* Brooke LJ.

each of these standards must be complied with irrespective of what the other standard requires. It must also be borne in mind that the *Al-Jedda* decision is not a fully-fledged affirmation of the *lex specialis* nature of humanitarian law in relation to human rights law. Much of the decision reached by both the Divisional Court and Court of Appeal was based on their reference to the relevant UN Security Council resolution which overrode other applicable norms by virtue of Article 103 of the UN Charter. The propriety of this argument is beyond the scope of this analysis.[72]

The detention of terrorism suspects at the US base at Guantánamo Bay raises similar issues. Section 4 of the Presidential Military Order of 2001 authorizes the trial of the persons detained in the course of the 'war on terror' by the military commissions to be established by the Secretary of Defense.[73] In this process, the establishment and operation of these commissions reveal a number of violations of both human rights law and humanitarian law. The 2006 US Military Commissions Act contains a number of inconsistencies with the Geneva Conventions, especially Common Article 3.

As the UN Report on the Guantánamo Detainees affirms, like the issue of detention as such, the matter is governed by human rights law alone, as the conditions for the applicability of humanitarian law are no longer met. The Report emphasizes that the military commissions established by the Order replace the jurisdiction of the ordinary courts and deny the accused the well-established procedures of the ordinary civilian courts or military tribunals.[74] Pursuant to General Comment 13 (1984) of the UN Human Rights Committee, the Report affirms that fair trial guarantees are to apply to both ordinary and specialized tribunals, and thus Article 14 ICCPR fully applies to the case of the establishment of military commissions. In addition, the judges of the commissions

> should be commissioned officers of the armed forces and may be removed by the Appointing Authority. Such provisions suggest not only interference by but full control over the commissions' judges by the executive: the requirement of an independent judiciary is clearly violated. In addition, there appears to be no impartial judicial mechanism for resolving conflict of jurisdiction: decisions on issues of jurisdiction and competence are made by the Appointing Authority, leaving the military commissions outside the control of judicial authorities.[75]

Another problematic point is that the evidence can be admitted against an individual without the individual having seen it, which violates Article 14(3) of the International Covenant on Civil and Political Rights (ICCPR), which guarantees the right to prepare one's defence. The possibility of appeal to a regularly constituted court is also very restricted, which contravenes Article 14(5) ICCPR. Thus, although the Presidential

[72] On this see A. Orakhelashvili, 'The Acts of the Security Council: Meaning and Standards of Review', 11 *Max-Planck Yearbook of UN Law* (2007) 143.

[73] *Presidential Military Order on the Detention, Treatment, and Trial of Certain Non-citizens in the War against Terrorism*, 13 Nov. 2001, 41 ILM (2001) 252. Most recently, the final executive order of the US President permitted the commissions to impose sentences of imprisonment and of death on individuals on the basis of hearsay and coerced testimony: 'Military Justice Goes Missing', *International Herald Tribune*, 19 Feb. 2007, at 8.

[74] UN Report, *supra* note 6, at 17, para. 30.

[75] *Ibid.*, at 17–18, paras 31–32.

Order was committed to 'provid[ing] a full and fair trial', its provisions did not guarantee that right.[76]

The Report concludes that:

> The persons held at Guantánamo Bay are entitled to challenge the legality of their detention before a judicial body in accordance with article 9 of ICCPR, and to obtain release if detention is found to lack a proper legal basis. This right is currently being violated, and the continuing detention of all persons held at Guantánamo Bay amounts to arbitrary detention in violation of article 9 of ICCPR.

In addition, the Executive effectively operates as the Judiciary and this contravenes Article 14 ICCPR.[77]

The US case law in the context of the detentions at Guantánamo Bay, offers the relevant material for ascertaining the intersection between human rights law and humanitarian law in this aspect. In the case of *Rasul v. Bush*, the US Supreme Court had to address the question whether aliens could exercise their right to *habeas corpus* for judicial review of their detention in a territory over which the United States exercised exclusive jurisdiction, though not ultimate sovereignty.[78] The Court ruled that the petitioner's absence from the Court's jurisdiction, such as overseas, does not rule out *habeas corpus*, because it acts not upon the prisoner who seeks help but upon the person who is holding that prisoner.[79] The Court further used the established common law principles to affirm that *habeas corpus* extends to every person, whether a US citizen or an alien, detained abroad by the Executive.[80]

While this case does not directly draw on either international human rights law or humanitarian law, it was decided in the context of the applicability of the two fields. Without expressly referring to any of these bodies of law, *Rasul* is in line with Article 14 ICCPR regarding the individual right to challenge one's detention before the competent authority; and with Article 5 of the Third Geneva Convention, according to which persons detained in the course of or in relation to an armed conflict have the right to challenge their detention before and request the determination of their status by a regularly constituted court.

In *Hamdi v. Rumsfeld*, the Supreme Court effectively accepted the rationale underlying humanitarian law that the purpose of detention of individuals in armed conflicts is neither revenge, nor punishment, but just protective custody to prevent the relevant persons from taking up arms again.[81] The government tried to justify Hamdi's detention by contending that the 'war of terror' could last for two generations, and during that period Hamdi's release could allow him to join forces hostile to the United States. Therefore, Hamdi's detention could effectively last indefinitely.[82]

[76] *Ibid.*, at 18–20, paras 34, 36, 40.

[77] *Ibid.*, at 36, paras 84–85.

[78] *Shafiq Rasul et al. v. George Bush*, Nos 03-334 and 03-343, 28 June 2004, 542 US 466 (2004), at 6

[79] *Ibid.*, at 10–11.

[80] *Ibid.*, at 12–13.

[81] *Hamdi et al. v. Rumsfeld, Secretary of State, et al.*, No. 03-6696, 28 June 2004, 542 US 507 (2004), at 10–11.

[82] *Ibid.*, at 12.

The Court responded to such assertion with a straightforward reference to the clear principle embodied in Article 118 of the Third Geneva Convention that prisoners are to be released and repatriated after the end of active hostilities. Therefore, indefinite detention was not authorized. But the Court referred to the fact that there were active hostilities against the Taliban in Afghanistan and the government could detain individuals legitimately as Taliban combatants engaged in hostilities against the United States.[83]

Even if the detention was legitimate, the constitutional venues of disputing the individual's enemy combatant status were still relevant, in the context in which Hamdi was trying to achieve judicial review of his detention through *habeas corpus*. Judicial mechanisms had to be employed to ensure that the individual was not deprived of his life and liberty without due process of law.[84] A citizen-detainee seeking to challenge his classification as an enemy combatant must receive 'a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker'. While the ability of the military to conduct war without being undermined by litigation should be considered, 'the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator'.[85]

In *Hamdan v. Rumsfeld*, the Supreme Court used the international humanitarian law reasoning more extensively. The question of the legality of detention of the Guantánamo Bay prisoners did not directly come before the Court – which may perhaps be viewed as an impact of *Hamdi*. Thus, the Court was examining the legality of procedures of the Military Commission to allow evidence to be kept from the accused.[86]

The Court also considered that Hamdan could not be tried by the Military Commission in accordance with US law, because such commissions could be justified only by military necessity which was not present in this case. The petitioner's involvement in the dealings long predating the attacks of 11 September 2001 could well be a crime but not that against the law of war for which one may be tried by such commissions; these actions were not performed during the war.[87]

The issue of the applicability of international humanitarian law was raised by the government's contention that the procedural safeguards under the 1949 Geneva Convention did not apply to this case, because Hamdan's capture was concerned not with the war between the United States and the Taliban Government in Afghanistan, which was a conflict of the type covered by Article 2 of the Convention. Instead, the US had been fighting Al-Qaeda – a non-state actor and not a 'High Contracting Party' to the Convention – and the Convention did not extend to this type of conflict. The Court avoided the issue of the general applicability of the Geneva Convention, by relying on Common Article 3, which extends minimum safeguards of the treatment of

[83] *Ibid.*, at 12–14.
[84] *Ibid.*, at 17–18, 21–22.
[85] *Ibid.*, at 26, 28–29.
[86] *Hamdan v. Rumsfeld, Secretary of State et al.*, No. 05-184, 29 June 2006, at 49–50, 72.
[87] *Ibid.*, at 48–49.

individual protected persons to all conflicts occurring in the territory of the signatory state, whether international or internal.[88]

Common Article 3 refers to the 'regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples', without defining this concept more precisely. The Supreme Court emphasized that the Commentary to the Fourth Geneva Convention defines 'regularly constituted' tribunals so as to include 'ordinary military courts' and 'definitely exclude all special tribunals'. Thus, although the Geneva Convention did not define the notion of a 'regularly constituted court', it must be understood to 'incorporate at least the barest of those trial protections that have been recognized by customary international law'. The Court by analogy used the procedural safeguards mentioned in Article 75 of the 1977 Additional Protocol I to the Geneva Conventions. Even though the United States did not ratify this Protocol, it embodied the basic procedural standards which benefited all persons at the hands of an adversary. This included the right of the accused to be given the evidence against him and, the statutory derogation absent, the government was bound to give it to him.[89]

Although there is no significant reference to human rights law in the US case law relating to the Guantánamo Bay detainees, this case law, notably *Hamdan*, shows some degree of implicit consideration for international human rights standards. This proves that the application of humanitarian law safeguards can largely secure the legal outcome that would be reached through the faithful application of human rights law. In fact, human rights requirements of fair trial and judicial review of illegal detention can be compromised if the relevant court considers neither human rights nor humanitarian law, as is the case with the Court of Appeals' decision in *Boumediene v. Bush*, in which it affirmed the constitutionality of the 2006 Military Commissions Act withdrawing the jurisdiction of US courts from Guantánamo Bay detainees.[90]

The attitude of the Inter-American Commission on Human Rights on this subject particularly reflects the parallel applicability of the two bodies of law. The Commission specifies that basic procedural human rights safeguards apply 'without prejudging the possible application of international humanitarian law to the detainees at Guantanamo Bay'.[91] The relevance of human rights law in this context is to provide the outer layer of protection to individuals, *inter alia* when humanitarian law ceases to apply after the end of hostilities, and to provide interpretive guidance for understanding the content of fair trial guarantees under humanitarian law.

7 Conclusion

This article has demonstrated that the preconceived approach that humanitarian law can, as *lex specialis,* displace human rights law is not supported by sufficient

[88] *Ibid*., at 65–68.

[89] *Ibid*., at 69–72

[90] *Lakhdar Boumediene v. George W Bush*, No. 05-5063, DC Court of Appeals, 20 Feb. 2007. The Supreme Court denied certiorari in this case for the technical reason that the relevant remedies were not exhausted before the Supreme Court was seised. See *Boumediene v. Bush*, No. 06-1195/1196, 549 US__(2007).

[91] Decision to Request Precautionary Measures, 12 Mar. 2002.

evidence. If humanitarian law is *lex specialis*, it is so for limited purposes and in a way complements – not curtails – the level of protection under human rights law. The relationship between the norms from the two fields must be verified by reference to the interaction between individual norms. When humanitarian law safeguards are applied as their content requires, human rights and humanitarian law norms reveal a similar content. In these cases the protection under humanitarian norms does not prove to be less than under human rights law. On the other hand, the built-in limitations of human rights treaty norms provide for accommodating the requirements of military necessity, proportionality, and humanity as applicable in humanitarian law.