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ITEM 13: RELATIONSHIP BETWEEN HUMAN RIGHTS LAW AND INTERNATIONAL LAW, INCLUDING INTERNATIONAL HUMANITARIAN LAW

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Relationship between Human Rights Law and International Law, Including International Humanitarian Law

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1. Introductory Remarks about the Relationship between Human Rights Law and Public International Law

1.1 Paper at the Venice Commisson seminar

In October 2005 the European Commission for Democract through Law organized a UNIDEM seminar on "The Status of International Treaties on Human Rights" in, Coimbra (Portugal). One of the main segments of the event was devoted to various dimensions of the possible special status of human rights treaties within the broader framework of public international law. On that occasion I had the honour to present one of the papers, entitled "Human Rights Treaties and the Vienna Convention on the Law of Treaties – Conflicts or Harmony".[1] It is my understanding that the Venice Commission is working towards the publication of the papers as a book.

1.2 ILA study

At the Association's 2004 Berlin Conference the International Law Association entrusted ILA's internal committee specialized in human rights with the task of preparing a report on the relationship between general international law and international human rights law. The Committee will submit its final report to the ILA 2008 Conference in Brazil. The Committee held its first meeting on the theme in January 2006 in Maastricht (Netherlands). At the moment, the officers of the Committee are finalizing a brief interim report for the ILA 2006 in Toronto, in order to report about the results of the Maastricht meeting and the Committee's plans about future work. In draft form, the interim conclusions read as follows:

> 1. In interpreting the scope of its study the Committee decided to adopt a broad concept of international human rights law i.e. encompassing not only international human rights law stricto sensu but also international humanitarian law, minority rights law and international labour law.
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> 2. The Committee began by noting that there was increasing interaction between general international law and international human rights law. The interaction occurred in particular when international human rights courts, human rights treaty bodies and international criminal courts apply general international law but also when bodies established to interpret general international law - such as the International Court of Justice and the International Law Commission – apply international human rights law.
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> 3. The Committee discussed two broad, alternative approaches to the study of the relationship between general international law and international human rights law. The first approach was to emphasize the special, distinctive nature of international human rights law and to assume that the rules and principles of general international law are not applicable to human rights law. This was labeled the 'fragmentation' approach. The other approach was to take as the point of departure that international human rights law is part of general international law and that the two branches of law should be reconciled with each other as much as possible. This was labeled the 'reconciliation' approach. The Committee unanimously agreed that the reconciliation approach was preferable to the fragmentation approach.

[1] CDL-UD(2005)014

4. The Committee noted that international human rights law and the values on which it is based serve as a driver of change vis-à-vis general international law. They help to 'humanize' international law, i.e. to gradually transform it from classic inter-state law reflecting only the interests of states into the law of the world community reflecting the interests of a wider variety of actors. An example of this process was the gradual replacement of the system of diplomatic protection based on the international minimum standard by a system of inter-state enforcement based on the erga omnes character of international human rights standards. In the field of state responsibility an example was the absence of the element of damage from the definition of an internationally wrongful act.

5. The Committee agreed that certain human rights standards, including the right not to be discriminated, the right to life, the right to be free from slavery, the right to be free from torture, have superior status under general international law. These norms override conflicting norms of other origin. They may not be suspended and reservations against treaty provisions containing such norms are not permitted. These standards therefore represent evidence of the hierarchical nature or constitutionalization of international law.

6. While some special rules apply with respect to international human rights law (for example, with regard to treaty interpretation, treaty reservations and state succession to treaties) the specificity of these rules should not be overestimated. Many of the characteristics of international human rights law that may be considered 'special' are in fact provided for under general international law and therefore are not as distinctive and special as proponents of a specificity thesis might assume. For example, the list of jus cogens norms is not limited to human rights standards but also includes the prohibition of aggression. The principle of automatic continuity of obligations in case of state succession applies not only to human rights treaties but also to treaties establishing boundaries and other territorial regimes. Further, also other than human rights treaties may establish monitoring bodies the functioning of which will affect the application of rules concerning treaty interpretation.

7. With regard to its future work, the Committee agreed to work towards a succinct doctrinal statement on the relationship between general international law and international human rights law that will be proposed for adoption by the Association's General Conference in 2008. A Committee meeting in order to prepare a draft-statement will be held in late 2007 or early 2008. In addition an edited volume of papers emanating from the Committee's project will be published in 2008. Revised versions of the papers produced so far will be included in this volume. It was agreed that papers by members or alternate members of the Committee on subtopics not yet covered so far (such as remedies) are still very welcome. The officers of the Committee are also grateful for any feedback (including references to literature) from anyone else interested in the theme under consideration.

2. The Relationship between Human Rights Law and International Humanitarian Law

2.1 Briefly about Similarities and Dissimilarities

Both human rights law and international humanitarian law address the fundamental rights of human beings and have their background in past atrocities and massive violations of human dignity, not the least in the context of large-scale wars and specifically World War Two and the atrocities by the Nazi regime already prior to it. Consequently, there are many common substantive norms within the two bodies of law. The project on Fundamental Standards of

Humanity (previously Minimum Humanitarian Standards)[2] aims at building upon the common elements in order to identify fundamental rights of all human beings that must be respected by everyone in all situations, including war, peace and the "gray zone" in between.

Despite the important similarities, there are also important differences between human rights law and humanitarian law. While the atrocities of World War Two today form a common point of departure for the two bodies of law as they are codified in the framework of presently applicable international treaties, the more distant historical background is very different (laws and customs of war vs. liberal constitutions of nation states). While human rights law is by definition universal, defining the rights that belong to all human beings, humanitarian law focuses on specific categories of "protected persons" who in the course of hostilities find themselves in a vulnerable position. Also the approaches to duty-bearers are different: where human rights law builds mechanisms of international monitoring that make the state accountable for human rights violations in respect of individuals within its jurisdiction, obligations under humanitarian law belong to the parties of an armed conflict and are partly implemented through individual criminal responsibility for grave breaches of the Geneva Conventions. While human rights obligations are primarily territorial, humanitarian law applies wherever the hostilities occur.

2.2 The Cumulative Application of Both Bodies of Law

At the time human rights treaties emerged, there were authors who saw them as applicable during peaceful times, to be pushed aside by more traditional norms of humanitarian law when the country goes to war. The current treaty framework leaves no room for such a position. The existence of specific derogation clauses in the European Convention on Human Rights (article 15) and the International Covenant on Civil and Political Rights (article 4) bears testimony to this. When a country is confronted with an international or non-international armed conflict, it must comply with its obligations both under humanitarian law and human rights law – the latter of course being subject to permissible derogations.

2.3 Approaches Reflected in the Case Law by the European Court of Human Rights

The jurisdiction of the European Court of Human Rights is defined by the European Convention on Human Rights and its Protocols. Hence, the Court is not in a position fully to apply international humanitarian law. However, in interpreting and applying the European Convention on Human Rights, it may refer to other treaties or to customary international law. There have been cases where either the parties before the Court or the Court itself have made use of international humanitarian law. Such instances do not represent one uniform approach concerning the relationship between human rights law and international humanitarian law.

In the case of *Bankovic and Others v. Belgium and Others*[3]emphasis was on the dissimilarities of human rights law and humanitarian law, when the Court in its reasoning for declaring the case inadmissible used stated:

> Had the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text the same as or similar to the contemporaneous Articles 1 of the four Geneva Conventions of 1949 (para. 75).

One could characterize the Court's approach as one of *distinction*: because humanitarian law was based on different premises (and was applicable), human rights law could not be applicable.

[2] In December 1990, a group of experts convened at Åbo Akademi University (Finland) an adopted the Turku Declaration on Minimum Humanitarian Standards, available as United Nations document E/CN.4/1995/116.

[3] Application no. 52207/99, inadmissibility decision of 12 December 2001.

In *Issa and Others v. Turkey*[4] humanitarian law was relied upon for the opposite purpose, namely to demonstrate the existence of jurisdiction. Hence, the case could be said reflect an approach of *interdependence*. The applicants argued that due to falling within the protected persons category defined in Article 4 of the Fourth Geneva Convention the shepherds had been within the jurisdiction of Turkey although physically in Iraq. The noted as undisputed that the Turkish armed forces had carried out military operations in northern Iraq during the material time and continued:

> 74. The Court does not exclude the possibility that, as a consequence of this military action, the respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq. Accordingly, if there is a sufficient factual basis for holding that, at the relevant time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of Turkey (and not that of Iraq, which is not a Contracting State and clearly does not fall within the legal space (espace juridique) of the Contracting States (see the above-cited Bankovic decision, § 80).

As we know, despite this statement of principle the case was decided on factual grounds to the detriment of the applicants.

As a third approach which could be characterized as *harmonization*, reference can be made to cases where the Court has relied upon specific norms of international humanitarian law in the substantive interpretation of the European Convention on Human Rights. In the case of *Akkum and Others v. Turkey*[5] this was done in respect of article 3 of the European Convention.

> 252. The first applicant, Zülfi Akkum, submitted that his son's ears had been severed post mortem by the soldiers. This applicant, referring to Article 15 of the Geneva Convention I of 1949, applicable in international conflicts, and also to common Article 3 of the four Geneva Conventions of 1949, applicable in non-international conflicts, submitted that even in time of war, the dead should not be despoiled or mutilated. …
> 259. …the Court has no doubts that the anguish caused to Mr Akkum as a result of the mutilation of the body of his son amounts to degrading treatment contrary to Article 3 of the Convention.

Similarly, the Court has relied upon norms of humanitarian law in the interpretation of the scope and contents of article 2 of the European Convention in cases emanating from Chechnya.

In the case of *Isayeva. Yusupova and Bazayeva v. Russia*,[6] the applicants argued that aerial bombardment was an indiscriminate attack on civilians, in breach common Article 3 of the Geneva Conventions and therefore also constituting a violation of the European Convention. The Court apparently agreed as it included the word "civilians" in one of its findings:

> 229. The Court considers that the consequences described by the applicants were a result of the use of lethal force by the State agents in breach of Article 2 of the Convention. Having regard to its above findings about the danger to the lives of the three applicants as a result of the missile attacks, the Court does not find that separate issues arise under Article 3 of the Convention.
> 233. The Court has found it established that the third applicant was subjected to an aerial attack by the federal military forces when trying to use the announced "safe

[4] Application no. 31821/96, judgment of 16 November 2004.
[5] Application no. 21894/93, judgment of 24 June 2005.
[6] Applications nos. 57947/00, 57948/00 and 57949/00, judgment of 24 February 2005. See, also Isayeva v. Russia, application no. 57950/00, judgment of 24 February 2005 where the applicant's argument related to humanitarian law is formulated as follows: "163. The applicant submitted that the way in which the military operation in Katyr-Yurt had been planned, controlled and executed constituted a violation of Article 2. She submitted that that the use of force which resulted in the death of her son and nieces and the wounding of herself and her relatives was neither absolutely necessary nor strictly proportionate."

> exit" for civilians fleeing heavy fighting. This attack resulted in destruction of the vehicles and household items belonging to the applicant and her family. There is no doubt that these acts, in addition to giving rise to a violation of Article 2, constituted grave and unjustified interferences with the third applicant's peaceful enjoyment of her possessions (see also Bilgin v. Turkey, no. 23819/94, § 108, 16 November 2000).
> 234. It follows that there has been a violation of Article 1 of Protocol No. 1 in respect of the third applicant.

Finally, reference should be made to the fact that the derogation clause in article 15 of the European Convention not only demonstrates the simultaneous applicability of human rights law and humanitarian law during such armed conflict that also constitutes a threat to the life of the nation (as most armed conflicts would no doubt do) but the clause even explicitly calls for the simultaneous and harmonizing interpretation of the two bodies of law through the requirement that any measures derogating from the European Convention must not be inconsistent with a country's other obligations under international law. The Court does not seem to have made full use of this provision as a reference to treaties and customary law in the field of international humanitarian law.

2.4 The United Nations Human Rights Committee

Exactly on the last-mentioned point the Human Rights Committee, in turn, has been quite explicit. In its General Comment No. 29 on states of emergency (article 4 of the ICCPR),[7] the Committee argued:

> 9. Furthermore, article 4, paragraph 1, requires that no measure derogating from the provisions of the Covenant may be inconsistent with the State party's other obligations under international law, particularly the rules of international humanitarian law. Article 4 of the Covenant cannot be read as justification for derogation from the Covenant if such derogation would entail a breach of the State's other international obligations, whether based on treaty or general international law. This is reflected also in article 5, paragraph 2, of the Covenant according to which there shall be no restriction upon or derogation from any fundamental rights recognized in other instruments on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.
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> 10. Although it is not the function of the Human Rights Committee to review the conduct of a State party under other treaties, in exercising its functions under the Covenant the Committee has the competence to take a State party's other international obligations into account when it considers whether the Covenant allows the State party to derogate from specific provisions of the Covenant. Therefore, when invoking article 4, paragraph 1, or when reporting under article 40 on the legal framework related to emergencies, States parties should present information on their other international obligations relevant for the protection of the rights in question, in particular those obligations that are applicable in times of emergency. In this respect, States parties should duly take into account the developments within international law as to human rights standards applicable in emergency situations. [here note 6 referring, inter alia, to the Turku Declaration
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> 11. The 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 proclamation of certain provisions of the Covenant as being of a non derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., articles 6 and 7). However, it is

[7] UN document CCPR/C/21/Rev.1/Add.11.

> apparent that some other provisions of the Covenant were included in the list of non-derogable provisions because it can never become necessary to derogate from these rights during a state of emergency (e.g., articles 11 and 18). Furthermore, 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.

In another General Comment, namely No. 31,[8] the Human Rights Committee commented on a doctrinal level the relationship between human rights law and humanitarian law:

> 11. As implied in General Comment 29, the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, 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, not mutually exclusive.

What perhaps is most interesting in this formulation is that the Committee is avoiding the use of the Latin expression of *lex specialis* which often carries the connotation of the more specific norm pushing aside or suspending the more general one (*lex specialis derogat legi generali*, as the Latin expression goes).

2.5 Some examples of tension or conflict between human rights law and humanitarian law

General Comment No. 29 by the Human Rights Committee begs the question whether there is a conflict between human rights law and humanitarian law in the issue of whether a prisoner of war has a right to the judicial examination of his POW status.

As is well-known, in General Comment No. 29 the Human Rights Committee reiterated and developed its position that the right to judicial review of any form of detention (article 9 (4) of the ICCPR) is not subject to derogation during a state of emergency, despite the fact that article 9 (as a whole) is not listed as a non-derogable rights in article 4 (2) of the Covenant.

> 16. …In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.

In the General Comment, this conclusion is accompanied with footnote 9 that refers to the Committee's earlier practice:

> See the Committee's concluding observations on Israel (1998) (CCPR/C/79/Add.93), para. 21: "… The Committee considers the present application of administrative detention to be incompatible with articles 7 and 16 of the Covenant, neither of which allows for derogation in times of public emergency … . The Committee stresses, however, that a State party may not depart from the requirement of effective judicial review of detention."

The consequence of this line of reasoning is that during an armed conflict any person placed in internment, and prisoners of war during international armed conflict would have a right to judicial review of the lawfulness of their detention which for instance for POWs would entail a review of whether the person in question is a prisoner of war under article 4 of the third Geneva Convention. As is well-known, article 5 (2) of the third Geneva Convention supports the conclusion that some sort of review by a "tribunal" must be available for the determination of POW status[9] but humanitarian law does not guarantee to other persons

[8] UN document CCPR/C/21/Rev.1/Add.13.

[9] "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons

interned during international or non-international armed conflict access to such review. Treating ICCPR 9 (4) as non-derogable helps on settling many situations that under humanitarian law are disputed as to whether the conflict is international or non-international and whether certain detained persons qualify as POWs.

Another delicate issue of interpretation relates to the formulation of the right to life in ICCPR article 6 and article 2 of the European Convention, when addressed against the framework of international humanitarian law that of course sees as legitimate the killing of combatants in the course of an armed conflict.

The text of ICCPR article 6 should not pose any significant problem for the application of humanitarian law, since its introductory paragraph outlaws "arbitrary deprivation of life" and international humanitarian law would certainly help in defining whether the killing of an individual in the course of hostilities was "arbitrary". Simply, one would apply a harmonizing interpretation according to which loss of life occurring in the course of hostilities during armed conflict where the parties to the armed conflict were complying with the "more specific rules" of humanitarian law was not "arbitrary" in the sense of ICCPR article 6. Irrespective of whether a country has declared a state of emergency on order to derogate from some Covenant obligations, the interpretation of article 6 would be informed by the application of international humanitarian law as to whether a case of death was "arbitray" – as known, article 6 in its entirety is nonderogable.

Also article 2 (1) of the European Convention on Human Rights includes a prohibition against arbitrary deprivation of life. However, what makes the solution of applying international humanitarian law to determine whether a death in the course of hostilities was arbitrary less obvious than under the ICCPR is the existence of relevant more specific clauses in articles 2 and 15:

> 2 (2) Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than 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.
>
> 15 (2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, …

2.5 Approaches by the International Court of Justice

Reference is made to two advisory opinions by the International Court of Justice where the Court has used the notion of "lex specialis" when addressing the relationship between human rights law and humanitarian law.

> Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons: The Court stated that the ICCPR remains applicable in times of war, "except by operation of Article 4". "The test of what is an arbitrary deprivation of life … falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities." (para 24)
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> Advisory Opinion of 9 July 2004 on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: "As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law,

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shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

> namely human rights law and, as lex specialis, international humanitarian law." (para. 106)

Especially in the latter advisory opinion it is clear that the Court did not use the Latin expression of *lex specialis* in order to say that the applicability of humanitarian law would suspend the application of human rights law. Quite on the contrary, the opinion systematically applies the approach of cumulative application of both bodies of law. Although the Court used the catch phrase of lex specialis that had been avoided by the Human Rights Committee in General Comment No. 31, in fact the Court was confirming the Committee's view that "both spheres of law are complementary, not mutually exclusive".

3. Human Rights, Humanitarian Law and Counter-Terrorism

In the current fight against terrorism many actors have resorted to the notion of "war", some of them rhetorically and others actually aiming at qualifying the situation as a non-international but nevertheless global armed conflict between organized military forces.

Against this background it is important that for instance the United Nations Security Council has on several occasions underlined that the fight against terrorism must be conducted in compliance with human rights law *and* humanitarian law.

UN Security Council resolution 1456 (2003)

> States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law;

UN General Assembly resolution 59/191:

> Reaffirms that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law;

UN Commission on Human Rights resolution 2005/80

> Reaffirms that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law;

Path-braking work also in the issue of cumulative application of human rights law and humanitarian law was done in 2004-2005 by professor Robert K. Goldman, the UN independent expert on the protection of human rights and fundamental freedoms while countering terrorism.[10]

One of the controversies surrounding the human rights debate on counter-terrorism is related to the issue whether acts of terrorism by non-state actors constitute human rights violations or whether the notion of human rights violation shall remain applicable only in respect of states. The interdependent and harmonized interpretation of human rights law and humanitarian law may help in resolving this controversy, not the least because of the project on Fundamental Standards of Humnanity.

Report of the Special Rapporteur on the Protection and Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism, submitted in accordance with Commission resolution 2005/80[11]

> 70. The Special Rapporteur supports the view that every human being is entitled to the full respect of his or her human rights and fundamental freedoms, in respect of which not only States, but also other actors, must not act in a way that would render nugatory the rights in question. This is true, in particular, with respect to those rights

[10] See, UN document E/CN.4/2005/103.
[11] UN document E/CN.4/2006/98.

and freedoms that belong to the category of fundamental standards of humanity, representing the traditions of humanitarian law and human rights law and applicable in respect of all actors in all circumstances, including during states of emergency or armed conflict. The fact that acts of terrorism are aimed at and result in the destruction of human rights calls for intensified work by the international community to promote awareness of the existence and contents of such fundamental standards of humanity, and for the creation of mechanisms for their effective implementation, also in respect of non-state actors.

71. The Special Rapporteur will closely follow the work of the Commission on the issue of fundamental standards of humanity and will, in due course, address the matter in his own reports.