

# INTERNATIONAL LEGAL PROTECTION OF **HUMAN RIGHTS IN ARMED CONFLICT**



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## INTRODUCTION

In recent decades, armed conflict has blighted the lives of millions of civilians. Serious violations of international humanitarian and human rights law are common in many armed conflicts. In certain circumstances, some of these violations may even constitute genocide, war crimes or crimes against humanity.

In the past 20 years, Governments, rebels, politicians, diplomats, activists, demonstrators and journalists have referred to international humanitarian law and human rights in armed conflicts. They are regularly referred to in United Nations Security Council resolutions, in United Nations Human Rights Council discussions, in political pamphlets of opposition movements, in reports of non-governmental organizations (NGOs), in the training of soldiers and in diplomatic discussions. International human rights law and international humanitarian law are now important parameters for many military commanders, advised on the ground by lawyers. Finally, they are often referred to by defence lawyers and prosecutors in international and—to a still limited extent—domestic tribunals, and form the basis for well-reasoned verdicts.

International human rights law and international humanitarian law share the goal of preserving the dignity and humanity of all. Over the years, the General Assembly, the Commission on Human Rights and, more recently, the Human Rights Council have considered that, in armed conflict, parties to the conflict have legally binding obligations concerning the rights of persons affected by the conflict. Although different in scope, international human rights law and international humanitarian law offer a series of protections to persons in armed conflict, whether civilians, persons who are no longer participating directly in hostilities or active participants in the conflict. Indeed, as has been recognized, *inter alia*, by international and regional courts, as well as by United Nations organs, treaty bodies and human rights special procedures, both bodies of law apply to situations of armed conflict and provide complementary and mutually reinforcing protection.

This publication provides a thorough legal analysis and guidance to State authorities, human rights and humanitarian actors and others on the application of international human rights law and international humanitarian law for the protection of persons in armed conflict. It addresses, in particular, the complementary application of these two bodies of law. It does not aim to cover all relevant aspects, but seeks instead to provide an overview of their concurrent application. It provides the necessary legal background and analysis of the relevant notions, in order for the reader to better understand the relationship between both bodies of law, as well as the implications of their complementary application in situations of armed conflict.

Chapter I outlines the legal framework within which both international human rights law and international humanitarian law apply in situations of armed conflict, identifying some sources of law, as well as the type of legal obligations imposed on the different parties to armed conflicts. It explains and compares the principles of both branches and also analyses who the duty bearers are of the obligations flowing from international humanitarian law and international human rights law.

Chapter II analyses the formal requirements for the concurrent application of international human rights law and international humanitarian law, particularly from the perspective of the existence of an armed conflict and its territorial scope. It also deals with their limitations in such circumstances and discusses the problems resulting from their concurrent application.

Chapter III deals with accountability and explores the legal framework determining State and individual responsibility for violations of international human rights and humanitarian law. It also presents victims' rights in the event of such violations. Finally, it gives an overview of the non-judicial forms of justice which can accompany (or in some cases be a substitute for) criminal justice.

Chapter IV examines selected United Nations practice in applying international human rights and humanitarian law in situations of armed

conflict, including practice by the Security Council, the Human Rights Council and its special procedures, the Secretary-General, and the Office of the High Commissioner for Human Rights. This chapter shows that the United Nations has a well-established practice of simultaneously applying international human rights law and international humanitarian law to situations of armed conflict, including in protection mandates for field activities, and provides numerous examples.

- INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW IN ARMED CONFLICT: LEGAL SOURCES, PRINCIPLES AND ACTORS

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International human rights law is a system of international norms designed to protect and promote the human rights of all persons. These rights, which are inherent in all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status, are interrelated, interdependent and indivisible. They are often expressed and guaranteed by law, in the form of treaties, customary international law, general principles and soft law. Human rights entail both rights and obligations. International human rights law lays down the obligations of States to act in certain ways or to refrain from certain acts, in order to promote and protect the human rights and fundamental freedoms of individuals or groups.

International humanitarian law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities, and restricts the means and methods of warfare. Its scope is, therefore, limited *ratione materiae* to situations of armed conflict. International humanitarian law is part of *ius in bello* (the law on how force may be used), which has to be distinguished and separated from *ius ad bellum* (the law on the legitimacy of the use of force). The use of force is prohibited under the Charter of the United Nations. Nevertheless, international humanitarian law has to be applied equally by all sides to every armed conflict, regardless of whether their cause is justified. This equality between the belligerents also crucially distinguishes an armed conflict, to which international humanitarian law applies, from a crime, to which only criminal law and the rules of human rights law on law enforcement apply.

For years, it was held that the difference between international human rights law and international humanitarian law was that the former applied in times of peace and the latter in situations of armed conflict. Modern international law, however, recognizes that this distinction is inaccurate. Indeed, it is widely recognized nowadays by the international community that since human rights obligations derive from the recognition of inherent rights of all human beings and that these rights could be affected both in times of peace and in times of war, international human rights law

continues to apply in situations of armed conflict. Moreover, nothing in human rights treaties indicates that they would not be applicable in times of armed conflict. As a result, the two bodies of law—international human rights law and international humanitarian law—are considered to be complementary sources of obligations in situations of armed conflict. For example, the Human Rights Committee, in its general comments Nos. 29 (2001) and 31 (2004), recalled that the International Covenant on Civil and Political Rights applied also in situations of armed conflict to which the rules of international humanitarian law were applicable.<sup>1</sup> The Human Rights Council, in its resolution 9/9, further acknowledged that human rights law and international humanitarian law were complementary and mutually reinforcing. The Council considered that all human rights required protection equally and that the protection provided by human rights law continued in armed conflict, taking into account when international humanitarian law applied as *lex specialis*.<sup>2</sup> The Council also reiterated that effective measures to guarantee and monitor the implementation of human rights should be taken in respect of civilian populations in situations of armed conflict, including people under foreign occupation, and that effective protection against violations of their human rights should be provided, in accordance with international human rights law and applicable international humanitarian law.

Over the past few years, the application of the rules of international human rights law and international humanitarian law to situations of armed conflict has raised a series of questions concerning the implementation of the specific protections guaranteed by both bodies of law. Their concurrent application has created confusion about the obligations of the parties to a conflict, the extent of these obligations, the standards to be applied and the beneficiaries of these protections.

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<sup>1</sup> See general comments Nos. 29 (2001) on states of emergency (art. 4), para. 3, and 31 (2004) on the nature of the general legal obligation imposed on States Parties to the Covenant, para. 11.

<sup>2</sup> See the discussion on the application of the principle of *lex specialis* in chapter II, section D, below.

In order to correctly understand the relationship between international human rights law and international humanitarian law when applied in practice to situations of armed conflict, it is thus important to put this relationship in its legal and doctrinal context. This chapter will address the main elements of this legal framework. It will concentrate firstly on identifying the main sources of both international human rights law and international humanitarian law. Secondly, it will present and compare their main underlying principles. Thirdly, this chapter will deal with the duty bearers in both.

## A. SOURCES OF INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW

While international human rights law and international humanitarian law have different historical and doctrinal roots, both share the aim of protecting all persons and are grounded in the principles of respect for the life, well-being and human dignity of the person.<sup>3</sup> From a legal perspective, both international human rights law and international humanitarian law find their source in a series of international treaties, which have been reinforced and complemented by customary international law.<sup>4</sup> Taking into account that international human rights law applies at all times—whether

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<sup>3</sup> In *Prosecutor v. Anto Furundžija*, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia emphasized that the general principle of respect for human dignity was the “basic underpinning” of both human rights law and international humanitarian law. Case No. IT-95-17/1-T, Judgement of 10 December 1998, para. 183. The Inter-American Commission on Human Rights, in *Juan Carlos Abella v. Argentina*, stated that its authority to apply international humanitarian law could be derived from the overlap between norms of the American Convention on Human Rights and the Geneva Conventions. The Commission stated that the “provisions of common article 3 are pure human rights law [...] Article 3 basically requires the State to do, in large measure, what it is already legally obliged to do under the American Convention.” Report No. 55/97, case 11.137, footnote 19.

<sup>4</sup> Customary international law is one of the main sources of international legal obligations. As indicated in the Statute of the International Court of Justice, international custom is defined as “evidence of a general practice accepted as law”. Thus, the two components in customary law are State practice as evidence of generally accepted practice, and the belief, also known as *opinio iuris*, that such practice is obligatory. See in this respect the decision of the International Court of Justice on the *North Sea Continental Shelf cases*, I.C.J. Reports 1969, p. 3.

in peace or in war—and that international humanitarian law applies only in the context of armed conflicts, both bodies of law should be applied in a complementary and mutually reinforcing way in the context of armed conflict.<sup>5</sup>

Moreover, certain violations of international human rights and humanitarian law constitute crimes under international criminal law, so other bodies of law, such as the Rome Statute of the International Criminal Court, could, therefore, also be applicable. International criminal law and criminal justice on war crimes implement international humanitarian law, but they also clarify and develop its rules. Similarly, other bodies of law, such as international refugee law and domestic law, will often also be applicable and may influence the type of human rights protections available.

## 1. International human rights law

International human rights law is reflected, *inter alia*, in the Universal Declaration of Human Rights, as well as in a number of international human rights treaties and in customary international law. In particular, the core universal human rights treaties are:

- The International Covenant on Economic, Social and Cultural Rights and its Optional Protocol;
- The International Covenant on Civil and Political Rights and its two Optional Protocols;
- The International Convention on the Elimination of All Forms of Racial Discrimination;

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<sup>5</sup> The High Commissioner has recalled that, over the years, the General Assembly, the Commission on Human Rights and, more recently, the Human Rights Council expressed the view that, in situations of armed conflict, parties to the conflict had legally binding obligations concerning the rights of persons affected by the conflict. The Council also recognized the importance and urgency of these problems. In line with recent international jurisprudence and the practice of relevant treaty bodies, the Council acknowledged that human rights law and international humanitarian law were complementary and mutually reinforcing (A/HRC/11/31, para. 5).

- The Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol;
- The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol;
- The Convention on the Rights of the Child and its two Optional Protocols;
- The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;
- The International Convention for the Protection of All Persons from Enforced Disappearance; and
- The Convention on the Rights of Persons with Disabilities and its Optional Protocol.

There is a growing body of subject-specific treaties and protocols as well as various regional treaties on the protection of human rights and fundamental freedoms. Moreover, resolutions adopted by the General Assembly, the Security Council and the Human Rights Council, case law by treaty bodies and reports of human rights special procedures, declarations, guiding principles and other soft law instruments contribute to clarifying, crystallizing and providing principled guidance on human rights norms and standards, even if they do not contain legally binding obligations per se, except those that constitute rules of international custom.<sup>6</sup>

International human rights law is not limited to the rights enumerated in treaties, but also comprises rights and freedoms that have become part of customary international law, binding on all States, including those that are

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<sup>6</sup> See, for example, resolution 60/147, by which the General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law and in which it emphasized their customary nature when it indicated that the resolution did not entail new international or domestic legal obligations but identified mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law.

not party to a particular treaty. Many of the rights set out in the Universal Declaration of Human Rights are widely regarded to have this character.<sup>7</sup> Furthermore, some rights are recognized as having a special status as peremptory norms of customary international law (*ius cogens*), which means that no derogation is admissible under any circumstance and that they prevail, in particular, over other international obligations. The prohibitions of torture, slavery, genocide, racial discrimination and crimes against humanity, and the right to self-determination are widely recognized as peremptory norms, as reflected in the International Law Commission's draft articles on State responsibility.<sup>8</sup> Similarly, the Human Rights Committee has indicated that provisions in the International Covenant on Civil and Political Rights that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of *reservations*.<sup>9</sup> The Committee added that "a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would not be." The Committee, in line with article 4 of the Covenant, has also

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<sup>7</sup> See the Human Rights Committee's observations—in its general comment No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, and in its general comment No. 29 (2001)—that some rights in the International Covenant on Civil and Political Rights also reflect norms of customary international law.

<sup>8</sup> Draft articles on responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session in 2001, reproduced in *Yearbook of the International Law Commission, 2001*, vol. II, Part II (United Nations publication, Sales No. E.04.V.17 (Part 2)).

<sup>9</sup> General comment No. 24 (1994), para. 8.

reiterated that certain rights contained in the Covenant cannot be subject to *derogation*, including article 6 (right to life), article 7 (prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent), article 8, paragraphs 1 and 2 (prohibition of slavery, slave trade and servitude), article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation), article 15 (the principle of legality in the field of criminal law, i.e., the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty), article 16 (the recognition of everyone as a person before the law), and article 18 (freedom of thought, conscience and religion).<sup>10</sup> The Committee on the Elimination of Racial Discrimination, in its Statement on racial discrimination and measures to combat terrorism, has confirmed that the prohibition of racial discrimination is a norm of *ius cogens*.<sup>11</sup>

The jurisprudence of the International Court of Justice, which the Court's Statute recognizes as a subsidiary means for the determination of rules of law, is increasingly referring to States' human rights obligations in situations of armed conflict.<sup>12</sup> These decisions have provided further clarification on issues such as the continuous application of international human rights law in situations of armed conflict.

In the context of the implementation of human rights obligations, the human rights treaty bodies established to monitor the implementation of core human rights treaties, such as the Human Rights Committee or the Committee on Economic, Social and Cultural Rights, regularly provide

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<sup>10</sup> General comment No. 29 (2001), para. 7.

<sup>11</sup> *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 18 (A/57/18)*, chap. XI, sect. C, para. 4.

<sup>12</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p. 136; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment*, I.C.J. Reports 2005, p. 168.

general comments, which interpret and clarify the content and extent of particular norms, principles and obligations contained in the relevant human rights conventions.

## 2. International humanitarian law

International humanitarian law is a set of rules that seek to limit the effects of armed conflict on people, including civilians, persons who are not or no longer participating in the conflict and even those who still are, such as combatants. To achieve this objective, international humanitarian law covers two areas: the protection of persons; and restrictions on the means and the methods of warfare.

International humanitarian law finds its sources in treaties and in customary international law. The rules of international humanitarian law are set out in a series of conventions and protocols. The following instruments form the core of modern international humanitarian law:

- The Hague Regulations respecting the Laws and Customs of War on Land;
- The Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;
- The Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;
- The Geneva Convention (III) relative to the Treatment of Prisoners of War;
- The Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War;
- The Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts (Protocol I); and
- The Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

The Hague Regulations are generally considered as corresponding to customary international law, binding on all States independently of their acceptance of them. The Geneva Conventions have attained universal ratification. Many of the provisions contained in the Geneva Conventions and their Protocols are considered to be part of customary international law and applicable in any armed conflict.<sup>13</sup>

Other international treaties dealing with the production, use and stockpiling of certain weapons are also considered part of international humanitarian law, insofar as they regulate the conduct of armed hostilities and impose limitations on the use of certain weapons. Some of these conventions are:

- The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction;
- The Convention on Cluster Munitions;
- The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction;
- The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction;
- The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects; and
- The Treaty on the Non-Proliferation of Nuclear Weapons.

The International Committee of the Red Cross (ICRC) has a special role under international humanitarian law. The Geneva Conventions stipulate that it will visit prisoners, organize relief operations, contribute to family reunification and conduct a range of humanitarian activities during international armed conflicts. They also allow it to offer these services

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<sup>13</sup> For a detailed analysis of customary rules of international humanitarian law, see International Committee of the Red Cross, *Customary International Humanitarian Law*, by Jean-Marie Henckaerts and Louise Doswald-Beck (Cambridge University Press, 2005).

in non-international armed conflicts. The International Committee of the Red Cross has a recognized role in the interpretation of international humanitarian law and is charged with working towards its faithful application in armed conflicts, taking cognizance of breaches of that law and contributing to the understanding, dissemination and development of the law.<sup>14</sup>

## B. PRINCIPLES OF INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW

Human rights are rights inherent in all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. These rights are all interrelated, interdependent and indivisible. They are often expressed and guaranteed by legal norms, in the form of treaties, customary international law, general principles and other sources of international law. International human rights law lays down the obligations of States to act in certain ways or to refrain from certain acts, in order to promote and protect the human rights and fundamental freedoms of individuals or groups.

Human rights entail both rights and obligations. States assume obligations under international law to respect, protect and fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups from human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of human rights. As individuals, we are all entitled to human rights, but each of us should also respect the human rights of others.

International humanitarian law limits the use of violence in armed conflicts to spare those who do not or who no longer directly participate

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<sup>14</sup> See Statutes of the International Red Cross and Red Crescent Movements, art. 5.2 (c) and (g). For additional detail on the “guardian” function of ICRC, see Y. Sandoz, “The International Committee for the Red Cross as guardian of international humanitarian law”, 31 December 1998. Available from [www.icrc.org](http://www.icrc.org).

in hostilities, while at the same time limiting the violence to the extent necessary to weaken the military potential of the enemy. Both in limiting the violence and in regulating the treatment of persons affected by armed conflict in other respects, international humanitarian law strikes a balance between humanity and military necessity. While on the face of it, the rules of international human rights law and international humanitarian law are very different, their substance is very similar and both protect individuals in similar ways. The most important substantive difference is that the protection of international humanitarian law is largely based on distinctions—in particular between civilians and combatants—unknown in international human rights law.

## 1. Protected rights

International humanitarian law is traditionally formulated in terms of objective rules of conduct for States and armed groups, while international human rights law is expressed in terms of subjective rights of the individual vis-à-vis the State. Today, an increasing number of rules of international humanitarian law, in particular fundamental guarantees for all persons in the power of a party to a conflict and rules of international humanitarian law in non-international armed conflict, are formulated in terms of subjective rights, e.g., the right of persons whose liberty has been restricted to receive individual or collective relief or the right of families to know the fate of their relatives. Conversely, subjective rights have been translated by United Nations General Assembly resolutions into rules of conduct for State officials. For instance, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990, provide an authoritative interpretation of the principles authorities must respect when using force in order not to infringe the right to life, and they direct, *inter alia*, law enforcement officials to “give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious

harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident."

When comparing norms of international human rights law and international humanitarian law, it becomes apparent that the latter protects only some human rights and only to the extent that they are particularly endangered by armed conflicts, and is not, as such, incompatible with the very existence of an armed conflict. Thus, the right to social security, the right to free elections, freedom of thought or the right to self-determination are not covered by international humanitarian law. In a number of situations, its rules could be, on the limited issues they deal with, more adapted to the specific problems arising in armed conflicts. Moreover, while the rules of international humanitarian law on the treatment of persons who are in the power of the enemy may be understood as implementing their human rights, taking military necessity and the peculiarities of armed conflicts into account, certain rules on the conduct of hostilities deal with issues not addressed by human rights, e.g., who may directly participate in hostilities and how such persons must distinguish themselves from the civilian population, or the rights and identification of medical personnel.

International humanitarian law provides for the protection of a number of civil and political rights (e.g., the right to life of enemies placed hors de combat or judicial guarantees), economic, social and cultural rights (e.g., the right to health and the right to food) and group rights (e.g., the right to a healthy environment). This is particularly evident concerning the wounded and the sick, who must be respected, protected, collected and cared for.

## **2. Modes of protection**

International human rights law imposes obligations to respect, protect and fulfil that stretch across all human rights. These three terms make it possible to determine whether international human rights obligations have been violated. While these terms have not traditionally been used

in international humanitarian law, the obligations resulting from its rules may be split up into similar categories. Since States have obligations to do something (positive obligations) or to abstain from doing something (negative obligations) under both branches, they can be responsible for a violation of international human rights and humanitarian law through action, omission or inadequate action. In international humanitarian law they have an explicit obligation to respect and to ensure respect.

In international human rights law, the obligation to respect requires States not to take any measures that would prevent individuals from having access to a given right. For instance, the right to adequate food is primarily to be realized by rights holders themselves through their economic and other activities. States have a duty not to unduly hinder the exercise of those activities. This obligation to respect stemming from human rights law is applicable in both natural and man-made disasters. Similarly, the obligation to respect the right to adequate housing means that Governments must abstain from carrying out or otherwise advocating the forced or arbitrary eviction of persons or groups. States must respect people's rights to build their own dwellings and govern their environments in a manner which most effectively suits their culture, skills, needs and wishes. Many prohibitions in international humanitarian law, e.g., of physical and moral coercion exercised against protected civilians and prisoners of war, of violence to life and person directed against persons taking no active part in the hostilities, of the requisition of foodstuffs and hospitals in occupied territories, of attacks against objects indispensable for the survival of the civilian population, function in a similar way.

As part of the obligation to protect, States must prevent, investigate, punish and ensure redress for human rights violations committed by third parties, e.g., private individuals, commercial enterprises or other non-State actors. In this respect, the Human Rights Committee has recalled that "the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment

of Covenant rights insofar as they are amenable to application between private persons or entities.”<sup>15</sup> In international humanitarian law too, States must protect prisoners, e.g., from public curiosity, maintain law and order in occupied territories, and protect women from rape. Under the obligation to take precautions against the effects of attacks by the enemy, they must even take measures, to the maximum extent feasible, to protect their own civilian population, e.g., by endeavouring to keep military objectives and combatants away from densely populated areas.

States also have an obligation to fulfil, for instance, by taking legislative, administrative, budgetary, judicial and other steps towards the full realization of human rights. This obligation may be realized incrementally or progressively in relation to economic, social and cultural rights,<sup>16</sup> and includes the duties to facilitate (increase access to resources and means of attaining rights), provide (ensure that the whole population may realize its rights if it is unable to do so on its own) and promote that right. For example, the Committee on Economic, Social and Cultural Rights has indicated that the obligation to fulfil the right to work includes the implementation by States parties of plans to counter unemployment, to take positive measures to enable and assist individuals to enjoy the right to work, to implement technical and vocational education plans to facilitate access to employment, and to undertake, for example, educational and informational programmes to instil public awareness of the right to work.<sup>17</sup>

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<sup>15</sup> General comment No. 31 (2004), para. 8.

<sup>16</sup> The Committee on Economic, Social and Cultural Rights, in general comment No. 3 (1990) on the nature of States parties obligations, has indicated that “while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant” (para. 2). Moreover, the Committee indicated that the progressive realization of economic, social and cultural rights “differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the [International] Covenant [on Economic, Social and Cultural Rights] should not be misinterpreted as depriving the obligation of all meaningful content” (para. 9).

<sup>17</sup> General comment No. 18 (2005) on the right to work, paras. 26–28.

In international humanitarian law, the wounded and the sick must be collected and cared for, prisoners must be fed and sheltered, and an occupying Power must to the fullest extent of the means available to it ensure food and medical supplies, public health and hygiene in a territory it occupies.

The Committee on Economic, Social and Cultural Rights, referring to the right to food, has demonstrated how these three principles apply in practice. It has stated that “the right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to *respect*, to *protect* and to *fulfil*. In turn, the obligation to *fulfil* incorporates both an obligation to *facilitate* and an obligation to *provide*. The obligation to *respect* existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to *fulfil (facilitate)* means the State must proactively engage in activities intended to strengthen people’s access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfil (provide)* that right directly.”<sup>18</sup>

An example of the interaction of the three modes of protection in international humanitarian law is provided by the obligations of belligerents towards the education system of the adverse party. Schools may not be attacked; they are presumed not to make an effective contribution to military action. Once under the control of the enemy, in an occupied territory, their proper working must be facilitated by the occupying Power and, in the last resort, should local institutions be inadequate, the occupying Power must make arrangements for the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are

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<sup>18</sup> General comment No. 12 (1999) on the right to adequate food, para. 15.

separated from their parents, and facilitate the re-establishment of family links and the reunification of families.<sup>19</sup>

### 3. The principle of distinction in international humanitarian law

Possibly the most important difference between international humanitarian law and international human rights law is that the substantive protection a person benefits from under the former depends on the category that person belongs to, while under the latter all human beings benefit from all human rights, although some human rights instruments establish and protect specific rights for specific categories of persons, e.g., children, persons with disabilities or migrants. In international humanitarian law, the protection of civilians is not the same as the protection of combatants. This difference is particularly relevant in the conduct of hostilities: there is a fundamental distinction between civilians and combatants, and between military objectives and civilian objects. Combatants may be attacked until they surrender or are otherwise hors de combat, while civilians may not be targeted, unless and for such time as they directly participate in hostilities, and they are protected by the principles of proportionality and precaution against the incidental effects of attacks against military objectives and combatants.

The difference also has an impact on the protection of persons who are in the power of the enemy. The protection of captured combatants who turn into prisoners of war is not the same under Geneva Convention III as that of protected civilians under Geneva Convention IV. In particular, the former may be interned without any individual procedure, while protected civilians may be deprived of their liberty only in the framework of criminal proceedings or upon individual decision for imperative security reasons. Among civilians in the power of a party to an international armed conflict, international humanitarian law in addition distinguishes between protected civilians (i.e., basically those of enemy nationality) and other civilians, who benefit only from more limited fundamental guarantees.

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<sup>19</sup> Protocol I, arts. 52.2 and 52.3, and Geneva Convention IV, art. 50.

In addition, the protection of protected civilians on a belligerent's own territory is more limited than in an occupied territory. International human rights law does not foresee fundamentally different rights for each category of person. It rather adapts everyone's rights to the particular needs of those categories, i.e., children, women, persons with disabilities, migrants, indigenous peoples, human rights defenders, etc.

### C. DUTY BEARERS IN INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW

International human rights law and international humanitarian law have different rules regarding the type of actors that bear responsibilities and can be bound by the law. They also contain specific provisions for the protection of persons and of specific groups of persons who are considered to be more exposed to the risk of violations, particularly in an armed conflict. Despite their differences, both bodies of law are increasingly understood as imposing obligations on both State and non-State actors, albeit in different conditions and to differing degrees.

Legal rules are addressed to the subjects of those rules.<sup>20</sup> In general, a distinction is made between duty bearers and rights holders. Duty bearers have obligations, which can be positive—an obligation to do something—or negative—an obligation to refrain from doing something. In international human rights and humanitarian law, duty bearers are bound to respect a series of positive and negative obligations. These obligations may differ, depending on whether international law recognizes a particular actor as a primary subject of international law (i.e., States and international organizations) or as a secondary subject (i.e., non-State actors). The next

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<sup>20</sup> Ian Brownlie, for instance, explains that "a subject of the law is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims". Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford, Oxford University Press, 2003), p. 57. See also *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, I.C.J. Reports 1949, p. 174.

sections will address how and to what extent different subjects of law are bound by obligations of international human rights and humanitarian law.

## 1. States

International law recognizes that in general States, together with international organizations, are the primary subjects of international law.<sup>21</sup> They acquire legal obligations by entering into international treaties and also have legal obligations deriving from customary international law.

Thus, subject to lawful reservations dealt with below, States that have ratified international humanitarian law or human rights treaties are bound by their provisions. Moreover, according to the Vienna Convention on the Law of Treaties, States that have signed but not ratified a treaty are bound to act in good faith and not to defeat its object and purpose (art. 18).

Beyond these general rules, there are some distinctions in the application of international human rights law and of international humanitarian law. International human rights law explicitly protects a very wide range of rights—from the right to be free from torture to the right to education—which can be affected, directly or indirectly, by armed conflict. These human rights obligations, whether positive or negative, apply to the State as a whole, independently from any internal institutional structure and division of responsibilities among different authorities.<sup>22</sup>

International humanitarian law is primarily, although not exclusively, addressed to States parties to an armed conflict.<sup>23</sup> The Geneva Conventions, for example, impose obligations on States and their forces participating

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<sup>21</sup> See Brownlie, *Principles of Public International Law*, pp. 58 ff., and *Reparation for Injuries*.

<sup>22</sup> The Vienna Convention on the Law of Treaties indicates that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty” (art. 27).

<sup>23</sup> See, in this respect, article 3 common to the four Geneva Conventions, which is addressed to the parties to a non-international armed conflict, including non-State armed groups.

in armed conflict and extend responsibility for violations to the direct participants and to their civilian leadership, where relevant. International humanitarian law further imposes on States the obligations to respect its rules and to protect civilians and other protected persons and property.

These legal obligations do not cease to exist when the State delegates governmental functions to individuals, groups or companies. The State is, thus, responsible for ensuring that delegated activities are carried out in full conformity with its international obligations, particularly human rights obligations.

Finally, as the primary subject of international law, the State's obligations under international human rights and humanitarian law include the duties to investigate alleged violations of international human rights and humanitarian law, and to prosecute and punish those responsible.

## **2. Non-State actors**

While international law in general has developed in order to regulate mainly the conduct of States in their international relations, international human rights law and international humanitarian law have developed specific particularities aimed at imposing certain types of obligations on others, including individuals and non-State actors. For example, recent developments in international criminal law recognize that individuals may be responsible at the international level for gross human rights violations and serious violations of international humanitarian law which amount to crimes against humanity, war crimes and genocide.

Similarly, it is generally accepted that international humanitarian law related to non-international armed conflicts, in particular the provisions contained in common article 3 of the Geneva Conventions and, when applicable, Protocol II, applies to parties to such a conflict, whether State

or non-State armed groups.<sup>24</sup> It is also recognized that rules of customary international law related to non-international armed conflicts, such as the principles of distinction and proportionality, are applicable to non-State armed groups. As mentioned above, those customary rules tend to become increasingly similar in international and in non-international armed conflicts.

Concerning international human rights obligations, the traditional approach has been to consider that only States are bound by them. However, in evolving practice in the Security Council and in the reports of some special rapporteurs, it is increasingly considered that under certain circumstances non-State actors can also be bound by international human rights law and can assume, voluntarily or not, obligations to respect, protect and fulfil human rights. For instance, the Security Council has called in a number of resolutions on States and non-State armed groups to abide by international humanitarian law and international human rights obligations.<sup>25</sup> The Special Rapporteur on extrajudicial, summary or arbitrary executions indicated in the context of his mission to Sri Lanka that “[a]s a non-State actor, the LTTE does not have legal obligations under [the International Covenant on Civil and Political Rights], but it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect

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<sup>24</sup> It should be noted that the threshold for the applicability of Protocol II to non-State armed groups is sensibly higher than that of common article 3. Article 1 of Protocol II indicates that its provisions apply to organized armed groups which, under responsible command, exercise such control over a part of a State's territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol. Article 3, on the other hand, does not contain any such condition and instead indicates that its provisions apply as minimum standards to parties to a non-international armed conflict.

<sup>25</sup> See, for example, resolution 1894 (2009), in which the Security Council, while recognizing that States bear the primary responsibility to respect and ensure the human rights of their citizens, as well as all individuals within their territory as provided for by relevant international law, reaffirms that parties to armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of civilians, and demands that parties to armed conflict comply strictly with the obligations applicable to them under international humanitarian, human rights and refugee law.

and promote human rights." Moreover, "[t]he international community does have human rights expectations to which it will hold the LTTE, but it has long been reluctant to press these demands directly if doing so would be to 'treat it like a State'."<sup>26</sup>

This approach was reiterated in a joint report on their mission to Lebanon and Israel by a group of four special procedure mandate holders. The report further indicates that "the Security Council has long called upon various groups which Member States do not recognize as having the capacity to do so to formally assume international obligations to respect human rights. It is especially appropriate and feasible to call for an armed group to respect human rights norms when it 'exercises significant control over territory and population and has an identifiable political structure'."<sup>27</sup>

Therefore, it is clear that the application of human rights standards to non-State actors is particularly relevant in situations where they exercise some degree of control over a given territory and population. Taking into account that international human rights law aims at providing rights and protections that are considered to be fundamental for the human being, non-State armed groups are increasingly called upon to observe human rights protections, albeit in a manner that is in accordance with the particular situation on the ground. Indeed, the assumption of international human rights responsibilities by non-State actors is seen as a pragmatic recognition of the realities of a conflict, without which rights holders would lose out on any practicable claim to their human rights.

As the obligations of non-State actors under international humanitarian law are well established, the following examples focus only on illustrating the principle that non-State actors can be bound under international human rights law:

<sup>26</sup> The Special Rapporteur further indicated that "[i]t is increasingly understood, however, that the human rights expectations of the international community operate to protect people, while not thereby affecting the legitimacy of the actors to whom they are addressed. The Security Council has long called upon various groups that Member States do not recognize as having the capacity to formally assume international obligations to respect human rights." See E/CN.4/2006/53/Add.5, paras. 25–27.

<sup>27</sup> A/HRC/2/7, para. 19.

- *The provisions of international human rights treaties:* article 4 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict specifically imposes some degree of obligation on armed groups. The Committee on the Rights of the Child, in its 2001 concluding observations on the Democratic Republic of the Congo, alluded to the responsibility of armed groups and private companies for violations of the Convention on the Rights of the Child in the context of the armed conflict;<sup>28</sup>
- *The practice of United Nations organs:* the Security Council has, on a number of occasions, called on all parties to a conflict, including non-State actors, to respect international humanitarian and human rights law. For example, in resolution 1564 (2004), it stressed in the preamble that "the Sudanese rebel groups [...] must also take all necessary steps to respect international humanitarian law and human rights law";
- *The practice of non-State actors:* in 2005 the Communist Party of Nepal-Maoist issued a statement welcoming the establishment of a United Nations human rights field operation in Nepal, promising United Nations personnel full access to the areas it controlled and committing itself to respecting human rights standards. The Office of the United Nations High Commissioner for Human Rights (OHCHR) later determined that the Party had not respected human rights and had acted to limit some rights. In El Salvador, the Frente Farabundo Martí para la Liberación Nacional and the Government entered into the San José Agreement on Human Rights, co-signed by the United Nations Secretary-General.

Moreover, as will be explained in the following chapter, gross violations of human rights and serious violations of humanitarian law could entail individual criminal responsibility, including for violations committed by members and leaders of non-State armed groups.

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<sup>28</sup> CRC/C/15/Add.153.

In any case, it should be recalled that, where a non-State actor is expected to observe certain human rights standards, this does not in any way lessen the State's primary responsibility to protect and fulfil human rights. In this respect, it is important to note that modern rules of State responsibility consider that, under certain circumstances, States are also responsible for acts carried out by non-State actors. For example, it has been considered that the State's responsibility could be engaged by the conduct of non-State actors when:

- The group has been empowered by the law of that State to exercise elements of the governmental authority;
- The group is in fact acting on the instructions of, or under the direction or control of, the State in carrying out the conduct;
- The group has violated international legal obligations and subsequently becomes the new Government of the State;
- The group has violated international legal obligations and subsequently succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration.<sup>29</sup>

So if a non-State actor, such as a paramilitary group, is acting in support of or as an agent of the State authorities in an armed conflict, then the State is also responsible for the actions of this armed group as an extension of its own legal obligations.

Finally, even individuals who are linked neither to the State nor to an armed group are subject to international criminal law, in particular regarding war crimes, insofar as a connection exists between their conduct and the armed conflict.

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<sup>29</sup> See *Yearbook of the International Law Commission, 2001*, vol. II, Part II, p. 26.

### 3. Peacekeeping and peace enforcement operations

The fact that States provide military personnel to operations put under the authority of the United Nations should not exonerate their personnel from observing international humanitarian law and human rights obligations. Where United Nations peacekeepers have a role as parties to an armed conflict, they should be bound by the applicable provisions of international humanitarian law in the same way as other parties to the conflict. The Secretary-General's Bulletin on observance by United Nations forces of international humanitarian law includes and summarizes many, but not all, rules of international humanitarian law and instructs United Nations forces to comply with them when engaged as combatants in armed conflicts.<sup>30</sup> The Convention on the Safety of United Nations and Associated Personnel, adopted by the United Nations General Assembly in 1994, provides that "[n]othing in this Convention shall affect: (a) [t]he applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards" (art. 20).

Regarding international human rights obligations, the Human Rights Committee has stated that "States parties are required by article 2, paragraph 1, [of the International Covenant on Civil and Political Rights] to respect and to ensure the Covenant rights [...]. This principle also applies to those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State party assigned to an international peacekeeping or peace enforcement operation."<sup>31</sup>

Taking into account that international human rights law and international humanitarian law seek to protect the fundamental rights of human beings,

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<sup>30</sup> ST/SGB/1999/13.

<sup>31</sup> General comment No. 31 (2004), para. 10. See, moreover, ST/SGB/1999/13.

the continuing application of both to States participating in United Nations peacekeeping and peace enforcement operations aims at preventing any gap in that protection. For the same reason, it is undeniable that States participating in multinational armed operations approved but not directly under United Nations command are also bound to respect international human rights and humanitarian law. This primary responsibility of the State is in no way affected by the fact that the military operations may have been approved by the United Nations, including by the Security Council under Chapter VII of the Charter of the United Nations.<sup>32</sup> It could be argued that the Security Council may derogate from obligations of international humanitarian law and international human rights law and that obligations established under such a Security Council resolution would prevail under Article 103 of the Charter.<sup>33</sup> Such derogations would, however, need to be explicit and cannot be presumed.

On the issue of whether international organizations participating in an armed conflict have human rights and international humanitarian law obligations, there is no clearly established practice. International organizations are not parties to the relevant treaties, but their member States and States contributing troops to peace operations are. In addition, it is argued that the customary law applicable in this field to international organizations is the same as that applicable to States.

While the European Court of Human Rights decided in the case of *Behrami v. France* that human rights violations can be attributed to international organizations, this decision has been highly controversial and may be revisited by the Court in a series of cases before it. In any event, it should be recalled that, as regards the United Nations, the Organization seeks to observe the highest standards of behaviour when conducting

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<sup>32</sup> It should be noted that in 2000 the International Law Commission, on the basis of the recommendation of a working group, decided to include the topic of the responsibility of international organizations in its long-term programme of work. It further decided to prepare draft articles on the responsibility of international organizations to be submitted to Member States for their consideration.

<sup>33</sup> See, for example, House of Lords, *Al-Jedda v. Secretary of State for Defence*, 12 December 2007, paras. 35 and 125.

peacekeeping operations. In this respect, the Secretary-General's Bulletin mentioned above provides some guidance on the fundamental principles and rules of international humanitarian law which apply to United Nations forces actively engaged in armed conflict as combatants, to the extent and for the duration of their engagement. Moreover, it should be borne in mind that the Charter of the United Nations recognizes the protection and promotion of human rights as one of the fundamental principles of the Organization. In more general terms, military forces acting under the authority of the United Nations are expected to apply the highest standards in relation to the protection of civilians and are also expected to investigate and to ensure accountability for violations of international human rights and humanitarian law.



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- **REQUIREMENTS, LIMITATIONS AND EFFECTS OF THE CONCURRENT APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW IN ARMED CONFLICT**

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Chapter I having covered the legal framework of international human rights law and international humanitarian law in armed conflict, chapter II will focus first on the trigger for their concurrent application, namely the existence of an armed conflict. It will also analyse the current legal understanding of their territorial scope. It will then explain how the exceptional mechanisms known as derogations and limitations as well as the use of reservations to treaties affect their applicability. Finally, it will discuss the problems resulting from their concurrent applicability.

### A. ARMED CONFLICT AS THE TRIGGER

The concurrent application of international human rights and humanitarian law can happen only when a series of objective conditions are met. International humanitarian law being essentially a body of law applicable to armed conflict, the existence of a situation amounting to an armed conflict is necessary to trigger its applicability in conjunction with international human rights law. The next sections will address the question of what an armed conflict is and what types of armed conflict international humanitarian law applies to. It should, however, be noted that a number of international humanitarian law obligations require action before a conflict begins or after a conflict ends. For example, States must provide training in international humanitarian law to their armed forces in order to prevent potential abuse; States must also encourage the teaching of international humanitarian law to the civilian population; domestic legislation must be adopted implementing its relevant provisions, including the obligation to include war crimes in domestic law; States must also prosecute persons who have committed war crimes. One category of war crimes, grave breaches of the Geneva Conventions and of Protocol I, must be prosecuted according to the principle of universal jurisdiction, i.e., independently of where the crime has been committed and of the nationality of the offender and of the victims. Thus, some violations of international humanitarian law could be established and their perpetrators punished outside the time frame and the geographical context of an actual armed conflict.

The concurrent applicability of international human rights and humanitarian law depends on the objective legal conditions required for the corresponding legal norms to apply. In this particular case of the relationship between international human rights law and international humanitarian law, it is the existence of an armed conflict that will trigger the application of the latter and, thus, of the complementary application of international human rights and international humanitarian protections. The following sections will discuss the different types of conflict as defined in conventional and customary international law and will also analyse the challenges posed by certain uses of force that do not reach the threshold of an armed conflict.

## 1. International armed conflict

Article 2 common to the Geneva Conventions states that "[i]n addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." Protocol I to the Geneva Conventions extends the situations covered by common article 2, stating that the situations to which the Protocol applies "include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination" (art. 1.4).

While the Geneva Conventions and Protocol I indicate the type of situations to which they will apply, they do not provide a clear definition of "armed conflict". The existence of an armed conflict is a precondition for the application of international humanitarian law, but the existing body of rules is not clear about the elements necessary to determine that a situation between two States has reached the threshold of an armed conflict. Indeed, common article 2 limits the scope of the Geneva Conventions to

conflicts in which one or more States have recourse to armed force against another State. The commentary to the Geneva Conventions provides further guidance when it indicates that “any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.”<sup>34</sup> Furthermore, the International Criminal Tribunal for the former Yugoslavia has stated that “an armed conflict exists whenever there is a resort to armed force between States”.<sup>35</sup>

One of the problems of the lack of a clear definition is that, for example, it is uncertain whether international humanitarian law would apply in low-intensity military confrontation, such as border incidents or armed skirmishes. International law does not provide guidance on the precise meaning of “use of force” or “armed conflict” in the context of the Charter of the United Nations and of the Geneva Conventions. While some claim that every act of armed violence between two States is covered by international humanitarian law of international armed conflicts, others consider that a threshold of intensity should be applied.<sup>36</sup>

Notwithstanding this lack of clarity, it is important to remember that, irrespective of the existence of an actual armed conflict, international human rights law continues to apply. As the hostilities unfold, international humanitarian law will be triggered and its protections and standards will complement, complete and in certain cases further clarify international human rights protections, guarantees and minimum standards.

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<sup>34</sup> Jean Pictet et al., eds., *Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary* (Geneva, ICRC, 1952), p. 32.

<sup>35</sup> *Prosecutor v. Duško Tadić*, case No. IT-94-1-A, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, para. 70.

<sup>36</sup> See, in this respect, the International Criminal Tribunal for the former Yugoslavia’s decision on Tadić’s defence motion for interlocutory appeal on jurisdiction, where the Appeals Chamber indicates that hostilities in the former Yugoslavia in 1991 and 1992 “exceed the intensity requirements applicable to both international and internal armed conflicts.” *Ibid.*

## 2. Non-international armed conflict

International humanitarian law contains two different legal frameworks dealing with non-international armed conflicts. On the one hand, article 3 common to the Geneva Conventions stipulates that "in the case of armed conflict not of an international character" a series of minimum provisions of international humanitarian law shall apply.<sup>37</sup> The Conventions do not define what "non-international armed conflict" means, but it is now commonly accepted that it refers to armed confrontations between the armed forces of a State and non-governmental armed groups or between non-State armed groups.<sup>38</sup> Protocol II to the Geneva Conventions provides that the Protocol applies to armed conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol" (art. 1).

The International Criminal Tribunal for the former Yugoslavia's Appeals Chamber has indicated that an armed conflict exists whenever there is protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. It has

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<sup>37</sup> According to common article 3, these minimum guarantees are:

"(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;  
(b) taking of hostages;  
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;  
(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for."

<sup>38</sup> See ICRC, "How is the term 'armed conflict' defined in international humanitarian law?", Opinion Paper, March 2008.

further indicated that international humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a peaceful settlement is achieved.<sup>39</sup> In the *Haradinaj* case, the Trial Chamber stated that the criterion of protracted armed violence is to be interpreted as referring more to the intensity of the armed violence than to its duration. In addition, armed groups involved must have a minimum degree of organization. The Trial Chamber summarized the indicative factors that the Tribunal has relied on when assessing the two criteria. For assessing the intensity these include "the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the [United Nations] Security Council may also be a reflection of the intensity of a conflict." On the degree of organization an armed group must have to make hostilities between that group and governmental forces a non-international armed conflict, the Tribunal has stated that an "armed conflict can exist only between parties that are sufficiently organized to confront each other with military means. [...] []Indicative factors include the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as ceasefire or peace accords."<sup>40</sup>

Similarly, ICRC proposes those two criteria of intensity of violence and organization of non-State parties as determining the lower threshold for

<sup>39</sup> *Prosecutor v. Duško Tadić*, para. 70.

<sup>40</sup> *Prosecutor v. Ramush Haradinaj et. al.*, case No. IT-04-84-T, Judgement of 3 April 2008, paras. 49 and 60.

the application of international humanitarian law of non-international armed conflicts:

- "First, the hostilities must reach a minimum level of intensity. This may be the case, for example, when the hostilities are of a collective character or when the Government is obliged to use military force against the insurgents, instead of mere police forces;
- "Second, non-governmental groups involved in the conflict must be considered as 'parties to the conflict', meaning that they possess organized armed forces. This means for example that these forces have to be under a certain command structure and have the capacity to sustain military operations."<sup>41</sup>

It should be noted that the regulations in Protocol II concerning non-international armed conflicts are narrower than those under common article 3. For example, Protocol II introduces a requirement of territorial control for non-State actors. Furthermore, while Protocol II expressly applies only to armed conflicts between State armed forces and dissident armed forces or other organized armed groups, common article 3 applies also to armed conflicts occurring only between non-State armed groups.<sup>42</sup> Moreover, Protocol II requires a command structure for non-State armed groups, which is not expressly included in common article 3.

It can be difficult to establish whether these requirements are met in a particular situation. Determining what constitutes "responsible command" is difficult as the command of an armed group might change over time. Ascertaining the exercise of control over a part of the territory is particularly complex as armed groups rarely maintain a single sustained area of operations, but may move frequently from place to place. It is

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<sup>41</sup> See ICRC, "How is the term "armed conflict" defined in international humanitarian law?"

<sup>42</sup> In this context ICRC has indicated that "Protocol II 'develops and supplements' common article 3 'without modifying its existing conditions of application'. This means that this restrictive definition is relevant for the application of Protocol II only, but does not extend to the law of [non-international armed conflicts] in general." See ICRC, "How is the term "armed conflict" defined in international humanitarian law?"

beyond the scope of this publication to examine the details of practice and jurisprudence on this issue. However, regional and international courts, ICRC and numerous academics have produced opinions that explain in some detail how these criteria may be interpreted. In any case, it should be noted that even if the stricter criteria of Protocol II are not entirely met, a situation may still be covered by common article 3 as international humanitarian law's "minimum guarantee".<sup>43</sup> As indicated above, unlike article 1 of Protocol II, common article 3 of the Geneva Conventions does not make the same references to "responsible command", "exercise of control" or "organized armed groups" and, therefore, has a significantly lower threshold of application. Under common article 3, an armed conflict could potentially exist between two armed groups, without any involvement of State forces. Common article 3 is, thus, seen as defining the lowest threshold of armed conflict, below which there is no armed conflict and international humanitarian law is not applicable.

Finally, it is important to recall, as indicated above, that in non-international armed conflicts the intensity of hostilities plays a fundamental role in triggering the application of international humanitarian law and, thus, the concurrent applicability regime. So to distinguish an armed conflict from other forms of violence, such as internal disturbances and tensions, riots or acts of banditry, the situation must reach a certain threshold of confrontation. This question is relevant because, as has already been indicated, the application of international humanitarian law can be triggered only through the existence of an armed conflict. There is, however, no specific organ or authority with special responsibility for determining whether an armed conflict is taking place or not. It is not necessary for

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<sup>43</sup> The International Court of Justice held that "article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity'." *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, para. 218.

the parties to a conflict to recognize that actual armed conflict exists. This determination must be made primarily on the basis of the situation on the ground, according to the relevant provisions of international humanitarian law. In addition, public statements by ICRC or the United Nations would be significant in determining that there is an armed conflict.

Why is it important to determine when the applicability of international humanitarian rules has been triggered? International human rights law and international humanitarian law share a number of protections and standards aimed at protecting civilians from the effects of war. Yet, because international humanitarian law gives States more leeway when they use armed force (for example, on the use of deadly force) and, according to certain States, when they detain enemies without judicial procedure (like prisoners of war in international armed conflicts), there may be a temptation to invoke rules of international humanitarian law in a situation where the threshold of armed force has *not* been reached. In those unclear cases it is essential to consider international human rights law as the only applicable legal regime, until such time that the threshold and conditions of an armed conflict have been met.

### **3. The distinction between international and non-international armed conflict in contemporary law and practice**

At various moments in history efforts have been made to remove the distinction between international and non-international armed conflicts in order to create a single body of international humanitarian law common to all situations of armed conflict. Although these efforts have not been fully successful, developments in case law, international practice and the actual character of armed conflict are de facto blurring the distinction between the two. As a result, the higher protections previously ascribed only to international armed conflicts, or only to the more formal non-international armed conflicts defined under Protocol II, are now being applied even to the category of conflict defined under common article 3.

Moreover, international human rights law has continued to expand through jurisprudence and the addition of new human rights protections in the context of armed conflict, irrespective of whether the conflict is international or non-international. The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, for instance, creates international human rights obligations regarding the recruitment and use of children in armed groups, in times of peace and in times of war, irrespective of whether an armed conflict is international or non-international. As the range of international human rights protections particularly pertinent to situations of armed conflict increases, and because international human rights law applies to both international and non-international conflict, it becomes arbitrary to exclude similar international humanitarian law protections that had previously been reserved for one category of conflict.

Finally, recent developments show a sharp increase in the number and intensity of non-international armed conflicts, as well as a growing number of United Nations peacekeeping missions and international coalitions to assist a State in an armed conflict within its own territory. All these factors have combined to render the application of traditional distinctions of international humanitarian law between international and non-international armed conflicts extremely challenging. It is, however, uncontroversial that combatant immunity against prosecution for acts of hostility not prohibited by international humanitarian law (a central feature of prisoner-of-war status in international armed conflicts) and the rules on military occupation cannot be applied by analogy to non-international armed conflicts. In addition, when bringing international humanitarian law of non-international armed conflicts closer to that of international armed conflicts, it should be kept in mind that the former also applies to non-State armed groups, which are often less able to comply with the more demanding rules of international humanitarian law of international armed conflicts.

## B. TERRITORY AND APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW

According to the traditional view, the principle of territoriality has been one of the key elements concerning the application of international human rights law and, to a lesser extent, of international humanitarian law. It was argued that those rights holders towards whom the State had the obligation to respect, protect and fulfil their human rights could be only those persons within its territory because they were directly under its jurisdiction. Thus, international human rights law was considered to be essentially territorial.

For international humanitarian law, it has generally been considered that the territorial link is less important and the obligations and protections apply whenever and wherever armed conflict is taking place. This means, for example, that a State fighting on the territory of another is bound to respect international humanitarian law in the same way as if it were fighting on its own territory.

Modern conflict has transformed this approach to international human rights law and international humanitarian law. As will be explained below, this has led to the recognition of the extraterritorial application of international human rights law. Moreover, challenges have been raised as to whether international humanitarian law remains applicable beyond the zone of actual combat.

### 1. International human rights law and the territorial element

A question that often arises is whether States are bound to comply with their international human rights obligations only on their own territory. It is uncontroversial that most human rights protect not only citizens but also foreigners. It has sometimes been contested that conventional human rights obligations bind States outside their territory. The International Covenant on Civil and Political Rights stipulates that “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in

the [...] Covenant" (art. 2.1). A restrictive interpretation of this provision considers that States cannot be held accountable for human rights violations committed outside their territory.<sup>44</sup> This interpretation, however, does not properly take into consideration the Covenant's object and purpose. In this respect, the Human Rights Committee has stated that a State party "must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party." The Committee has interpreted that rights must be available to all individuals who are in the territory or subject to the jurisdiction of the State. Moreover, it has indicated that the principle of extraterritorial protection "also applies to those within the power or effective control of the forces of a State party acting outside its territory".<sup>45</sup> This conclusion is supported by the International Court of Justice, which concluded that "the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."<sup>46</sup>

The Committee against Torture has indicated that "the State party should recognize and ensure that the Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction". The Committee defined the territory under the State party's jurisdiction in terms of all persons under the effective control of the State's authorities, of whichever type, wherever located in the world.<sup>47</sup>

The International Court of Justice also held that article 2 of the Convention on the Rights of the Child imposes obligations on States parties to each child within their jurisdiction and observed that the Convention could be applied extraterritorially.<sup>48</sup> In a later case it recalled that international

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<sup>44</sup> See, for example, the point of view of the United States of America expressed in a periodic report to the Human Rights Committee (CCPR/C/USA/3, annex I).

<sup>45</sup> General comment No. 31 (2004), para. 10.

<sup>46</sup> *Legal Consequences of the Construction of a Wall*, para. 111.

<sup>47</sup> CAT/C/USA/CO/2, paras. 14–15.

<sup>48</sup> *Legal Consequences of the Construction of a Wall*, para. 113.

human rights instruments are applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.<sup>49</sup>

While the Human Rights Committee and the Committee against Torture have focused on persons under the jurisdiction and effective control of the State, irrespective of their location, the International Court of Justice has found that, for economic, social and cultural rights, there is a stronger link to the territory of the State. It indicated that while the International Covenant on Economic, Social and Cultural Rights contains no provision on its scope of application, “[t]his may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction.” In other words, the Court considers that the Covenant could be applied outside the territory of the State as long as that State has effective control—it exercises jurisdiction—over the foreign territory. That is the case in situations of occupation, in which the occupying State exercises effective control over the occupied territory. The Court examined the analysis by the Committee on Economic, Social and Cultural Rights of the applicability of the Covenant to the Occupied Palestinian Territory. It noted that the Committee had “reiterated its concern about Israel’s position and reaffirmed ‘its view that the State party’s obligations under the Covenant apply to all territories and populations under its effective control’.” The Court observed “that the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights.”<sup>50</sup>

While the territorial element is one of the criteria to delimit the scope of human rights obligations, many of these obligations also refer to persons under the jurisdiction of a State. This criterion covers persons who are still in the power of a State, irrespective of whether they are physically

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<sup>49</sup> *Armed Activities on the Territory of the Congo*, para. 216.

<sup>50</sup> *Legal Consequences of the Construction of a Wall*, para. 112.

in the territory of that State. This could be the case of a person detained by agents of a State outside its territory. This could also, under certain circumstances, cover cases of violations committed against persons who are temporarily placed under the control of the State, for example, when it carries out military incursions in another State.

In conclusion, it is uncontroversial that everyone, everywhere in the world, benefits from human rights. It is, therefore, logical to assert that States should be bound to comply with their obligations in respect of all persons under their jurisdiction, irrespective of whether they are in their territory.

## **2. Obligations under international humanitarian law beyond the vicinity of an armed conflict**

Concerning the territorial scope of international humanitarian law, the International Criminal Tribunal for the former Yugoslavia has provided criteria leading to the determination that obligations of international humanitarian law apply not only to the region where hostilities are taking place, but to the entire territory of the parties to the conflict.

Its Appeals Chamber has held that the provisions of the Geneva Conventions "suggest that at least some of the provisions of the Conventions apply to the entire territory of the parties to the conflict, not just to the vicinity of actual hostilities." It has recognized that certain obligations of international humanitarian law have a particular territorial scope and their geographical application may, therefore, be limited. However, it has noted that other obligations, "particularly those relating to the protection of prisoners of war and civilians, are not so limited. [...] Geneva Convention IV protects civilians anywhere in the territory of the Parties. [...] In addition to these textual references, the very nature of the Conventions—particularly Conventions III and IV—dictates their application throughout the territories of the parties to the conflict". Regarding non-international armed conflicts, it noted that until a peace settlement is achieved, international humanitarian

law continues to apply to the whole territory under the control of a party, whether or not actual combat takes place there.<sup>51</sup>

The Tribunal later confirmed this interpretation. Its Trial Chamber held that if the conflict in Bosnia and Herzegovina was considered international “the relevant norms of international humanitarian law apply throughout its territory until the general cessation of hostilities, unless it can be shown that the conflicts in some areas were separate internal conflicts, unrelated to the larger international armed conflict.” If the conflict was considered internal then “the provisions of international humanitarian law applicable in such internal conflicts apply throughout those areas controlled by the parties to the conflict, until a peaceful settlement is reached.”<sup>52</sup>

### C. LIMITATIONS ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW PROTECTIONS

As a general principle, the legal applicability of international human rights protections is not affected by conflicts. However, international human rights law is characterized by an exceptional regime, by which under certain strict conditions States may limit their fulfilment or their protection of certain rights. These conditions frequently take place in armed conflict, even if they are not limited to such situations. Specifically, under international human rights law it is possible for States to derogate from certain human rights obligations and to impose limitations on the exercise of certain rights. To a lesser extent, derogations from rules protecting civilians are admissible in some circumstances in international humanitarian law, and several of its rules allow exceptions for reasons of military necessity or security.

States may also register reservations on the extent to which some provisions of a particular international humanitarian law or human rights instrument are applicable. Significant conditions apply to States that wish to use any

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<sup>51</sup> *Prosecutor v. Duško Tadić*, paras. 68 and 70.

<sup>52</sup> *Prosecutor v. Zejnil Delalić et al.*, case No. IT-96-21-T, Judgement of 16 November 1998, para. 209. See also *Prosecutor v. Tihomir Blaškić*, case No. IT-95-14-T, Judgement of 3 March 2000, para. 64.

of these options to restrict the applicability of international human rights and humanitarian law. The following sections will analyse these conditions and clarify how these exceptional regimes could be linked to situations of armed conflict.

## 1. Derogation from human rights obligations

In certain exceptional circumstances, States are allowed to derogate from their accepted human rights obligations. The International Covenant on Civil and Political Rights, for example, recognizes that “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant [...]” (art. 4.1).<sup>53</sup> Yet, derogations are subject to stringent conditions:

- *The existence of a public emergency:* the Human Rights Committee has stated that not every armed conflict qualifies as a state of emergency. In that respect, the Committee has indicated that “[t]he Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. If States parties consider invoking article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances.”<sup>54</sup> Furthermore, the European Court of Human Rights has defined public emergencies as “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed”;<sup>55</sup>

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<sup>53</sup> Derogation clauses can also be found in the American Convention on Human Rights (art. 27) and in the European Convention for the Protection of Human Rights and Fundamental Freedoms (art. 15).

<sup>54</sup> General comment No. 29 (2001), para. 3.

<sup>55</sup> *Case of Lawless v. Ireland* (No. 3), application No. 332/57, Judgement of 1 July 1961, para. 28.

- *Temporary*: derogation measures are temporary and must be lifted as soon as the public emergency or armed conflict ceases to exist;<sup>56</sup>
- *Necessary and proportional*: derogation measures must be strictly required by the emergency.<sup>57</sup> Furthermore, derogations cannot be justified when the same aim could be achieved through less intrusive means;
- *Consistent with other obligations under international human rights and humanitarian law*: the International Covenant on Civil and Political Rights (art. 4.1) indicates that States may take measures derogating from their international human rights obligations only provided that such measures are not inconsistent with their other obligations under international law. The Human Rights Committee has indicated that "during armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant to prevent the abuse of a State's emergency powers";<sup>58</sup>
- *Procedural guarantees*: the Human Rights Committee notes that "the provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights."<sup>59</sup>

Certain international human rights instruments explicitly prohibit derogation from some provisions. For example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture" (art. 2.2).<sup>60</sup> The International Covenant on Civil and Political Rights explicitly

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<sup>56</sup> International Covenant on Civil and Political Rights (art. 4.1). See also E/CN.4/Sub.2/1997/19, para. 69.

<sup>57</sup> See International Covenant on Civil and Political Rights (art. 4.1).

<sup>58</sup> General comment No. 29 (2001), para. 3.

<sup>59</sup> Ibid., para. 15. See also below.

<sup>60</sup> See similar clause in the International Convention for the Protection of All Persons from Enforced Disappearance (art. 1.2).

prescribes that no derogation may be made concerning the right to life, the prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent, the prohibition of slavery, slave trade and servitude, the prohibition of imprisonment because of the inability to fulfil a contractual obligation, the principle of legality in the field of criminal law, i.e., the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty, the recognition of everyone as a person before the law, and the freedom of thought, conscience and religion (art. 4.2). In its general comment No. 29 (2001), the Human Rights Committee further includes the prohibition against the taking of hostages, abductions or unacknowledged detention; discrimination, deportation or forced transfer of minorities; incitement to discrimination, hostility or violence through advocacy of national, racial or religious hatred. It has also stressed that no derogation can be made from peremptory norms of international law.<sup>61</sup>

The Human Rights Committee has also indicated that to assess the scope of legitimate derogation from the Covenant, one criterion can be found in the definition of certain human rights violations as crimes against humanity. In this respect, the Committee has asserted that "if action conducted under the authority of a State constitutes a basis for individual criminal responsibility for a crime against humanity by the persons involved in that action, article 4 of the Covenant cannot be used as justification that a state of emergency

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<sup>61</sup> The Committee indicated that "[t]he enumeration of non-derogable provisions in article 4 is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law." The Committee further stated that "the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2. States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence" (general comment No. 29 (2001), para. 11).

exempted the State in question from its responsibility in relation to the same conduct.”<sup>62</sup>

Furthermore, the non-derogable character of these rights entails States’ obligation to provide for adequate procedural guarantees, including often judicial guarantees, in particular the right to habeas corpus, i.e., the right to challenge before a court the lawfulness of any detention. The Human Rights Committee has reiterated that the provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. In this respect, article 4 may not be resorted to in a way that would result in derogation from non-derogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 and 15.<sup>63</sup>

Given that international humanitarian law deals with armed conflicts, which are in essence emergency situations, it is not subject to derogations. Nevertheless, as far as the rules on protected civilians are concerned, Geneva Convention IV allows for derogations in respect of certain persons (art. 5). On its own territory, a party may deprive a person suspected of or engaged in activities hostile to the security of the State of rights and privileges under the Convention, which, if exercised in favour of that person would be prejudicial to the security of that State. In occupied territories, such derogations may affect only communication rights. In any event, such persons must be treated with humanity and may not be deprived of their right to a fair trial.

## 2. Lawful limitations on the exercise of certain human rights

Under the International Covenant on Civil and Political Rights, some articles that define specific rights, including the rights to freedom of religion, movement, expression, peaceful assembly and association, also

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<sup>62</sup> Ibid., para. 12.

<sup>63</sup> Ibid., para. 15.

include terms allowing limitations on the extent to which the right can be exercised. The International Covenant on Economic, Social and Cultural Rights accepts the possibility of limitations on rights protected by the Covenant in general (art. 4). Limitations can be applied in times of armed conflict as well as at other times. The possibility of imposing limitations is conditioned as follows:

- *Necessary and prescribed by law*: States are restricted by the language of the treaty provisions themselves. For example, article 18.3 of the International Covenant on Civil and Political Rights provides that “[f]reedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” Article 12.3, on liberty of movement, contains a similar provision;
- *Compatible with the right itself and the promotion of the general welfare*: for example, article 4 of the International Covenant on Economic, Social and Cultural Rights provides that “the State may subject [Covenant] rights only to such limitations as are determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society”;
- *Proportionality and “intrusiveness”*: international jurisprudence and practice have insisted on the fact that restrictions to human rights must observe the principle of proportionality and must limit to the maximum extent possible their repercussions on the enjoyment of other rights. The International Court of Justice, citing the Human Rights Committee’s general comment No. 27 (1999) on freedom of movement, noted that the restrictions on human rights “must conform to the principle of proportionality” and “must be the least intrusive instrument amongst those which might achieve the desired result”. It applied similar conditions to its assessment of the limitations on the enjoyment of economic, social and cultural rights resulting from the construction of the wall.<sup>64</sup>

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<sup>64</sup> *Legal Consequences of the Construction of a Wall*, para. 136.

In relation to international humanitarian law, some individual norms provide in certain circumstances for the possibility of exceptions to the normal obligations. Sometimes a measure is admissible if it is necessary for security reasons<sup>65</sup> or when a "grave emergency involving an organized threat to the security of the Occupying Power" exists.<sup>66</sup> While civilians, unlike combatants, may normally not be interned, a belligerent may intern protected civilians when its security "makes it absolutely necessary"<sup>67</sup> and an occupying Power may do so for "imperative reasons of security".<sup>68</sup> A State may refuse individual relief consignments for "imperative reasons of security."<sup>69</sup> States may subject the activities of relief organizations to measures they "consider essential to ensure their security."<sup>70</sup> Other obligations may be derogated from for "imperative military reasons",<sup>71</sup> when it is "rendered absolutely necessary by military operations"<sup>72</sup> or where an "unavoidable military necessity" exists.<sup>73</sup>

### 3. Reservations to international humanitarian and international human rights treaty obligations

It is established practice in international law that States, under certain circumstances, may at the time of ratification limit the applicability of a given provision in the treaty by lodging a reservation. According to the Vienna Convention on the Law of Treaties, reservation means "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports

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<sup>65</sup> Geneva Convention IV, art. 27.

<sup>66</sup> Ibid., art. 75.

<sup>67</sup> Ibid., art. 42.

<sup>68</sup> Ibid., art. 78.

<sup>69</sup> Ibid., art. 62.

<sup>70</sup> Ibid., art. 142, and Geneva Convention III, art. 125.

<sup>71</sup> Geneva Convention IV, art. 49.

<sup>72</sup> Ibid., art. 53.

<sup>73</sup> 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, art. 11.2.

to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State” (art. 2.1 (d)).

Entering reservations on international human rights or international humanitarian treaties is legal under international law insofar as they respect the provisions of article 19 of the Vienna Convention on the Law of Treaties. This Convention, which to a great extent codifies existing customary law, indicates that reservations can be formulated if the treaty itself allows it or, if the treaty is silent, if the reservation is not incompatible with the purpose and object of the treaty.

International law requires a series of conditions for reservations to be valid. Reservations to treaties of international humanitarian law are quite rare. However, State parties’ approach to reservations to the International Covenant on Civil and Political Rights has prompted the Human Rights Committee to indicate that reservations to certain provisions may not be compatible with its object and purpose. The Committee noted in its general comment No. 24 (1994) that a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he or she proves his or her innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language.<sup>74</sup>

The Committee on the Elimination of Discrimination against Women finds it unacceptable that States reserve the commitment to pursue by all appropriate means and without delay a policy of eliminating discrimination

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<sup>74</sup> General comment No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, para. 8.

against women as embodied in article 2 of the Convention.<sup>75</sup> Equally unacceptable is the reservation on the obligation to eliminate discrimination against women in all matters relating to marriage and family relations as embodied in article 16.<sup>76</sup> Reservations on these two provisions render the State parties' obligations under the Convention meaningless.

#### D. CONCURRENT APPLICATION AND THE PRINCIPLE OF *LEX SPECIALIS*

When, according to the rules explained above, both international humanitarian law and international human rights law apply to a given issue in an armed conflict, how do they interact, in particular when both offer contradictory answers? This complex question is sometimes raised by State authorities, human rights and humanitarian workers and others in the field. Two arguments have specifically been raised against their concurrent application. First, it has been argued that international human rights law and international humanitarian law are regimes that apply in separate contexts—namely the former in peace time only and the latter in armed conflict—and their concurrent or complementary application is, therefore, irrelevant. Second, it has also been argued that if both bodies of law are in fact applicable in situations of armed conflict, then the question is whether one body of law would have pre-eminence over the other as a matter of *lex specialis*.

While these questions may seem academic, they could have an impact on the activities of human rights workers and advocates. Having a clear legal framework is essential to adequately address and engage with the relevant actors, including States and non-State armed groups. The following sections will draw from the views of human rights bodies, as well as decisions of the International Court of Justice and regional human rights courts. As will be shown, legal and jurisprudential developments over the past 15 years have provided clear confirmation of the concurrent application of both

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<sup>75</sup> *Official Records of the General Assembly, Fifty-third Session, Supplement No. 38 (A/53/38/Rev.1)*, Part Two, chap. I, paras. 6, 10 and 16.

<sup>76</sup> General recommendation No. 21 (1994) on equality in marriage and family relations, para. 44.

regimes in times of armed conflict. Furthermore, decisions by judicial and treaty bodies have further clarified the extent of *lex specialis* in armed conflict. Finally, the interplay between the two branches will be shown through an example in which the two seem to contradict each other, in particular in the context of the right to life and the use of force.

## 1. Concurrent application: the continuous application of international human rights law

A number of decisions by human rights and judicial organs have concluded that international human rights law applies at all times, irrespective of whether there is peace or an armed conflict. Meanwhile, international humanitarian law specifically applies only to situations of armed conflict. Thus, in an armed conflict, international human rights law is applicable concurrently with international humanitarian law. For example, the International Court of Justice has clearly stated that "the protection of the International Covenant on 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". In another case it reiterated "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."<sup>77</sup> The Human Rights Committee has stated that human rights obligations contained in the International Covenant on Civil and Political Rights "[apply] also in situations of armed conflict to which the rules of international humanitarian law are applicable." The Committee has further indicated that "[w]hile, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary,

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<sup>77</sup> *Legality of the Threat or Use of Nuclear Weapons*, para. 25, and *Legal Consequences of the Construction of a Wall*, para. 106.

not mutually exclusive.”<sup>78</sup> The Committee has taken similar positions in numerous concluding observations on specific country situations.<sup>79</sup>

The complementary application of the two legal regimes is known as concurrent application or dual applicability. In the context of international human rights law and international humanitarian law, it means that both legal regimes are applicable in times of armed conflict. As will be explained later, this concurrent application should be seen in the context of the principle of *lex specialis* as well as in the context of the human rights derogations procedure referred to above. The following examples reflect international recognition of concurrent application:

- The Convention on the Rights of the Child is an example of a treaty that contains explicit provisions applicable to both peace and war situations. The Convention, which is essentially an international human rights treaty, explicitly refers to situations of armed conflict, noting that “States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child” (art. 38.1).<sup>80</sup> Furthermore, its Optional Protocol on the involvement of children in armed conflict defines legally binding obligations that must specifically be applied both in peace time and during armed conflict. According to its article 1, “States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.”<sup>81</sup> In a case opposing the Democratic Republic

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<sup>78</sup> General comment No. 31 (2004), para. 11.

<sup>79</sup> For instance, the Committee “notes with concern the restrictive interpretation made by the State party of its obligations under the Covenant, as a result in particular of [...] its position that the Covenant does not apply [...] in time of war, despite the contrary opinions and established jurisprudence of the Committee and the International Court of Justice [...]. The State party should review its approach and interpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in the light of its object and purpose. The State party should in particular (a) acknowledge the applicability of the Covenant [...] in time of war [...]” (CCPR/C/USA/CO/3/Rev.1, para. 10).

<sup>80</sup> See also article 38.4.

<sup>81</sup> See also article 6.

of the Congo and Uganda, the International Court of Justice indicated that the Convention and the Optional Protocol were applicable in the context of the conflict between them.<sup>82</sup> Similarly, the Convention on the Rights of Persons with Disabilities provides that States parties “shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters” (art. 11);

- Protocol I to the Geneva Conventions states that “no provision of this article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1” (art. 75.8);
- The International Court of Justice has noted that there are three possible situations when it comes to the relationship between international humanitarian law and international human rights law: “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”,<sup>83</sup>
- The International Committee of the Red Cross has identified certain “fundamental guarantees” and noted that human rights law instruments, documents and case law support, strengthen and clarify analogous principles of international humanitarian law.<sup>84</sup>

In practice, due to the similar protections offered by both international human rights law and international humanitarian law, their concurrent application in armed conflicts does not, in general, raise substantive problems. When persons find themselves in the power of the enemy in

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<sup>82</sup> *Armed Activities on the Territory of the Congo*, para. 217.

<sup>83</sup> *Legal Consequences of the Construction of a Wall*, para. 106. The Court maintained the same approach in *Armed Activities on the Territory of the Congo*, para. 216.

<sup>84</sup> *Customary International Humanitarian Law*, Part V, chap. 32.

the context of hostilities, both bodies of law seek to provide protection to these persons and often provide a similar response to particular situations.

Nevertheless, in certain exceptional cases, international human rights law and international humanitarian law may offer contradictory solutions. For example, as will be discussed below, the amount of deadly force that may be used against a person is regulated differently in international human rights law and in international humanitarian law. International law has therefore foreseen a number of mechanisms of legal interpretation that would help to decide how two apparently conflicting norms should be read together and, if that proves impossible, which would have pre-eminence.

As will be explained in the next section, one such mechanism is the so-called principle of *lex specialis derogat legi generali*, according to which, in cases of a conflict of norms, the more specific rule is applied over the more general rule. Yet, other mechanisms, such as the principles of *lex posterior derogat legi priori*<sup>85</sup> or *interprétation conforme*, could also be applied to determine how two seemingly conflicting rules can be applied to a given situation or, if necessary, which of the two rules should be applied.

## **2. International human rights law, international humanitarian law and the principle of *lex specialis***

As indicated above, international human rights law and international humanitarian law apply concurrently in situations of armed conflict, with their different protections complementing each other. However, there could be instances in which international human rights law and international humanitarian law regulate the same situation in a different manner, yielding different results. In such cases of conflict of norms, international practice has established that, failing other means to interpret both norms in conformity, one of the principles of interpretation of norms that could be applied is that of *lex specialis*.

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<sup>85</sup> The principle that new laws are, generally, given preference over previous ones is a principle of law that has been codified in the Vienna Convention on the Law of Treaties (art. 30).

The *lex specialis derogat legi generali* principle reflects a widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts. It establishes that, if a matter is being regulated by a general standard and at the same time by a more specific rule, then the latter should take precedence over the former. The relationship between the general standard and the specific rule may, however, be conceived in two ways. One is where the specific rule should be read and understood within the confines or against the background of the general standard, typically as an elaboration, update or technical specification of the latter. From a narrower perspective, *lex specialis* is also understood to cover the case where two legal provisions that are both valid and applicable are in no express hierarchical relationship and provide incompatible direction on how to deal with the same set of facts. In such a case, the application of the *lex specialis* principle is used to resolve conflicts of norms. In both cases, however, the rule with a more precisely delimited scope of application has priority.<sup>86</sup>

The principle of *lex specialis* has sometimes been misunderstood and overstated in the relationship between international human rights law and international humanitarian law. First, as indicated above, the number of concrete situations in which international human rights law and international humanitarian law yield different results is small compared to the number of situations in which both provide similar protections. In these cases, the principle of *lex specialis* does not have any particular role. In this respect, the International Law Commission has indicated that “for the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other.”<sup>87</sup> Second, as recalled by the International Law Commission, the principle of *lex specialis* applies to provisions that, when used in the context of

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<sup>86</sup> See “Fragmentation of international law: difficulties arising from the diversification and expansion of international law – Report of the Study Group of the International Law Commission” (A/CN.4/L.682, paras. 56–57).

<sup>87</sup> Draft articles on responsibility of States for internationally wrongful acts, commentary to article 55.

a specific situation, produce diverging results.<sup>88</sup> Third, the principle determines which rule prevails over another in a particular situation.<sup>89</sup>

The main aspect that should be retained is that, according to the *lex specialis* principle, when two conflicting provisions apply to the same situation, the provision that gives the most detailed guidance should be given priority over the more general rule.<sup>90</sup>

In international armed conflict, some rules of international humanitarian law are recognized as *lex specialis* on a number of issues. For example, in a 1996 advisory opinion the International Court of Justice examined the interaction between international human rights law and international humanitarian law concerning, in particular, the diverse regulation of the right to life. The Court indicated that, in principle, the right not to be arbitrarily deprived of one's life (International Covenant on Civil and Political Rights, art. 6) 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, international humanitarian law, which is designed to regulate the conduct of hostilities. This was true at least for the issue to be determined by the Court, i.e., whether the use of a certain weapon was lawful. The Court was also careful to point out that human rights law continues to apply in armed conflict. International humanitarian law as *lex specialis* does not suggest that human rights are

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<sup>88</sup> In the report to the Human Rights Council on the outcome of the expert consultation on the human rights of civilians in armed conflict, "some experts explained that bodies of law as such did not function as *lex specialis*. It was recalled that the *lex specialis* principle meant simply that, in situations of conflicts of norms, the most detailed and specific rule should be chosen over the more general rule, on the basis of a case-by-case analysis, irrespective of whether it was a human rights or a humanitarian law norm" (A/HRC/11/31, para. 13).

<sup>89</sup> *Yearbook of the International Law Commission, 2004*, vol. II, Part II (United Nations publication, forthcoming), para. 304.

<sup>90</sup> The Study Group of the International Law Commission also indicated in its final report that "a special rule is more to the point ('approaches most nearly to the subject in hand') than a general one and it regulates the matter more effectively ('are ordinarily more effective') than general rules. This could also be expressed by saying that special rules are better able to take account of particular circumstances" (A/CN.4/L.682, para. 60).

abolished in war but, instead, only affects one aspect of it, namely the relative assessment of arbitrariness of the use of a certain weapon.<sup>91</sup> Thus, cases involving the killing of civilians in an attack by a party to a conflict imply the application of the international humanitarian law principles of distinction and proportionality as *lex specialis*, with the relevant provisions of the Covenant being applied as complementary norms.

It could be argued that in this advisory opinion the Court recognized the *lex specialis* status of international humanitarian law as a whole in situations of armed conflict. This conclusion is not supported by the subsequent practice of the Court. In a 2004 advisory opinion the Court further clarified its understanding of the principle of *lex specialis* when it indicated that some rights may be exclusively matters of international humanitarian law, others may be exclusively matters of human rights law, while others may be matters of both these branches of international law (see sect. 1 above).

As indicated above, this view has been further reinforced by the Human Rights Committee's interpretation of the principle of *lex specialis* in its general comment No. 31 (2004).

In practical terms, it is important to reiterate that the use of the *lex specialis* principle is required only when there is an apparent conflict between two norms that could be applied to a specific situation. The identification of which rule will have pre-eminence depends on an examination of the facts and of the particular protection included in the relevant rules. As the Study Group of the International Law Commission correctly indicates, the principle of *lex specialis* "does not admit of automatic application."<sup>92</sup> First, it is not always easy to determine which norm provides the most specific regulation to apply in a particular circumstance. A careful analysis of each concrete situation will be required.

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<sup>91</sup> *Legality of the Threat or Use of Nuclear Weapons*, para. 25.

<sup>92</sup> A/CN.4/L.682, para. 58.

Second, it is also difficult to determine whether the results each norm would produce are actually in conflict or not. The Study Group of the International Law Commission suggested that a conflict of norms exists "if it is possible for a party to two treaties to comply with one rule only by thereby failing to comply with another rule."<sup>93</sup>

As the International Court of Justice has indicated, in the context of international human rights and humanitarian law in armed conflict, there are situations in which recourse to the principle of *lex specialis* is necessary to determine the scope of the protections and the standards. As ICRC has recognized, there are circumstances in which provisions of international humanitarian law, such as common article 3 of the Geneva Conventions, "must [...] be given specific content by application of other bodies of law in practice."<sup>94</sup> This is, for example, the case of the guarantees of fair trial provided for in article 14 of the International Covenant on Civil and Political Rights, which are far more detailed than the provisions of common article 3 (d) of the Geneva Conventions.

Furthermore, many human rights violations that occur during armed conflict are not a direct result of hostilities and should be resolved by applying international human rights law and domestic law. For example, a party to the conflict may take part in violations that are unrelated to the conflict and to which international human rights law applies because they are simply not governed by international humanitarian law. Similarly, even in a country affected by an armed conflict, law enforcement is always governed by international human rights law.<sup>95</sup> Moreover, even where

<sup>93</sup> Ibid., para. 24. It provides as an example the relationship between the law of State immunity and the law of human rights to illustrate how two sets of rules can in practice produce different and incompatible results.

<sup>94</sup> Jakob Kellenberger, President of the International Committee of the Red Cross, "International humanitarian law and other legal regimes: interplay in situations of violence", statement to the 27th Annual Round Table on Current Problems of International Humanitarian Law, San Remo, Italy, 4–6 September 2003. Available from [www.icrc.org](http://www.icrc.org).

<sup>95</sup> See, for example, the "Eleventh periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan", 23 January 2009, dealing with the killing and injuring of civilians on 25 August 2008 by Government security forces in the Kalma camp for internally displaced persons (IDPs) in South Darfur, Sudan. Despite the

a conflict continues for many years, a State must meet its international responsibilities for a wide range of civil, cultural, economic, political and social rights.<sup>96</sup>

A criterion that could be used to determine which body of law should be applied to a particular situation is that of effective control: the more effective the control over persons or territory, the more human rights law would constitute the appropriate reference framework. In this respect, it has been argued that the human rights law paradigm posits effective control over a territory and/or an individual, while the international humanitarian law paradigm posits an absence or breakdown of control as a result of armed conflict. As a way to inform the *lex specialis* principle in the context of armed conflict, it has been suggested that the stabler the situation, the more the human rights paradigm would be applicable; the less stability and effective control, the more the international humanitarian law paradigm would be applicable to supplement human rights law.<sup>97</sup> Thus, instead of focusing solely on the existence of a conflict, the analysis should concentrate on stability and effective control.

Clearly, there are situations in which effective control over individuals can occur in a context of overall lack of control over a territory. This lack of control over territory does not imply that the human rights paradigm can be ignored. As indicated above, the Human Rights Committee has interpreted that the question of effective control referred to in article 2.1 of the Covenant is related not only to territorial control, but also to control over persons. In conformity with the rules of interpretation laid out in the Vienna Convention on the Law of Treaties, the Human Rights Committee has interpreted the provision in article 2 of the Covenant to mean that States have human rights obligations vis-à-vis all individuals within their

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fact that at the time Darfur was in a situation of internal armed conflict and that the alleged violations were carried out by Sudanese security forces, it was found that the Government of the Sudan had failed to respect its obligations under international human rights law. Available from [www.ohchr.org/Documents/Countries/11thOHCHR22jan09.pdf](http://www.ohchr.org/Documents/Countries/11thOHCHR22jan09.pdf).

<sup>96</sup> See *Legal Consequences of the Construction of a Wall*.

<sup>97</sup> See A/HRC/11/31, para. 14.

territory and all individuals subject to their jurisdiction. This interpretation is consistent with the context and with the object and purpose of the treaty.

In certain situations, it would also be possible to have real control over individuals in a non-stable environment. Control over individuals does not mean that there is total control over territory. Similarly, control over territory does not mean total control over individuals. Therefore, the more effective control a State has over territory or population, the more the human rights paradigm applies.

### **3. The interplay concerning the use of force**

One field where an apparent contradiction between international humanitarian law and international human rights law exists is the admissibility of the use of deadly force against persons. While it is generally accepted under international humanitarian law that enemy combatants may be targeted in an international armed conflict until they surrender or are otherwise hors de combat, regardless of whether they constitute an immediate threat to human life, international human rights law limits the admissibility of deadly force to such circumstances. In other words, the limitation on deadly force depends on the context and not on the person who uses it. This means, for example, that when military personnel undertake law enforcement activities, they are bound by rules of international human rights law concerning the use of deadly force.

#### **(a) International humanitarian law**

International humanitarian law does not prohibit the deliberate killing of a combatant as long as he or she does not surrender or is not otherwise hors de combat. Conversely, as far as civilians are concerned, international humanitarian law requires parties to a conflict to refrain from attacking civilians and obliges them to take constant care to prevent civilians being incidentally killed in attacks against combatants or military objectives. A determination of a violation of international humanitarian law often requires not only recognition of the harm that may have been caused

to civilians, but also an examination of the context in which such harm occurred. In order to examine the legality of a specific attack, international humanitarian law contains three main principles that all parties need to observe at all times to respect civilians and the civilian population: distinction, proportionality and precaution.

The principle of distinction requires the parties to a conflict to distinguish at all times between civilians and combatants, and attacks to be directed only against combatants. Parties to the conflict should distinguish themselves from civilians by using distinctive uniforms or other forms of identification. The parties to a conflict must at all times distinguish between civilian objects and military objectives, and attacks may be directed only against military objectives. Indiscriminate attacks, i.e., attacks that do not distinguish between military and non-military objectives, are prohibited.

According to the principle of proportionality, launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians or damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.

With regard to the precautions to be adopted in the conduct of military operations, constant care must be taken to spare civilians and civilian objects in any attack. All feasible precautions must be taken to prevent, or in any event minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects. Precautionary measures include the obligation to verify that a target is in fact a lawful military objective and also to give advance warning to civilians in the vicinity so they may leave the area.

### **(b) International human rights law**

The principle of distinction is unknown in international human rights law, while the principles of proportionality and precaution apply also to any use of force in international human rights law, but because there is no distinction between civilians and combatants they have more beneficiaries.

Human rights treaties prohibit the arbitrary deprivation of life. The European Convention for the Protection of Human Rights and Fundamental Freedoms specifies that for a deprivation of life not to be arbitrary it must be "absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection" (art. 2.2). The Special Rapporteur on summary, extrajudicial or arbitrary executions, Philip Alston, further stated that "the other element contributed by human rights law is that the intentional use of lethal force in the context of an armed conflict is prohibited unless strictly necessary. In other words, killing must be a last resort, even in times of war".<sup>98</sup>

Other universal and regional human rights bodies take, by and large, the same approach.<sup>99</sup> The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provide an authoritative interpretation of the principles authorities must respect when using force in order not to infringe the right to life. Those principles limit the use of firearms to cases of self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. The intentional lethal use of firearms is admissible only when strictly unavoidable in order to protect life. In addition, law enforcement officials "shall [...]

<sup>98</sup> E/CN.4/2006/53/Add.5, para. 29. See also *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/57/18)*, annex XI, *Suarez de Guerrero v. Colombia*, communication No. R.11/45: "The right enshrined in this article is the supreme right of the human being. It follows that the deprivation of life by the authorities of the State is a matter of the utmost gravity. This follows from the article as a whole and in particular is the reason why paragraph 2 of the article lays down that the death penalty may be imposed only for the most serious crimes. The requirements that the right shall be protected by law and that no one shall be arbitrarily deprived of his life mean that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a State."

<sup>99</sup> See, for example, Inter-American Court of Human Rights, *Case of Las Palmeras v. Colombia*, Judgement of 26 November 2002, Series C, No. 96.

give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident" (arts. 9–10). In international human rights law the proportionality principle therefore applies also to the target of the force and precautionary measures, such as warnings, must also be taken for the benefit of those targets.

### (c) An example of the application of the *lex specialis* principle

As already indicated, there is much common ground between the protections offered by international humanitarian law and by international human rights law. It is where their solutions actually contradict each other that the applicable rule must be determined under the *lex specialis* principle. For combatants in international armed conflicts, international humanitarian law is generally considered to constitute the *lex specialis* in relation to the amount of force to be used against enemy combatants. The issue is much more controversial regarding fighters in non-international armed conflicts. A common example of a contradiction between the two branches is that of a member of an insurgent armed group with a continuing fighting function who is found carrying out personal (non-conflict related) activities outside the fighting area.<sup>100</sup> Some have interpreted—by analogy with international armed conflicts—that international humanitarian law permits the authorities to shoot to kill this person. Under international human rights law, a person must be arrested and a graduated use of force must be employed. In this case, taking into account the extent of Government control (if any) over the place where the killing occurs, international human rights law should be considered as the *lex specialis*. International humanitarian law was made for hostilities against forces on or beyond the frontline, i.e., in a place that is not under the control of those who attack them. In traditional

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<sup>100</sup> See in this respect Marco Sassòli and Laura M. Olson, "The relationship between international humanitarian law and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflict", *International Review of the Red Cross*, vol. 90, No. 871 (September 2008), pp. 613–615.

conflicts, this corresponds to the question of how remote the situation is from the battlefield, although new types of conflicts are characterized by the absence of frontlines and battlefields.

What then constitutes sufficient control to warrant international human rights law predominating as the *lex specialis*? In an area on the territory of a State whose Government is fighting rebel forces, but which is neither under firm rebel nor under firm Government control, the impossibility to arrest the fighter, the danger inherent in attempting to arrest the fighter and the danger represented by the fighter to Government forces and civilians, as well as the immediacy of this danger, may lead to the conclusion that international humanitarian law is the *lex specialis* in that situation. In addition, where neither party has clear geographical control, the higher the degree of certainty that the target is actually a fighter, the easier the international humanitarian law approach appears as *lex specialis*.<sup>101</sup>

Even where international human rights law prevails as the *lex specialis* in the context of armed conflict, international humanitarian law remains in the background and may in some specific situations relax the international human rights law requirements of proportionality and warning, once an attempt to arrest has been unsuccessful or is not feasible. Similarly, even where international humanitarian law prevails as the *lex specialis*, international human rights law remains in the background and may require an inquiry whenever a person has been deliberately killed by security forces in a non-combat situation.

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<sup>101</sup> See *Suarez de Guerrero v. Colombia*, paras. 13.1–13.3.





## ● ACCOUNTABILITY AND THE RIGHTS OF VICTIMS

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One of the most important legal obligations arising from violations of international human rights and humanitarian law is the obligation to ensure accountability for those violations. As the United Nations Secretary-General has indicated, respect for the rule of law implies that "all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."<sup>102</sup>

Furthermore, in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, the General Assembly recognized that the obligation to respect, ensure respect for and implement international human rights and humanitarian law implies the duty to "investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law" (para. 3 (b)). The General Assembly further recognized the customary law character of this obligation and indicated that the Basic Principles and Guidelines "do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms" (preamble).

The following sections will address accountability for violations of international human rights and humanitarian law from the perspective of States and individuals, as well as the right of victims to reparation. Non-

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<sup>102</sup> "The rule of law and transitional justice in conflict and post-conflict societies" (S/2004/616, para. 6).

judicial forms of accountability as an alternative to criminal justice will be addressed at the end.

## A. STATE RESPONSIBILITY FOR VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW

State responsibility for violations of international human rights and humanitarian law has long been a foundation of international law. State responsibility stems from the principle of *pacta sunt servanda*, which means that every treaty in force is binding upon the parties to it and must be performed by them in good faith.<sup>103</sup> Even beyond treaty obligations, the International Law Commission's draft articles on State responsibility recall the general principle of international law that the breach of a State's international obligation constitutes an international wrongful act, which entails the international responsibility of that State (draft arts. 1–2). In this context, it is useful to recall that a State is responsible for violations of international human rights and humanitarian law in the context of armed conflict if the violations are attributable to it, such as:

- Violations committed by its organs, including its armed forces;
- Violations committed by persons or entities empowered to exercise elements of governmental authority;
- Violations committed by persons or groups acting in fact on its instructions, or under its direction or control;
- Violations committed by private persons or groups which it acknowledges and adopts as its own conduct.<sup>104</sup>

A State may also be responsible for lack of due diligence if it has failed to prevent or punish violations of international human rights and humanitarian law committed by private actors.

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<sup>103</sup> Vienna Convention on the Law of Treaties, art. 26.

<sup>104</sup> See *Yearbook of the International Law Commission, 2001*, vol. II (Part Two), p. 26.

Both international jurisprudence and regional jurisprudence have established that a finding of State responsibility for violations of international human rights and humanitarian law should lead to the adoption by the State of measures to repair the damage it may have caused and to prevent future violations. Such measures range from paying reparations to the victims and their families, and giving assurances of non-repetition, to the adoption of legal mechanisms to prevent future abuses. While the obligation of the State to pay reparation for a violation of international humanitarian law is uncontroversial, the entitlement of the individual victim to claim such reparation based on international humanitarian law has been rejected by several domestic courts. In *Bosnia and Herzegovina v. Serbia and Montenegro*, the International Court of Justice found that Serbia had violated its obligations to prevent and prosecute acts of genocide. The Court decided that Serbia had to "take effective steps to ensure full compliance with its obligation under the Convention on the Prevention and Punishment of the Crime of Genocide [...] and to transfer individuals accused of genocide or any of those other acts for trial by the International Criminal Tribunal for the former Yugoslavia, and to cooperate fully with that Tribunal."<sup>105</sup> The Inter-American Court of Human Rights and the European Court of Human Rights refer to international customary rules on State responsibility to order the payment of compensation to victims of human rights abuses.<sup>106</sup>

It should be noted that, under international law, the fact that an individual is found guilty of gross abuses of international human rights and humanitarian law does not exonerate the State from international responsibility<sup>107</sup> and vice versa.

<sup>105</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, I.C.J. Reports 2007, p. 43.

<sup>106</sup> For example, according to the Inter-American Court of Human Rights, "[i]t is a principle of International Law that any violation of an international obligation which causes damage gives rise to a duty to make adequate reparations. The obligation to provide reparations is regulated in every aspect by International Law." *Case of the Rochela Massacre v. Colombia*, Judgement of 11 May 2007, Series C, No. 163, para. 226.

<sup>107</sup> See, in this respect, article 25.4 of the Rome Statute of the International Criminal Court,

## B. INDIVIDUAL RESPONSIBILITY FOR VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW

Many violations of international human rights and humanitarian law may be considered criminal under domestic law. When certain conditions are met, some of these violations can also be qualified as crimes under international law, with additional legal consequences for States and individuals. Unlike “simple” violations of international human rights and humanitarian law, international crimes may in particular be prosecuted not only domestically but also internationally. Genocide, crimes against humanity and war crimes, for instance, may be tried by an international criminal tribunal.

### 1. Violations of international human rights law and international humanitarian law as international crimes under international criminal law

#### (a) Definitions of international crimes

Certain gross or serious violations of international human rights and humanitarian law have been considered of such gravity by the international community that they have been regulated under international criminal law,<sup>108</sup> establishing individual criminal responsibility for such acts. Individual criminal responsibility is fundamental to ensuring accountability for violations of international human rights and humanitarian law. The Nuremberg International Military Tribunal famously noted that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” Since the 1990s the international community has intensified efforts to create adequate

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which establishes that “[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.”

<sup>108</sup> International criminal law is a body of international rules designed to proscribe certain categories of conduct and to make those persons who engage in such conduct criminally liable. Antonio Cassese, *International Criminal Law*, 2nd ed. (Oxford, Oxford University Press, 2008), p. 3.

mechanisms through which individuals can be brought to justice for serious violations of international human rights and humanitarian law.

The Rome Statute of the International Criminal Court provides the most complete and updated definition of relevant international crimes, the components of which are primarily violations of international human rights and humanitarian law:<sup>109</sup>

- *Genocide*: article 6 states: “[f]or the purpose of this Statute, ‘genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) [k]illing members of the group; (b) [c]ausing serious bodily or mental harm to members of the group; (c) [d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) [i]mposing measures intended to prevent births within the group; (e) [f]orcibly transferring children of the group to another group”;
- *War crimes*: article 8 states that “war crimes” means: (a) grave breaches of the Geneva Conventions of 12 August 1949; (b) other serious violations of the laws and customs applicable in international armed conflict; and (c) in the case of an armed conflict not of an international character, serious violations of common article 3 and other serious violations of the laws and customs applicable in such a conflict. The Rome Statute identifies a list of acts under each of these headings, such as wilful killing, torture or inhuman treatment, wilfully causing great suffering, or serious injury to body or health, unlawful deportation or transfer or unlawful confinement; taking of hostages, declaring that no quarter will be given; using civilians as shields;
- *Crimes against humanity*: article 7 states: “[f]or the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

<sup>109</sup> See the elements of crimes under the Rome Statute in the “Report of the Preparatory Commission for the International Criminal Court” (PCNICC/2000/1/Add.2).

(a) [m]urder; (b) [e]xtermination; (c) [e]nslavement; (d) [d]eportation or forcible transfer of population; (e) [i]mprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) [t]orture; (g) [r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) [p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender [...], or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the court; (i) [e]nforced disappearance of persons; (j) [t]he crime of apartheid; (k) [o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” It is important to note that under customary international law crimes against humanity do not require a connection to an armed conflict.<sup>110</sup>

With the exception of the Convention against Torture,<sup>111</sup> the International Convention for the Protection of All Persons from Enforced Disappearance,<sup>112</sup> and the Optional Protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict<sup>113</sup> and on the sale of

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<sup>110</sup> *Prosecutor v. Duško Tadić*, para. 141.

<sup>111</sup> Article 4 states that each State party must ensure that all acts of torture, attempts to commit torture and acts which constitute complicity or participation in torture are offences under its criminal law. It also provides that “[e]ach State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.” Article 5 requires each State party to establish jurisdiction over such offences when they are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State.

<sup>112</sup> Article 4 states that “[e]ach State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.” Article 9.2 further indicates that “[e]ach State Party shall likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized.”

<sup>113</sup> Article 4.2 states that “States Parties shall take all feasible measures to prevent such

children, child prostitution and child pornography,<sup>114</sup> few international human rights treaties contain provisions regarding the criminalization and prosecution of human rights violations. Yet, even if certain human rights violations are not covered in specific treaties, perpetrators may be brought to justice if the violations correspond to genocide, crimes against humanity or war crimes in those cases where the International Criminal Court can exercise jurisdiction, or under domestic law, which sometimes allows for its extraterritorial application to certain serious violations of international human rights law.

### **(b) The extent of individual criminal responsibility**

The Rome Statute provides the most recent codification of individual responsibility for international crimes. Article 25.3 indicates that "in accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court" and then lists a series of criminal behaviour, such as committing the crime, ordering or instigating it.

It is particularly important for human rights officers confronted by an ongoing situation to note that, according to article 25.3 (f) of the Rome Statute, "a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose." This key provision might facilitate the efforts of human rights advocates who are trying to use the threat of possible international prosecution to influence ongoing events.

Here are some of the most important principles in individual criminal responsibility:

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recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices."

<sup>114</sup> See arts. 3 and 7.

- Everyone has a duty to disobey a manifestly unlawful order. Orders to commit genocide or crimes against humanity are manifestly unlawful;
- Individuals are criminally responsible for the international crimes they commit;
- Commanders and other superiors are criminally responsible for international crimes committed pursuant to their orders and, beyond that, under the principle of command responsibility discussed in the next subsection;
- Individuals shall be criminally responsible and liable for punishment for an international crime if the material elements of the crime are committed with intent and knowledge.

These principles apply to the different types of crimes—ranging from grave breaches of the Geneva Conventions and violations of the laws or customs of war and of common article 3, to crimes against humanity and genocide—for which individual responsibility arises for any person who planned, instigated, ordered, committed or otherwise aided and abetted in their planning, preparation or execution. This standard is confirmed by the Statutes of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda and, subsequently, by the Rome Statute.

The question also arises of whether individuals should be affiliated to a State entity in order to be criminally responsible for serious violations of international human rights and humanitarian law. Individual responsibility with regard to violations of international human rights and humanitarian law amounting to international crimes can be determined on the basis of international criminal law. For example, the Convention on the Prevention and Punishment of the Crime of Genocide stipulates that “[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals” (art. IV). The Statutes of the above-mentioned International Criminal Tribunals and the Rome Statute reaffirm this.

The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia held that "the drafters of the Convention did not deem the existence of an organization or a system serving a genocidal objective as a legal ingredient of the crime. In so doing, they did not discount the possibility of a lone individual seeking to destroy a group as such." Nevertheless, the Trial Chamber noted that "it will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes committed are not widespread and if the crime charged is not backed by an organization or a system."<sup>115</sup>

Even in the case of genocide, this organizational affiliation does not relate only to State actors, but also to non-State actors engaged in an armed conflict. Crimes against humanity may equally be committed by individuals affiliated with non-State armed groups. Regarding war crimes, insofar as non-State entities have important obligations in international humanitarian law, their violations fall within the same legal framework applicable to States. For example, the Security Council, in its resolution 1214 (1998), recalled to all parties in the context of the Afghan internal armed conflict that "persons who commit or order the commission of breaches of the [Geneva] Conventions are individually responsible in respect of such breaches", which demonstrates that modern international humanitarian law applies the same standards to State and to non-State actors.

### (c) Command responsibility

While the general principle for imposing individual criminal responsibility for violations of international humanitarian law requires a direct participation, international criminal law recognizes the importance of leaders and commanders in ensuring that individuals under their command do not engage in any type of criminal behaviour leading to gross violations of international human rights law or international humanitarian law. In this respect, article 86.2 of Protocol I indicates that a breach of the obligations under the Conventions by a subordinate does not absolve the superiors

<sup>115</sup> *Prosecutor v. Goran Jelisić*, case No. IT-95-10-T, Judgement of 14 December 1999, paras. 100–101.

from their own responsibility of supervision and control. Yet, for command responsibility to be applicable, it is necessary that the superior knew or had reason to know that violations were being committed or were about to be committed. In that case, the superior is under the obligation to adopt all necessary measures to prevent such violations or punish the perpetrators if they do occur.

The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia analysed the different components of the notion of command responsibility. It recalled that a commander's de jure power creates a presumption of effective control. It also discussed the scope of the "had reason to know" standard and indicated that the commander's responsibility would be engaged if he failed to act despite having sufficiently alarming information about possible violations. The Appeals Chamber indicated that "[w]hile a superior's knowledge of and failure to punish his subordinates' past offences is insufficient, in itself, to conclude that the superior knew that similar future offences would be committed by the same group of insubordinates, this may [...] nevertheless constitute sufficiently alarming information to justify further inquiry". Thus, it interpreted the "reason to know" standard as requiring an assessment of whether a superior had sufficiently alarming information that would have alerted him to the risk that crimes might be committed by his subordinates.<sup>116</sup>

In another case, the Tribunal's Trial Chamber made it clear that the determination of a causal link between a commander's failure to act and his subordinate's crimes is unnecessary to a finding of superior responsibility. It recalled that "[i]f a causal link were required this would change the basis of command responsibility for failure to prevent or punish to the extent that it would practically require involvement on the part of the commander in the crime his subordinates committed".<sup>117</sup>

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<sup>116</sup> *Prosecutor v. Hadžihasanović & Kubura*, case No. IT-01-47-A, Judgement of 22 April 2008, in particular para. 30.

<sup>117</sup> *Prosecutor v. Sefer Halilović*, case No. IT-01-48-T, Judgement of 16 November 2005, para. 78.

Concerning the superior's "duty to prevent" established in article 87.2 of Protocol I, the Appeals Chamber indicated that the general duty of commanders to take the necessary and reasonable measures was well rooted in customary international law and stemmed from their position of authority. It stated that the "'necessary' measures are the measures appropriate for the superior to discharge his obligation (showing that he genuinely tried to prevent or punish) and 'reasonable' measures are those reasonably falling within the material powers of the superior." Thus, the standard is whether the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator.<sup>118</sup>

## 2. The obligations of States regarding international crimes

Where violations of international human rights and humanitarian law constitute international crimes, States have a series of legal obligations and responsibilities that stem from international criminal law. States have the duty to investigate violations and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for them and to punish the perpetrator in accordance with the law, to exclude the possibility of amnesty for certain perpetrators, and to offer remedy and reparation to victims or their families. Their obligation to extend jurisdiction for prosecution of such crimes beyond their territory will be discussed in the next subsection. The obligation to seek accountability includes a responsibility for States, in accordance with international law, to cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.

The obligation to seek accountability is explicitly referred to in some instruments of international human rights and humanitarian law and has been reinforced by interpretations of the law. The International Covenant on Civil and Political Rights,<sup>119</sup> the Convention against Torture, the

<sup>118</sup> *Prosecutor v. Sefer Halilović*, case No. IT-01-48-A, Judgement of 16 October 2007, paras. 63–64.

<sup>119</sup> For example, article 2.3 states that "[e]ach State Party to the present Covenant undertakes: (a) [t]o ensure that any person whose rights or freedoms as herein recognized are

International Convention for the Protection of All Persons from Enforced Disappearance, and the Optional Protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography impose a general obligation on all States parties to provide an effective remedy for violations of the rights and freedoms contained in these treaties, including a duty to investigate and punish those responsible.

The Updated Set of principles for the protection and promotion of human rights through action to combat impunity refers to States' obligation to "undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished."<sup>120</sup>

Furthermore, resolutions adopted by the General Assembly and the Commission on Human Rights, the reports of United Nations special procedures and the jurisprudence of human rights treaty bodies have all consistently affirmed that States have a duty to investigate and prosecute violations of international human rights and humanitarian law.

In international humanitarian law, a distinction is made between international and non-international armed conflicts. Regarding international

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violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) [t]o ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) [t]o ensure that the competent authorities shall enforce such remedies when granted."

<sup>120</sup> E/CN.4/2005/102/Add.1, principle 19. The principles define the term "serious crimes under international law" as encompassing grave breaches of the Geneva Conventions and other violations of international humanitarian law that are crimes under international law, genocide, crimes against humanity, and other violations of internationally protected human rights that are crimes under international law and/or which international law requires States to penalize, such as torture, enforced disappearance, extrajudicial execution and slavery.

armed conflicts, all States have the responsibility to respond to grave and other breaches of the Geneva Conventions and of Protocol I. Under the Geneva Conventions, States undertake the obligation to respect and to ensure respect for the Conventions in all circumstances. Specifically, States undertake to enact legislation to provide effective penal sanctions for perpetrators of grave breaches of international humanitarian law.

In contrast, neither common article 3 nor Protocol II makes specific provision for the prosecution of serious violations of their rules or for grave breaches. However, the jurisprudence of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda has established that war crimes may also be committed in non-international armed conflicts.<sup>121</sup> Moreover, taking into account the complementary nature of the International Criminal Court's jurisdiction, the inclusion in its Rome Statute of war crimes committed in non-international armed conflicts means that States also have an obligation to investigate and prosecute serious violations of common article 3 of the Geneva Conventions, as well as other serious violations of the laws and customs applicable in armed conflicts not of an international character.<sup>122</sup>

The International Court of Justice dealt with the obligation to prevent and punish genocide. It determined that "one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent." Furthermore, the Court recalled that, under the Convention on the Prevention and Punishment of the Crime of Genocide, States parties have an obligation to "arrest persons accused of genocide who are in their territory—even if the crime of which they are accused was committed outside it—and, failing prosecution of them in the parties' own courts, that they will hand them over for trial by the competent international tribunal."<sup>123</sup>

<sup>121</sup> See, in particular, *Prosecutor v. Duško Tadić*, paras. 86–136.

<sup>122</sup> Rome Statute, art. 8.2 (c) and (e).

<sup>123</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, paras. 426 and 443.

Moreover, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law provide that “in cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him” (para. 4).

### **3. Domestic and international jurisdiction**

While domestic courts have jurisdiction over violations that occurred within the territory of their own State, territory alone does not define the limits of jurisdiction. The legal obligations created by international human rights and humanitarian law have been widely recognized as extending beyond the territory of a State and to any place where the State exercises jurisdiction or control over persons. Furthermore, under the principle of universal jurisdiction, a State may—and for grave breaches of the Geneva Conventions *must*—prosecute alleged perpetrators for certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim. For example, Geneva Convention IV on the protection of civilians establishes universal jurisdiction over grave breaches, providing that parties to the Convention “shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches [of the present Convention], and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie case*” (art. 146). This principle of universal jurisdiction derogates from the ordinary rules of criminal jurisdiction that require a territorial or personal link with the crime, the perpetrator or the victim. The rationale behind this principle is that “certain crimes are so harmful to international

interests that States are entitled—and even obliged—to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim.”<sup>124</sup>

Sometimes the extent of a State’s accountability obligations will have to be determined in the framework of the jurisdictional competence of an international tribunal or court. The jurisdiction of the International Criminal Court, for example, applies to the crimes set out in its Rome Statute committed by nationals or on the territory of a State party to the Statute—or when the United Nations Security Council so decides.<sup>125</sup> However, in view of the complementarity principle enshrined in the Rome Statute, the Court can exercise its jurisdiction only when the competent State is unwilling or unable to prosecute. States therefore retain the main responsibility for trying alleged perpetrators and only in certain cases may prosecution be transferred to the International Criminal Court.

#### 4. Amnesties<sup>126</sup>

Opportunities for accountability and justice most often come at the end of an armed conflict. Amnesty for violations committed during the conflict can become a key condition for obtaining a ceasefire or peace process, raising challenging questions as to the extent to which the granting of amnesty is compatible with international human rights and humanitarian law requirements of accountability and the rights of victims.

It is generally held that amnesty laws that foreclose prosecution of war crimes, genocide, crimes against humanity and gross violations of human rights, such as extrajudicial, summary or arbitrary execution, torture, and enforced disappearance, are inconsistent with States’ accountability

<sup>124</sup> Mary Robinson, “Preface”, in *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*, Stephen Macedo, ed. (Philadelphia, University of Pennsylvania Press, 2004).

<sup>125</sup> Rome Statute, art. 5.

<sup>126</sup> For further information, see *Rule-of-law Tools for Post-conflict States: Amnesties* (United Nations publication, Sales No. E.09.XIV.1). Available from [www.ohchr.org](http://www.ohchr.org).

obligations. Principle 24 of the Updated Set of principles for the protection and promotion of human rights through action to combat impunity states that “[e]ven when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within the following bounds: (a) [t]he perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met the obligations to which principle 19 refers or the perpetrators have been prosecuted before a court with jurisdiction [...] outside the State in question.”

In his report on the establishment of a Special Court for Sierra Leone, the Secretary-General stated that “[w]hile recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.”<sup>127</sup> More recently, the 2006 revised and updated version of the Guidelines for United Nations Representatives on certain aspects of negotiations for conflict resolution state that the United Nations cannot condone amnesties regarding war crimes, crimes against humanity, genocide or gross violations of human rights, or foster those that violate relevant treaty obligations of the parties in this field.

## 5. Accountability of United Nations personnel

Accountability for violations international human rights or humanitarian law committed by individual United Nations personnel could be addressed in the same way as those committed by any other individual, with prosecution, where appropriate, in a State’s domestic courts. Such personnel usually benefit from immunities in the territory where they are deployed. However, following international human rights law and international humanitarian law principles of accountability and the Charter of the United Nations, the

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<sup>127</sup> S/2000/915, para. 22.

United Nations conducts internal investigations of reported violations and reports on the results.<sup>128</sup> Moreover, these individuals' home States have jurisdiction and, when acting through the United Nations, including through the Security Council, must take steps to prevent violations and to ensure accountability of their own nationals in accordance with international human rights law and international humanitarian law requirements.

### C. VICTIMS' RIGHTS WITH RESPECT TO INTERNATIONAL CRIMES

According to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, victims are "persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term 'victim' also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization" (para. 8).

The Basic Principles and Guidelines make clear that victims' rights under international human rights law and international humanitarian law include an obligation on States to prevent violations from occurring and to investigate them when they do. The Basic Principles and Guidelines further state that "[t]he obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, *inter alia*, the duty to: (a) [t]ake appropriate legislative and administrative and other appropriate measures to prevent violations; (b) [i]nvestigate violations

<sup>128</sup> See United Nations, "Security Council condemns 'in the strongest terms' all acts of sexual abuse, exploitation by UN peacekeeping personnel: In Presidential Statement, Council recognizes shared responsibility of Secretary-General, all Member States to prevent abuse, enforce United Nations standards", press release SC/8400, 31 May 2005.

effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law; (c) [p]rovide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, [...] irrespective of who may ultimately be the bearer of responsibility for the violation; and (d) [p]rovide effective remedies to victims, including reparation [...]" (para. 3).

In particular:

- Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families;
- Victims shall have access to judicial remedies, including: (a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; and (c) access to relevant information concerning violations and reparation mechanisms;
- Furthermore, a victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law, as well as access to administrative and other bodies;
- Victims shall also receive reparation, which should be proportional to the gravity of the violations and the harm suffered. Effective reparation can take the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property;
- Finally, victims shall have adequate access to relevant information concerning violations and reparation mechanisms.

As mentioned in section B above, a number of international human rights treaties and provisions also provide a right to a remedy for victims of violations, including the International Covenant on Civil and Political Rights (art. 2), the International Convention on the Elimination of All Forms of Racial Discrimination (art. 6), the Convention against Torture (art. 14), and the Convention on the Rights of the Child (art. 39).

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,<sup>129</sup> focusing on crimes under domestic law, but also on abuses of power, which include violations of international human rights and humanitarian law, the African Charter on Human and Peoples' Rights (art. 7), the American Convention on Human Rights (art. 25), as well as decisions by the European Court of Human Rights and the Inter-American Court of Human Rights, also recognize the rights of victims. Finally, the Rome Statute establishes the power of the International Criminal Court to "determine the scope and extent of any damage, loss and injury to, or in respect of, victims" and to "make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation" (art. 75).

The International Court of Justice has also determined that certain violations committed in the context of armed conflict give rise to the rights of victims to reparation. For example, the Court indicated that "given that the construction of the wall in the Occupied Palestinian Territory has, inter alia, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned." The Court concluded that "Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered.

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<sup>129</sup> General Assembly resolution 40/34.

The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction.”<sup>130</sup>

## D. OTHER FORMS OF JUSTICE

Over the past few years, new mechanisms for accountability and victims' right to the truth and to reparation, particularly in post-conflict situations, have evolved. Transitional justice mechanisms, for example, have been developed at the national level as means to facilitate the end of hostilities, while preserving the State's obligation to ensure accountability and the victims' right to truth and reparation. Often countries emerging from civil war or authoritarian rule create truth commissions during the immediate post-conflict or transition period. These commissions are given a relatively short period for investigations and public hearings before completing their work with a final public report. While truth commissions do not replace the need for prosecutions, they offer some form of accountability that serves the interests of addressing situations where prosecutions for massive crimes are impossible or unlikely.<sup>131</sup>

It is important to note that for a truth and reconciliation process to succeed, violent conflict, war or repression must have come to an end. It is possible that the de facto security situation will not yet have fully improved, and truth commissions often do work in a context where victims and witnesses are afraid to speak publicly or to be seen to cooperate with the commission. But if a war or violent conflict is still actively continuing throughout the country, it is unlikely that there will be sufficient space to undertake a serious inquiry.

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<sup>130</sup> *Legal Consequences of the Construction of a Wall*, paras. 152–153.

<sup>131</sup> For a detailed analysis of truth and reconciliation mechanisms, see *Rule-of-Law Tools for Post-Conflict States: Truth Commissions* (United Nations publication, Sales No. E.06. XIV.5).

Other mechanisms that have been used to guarantee accountability and reparation to victims are international compensation commissions. For example, the United Nations Compensation Commission was created in 1991 as a subsidiary organ of the United Nations Security Council. Its mandate was to process claims and pay compensation for losses and damage suffered as a direct result of Iraq's unlawful invasion and occupation of Kuwait. This alternative form of justice provides a further mechanism to ensure that States that have sponsored or carried out serious violations of international human rights and humanitarian law are held liable for their acts, and also enables victims to obtain reparation.

Finally, another mechanism that has contributed to fulfilling the duty of States to investigate human rights violations is the creation of official commissions of inquiry with a human rights mandate. The names of these commissions, their composition, terms of reference, time frames and powers vary greatly. Although such inquiries are by definition established at the initiative of the Government authorities, they are most often a result of concerted demands by civil society and sometimes also by the international community. National commissions of inquiry are often set up to address victim-specific violations by being tasked to investigate the alleged abuses, give a detailed account of a particular incident or series of abuses, or recommend individuals for prosecution. In an effort by the State to prevent future violations or to strengthen the criminal justice system, a commission may also be given a broader mandate to report on the causes of the violation and to propose recommendations for institutional reform.<sup>132</sup>

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<sup>132</sup> See "Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston" (A/HRC/8/3, paras. 12 ff).

# IV

- APPLICATION OF  
INTERNATIONAL  
HUMAN RIGHTS LAW  
AND INTERNATIONAL  
HUMANITARIAN LAW  
BY THE UNITED NATIONS

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Maintaining peace and preventing armed conflict are vital concerns of the United Nations. As provided in Article 1.3 of the Charter of the United Nations, promoting and encouraging respect for human rights and for fundamental freedoms for all without discrimination is one of the fundamental purposes of the Organization. In this respect, the United Nations has a long history of drawing on both international human rights law and international humanitarian law to protect people during times of armed conflict. It takes into account that the adoption of important international instruments on human rights, such as the Universal Declaration of Human Rights and international human rights treaties, has contributed to affirm the idea that everyone is entitled to enjoy human rights, whether in peacetime or in wartime.

In the past two decades United Nations Member States have increasingly called on the United Nations Secretariat and specialized agencies to use both bodies of law as the basis for their objectives and activities, leading to the development of considerable expertise, methodology and practice in the field. Both regimes of law are applied in the context of the General Assembly, the Security Council and the Human Rights Council. They are also used in the context of resolutions, monitoring, investigations, analysis, and reporting by the United Nations Secretariat and specialized agencies, including the Secretary-General and OHCHR. International human rights law and international humanitarian law have been applied, in particular, in the context of the Security Council's work concerning the protection of categories of persons, including civilians, women, children and IDPs.

This chapter provides examples of the application of international human rights and humanitarian law by the United Nations in these various contexts.

## A. THE GENERAL ASSEMBLY

The General Assembly, as the main norm-creating body of the United Nations, has since the creation of the Organization been actively involved in the development of human rights norms, including the Universal

Declaration of Human Rights. The General Assembly has adopted a number of human rights principles and standards on the rights of specially protected groups. The General Assembly has also developed standards on the detention, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.<sup>133</sup>

Concerns for the respect of human rights in armed conflict were already raised in the 1968 Proclamation of Teheran, in which Member States declared that “[m]assive denials of human rights, arising out of aggression or any armed conflict with their tragic consequences, and resulting in untold misery, engender reactions which could engulf the world in ever growing hostilities” (para. 10).<sup>134</sup>

The Teheran Conference, in its resolution XXIII, requested the Secretary-General of the United Nations, after consultation with ICRC, to bring to the attention of all States Members of the United Nations the existing rules of international humanitarian law, and urge them, pending the adoption of new rules, to ensure that civilians and combatants are protected. The General Assembly, in resolution 2444 (XXIII), took note of this and also requested the Secretary-General to prepare a study on the question of respect for human rights in armed conflicts. The Secretary-General subsequently submitted several reports to the General Assembly.<sup>135</sup>

During the 1970s the General Assembly adopted a series of resolutions<sup>136</sup> in which it reaffirmed the need to secure the full observance of human rights in armed conflicts. In particular, the General Assembly affirmed in resolution 2675 (XXV) that “[f]undamental human rights, as accepted in international law and laid down in international instruments, continue

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<sup>133</sup> Resolution 3074 (XXVIII).

<sup>134</sup> It should be noted that the 1993 Vienna World Conference on Human Rights recommended that “the United Nations assume a more active role in the promotion and protection of human rights in ensuring full respect for international humanitarian law in all situations of armed conflict” (A/CONF.157/23, para. 96).

<sup>135</sup> A/7720 and A/8052.

<sup>136</sup> See resolutions 2597 (XXIV), 2675 (XXV), 2676 (XXV), 2852 (XXVI), 2853 (XXVI), 3032 (XXVII), 3102 (XXVIII), 3319 (XXIX), 3500 (XXX), 31/19 and 32/44.

to apply fully in situations of armed conflict.” It also emphasized that dwellings, refuges, hospital zones and other installations used by civilians should not be the object of military operations. Civilians should not be the victims of reprisals, forcible transfers or other assaults on their integrity. The General Assembly also declared that providing international relief to civilian populations is in conformity with the Charter of the United Nations, the Universal Declaration of Human Rights and other international human rights instruments.

In recent years the General Assembly has been actively involved in the progressive development of human rights in all contexts, particularly through the adoption of the Millennium Development Goals. In their Millennium Declaration, the Heads of State and Government resolved “[t]o ensure the implementation, by States Parties [...] of international humanitarian law and human rights law, and call[ed] upon all States to consider signing and ratifying the Rome Statute of the International Criminal Court”.<sup>137</sup>

At their 2005 World Summit, the Heads of State and Government reiterated their commitment to protecting human rights, including the responsibility of each individual State to protect its populations from genocide, war crimes and crimes against humanity. This responsibility entails preventing such crimes, as well as incitement to commit them. The Heads of State and Government declared that “[t]he international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.” They further stressed the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes and crimes against humanity and its implications, bearing in mind the principles of the Charter and of general international law. They reaffirmed their commitment to helping States build their capacity to protect their populations from genocide, war crimes and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.<sup>138</sup>

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<sup>137</sup> General Assembly resolution 55/2, para. 9.

<sup>138</sup> General Assembly resolution 60/1, paras. 138–139.

Even if the General Assembly as an organ does not carry out or directly enforce protective measures, its creation of norms, principles and standards is fundamental for the effective protection of individual rights. Furthermore, its resolutions often represent States' *opinio iuris* on a given question, which in time may be consolidated through State practice as a rule of customary law binding on all States. For example, there is a broad consensus that many of the rights contained in the Universal Declaration of Human Rights have crystallized over time into norms of customary international law. Therefore, the continuous involvement of the General Assembly in the development of international human rights rules and principles is of great relevance.

## B. THE SECURITY COUNCIL

In the 2005 World Summit Outcome, Member States clearly recognized that "[t]he international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, [they] are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity" (para. 139).

The Security Council has, in fact, a long-standing practice of adopting resolutions in response to certain specific country situations where international peace and security are at risk and frequently where armed conflict has begun or is imminent. It has repeatedly demanded that parties to an armed conflict respect human rights and humanitarian law

obligations. Already in 1967, it considered "that essential and inalienable human rights should be respected even during the vicissitudes of war".<sup>139</sup>

Since the 1990s the Security Council has further developed its practice of including human rights considerations in its resolutions on situations of armed conflict. For example, it demanded that "all factions and forces in Sierra Leone [...] respect human rights and abide by applicable rules of international humanitarian law".<sup>140</sup> Concerning the situation in the Democratic Republic of the Congo, it reaffirmed "that all Congolese parties have an obligation to respect human rights, international humanitarian law and the security and well-being of the civilian population".<sup>141</sup> It also called "for full respect for human rights and international humanitarian law throughout Afghanistan".<sup>142</sup>

The Security Council has also on various occasions condemned violations of human rights and humanitarian law in armed conflicts and called for accountability.<sup>143</sup> For instance, it condemned "all and any violations of human rights and international humanitarian law, call[ed] upon all parties in Somalia to respect fully their obligations in this regard, and call[ed] for those responsible for such violations in Somalia to be brought to justice".<sup>144</sup> It also called on the Sudan "to end the climate of impunity in Darfur by identifying and bringing to justice all those responsible [...] for the widespread human rights abuses and violations of international humanitarian law".<sup>145</sup>

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<sup>139</sup> Resolution 237 (1967).

<sup>140</sup> Resolution 1181 (1998).

<sup>141</sup> Resolution 1493 (2003).

<sup>142</sup> Resolution 1746 (2007).

<sup>143</sup> It should be noted that since the 1990s the Security Council has considered that human rights and humanitarian law obligations are to be observed in armed conflicts. For example, in its resolution 1019 (1995) on violations committed in the former Yugoslavia, it "condemn[ed] in the strongest possible terms all violations of international humanitarian law and of human rights in the territory of the former Yugoslavia and demand[ed] that all concerned comply fully with their obligations in this regard". See also its resolution 1034 (1995).

<sup>144</sup> Resolution 1814 (2008).

<sup>145</sup> Resolution 1564 (2004).

The Security Council has developed a practice of adopting periodic and thematic resolutions on the protection of particular categories of persons in armed conflicts, including civilians, children and women. For example, in its resolution 1265 (1999), it urged parties to comply strictly with their obligations under international humanitarian, human rights and refugee law. More recently, in its resolution 1894 (2009), it demanded "that parties to armed conflict comply strictly with the obligations applicable to them under international humanitarian, human rights and refugee law". The Security Council has used similar language in its aides-memoires.<sup>146</sup> In all these instruments, the Security Council increasingly requires the United Nations to take action to implement and protect standards of both international human rights law and international humanitarian law.

Furthermore, in its resolution 1612 (2005) the Security Council requested the Secretary-General to implement a monitoring and reporting mechanism on children and armed conflict and established a working group to review the mechanism's reports. The mechanism monitors in particular six grave abuses: (a) killing or maiming of children; (b) recruiting or using child soldiers; (c) attacks against schools or hospitals; (d) rape and other grave sexual violence against children; (e) abduction of children; and (f) denial of humanitarian access for children. The working group makes recommendations to the Security Council on possible measures to promote the protection of children affected by armed conflict and addresses requests to other United Nations bodies for action to support the implementation of the Security Council resolution.<sup>147</sup>

There are no similar Security Council working groups for civilians and women in armed conflicts. However, in its resolution 1888 (2009) on women and peace and security, the Security Council requested the Secretary-General "to devise urgently and preferably within three

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<sup>146</sup> See, for example, the aide-memoire annexed to the Statement by the President of the Security Council (S/PRST/2002/6, updated in 2003).

<sup>147</sup> For more information on the mechanism, see the action plan presented by the Secretary-General (A/59/695-S/2005/72). See also [www.un.org/children/conflict/english/index.html](http://www.un.org/children/conflict/english/index.html) (accessed 30 June 2011).

months, specific proposals on ways to ensure monitoring and reporting in a more effective and efficient way within the existing United Nations system on the protection of women and children from rape and other sexual violence in armed conflict and post-conflict situations, utilizing expertise from the United Nations system and the contributions of national Governments, regional organizations, non-governmental organizations in their advisory capacity and various civil society actors, in order to provide timely, objective, accurate and reliable information on gaps in United Nations entities response, for consideration in taking appropriate action". In resolution 1894 (2009), on civilians in armed conflicts, the Security Council considered "the possibility [...] of using the International Fact-Finding Commission established by article 90 of the First Additional Protocol to the Geneva Conventions" in order to receive information on alleged violations of applicable international law relating to the protection of civilians.

In its resolution 1674 (2006), the Security Council recognized that development, peace and security and human rights are interlinked and mutually reinforcing and noted "the commission of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security". It further noted, in its resolution 1894 (2009), that "the deliberate targeting of civilians as such and other protected persons, and the commission of systematic, flagrant and widespread violations of applicable international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security" and reaffirmed "its readiness to consider such situations and, where necessary, to adopt appropriate steps".

With the adoption of the Rome Statute, the Security Council has also been given an active role in the fight against impunity for genocide, war crimes, crimes against humanity and aggression. The Rome Statute foresees that the Security Council, acting under Chapter VII, may refer to the International Criminal Court situations in which one or more of such crimes appears to have been committed. In the exercise of this power, the

Security Council referred to the Prosecutor the Darfur situation in resolution 1593 (2005), in which it affirmed that justice and accountability were critical to achieving lasting peace and security in Darfur.

Clearly, the role of the Security Council as the executive organ of the Organization with enforcement powers gives it a central responsibility in achieving the United Nations main principles, particularly when there is a threat to peace, a breach of peace or an act of aggression. Through the adoption and implementation of coercive measures agreed on a multilateral level, the Security Council contributes to enforcing human rights standards and calls upon States to respect the principles of international humanitarian law. Moreover, a timely Security Council intervention can be an effective mechanism for ensuring that the international community and, in particular, the States concerned observe their obligations to protect civilian populations and to prevent gross human rights violations amounting to genocide, crimes against humanity and war crimes.

### C. THE UNITED NATIONS SECRETARY-GENERAL

As indicated above, the Secretary-General has presented several reports on respect for human rights in armed conflicts to the General Assembly. In his 1969 report, the Secretary-General recalled that "the human rights provisions of the Charter make no distinction in regard to their application as between times of peace on the one hand and times of war on the other." He further stated that "[t]he phraseology of the Charter would apply in its generality to civilian as well as military personnel; it would encompass persons living under the jurisdiction of their own national authorities and persons living in territories under belligerent occupation." He also indicated that "[t]he Universal Declaration of Human Rights does not refer in any of its provisions to a specific distinction between times of peace and times of armed conflict. It sets forth the rights and freedoms which it proclaims as belonging to 'everyone', to 'all', and formulates prohibitions by the phrase that 'no one' shall be subjected to acts of which the Declaration disapproves." Finally, he recalled that "the Convention on the Prevention

and Punishment of the Crime of Genocide confirms what appears to be the United Nations position that the protection of human rights through the instruments prepared under the auspices of the Organization shall apply both in time of peace and in time of war.”<sup>148</sup>

In his 1970 report, the Secretary-General reviewed the protection given by United Nations human rights instruments in armed conflicts. Among other things, he stated that “[t]here are instances in which the autonomous protection ensured by the human rights instruments of the United Nations is more effective and far-reaching than that derived from the norms of the Geneva Conventions and other humanitarian instruments oriented towards armed conflicts.” The Secretary-General further recalled that “[t]o the extent, therefore, that the Geneva Conventions make the protection of certain rights dependent upon the character of the armed conflict concerned, the protection derived from the United Nations instruments with respect to the rights in question is more encompassing.” He also indicated that “[i]n some cases, the human rights instruments of the United Nations and, in particular, the International Covenant on Civil and Political Rights, go beyond the Geneva Conventions as regards the substance of the protection accorded. The Covenant contains certain substantive provisions protecting some rights of all persons in all types of armed conflict which either do not find their counterpart in the Geneva Conventions at all or are included in some of the Conventions only in regard to international armed conflicts.”<sup>149</sup>

Recently, the Security Council has frequently requested the United Nations Secretariat, through the Secretary-General, to take action to respond to armed conflicts, including by addressing violations of international human rights and humanitarian law. For example, in its resolution 1564 (2004), the Security Council requested “that the Secretary-General rapidly establish an international commission of inquiry in order immediately to

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<sup>148</sup> A/7720, paras. 23–24 and 30.

<sup>149</sup> A/8052, paras. 24–25 and 27. The Secretary-General goes on to list some examples: the prohibition of the death penalty for minors and pregnant women, the prohibition of slavery, the principle of non-retroactivity of criminal law, the right to freedom of thought, etc.

investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable [...]"'. The Secretary-General asked the High Commissioner for Human Rights to oversee the establishment of the Commission and to provide it with suitable support.

Furthermore, in his 2005 report to the Security Council on the protection of civilians in armed conflict, the Secretary-General noted that "compliance with international humanitarian law, human rights law, refugee law and international criminal law by all parties concerned provides the strongest basis for ensuring respect for the safety of the civilian population."<sup>150</sup> In his 2007 report on the same subject, he stated that "[a]s a standard practice, the Security Council should make every effort to call upon parties to conflict, and multinational forces that it has authorized, to uphold their international humanitarian law and human rights obligations."<sup>151</sup>

Moreover, the Secretary-General has issued a number of reports which record recent developments in international human rights and humanitarian law that contribute to the growing body of law that can be considered to be fundamental standards of humanity.<sup>152</sup>

## D. THE HUMAN RIGHTS COUNCIL

The Commission on Human Rights and its successor, the Human Rights Council, have been the historical forums for the analysis and discussion by its members of human rights situations and issues. The mandate of the Human Rights Council consolidated the work of the Commission since 1947. Indeed, when adopting resolution 60/251 to create the Human Rights Council, the General Assembly decided to give it two core responsibilities: (a) promote universal respect for the protection of

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<sup>150</sup> S/2005/740, para. 12.

<sup>151</sup> S/2007/643, para. 25.

<sup>152</sup> See, for instance, A/HRC/8/14.

all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner; and (b) address situations of violations of human rights, including gross and systematic violations, and make recommendations to resolve them.

Both the Commission and the Council have consistently considered violations of international humanitarian law to fall within their mandates. The Council has further decided that "given the complementary and mutually interrelated nature of international human rights law and international humanitarian law, the [universal periodic] review shall take into account applicable international humanitarian law."<sup>153</sup> Member States have repeatedly called for action by States and the United Nations to address such violations. For instance, in 1994, the Commission analysed the human rights situation in Rwanda and issued a resolution "condemn[ing] in the strongest terms all breaches of international humanitarian law [...] and call[ing] upon all the parties involved to cease immediately these breaches, violations and abuses and to take all necessary steps to ensure full respect for human rights and fundamental freedoms and for humanitarian law".<sup>154</sup> The Commission also adopted a number of resolutions referring to abuses of both international human rights law and international humanitarian law in the context of armed conflict in Afghanistan, Burundi, Colombia, the Occupied Palestinian Territory and Uganda, among others.

More recently the Commission on Human Rights acknowledged that "human rights law and international humanitarian law are mutually reinforcing" and considered that "the protection provided by human rights law continues in armed conflict situations, taking into account when international humanitarian law applies as *lex specialis*". The Commission emphasized that "conduct that violates international humanitarian law, including grave breaches of the Geneva Conventions, of 12 August 1949, or of the Protocol Additional thereto of 8 June 1977 relating to the Protection of Victims of International Armed Conflicts (Protocol I), may also constitute a gross violation of human rights". The Commission then

<sup>153</sup> Resolution 5/1, annex.

<sup>154</sup> Resolution S-3/1.

urged “all parties to armed conflicts to comply with their obligations under international humanitarian law, in particular to ensure respect for and protection of the civilian population, and also urges all States to comply with their human rights obligations in this context”.<sup>155</sup> This resolution may be seen as the cornerstone of the Human Rights Council’s work on the protection of human rights in conflict situations.

The Human Rights Council has followed the same approach. It also reiterated “that effective measures to guarantee and monitor the implementation of human rights should be taken in respect of civilian populations in situations of armed conflict, including people under foreign occupation and that effective protection against violations of their human rights should be provided, in accordance with international human rights law and applicable international humanitarian law”.<sup>156</sup>

Finally, since 1989 the Sub-Commission on Prevention of Discrimination and Protection of Minorities, as it was then known, has also insisted on the need to respect obligations of both international human rights law and international humanitarian law in armed conflict. In its resolution 1989/24, it deplored the frequent lack of respect during armed conflicts of relevant provisions in international humanitarian law and the law of human rights. Furthermore, in 2005 it issued a working paper on the relationship between human rights law and international humanitarian law, particularly from the perspective of their dual or simultaneous application in the light of the case law of human rights treaty bodies and special procedures.<sup>157</sup>

## E. THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS

The field-based activities of OHCHR illustrate how it addresses obligations of both international human rights law and international humanitarian law

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<sup>155</sup> Resolution 2005/63.

<sup>156</sup> Resolution 9/9.

<sup>157</sup> E/CN.4/Sub.2/2005/14.

in specific conflict situations. For example, according to the Agreement concerning the establishment of an office in Nepal between OHCHR and the Government of Nepal signed in April 2005, the office shall "monitor the observance of human rights and of international humanitarian law [...] with a view to advising the authorities of Nepal on [...] policies, programmes and measures for the promotion and protection of human rights". The Agreement also indicates that the office will "engage all relevant actors, including non-State actors, for the purpose of ensuring the observance of relevant international human rights and humanitarian law". The Agreement for the establishment of an OHCHR office in Uganda, signed on 9 January 2006, contains similar provisions, with the office conducting a similar range of activities. Similarly, the Agreement regarding the establishment of an OHCHR office in Togo, signed on 10 July 2006, provides that its mandate is to monitor the observance of human rights rules and principles and respect for international humanitarian law obligations.

Furthermore, the Agreement on the establishment of an office in Colombia, signed on 29 November 1996, states that the office will receive "complaints on human rights violations and other abuses, including breaches of humanitarian law applicable in armed conflicts."<sup>158</sup> The office monitors and reports on alleged violations by State and non-State actors.

Finally, the agreement between OHCHR and Mexico, signed on 6 February 2008, indicates that the office shall have freedom of movement throughout the country, working in a complementary way with other international agencies dealing with issues of international human rights and humanitarian law.

The High Commissioner also issues periodic reports referring to violations of international human rights and humanitarian law by parties to a conflict. For example, in her 2008 report on the human rights violations resulting from Israeli military attacks and incursions in the Occupied Palestinian Territory, she recalled that "both Israel and the Palestinian Authority, as well as Hamas in Gaza, carry obligations under international humanitarian

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<sup>158</sup> E/CN.4/1997/11, annex.

law and international human rights law vis-à-vis the civilian populations in both Israel and the [Occupied Palestinian Territory]."<sup>159</sup> Concerning the situation in the Sudan, the High Commissioner called on all parties to the conflict to "respect their obligations under international human rights law and international humanitarian law and implement their obligations under all relevant Security Council resolutions and ceasefire agreements".<sup>160</sup> Similarly, she appealed publicly to both parties to the conflict in Nepal "not to repeat the gross violations of international humanitarian law and human rights perpetrated during previous phases of the conflict."<sup>161</sup> Regarding Colombia, she urged "the Government, illegal armed groups and civil society at large to give priority to full respect for human rights and international humanitarian law."<sup>162</sup>

## F. TREATY BODIES AND SPECIAL PROCEDURES

Independent United Nations human rights experts, working in treaty bodies or as the holders of country or thematic special procedure mandates of the Human Rights Council, regularly refer to obligations of international human rights and humanitarian law in armed conflict. Their reports and recommendations help to identify and sometimes prevent violations in armed conflict. Their findings and outputs have been referred to in decisions of the International Court of Justice. For example, in its judgment on the *Armed Activities on the Territory of the Congo*, the Court considered the report of the Special Rapporteur on the Democratic Republic of the Congo in its findings of violations of international human rights and humanitarian law. In its advisory opinion on the *Legal Consequences of the Construction of a Wall* the Court reiterated the Human Rights Committee's interpretation that the International Covenant on Civil and Political Rights is binding on

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<sup>159</sup> A/HRC/8/17, para. 4.

<sup>160</sup> "Ninth periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan", 20 March 2008. Available from [www.ohchr.org/EN/Countries/AfricaRegion/Pages/SDPeriodicReports.aspx](http://www.ohchr.org/EN/Countries/AfricaRegion/Pages/SDPeriodicReports.aspx) (accessed 30 June 2011).

<sup>161</sup> E/CN.4/2006/107, para. 18.

<sup>162</sup> A/HRC/10/32, para. 98.

the occupying Power vis-à-vis the population of the occupied territory. There are also instances where domestic courts have referred to the outputs of treaty bodies, including general comments and concluding observations.

The following examples illustrate how treaty bodies and special procedures deal with the complementarity of rules and principles of international human rights law and international humanitarian law.

## **1. Treaty bodies**

The Human Rights Committee, in its general comments Nos. 29 (2001) and 31 (2004), dealt with the applicability of the International Covenant on Civil and Political Rights in armed conflict and recalled that the Covenant's human rights obligations apply in situations of armed conflict to which the rules of international humanitarian law are also applicable (see chap. II, sect. D).

The Human Rights Committee also recalled in its concluding observations on a report of Israel that "the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant" and that "the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law."<sup>163</sup> The Human Rights Committee also indicated in its concluding observations on a report submitted by the United States of America that "the State party should in particular [...] acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory, as well as its applicability in time of war". It also considered that the State concerned should "grant the International Committee of the Red Cross prompt access to any person detained in connection with an armed conflict. The State party should also ensure that detainees, regardless

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<sup>163</sup> CCPR/CO/78/ISR, para. 11.

of their place of detention, always benefit from the full protection of the law.”<sup>164</sup> In its concluding observations on a report of Germany, the Human Rights Committee reiterated “that the applicability of the regime of international humanitarian law does not preclude accountability of States parties under article 2, paragraph 1, of the Covenant for the actions of [their] agents outside their own territories.”<sup>165</sup>

The Committee on the Rights of the Child, for its part, recommended “with reference to international humanitarian law [...] that the State party fully comply with the rules of distinction (between civilians and combatants) and proportionality (of attacks that cause excessive harm to civilians)”.<sup>166</sup> Moreover, in relation to the application of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, the Committee has determined, for example, that “in accordance with State responsibility in international law and under the prevailing circumstances, the provisions of the Convention and Optional Protocols apply to the benefit of the children of the occupied Palestinian territory, notably with regard to all conduct by the State party’s authorities or agents that affects the enjoyment of rights enshrined in the Convention. The Committee underlines the concurrent application of human rights and humanitarian law, as established by the International Court of Justice in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, and recalls the explicit references to humanitarian law in the Optional Protocol.”<sup>167</sup>

The Committee against Torture in its concluding observations on a report of the United States of America discussed the argument of whether international humanitarian law may be regarded as *lex specialis*. It recalled that “the State party should recognize and ensure that the Convention [against Torture] applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction and that the application of the

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<sup>164</sup> CCPR/C/USA/CO/3/Rev.1, paras. 10 and 12.

<sup>165</sup> CCPR/CO/80/DEU, para. 11.

<sup>166</sup> CRC/C/15/Add.195, para. 51.

<sup>167</sup> CRC/C/OPAC/ISR/CO/1, para. 4

Convention's provisions are without prejudice to the provisions of any other international instrument".<sup>168</sup> Moreover, in its concluding observations on a report submitted by Indonesia, the Committee expressed concern over "allegations of the high incidence of rape in conflict areas perpetrated by military personnel as a form of torture and ill-treatment and by the absence of investigation, prosecution and conviction of the perpetrators." It also expressed concern "at the situation of refugees and internally displaced persons as a consequence of armed conflict, especially children living in refugee camps" and recommended that "the State party should take effective measures to prevent violence affecting refugees and internally displaced persons, especially children, who should be registered at birth and prevented from being used in armed conflict."<sup>169</sup>

The Committee on Economic, Social and Cultural rights has reaffirmed in its concluding observations on a report of Israel that "the State party's obligations under the Covenant apply to all territories and populations under its effective control." It reaffirmed its position that, even in a situation of armed conflict, fundamental human rights must be respected and that basic economic, social and cultural rights, as part of the minimum standards of human rights, are guaranteed under customary international law and are also prescribed by international humanitarian law. The Committee also recalled that "the applicability of rules of humanitarian law does not by itself impede the application of the Covenant or the accountability of the State under article 2 (1) for the actions of its authorities."<sup>170</sup>

## 2. Special procedures

Human rights special procedures have also contributed through their reports to further clarifying the relationship between obligations of international human rights law and international humanitarian law, particularly the continuing application of human rights norms to situations

<sup>168</sup> CAT/C/USA/CO/2, para. 14.

<sup>169</sup> CAT/C/IDN/CO/2, paras. 16 and 18.

<sup>170</sup> E/C.12/1/Add.90, para. 31.

of armed conflict. For example, the Special Rapporteur on extrajudicial, summary or arbitrary executions has consistently referred to both bodies of law in his analysis of the lawfulness of killings in armed conflict.<sup>171</sup> Regarding the question of whether international humanitarian law falls within the Special Rapporteur's mandate, he noted that "it falls squarely within the mandate. All major relevant resolutions in recent years have referred explicitly to that body of law."<sup>172</sup> The General Assembly, dealing with the mandate of the Special Rapporteur, urged Governments "to take all necessary and possible measures, in conformity with international human rights law and international humanitarian law, to prevent loss of life [...] during [...] armed conflicts".<sup>173</sup>

In 2006, four Special Rapporteurs issued a report on their mission to Lebanon and Israel. They recalled that "[h]uman rights law does not cease to apply in times of war, except in accordance with precise derogation provisions relating to times of emergency." Regarding economic, social and cultural rights, they indicated that "the International Covenant on Economic, Social and Cultural Rights [...] does not explicitly allow for derogations in time of public emergency, but the guarantees of the Covenant may, in times of armed conflict, be limited in accordance with its articles 4 and 5 and because of the possible scarcity of available resources in the sense of article 2, paragraph 1." They also indicated that "[h]uman rights law and international humanitarian law are not mutually exclusive but exist in a complementary relationship during armed conflict, and a full legal analysis requires consideration of both bodies of law. In respect of certain human rights, more specific rules of international humanitarian law may be relevant for the purposes of their interpretation." They concluded that "[t]he international human rights regime, consisting of the full range of economic, social and cultural rights (such as those

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<sup>171</sup> Including in annual reports since at least 1992, which have dealt with the right to life in the context of international and non-international armed conflicts, for example E/CN.4/1993/46, paras. 60–61, and A/HRC/4/20. See also the Special Rapporteur's report to the General Assembly (A/62/265, para. 29).

<sup>172</sup> E/CN.4/2005/7, para. 45.

<sup>173</sup> Resolution 59/197, para. 8 (b).

pertaining to the highest attainable standard of physical and mental health and adequate housing), as well as civil and political rights, thus applies to the analysis of this conflict.”<sup>174</sup>

In the same year, another group of special procedure mandate holders issued a report on the situation of detainees in Guantanamo Bay, assessing the legal framework applicable to them, including the notion of arbitrary detention, in two situations: detainees captured in the course of an armed conflict and detainees captured in the absence of armed conflict.<sup>175</sup>

The Working Group on Arbitrary Detention, in its 2005 annual report, also noted that it “considers its mandate as being to deal with communications arising from a situation of international armed conflict to the extent that the detained persons are denied the protection of the Third or the Fourth Geneva Conventions [...]. The Working Group stated, for instance, that “[i]nternal armed conflict involves the full applicability of relevant provisions of international humanitarian law and of human rights law with the exception of guarantees derogated from, provided such derogations have been declared by the State party to the International Covenant on Civil and Political Rights concerned, in accordance with article 4”.<sup>176</sup>

Other special procedure mandate holders, such as the Special Rapporteur on adequate housing, the Special Rapporteur on illicit movement and dumping of toxic and dangerous products and wastes, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on the sale of children, the Special Rapporteur on the right to education, the Special Rapporteur on the question of torture, and the Representative of the Secretary-General on the human rights of internally displaced persons, have issued thematic reports related to the application of human

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<sup>174</sup> A/HRC/2/7, paras. 15–17.

<sup>175</sup> E/CN.4/2006/120.

<sup>176</sup> E/CN.4/2006/7, paras. 75 and 71 (b).

rights standards in armed conflict.<sup>177</sup> Furthermore, the Special Rapporteur on the situation of human rights in the Sudan recommended, for example, that "all parties [to the conflict] should respect international humanitarian law and human rights law."<sup>178</sup>

## G. HUMAN RIGHTS COMPONENTS OF UNITED NATIONS PEACEKEEPING MISSIONS

The United Nations systematically includes human rights components in its peace missions established by the Security Council. These components, integral to the mission but reporting also to OHCHR, are required to respond to concerns of both international human rights law and international humanitarian law.

For example, the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) was mandated "to assist [the Government] in the promotion and protection of human rights, [...] investigate human rights violations [...] and [...] cooperate with efforts to ensure that those responsible for serious violations of human rights and international humanitarian law are brought to justice".<sup>179</sup>

The human rights component of the United Nations Mission in the Sudan (UNMIS) was established "[t]o ensure an adequate human rights presence, capacity, and expertise within UNMIS to carry out human rights promotion, civilian protection, and monitoring activities".<sup>180</sup> The United Nations Mission in the Sudan and OHCHR regularly publish reports on their monitoring and investigations of respect for international human rights

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<sup>177</sup> See, for instance, E/CN.4/2001/51, E/CN.4/2002/59, E/CN.4/2004/48, E/CN.4/2005/48, E/CN.4/2006/41, A/HRC/7/16, A/HRC/5/5, A/60/321, E/CN.4/2006/52, A/63/271, E/CN.4/Sub.2/2004/40, E/CN.4/2006/98, A/HRC/6/17, A/63/223, E/CN.4/2006/67, A/HRC/8/10, E/CN.4/2006/6, A/HRC/6/19, A/HRC/10/13/Add.2 and A/HRC/8/6/Add.4.

<sup>178</sup> E/CN.4/2006/111, para. 81.

<sup>179</sup> Security Council resolution 1565 (2004).

<sup>180</sup> See Security Council resolution 1590 (2005), para. 4 (a) (ix), extended by resolution 1706 (2006).

and humanitarian law, particularly in the region of Darfur. For example, in 2008, they recommended that the Government of the Sudan should "carry out an impartial, transparent, and timely investigation into the attacks on villages and towns in the northern corridor and bring to justice those who were involved in serious human rights violations or crimes under international humanitarian law".<sup>181</sup>

Human rights components with similar mandates have been established in the United Nations Assistance Missions in Afghanistan (UNAMA) and for Iraq (UNAMI) with their respective reports referring to both international human rights law and international humanitarian law.<sup>182</sup> In its 2008 annual report on the protection of civilians in armed conflict, UNAMA recalled that, once an insurgent is hors de combat, international human rights standards to which the State is a party or which form part of customary international law are applicable. Members of the pro-Government military forces are also accountable for violations of international humanitarian law and international human rights norms.<sup>183</sup> In 2007, UNAMI stated that "armed groups from all sides continued to target the civilian population. In doing so, these groups frequently violated the sanctity of places of religious worship, such as mosques to store weapons and ammunition, occupied civilian buildings such as schools, and disregarded the protected status of health facilities and health professionals in violation of international humanitarian and human rights laws."<sup>184</sup>

## H. COMMISSIONS OF INQUIRY AND FACT-FINDING MISSIONS

One of the mechanisms to investigate gross violations of human rights and serious violations of international humanitarian law that the Security

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<sup>181</sup> "Ninth periodic report".

<sup>182</sup> See, for example, UNAMI, "Human Rights Report: 1 January to 31 March 2007". Available from [www.ohchr.org/Documents/Countries/jan-to-march2007\\_engl.pdf](http://www.ohchr.org/Documents/Countries/jan-to-march2007_engl.pdf) (accessed 30 June 2011).

<sup>183</sup> Available from [http://unama.unmissions.org/Portals/UNAMA/human%20rights/UNAMA\\_09february-Annual%20Report\\_PoC%202008\\_FINAL\\_11Feb09.pdf](http://unama.unmissions.org/Portals/UNAMA/human%20rights/UNAMA_09february-Annual%20Report_PoC%202008_FINAL_11Feb09.pdf) (accessed 30 June 2011)

<sup>184</sup> "Human Rights Report: 1 January to 31 March 2007".

Council and the Human Rights Council have had recourse to is the use of fact-finding missions and commissions of inquiry. The Office of the United Nations High Commissioner for Human Rights is frequently asked to help establish and provide expertise to such efforts.

The Secretary-General has stated that international commissions of inquiry and fact-finding missions "can assist the United Nations intergovernmental bodies, including the Commission on Human Rights and the Security Council, in their decision-making processes on action when serious violations of international human rights law and international humanitarian law are taking place."<sup>185</sup> Similarly, the High Commissioner for Human Rights has stated that among the most significant actions that the Security Council has taken for the protection of civilians is the establishment of commissions of inquiry.<sup>186</sup>

United Nations commissions of inquiry or fact-finding missions, supported by OHCHR, have been established to assist States in addressing violations of international human rights and humanitarian law in Timor-Leste, then East Timor<sup>187</sup> (1999), in Togo<sup>188</sup> (2000), in the Occupied Palestinian Territory<sup>189</sup> (2000), in the Darfur region of the Sudan<sup>190</sup> (2004-2005), in Lebanon<sup>191</sup> (2006), regarding events in Beit Hanoun in the Occupied Palestinian Territory<sup>192</sup> (November 2006), regarding human rights concerns in Darfur<sup>193</sup> (December 2006), and regarding Israeli military operations in Gaza<sup>194</sup> (2009).

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<sup>185</sup> E/CN.4/2006/89.

<sup>186</sup> Statement to the Security Council during its open debate on the protection of civilians in armed conflict on 7 July 2010.

<sup>187</sup> Commission on Human Rights resolution 1999/S-4/1.

<sup>188</sup> Established under the auspices of the United Nations and the Organization of African Unity (OAU) at the request of the Government of Togo.

<sup>189</sup> Commission on Human Rights resolution S-5/1.

<sup>190</sup> Security Council resolution 1564 (2004).

<sup>191</sup> Human Rights Council resolution S-2/1.

<sup>192</sup> Human Rights Council resolution S-3/1.

<sup>193</sup> Human Rights Council resolution S-4/101.

<sup>194</sup> Human Rights Council resolution S-9/1.

For example, the International Commission of Inquiry on Darfur was established in September 2004 by Security Council resolution 1564 (2004), adopted under Chapter VII of the Charter, "to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties", "to determine also whether or not acts of genocide have occurred", and "to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable".

In its report, the Commission indicated that "[t]wo main bodies of law apply to the Sudan in the conflict in Darfur: international human rights law and international humanitarian law. The two are complementary. For example, they both aim to protect human life and dignity, prohibit discrimination on various grounds, and protect against torture or other cruel, inhuman and degrading treatment. They both seek to guarantee safeguards for persons subject to criminal justice proceedings, and to ensure basic rights including those related to health, food and housing. They both include provisions for the protection of women and vulnerable groups, such as children and displaced persons." The Commission added that "States are responsible under international human rights law to guarantee the protection and preservation of human rights and fundamental freedoms at all times, in war and peace alike. The obligation of the State to refrain from any conduct that violates human rights, as well as the duty to protect those living within its jurisdiction, is inherent in this principle. Additional Protocol II to the Geneva Conventions evokes the protection of human rights law for the human person. This in itself applies the duty of the State to protect also to situations of armed conflict. International human rights law and humanitarian law are, therefore, mutually reinforcing and overlapping in situations of armed conflict."<sup>195</sup> As a result of the Commission's report, the Security Council referred the situation of Darfur to the International Criminal Court,<sup>196</sup> whose Prosecutor subsequently opened an investigation.

Similarly, the Commission of Inquiry on Lebanon, in its 2006 report to the Human Rights Council, indicated that "[w]hile the conduct of armed

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<sup>195</sup> S/2005/60, paras. 143–144.

<sup>196</sup> Resolution 1593 (2005).

conflict and military occupation is governed by international humanitarian law, human rights law is applicable at all times, including during states of emergency or armed conflict. The two bodies of law complement and reinforce one another.”<sup>197</sup>

The high-level fact-finding mission to Beit Hanoun stated that “[a]s the occupying force, Israel has obligations towards the population in Gaza under both international human rights law and international humanitarian law, both of which are relevant to the shelling of Beit Hanoun. [...] The long-standing position of United Nations human rights treaty bodies is that, as a State party to international human rights instruments, Israel continues to bear responsibility for implementing its human rights conventional obligations in the occupied Palestinian territory, to the extent that it is in effective control. This position is supported by the jurisprudence of the International Court of Justice which, in its advisory opinions on the [*International Status of South-West Africa* case and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case, held that an occupying Power remains responsible for fulfilling its obligations under the relevant human rights conventions in occupied territory.”<sup>198</sup>

Finally, the United Nations Fact-Finding Mission on the Gaza Conflict stated that “the Mission’s mandate covers all violations of international human rights law (IHRL) and international humanitarian law (IHL) that might have been committed at any time, whether before, during or after, in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 to 18 January 2009. The Mission has therefore carried out its task within the framework of general international law, in particular IHRL and IHL.” It further stated that “it is now widely accepted that human rights treaties continue to apply in situations of armed conflict.”<sup>199</sup>

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<sup>197</sup> A/HRC/3/2, para. 64.

<sup>198</sup> A/HRC/9/26, para. 12.

<sup>199</sup> A/HRC/12/48, paras. 268 and 295.

## CONCLUSION

As indicated throughout this study, international human rights law and international humanitarian law are bodies of law in permanent evolution. Warfare is a phenomenon in constant change and, thus, international human rights law and international humanitarian law are required to adjust constantly to avoid gaps in the protection they provide. Changes in the law stem essentially from the practice of the different organs that supervise compliance with the system. Jurisprudence by judicial organs, but also by treaty bodies, is a significant source of interpretation and is fundamental for the development of the system. But applying the rules correctly and, most importantly, providing adequate protection to populations at risk require a thorough understanding of how these different norms interact and how they complete and complement each other to afford the highest standard of protection possible.

The discussion on their interaction is certainly part of a broader legal debate on the fragmentation and unity of international law. As a result, recent legal debates have concentrated on developing mechanisms to ensure maximum protection for the individual. For instance, in a number of cases, one body of law requires a referral to another body of law, as is the case of common article 3 of the Geneva Conventions, which uses concepts developed in more detail in human rights instruments, including in the Universal Declaration of Human Rights. Similarly, on certain occasions human rights law needs to be interpreted in the context of international humanitarian law, as done by the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*.

Concerning their complementarity, both human rights law and international humanitarian law inform each other in a number of ways. In the context of the Human Rights Council's discussions on this subject, different experts have highlighted that in certain complex situations some type of test may be necessary to assess the most adequate legal framework to be applied in a particular situation.

As a result of efforts to ensure effective protection for the rights of all persons in situations of armed conflict, a number of United Nations bodies and organizations, human rights special mechanisms, as well as international and regional courts, have in practice increasingly applied obligations of international human rights law and international humanitarian law in a complementary and mutually reinforcing manner.

In any case, it should be recalled that, as stated by the High Commissioner for Human Rights, "international human rights law and international humanitarian law share the common goal of preserving the dignity and humanity of all. Over the years, the General Assembly, the Commission on Human Rights and more recently the Human Rights Council, have considered that, in situations of armed conflict, parties to the conflict have legally binding obligations concerning the rights of persons affected by conflict."<sup>200</sup>

In this respect, both international human rights law and international humanitarian law provide extensive protections and guarantees for the rights of persons not actively or no longer participating in hostilities, including civilians. The application of both bodies of law should be carried out in a complementary and mutually reinforcing manner. Doing so prevents gaps in protection and could facilitate a dialogue with the parties to the conflict concerning the extent of their legal obligations. Moreover, the complementary application of both bodies of law will also provide the necessary elements for triggering national or international accountability mechanisms for violations committed in the conflict. Finally, both legal regimes also provide the necessary mechanisms to ensure that victims can exercise their right to a remedy and to reparation.

As this publication has shown, the interaction between international human rights law and international humanitarian law highlights the complexities of adequately understanding the legal regime applicable to armed conflicts. Yet, despite these complexities, consistent practice by international

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<sup>200</sup> High Commissioner's opening remarks at the Expert consultation on the protection of the human rights of civilians in armed conflict, Geneva, 15 April 2009.

courts, regional human rights courts, treaty bodies and the Human Rights Council's special procedures clearly shows that their complementarity and mutually reinforcing character have contributed to the establishment of a solid set of legal obligations extensively protecting the rights of all persons affected by armed conflict. While conflicts of norms are inevitable—hence the importance of the principle of *lex specialis*—they are the exception, rather than the rule. Future developments could include decisions by the International Court of Justice, which increasingly deals with the application of human rights treaties, as well as further decisions from regional human rights courts, resolutions from the Security Council and the Human Rights Council, and the work of treaty bodies and special rapporteurs. All these developments need to be seen as a whole and should be understood as an effort of the international community to further strengthen the protection of all persons in armed conflict.

