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A CONFLICT OF NORMS: THE RELATIONSHIP BETWEEN HUMANITARIAN LAW AND HUMAN RIGHTS
LAW IN THE ICRC CUSTOMARY LAW STUDY

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A. THE EMERGENCE OF A LEX SPECIALIS RULE : FROM SEPARATION TO NORMATIVE CONFLICT

Conflicts of norms increasingly arise in the international legal order. The growth of the content and the complexity of international law has led to specialised international legal regimes the autonomy of which provokes conflicts with general international law or between special regimes. The law must address the question of how rules embedded in different legal regimes relate to each other when obligations which are separate yet similar deal with the same subject matter. Recent discussions have focussed on the role of the *lex specialis* rule as a means for solving the conflict, but the exact meaning of this rule is by no means clear.²

Discussions about the relationship between human rights law and humanitarian law reflect this development. For several decades, it was generally considered that human rights law is not applicable in situations of armed conflict. This position was vigorously entertained in the context of the codification of international humanitarian law until the 1970s.³ Since international humanitarian law and human rights law are based on completely different historical roots, they were considered mutually exclusive.⁴ The laws of war are tailored for the extraordinary situation of an armed conflict and for protection of the respective interests of the (State) parties while human rights deal with limitations on regular governmental activities vis-à-vis the individual.⁵ Whereas the laws of war form one of the oldest spheres of international law, the rise of human rights law began only after World War II, in response to the experiences with fascist and totalitarian regimes in the 1930s.⁶ In the first period after World War II

¹ Institute of International Law, University of Göttingen. I would like to thank Robert Cryer for his helpful comments on an earlier draft.

² On the *lex specialis* rule and the conflict of norms see: Jörg Kammerhofer, 'Unearthing Structural Uncertainties through Neo-Kelsian Consistency: Conflicts of Norms in International Law', ESIL Research Forum on International Law: Contemporary Issues, Workshop Paper; <http://www.esil-sedi.org/english/pdf/Kammerhofer.pdf>; Wolfram Karl, 'Treaties, Conflicts Between', in R. Bernhardt (ed.), *Encyclopaedia of Public International Law* Vol. III (2000) 935.; Martti Koskenniemi, 'Study in the Function and the Scope of the Lex Specialis Rule and the Question of 'Self-Contained' Regimes', UN. Doc. ILC(LVI)/SG/FIL/CRD.1 and Add.1., 4 and 7 May 2004; Anja Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrines of *Lex Specialis*' (2005) 74 *Nordic Journal of International Law* 27; Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge: CUP, 2003); Erich Vranes, '*Lex Superior, Lex Specialis, Lex Posterior* – Zur Rechtsnatur der "Konfliktlösungsregeln"' (2005) 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 391.

³ Yoram Dinstein, 'The International Law of Inter-State Wars and Human Rights' (1977) 7 *Israel Yearbook on Human Rights* 148; (1972) 88 Henri Meyrovitz, 'Le droit de la guerre et les droits de l'homme' *Revue de droit public et de la science politique*, 1059, at 1104; W. K. Suter, 'An enquiry into the meaning of the Phrase "Human Rights in Armed Conflicts"' (1976) XV *Revue de droit pénal militaire et droit de la guerre* 393, at 421; see also Orna Ben-Naftali and Yuval Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories' (2004) 37 *Israel Law Review* 8..The perception started to change at the Teheran Conference of 1968.

⁴ Stefanie Schmahl, 'Der Menschenrechtsschutz in Friedenszeiten im Vergleich zum Menschenrechtsschutz im Krieg' in Jana Hasse et. al. (eds.), *Menschenrechte. Bilanz und Perspektiven* (Baden-Baden: Nomos, 2002), 41, at 42ff. and 53ff.

⁵ Dietrich Schindler, 'Kriegsrecht und Menschenrechte' in Ulrich Häfelin et al. (eds.), *Menschenrechte, Föderalismus, Demokratie* (Zürich: Schulthess, 1979) 327. The argument was still advanced in the proceedings of the Nuclear Weapons Advisory Opinion: "The Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict", I.C.J., *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996 (I), p. 239, para. 24.

⁶ Michael Bothe, 'The Historical Evolution of International Humanitarian Law, International Human Rights Law, Refugee Law and International Criminal Law' in Horst Fischer et. al. (eds.), *Krisensicherung und Humanitärer Schutz* (Berlin:

human rights law was still too immature and technically undeveloped to influence the laws of armed conflict. Its sphere of application still had to be defined. The separation was also institutionally motivated. The ICRC wanted to keep its neutrality and its distance from the politicised organs of the United Nations. Thus, the United Nations which emphasised the *ius contra bellum* did not deal with laws of war while the ICRC was unwilling to approach human rights, which were seen as an emanation of political agendas in the United Nations. Consequently, the Universal Declaration of Human Rights of 1948 and the 1949 Geneva Conventions were separately drafted without taking account of one another.⁷

However, perceptions change. In the International Covenant on Civil and Political Rights and the European Convention of Human Rights the scope of application of human rights was extended to times of war in Article 4, paragraph 1 and Article 15, paragraph 2 respectively.⁸ In the following period human rights law developed into one of the most important and refined branches of international law. It now forms a complex subsystem with autonomous enforcement instruments. In particular, in the regional context of the European Convention on Human Rights human rights law can claim a high level of efficiency. Extensive jurisprudence has advanced and complicated the law. In particular, the ambit of general obligations imposed upon State parties in Art. 2 of the Covenant and Art. 1 ECHR have consistently been expanded. Concepts such as positive obligations,⁹ as well as the territorial applicability of human rights law¹⁰ have been refined through the jurisprudence of human rights bodies. A further step in this development can be found in two judgments of the European Court of Human Rights in the *Isayeva* cases of February 2005 which concern the armed conflict in Chechnya.¹¹ The Court evaluated whether Russian conduct of hostilities infringed the European Convention, basing its findings exclusively on human rights law. Previously such pronouncements belonged solely to humanitarian law.¹²

As a result of this development, two divergent sets of norms claim a common sphere of personal and material application. Therefore their legal relationship must be determined. Conflicts of norms are generally resolved through legal techniques such as the *lex specialis* rule (*lex specialis derogat lex generalis*). Indeed, it is generally accepted that although human rights law is applicable in armed conflicts the rules of international humanitarian law take precedence as *lex specialis*.¹³ Although the

Berliner Wissenschafts-Verlag, 2004) 37.

⁷ Robert Kolb, 'The Relationship between International Humanitarian Law and Human Rights Law' (1998) 80 *International Review of the Red Cross* 409; see also René Provost, *International Human Rights and Humanitarian Law*, (Cambridge: CUP, 2003).

⁸ For the Covenant: UN Doc. E/CN.4/AC.1/4, Annex 1, p. 5 and 7; For the European Convention on Human Rights: Council of Europe, *Collected edition of the "Travaux préparatoires" of the European Convention on Human Rights*, Vol. III, (The Hague: Nijhoff, 1976), pp. 190, 280, 282; s.a. Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception* (The Hague: Nijhoff, 1998) pp. 200-217.

⁹ See Heike Krieger, 'The Protective Function of the State in the United States and Europe: Comment' in Georg Nolte (ed.), *European and US Constitutionalism* (Cambridge: CUP, 2005), 181ff; Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart, 2004).

¹⁰ See, for example, Fons Coomans and Menno Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Antwerpen: Intersentia, 2004).

¹¹ *Isayeva, Yusupova and Bazayeva v Russia*, App. No. 57947/00; 57948/00; 57949/00, Eur.Crt.H.R., judgment of 24 February 2005; *Isayeva v Russia*, App.No. 57950/00, Eur.Crt.H.R., judgment of 24 February 2005; both available at <http://www.echr.coe.int>.

¹² William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16 *European Journal of International Law* 741; see also Hans-Peter Gasser, 'International Humanitarian Law and Human Rights Law in Non-International Armed Conflict: Joint Venture or Mutual Exclusion' (2002) 45 *German Yearbook of International Law* 149.

¹³ See for instance: Jochen Abr. Frowein, 'The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation' (1998) 28 *Israel Yearbook of Human Rights* 1, at 10; Provost, *supra* note 2, p. 277.

International Court of Justice confirmed this normative relationship¹⁴ uncertainties remain. Do norms with a *lex specialis* character override more general rules systematically and invariably, or is there room for complementarity? To what extent are human rights standards applicable in armed conflicts and in how far is the jurisprudence of regional human rights courts pertinent?

The ICRC Study on Customary International Humanitarian Law¹⁵ embraces the International Court of Justice's statement. Still, in chapter 32 the *Study* refers extensively to the jurisprudence of human rights bodies in order to specify fundamental guarantees of humanity. Thus, the *Study* provides a relevant example of how the normative relationship between human rights law and humanitarian law on the basis of the *lex specialis* rule can be conceived.

B. THE DOCTRINE OF *LEX SPECIALIS* IN INTERNATIONAL LAW

The doctrine of *lex specialis* is well-known in domestic laws.¹⁶ It has been described as an informal part of legal reasoning.¹⁷ However, its application in international law is much more problematic. The international legal order differs considerably from domestic legal systems. The subjects of international law themselves create the norms which they have to apply and to obey. The decentralised structure in which international law operates leads to a system with less coherence than national legal orders.¹⁸ In a system where bilateral state relations still dominate it is much more difficult to establish systematic relations between norms. Only a few treaties define their relationship to other treaties.¹⁹ The lack of a centralised law-making process allows differing interpretations of pertinent norms and norm contradictions to persist.²⁰ Thus, the *lex specialis* rule is used in different contexts and may have diverging meanings.²¹ Moreover, there is still only sparse case law on the *lex specialis* rule.²²

In domestic law, the reasoning behind the *lex specialis* rule is the fulfilment of legislative will. In international law the intentions of the parties are taken into account when the specific circumstances of a particular case require it.²³ As an expression of consent it is an adequate tool for international law. The more specific rule prevails over the general rule because the parties consider it more appropriate.²⁴ The idea of preferring the more specific rule over its more general counterpart is based on its appropriateness in any given circumstances so that its application is more effective than the application of the general rule.²⁵ Special rules are clearer and more definite which adds to their efficiency.

¹⁴ I.C.J., *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996 (I), p. 239 para. 25; I.C.J., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, para. 106.

¹⁵ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: CUP, 2005), [hereinafter *Study*], p. 300.

¹⁶ Karl Larenz, *Methoden der Rechtswissenschaft* (Berlin: Springer-Verlag, 1979), pp. 251ff.

¹⁷ Koskeniemi, *supra* note 1, paras. 21,24.

¹⁸ Heike Krieger, *Das Effektivitätsprinzip im Völkerrecht* (Berlin: Dunckert&Humblot, 2000) pp. 55ff.

¹⁹ See, for instance, Art. 103 of the UN Charter.

²⁰ Lindroos, *supra* note 1, 28; see also Pauwelyn, *supra* note 1, p. 12ff.

²¹ Pauwelyn, *supra* note 1, p. 385.

²² Lindroos, *supra* note 1, p. 37; see also Wilfred Jenks, 'The Conflict of Law-Making Treaties' (1953) XXX *British Year Book of International Law* 401, at 420ff.

²³ Lindroos, *supra* note 1, 36; Karl, *supra* note 1, 937.

²⁴ Jenks, *supra* note 3, 446; Pauwelyn, *supra* note 1, p. 385.

²⁵ Michael Akehurst, 'The Hierarchy of the Sources of International Law' (1974-75) XLVII *British Year Book of International Law* 273.

Owing to its rationale being based on its appropriateness the *lex specialis* rule should be seen as a contextual principle.²⁶ Decisions to apply a more specific rule as *lex specialis* depend on the circumstances of the individual case. Thus, in principle, it is difficult to maintain a constant relationship between two sets of rules *in abstracto*. In international jurisprudence courts have in general applied the maxim to the conflict of two specific norms and not as a general guideline for the relations between two specialised regimes.²⁷ Therefore, the decision to apply a rule as *lex specialis* in any given case will depend on the character of the norm concerned as well as the specific facts at issue. Consequently, the norm environment remains relevant for the application of the special rule. Even if the more special rule applies, the more general norm environment is not excluded.

Basically, two ways in which the relationship between a special norm and a more general norm can be conceived have been established in international legal theory and practice.²⁸ On the one hand, a special norm can be seen as an application of the general law in specific circumstances.²⁹ This approach can often be found in human rights jurisprudence where it is used to prevent the parallel application of two human rights norms which guarantee comparable freedoms.³⁰ In such a case, the specific provision is still related to the general norm and must be interpreted in the light of it. Especially in cases of conflict between two norms which are both part of the same treaty regime those norms should not be interpreted in a way which would hinder the realization of other rights guaranteed in the treaty.³¹ On the other hand, a special rule may be seen as an exception to the general rule. In such a case, the special rule modifies or overrules the general rule.³²

C. HUMANITARIAN LAW AS *LEX SPECIALIS*

It is against this background that the normative relationship between human rights law and humanitarian law must be analysed. As we have seen, humanitarian law is generally *lex specialis* in relation to human rights law during times of conflict.³³ ‘The laws of war must be regarded as leges

²⁶ Jenks, *supra* note 3, 447; Lindroos, *supra* note 1, 42.

²⁷ Lindroos, *supra* note 1, 43ff.

²⁸ Koskenniemi, *supra* note 1, paras. 61-81; for a slightly different approach see Andrea Bianchi, ‘Dismantling the Wall: The ICJ’s Advisory Opinion and its Likely Impact on International Law’ (2004) 47 *German Yearbook of International Law* 370, at 371ff, who distinguishes between *lex specialis ratione personae* and *ratione materiae*.

²⁹ Larenz, *supra* note 3, p.251ff.

³⁰ Lindroos, *supra* note 1, 60ff.

³¹ Lindroos, *supra* note 1, 62.

³² Koskenniemi, *supra* note 1, para. 76; see however, Kammerhofer, *supra* note 1, p. 5ff.

³³ For the *lex specialis* rule to operate a common sphere of application of human right law and humanitarian law is necessary. In the most pertinent case of an international armed conflict human rights law will often not be applicable since its territorial sphere of application is limited according to Art. 2 ICCPR and Art. 1 ECHR to the jurisdiction of the contracting parties. In 2001, the European Court of Human Rights stated in its decision on admissibility in the *Bankovic* case that the protection of the ECHR did not extend to extra-territorial acts of NATO Member States. However, the Court also found that jurisdiction is established when a Contracting State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation, or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that government. Thus, a common sphere of application might arise, inter alia, in the case of a military occupation, of the international administration of foreign territory and of an internal armed conflict; *Bankovic*, 2001-XII Eur.Crt.H.R., paras. 67ff.; *Ilascu*, 2004-VII Eur.Crt.H.R., paras. 314ff.; *Issa*, Eur.Crt.H.R. App. No. 31821/96, judgment of 16 November 2004, paras. 65ff.; see on the extra-territorial application of the ECHR in the context of armed conflicts: Kerem Altiparmak, ‘*Bankovic*: An Obstacle to the Application of the European Convention on Human Rights in Iraq’ (2004) 9 *Journal of Conflict and Security Law* 213; Matthew Happold, ‘*Bankovic v Belgium* and the Territorial Scope of the European Convention on Human Rights’ (2003) 3 *Human Rights Law Review* 77; Heike Krieger, ‘Die Verantwortlichkeit Deutschlands nach der EMRK für seine Streitkräfte im Auslandseinsatz’ (2002) 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 669; Dirk Lorenz, *Der territoriale Anwendungsbereich der Grund- und Menschenrechte* (Berlin: Berliner Wissenschafts-Verlag, 2005).

specialis in relation to - and thus override – rules laying out the peace-time norms relating to the same subjects.³⁴ Such an approach might lead to the conclusion that humanitarian law *en bloc* overrides human rights law regularly and systematically.

I. EN BLOC APPLICATION OF HUMANITARIAN LAW?

In the Nuclear Weapons Advisory Opinion the ICJ chose a different approach and rejected the idea that a whole set of legal rules (humanitarian law) takes precedence over another (human rights law):

The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. 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 by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.³⁵

Although it could be assumed that humanitarian law is, at least for the most part, more specific than human rights law since it aims to protect individuals under the specific conditions of armed conflict, this does not lead to the conclusion that humanitarian law regularly overrides human rights. Human rights law is not necessarily more humane and humanitarian law is not per se better suited to achieving military victories. It would ignore the contextual character of the *lex specialis* rule if the whole regime of humanitarian law in general prevailed over human rights law even in cases of an armed conflict. Thus, the relationship between a norm of humanitarian law and human rights law must always be determined in each particular case and with a view to the particular norms in question.³⁶ Consequently, in the *Nuclear Weapons* Advisory Opinion the Court restricted its statement to the specific question of deprivation of life. The Court pursued the same approach in the *Wall* Advisory Opinion. It stressed that in certain circumstances human rights are fully applicable to situations of armed conflict, the question of when depending on the norm and its context. Human rights law is not *en bloc* overridden by the application of international humanitarian law.³⁷

More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.³⁸

³⁴ Koskenniemi, *supra* note 1, para. 76.; see Jenks, *supra* note 3, 407; Karl, *supra* note 1, p. 937.

³⁵ I.C.J., *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996 (I), p. 239 para. 25.

³⁶ Lindroos, *supra* note 1, 49.

³⁷ For a different reading of the *Wall* Advisory Opinion see Bianchi, *supra* note 4, 370ff.

³⁸ I.C.J., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, para. 106.

II. A JUSTIFICATION UNDER HUMAN RIGHTS LAW

According to the International Court of Justice the lawfulness of conduct under humanitarian law is a justification in relation to what are *prima facie* violations of Human Rights treaties.³⁹ Under the European Convention on Human Rights the same approach is valid. According to Art. 15 sect. 2 ECHR humanitarian law displaces the pertinent provisions of the ECHR. Killings which are justified under international humanitarian law do not infringe Art. 2 of the ECHR. However, this rule only applies if an emergency has been declared. Therefore, the rule cannot necessarily be applied to different situations.⁴⁰ In this respect the decision of the European Commission on Human Rights in the *Cyprus v. Turkey* case is helpful. That decision suggested that humanitarian law displaces human rights law as *lex specialis*. The Commission had to examine whether the internment of 2400 Greek Cypriots would infringe Art. 5 ECHR. Turkey granted ‘prisoner of war’ status to some of those people and delegates of the ICRC visited their places of detention.⁴¹ The Commission referred to international humanitarian law and did not examine possible violations of Art. 5 with regard to those accorded prisoner of war status. Although the Commission was not explicit about this, it seems to have applied Geneva Conventions III and IV, which provide for special rules on detention and judicial proceedings as the pertinent *lex specialis*.⁴² Special provisions of humanitarian law thus justify infringements of Art. 5 ECHR. A specific rule of international humanitarian law takes precedence as *lex specialis* when it provides a special justification for an interference with individual rights. In these cases the justification must also be accepted under human rights law.

III. EXCEPTIONS TO THE RULE

Nevertheless, there are exceptions to this normative relationship. As seen above the *lex specialis* rule is a contextual norm. The relation between two norms depends on an interpretation of the purposes of each norm and of the normative context. Consequently, international humanitarian law does not per se override human rights law in cases where humanitarian law itself is only applied by way of analogy.⁴³ A significant example is the international administration of territory. The prevalence of humanitarian law is also doubtful when its rules lack greater specificity in comparison with human rights law. This might be argued in relation to internal armed conflicts.

1. The International Administration of Territory

The prevalence of humanitarian law is based on the fact that it is particularly tailored for situations of armed conflict. It is a compromise between military necessity and humanitarian considerations to protect human beings, as far as possible, from the specific dangers of armed conflict. Thus, it is law for exceptional circumstances where states use military force to bring down military adversaries.⁴⁴ However, many present day military operations are performed in a different context and do not fit completely this purpose. IFOR/SFOR operations are different in many aspects to combat operations. KFOR is not a belligerent occupant according to Security Council Resolution 1244 and in the context of that conflict. Those armed forces are deployed with the consent of the Yugoslav government.⁴⁵ In such a case, where one or more international organizations and their Member States have deployed

³⁹ Krieger, *supra* note 4, 694.

⁴⁰ See Jochen Abr. Frowein, ‘Probleme des allgemeinen Völkerrechts vor der Europäischen Kommission für Menschenrechte’ in Ingo v. Münch (ed.), *Staatsrecht-Völkerrecht-Europarecht* (Berlin: de Gruyter, 1981) 289, at 294.

⁴¹ *Cyprus v Turkey*, Eur. Comm. H.R.; App. No. 6780/74 und 6950/75, p.108ff.

⁴² Frowein, *supra* note 2, 10ff; Provost, *supra* note 2, p. 199.

⁴³ Krieger, *supra* note 4, 695.

⁴⁴ Christopher Greenwood in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: OUP, 2003), No. 103.

⁴⁵ UN SC Res 1244 (1999) of 10 June 1999, para. 5.

significant military presences to undertake activities comparable to those of occupying forces, the exclusive application of humanitarian law or its prevalence is not self-evident.

Armed forces deployed under the aegis of the United States or its Member States exercise functions comparable to police functions.⁴⁶ Decisions which soldiers must take when they are, for instance, confronted with mass rallies differ from traditional decision which soldiers face in armed conflicts. A pertinent case has been decided in the UK High Court dealing with shootings during a mass rally in Pristina.⁴⁷ Although the circumstances of these missions are not comparable to the circumstances which prevail in peaceful democratic societies the armed forces' activities are closer to regular governmental activities than to combat operations. These functions are more adequately conceived in terms of the classical freedoms from interference by the state than in terms of military or humanitarian aspects of the laws of war.⁴⁸ Thus, the approach which holds that humanitarian law is the more suitable yardstick for armed forces' activities than the far-reaching exigencies of human rights is not necessarily correct.⁴⁹ Even though humanitarian law is applied in these missions⁵⁰ it is not necessarily the more appropriate legal system. Therefore the *lex specialis* rule may be overridden by other interpretative techniques, such as the most favourable principle of human rights law which permits the application of the norm which provides greater protection for the individual.⁵¹

2. Internal Armed Conflicts

Internal armed conflicts are regulated by Common Article 3 of the Geneva Conventions of 1949 and Additional Protocol II to the Geneva Conventions⁵² which has not been ratified, inter alia, by Indonesia, Israel, Sudan, and the United States.⁵³ Neither are very detailed. For instance, Common Article 3 does not include rules on the conduct of hostilities. Protocol II only provides rules for civilians in general terms.⁵⁴ Likewise, Common Article 3 of the Geneva Conventions includes only minimal vague guarantees on the right of fair trial.⁵⁵ In contrast, human rights law is highly detailed in this respect.⁵⁶ Another solution is to apply customary international humanitarian law to internal armed conflicts.⁵⁷ Yet customary international law it is not necessarily more specific than human rights law and therefore humanitarian law is not always more appropriate for the regulation of internal armed conflicts.⁵⁸

⁴⁶ Stephan Ratner, 'Foreign Occupation and International Territorial Administration: The Challenges of Convergence' (2005) 16 *European Journal of International Law* 696.

⁴⁷ High Court of Justice, *Mohamet Bici Skender v Ministry of Defence*, 2004 EWHC 786(QB).

⁴⁸ Krieger, *supra* note 4, 696.

⁴⁹ Schindler, *supra* note 1, 348.

⁵⁰ Michael Bothe, Karl Partsch and Waldemar Solf, *New Rules for Victims of Armed Conflicts* (The Hague: Nijhoff, 1982) 636; on the applicability of the rules of military occupation in Kosovo: Tobias Irmscher, 'The Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo' (2001) 44 *German Yearbook of International Law* 353, at 375-387; see on the praxis not to use the term occupation in relation to the international administration of territory Ratner, *supra* note 7, 705.

⁵¹ See Gasser in Fleck, *supra* note 6, Chapter 5. III. 2.

⁵² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

⁵³ For ratification see: <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=475&ps=P>.

⁵⁴ Article 13-18 Protocol II.

⁵⁵ Robert Kolb, *Ius in Bello: Le droit international des conflits armés* (Bâle: Helbing & Lichtenhahn, 2003), No. 157.

⁵⁶ See for this example Bianchi, *supra* note 4, 371.

⁵⁷ *Study*, xxix: "the gaps in the regulation of the conduct of hostilities in Additional Protocol II have largely been filled through State practice, which has led to the creation of rules parallel to those in Additional Protocol I, but applicable as customary law to non-international armed conflicts."

⁵⁸ Kolb, *supra* note 7, No. 157.

Consequently, the approach of the European Court of Human Rights in the *Isayeva* cases of February 2005 to apply human rights law to the conduct of hostilities in an internal armed conflict has its merits.⁵⁹ If human rights law can effectively regulate these situations, it might well be the *lex specialis* in this particular aspect of armed conflicts. Internal armed conflicts can be much closer to the regular sphere of application of human rights law because they also concern the relation of the individual vis-a-vis his or her State. The territorial application of human rights law is beyond doubt. If a State does not derogate from human rights law its standards are even fully applicable according to the rationale of Article 15 ECHR.⁶⁰ As has been observed ‘given that Russia at least accepts that the ECHR is a relevant source of law, its direct application to the conduct of hostilities [in Chechnya] must be considered a promising strategy’.⁶¹ From a political point of view the Court’s approach is encouraging because it is applied law to an internal armed conflict which has not been officially acknowledged as such.⁶²

IV. INTERPRETATION OF HUMANITARIAN LAW IN THE LIGHT OF HUMAN RIGHTS LAW

Moreover, it is conceivable that humanitarian law and human rights law can reinforce each other. As seen above, the meaning of the concept of *lex specialis* under international law is not exclusively restricted to the specific overriding the more general norm. It may also describe the fact that a special norm can be seen as an application of the more general norm, in which case the special norm can be interpreted in the light of the more general norm. Thus, under specific circumstances humanitarian law can be seen as an application of the more general human rights law. In such a case, the specific humanitarian law rule would still be related to the general human rights norm which would require or at least permit the interpretation of the humanitarian law norm in the light of the more general human rights norm.⁶³

According to Art. 13(3) GC III and rule 90 of the ICRC study it is a fundamental guarantee that degrading treatment is prohibited. A comparable prohibition exists under human rights law, for instance in Art. 7 of the Covenant and Art. 3 ECHR. In human rights law there is comprehensive case law providing for a definition of the term ‘degrading treatment’. In both regimes the prohibition aims at the protection of an individual’s dignity. Accordingly, for the definition of legal concepts in international humanitarian law, human rights law as developed through the jurisprudence of the Courts can function as a complementary source of interpretation. Comparably, the prohibition of inhumane treatment or the right to protection from arbitrary detention under international humanitarian law is only vaguely framed.⁶⁴ Judicial interpretation and more detailed treaty provisions make it clear that human rights law could be supportive of humanitarian law provisions. The International Criminal Tribunal for the Former Yugoslavia, for instance, used human rights law in order to define the contents of the prohibition on torture and rape in the *Furundžija* case.⁶⁵ After all, the common purposes of human rights law and humanitarian law are reflected in the various international efforts to merge these

⁵⁹ Abresch, *supra* note 2, 750. On negative implications of this approach see however below E.

⁶⁰ *Isayeva v Russia*, App.No. 57950/00, Eur.Crt.H.R., judgment of 24 February 2005, para. 191” No martial law and no state of emergency has been declared in Chechnya, and no derogation has been made under Article 15 of the Convention (see § 133). The operation in question therefore has to be judged against a normal legal background.”

⁶¹ Abresch, *supra* note 2, 750.

⁶² Abresch, *supra* note 2, 757.

⁶³ See above B.

⁶⁴ See also Louise Doswald-Beck, ‘Developments in Customary International Humanitarian Law’, (2005) 15 *Schweizerische Zeitschrift für internationales und europäisches Recht* 471, at 498.

⁶⁵ *Prosecutor v Furundžija*, Judgment, IT-95-17/1-T, 10 December 1998, paras. 134ff.

provisions into a minimum common standard applicable at all times.⁶⁶ This is also the approach of the *Study*.

D. APPLICABLE STANDARDS: THE APPROACH OF THE ICRC STUDY

The *Study* contains a chapter on “Fundamental Guarantees.”⁶⁷ That chapter (32) restates basic rules which ‘apply to all civilians in the power of a party to the conflict and who do not take a direct part in hostilities, as well as to all persons who are hors *de combat*.’⁶⁸ Although the study claims that these rules are established rules of international humanitarian law applicable in both international and non-international armed conflicts their content is defined by references to human rights law instruments, documents and case-law.⁶⁹ As stressed in the study, ‘this was done, not for the purpose of providing an assessment of customary human rights law, but in order to support, strengthen and clarify analogous principles of humanitarian law.’⁷⁰ In order to define concepts such as humane treatment,⁷¹ torture and degrading treatment,⁷² in order to demonstrate that enforced disappearances are forbidden⁷³ or in order to define limitations in cases of deprivation of liberty⁷⁴ and give precise indications of standards for fair trial⁷⁵ the ICRC study refers to the jurisprudence of the European Court of Human Rights and other international judicial and quasi-judicial bodies. The rationale behind the concept of fundamental guarantees was to restate that there are certain fundamental rules applicable in all kinds of armed conflicts irrespective of their classification according to international humanitarian law.⁷⁶ The *Study* itself is very careful not to go much further in the use of human rights law in the context of humanitarian law. The rules on precautions in attack,⁷⁷ for example, do not refer to any human rights law. In contrast, the Commentary stresses that the arbitrary deprivation of the right to life in the conduct of hostilities is subject to the pertinent *lex specialis* which are the rules on the principle of distinction.⁷⁸

The following section will look into the *Study*’s approach in order to see where the application of human rights standards reinforces humanitarian law and where problems with this approach might arise. It focuses on the use of the jurisprudence of the European Court of Human Rights because the European Convention on Human Rights probably offers the most elaborated standards in human

⁶⁶ UN, Report of the UN Secretary-General on ‘Fundamental Standards of Humanity’, UN Doc. E/CN.4/2004/90, 25 February 2004; see also: E/CN.4/2002/103; E/CN.4/2001/91; E/CN.4/2000/94; E/CN.4/1999/92, para. 3; E/CN.4/1998/87; the development of these principles is another way to address the lack of rules in certain internal armed conflicts; see: Jean-Daniel Vigny et Cecilia Thompson, ‘What future for fundamental standards of humanity?’, (2000) 840 *International Review of the Red Cross* 917-939. In a way it is a project comparable to the *Study* but under the aegis of the UN Human Rights Commission, Report, para. 2: “The need to identify fundamental standards of humanity initially arose from the premise that most often situations of internal violence pose particular threats to human dignity and freedom However, the need for a statement of principles to be derived from human rights and international humanitarian law, which would apply to everyone in all situations, is clearly not limited to situations of internal strife. The process of fundamental standards of humanity aims at strengthening the practical protection of individuals in all circumstances.”

⁶⁷ *Study*, Vol. I, Chapter 32.

⁶⁸ *Study*, Vol. I, 299.

⁶⁹ *Study*, Vol. II, 1986-2536.

⁷⁰ *Study*, Vol. I, 299.

⁷¹ *Study*, Vol. I, Rule 87 and 90.

⁷² *Study*, Vol. I, Rule 90.

⁷³ *Study*, Vol. I, Rule 98.

⁷⁴ *Study*, Vol. I, Rule 99.

⁷⁵ *Study*, Vol. I, Rule 100.

⁷⁶ See Louise Doswald-Beck, Human Rights: Their Place on the Battlefield, in *Chatham House Conference Proceedings, The Law of Armed Conflict: Problems and Prospects*, 18-19 April 2005, p. 50; available at <http://www.chathamhouse.org.uk/pdf/research/il/ILParmedconflict.pdf>.

⁷⁷ *Study*, Vol. I, 51ff.

⁷⁸ The *Study* cites Rules 1, 11 and 14; *Study*, Vol. I, 314.

rights protection with a high degree of enforcement. Moreover, especially with the *Isayeva* cases the Court has claimed a major role in the definition of human rights standards in internal armed conflicts.

I. COMMON STANDARDS

In many cases the application of human rights standards to fundamental guarantees of humanitarian law in the *Study* works well. Thus, the *Study* demonstrates that human rights can clarify uncertainties of vague humanitarian law guarantees. It supports the claim that the increasingly accepted interaction not only between human rights law and international humanitarian law but also international criminal law and international refugee law is feasible.⁷⁹ While some of the fundamental guarantees in the *Study* are historically based in humanitarian law, such as the respect for convictions and religious practices,⁸⁰ other are framed in more ‘innovative’ terms,⁸¹ such as the rule that ‘family life must be respected as far as possible.’⁸² The way in which these fundamental guarantees have been phrased as part of customary international humanitarian law in the *Study* resembles human rights law in its use of broad legal terms in contrast to the often very narrowly and precisely framed obligations of humanitarian treaty law. Religious freedoms and respect for family life are concepts which are deeply embedded in human rights law and the jurisprudence of the European Court of Human Rights helps to concretize the applicable terms⁸³ whose rationale is the same in both legal systems.

Examples of human rights jurisprudence complementing humanitarian law provisions can be found throughout Chapter 32. The *Study*, for example, refers to the 1969 *Greek Case* of the European Commission of Human Rights⁸⁴ in which the Commission concluded that accommodation in a camp constitutes inhumane treatment because of ‘the conditions of gross overcrowding and its consequences.’⁸⁵ The case comes from a pertinent context and specifies a term which protects human dignity in both legal systems. Likewise, the cases concerning the conflicts between Turkish security forces and the PKK provide relevant standards because of their context and the comparable rationale of the rules in question. The *Selcuk and Asker v Turkey* case, for instance, stated that it must be considered as inhumane and degrading treatment to deliberately destroy a person’s home and belongings especially in case of elderly and infirm persons. Such an action is even not justified if the security forces try to prevent the homes being used by terrorists.⁸⁶ Moreover, cases such as the *Cyprus Case* of 2001⁸⁷ are pertinent since they describe human rights standards for military occupations. Thus, the *Study*’s reference to the European Court’s jurisprudence on living conditions for part of the Greek minority in Northern Cyprus amounting to discrimination and degrading treatment is appropriate.⁸⁸ Another example is the Court’s finding that restrictions on the freedom of movement of the Greek minority which limit access to places of worship are violations of the freedom of religion.⁸⁹

II. DIFFERENCES IN LEGAL TECHNIQUES

⁷⁹ See Report of the UN Secretary-General, *supra* note 9, para. 5.

⁸⁰ *Study*, Vol. I, Rule 104.

⁸¹ Doswald-Beck, *supra* note 8, 498.

⁸² *Study*, Vol. I, Rule 105.

⁸³ *Study*, Vol. II, 2534ff.

⁸⁴ *Greek case*, Eur.Com.H.R., Report of 5 November 1969, paras. 14 and 21.

⁸⁵ *Study*, Vol. II, 2021.

⁸⁶ *Selcuk and Asker v. Turkey*, 1998-II Eur.Crt.H.R., paras. 78-80.

⁸⁷ *Cyprus v Turkey*, 2001-IV Eur.Crt.H.R., paras. 245 et seq.; para. 311.

⁸⁸ *Study*, Vol. II, 2160.

⁸⁹ *Study*, Vol. II, 2524.

Although different legal techniques are used in human rights law and humanitarian law the *Study's* approach works in principle because the use of human rights law in it is basically restricted to proving the existence of fundamental guarantees.

Under humanitarian law, the application of rules varies according to qualification of the conflict as a whole. In contrast, human rights law does not differentiate between different types of conflicts.⁹⁰ In human rights law the standards only oblige the State and its organs⁹¹ while humanitarian law applies to all parties to a conflict.⁹² In turn human rights law protects the interests of the individual whereas humanitarian law also protects the interests of the (State) parties to a conflict. From a formal point of view human rights law remains unchanged under all circumstances but in its application it is modified according to the circumstances of a given case. In contrast, humanitarian law consists of diverging regimes with rigid and narrowly defined rules.⁹³ However, the *Study's* concept of providing customary international law rules which 'apply in both international and non-international armed conflicts'⁹⁴ removes many of these technical differences. Fundamental guarantees in Chapter 32 are conceived as 'overarching rules that apply to all persons'⁹⁵ and 'in all times'⁹⁶ to situations 'in which it is not absolutely clear that the level or extent of violence has reached that of an internal armed conflict.' Thus, these fundamental humanitarian law rules come close to the realm of application of human rights law. Moreover, the *Study* stresses that the rules on fundamental guarantees could have been restated without reference to human rights law.⁹⁷ The *Study* only wants to provide a 'distillation as a basic rule'⁹⁸ which might allow us to ignore technical differences.

However, if there is any value in restating human rights jurisprudence in the context of humanitarian law, it will be for interpretative purposes, which requires careful analysis of how far standards from one set of rules are applicable in the other. Even in the context of fundamental rules the differences between both legal regimes are subtle and require meticulous interpretation. The idea that a special norm can be seen as an application of the more general norm and thus the special norm can be interpreted in the light of the more general one is normally applied between rules of a single treaty regime.⁹⁹ To apply it between two separate sets of rules relies upon a universalistic concept of the international legal order which assumes that it is more or less organized.¹⁰⁰ It presupposes that special regimes remain related to the universal order and to each other. Since more or less the same states have negotiated and acceded to the human rights and humanitarian law treaties, one can assume that these treaties are consistent with one another.¹⁰¹ States would not intentionally subscribe to contradictory imperatives. Norms would otherwise lose their ability to direct behaviour. This idea of a systematic unity as a normative postulate is not entirely based on logical deduction or induction but on value

⁹⁰ Provost, *supra* note 2, p. 152ff.

⁹¹ For exceptions see: Christian Tomuschat, 'The Applicability of Human Rights Law to Insurgent Movements' in Horst Fischer et. al. (ed.), *Krisensicherung und Humanitärer Schutz* (Berlin: Berliner Wissenschafts-Verlag, 2004), 573; see on the problem in relation to humanitarian law: Dieter Fleck, 'International Accountability for Violations of the *Ius in Bello*: The Impact of the ICRC Study on Customary International Humanitarian Law', (2006) 11 *Journal of Conflict and Security Law* ?? pp.??.

⁹² See on the diverging conceptualization of the individual in human rights law and humanitarian law: Provost, *supra* note 2, pp. 116 and 343.

⁹³ Abresch, *supra* note 2, 753 et seq.; see also Kolb, *supra* note 7, Nos. 164-184.

⁹⁴ *Study*, Vol. I, xxix.

⁹⁵ *Study*, Vol. I, 299.

⁹⁶ Doswald-Beck, *supra* note 8, 497.

⁹⁷ Doswald-Beck, *supra* note 8, 497.

⁹⁸ Doswald-Beck, *supra* note 9, 50.

⁹⁹ See above B.

¹⁰⁰ Dirk Pulkowski, Narratives of Fragmentation: International Law between Unity and Multiplicity; *ESIL Agora Paper*, p. 3; available at <http://www.esil-sedi.org/english/pdf/Pulkowski.PDF>.

¹⁰¹ Abresch, *supra* note 2, 5; see however Koskeniemi, *supra* note 1, para. 28 who stresses that treaties are often a result of bargains so that there is no single legislative will in the international order; Pulkowski, *supra* note 11, p. 8; see also above B.

judgments. Thus, the inner coherence of values does not so much depend on logical reasoning but also on teleological interpretation.¹⁰² Teleological interpretations require a detailed norm to norm comparison of a norm's purposes and environment as well as the context of the single case, rather than an omnibus approach. This approach limits the application of human rights' norms and jurisprudence as an interpretative tool for humanitarian law norms. Problems arise, inter alia, in relation to proportionality when using force, in relation to limitation clauses and in relation to the different dimensions of human rights protection.

1. The Principle of Proportionality in the Use of Force

The principle of proportionality in the use of force reveals legal differences between human rights law and humanitarian law. The European Court's of Human Rights evaluation of the use of force in law enforcement operations contains different language and different balancing techniques to humanitarian law which may be overlooked because both legal systems use terms that sound the same. Despite their similarity, the terms have different meanings.¹⁰³ The term 'proportionality' describes a process of balancing in both areas of law but the values which are balanced differ.

If a state agent uses force against an individual, in human rights law the effect on the individual him or herself is balanced with the aim of protecting a person against unlawful violence. The action is only proportionate if the smallest amount of force necessary is used. Lethal force is only permissible in very narrow circumstances.¹⁰⁴ In contrast, under international humanitarian law, if a combatant is killed the proportionality principle focuses on the effect to civilians or civilian objects, not on the targeted combatant. Lethal force is often permissible as first recourse. The *Study* tries to escape from these differences by pointing to the underlying common principle that there is a 'need for proper precautions to be taken, for limitations of the use of force to the degree strictly necessary.'¹⁰⁵ However, when the *McCann* judgment¹⁰⁶ is referred to in order to define what is strictly necessary the differences in the balancing techniques become pertinent. In contrast to what the *Study* suggests the balancing process in the *McCann* judgment is in the first place not about the killing of persons *hors de combat* which would be a pertinent balancing process under humanitarian law. It is, above all, about the 'minimum resort to the use of lethal force against those suspected of posing [the] threat'.¹⁰⁷ This balancing process, however, is not required by humanitarian law in relation to a combatant.

2. Limitation Clauses

The attempt to restate only abstract principles which apply 'in all situations' and 'all times' is also problematic because it ignores the manner in which limitation clauses operate in human rights law. This can be shown in relation to those fundamental guarantees which are deeply rooted in human rights law, such as the respect for religious practices and family life. On the one hand, the finding in the European Court's *Cyprus* case that restrictions on the freedom of movement of the Greek minority which limit access to places of worship are violations of the freedom of religion is a pertinent abstract statement which is applicable under humanitarian law, too.¹⁰⁸ On the other hand, the findings of the European

¹⁰² Claus-Wilhelm Canaris, *Systemdenken und Systembegriff in der Jurisprudenz: Entwickelt am Beispiel des deutschen Privatrechts* (Berlin: Duncker & Humblot, 1983), 21ff; Pulkowski, *supra* note 11, p. 3.

¹⁰³ Noam Lubell, Challenges in Applying Human Rights Law to Armed Conflict, *Conference to Mark the Publication of the ICRC Study on "Customary International Humanitarian Law"*, The Hague 30-31 May 2005, p. 17; available at http://www.rodekruis.nl/picture_upload/Upload%20document%20Cust%20Law%20Conf.pdf.

¹⁰⁴ David J. Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (2nd. ed. London: Butterworths, 2004), pp.??.

¹⁰⁵ *Study*, Vol. I, Rule 89, 314.

¹⁰⁶ *Study*, Vol. II, 2099.

¹⁰⁷ *McCann v United Kingdom*, 324 Eur.Crt.H.R. (ser. A) (1995), para. 192.

¹⁰⁸ See above D. I.

Court depend very much on the concrete circumstances of the individual case. The restrictions which were unjustified in the Cyprus case may under different circumstance be justifiable.

In human rights law Art. 9 ECHR is subject to a detailed limitation clause. Art. 9 para 2 ECHR provides: ‘Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.’ Rule 104 in the *Study* contains no such clause, although the commentary argues for permissible restrictions.¹⁰⁹ The proper extent of any human right can only be determined by reference to the limitation clauses. Thus, the application of human rights law without taking into account the concrete limitation clause might lead to misinterpretation. If the *Study* is, in turn, used to restate the fundamental standards of humanity in a human rights context¹¹⁰ imprecision in formulation¹¹¹ or the absence of relevant limitations may well have repercussions on the understanding of human rights law. In sum, it would have been more appropriate if the Study had included more accurate limitation clauses on fundamental guarantees.

3. Positive Obligations

Moreover, the occasional reference to positive obligations in the Study raises complex legal questions. The duty to protect under human rights law is a positive obligation of a State to protect the individual against harmful actions by private persons.¹¹² There is an obligation of the State to secure a person’s rights by putting in place effective legislation to guarantee the effective realization of a person’s rights under the Convention.¹¹³ Secondly, there is a positive obligation on the executive authorities to take preventative measures, for instance, to protect an individual whose life is endangered by criminal acts of others.¹¹⁴ Thirdly, the duty to protect may also require proper adjudication.¹¹⁵ The European Court of Human Rights has said on a number of occasions that positive obligations require an effective independent judicial system.¹¹⁶ Finally, there is a duty to investigate under certain circumstances. In relation to the duty to investigate the Study refers to cases in which individuals probably died in custody through an allegedly unlawful killing by state agents.¹¹⁷ However the European Court’s jurisprudence also extends the duty to investigate to cases in which it is not clear whether the State was involved in the disappearance. When State organs receive information on the disappearance of a person the duty to investigate arises even if the State has not been responsible or involved in the disappearances.¹¹⁸ The extensive jurisprudence of the European Court of Human Rights on positive

¹⁰⁹ *Study*, Vol I, Rule 104, 379.

¹¹⁰ See Report of the UN Secretary-General, *supra* note 9, p. 2.

¹¹¹ *Study*, Vol. I, 379: ‘Family life must be respected as far as possible’. Again in the commentary reference is made to the limitation clause contained in Art. 8 para 2 ECHR.

¹¹² *Young, James and Webster v The United Kingdom*, 44 Eur.Crt.H.R. (ser. A) (1980), para. 49; *X and Y v The Netherlands*, 91 Eur.Crt.H.R. (ser. A) (1985), para. 23; *Plattform “Ärzte für das Leben” v Austria*, 139 Eur.Crt.H.R. (ser. A) (1988), para. 32.

¹¹³ Krieger, *supra* note 2, 185.

¹¹⁴ *Akoc v Turkey*, 2000-X Eur.Crt.H.R. 389, para. 78; *Osman v Turkey*, 1998-VIII Eur.Crt.H.R. 3124, para. 115; *Kilic v Turkey*, 2000-III Eur.Crt.H.R. 75, para. 63; *Mahmut Kaya v Turkey*, 2000-III Eur.Crt.H.R. 149, para. 86; *Paul und Audrey Edwards v The United Kingdom*, 2002-II Eur.Crt.H.R. 137, para. 55; *Mastromatteo v Italy*, 2002-VIII Eur.Crt.H.R. 151, paras. 67ff.

¹¹⁵ *Velosa Barreto*, 334 Eur.Crt.H.R. (ser. A) (1995), paras. 23 and 26; *VGT Verein gegen Tierfabriken v Switzerland*, 2001-VI Eur.Crt.H.R. 243, paras. 45-47.

¹¹⁶ *Vo v France*, Eur.Crt.H.R., judgment of 8 July 2004, para. 90, available at <http://www.echr.coe.int>.

¹¹⁷ *Study*, Vol. II, 2099ff.

¹¹⁸ *Ergi v Turkey*, 1998-IV Eur.Crt.H.R. 1778, para. 82; *Yasa v Turkey*, 1998-VI Eur.Crt.H.R. 2411, para. 100; *Tanrikulu v Turkey*, 1999-IV Eur.Crt.H.R. para. 103; *Salam v Turkey*, 2000-VII Eur.Crt.H.R., para. 105; *Tanli v Turkey*, 2001-III Eur.Crt.H.R. 211, para. 149; *Ulku Ekinci v Turkey*, Eur.Crt.H.R. App. No. 27602/95, judgment of 16 July 2002, para. 144; *Tepe v Turkey*, Eur.Crt.H.R. App. No. 27244/95, Judgment of 9 May 2003, para. 177.

obligations raises the question whether the extraterritorial application of human rights in situations of armed conflict leads to the application of all dimensions of human rights protection. Are the armed forces in an occupied territory only responsible for acts they have committed themselves or do individuals have a right to ask for their protection?¹¹⁹

In order to define respect for family life the Study refers to positive obligations when it cites the case of *B v the United Kingdom*¹²⁰ and *Vermeire v Belgium*¹²¹ in which the Court found that an illegitimate child may not be discriminated against. The reference brings up the issue whether human rights law might oblige an occupying power not to apply certain rules of the local legal order or even to change the local legal order. Under the European Convention individuals may successfully raise a complaint that a failure to legislate properly violates their human rights.¹²² However, humanitarian law, especially Article 64 Geneva Convention IV and Art. 43 Hague Convention on the Laws and Customs of War on Land will override human rights obligations in this respect, although the law of occupation itself can be transformative in this respect. Thus, it is arguable that the occupying power must not apply rules which infringe public international law in general and the *ius cogens* core of human rights law in particular.¹²³ Here, human rights law can complement an evolving interpretation of humanitarian law.

On a more general level one might argue that only the duty to refrain is fully valid while an unrestricted application of positive obligations could exceed the obligations of an occupying power under humanitarian law. After all the responsibility for the general security situation will depend on the whole legal framework of troop deployment which includes UN Resolutions, Status-of-Force agreements and the national governments consent at least in cases of international administration of a territory.¹²⁴ On the other hand, the European Court of Human Rights stated in the *Banković* case that human rights obligations cannot be tailored according to circumstance but in principle apply in their entirety.¹²⁵

When developing positive obligations the European Court has increasingly emphasised the interplay between the substance of a particular human right and the State's general obligation under Art. 1 of the European Convention to secure 'to everyone within their jurisdiction the rights and freedoms defined in this Convention'.¹²⁶ Therefore one must assume that all dimensions of human rights protection will be applicable when a Member State's jurisdiction is established subject to two limitations: First, as far as the duty to protect the individual against harmful actions by private persons is concerned, States enjoy a wide margin of appreciation in their choice of methods.¹²⁷ Second, the choice of methods is limited by specific obligations included in the humanitarian law of military occupation which restrict the permissible actions of an occupying power, such as Art. 54 Geneva Convention IV according to which the Occupying Power may not alter the status of public officials or judges in the occupied territories.¹²⁸ In many other cases humanitarian law and positive human rights obligations will reinforce each other. Art. 43 Hague Convention on the Laws and Customs of War on Land also requires the occupying power to insure, as far as possible, public order and safety. Consequently, the obligation to protect civilians especially against all acts of violence according to Art. 27 Geneva Convention IV can be

¹¹⁹ See Lorenz, *supra* note 4, p. 187ff.

¹²⁰ *B v United Kingdom*, 121 Eur.Crt.H.R. (ser. A) (1987), paras. 60ff.

¹²¹ *Vermeire v Belgium*, 214-C Eur.Crt.H.R. (ser. A) (1991), para. 25.

¹²² *X and Y v The Netherlands*, 91 Eur.Crt.H.R. (ser. A) (1985), para. 23.

¹²³ Gasser in Fleck, *supra* note 6, No. 547.

¹²⁴ Ratner, *supra* note 7, 703.

¹²⁵ *Banković et.al. v Belgium et.al.*, 2001-XII Eur.Crt.H.R. para. 75.

¹²⁶ See *Young, James and Webster v the United Kingdom*, 44 Eur. Ct. H.R. (ser. A) (1980), para. 49; *Gustafsson v Sweden*, 1996-II Eur. Ct. H.R. 637, para. 45.

¹²⁷ Krieger, *supra* note 2, pp. 186,190.

¹²⁸ See on the question whether the political, institutional and economic reforms in Iraq can be reconciled with the demands of the law of military occupation: Conor McCarthy, 'The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq' (2005) 10 *Journal of Conflict and Security Law* 43.

interpreted in the light of human rights jurisprudence on the duty to protect. Likewise the duty to investigate cases in which individuals probably died in custody through an allegedly unlawful killing by state agents will be fully applicable. After all Sect. V Geneva Convention requires the occupying power to provide information concerning protected persons. Thus, the High Court of Justice in the case of *Al Skeini* found that once jurisdiction is established the procedural duty to investigate is fully applicable even in the context of a military occupation. The security situation cannot displace the investigative duty.¹²⁹

III. DIFFERENCES IN CONTEXT

Although the Study demonstrates that humanitarian law and human rights law can complement each other, especially when it comes to fundamental guarantees applicable ‘at all times’,¹³⁰ it cannot be ignored that European human rights jurisprudence has so far been developed by Courts in order to be applied in democratic States under the rule of law as a yardstick for regular governmental activity. Even though it may be agreed that human rights law also applies in armed conflicts, jurisprudence has so far only rarely dealt with such circumstances, the Turkish cases in Northern Cyprus and in relation to the PKK being a notable exception.

Moreover, the legal techniques of human rights law are context based because within limitation clauses the principle of proportionality is applied. The application of the principle of proportionality depends on a norm’s context and the particular facts of the case. What is not proportionate in the circumstances of a democratic State under the rule of law may be in an ongoing belligerent occupation. The jurisprudence of the Human Rights Chamber for Bosnia Herzegovina, for instance, which had to apply the standards of the ECHR to Bosnia demonstrates the difficulty of applying the same standards in a postwar society and a democratic society, let alone a case of belligerent occupation.¹³¹ Rules on the deprivation of liberty can probably not be the identical when a person is arrested by police forces in Germany or by KFOR in Kosovo. In situations such as Kosovo the armed forces do not exercise governmental power under the rule of law but they are part of the effort to create the rule of law.

In a case concerning the extraterritorial applicability of the German Constitution’s fundamental rights, the German Constitutional Court stressed that these rights will not be applicable to their full extent when applied abroad. The Court accepted that fundamental rights only produce reduced effects (*verminderte Wirkkraft*) outside their sphere of regular application.¹³² The rationale can be applied in the context of international human rights law, too. Thus, it seems inappropriate to apply the findings of human rights jurisprudence to their full extent to the situation of armed conflict.

The *Study* cites numerous cases, especially in relation to fair trial guarantees, which all come from the context of normal government functions under the rule of law. The procedural requirements of rule 99 ‘arbitrary deprivation of liberty is prohibited’ are entirely based on human rights law.¹³³ This makes the case for a customary international humanitarian law rule weaker. Nonetheless, on an abstract level most of the findings seem pertinent in order to define fundamental procedural requirements. The obligations include the duty to inform a person who is arrested of the reason for arrest and to bring a person arrested on a criminal charge promptly before a judge. Thus, the *Study* cites relevant case law on the

¹²⁹ High Court of Justice, *Al Skeini v. The Secretary of State for Defence*, 2004 EWHC 2911 (Admin), paras. 318ff., at 324; see also *Ergi v Turkey*, 1998-IV Eur.Crt.H.R. 1778, para. 85.

¹³⁰ Doswald-Beck, *supra* note 8, 497.

¹³¹ Dietrich Rauschnig, ‘Umfang und Grenzen des Menschenrechtsschutzes durch die Human Rights Chamber für Bosnien-Herzegowina’ in Klaus Dicke et al. (eds.), *Weltinnenrecht* (Berlin: Dunker & Humblot, 2005), 551, at 560 and 564ff.

¹³² Decision of the German Constitutional Court, Vol. 92, 26, at 41 ff, 52ff.

¹³³ *Study*, Vol. I, Rule 99, 350.

permissible length of such a period in cases of a national emergency. On the other hand, there are also references to cases which come from the context of regular governmental activities. In the case of *Van Leer v. Netherlands*,¹³⁴ for instance, the *Study* refers to the finding that it is an infringement of Art. 5 ECHR that the detainee was not informed for ten days of a confinement order and the reasons for it.¹³⁵ A further apposite cited example¹³⁶ is the case *De Jong, Baljet and Van den Brink* in which the European Court of Human Rights held that detention without access to a court for a period exceeding six days was incompatible with Art. 5(4) ECHR.¹³⁷ What is certainly unacceptable under Dutch Law even in the context of military life may still be different in circumstance of an actual armed conflict. Particularly, temporal delays will be subject to different rules.¹³⁸

On the one hand, human rights law, because of its refined jurisprudence, is important to complement vague and undeveloped terms in humanitarian law, especially in regard to fundamental guarantees. On the other hand, concrete human rights standards depend very much on their circumstances because of the contextual techniques employed in interpretation of human rights law. They cannot readily be transferred to the situation of an armed conflict. Thus, the concrete application of the refined human rights law to interpret humanitarian law is not always as valuable as might be thought.

IV. DIFFERENCES IN STANDARDS

Finally, the *Study*'s approach gives room for the question of how far decisions of regional human rights courts are relevant for restating general customary international law. Can a decision of a regional court be a valid instrument of interpretation for a customary rule that claims general applicability? In principle, the *Study* tries to prove the existence of a particular fundamental guarantee by reference to all systems of human rights protection in order 'to make sure that there was a totality of agreement in a certain regard.'¹³⁹ This works well for defining a general rule, for instance rule 100: 'No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees.' Likewise, the more concrete definition that a fair trial affords all essential judicial guarantees is valid. Here, the commentary can refer to all human rights treaties and to the practice of UN and regional human rights bodies.¹⁴⁰ However, the more concrete the rule becomes the more its general applicability as humanitarian law rule becomes problematic. Thus, the commentary states that a number of cases 'stressed that military tribunals and special security courts must respect the same requirements of independence and impartiality as civilian tribunals.'¹⁴¹ The practice referred to includes the *Findlay* judgment of the European Court of Human Rights.¹⁴² While the judgment is very important in the context of the European *ordre public* it is at least doubtful whether it can be used to support the claim for a humanitarian law rule applicable in all times and all situations.

¹³⁴ *Van Leer v. Netherlands*, 170-A Eur.Crt.H.R. (ser. A) (1990), para. 31.

¹³⁵ *Study*, Vol. II, 2351.

¹³⁶ *Study*, Vol. II, 2354.

¹³⁷ *De Jong, Baljet and Van den Brink v the Netherlands*, 77 Eur.Crt.H.R. (ser. A) (1984), para. 58.

¹³⁸ This is the rationale of the derogation clause in the European Convention on Human Rights. While in the *Brogan* case the European Court thought that a period of more than three days of detention without appearance before a judge constituted an infringement of the Convention, the following British derogation from Art. 5 ECHR because of an emergency made a delay of up to seven days permissible; *Brogan v. United Kingdom*, 145-B Eur.Crt.H.R. (ser. A) (1988), para. 62; *Brannigan and McBride*, 258 Eur.Crt.H.R. (ser. A) (1993), para. 74.

¹³⁹ Doswald-Beck, *supra* note 9, p. 50.

¹⁴⁰ *Study*, Vol. I, 354; 355ff.

¹⁴¹ *Study*, Vol. I, 356.

¹⁴² *Findlay v United Kingdom*, 1997-I Eur.Crt.H.R. para. 75; see for its effects on the British armed forces G. R. Rubin, 'United Kingdom Military Law: Autonomy, Civilianisation, Juridification' (2002) ?? *Modern Law Review* 36, at 52ff.

For the findings of the judgment the role of the convening authority in a *Court-Martial* is decisive. The Court held that:

74. The Court observes that the convening officer, as was his responsibility under the rules applicable at the time, played a significant role before the hearing of Mr Findlay's case. He decided which charges should be brought and which type of court martial was most appropriate. He convened the court martial and appointed its members and the prosecuting and defending officers...

75. The question therefore arises whether the members of the court martial were sufficiently independent of the convening officer and whether the organisation of the trial offered adequate guarantees of impartiality... It is noteworthy that all the members of the court martial, appointed by the convening officer, were subordinate in rank to him. Many of them, including the president, were directly or ultimately under his command ... Furthermore, the convening officer had the power, albeit in prescribed circumstances, to dissolve the court martial either before or during the trial ...

76. In order to maintain confidence in the independence and impartiality of the court, appearances may be of importance. Since all the members of the court martial which decided Mr Findlay's case were subordinate in rank to the convening officer and fell within his chain of command, Mr Findlay's doubts about the tribunal's independence and impartiality could be objectively justified ...

77. In addition, the Court finds it significant that the convening officer also acted as 'confirming officer'. Thus, the decision of the court martial was not effective until ratified by him, and he had the power to vary the sentence imposed as he saw fit ... This is contrary to the well-established principle that the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of 'tribunal' and can also be seen as a component of the 'independence' required by Article 6 para. 1 [ECHR].

The system which the European Court of Human Rights considered to be an infringement of Art. 6 para. 1 ECHR is more or less still applied in the military law of the United States. The military law systems of the United States and the United Kingdom share the same historical roots.¹⁴³ In the United States the convening authority creates a court-martial by assigning members to the court and referring charges to it (Articles 22-24 Uniform Code of Military Justice).¹⁴⁴ Until the commander who convened the Court-Martial affirms the court's actions the findings and sentence do not take effect (Art. 57 (c), 60 UCMJ).¹⁴⁵ The principle legality of this procedure has so far not been contested by courts in the US. American legal literature considers the process as 'heavily weighted in favour of the defendant because

¹⁴³ Frederic Lederer and Barbara Hundley-Zeliff, 'Needed: An Independent Military Judiciary. A Proposal to Amend the Uniform Code of Military Justice' in Eugene Fidell/Dwight Sullivan (eds.), *Evolving Military Justice* (Annapolis: Naval Institute Press, 2002) 27, at 31; see *Parker v. Levy*, 417 U.S. 733 (1974).

¹⁴⁴ Lederer and Hundley Zeliff, *supra* note 17, 30; Charles Shanor and Lynn Hogue, *Military Law in a Nutshell* (St. Paul (Minn.): West Publishing Co, 1996), p. 126.

¹⁴⁵ Art. 60 (c)(1) UCMJ: "The authority under this section to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority... (2) Action on the sentence of a court-martial shall be taken by the convening authority ... The convening authority or other person taking such action, in his sole discretion, may approve, disapprove, commute, or suspend the sentence in whole or in part. (3) Action on the findings of a court-martial by the convening authority or other person acting on the sentence is not required. However, such person, in his sole discretion, may - (A) dismiss any charge or specification by setting aside a finding of guilty thereto; or (B) change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification. (d) Before acting under this section on any general court-martial case or any special court-martial case that includes a bad-conduct discharge, the convening authority or other person taking action under this section shall obtain and consider the written recommendation of his staff judge advocate or legal officer.

reductions of sentences by convening authorities are common.¹⁴⁶ The European Court of Human Rights rejected the same argument in its jurisprudence.¹⁴⁷ The divergent approach can be explained by particularities of the American Constitution and the position of military law in the American legal order. The American Constitution provides for judicial independence in Article III Sect. 1 of the Constitution. However, military courts are not considered to be courts under Article III of the Constitution. Consequently, the rules for military tribunals may derogate from the general principle.¹⁴⁸

Although it might be argued that standards comparable to the *Findlay* judgment exist under Art. 14 ICCPR¹⁴⁹ the UN Human Rights Committee has so far not rendered a concrete decision in this respect. The application of judgments such as the *Findlay* judgement which are rooted in the European *ordre public* makes the *Study* susceptible to American criticism that it tries to enforce a set of norms which would not bind the United States under humanitarian treaty law.¹⁵⁰ Any application of human rights law standards must therefore be very careful not to generalize valuable regional standards on the international level as a means to interpret humanitarian law lest such an approach weakens the universality of humanitarian law itself.

E. SIMILAR YET SEPARATE

The *Study* successfully demonstrates how human rights law can complement and reinforce humanitarian law and helps to interpret some of its rules. In the words of the International Court of Justice ‘some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law’ with international humanitarian law as the *lex specialis*.¹⁵¹ Such an application of human rights law is attractive. It is generally accepted that actions of democratic States are legitimised by their adherence to human rights law. So a sphere of governmental action where human rights law did not apply at all seems strange nowadays. Even if a government is persuaded of the legitimacy of an occupation or its support for the military component of the international administration of a foreign territory, occupation and military presence may be subject to severe criticism of their legitimacy. This is particularly troublesome if democratic governments adhere to human rights law and the rule of law at home but apply different standards abroad.¹⁵² Moreover, the inhabitants of an occupied or administrated territory are likely to invoke their human rights against occupying states. In contrast to humanitarian law, human rights law provides the individual with direct means to ask for redress for violations of his or her rights. In view of the human rights bodies’ jurisprudence on extraterritorial application of human rights treaties these means for redress offer huge advantages in comparison with humanitarian law.¹⁵³

¹⁴⁶ Shanor and, Hogue *supra* note 17, p. 171; for criticism see Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice May 2001, 7ff; see <http://www.nimj.org>.

¹⁴⁷ *Van de Hurk v the Netherlands*, 288 Eur.Crt.H.R. (ser. A) (1994), paras. 45 and 50; *Findlay v United Kingdom*, 1997-I Eur.Crt.H.R. paras. 52 and 77; *Cooper v United Kingdom*, 2003-XII Eur.Crt.H.R. para. 128.

¹⁴⁸ Lederer and Hundley, *supra* note 17 27, at 31.

¹⁴⁹ Thus it has been argued that the structure of the US Military Commissions established after 11 September reveals similarities with the court-martials in the British cases and that the dominant role of the appointing authority is incompatible with the exigencies of Art. 14 para. 1 ICCPR; Jeanine Bucherer, *Die Vereinbarkeit von Militärgerichten mit dem Recht auf ein faires Verfahren gemäß Art. 6 Abs. 1 EMRK, Art. 8 Abs. 1 AMRK und Art. 14 Abs. 1 des UN-Paktes über bürgerliche und politische Rechte*, (Berlin: Springer Verlag, 2005).

¹⁵⁰ Malcolm Maclaren and Felix Schwendimann, ‘An Exercise in the Development of International Law: The New ICRC *Study* on Customary International Law’ (2005) 6 *German Law Journal*, 1217, at 1237-1238.

¹⁵¹ I.C.J., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, para. 106.

¹⁵² Ratner, *supra* note 7, 704.

¹⁵³ Lorenz, *supra* note 4, p. 227ff.

In Kosovo, for instance, there is still no judicial or quasi-judicial review mechanism for inhabitants through which they can raise their claims against the international administration under human rights law.¹⁵⁴ Acts by UNMIK and by KFOR forces cannot be challenged in courts. Inhabitants can only address an Ombudsperson.¹⁵⁵ Since human rights violations through acts of KFOR and UNMIK occur, the issue of human rights protection in Kosovo was put on the agenda of the Parliamentary Assembly of the Council of Europe.¹⁵⁶ A solution might have been to extend the competence of the European Court of Human Rights to Kosovo. Since such an approach would have been legally difficult and politically doubtful, the Parliamentary Assembly asked the Venice Commission of the Council of Europe for its advice.¹⁵⁷ The Venice Commission suggested as an interim solution that UNMIK and KFOR establish advisory panels which inhabitants can address.¹⁵⁸ The Kosovo example demonstrates that human rights and their enforcements mechanisms can no longer be excluded from situations of armed conflict. Their fundamental function as instruments of legitimization increasingly calls for their application even in the context of an occupation of foreign territory or of an international administration of a foreign territory.

On the other hand, the *Study* also demonstrates where the traps in applying human rights law to situations of armed conflicts lie. Since the concrete standards of the human rights bodies' findings depend very much on the circumstances of the case before them because of the techniques employed to interpret human rights law its applicability in armed conflict is restricted. The basic difference between human rights law limiting regular governmental activities vis-à-vis the individual and humanitarian law applicable to the extraordinary circumstance of war prevails. To completely ignore this difference is not only problematic when human rights are used to interpret humanitarian law. It may also have repercussions on human rights law itself.

In this respect even the approach of the European Court of Human Rights might turn out to be problematic. The Court's jurisprudence in cases of internal armed conflicts will only be effective if human rights law takes into account the specific circumstances of that conflict. The Court must apply the broad principles of human rights law to the conduct of hostilities. So far the Court has applied, *mutatis mutandis*, the same basic rules to a law enforcement action, such as the *McCann* situation, as to the conduct of hostilities through aerial bombardment in a high-intensity conflict.¹⁵⁹ But the Court may not categorically prohibit killing of insurgents or civilians in the context of armed conflict. It must specify when a civilian may lawfully be killed as a consequence of a military operation. The Court must convincingly base its findings on the regular legal standards of human rights law.¹⁶⁰ It is possible that the extension of regular human rights jurisprudence to extraordinary situations, where a State has not derogated from the Convention, might in turn have an impact on regular human rights jurisprudence. The adoption of regular standards to the extraordinary situation might in the end change the standards of the regular situation. There is a danger inherent in such an approach. The Court may not be able to confine the exceptional character of its jurisprudence on armed conflicts. Once jurisprudence which allows for killing of innocent civilians is introduced into a legal order it might spread so that gradually

¹⁵⁴ Georg Nolte, 'Towards a Human Rights Mechanism for Kosovo: The Proposals of the Venice Commission of the Council of Europe' in Pierre-Marie Dupuy et. al. (eds.), *Festschrift für Christian Tomuschat* (Kehl: Engel Verlag, 2006), in print.

¹⁵⁵ See UNMIK/REG/2000/38 on the Establishment of the Ombudsperson in Kosovo, at: <http://www.unmikonline.org/regulations/index.htm>.

¹⁵⁶ See European Commission for Democracy through Law (Venice Commission), Opinion (no. 280/2004) on Human Rights in Kosovo – Possible Establishment of Human Rights Mechanism (CDL AD 2004/033), at paras. 24-60 available at: [http://www.venice.coe.int/docs/2004/CDL-AD\(2004\)033-e.asp](http://www.venice.coe.int/docs/2004/CDL-AD(2004)033-e.asp); Ombudsperson Institution in Kosovo, Fourth Annual Report 2003 – 2004, 12 July 2004, available at: <http://www.ombudspersonkosovo.org/>.

¹⁵⁷ Venice Commission, Human Rights in Kosovo, *supra* note 19, para 2.

¹⁵⁸ Venice Commission, Human Rights in Kosovo, *supra* note 19, paras. 113-141.

¹⁵⁹ *Isayeva v Russia*, App.No. 57950/00, Eur.Crt.H.R., judgment of 24 February 2005, paras. 175, 199, 209.

¹⁶⁰ Abresch, *supra* note 2, 750.

the idea that the state might lawfully kill innocent civilians for security reasons becomes part of human rights law.

In the end, the question which rule prevails within a society, in this case human rights law or humanitarian law, depends on value decisions. It cannot be solved by legal techniques alone but depends on the value which a particular set of rules holds within a society. Because of the importance which democratic societies attach to human rights law it is likely that human rights law, despite the problems which are involved with its application will play a more and more important role in the context of armed conflicts.