International Humanitarian Law and Human Rights Law

Towards a New Merger in International Law

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1. *Introduction*

The relationship between human rights law (HRL) and international humanitarian law (IHL), also called the law of war, did not draw much attention until the late 1960s. In contrast, nowadays, the way these two bodies of law interact is the focus of many scholarly writings and activities. Yet, the debate remains open as to how and when they apply and interrelate. In recent years academic literature has referred to the apparent "fusing,"[1] "meshing,"[2] "complementarity,"[3] "convergence"[4] or "confluence"[5] of these two areas of law.

This book aims to examine the current state of the law and the interpretations provided by various legal scholars. At the heart of the enquiry is whether the two bodies of law, IHL and HRL, have finally merged into a single set of laws.

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1 Felicity Rogers, *Australia's Human Rights Obligations and Australian Defence Force Operations*, 18 U. Tasmania L. Rev. 1, 2 (1999).

2 Theodor Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 Am. J. Int'l L. 589 (1983).

3 René Provost, International Human Rights and Humanitarian Law (2002); Hans-Joachim Heintze, *On the Relationship between Human Rights Law Protection and International Humanitarian Law*, 856 Int'l Rev. Red Cross 789, 794 (2004) [hereinafter Heintze 2004].

4 Raúl Emilio Vinuesa, *Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law*, 1 YB Int'l Humanitarian L. 69–110 (1998); Asbjørn Eide, *The Laws of War and Human Rights – Differences and Convergences, in* Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet 675–697 (Christophe Swinarski ed., 1984) [hereinafter Eide].

5 Robert Q. Quentin-Baxter, *Human Rights and Humanitarian Law-Confluence of Conflict?*, 9 Austl. Y.B. Int'l L. 94 (1985).

2. *IHL and HRL as Separate and Distinct Bodies of Law*

At the inception of the discussion, both *corpora juris* were considered separate and distinct because, as many experts claimed, they historically emerged and developed independently from each other.[6] International humanitarian law developed early within public international law,[7] for it predominantly regulates inter-state relations. Moreover, some of the concepts used in IHL go as far back as the Middle Ages (e.g. idea of chivalry). While IHL mainly grew via customary law,[8] its first treaty codification dates back to 1864 when the Geneva Convention of August 22, 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field was drafted.[9] This convention was followed by a range of treaties, each of them the product of the acknowledgment that individuals needed to be protected in times of armed conflict. Hence, as clearly stated by Cerna, IHL "evolved as a result of humanity's concern for the victims of war, whereas human rights law evolved as a result of humanity's concern for the victims of a new kind of internal war – the victims of the Nazi death camps."[10]

Consequently, human rights law only entered the field of public international law after the Second World War. Until then human rights had been granted to individuals via bills of rights[11] or, more generally, constitutional law[12] and in some

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[6] *See* e.g. Michael Bothe, *The Historical Evolution of International Humanitarian Law, International Human Rights Law, Refugee Law and International Criminal Law, in* Crisis Management and Humanitarian Protection – Festschrift für Dieter Fleck 37 (Horst Fischer *et al.* eds., 2004); Leslie C. Green, *Human Rights in Peace and War: An Historical Overview, in* Crisis Management and Humanitarian Protection – Festschrift für Dieter Fleck 159 (Horst Fischer *et al.* eds., 2004); Leslie C. Green, *The Relations Between Human Rights Law and International Humanitarian Law: A Historical Overview, in* Testing the Boundaries of International Humanitarian Law 49 (Susan C. Breau & Agnieszka Jachec-Neale eds., 2006).

[7] G.I.A.D. Draper, *Humanitarianism in the Modern Law of Armed Conflicts, in* Armed Conflict and the New Law 3 (Michael A. Meyer ed., 1989) [hereinafter Draper 1989].

[8] For a clear presentation of how IHL rules developed, *see* Leslie C. Green, *Human Rights and the Law of Armed Conflict, in* Essays on the Modern Law of War 435 (Leslie C. Green ed., 1999) and Dietrich Schindler, *International Humanitarian Law: Its Remarkable Development and its Persistent Violation*, 5 Journal of the History of International Law 165–188 (2003) [hereinafter Schindler].

[9] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, (Aug. 22, 1864), 18 Martens Nouveau Recueil (ser. 1) 607, 129 Consol. T.S. 361.

[10] Christina M. Cerna, *Human Rights in Armed Conflict: Implementation of International Humanitarian Law Norms by Regional Intergovernmental Human Rights Bodies, in* Implementation of International Humanitarian Law 31, 34 (Frits Kalshoven & Yves Sandoz eds., 1989).

[11] Examples are the *Magna Carta* of 1215 the U.K. Bill of Rights of 1688, the French Declaration of the Rights of Man and of the Citizens of 1789, the U.S. Bill of Rights of 1791.

[12] "The demand for human rights, in the modern sense of the word, started as a liberal reaction, influenced by rationalist thinking in the 17th and 18th century, to the unfreedom caused by feudalism or monarchism." Eide, *supra* note 4, at 678.

exceptional cases international treaties providing protection to minorities. Shortly after the adoption of the United Nations Charter, which includes a set of articles dedicated to human rights, and the Universal Declaration of Human Rights on December 10, 1948,[13] a range of universal and regional instruments were designed to protect human rights.

However, at this early stage, because of the "underdevelopment" of HRL, the relationship between IHL and HRL was not discussed. Another reason for this unwillingness to scrutinize this relationship was the United Nations' reluctance to include the laws of war into its work because it "might undermine the force of *jus contra bellum*... and shake confidence in the ability of the world body to maintain peace."[14] Kolb notes that the 1948 Universal Declaration of Human Rights "completely bypasses the question of respect for human rights in armed conflict, while at the same time human rights were scarcely mentioned during the drafting of the 1949 Geneva Conventions."[15] A contrary viewpoint is presented by Schindler who argues that "the UN exerted a considerable, though little noticed, influence on [the outcome of the diplomatic conference that led to the adoption of the Geneva Conventions]. The efforts towards an international guarantee of human rights left an imprint on the Conventions."[16] In particular, he points out that Common Article 3 constitutes, in his opinion, a human rights provision since it aims to regulate the relationship between the state and its nationals in times of non-international armed conflicts.[17] Moreover the change of name of the body of law governing armed conflicts, i.e. from "law of war" or "law of armed conflict" to "international humanitarian law," reflects a different attitude towards it. Nevertheless, it is doubtful that at that time, such a view represented the majority.

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[13] Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

[14] Robert Kolb, *The Relationship between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions*, 324 Int'l Rev. Red Cross 400, 409–419 (1998) [hereinafter Kolb]. *See also* Keith Suter, *Human Rights in Armed Conflicts*, XV Military Law and Law of War Review 400 (1976) [hereinafter Suter].

[15] *Id.*

[16] Schindler, *supra* note 8, at 170.

[17] *Id.* at 170–171. *See also* Louise Doswald-Beck & Sylvain Vité, *Origin and Nature of Human Rights Law and Humanitarian Law*, 293 Int'l Rev. Red Cross 95, 112 (1993) [hereinafter Doswald-Beck & Vité]; Joyce A.C. Gutteridge, *The Geneva Conventions of 1949*, 26 BYIL 300 (1949).

3. *"Human Rights in Armed Conflicts"*

Several events led to a growing interest in the issue: the adoption of the two international human rights covenants in 1966,[18] the conflicts in Vietnam and in Nigeria, and the Israeli occupation of Arab territories in 1967.[19] While the last two conflicts raised the difficult and practical issue of whether human rights law was applicable in times of armed conflict, the covenants, by creating a category of non-derogable rights,[20] explicitly acknowledged that certain human rights could be curtailed in armed conflict. It also ended the United Nations' trend to avoid dealing with armed conflicts.[21] Similar clauses are included in regional conventions such as the 1950 European Convention on Human Rights (ECHR),[22] and the 1969 American Convention on Human Rights.[23]

The 1968 Tehran Human Rights Conference, celebrating the 20th Anniversary of the UDHR, clearly raised the issue as to how both regimes interrelated. Doswald-Beck and Vité argue that it was "[t]he true turning point, when humanitarian law and human rights gradually began to draw closer."[24] Resolution No. XXIII called upon the U.N. General Assembly to "invite the Secretary General to study . . . steps which could be taken to secure the better application of existing humanitarian international conventions and rules in all armed conflicts" and "[t]he need for additional humanitarian international conventions or for possible revision of existing Conventions to ensure the better protection of civilians, prisoners and combatants in all armed conflicts."[25] Remarkably, the resolution was entitled "Human Rights

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[18] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR (Supp. No. 16) at 52, U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 [hereinafter ICCPR] and International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

[19] Suter, *supra* note 14, at 395.

[20] Article 2(4) spells out "No derogation from articles 6 [right to life], 7 [prohibition on torture and inhuman treatment], 8 (paragraphs 1 and 2) [prohibition on slavery and servitude], 11 [prohibition on imprisonment for failure to fulfill a contractual obligation], 15 [prohibition on prosecution for offences which were not crimes when committed], 16 [right to recognition as a person before the law] and 18 [freedom of thought, conscience, and religion] may be made under this provision." ICCPR, *supra* note 18.

[21] Suter, *supra* note 14, at 400.

[22] European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, *entered into force* Nov. 4, 1950 [hereinafter ECHR].

[23] American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978 [hereinafter ACHR].

[24] Doswald-Beck & Vité, *supra* note 17, at 95–119. *See also* Kolb, *supra* note 14, at 419.

[25] Resolution XXIII, adopted by the International Conference on Human Rights, Tehran, May 12, 1968, *available at* www1.umn.edu/humanrts/instree/1968a.htm (last visited October 8, 2007).

in Armed Conflicts" in order to satisfy those professing a separation between the two regimes. Indeed, fears were articulated that IHL may thereby be viewed as a branch of HRL. In those days, separatists claimed that the two underlying motivations of IHL, humanitarian considerations and self-interest, were not present in HRL norms.[26]

Yet, notwithstanding criticism, "human rights in armed conflicts" became "one of the most popular phrases in the United Nations political vocabulary"[27] in the beginning of the 1970s. It gained popularity although or maybe because it was unclear what it encompassed.[28] The drafter of the paper, Sean MacBride, equates the phrase with IHL,[29] which is highly disturbing since HRL in armed conflict and IHL are undeniably not the same. Later U.N. documents take a different stance inasmuch as they understand human rights as a peacetime concept. But, more generally, the expression "human rights law in conflict" seeks to provide protection to civilians caught in armed conflict. This explains why some scholars mainly focus on the Fourth Geneva Convention when dealing with this topic and assert that "the greatest departure made by the Geneva Law of 1949, which may be regarded as a manifesto of human rights for civilians during armed conflict, is the Fourth Convention relative to the Protection of Civilians."[30]

4. *Commonalities Between IHL and HRL*

In spite of the strong view expressed by separationists, the idea that IHL and HRL had several points of commonalities gained momentum in the early 1970s. At that time it was argued that the two *corpora juris* were not only related but also that "[t]he law of war [was] a derogation from the normal regime of human rights."[31] Furthermore, both sets of laws were "based in their fundamental nature upon the dignity and value of the individual being."[32]

See also "Respect for Human Rights in Armed Conflicts," GA Res. 2444 (XXIII), December 19, 1968, *available at* www.icrc.org/ihl.nsf/FULL/440?OpenDocument (last visited October 8, 2007).

[26] *See* discussion in Suter, *supra* note 14, at 405–413.

[27] Suter, *supra* note 14, at 394.

[28] *Id.* at 396–397.

[29] Sean MacBride, *Human Rights in Armed Conflicts*, Revue de Droit Pénal Militaire et de Droit de la Guerre 373–389 [1970].

[30] Leslie C. Green, *Human Rights and the Law of Armed Conflict, in* Essays on the Modern Law of War 435, 448 (Leslie C. Green ed., 1999).

[31] G.I.A.D. Draper, *The Relationship Between the Human Rights Regime and the Law of Armed Conflicts*, Isr. R.B. Hum. Rts. 191, 206 (1971).

[32] Draper 1989, *supra* note 7, at 4.

However this stance was only partially espoused by states. Indeed the two Additional Protocols to the Geneva Conventions,[33] while keeping the cleavage between the two regimes clear, "paid tribute to the world of human rights."[34] Several provisions acknowledge the existence of human rights norms while some read like a catalogue of human rights. For example, Article 72 AP I recognizes that besides the rules expressed therein as well as in the GC IV which deal with the protection of civilian and civilian objects there are "other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict."[35] More specifically, the Commentary invokes human rights law as a source of such "applicable rules."[36] What is more, Article 75 AP I lists a series of fundamental guarantees for individuals who are in the power of a belligerent state. Undoubtedly, this catalogue of rights is reminiscent of human rights provisions and, more concretely, the guarantees spelled out in the ICCPR concerning the right to fair trial.[37]

In contrast, Draper argued in the late 70s that IHL and HRL were fundamentally distinct because of differing origins, theories, nature and purposes. Strongly opposed to the fusion or even overlap of the two regimes, he heralded that

> The attempt to confuse the two regimes of law is insupportable in theory and inadequate in practice. The two regimes are not only distinct but are diametrically opposed... at the end of the day, the law of human rights seeks to reflect the cohesion and harmony in human society and must, from the nature of things be a different and opposed law to that which seeks to regulate the conduct of hostile relationships between states or other organized armed groups, and in internal rebellions.[38]

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[33] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts (Protocol I), opened for signature Dec. 12, 1977, U.N. Doc. A/32/144, Annex I, II, (1977), *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP II].

[34] Doswald-Beck & Vité, *supra* note 17, at 95–119.

[35] Article 72 API, *supra* note 33.

[36] "[V]arious instruments relating to human rights spring to mind... In the first place, there is the Universal Declaration of 1948, but that Declaration represents, in its own words, a common standard of achievement for all peoples and all nations and does not constitute a legal obligation upon States. In the field under consideration here, there are three instruments binding the States which are Parties to them: a) the International Covenant on Civil and Political Rights; b) the European Convention for the Protection of Human Rights and fundamental freedoms; c) the American Convention on Human Rights." Yves Sandoz, Christophe Swinarski, Bruno Zimmerman, eds., Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, paras 2927–2928 (1996).

[37] Article 75 AP I, *supra* note 33. See comments by Doswald-Beck & Vité, *supra* note 17, at 113.

[38] G.I.A.D. Draper, *Humanitarian Law and Human Rights*, Acta Juridica 193, 205 [1979].

While recognizing that there are occasions when IHL and HRL do overlap, he contends that they cannot do so in any meaningful manner and, thus, IHL should be the governing body of law during armed conflict. Consequently, IHL is a "derogation from the normal regime of human rights."

Nevertheless, in 1990 experts adopted the so-called Turku Declaration of Minimum Humanitarian Standards that interlinked IHL and HRL. What is more, it mingled principles and norms that were present in both sets of laws and merged them into a single document. It proclaims principles "which are applicable in all situations, including internal violence, disturbances, tensions and public emergency, and which cannot be derogated from under any circumstances."[39] Although this declaration is the result of a private initiative, it was quickly integrated in the work of the United Nations and became what is now called "standards of humanity." Gradually the resolution and, thereby, its approach to the relationship between IHL and HRL gained recognition.

5. *IHL as the* Lex Specialis

The debate as to how IHL and HRL interrelate was again opened in 1996 when the International Court of Justice was asked whether the use of nuclear weapons breached any international law rules. It had been argued that nuclear weapons inherently violated the right to life as enshrined in Article 6 ICCPR.[40] The ICJ explained that since Article 6 sets forth a non-derogable right, it also applies in time of armed conflict. Yet, the ICJ added that this provision could not be interpreted so as to outlaw military operations, which *per se* are aimed at the killing of individuals:

> In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. 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

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[39] Declaration of Minimum Humanitarian Standards, U.N. Doc. E/CN.4/Sub.2/1991/55 (Aug. 12, 1991).

[40] *See* the written statements of Malaysia, the Solomon Islands, and Egypt as cited in Christopher Greenwood, *Jus Ad Bellum and Jus In Bello in the Nuclear Weapons Advisory Opinion, in* International Law, the International Court of Justice and Nuclear Weapons 253 (Laurence Boisson de Chazournes & Philippe Sands, eds., 1999).

> by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[41]

Undoubtedly the ICJ declared that although IHL was the governing body of law applying in times of armed conflict, HRL continued to apply. It thereby recognized that while the interpretation of the right to life as encapsulated in the ICCPR might be affected by the application of the *lex specialis* rule, in other instances, the protection offered by HRL provisions might exceed that conceded by IHL.

This seminal statement led an entire generation of scholars to discuss the meaning of the expression *lex specialis* and, how the ICJ conceived the relationship between the two *corpora juris*. Generally, the *lex specialis* principle holds that when two norms collide, the more specific rule should be applied to provide content for the more general rule. For some authors the application of the *lex specialis* rule meant that in times of armed conflict IHL was the applicable law and HRL had to be discarded in the great majority of cases, for it was not appropriate. Speaking specifically about targeting, Watkin explains that "[r]ather than attempt to extend human rights norms to an armed conflict scenario, the appropriate approach is to apply the *lex specialis* of humanitarian law."[42] Some authors explain that, by adopting a *lex specialis* approach, the ICJ ignored "a large portion of human rights law, entirely disregarding the rights of those who are labeled as combatants."[43] As a result HRL is sidelined and replaced by IHL.

Another way to look at the *lex specialis* rule is to see it as a means to create a harmonious relationship between the two bodies of law since such a rule cannot be applied between two fundamentally incompatible set of laws. In particular, some authors contend that "the Court develop[ed] its reasoning by re-interpreting the law of armed conflict with a new-found emphasis on promoting humanitarian considerations."[44] Indeed, on several occasions, the ICJ explains that the rules and principles applicable in armed conflict are all related to considerations of humanity and that they are permeated with an "intrinsically humanitarian character."[45]

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[41] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, (July 8, 1996), I.C.J. Reports 1996, para. 25 [hereinafter Nuclear Weapons Opinion].

[42] Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 Am. J. Int'l L. 1, 22 (2004) [hereinafter Watkin].

[43] David S. Koller, *The Moral Imperative: Toward a Human Rights – Based Law of War*, 46 Harv. Int'l L. J. 231, 261 (2005) [hereinafter Koller].

[44] Dale Stephens, *Human Rights and Armed Conflict – The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case*, 4 Yale Hum. Rts. & Dev. L.J. 1, 15 (2001) [hereinafter Stephens].

[45] Nuclear Weapons Opinion, para. 86.

6. *IHL and HRL as Complementary or Distinctive Regimes*

In order to explain the articulation of the relationship between IHL and HRL, scholars submitted a new theory, that of complementarity, which proclaimed that IHL and HRL are "not identical bodies of law but complement each other and ultimately remain distinct."[46] Detter advocates a horizontal view of IHL and HRL inasmuch as they are "*ratione materiae* interrelated fields, both raising the level of behaviour towards individuals and both concerned with the rights and protections of individuals."[47] In a nutshell, IHL and HRL are mutually supportive regimes. This is based on the idea that there is "considerable scope for reference to human rights law as a supplement to the provisions of the laws of war."[48]

Three types of arguments are made in this regard. First, HRL may fill in gaps in IHL. This is particularly the case when IHL rules are unclear or cover only certain situations. For example, the right to fair trial as protected in human rights treaties and developed by the jurisprudence of various international/regional courts/committees appears to be more comprehensive than the one enshrined in the Geneva Conventions and the Additional Protocols.

Second, HRL may provide specific mechanisms for implementing IHL provisions. Owing to the dearth or failure of IHL enforcement mechanisms (barring the exception of international criminal law) and the successful development of strict accountability mechanisms in HRL, individuals have turned towards human rights organs to adjudicate violations of IHL. Slowly these organs ventured into IHL, an area that used to be considered as separate and discrete. Despite the controversy surrounding the involvement as such organs in applying IHL, it is contended that human rights bodies "fill an institutional gap and give international humanitarian law an even more pro-human-rights orientation."[49] What is more, "incorporation of human rights principles of accountability can have a positive impact on the regulation of the use of force during armed conflict."[50]

Third, humanitarian considerations entered IHL at the end of the 19th century when the first conventions were drafted. It is contended that the humanitarian impulse set at that time gradually replaced concepts such as reciprocity,[51] an

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[46] Heintze 2004, *supra* note 3, at 794.

[47] Ingrid Detter, The Law of War 161 (2000).

[48] Christopher Greenwood, *Rights at the Frontier: Protecting the Individual in Time of War, in* Law at the Centre, 277–293 (Barry Rider, ed., 1999) [hereinafter Greenwood].

[49] Theodor Meron, *The Humanization of Humanitarian Law*, 94 Am. J. Int'l L. 239, 247 (2000). *See also* Watkin, *supra* note 42, at 24.

[50] Watkin, *supra* note 42, at 34.

[51] *See* Stephens, *supra* note 44, at 11–12.

illustration of which being the Martens clause.[52] In light of this, experts argue that "[g]iven the relatively similar goals of these instruments, namely the protection and respect of humanity, it is difficult to accept... that the two streams of the law are 'diametrically opposed'."[53] As the International Criminal Tribunal for the Former Yugoslavia declared "[a] sovereignty-oriented approach has been gradually supplanted by a human being-oriented approach."[54]

This trend has been coined the "humanization of humanitarian law" by Theodor Meron who describes it in the following terms

> through a process of osmosis or application by analogy, the recognition as customary of norms rooted in international human rights instruments has affected the interpretation, and eventually the status, of the parallel norms in instruments of international humanitarian law.[55]

Despite this tendency, the doctrine of the separation of the two bodies of law continues to attract a number of scholars. Feinstein, for example, affirms that "the regime of international humanitarian law applicable in armed conflict situations and the regime of international human rights applicable in peacetime are mutually exclusive since there is a distinct contradiction between them."[56] Likewise, the European Union Guidelines on Promoting Compliance with International Humanitarian Law proffer that IHL and HRL "are distinct bodies of law and, while both are principally aimed at protecting individuals, there are important differences between them."[57]

Most arguments rely on the historical differences between these two areas. IHL was inspired and influenced by concepts of chivalry,[58] canonical notions of

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[52] "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience." Convention with respect to the Laws and Customs of War on Land, July 29, 1989, preamble, 32 Stat. 1803, 1805, 187 Consol. T.S. 429, 431. For a discussion on the Martens clause, *see* Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 317 Int'l Rev. Red Cross 125 (1997).

[53] Stephens, *supra* note 44, at 13.

[54] Prosecutor v. Tadic, Case No. IT-94-1-AR72, Appeals Chamber, (October 2, 1995) para. 97.

[55] Theodor Meron, *The Humanization of Humanitarian Law*, 94 Am. J. Int'l L. 239, 244 (2000).

[56] Barry A. Feinstein, *The Applicability of the Regime of Human Rights in Times of Armed Conflict and Particularly to Occupied Territories: The Case of Israel's Security Barrier*, 4 Nw. J. Int'l Hum. Rts. 238, 301 (2005).

[57] European Union Guidelines on Promoting Compliance with International Humanitarian Law, 2005/C 327/04, para. 12, Official Journal of the European Union, December 21, 2005.

[58] As early as 1989, Draper argued that IHL witnessed a gradual elimination of the ideals of chivalry. Draper 1989, *supra* note 7, at 6.

immunity of noncombatants,[59] personal honor, and reciprocity and, accordingly, developed through the centuries. In contrast, HRL intends to protect individuals from the abuse of power by their own governments and human rights are mainly granted via treaties.

Another recurrent argument is that it is more practical to maintain the two as distinct bodies of law because IHL provides a more complete set of norms relating to basic standards of human dignity in the particular circumstances of armed conflict. In other words, because IHL has been specifically designed to apply in times of conflict, it is better suited to military operations. Furthermore, as most IHL treaties are being negotiated by military lawyers who are well acquainted with the exigencies of battle conditions, one assumes that the standards to which they agreed upon in the various conventions are of practical value, i.e. they will be abided by because they reflect the situation on the ground. As Greenwood explains war is "far too complex and brutal a phenomenon to be capable of being constrained by rules designed for peacetime."[60]

7. *A Regained Interest in the* Lex Specialis *Rule*

While scholars were debating how the two regimes interrelated, the ICJ grappled again with the issue in 2004. In its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, it confirmed that IHL was the *lex specialis*. Repeating its early pronouncement, the Court admitted that the right to life should be interpreted according to IHL but again stressed that HRL applied also during armed conflict "save through the effect of provisions for derogation of the kind to be found in article 4 of the [ICCPR]."[61] In an attempt to clarify the way the *lex specialis* rule works in practice, the ICJ asserted that there are three groups of rights: "some rights may be exclusively matters of... humanitarian law; others may be exclusively of human rights law; yet other may be matters of both these branches of international law."[62]

Unfortunately, the ICJ does not explain how to subdivide the rights into these categories,[63] how a particular right should be interpreted when it is a matter of both branches, and whether IHL is always the *lex specialis* even when HRL provisions

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[59] Eide, *supra* note 4, at 677.

[60] Greenwood, *supra* note 48, at 277–293.

[61] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, July 9, 2004, I.C.J. Reports 2004, para. 106.

[62] *Id.* para. 106.

[63] *See* the critique by Michael Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 Am. J. Int'l L. 119, 133 (2005).

may be more specialized and accurate than those found in IHL.[64] As a result "a number of... experts characterized this analysis as utterly unhelpful."[65] This again has led to an upsurge of writing in the field and to a renewed battle between the proponents of the theories of complementarity and separation.[66]

H. *Issues Relating to the Relationship Between IHL and HRL*

As aforementioned this book aims to present the state of affairs between IHL and HRL and, thereby, show the current trend amongst scholars dealing with this issue.

The first chapter introduces the reader to the main concepts, tenets and theories relating to IHL and HRL. The second focuses on the applicability of the two regimes while the third examines the ways they are implemented. The fourth chapter provides an insight into the protection of specific rights and persons offered by IHL and HRL while the fifth chapter examines the relationship between these regimes in specific situations.

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[64] For example, Martin argues that "some derogable ECHR rights can constitute the *lex specialis* in armed conflict and should be used to interpret provisions in the law of armed conflict." Francisco F. Martin, *The Unified Use of Force and Exclusionary Rules: Amplifications in Light of the Comments of Professors Green and Paust*, 65 Sask. L. Rev. 451, 453 (2002).

[65] Report of the Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation, Geneva (Sept. 1–2, 2005), *available at* www.cudih.org/communication/droit_vie_rapport.pdf (last visited Sept. 4, 2007), at 19.

[66] *See* e.g. Koller, *supra* note 43, at 231.