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10. "The Death of *Lex Specialis*? Regional Human Rights Mechanisms and the Protection of Civilians in Armed Conflict"

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I. Introduction

In this contribution I engage with one of the thorniest and most controversial topics to bedevil international law concerning the protection of civilians in armed conflict. First, I outline the various approaches to the problem from 1996 onwards, and my own – radical perhaps – response in 2009. Next, I turn to the fruitful jurisprudence of the Inter-American Commission and Court of Human Rights. Third, I engage with the refusal, perhaps wisely, of the European Court of Human Rights to engage with the spectre of *lex specialis* as a means of resolving the apparent tension between international human rights law (IHRL) and international humanitarian law (IHL) or the law of armed conflict. This culminated in the 2014 Grand Chamber judgment in *Hassan v UK*. Lastly, I turn to a recent intervention by the African Commission on Human and Peoples' Rights.

II. What Are the Issues?

The issue of the application of IHRL and IHL was posed in 1996 in Paragraph 25 of the International Court of Justice's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.[2]

The Court observed that 'the protection of the International Covenant of Civil and Political Rights does not cease in times of war,' with the exception of course of those rights that, under Article 4, may be derogated from '(i)n time of public emergency which threatens the life of the nation'. This means that '(i)n principle, the right not arbitrarily to be deprived of one's life applies also in hostilities'.

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[1] I wish to acknowledge the tremendous research assistance given to me by the Birkbeck PhD candidate Leticia Da Costa Paes, especially as to the Inter-American system; and by my own Phd student Ali RaissTousi.
[2] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.

The Court observed, however, that '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.' It concluded therefore that 'whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.'

In 2004 Vera Gowland-Debbas explained that

> 'The Court accepts the continuing applicability of the Covenant in time of armed conflict, from which it may be inferred that it acknowledges the complementarity of human rights and humanitarian law. Its reference to the *lex specialis* cannot therefore mean the displacement of human rights by humanitarian law, at least to the extent of the nonderogable rights, in time of armed conflict. It should be pointed out that the maxim *lex specialis derogat generali* was traditionally applied only as a discretionary aid in interpreting conflicting but potentially applicable treaty rules. It is not relevant in determining the incremental or complementary nature of treaty rules.'[3]

In 2007 Nancie Prud'homme sought to 'demonstrate the inadequacy of the theory of *lex specialis* and the hazard of opting for such a model to articulate the parallel application of international humanitarian law and international human rights law'.[4] She wanted to lay the foundations for alternatives. However, in 2008, Françoise Hampson, referring to three judgments of the ICJ[5], stated that three interrelated propositions had emerged.[6] First, human rights law remains applicable even during armed conflict. Second, it is applicable in situations of conflict, subject only to derogation. Third, when both IHL and human rights law are applicable, IHL is the *lex specialis*. But the relation between IHL and IHRL had not been resolved. She suggested that the Inter-American Court of Human Rights had shown the way, at least as regards the manner in which IHL can be taken into account.[7] However, her reference was to the Inter-American Commission, which had only dealt with such situations

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[3] V Gowland-Debbas and F Kalshoven, 'The Relevance of Paragraph 25 of the ICJ's Advisory Opinion on Nuclear Weapons' (2004) *American Society of International Law Proceedings* 358-365.
[4] N Prud'homme, 'Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?' (2007) 40 *Israel Law Review* 2.
[5] *Legality of the Threat or Use of Nuclear Weapons* (n 2), para 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 106; *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda) [2005] ICJ Rep 168, paras 216–220.
[6] F Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body' (2008) 90 *International Review of the Red Cross* 871, 550.
[7] ibid, 572.

under the Inter-American Declaration of Human Rights, under which it did not deliver binding legal judgments.[8]

I took a more radical position in 2009[9], suggesting that 'Chalk is being compared with, or even substituted by, cheese. Or still worse, the two are being mixed together: chalky cheese is horribly indigestible, while cheesy chalk is no good at all for writing on black-boards'.[10] I argued that at the most superficial level, IHL and IHRL have much in common.[11] Both are bodies of law ratified by states and binding on states. In both cases there are large multilateral treaties, ratified by most states. But there the similarity ends. There are significant differences between the law of armed conflict and human rights law.

The first relates to history. IHL is far older than IHRL. It is to be found at the beginning of recorded history, on the earliest recorded interactions between polities.[12] IHRL, on the other hand, did not exist in any form before the eighteenth century, when it first emerged in the declaration and bills of the French and American Revolutions.[13] Even then, it formed part of domestic, constitutional law rather than international law, and only found its place in international law after World War I.

The second concerns the character of the normative structures themselves. IHL is, I asserted, intrinsically conservative, taking armed conflict as a given, as indeed it always has been in human society. Prior to the Red Cross codification, IHL was known as 'the laws and customs of war'. There is, on the other hand, no such pre-history for IHRL, which is in principle and has in my opinion always been revolutionary, scandalous in its inception, inspired by collective action and struggle and threatening to the existing state order.[14]

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[8] ibid, 565; her footnote referred to the US operations in Grenada which were at issue in *Disabled Peoples' International v the United States* (1987) Inter American Commission on Human Rights Case No 9213; *Coard et al v the United States* (1999) Inter American Commission on Human Rights Case No 10.951; and the invasion of Panama in *Salas v the United States* (1993) Inter American Commission on Human Rights Case No 10.573. The United States disputed the jurisdiction of the Inter-American Commission.

[9] B Bowring, 'Fragmentation, Lex Specialis and the Tensions in the Jurisprudence of the European Court of Human Rights' (2009) 14 *Journal of Conflict and Security Law* 3, 485-498. The next section of this contribution draws from that article.

[10] ibid, 485.

[11] ibid, 489-490.

[12] See, eg J Ober, 'Classical Greek Times' in M Howard, GJ Andreopoulos and MR Shulman (eds), *The Laws of War: Constraints on Warfare in the Western World* (Yale University Press, New Haven, 1994).

[13] In this I concur with A MacIntyre, *After Virtue: A Study in Moral Theory* 2nd ed (University of Notre Dame Press, 1990).

[14] See B Bowring, *The Degradation of The International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (Oxford, Routledge, 2008) 111-118; and B Bowring, 'Misunderstanding MacIntyre on Human Rights' in K Knight and P Blackledge (eds), *Revolutionary Aristotelianism: Ethics, Resistance and Utopia* (Stuttgart, Lucius & Lucius, 2008).

The third follows from the second, and relates to the nature of the redress provided. Breaches of IHL had, until the creation of the International Criminal Court, called for action by one state against another, as in the *DRC v Uganda* case,[15] or, as with the Geneva Conventions, punishment of 'grave breaches' carried out by individuals. The individuals concerned must be investigated and prosecuted by states, or more recently by bodies created by states, through the agency of the Security Council or treaty bodies. In either case, the actor seeking redress was the state or its surrogate. The victim has had (until the victim provisions in the ICC Statute) no standing as such.

Despite having been established by private actors, the International Committee of the Red Cross is a mediator between states, or, as in Additional Protocol II, non-state actors with the capacity to control territory. I emphasize that while by virtue of the Geneva Conventions states bind themselves to 'respect and ensure respect' for the conventions, the mechanism of enforcement is primarily that of national and international criminal law.

IHRL is the diametrical opposite. It is the province of individual complaint, before the World War II to national courts, and following WWII to treaty bodies and mechanisms in which states, and not individuals, are brought to account. However, it must be emphasized that the initial claimants of the first-generation rights were the revolutionary movements against absolutism in the eighteenth century; those of the second generations were typically trade unions and other social movements, whose struggles attained legal recognition with the creation of the International Labour Organization in 1919. And those of the third generation were, as is well known, peoples, notably colonized peoples, fighting for their independence. The first and most important of the rights of the third generation is the right of peoples to self-determination, finally recognized in common Article 1 of the 1966 International Covenants on human rights.[16]

From this point IHL has been profoundly marked by developments in IHRL. The anti-colonial struggles were largely aimed at securing independence within defined, overseas, territories – that is, the so-called 'salt-water self-determination', in respect of territories separated from the colonial metropolis by seas and oceans, the territories to which the UN 'colonial' declaration of 1960 was directed.[17] The non-state protagonists were the 'national

[15] *Armed Activities on the Territory of the Congo* (n 5), paras 216-217.
[16] See the key collection, which awakened my own interest in international law: J Crawford (ed), *The Rights of Peoples* (Oxford, Clarendon, 1988); and Bowring, *The Degradation of The International Legal Order?* (n 14) 69-98.9-38.
[17] UNGA Res 1514(XV) (14 December 1960).

liberation movements'.[18] That was the period, up to the collapse of the USSR, when the use of force by self-determination movements – National Liberation Movements – was not, as is so often the case today, characterized as 'terrorism'.[19]

Until 1977, when two Additional Protocols were promulgated (API and APII), there was no successful attempt to update the rules of conduct of hostilities from those contained in the Geneva Conventions of 1949 so as to take account of use of force in the cause of self-determination, as Hampson and Salama had pointed out.[20] They suggested that 'this may have been partly attributable to the reluctance, after both the first and second world wars, to regulate a phenomenon which the League of Nations and later the United Nations were intended to eliminate or control'.[21] However, this is to downplay the significance of the Protocols. It is of course the case that, as they note, API dealt with international armed conflicts, updating provisions on the wounded and the sick and formulating rules on the conduct of hostilities, while APII dealt, for the first time, with high-intensity non-international armed conflicts.

In this, they followed Doswald-Beck and Vité, in whose view the most important contribution of API 'is the careful delimitation of what can be done during hostilities in order to spare civilians as much as possible'.[22] However, of a number of scholars recently publishing on the tension (or clash) between IHRL and IHL, only William Abresch recognised that the Additional Protocols aimed to extend the reach of the existing treaties governing international conflicts to internal conflicts: 'thus, Protocol I deemed struggles for national liberation to be international conflicts'.[23] In other words, if an armed conflict is a struggle for national liberation against 'alien occupation' or 'colonial domination' it is considered an 'international armed conflict' falling within API.[24]

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[18] See the excellent analysis of the legal issues in J Faundez, 'International Law and Wars of National Liberation: Use of Force and Intervention' (1989) 1 *African Journal of International and Comparative Law* 85; and HA Wilson, *International Law and the Use of Force by National Liberation Movements* (Oxford, Oxford University Press, 1990).

[19] See GJ Andreopoulos, 'The Age of National Liberation Movements' in Howard, Andreopoulos and Shulman, *The Laws of War* (n 12); and B Bowring, 'Positivism versus self-determination: the contradictions of Soviet international law' in S Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge, Cambridge University Press, 2008).

[20] For a useful brief summary of the history of IHL, see F Hampson and I Salama, 'Working Paper on the Relationship between Human Rights Law and Humanitarian Law' (21 June 2005) UN Doc E/CN.4/Sub.2/2005/14, pp 25-26.

[21] ibid, 26

[22] L Doswald-Beck and S Vité, 'International Humanitarian Law and Human Rights Law' (1993) 293 *International Review of the Red Cross* 94, 99.

[23] W Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16 *European Journal of International Law* 741, 742.

[24] API, art 1(4). See also Abresch, 'A Human Rights Law of Internal Armed Conflict' (n 23) 753.

This, I suggested, was the key to understanding the significance of both Additional Protocols. They were the response of the ICRC, and then the overwhelming majority of states that had ratified the Protocols, to the new world of 'internationalized' internal conflicts, in the context of armed struggle for self-determination by national liberation movements. In this way the international legal recognition of the right of peoples to self-determination impacted directly on IHL.

Writing in 2012[25], Jean d'Aspremont and Elodie Tranchez noted that most lawyers and judges have 'presupposed that norms of IHL and HRL belong to the same legal order and the same legal regime and are, at the surface, in conflict with one another.' On the contrary, these authors argue that '… the relations between IHL and HRL ought to be construed in terms of competition rather than conflict'. Their starting point is that 'these two branches of international law have long lived side by side ignoring one another.'[26] They further point out that '… direct and strict conflicts between IHL and HRL norms hardly exist. Indeed, as was explained above, there can be no conflict of norms short of direct and strict incompatibilities.'[27] Their central argument was

> the scopes of HRL and IHL are now competing *ratione loci*, *ratione personae* and *ratione temporis*. *Ratione loci* since from now HRL is not held to bind States only in their territory but also in territories which come under their effective control; *ratione temporis* since HRL is no longer confined to times of peace but also extends to times of war; and *ratione personae* as a result of the application of HRL to intrastate conflict situations.[28]

Most recently, Françoise Hampson and Daragh Murray returned to the issue in an *EJIL Talk* blog[29], concluding that

> … it is essential that human rights bodies address situations of armed conflict in a manner that is fully cognisant of the reality of armed conflict. The law of armed conflict was established specifically for the purposes of regulating armed conflict.

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[25] J D'Aspremont and E Tranchez, 'The Quest for a Non-Conflictual Coexistence of International Human Rights Law and Humanitarian Law: which Role for the Lex Specialis Principle?' in R Kolb and G Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Cheltenham, Elgar, 2013) 223-250.
[26] ibid, 224.
[27] ibid, 232.
[28] ibid, 233.
[29] FJ Hampson and D Murray, 'ESIL-International Human Rights Law Symposium: 'Operationalising' the Relationship Between the Law of Armed Conflict and International Human Rights Law' *EJIL Talk!* (11 February 2016) www.ejiltalk.org/esil-international-human-rights-law-symposium-operationalising-the-relationship-between-the-law-of-armed-conflict-and-international-human-rights-law/.

> International human rights law was not. While it is perfectly possible to apply international human rights law during situations of armed conflict – and while it is appropriate and even beneficial that this occurs – doing so requires adapting international human rights law in order to acknowledge the distinct context of conflict, and the distinct requirements of the law of armed conflict. Accordingly, human rights bodies must ensure that they obtain sufficient expertise in relation to the law of armed conflict, and States must ensure that they argue their cases coherently and effectively. Importantly, States should also ensure that they intervene as third parties in relevant cases, so as to assist human rights bodies in appropriately operationalising the relationship between the two bodies of rules.

They were referring in particular to the case of *Hassan v UK*[30], to which I will return.

These topics continue to excite the interest of many scholars of international law.[31]

III. The Issues in the Inter-American System

The Inter-American Commission of Human Rights was the first international body to adjudicate cases in which it directly applied IHL, and found States in breach of these norms. In 30 October 1997 the Inter-American Commission in the *La Tablada* case, Argentina, examined for the first time whether it was competent to apply IHL directly.[32] The case concerned an attack launched by 42 armed persons on military barracks of the national armed forces in 1989 at La Tablada, Argentina. The attack precipitated a battle lasting approximately 30 hours and resulting in the deaths of 29 of the attackers and several State agents. The Commission understood that it was 'competent to apply directly rules of international humanitarian law or to inform its interpretations of relevant provisions of the American Convention by reference to these rules'[33]. The Commission argued that 'It is understandable that the provisions of conventional and customary humanitarian law generally afford victims of armed conflicts greater or more specific protections than do the more generally phrased guarantees in the American Convention and other human rights instruments' (paragraph 159). It understood that its competence to apply humanitarian law

[30] *Hassan v United Kingdom* (App no 29750/09) ECHR 16 September 2014.
[31] See the newly published, at the time of writing J Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (Cambridge, Cambridge University Press, 2016), in particular M Milanovic, 'The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law', 78-117.
[32] *Juan Carlos Abella v Argentina* (1997) Inter-American Commission on Human Rights Case No 11.137.
[33] ibid, para 157.

rules was supported by the text of the American Convention, by its own case law, as well as the jurisprudence of the Inter-American Court of Human Rights: 'the American Convention itself authorizes the Commission to address questions of humanitarian law in cases involving alleged violations of Article 25'.

However, the *Las Palmeras case v. Colombia*, decided by the Inter-American Court in 2001[34], articulated a jurisdiction limitation in the area of IHL. The Commission brought Las Palmeras to the Court after completing an investigation in Colombia into the deaths of at least six victims who have been killed extra-judicially by members of the National Police Forces, aides by the Colombian armed forces. This was the first case in which the Court addressed the application of IHL**.**

The Commission stated in the preliminary objections, as a declaration of principle, that 'the instant case should be decided in the light of the norms embodied in both the American Convention and in customary international humanitarian law applicable to internal armed conflicts and enshrined in Article 3, common to all the 1949 Geneva Conventions.' The Commission reiterated its belief that both the Court and the Commission were competent to apply this legislation.[35]

But the Court understood that the American Convention had only given the Court competence to determine whether the acts or the norms of the States parties are compatible with the American Convention itself, and not with the 1949 Geneva Conventions. Therefore, the Court decided to support the third preliminary objection filed by the State (lack of competence of the Court).

Although *Las Palmeras* was not a specific case about *armed conflict,* the Court reinforced its opinion in relation to IHL in later cases addressing internal conflict.

In the *Serrano Cruz Sisters Case v. El Salvador* (2005) before the Court, the Commission in the preliminary objections (2004) had not requested the Court to apply international humanitarian law, but to apply the American Convention in order to establish the international responsibility of El Salvador for the forced disappearance of the Serrano Cruz sisters[36].

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[34] *Las Palmeras v Colombia* (Judgment) Inter-American Court of Human Rights Series C No 67 (4 February 2000) para 29.
[35] ibid.
[36] *Serrano-Cruz Sisters v El Salvador* (Judgment) Inter-American Court of Human Rights Series C No 118 (23 November 2004) para 109.

The Court referred to the 'complementarity between international human rights law and international humanitarian law and the applicability of the former in times of peace and during armed conflict', and also repeated that the Court is 'empowered to interpret the norms of the American Convention in light of other international treaties'.[37] The Court also remembered that it had protected members of communities by adopting provisional measures 'in light of the provisions of the American Convention and international humanitarian law,' given that they were in a situation of extreme gravity and urgency in the context of an armed conflict.[38] The Court mentioned a wide range of IHL instruments as to the protection of victims of international armed conflicts. Also, the Court observed that:

> the State cannot question the full applicability of the human rights embodied in the American Convention, based on the existence of a non-international armed conflict. The Court considers that it is necessary to reiterate that the existence of a non-international armed conflict does not exempt the State from fulfilling its obligations to respect and guarantee the rights embodied in the American Convention to all persons subject to its jurisdiction, or to suspend their application[39].

In the case of *Bamáca Velazquez* (2000)[40], the Court confirmed its rejection of the direct application of IHL, but recognized once again the role of IHL as an interpretative reference for cases of armed conflict. The Commission had once again insisted that Guatemala was in breach of both the American Convention and Common Article 3 of the Geneva Conventions, as a result of the Guatemala military's torture and murder of a guerrilla fighter during the conflict there[41]. But the Court found violations only of the American Convention, confirming its lack of competence to find state violations of a treaty that was not explicitly contemplated in the Convention. However, the Court observed that:

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[37] ibid, para 111.

[38] cf 'Order of the Inter- American Court of Human Rights - *Matter of the Pueblo Indigena de Kankuamo*' (5 July 2004) para 11; 'Order of the Inter-American Court of Human Rights - *Matter of the Communities of Jiguamiandó and Curbaradó*' (6 March 2003) para 11; and 'Order of the Inter-American Court of Human Rights - *Matter of the Peace Community of San José de Apartadó*' (18 June 2002) para 11.

[39] *Serrano-Cruz Sisters v El Salvador* (n 36) para 118.

[40] *Bámaca-Velásquez v Guatemala* (Judgment) Inter American Court of Human Rights Series C No 70 (25 November 2000).

[41] The Commission stated that the purpose of the application was for the Court to decide whether the State had violated the following rights of Efraín Bámaca Velásquez: art 3 (Right to Juridical Personality), art 4 (Right to Life), art 5 (Right to Humane Treatment), art 7 (Right to Personal Liberty), art 8 (Right to a Fair Trial), art 13 (Freedom of Thought and Expression), art 25 (Right to Judicial Protection) and art 1 (Obligation to Respect Rights), all of the American Convention, and also arts 1, 2 and 6 of the Inter-American Convention to Prevent and Punish Torture and art 3 common to the Geneva Conventions. (*Bámaca-Velásquez v Guatemala* (n 40) para 2).

> Although the Court lacks competence to declare that a State is internationally responsible for the violation of international treaties that do not grant it such competence, it can observe that certain acts or omissions that violate human rights, pursuant to the treaties that they do have competence to apply, also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions and, in particular, common Article 3.[42]

The Court 'has already indicated in the *Las Palmeras Case* (2000), that the relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention' (par. 209). So the organs of the Inter-American System can employ IHL as an interpretive tool.

The Court's jurisprudence has reaffirmed on many occasions the importance of contextualizing human rights law within the broader scope of public international law, arguing that IHL can be extremely useful to achieve better interpretation of the human rights law in a context in which IHL applies. In the case *Mapiripán Massacre v. Colombia* (2005) the Court held**:**

> While it is clear that this Court cannot attribute international responsibility under International Humanitarian Law, as such, said provisions are useful to interpret the Convention, in the process of establishing the responsibility of the State and other aspects of the violations alleged in the instant case. These provisions were in force for Colombia at the time of the facts, as international treaty agreements to which the State is a party, and as domestic law, and the Constitutional Court of Colombia has declared them to be *jus cogens* provisions, which are part of the Colombian 'constitutional block' and are mandatory for the States and for all armed State and non-State actors involved in an armed conflict[43].

In the case of *The Santo Domingo Massacre v Colombia* (30 November 2012),[44] the Court reaffirmed its capacity to use IHL as *lex specialis* when adjudicating an alleged breach of human rights under the American Convention that had occurred in a context of armed conflict. This interpretation of the jurisdictional limits within the American Convention resulted in an end to the Commission's capacity to find direct violations of IHL by states.

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[42] *Bámaca-Velásquez v Guatemala* (n 40) para 208.
[43] *Mapiripán Massacre v Colombia* (Merits, Reparations and Costs) Inter American Court of Human Rights Series C No 134 (15 September 2005) para 115.
[44] See 'Santo Domingo Massacre v. Colombia (IACtHR)' *Weapons Law Encyclopedia* (1 December 2013) www.weaponslaw.org/cases/iacthr-santo-domingo-massacre .

Despite this, the use of IHL as an interpretive tool within the Inter-American System has remained useful and necessary.

In *Santo Domingo* the Court conducted its analysis in part on the basis of the rules of IHL governing the conduct of hostilities. The Court addressed the rules of proportionality and of distinction, but its analysis focused on the obligation to take *precautionary measures***.** The Court highlighted a range of factors about the cluster munition that was used, including the wide impact area of its six submunitions. It called the cluster munition an imprecise weapon (‘*una arma imprecisa’*) and considered that the use of any air-dropped explosive weapon (‘*armamento explosivo’*) was dangerous, and therefore needed to be strictly controlled to ensure that damage would only be caused to the selected target. The Court found that the instructions given for the weapon’s employment were imprecise, especially with respect to the minimum distance of the strike location to the village, and noted that military manuals in use in December 1998 indicated that this type of weapon should not be used in or near a populated area. In view of the weapon’s lethality and its limited accuracy (‘*capacidad letal y la precisión limitada’*) the Court concluded that the use of the cluster munition in or near the village of Santo Domingo violated the attacker’s precautionary obligations under IHL, and consequently, amounted to a violation, by Colombia, of the rights to life and to physical, mental, and moral integrity under the American Convention.[45]

After these cases before the Court in which the use of IHL as *lex specialis* was established, in the limited sense of a tool for helping interpret human rights under the Convention, the Commission had to deal with many cases involving armed conflict and the application of IHL. It seems that the Court’s decision has changed the Commission’s position. The Commission started following the Court, using IHL as an interpretative tool, but declining to find direct violations of IHL legal instruments: *Rio Frio Massacre v. Colombia* (2001)[46]; *Ana, Beatriz and Celia González Pérez v. Mexico* (2001)[47].

The evolution of the Court’s jurisprudence can be seen in the 2014 *Case of Rodriguez Vera et al (The disappeared from the Palace of Justice) v Colombia.*[48] This case concerned one of the most notorious events in recent Colombian history. In 1985, the Palace of Justice, Colombia's

[45] ibid.
[46] *Río Frío Massacre v Colombia* (2000) Inter American Commission on Human Rights Case No 11.654, para 758.
[47] *Ana, Beatriz and Celia González Pérez v Mexico* (2000) Inter American Commission on Human Rights Case No 11.565, para 1097.
[48] *Rodriguez Vera et al (The disappeared from the Palace of Justice) v Colombia* (Judgment) Inter American Court of Human Rights Series C No 287 (14 November 2014).

Supreme Court, was stormed and seized by members of the M-19 guerilla group. State security forces used disproportionate and excessive force in their fight to retake the Palace of Justice. As a result, many hostages in the building were killed by the use of automatic weapons, grenades, bombs, and the fires that ensued. Further, once the Palace of Justice had been retaken, special forces detained many innocent survivors, and transferred them to military locations, where they were tortured, beaten, and ultimately executed. The Court found that the State violated the American Convention, the Inter-American Convention to Prevent and Punish Torture, and the Inter-American Convention on Forced Disappearance of Persons.

The Court held (para 39) in terms which it is worth setting out in full:

> In the instant case, neither the Commission nor the representatives have asked the Court to declare the State responsible for possible violations of norms of international humanitarian law. In accordance with Article 29(b) of the American Convention and the general rules for the interpretation of treaties contained in the 1969 Vienna Convention on the Law of Treaties, the American Convention can be interpreted in relation to other international instruments. Starting with the case of *Las Palmeras v. Colombia*, the Court has indicated that the relevant provisions of the Geneva Conventions may be taken into account as elements for interpreting the American Convention. Therefore, when examining the compatibility with the Convention of a State's actions or norms, the Court may interpret the obligations and the rights contained in this instrument in light of other treaties. In this case, by using international humanitarian law as a norm of interpretation that complements the Convention, the Court is not ranking the different laws, because the applicability and relevance of international humanitarian law in situations of armed conflict is not in doubt. It merely means that the Court may observe the rules of international humanitarian law as a specific law in the matter, in order to apply the norms of the Convention more precisely when defining the scope of the State's obligations. Hence, if necessary, the Court may refer to provisions of international humanitarian law when interpreting the obligations contained in the American Convention in relation to the facts of this case. Consequently, the Court rejects this preliminary objection.

As will be seen, the Inter-American Court has worked its way to a position very similar to that of the Strasbourg Court.

IV. The Strasbourg Court: Turning a Blind Eye to the Issues?

Immediately prior to the public hearing at the ECtHR of the first six Chechen cases against Russia,[49] the applicants' lawyers, including the present author, argued between themselves whether it would assist their clients, the victims of gross violations of the right to life and other ECHR rights, to refer to or to rely upon the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY). They decided – rightly - not to.

Arnold and Quenivet co-edited a book suggesting that there is a 'new merger' between IHL and IHRL.[50] As the introduction puts it: 'At the heart of the enquiry is whether the two bodies of law, IHL and IHRL have finally merged into a single set of laws'.[51] The editors cite Cerna's remark[52] that IHL 'evolved as a result of humanity's concerns for the victims of war, whereas human rights law evolved as a result of humanity's concern for the victims of a new kind of internal war – the victims of Nazi death camps'.

It will be plain from my remarks above that, *pace* Cerna, this is as far from what actually happened as could be the case. I repeat that laws and customs of war have accompanied the use of armed force since the beginning of history, while human rights are much more recent, but pre-existed the Holocaust.

In her own chapter in the collection, commenting on the Chechen cases, Quenivet asserted that the Strasbourg Court 'never assessed whether military operations conducted by state authorities were carried out in order to gain a military advantage. This is certainly linked to the fact that the very notion of military advantage is one encapsulated in IHL, and is therefore beyond the legal remit in which the [Court] assesses violations of the ECHR'.[53] She concluded: 'Without explicitly recognising that it is appraising the compliance of states with the core principles of IHL in non-international armed conflicts, the [Court] is in fact referring

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[49] These were: the bombing of the civilian refugee column in October 1999 (*Isayeva, Yusupova and Bazayeva v Russia* (App No 57947/00, 57948/00 and 57949/00) ECHR 24 February 2005); the massacre in the Staropromyslovskiy district of Grozny (*Khashiyev and Akayeva v Russia* (App No 57942/00 and 57945/00) ECHR 24 February 2005); and the indiscriminate bombing of the village of Katyr-Yurt in February 2000 (*Isayeva v Russia* (App No 57950/00) ECHR 24 February 2005).

[50] R Arnold and N Quenivet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Leiden, Martinus Nijhoff, 2008).

[51] ibid, 1.

[52] CM Cerna, 'Human Rights in Armed Conflict: Implementation of International Humanitarian Law Norms by Regional Intergovernmental Human Rights Bodies' in F Kalshoven and Y Sandoz (eds), *Implementation of International Humanitarian Law* (The Hague, Kluwer, 1989) 31, 34.

[53] N Quenivet, 'The Right to Life in International Humanitarian Law and Human Rights Law' in Arnold and Quenivet, *International Humanitarian Law and Human Rights Law* (n 50) 341.

to the main principles of the lex specialis'.[54] and further: ‘What is remarkable is that the Court applies the detailed provisions applicable in times of international armed conflict to situations of non-international armed conflict’. I hope I have shown that the Court would very likely have reached a quite different result if it had been confronted with applying IHL to individual commanders. In my view, the ECtHR was able to make the findings of fact it did precisely because it was applying different standards within a very different conceptual frame-work.

William Abresch, on the other hand, believed that the ECtHR had applied the doctrines it had developed on the use of force in law enforcement operations (for example, by the police), to high intensity conflicts involving large numbers of insurgents, artillery and aerial bombardment.[55] He correctly observed that for lawyers trained and practising within IHL the law of international armed conflict would be the ideal proper law for internal armed conflict. He called this an 'internationalizing trajectory'.[56] However, he contended that the ECtHR has broken from such a trajectory, in order to derive its own rules from the 'right to life' enshrined in Article 2 of the ECHR. His prognosis was that:

> given the resistance that states have shown to applying humanitarian law to internal armed conflicts, the ECtHR's adaptation of human rights law to this end may prove to be the most promising base for the international community to supervise and respond to violent interactions between the state and its citizens.[57]

He therefore continued to believe that IHL was the proper law to be applied to situations such as the Chechen (or the Kurdish) conflicts.

Abresch’s approach was in reality therefore not so far from that of Hampson, who clearly considers that the Strasbourg Court should take IHL into account to the extent of applying it, and believed that despite the fact that the Court has never referred to the applicability of IHL, 'there is an awareness of the type of analysis that would be conducted under IHL'.[58] In this she follows the 'classical' model of Doswald-Beck and Vité, who considered that 'the obvious advantages of human rights bodies using [IHL] is that [IHL] will become increasingly known to decision-makers and the public, who, it is hoped, will exert increasing pressure to obtain respect for it'.[59]

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[54] ibid, 353.
[55] Abresch, 'A Human Rights Law of Internal Armed Conflict’ (n 23) 742.
[56] ibid, 742.
[57] ibid, 743.
[58] Hampson and Salama, ‘Working Paper’ (n 20) 18.
[59] Doswald-Beck and Vité, 'International Humanitarian Law and Human Rights Law' (n 22) 108.

Similarly, Aisling Reidy, who was one of the lawyers in the Turkish Kurdish cases, together with Hampson and the present author,[60] considered that in the cases against Turkey, the Strasbourg Court was 'borrowing language from [IHL] when analysing the scope of human rights obligations. Such willingness to use humanitarian law concepts is encouraging'.[61] She too saw this development as 'certainly welcome in so far as it contributes to a stronger framework for the protection of rights'.[62] I disagree. I cannot see how the use of the alien framework of IHL in such a case would be 'encouraging'.

I can illustrate these points by further reference to the Chechen cases at the ECtHR.[63] These were cases brought by individual Chechen 'victims' against the Russian Federation. There could have been an inter-state case, and perhaps should have been; but this would still have been a complaint of violation of individual rights. The Chechen applicants in many ways spoke for the whole of their people. Their objective in the proceedings was not to obtain monetary compensation. What they wanted was the vindication, at the highest level, of the truth of their account of what had happened to them and to the mass of Chechens. At this level Russia's right to sovereign action was at stake.

One by-product – entirely contingent as it happens – of the judgments in their favour, was the naming of perpetrators in the case of *Isayeva v Russia*, which concerned the indiscriminate bombing of the village of Katyr-Yurt in February 2000 ordered by senior Russian officers, General Shamanov and General Nedobytko. Findings of fact that amount to the commission of war crimes placed their investigation with a view to prosecution firmly on the agenda. In their submissions to the Council of Europe's Committee of Ministers on compliance with the judgments in October 2005,[64] the applicants argued that 'these two officers were found to have been responsible for a military operation which involved the "massive use of indiscriminate weapons" and which led, inter alia, to the loss of civilian lives and which has been found to have violated Article 2 of the European Convention on Human Rights. The applicants submit that in the light of the Court's findings ..., criminal proceedings should be

[60] See B Bowring, 'The Kurds of Turkey: Protecting the Rights of a Minority' in K Schulze, M Stokes and C Campbell (eds), *Nationalism, Minorities and Diasporas: Identities and Rights in the Middle East* (London, IB Tauris, 1996).
[61] A Reidy, 'The Approach of the European Commission and Court of Human Rights to International Humanitarian Law' (1998) 324 *International Review of the Red Cross* 513, 521.
[62] ibid, 521.
[63] References for the first six cases are given above, n49.
[64] See 'Implementation of ECtHR judgments in Chechen cases' *EHRAC Bulletin* (2008) www.ehrac.org.uk/wp-content/uploads/2014/10/Issue-10-ENG-ONLINE.pdf#page=6, p 6.

opened in respect of both of them.' It goes almost without saying that Russia never opened such proceedings.

Finally, I turn to Alexander Orakhelashvili.[65] He noted 'interdependence' of IHRL and IHL as explained by the ICJ in the *Wall* opinion, and 'parallelism' as displayed in *DRC v Uganda*. He cited the *Kunarac* case for the proposition that IHRL and IHL are 'mutually complementary'[66] and that 'their use for ascertaining each other's content and scope is both appropriate and inevitable'.[67] He commented in detail on the first six Chechen cases,[68] and concluded that 'the European Court's approach allows it to secure the legal outcome required under both human rights law and humanitarian law, even though it does not directly apply the provisions of the latter body of law, as norms falling outside its competence.'[69]

This, I respectfully submit, is simply wrong. I have sought to show above that the defendant(s), the burden and standard of proof, and the evidential issues, would have been quite different had IHL been the proper body of law for these cases. Orakhelashvili's conclusion, with which I also disagree, is that 'the Court's approach should be based, as it mostly is, on the implicit application of the standards of humanitarian law, albeit cloaked in the Convention-specific categories of legitimacy, necessity and proportionality.'[70] I return to the metaphor of chalk and cheese: these categories have an entirely different origin and content from those of IHL.

Hassan v UK

The first case in which the European Court of Human Rights expressly considered the relation between IHRL and IHL was the Grand Chamber judgment in *Hassan v United Kingdom*[71]. Under the heading 'Relevant International Law' the Court listed 'Relevant provisions of the Third and Fourth Geneva Conventions' (paragraph 33); The Vienna Convention on the Law of Treaties, 1969, Article 31 'General Rule of Interpretation'

[65] A Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' (2008) 19 *European Journal of International Law* 1; see also A Orakhelashvili 'The Interaction between Human Rights and Humanitarian Law: A Case of Fragmentation' (2007) www.iilj.org/research/documents/orakhelashvili.pdf.
[66] *Prosecutor v Kunarac, Kovac and Vucovic* (Judgment) ICTY-96-23-T and ICTY-96-23/1-T (22 February 2001) para 467.
[67] Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law' (n 65) 164.
[68] ibid, 170-174.
[69] ibid, 174.
[70] ibid, 182.
[71] *Hassan v the United Kingdom* (n 30).

(paragraph 34); the 'Case-law of the International Court of Justice concerning the inter-relationship between international humanitarian law and international human rights law' (paragraphs 35-37), notably the Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons* (8 July 1996), paragraph 31; the Advisory Opinion on *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004) paragraph 106; the judgment in *Armed Activities on the Territory of the Congo (Democratic Republic of Congo (DRC) v. Uganda)*, (19 December 2005), paragraph 215-216; The Report of the Study Group of the International Law Commission on Fragmentation of International Law (paragraph 38) and the Analytical Study of the Study Group on the same topic, dated 13 April 2006, (A/CN.4/L.682), paragraph 104; The House of Lords' judgment in *Al-Jedda* (paragraph 39); 'Derogations relating to detention under Article 15 of the European Convention on Human Rights and Article 4 of the International Covenant on Civil and Political Rights' (paragraphs 40-42).

The Applicant submitted, as summarised by the Court:

> 83. The Court had often applied the Convention in situations of armed conflict and recognised that in principle it was not displaced (the applicant referred to the following cases: *Ahmet Özkan and Others v. Turkey*[72]; *Varnava and Others v. Turkey* [GC][73]; *Al-Jedda*, § 105; *Al-Skeini*, §§ 164-167). This was, moreover, supported by the advisory opinion of the International Court of Justice in *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, § 106. In the applicant's submission, the International Court of Justice was recognising in this passage that there might be some rights that fall within the scope of international humanitarian law but to which no human rights convention extended. In the applicant's view, the position was that at most, the provisions of international humanitarian law might influence the interpretation of the provisions of the Convention. For example, they might be relevant in determining what acts were strictly required by the exigencies of the situation for the purposes of a derogation from Article 2. In the context of Article 5, this might, in an appropriate case, inform the Court's interpretation of "competent legal authority" and "offence" in Article 5 § 1(c). However, it was not right that Article 5 was displaced in circumstances in which the Geneva Conventions were engaged. The Convention was a treaty aimed at

[72] *Ahmet Özkan and Others v Turkey* (App no 21689/93) ECHR 6 April 2004, paras 85, 319.
[73] *Varnava and Others v Turkey* (App no 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) EHCR 18 September 2009, para 191.

protecting fundamental rights. Its provisions should not be distorted, still less ignored altogether, to make life easier for States which failed to use the mechanism within the Convention that expressly dictated how they were to reconcile its provisions with the exigencies of war.

84. The applicant further contended that, in any event, the Government had not identified anything that United Kingdom forces were required to do by the Geneva Conventions that would have obliged them to act contrary to Article 5. The Iraq war was a non-international armed conflict following the collapse of Saddam Hussein's forces and the occupation by coalition forces. There was considerably less treaty law applicable to non-international armed conflicts than to international armed conflicts. International humanitarian law stipulated minimum requirements on States in situations of armed conflict but did not provide powers. In reality, the Government's submission that the Convention should be "displaced" was an attempt to re argue the question of Article 1 jurisdiction which was decided in *Al Skeini*. If the Government's position were correct, it would have the effect of wholly depriving victims of a contravention of any effective remedy, since the Third and Fourth Geneva Conventions were not justiciable at the instance of an individual. Such a narrowing of the rights of individuals in respect of their treatment by foreign armed forces would be unprincipled and wrong.

85. Finally, even if the Court were to decide that Article 5 should be interpreted in the light of the Third and Fourth Geneva Conventions, Tarek Hassan was arrested and detained as a means of inducing the applicant to surrender. The detention was arbitrary, it did not fall within any of the lawful categories under Article 5 § 1 and it was not even permissible under international humanitarian law.

The Government submitted:

86. The Government submitted that the drafters of the Convention did not intend that an alleged victim of extra-territorial action in the active phase of an international armed conflict, such as a prisoner of war protected by the Third Geneva Convention, who might nonetheless wish to allege a breach of Article 5, would benefit from the protections of the Convention. There was nothing to suggest any such intent within the Convention or its *travaux préparatoires*, or indeed in the wording or *travaux préparatoires* of the 1949 Geneva Conventions, which would have been at the

> forefront of the minds of those drafting the Convention as establishing the relevant applicable legal regime. Furthermore, such intent would be inconsistent with the practical realities of conduct of active hostilities in an international armed conflict, and also with such Convention jurisprudence as there was bearing on the issue.

The Human Rights Centre at the University of Essex made extensive submissions which were summarised by the Court in paragraphs 91-95.

The Court recognised (paragraph 99) that 'This is the first case in which a respondent State has requested the Court to disapply its obligations under Article 5 or in some other way to interpret them in the light of powers of detention available to it under international humanitarian law…'. The Court continued (paragraph 100) that 'The starting point for the Court's examination must be its constant practice of interpreting the Convention in the light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969 (see *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, § 29, and many subsequent cases).' The Court observed (paragraph 101) that 'The practice of the High Contracting Parties is not to derogate from their obligations under Article 5 in order to detain persons on the basis of the Third and Fourth Geneva Conventions during international armed conflicts… Moreover, it would appear that the practice of not lodging derogations under Article 15 of the Convention in respect of detention under the Third and Fourth Geneva Conventions during international armed conflicts is mirrored by State practice in relation to the International Covenant for the Protection of Civil and Political Rights.'

Having reviewed the ICJ case-law, the Court held:

> 103. In the light of the above considerations, the Court accepts the Government's argument that the lack of a formal derogation under Article 15 does not prevent the Court from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5 in this case.
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> 104. Nonetheless, and consistently with the case-law of the International Court of Justice, the Court considers that, even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law.
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> …
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> 107. Finally, although, for the reasons explained above, the Court does not consider it necessary for a formal derogation to be lodged, the provisions of Article 5 will be

> interpreted and applied in the light of the relevant provisions of international humanitarian law only where this is specifically pleaded by the respondent State.

The Court's conclusion was (paragraph 110): '… it would appear that Tarek Hassan's capture and detention was consistent with the powers available to the United Kingdom under the Third and Fourth Geneva Conventions, and was not arbitrary.'

This long-awaited clarification has aroused considerable discussion[74].

As always, the EJIL Talk blog provided excellent rapid reaction. For Lawrence Hill-Cawthorne[75], the Court had '…effectively read into Article 5(1) ECHR an extra permissible ground for detention where consistent with the Third and Fourth Geneva Conventions, and it read down the requirement of habeas corpus in Article 5(4) to allow for the administrative forms of review under the Fourth Geneva Convention.' As to positive points in the Court's judgment, he pointed out that '… the Court rejected the UK's principal argument that IHL as the *lex specialis* precluded jurisdiction arising under Article 1 ECHR (para 77). To have followed this would effectively have been to displace the entire Convention where IHL applies.' Second, the Court had refused to follow the UK '… on the notion of *lex specialis*. Instead, its reasoning rests on two tools of treaty interpretation under Article 31(3) of the Vienna Convention on the Law of Treaties (VCLT), namely subsequent practice (Article 31(3)(b)) and other relevant rules of international law applicable in the relations between the parties (Article 31(3)(c)) (paras 100-102).' Furthermore, '… the Court does not simply submit Article 5 ECHR to the more permissive treaty standards in the Third and Fourth Geneva Conventions. Rather, its approach to this relationship is more symbiotic.'

His first criticism of the Court was that '…whilst its reliance on Articles 31(3)(b) and (c) VCLT over the *lex specialis* maxim did, as noted, encourage greater clarity, it is not clear that either subsequent practice or Article 31(3)(c) quite so readily points to the conclusion at which the Court arrived.' He identified the Court's reliance on state practice of non-derogation. He also raised a 'more general question about the propriety of using subsequent practice in a manner that effectively modifies treaty obligations.'

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[74] See, eg R English, 'Law of armed conflict means that anti-detention provision in ECHR may be disapplied re Iraqi detainee' *UK Human Rights Blog* (16 September 2014) ukhumanrightsblog.com/2014/09/16/law-of-armed-conflict-means-that-anti-detention-provision-in-echr-may-be-disapplied-re-iraqi-detainee/.

[75] L Hill-Cawthorne, 'The Grand Chamber Judgment in Hassan v UK' *EJIL Talk!* (16 September 2014) www.ejiltalk.org/the-grand-chamber-judgment-in-hassan-v-uk/.

Marko Milanovic followed with '… some thoughts on the practical impact of Hassan, its bottom line and possible future influence.'[76] As to the bottom line, he emphasised that '… whenever the military forces of a European state capture any individual, no matter where that individual is located… the Convention will apply by virtue of the personal conception of Article 1 jurisdiction as authority and control over individuals…. In short, European soldiers carry the ECHR with them whenever they engage in capture operations.' Moreover, '… the most striking features of the judgment are its refusal to apply (or even mention) the *lex specialis* principle, and the fact that it is confined to situations of international armed conflict only.' Of course, '…the Court's re-interpretation of Article 5 is tantamount to its amendment.' Judgment in the case of *Jaloud v. Netherlands* followed swiftly on 20 November 2014, but did not shake the approach taken in *Hassan*.[77]

Shaheed Fatima QC published a two-part commentary, under the heading 'Reflections on *Hassan v UK*: A Mixed Bag on the Right to Liberty.'[78] She was also critical of the Grand Chamber, in particular its starting point that state practice regarding both the ECHR and ICCPR is not to enter derogations regarding detentions made pursuant to the Third and Fourth Geneva Conventions:

> This premise does not support the GC's conclusion because the state practice simply begs the questions: what are the reasons explaining the state practice and what (if anything) do those reasons say about whether IHL may be used when assessing the human rights' lawfulness of detentions? The GC should have considered these questions. In particular, the GC should have considered whether the state practice is explicable (partly at least) by reference to jurisdictional issues and therefore whether it has any continuing relevance to the relationship between IHL/IHRL.

Finally, Diane Webber, in *ASIL Insights*, wrote in 2015 under the heading: 'Hassan v. United Kingdom: A New Approach to Security Detention in Armed Conflict?'[79] She concluded by suggesting that:

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[76] M Milanovic, 'A Few Thoughts on Hassan v United Kingdom' *EJIL Talk!* (22 October 2014) www.ejiltalk.org/a-few-thoughts-on-hassan-v-united-kingdom/.

[77] *Jaloud v The Netherlands* (App no 47708/08) ECHR 20 November 2014. See A Sari, 'Jaloud v Netherlands: New Directions in Extra-Territorial Military Operations' *EJIL Talk!* (24 November 2014) www.ejiltalk.org/jaloud-v-netherlands-new-directions-in-extra-territorial-military-operations/.

[78] F Shaheed, 'Reflections on Hassan v UK: A Mixed Bag on the Right to Liberty (Part 1)' *Just Security* (10 October 2014) www.justsecurity.org/16170/reflections-hassan-uk-mixed-bag-liberty-2/; see also F Shaheed, 'Reflections on Hassan v UK: A Mixed Bag on the Right to Liberty (Part 2)' *Just Security* (14 October 2014) www.justsecurity.org/15942/reflections-hassan-uk-mixed-bag-liberty/.

[79] D Webber, 'Hassan v. United Kingdom: A New Approach to Security Detention in Armed Conflict?' (2015) 19 *American Society of International Law* 7.

> … a subtle difference can be discerned between the approach of the ECHR and [UN Human Rights Committee] HRC. The ECHR requires armed conflict security detention to comply with Section 5 European Convention, whereas the HRC assumes in principle that armed conflict security detention complies with Section 9 ICCPR. So parties to the European Convention are required to be satisfied that armed conflict detention is not arbitrary, whereas parties to the ICCPR are not required to take that extra step. States that are parties to both Conventions might be advised to ensure that security detentions in armed conflict comply with the more stringent requirements enumerated by the ECHR.

What is clear is that the spectre of *lex specialis* has been definitely laid to rest by the Grand Chamber in *Hassan.*

V. The African System Gets Involved

In November 2015, the African Commission on Human and Peoples' Rights (the Commission) adopted General Comment (GC) no. 3 on the right to life.[80] The GC deals with a variety of issues surrounding the right to life, inter alia the death penalty, use of force in law enforcement and armed conflict, investigations and accountability, and extraterritoriality. The GC also considers the relationship between the African Charter on Human and Peoples' Rights (ACHPR) and IHL.

The GC states:

> 32. In armed conflict, what constitutes an 'arbitrary' deprivation of life during the conduct of hostilities is to be determined by reference to international humanitarian law. This law does not prohibit the use of force in hostilities against lawful targets (for example combatants or civilians directly participating in hostilities) if necessary from a military perspective, provided that, in all circumstances, the rules of distinction, proportionality and precaution in attack are observed. Any violation of international humanitarian law resulting in death, including war crimes, will be an arbitrary deprivation of life

[80] African Commission on Human and Peoples' Rights, 'General Comment No 3 On The African Charter On Human And Peoples' Rights: The Right To Life (Article 4)' (2015).

On 7 June 2016 Vito Todeschini commented on *EJIL Talk*.[81] He pointed out that this paragraph was '… interesting in respect of three elements: the concept of 'arbitrariness' with regard to acts of deprivation of life in armed conflict; the interpretive principle employed to connect the ACHPR and IHL; and the legal consequences arising from IHL violations when human rights law also applies.' Furthermore, like the Strasbourg Court, the Commission '… refrained from invoking *lex specialis* to read the interplay between IHL and human rights law', and confirmed that '…systemic integration, not *lex specialis*, is the appropriate interpretive principle to operationalise the relationship between norms of IHL and human rights law.'

Most importantly, the Commission had affirmed that '…an attack causing death in violation of IHL rules amounts to an arbitrary deprivation of life. … For the first time, a human rights treaty body made it explicit that, when human rights law norms are placed in the background to favour the application of IHL norms, a breach of the latter entails a violation of the former.'

This has momentous consequences for the availability of remedies: 'The acknowledgment that a breach of the IHL targeting rules resulting in death amounts to an arbitrary deprivation of life opens the way to individuals for obtaining redress for IHL violations via the right to a remedy under human rights law.' I very much agree with Todeschini's conclusion: 'Overall, the African Commission's GC may constitute a significant contribution to strengthen the enforcement of victims' right to reparation for both IHL and human rights violations in armed conflict.'

VI. Conclusion

The invitation to prepare this contribution has come at an auspicious time, when some much needed clarity has emerged as to the relationship between IHRL and IHL. While I do not retract my remarks as to chalk and cheese, and the very different origins of the two branches of law, all three regional human rights systems have now taken giant steps to augmenting the protection of civilians caught up in armed conflict.

[81] V Todeschini, 'The Relationship between International Humanitarian Law and Human Rights Law in the African Commission's General Comment on the Right to Life' *EJIL Talk!* (7 June 2016) www.ejiltalk.org/the-relationship-between-international-humanitarian-law-and-human-rights-law-in-the-african-commissions-general-comment-on-the-right-to-life/.