



EUI Working Papers

AEL 2010/01

ACADEMY OF EUROPEAN LAW

PRIV-WAR project

The Interface of Human Rights Law and International Humanitarian Law in the
Regulation of private Military and Security Companies

Federico Lenzerini

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
ACADEMY OF EUROPEAN LAW

*The Interface of Human Rights Law and International Humanitarian Law in the
Regulation of Private Military and Security Companies*

FEDERICO LENZERINI

EUI Working Paper **AEL** 2010/01

This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper or other series, the year, and the publisher.

The ‘Regulating Privatisation of “War”’: The Role of the EU in Assuring the Compliance with International Humanitarian Law and Human Rights’ (PRIV-WAR) project is funded by the European Community’s 7th Framework Programme under grant agreement no. 217405.

This paper was produced as part of the EUI contribution to Work-Package 4 of the PRIV-WAR Project: *Private Military and Security Companies and the Protection of Human Rights*.

www.priv-war.eu

ISSN 1831-4066

© 2010 Federico Lenzerini

Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
cadmus.eui.eu

Abstract

The typical functions of private military and security companies (PMSCs) are designed to operate in the context of situations of crisis, which mostly take place in the event of armed conflicts. International humanitarian law (IHL) plays therefore a particularly significant role in regulating the activities of PMSCs. In playing this role, however, IHL interacts with international human rights law (HRL) to a very strict extent. While it is commonly held that HRL and IHL represent two distinct legal regimes, their strict interrelation is evident both in light of their common purpose and of the formulation and content of most of their provisions. According to the International Court of Justice, in the event of armed conflict both HRL and IHL find application, but IHL, being specifically designed to regulate the conduct of fighting, is to be considered as *lex specialis*. This does not prevent, however, that the most fundamental rules of HRL apply in any case, even if the relevant situations they regulate might also be covered by other rules of international law, including IHL. IHL must therefore conform with the fundamental rules of IHR, according to the principle of complementarity. Nevertheless, this operation may be hardly translated into practice with respect to certain specific rights, particularly the fundamental right to life. This problem has been extensively addressed in the recent practice of the monitoring bodies established by regional human rights instruments, according to which basic human rights fully apply also in the event of armed conflict, and IHL remains an interpretative tool for better defining the scope of application of those rights.

The Interface of Human Rights Law and International Humanitarian Law in the Regulation of Private Military and Security Companies

FEDERICO LENZERINI*

1. The Origin and Purpose of International Humanitarian Law

The birth of international humanitarian law (IHL) is usually identified with the first codification of the law of belligerent occupation – the well-known *Lieber Code*¹ – drafted in 1863 by Dr. Francis Lieber at President's Lincoln request on the occasion of the U.S. War of Secession.² While a number of shortcomings are apparent in the text of the *Lieber Code*, that were corrected by subsequent IHL codification, its strong humanitarian driving force is abundantly clear, especially if one contextualizes the instrument in the epoch of its birth. For instance, it confined the scope of military necessity by admitting of neither

cruelty – that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions [...] the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.³

It also recommended commanders – whenever possible – to inform the enemy of their intention to bombard, in order to allow them to remove non-combatants, especially women and children, before the bombardments begins (although admitting that in some cases “[s]urprise may be a necessity”).⁴ Other provisions affirmed, *inter alia*: the need to protect, in occupied countries, religion and morality, private property and the inhabitants, especially women, as well as to punish rigorously offenses to these values;⁵ the fact that slavery only existed according to municipal and local law but was contrary to the law of nature, with the consequence that “in a war between the United States and a belligerent which admits of slavery, if a person held in bondage by that belligerent be captured by or come as a fugitive under the protection of the military forces of the United States, such person is immediately entitled to the rights and privileges of a freeman [as] [t]o return such person into slavery would amount to enslaving a free person”;⁶ the prohibition of “[a]ll wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, [...] all rape, wounding, maiming, or killing of such inhabitants”, the breach of which was to be punished “under the penalty of death, or such other severe punishment

* Professor of International Law, University of Siena. Email: lenzerini@unisi.it. The author gratefully acknowledges Dr. Rebecca Mori, J.D. University of Siena, LL.M. University of Toronto, for her valuable help in the research of the doctrinal and jurisprudential sources used in the present paper. The author also wishes to thank Professor Francesco Francioni, Professor of International Law and Human Rights, European University Institute, Florence, for his comments concerning an earlier draft of this paper.

¹ See *Instructions for the Government of Armies of the United States in the Field (Lieber Code)*, 24 April 1863, available in full text at <<http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument>> (last visited on 4 December 2009).

² See J. L. COHEN, “The Role of International Law in Post-Conflict Constitution-Making: Toward a *Jus Post Bellum* for ‘Interim Occupation’”, 51 *New York Law School Law Review*, 2006/07, 497, p. 503.

³ See *Lieber Code*, Article 16.

⁴ *Ibid.*, Article 19.

⁵ *Ibid.*, Article 37.

⁶ *Ibid.*, Articles 42-43.

as may seem adequate for the gravity of the offense” and authorized a superior to lawfully kill “on the spot” any “soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it”;⁷ the prohibition to make the prisoners of war who “are subject to confinement or imprisonment such as may be deemed necessary on account of safety” the object of any “other intentional suffering or indignity”⁸ and the duty to treat them with humanity;⁹ as well as the requirement – as a matter of “common justice and plain expediency” – that “the military commander protect the manifestly loyal citizens, in revolted territories, against the hardships of the war as much as the common misfortune of all war admits”.¹⁰

These provisions – described with by way of example – show that the core of IHL was already present in the *Lieber Code*. Better yet, they show the purpose of IHL, that is to humanize war through reconciling military necessity and the requirements of humanity.

The principles expressed by the *Lieber Code* were refined and developed in the subsequent decades, leading to the adoption of a number of international instruments characterized by a growing amount of provisions – some of them eventually developed into principles of customary international law¹¹ – that have progressively intensified the degree of protection available to human dignity and other related values during armed conflicts. These instruments include – but are not limited to – the 1899 and 1907 Hague Conventions on the Law and Customs of War,¹² the Four Geneva Conventions of 1949¹³ and their two Additional Protocols of 1977 relating to the protection of victims of armed conflicts,¹⁴ as well as a number of specific conventions concerning certain peculiar IHL aspects, including the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict,¹⁵ the 1972 Convention on Biological Weapons,¹⁶ the 1980 Convention on Conventional Weapons,¹⁷ the 1993 Convention on Chemical Weapons,¹⁸ the 1997 Ottawa Convention on the Prohibition of Anti-Personnel Mines,¹⁹ the 2000 Optional Protocol to the Convention on the Rights of the Child on the

⁷ *Ibid.*, Article 44.

⁸ *Ibid.*, Article 75.

⁹ *Ibid.*, Article 76.

¹⁰ *Ibid.*, Article 156.

¹¹ According to the International Committee of the Red Cross, at present 161 rules of customary IHL would exist; see J.-M. HENCKAERTS, “Study on Customary International Humanitarian Law: A contribution to the understanding and respect for the rule of law in armed conflict”, 87 *International review of the Red Cross*, No. 857, 2005, p. 175 ff.

¹² The text of the 1899 and 1907 Hague Conventions on the Laws and Customs of War is available at <<http://www.icrc.org/ihl.nsf/INTRO?OpenView>> (last visited on 18 November 2009).

¹³ See *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 75 UNTS 31 (Geneva Convention I); *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 75 UNTS 85 (Geneva Convention II); *Convention (III) relative to the Treatment of Prisoners of War*, 75 UNTS 135 (Geneva Convention III); *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287 (Geneva Convention IV).

¹⁴ See *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 1125 UNTS 3 (Protocol I); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, 1125 UNTS 609 (Protocol II).

¹⁵ 249 UNTS 240.

¹⁶ *Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*, 1015 UNTS 163.

¹⁷ *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects*, 1342 UNTS 137.

¹⁸ *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and Their Destruction*, 32 ILM 800.

¹⁹ *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, 36 ILM 1507.

involvement of children in armed conflict,²⁰ plus various protocols to some of these conventions. These instruments basically pursue two main goals. The first consists of granting protection in favour of the persons who are not (or no longer) involved in fighting, particularly civilian persons, prisoners of war and personnel providing various kind of assistance to the people involved in the conflict, like medical or religious personnel. The second basic goal of IHL, complementary to the first, rests in restricting the use and effects of certain methods of warfare that can be particularly prejudicial to human welfare, e.g. those kinds of weapons that cause unnecessary suffering or indiscriminately strike fighting forces and/or civilian persons.

In general terms, the relevant instruments of IHL set up a heterogeneous level of protection if one compares the rules applicable to international and non-international armed conflicts respectively, in light of the fact that the restrictions to military action contemplated with respect to international wars are superior in number and usually more sophisticated than those governing the conduct of non-international conflicts. This is evidently due to the lesser level of intrusion in the sphere of State sovereignty determined by the rules governing international conflicts with respect to those regulating civil wars, which traditionally make the former more easily acceptable to governments than the latter. However, this differentiation has progressively faded in more recent times, leading to the recognition of the applicability of most principles of humanity governing international armed conflicts also with respect to non-international wars.

2. The Role of International Humanitarian Law in the Regulation of Private Military and Security Companies

The typical *modus operandi* of PMSCs is actually designed to face situations of crisis, which mostly take place in the event of armed conflicts, either of international or non-international nature. It is therefore evident that IHL – which is the legal body pertaining to international law specifically intended to regulate the conduct of armed conflicts – plays a particularly significant role in regulating the activity of PMSCs.

In practical terms, virtually any possible breach of IHL can be perpetrated by PMSCs. First, since employees of PMSCs can take part in fighting, they can determine, where applicable, – in addition to their own individual responsibility – the responsibility of their hiring company for takings of life occurred outside the realm of the narrow limits provided for by the applicable rules of IHL. This includes killing of civilians²¹ or prisoners of war, treacherously killing persons belonging to the hostile army,²² killing an enemy who has surrendered,²³ killing an adversary by resort to perfidy,²⁴ as well as any other kind of murder or wilful killing not justified by military necessity.²⁵ Some of this conduct can result in an infringement of IHL even in the event that it does not entail the death of the victim, but however violates his/her physical integrity; in this respect, IHL prohibits, e.g., treacherous wounding

²⁰ Available at <<http://www2.ohchr.org/english/law/crc-conflict.htm>> (last visited on 18 November 2009).

²¹ See, e.g., Article 32 Geneva Convention IV.

²² See, e.g., Article 23(b) of the 1907 Hague *Regulations respecting the Laws and Customs of War on Land* (Hague Regulations), available at <<http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument>> (last visited on 18 November 2009); Articles 8(2)(b)(xi) and 8(2)(e)(ix) of the 1993 *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* (ICTY Statute), available at <<http://www.icty.org>> (last visited on 18 November 2009).

²³ See, e.g., Article 23(c) Hague Regulations; Article 8(2)(b)(vi) ICTY Statute.

²⁴ See, e.g., Article 37 Hague Regulations; Article 37 Protocol I. According to the study of the International Committee of the Red Cross on the status of customary international law in the field of IHL, the prohibition in point would actually amount to a rule of customary international law; see HENCKAERTS, *cit.*, p. 204 (Rule 65).

²⁵ See Article 50 Geneva Convention I; Article 51 Geneva Convention II; Article 130 Geneva Convention III; Article 147 Geneva Convention IV; Article 75 Protocol I; Article 4 Protocol II.

of “individuals belonging to the hostile nation or army”²⁶ or wounding of “a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion”,²⁷ as well as injuring or capturing “an adversary by resort to perfidy”.²⁸

To a similar extent, PMSCs employees (and, *a fortiori*, PMSCs themselves) may well be responsible for other kinds of acts that are considered particularly intolerable affronts to human dignity and are therefore prohibited by IHL “at any time and in any place whatsoever, whether committed by civilian or by military agents”.²⁹ These acts include: violence to the life, health, or physical or mental well-being of persons (including, *inter alia*, torture of all kinds, whether physical or mental, corporal punishment and mutilation); outrages upon personal dignity (especially humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault); the taking of hostages; slavery and the slave trade in all their forms; acts of terrorism; collective punishments; threats to commit any of the afore-mentioned acts; and, breaches of the principle of access to fair treatment in favour of persons taking no active part in the hostilities – including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause – who are accused of having committed criminal offences.

Respect for these prohibitions is only one of the requirements that all forces involved in a armed conflict – including PMSCs and their personnel – are bound to obey. With respect to civilian persons, in particular, a number of obligations exist which pursue the goal of alleviating the suffering caused by war, covering “the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion”.³⁰ This principle is also operative in the event of non-international armed conflict, as affirmed by Article 13 of Protocol II, according to which “[t]he civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations [...] [through a set of] rules [that] shall be observed in all circumstances”. Also, the civilian population and individual civilians cannot be the object of attack or of “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited”, both in international and non-international armed conflicts.³¹ Protection is also extended to objects that are indispensable to the survival of the civilian population³² – particularly in order to prevent starvation – as well as to other elements that are of particular significance for the physical and or spiritual well-being of civilians, including cultural objects and places of worship which “constitute the cultural or spiritual heritage of people”.³³

The examples just provided certainly do not exhaust the list of obligations of actors actively involved in international or non-international armed conflicts *vis-à-vis* the civilian population. A number of other specific obligations actually exist, some of them regulated by specific treaties. By way of example, one can cite the prohibition on conscription of minors or their involvement in war, as dictated in particular by the 2000 *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*.

²⁶ See, e.g., Article 23(b) Hague Regulations; Articles 8(2)(b)(xi) and 8(2)(e)(ix) ICTY Statute

²⁷ See, e.g., Article 8(2)(b)(vi) ICTY Statute.

²⁸ See, e.g., Article 37 Protocol I.

²⁹ See, e.g., Article 75 Protocol I; Article 4 Protocol II.

³⁰ See Article 13 Geneva Convention IV (the whole Convention is expressly devoted to the protection of civilian persons in time of war).

³¹ See, respectively, Article 51 Protocol I and Article 13 Protocol II.

³² See Article 54 Protocol I and Article 14 Protocol II.

³³ See Article 53 Protocol I and Article 16 Protocol II; see also the *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* and its two Protocols of, respectively, 1954 and 1999 (both available at <<http://www.unesco.org>>, last visited on 18 November 2009).

Most of these obligations, at least in substance, correspond today to parallel principles of customary international law.³⁴

Another particularly sensitive issue addressed by IHL is the taking and detention of prisoners. Being security-related functions included among the typical institutional activities of PMSCs, these companies can be ordinarily involved in situations in the context of which it is necessary to take prisoners and, consequently, to grant them treatment in line with the principles of IHL. In this respect, it is first to be noted that the members of belligerent parties (including PMSCs) do not possess an unlimited power to take prisoners, even in the course of an armed conflict. In particular, as previously noted,³⁵ the capture of an adversary by resort to perfidy is prohibited.

In addition, a very detailed set of rules exists regulating internment and detention of both civilian persons and members of military forces in the course of an armed conflict. Basically, all persons deprived of their liberty must be treated with dignity. This obligation translates into a number of specific requirements, including, *inter alia*, those of providing prisoners with adequate food, water, clothing, shelter and medical assistance; holding them in areas located outside the theatre of combat; allowing them to practice their religion and to correspond with their families; recording accurately their personal details. Also, specific assistance is to be provided for vulnerable prisoners, particularly women and children, who must be kept separate from, respectively, men and adults. Furthermore, both civilian internees and prisoners of war may only be confined “as an indispensable measure of safety and only while the circumstances which necessitate the measure continue to exist”,³⁶ and must be released and repatriated without unjustified delay after the end of hostilities (except in the event that continued deprivation of their liberty is justified by the need for them to serve a sentence lawfully imposed or by criminal proceedings that are pending against them).

It is opportune to underline that detaining powers do not possess unlimited authority even with respect to the categories of detainees who do not enjoy – according to applicable IHL – the status of prisoners of war. This status, in particular, is not enjoyed by unlawful combatants,³⁷ who, however, are included within the category of “protected persons” – being therefore entitled to the same protection as civilians – if, according to Article 4 of Geneva Convention IV, “at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals”, although this rule is subject to precise exceptions.³⁸ In addition, pursuant to Article 45 paragraph 3 of Protocol I, “[a]ny person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol”; Article 75, for its part, recognizes in favour of these people a number of fundamental guarantees that must be granted “without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria”. These guarantees include, *inter*

³⁴ See HENCKAERTS, *cit.*, *passim*.

³⁵ See note 29 and corresponding text.

³⁶ See Article 5 Hague Regulations.

³⁷ On unlawful combatants see K. DÖRMANN, “The legal situation of ‘unlawful/unprivileged combatants’”, 85 *International Review of the Red Cross*, No. 849, 2003, p. 45 ff.

³⁸ In particular, according to the same article, “[n]ationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are”; the same provision also states that “[p]ersons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, shall not be considered as protected persons within the meaning of the present Convention”.

alia, the right to be treated humanely; the right to respect for “the person, honour, convictions and religious practices”; the right to be protected against any kind of violence to the life, health or physical and mental well-being of the person (particularly murder, torture, corporal punishment and mutilation) as well as against outrages upon personal dignity (including humiliating and degrading treatment, enforced prostitution and indecent assault) and collective punishment; the right to be promptly informed of the reasons for the arrest, detention or internment; the right to be released as soon as the circumstances justifying the arrest, detention or internment have ceased to exist; and a number of rights related to the fair administration of justice.

Articles 4-6 of Protocol II extend similar guarantees to the context of non-international armed conflicts, in favour of “all persons who do not take a direct part or who have ceased to take part in hostilities”, therefore including unlawful combatants too, although the provisions in point do not explicitly refer to persons “not entitled to prisoner-of-war status”.³⁹ These provisions represent a specification of the content of Article 3 common to the four 1949 Geneva conventions (Common Article 3), according to which

[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular, humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. [...].

Furthermore, it is indubitable that the obligation to grant the enjoyment of these minimum guarantees to whatever person in the power of a party to an armed conflict, including unlawful combatants, is also part of customary international law applicable in the event of both international and non-international armed conflict.

It is evident that, in the context of the usual operations of PMSCs, a risk that the guarantees in point are denied – consequently giving rise to breaches of IHL – exists *at least* to the same extent that it exists in consequence of the activities ordinarily carried out by regular State military forces.

Similar considerations can be developed with regard to the treatment of the sick and wounded. Two of the four Geneva Conventions – the first, concerning the war on land, and the second, relating to the military personnel at sea – are specifically devoted to this issue, setting up a number of detailed obligations that can be easily breached by PMSCs personnel in the execution of their usual functions. Other relevant provisions are included, *inter alia*, in the other two Geneva Conventions⁴⁰ as well as in the two Additional Protocols of 1977,⁴¹ regulating the condition of not only sick and wounded military personnel, but also of sick and wounded civilian persons. Again, the relevant provisions applicable in non-international armed conflicts represent a specification of one of the rules included in Common

³⁹ The reason of this is simply that “[t]he law applicable in non-international armed conflicts does not foresee a combatant’s privilege (i.e. the right to participate in hostilities and impunity for lawful acts of hostility). Once captured or detained, all persons taking no active/direct part in hostilities or who have ceased to take such a part come under the relevant provisions of international humanitarian law”; see DÖRMANN, *cit.*, p. 47 (footnotes omitted).

⁴⁰ See articles 19, 47, 70 and 109-113 Geneva Convention III, and articles 14-22, 57, 98, 106, 127 and 132 Geneva Convention IV.

⁴¹ See Part II and articles 37, 41, 44 and 85 Protocol I, and Article 5, Part III and Article 18 Protocol II.

Article 3 – *i.e.* paragraph (2) – according to which “[t]he wounded and sick shall be collected and cared for”.

Last but not least, PMSCs – to the same extent as regular armed forces – are bound to avoid the use of prohibited methods of warfare, particularly of banned weapons like anti-personnel mines or biological weapons, as well as bullets expanding or exploding in the human body, in so far as these devices are prohibited by relevant rules of international law (including customary international law)⁴² and these rules are binding for the States which bear the responsibility for the activities performed by the PMSCs concerned.

3. Human Rights Law and International Humanitarian Law: Separate Spheres or Concentric Circles?

While it is commonly held that human rights law (HRL) and IHL represent two distinct legal regimes,⁴³ their strict interrelation is evident not only in light of their common philosophical roots – *i.e.* the protection of the paramount value of human dignity – but also due to the formulation of some key provisions included in the first historical instruments aimed at regulating IHL. For example, the well-known *Martens clause*, included in the Preamble to the 1899 Hague Convention II concerning the laws and customs of war on land,⁴⁴ proclaimed the principle according to which,

[u]ntil a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.

The reference in this clause to the “laws of humanity” and to “the requirements of the public conscience” is prophetic, formulating at once the very inspiration and basis of the international human rights movement that would later spread as a reaction to the tragic catastrophe of World War II. Indeed, the concern that in barely five decades would lead to the solemn adoption of the *Universal Declaration of Human Rights* by the General Assembly of the United Nations was already burning in the conscience of the international community, although it needed the cataclysm of the Second World War in order to overcome the striking obstacle represented by the firm devotion of States to the principle of territorial sovereignty. In the legal background characterizing international law at the end of the XIX Century, it was far more acceptable for States to convene for the establishment of a set of rules aimed at regulating the conduct of war. Their scope of application was in fact limited to the very specific context of (international) armed conflicts, and their influence on State sovereignty was much more restrained than human rights law would have been, being human rights inherently designed to operate within the State borders in every-day life. In any event, the birth of IHL allowed the idea of human dignity to emerge from the quicksand of the absolutely-conceived notion of territorial sovereignty, which previously suffocated all philosophical impulses toward the “humanization” of international law.

However, it would then take a long time before this philosophical seed yielded positive international law in the field of human rights. At the same time, existing rules of IHL showed that they were constrained by too many inherent limits (*e.g.* the *si omnes* clause conditioning the operation of the 1899 and 1907 Hague Convention) to enable them to prevent the occurrence of the most dreadful

⁴² For example, the use of expanding or exploding bullets is considered as prohibited as a matter of customary international law; see, in this respect, HENCKAERTS, *cit.*, p. 205.

⁴³ See C. TOMUSCHAT, “Human Rights and International Humanitarian Law”, 21 *EJIL* (forthcoming).

⁴⁴ See *supra*, note 12.

abuses of human dignity during armed conflicts. Therefore, the development of the two fields of international law in point continued parallel, with the purpose of creating rules capable of achieving the purposes for which each was conceived. However, while HRL developed quite plainly – being unconstrained by any inherent restrictions which could restrain its scope – the situation was quite different with respect to IHL, as by its very nature it was destined to extend its scope of application only to the “peripheral portion” of the subject-matter it was aimed to regulate. In fact, the inherent boundaries of IHL inhere in the circumstance that its purpose is only limited to controlling “adverse effects” of armed conflicts, *i.e.* to prevent those forms of fighting prejudicial to certain protected values (basically human dignity) – which are useless and unjustifiable in light of the purposes ordinarily achieved in time of war. That aside – and apart from a limited cluster of specific horrible crimes – IHL cannot intrinsically extend to cover all those situations in which the most important prerogatives attached to human dignity (particularly the right to life) are sacrificed in order to pursue the ordinary goals of belligerent parties.

However, once human dignity emerged as the paramount value pursued by the international community, this lack of protection could no longer be accepted. In particular – although, as stated by most international human rights instruments, most rules of HRL can be suspended in situations of emergency, which undoubtedly include armed conflicts – it was hardly acceptable that the protection available for certain fundamental rights of the human being in the event of armed conflict was restrained within the narrow limits of IHL. Therefore, in 1996, in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*,⁴⁵ the International Court of Justice (ICJ) constructed its theory of IHL as *lex specialis*. However, the Court formulated this principle in a quite “contradictory fashion”;⁴⁶ in fact, while asserting that “the right not arbitrarily to be deprived of one’s life [contemplated by Article 6 of the *International Covenant of Civil and Political Rights* (ICCPR)] applies also in hostilities”, as it is not included among the provisions that “may be derogated from in a time of national emergency” (pursuant to Article 4 ICCPR), the Court also held that

[t]he test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life [...] can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.⁴⁷

As authoritatively noted by Professor Tomuschat, this statement – due to its ambiguity – was open to different interpretations. On the one hand, the use of the term “can *only* be decided” could mean that in time of war the only protection offered for the right to life (and, *a fortiori*, for human rights in general) is that available under IHL; on the other hand, the reference to the fact that Article 6 ICCPR “applies also in hostilities” seems to suggest that in the event of armed conflict the application of HRL is to be evaluated “in conjunction” with the applicable rules of IHL.⁴⁸

The ICJ refined its position in 2004, showing that, among the two possible interpretations just mentioned, the latter is to be preferred. In the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,⁴⁹ the Court confirmed that “the protection offered by human rights conventions does not cease in case of armed conflict”, except with respect to those human rights that can be derogated from in time of emergency. Then, in defining the

⁴⁵ *ICJ Reports*, 1996, p. 226.

⁴⁶ See TOMUSCHAT, *cit.*

⁴⁷ *ICJ Reports*, 1996, p. 240, para. 25.

⁴⁸ See TOMUSCHAT, *cit.*

⁴⁹ *ICJ Reports*, 2004, p. 136.

relationship between IHL and HRL, the Court offered three possible solutions, although it did not provide the criteria for ascertaining which solution is to be applied:

some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.⁵⁰

This statement was then reiterated by the ICJ in the 2005 judgment concerning the armed activities of Uganda in the territory of the Congo,⁵¹ concluding “that both branches of international law, namely international human rights law and international humanitarian law [...] have to be taken into consideration” when perpetrated in the course of an armed conflict.⁵²

Finally, in 2008, in the context of the dispute between Georgia and the Russian Federation concerning the application of the *Convention on the Elimination of All Forms of Racial Discrimination*, the ICJ affirmed that this Convention always also applies in the event of armed conflict “even if certain of these alleged acts might also be covered by other rules of international law, including humanitarian law”.⁵³

With respect to the latter statement, one has certainly to be aware that, as Professor Tomuschat warns, it “should not be overrated since the Court was faced with a request for issuing a provisional measure. The urgency of the matter prevailed over any other consideration”.⁵⁴ However, the position taken by the Court paves the way for the unconditioned application of HRL even in the event of armed conflict, at least when the relevant matter is not adequately regulated by the *lex specialis* represented by IHL or when the value protected by the relevant rules of HRL is so fundamental – as with the prohibition of racial discrimination – that even the peculiar situation existing in the event of armed conflict can in no way influence its application, even in the presence of other rules, including those belonging to IHL, that could in principle be applied to the same facts covered by applicable HRL.

It follows from the foregoing that the relationship between HRL and IHL is to be seen as the connection existing between two concentric circles, the smaller being represented by IHL, as *lex specialis*. Therefore, the relevant aspects covered by IHL should in principle be regulated – due to their speciality – according to the rules pertaining to this body of law. However, as emerges from the statement of the ICJ in the case concerning the application of the Racial Discrimination Convention, a caveat is necessary, *i.e.* that IHL must conform with the principles of human rights defending values which are considered so fundamental by the international community that they cannot be the object of derogation even in time of war. In practical terms, this outcome can be achieved through interpreting IHL in a way that is consistent with human rights principles, usually possible due to the coincidence of the basic goal pursued by both bodies of law, *i.e.* the protection of the paramount value of human dignity.

This idea of “consistent interpretation” paves the way for a dynamic and harmonic approach to the relationship between HRL and IHL, that is usually referred to as the *principle of complementarity*. As stressed by one scholar, this principle “in a sense, enshrines the idea of international law understood as

⁵⁰ *ICJ Reports*, 2004, p. 178, para. 106.

⁵¹ *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, available at <<http://www.icj-cij.org/docket/files/116/10455.pdf>> (last visited on 19 November 2009), p. 69, para. 216.

⁵² *Ibid.*, p. 70, para. 216.

⁵³ *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Order on the request for the indication of provisional measures, 15 October 2008, available at <<http://www.icj-cij.org/docket/files/140/14801.pdf>> (last visited on 19 November 2009), p. 31, para. 112.

⁵⁴ See TOMUSCHAT, *cit.*

a coherent system”,⁵⁵ as proclaimed in the rule of interpretation codified by Article 31(3)(c) of the Vienna Convention on the Law of Treaties.⁵⁶ The two bodies of law in point can therefore mutually reinforce, particularly through the interpretation of one consistent with the principles enshrined by the other.⁵⁷

Theory can be difficult to implement. In fact, the two principles of, respectively, IHL as *lex specialis* and consistent interpretation between the two bodies of law in point can be hardly reconciled with each other in some practical circumstances. This happens, in particular, with respect to the right to life, the degree of protection of which varies substantially depending on whether it is considered from the perspective of IHR or that of IHL. According to HRL, in fact, apart from the limited contexts in which death penalty is still lawful, use of lethal force is only justifiable for reasons of self-defence or for defending the life of others, in the event of an imminent danger that cannot be prevented through resorting to any other means. On the contrary, according to IHL, lethal force can normally be used to pursue the ordinary purposes of armed conflicts and, within certain limits, incidental killing of civilians not directly participating in hostilities is tolerated. The test that is commonly applied in order to establish whether or not taking of life occurring in time of war can be considered lawful pursuant to IHL is that of *proportionality*. Under IHL this term takes a different meaning to the one it has in the realm of HRL. In fact, while in the context of the latter it requires that the force used is proportionate to the purpose of protecting someone’s life, with respect to IHL proportionality is measured on the basis of the military advantage concretely pursued, in the sense that for it to be satisfied it is sufficient that incidental loss of civilian life is not *excessive* in relation to such an advantage.⁵⁸

The problem of how these two approaches can be reconciled has been addressed in detail in the context of the recent practice of the European and Inter-American Courts of Human Rights (hereinafter ECtHR and IACtHR, respectively), and the African Commission of Human and Peoples’ Rights (ACHPR). This practice will be examined in the following Section.

4. The Practice of Regional Monitoring Bodies concerning Human Rights Breaches Taking Place in Armed Conflicts

The most recent decades have been characterized by an incremental proliferation in non-international armed conflicts, some of which, due to the sporadic fighting by which they are characterized and the ambiguous status of the armed groups involved, remain at the fringe of war proper and situations of internal disturbances and tensions that cannot be properly qualified as armed conflicts.⁵⁹ Some of these conflicts have offered regional human rights bodies the opportunity to face situations of human rights breaches taking place during the fighting, and consequentially to address a number of problems concerning their competence to deal with those cases as well as the law applicable to them.⁶⁰ In fact, while the institutional competence of human rights bodies is limited to cases in which HRL is applicable, the proper sector of law competent to regulate situations occurring in the event of armed

⁵⁵ See C. DROEGE, “The Interplay between International Humanitarian Law and International Human Rights in Situations of Armed Conflict”, 40 *Israel Law Review*, 2007, 310, p. 337;

⁵⁶ See C. MCLACHLAN, “The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention”, 54 *ICLQ*, 2005, p. 279 ff.

⁵⁷ See DROEGE, *cit.*, p. 340 ff.

⁵⁸ *Ibid.*, p. 345 f.

⁵⁹ See Article 1 para. 2 Protocol II.

⁶⁰ For a comprehensive analysis of these cases see R. MORI, “The Protection of the Right to Life in Non-International Armed Conflicts: What the ECtHR and the IACtHR Should Learn from One Another”, LL.M. Thesis, University of Toronto, 2008 (on file with the author).

conflict is in principle IHL, which should be technically extraneous to the sphere of competence of said bodies.

A. The Practice of the Inter-American Court of Human Rights

Historically, the first case of significance to this enquiry is *Las Palmeras*, decided by the IACtHR in 2000.⁶¹ The facts of this case occurred in the context of the internal fighting between the State army and the left-wing guerrillas which – although characterized by the alternation between intense peaks and times of relative calm – has taken place in Colombia from the 1960s to date. In particular, in January 1991, during an armed operation in Las Palmeras (in the municipality of Mocoa, Department of Putumayo), close to a rural school, the National Police Force extrajudicially executed six persons, including a schoolteacher. The members of the police force subsequently attempted to justify their conduct; it was alleged, in particular, that “they had dressed the bodies of some of the persons executed in military uniforms, they had burned their clothes and they had threatened those who witnessed the event. Also, that the National Police Force had presented seven bodies as belonging to rebels who died in an alleged confrontation”.⁶² After two inquiries, it was ascertained that “the victims of the armed operation did not belong to any armed group and that the day of the facts they were carrying out their usual tasks”; in addition, it was also established that “the National Police Force had extrajudicially executed the victims when they were defenseless [*sic*]”.⁶³

With respect to this case, the IACtHR was asked by the Inter-American Commission on Human Rights (IACHR) to

[c]onclude and declare that the State of Colombia has violated the right to life, embodied in Article 4 of the Convention, and *Article 3, common to all the 1949 Geneva Conventions*, to the detriment of six persons [...] [and] [e]stablish the circumstances of the death of a seventh person, who had presumably died in combat [...] in order to determine whether the State of Colombia has violated his right to life embodied in Article 4 of the [American Convention on Human Rights (ACHR)] and *Article 3, common to all the 1949 Geneva Conventions*.⁶⁴

⁶¹ See *Case of Las Palmeras v. Colombia*, Series C No. 67, Preliminary Objections, Judgment of 4 February 2000, available at <http://www.corteidh.or.cr/docs/casos/articulos/seriec_67_ing.pdf> (last visited on 5 December 2009).

⁶² *Ibid.*, para. 2.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, para. 12 (emphasis added; footnotes omitted). It is to be noted that the IACHR has never shown any reluctance in considering itself (as well as the IACtHR) competent to apply IHL. For example, in the Case 11.137, Juan Carlos Abella (Argentina), 18 November 1997, Doc. OEA/Ser.L/V/II.98 doc. 6 rev. of 13 April 1998 (also available at <<http://www.cidh.oas.org/annualrep/97eng/Argentina11137.htm>>, last visited on 19 December 2009), concerning a fight between the Argentine Army and a rebel group which had seized a military base and was believed to imminently launch a *coup d'état*, the Commission found that the relevant events were not to be characterized as a mere “situation of internal disturbances”, but rather as an internal armed conflict which triggered application of the provisions of [Common Article 3], as well as other rules relevant to the conduct of internal hostilities” (see para. 154 ff.). The Commission, therefore, affirmed that its “ability to resolve claimed violations of [the right to life] arising out of an armed conflict may not be possible in many cases by reference to Article 4 of the American Convention alone. This is because the American Convention contains no rules that either define or distinguish civilians from combatants and other military targets, much less, specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations. Therefore, the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of this and other kinds of claims alleging violations of the American Convention in combat situations. To do otherwise would mean that the Commission would have to decline to exercise its jurisdiction in many cases involving indiscriminate attacks by State agents resulting in a considerable number of civilian casualties. Such a result would be manifestly absurd in light of the underlying object and purposes of both the American Convention and humanitarian law treaties” (see para. 161). In addition, “the Commission’s competence to apply humanitarian law rules is 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. Virtually every OAS member State that is a State Party to the American Convention has also ratified one or more of the 1949 Geneva Conventions and/or other humanitarian law instruments. As States Parties to the Geneva

Colombia, in its preliminary objections contested the competence of both the IACHR and the IACtHR “to apply international humanitarian law and other international treaties”.⁶⁵ Then, at the public hearing, the respondent State clarified its position, specifying, on the basis of the distinction between “interpretation” and “application”, that “[t]he Court may interpret the Geneva Conventions and other international treaties, but *it may only apply* the [ACHR]”.⁶⁶ The Court – confuting the reasoning of the IACHR – accepted the objection of Colombia, and concluded declaring its incompetence to “determine whether the acts or the norms of the States are compatible with [...] the 1949 Geneva Conventions”, its competence being limited to releasing “an opinion in which the Court will say whether or not [the conduct of a State party] is compatible with the American Convention”.⁶⁷ This conclusion was partially mitigated by the fact that the Court also stressed that it is in any case “competent to determine whether any norm of domestic or international law applied by a State, in times of peace or armed conflict, is compatible or not with the American Convention [...] [therefore] interpret[ing] the norm in question and analyz[ing] it in the light of the provisions of the Convention”.⁶⁸

However, the IACtHR was shortly offered the opportunity to reconsider its position on the issue, in the subsequent case of *Bámaca Velásquez*, also decided in 2000. Mr. Bámaca Velásquez was the leader of a revolutionary organization fighting against the national army in Guatemala in the context of the internal conflict taking place in the country during the 1980s and 1990s;⁶⁹ after being captured and imprisoned by the Guatemalan forces, he was tortured and eventually executed.

Like in *Las Palmeras*, also in this case the Court was asked by the IACHR to decide whether Guatemala had violated, in addition to a number of provisions of the ACHR, Common Article 3.⁷⁰ In this respect, quite surprisingly, in its final oral arguments the respondent States declared that, “although the case was instituted under the terms of the American Convention, since the Court had ‘extensive faculties of interpretation of international law, it could [apply] any other provision that it deemed appropriate’”.⁷¹ This approach followed by Guatemala arguably offered the Court the chance to reach different conclusions than in *Las Palmeras* with respect to its competence to deal with IHL.⁷² In fact, although reiterating that it “lacks competence to declare that a State is internationally responsible for the violation of international treaties that do not grant it such competence”,⁷³ it could nevertheless “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”.⁷⁴ In

(Contd.) _____

Conventions, they are obliged as a matter of customary international law to observe these treaties in good faith and to bring their domestic law into compliance with these instruments. Moreover, they have assumed a solemn duty ‘to respect and to ensure respect’ of these Conventions in all circumstances, most particularly, during situations of interstate or internal hostilities” (see para. 162).

⁶⁵ See *Case of Las Palmeras v. Colombia*, *cit.*, para. 16.

⁶⁶ *Ibid.*, para. 30 (emphasis added).

⁶⁷ *Ibid.*, para. 33.

⁶⁸ *Ibid.*, paras. 32-33.

⁶⁹ See *Case of Bámaca Velásquez v. Guatemala*, Series C No. 70, Merits, Judgment of 25 November 2000, available at <http://www.corteidh.or.cr/docs/casos/articulos/seriec_70_ing.pdf> (last visited on 6 December 2009).

⁷⁰ *Ibid.*, para. 1.

⁷¹ *Ibid.*, para. 204.

⁷² See MORI, *cit.*, p. 17.

⁷³ See *Case of Bámaca Velásquez v. Guatemala*, *cit.*, para. 208.

⁷⁴ *Ibid.* According to C. BYRON, “Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies”, 47 *Virginia Journal of International Law*, 2007, 839, p. 862, this statement would imply the competence of the Court to condemn the conduct of a State and to recommend it to comply with its international obligations pursuant to IHL. For a more restrictive approach, see L. MOIR, “Law and the Inter-American Human Rights System”, 25 *Human Rights Quarterly*, 2003, 182, p. 199.

addition – noting that “there is a similarity between the content of Article 3, common to the 1949 Geneva Conventions, and the provisions of the American Convention and other international instruments regarding non-derogable human rights (such as the right to life and the right not to be submitted to torture or cruel, inhuman or degrading treatment)” – the Court reiterated, more explicitly and less timorously than in *Las Palmeras* that, “the relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention”.⁷⁵

Having the foregoing in mind, what is now important to stress is that in the instant case the IACtHR actually found a violation of (*inter alia*) Article 4 of the ACHR, which protects the right to life, in a context with respect to which – as explicitly clarified by the Court itself – “[a]t the time when the facts relating to this case took place, Guatemala was convulsed by an internal conflict”.⁷⁶ In other words, the Court found the ACHR applicable in the event of a non-international armed conflict, on the basis of the assumption that – irrespective of the fact that such a conflict existed – “although the State has the right and obligation to guarantee its security and maintain public order, its powers are not unlimited, because it has the obligation, at all times, to apply procedures that are in accordance with the law and to respect the fundamental rights of each individual in its jurisdiction”.⁷⁷ This was further confirmed by the Court through pointing out that, as “Guatemalan legislation was not sufficient or adequate to protect the right to life, in accordance with the provisions of Article 4 of the American Convention [...], in any circumstance, *including during internal conflicts*[, ...] the Court reserves the right to examine this point at the appropriate time during the reparations stage”.⁷⁸ In sum, fundamental human rights (as enshrined in the ACHR) and the rule of law,⁷⁹ according to the IACtHR, must be respected also in the event of (non-international) armed conflict.

Apparently less clear is whether the Court did actually rely on IHL as a source of interpretation of the relevant provisions of the ACHR, an operation that, as just noted, the Court considered in principle absolutely permissible.⁸⁰ In fact, when discussing about its competence to consider IHL, the Court stressed that

as established in Article 3 common to the Geneva Conventions of August 12, 1949, confronted with an internal armed conflict, the State should grant those persons who are not participating directly in the hostilities or who have been placed hors de combat for whatever reason, humane treatment, without any unfavorable distinctions. In particular, international humanitarian law prohibits attempts against the life and personal integrity of those mentioned above, at any place and time.⁸¹

This could *prima facie* persuade us that the Court did actually consider IHL as interpretative tool in evaluating the applicability of Article 4 ACHR to the instant case. On the other hand, however, it is to be noted that, in assessing the specific issue of the violation of Article 4, the Court did not include any reference to IHL, and that its appraisal concerning the actual existence of the said violation was concluded – positively – well before the Court evaluated the issue of the significance of Common

⁷⁵ See *Case of Bámaca Velásquez v. Guatemala, cit.*, para. 209.

⁷⁶ *Ibid.*, paras. 121(b) and 207.

⁷⁷ *Ibid.*, para. 174. In particular, a breach of Article 4 of the ACHR was found in connection with the violation of Article 7 of the same instrument (providing for the right to personal liberty), which entails a series of judicial guarantees in favour of persons deprived of their liberty that in the instant case had not been granted. In the words of the Court, “[a]lthough this is a case of the detention of a guerrilla during an internal conflict [...], the detainee should have been ensured the guarantees that exist under the rule of law, and been submitted to a legal proceeding. This Court has already stated that, although the State has the right and obligation to guarantee its security and maintain public order, it must execute its actions ‘within limits and according to procedures that preserve both public safety and the fundamental rights of the human person’” (*ibid.*, para. 143).

⁷⁸ *Ibid.*, para. 225 (emphasis added).

⁷⁹ See para. 143 of the *Bámaca Velásquez* judgment, *supra*, note 79.

⁸⁰ See *supra*, note 77 and corresponding text.

⁸¹ See *Case of Bámaca Velásquez v. Guatemala, cit.*, para. 207.

Article 3 for the instant case, and totally independently. Therefore, it appears that the IACtHR considered Article 4 sufficient in itself (or in connection with other provisions *of the ACHR*) to determine whether a breach of the right to life occurred in the instant case (although it was characterized by the existence of an armed conflict), without needing to rely on IHL, which in the instant case – *at best* – can be considered as being used by the Court *ad abundantiam*.

This approach was confirmed in the *Castro Prison* case,⁸² in which the Court had to deal with a massacre occurring in the context of the civil war taking place in Peru between the national army and the revolutionary group *Sendero Luminoso*, lasting for nearly two decades from the 1980s to 2000. In particular, on 6 May 1992, during an attack to a block of Lima’s high security Miguel Castro Castro penitentiary, the Peruvian military police and security forces extrajudicially and indiscriminately killed at least 42 as well as injuring 175 inmates, and subjected 322 to cruel, inhuman, or degrading treatment.⁸³ Also in this case the Court acknowledged the fact that, at the material time, “Peru lived a conflict between armed groups and agents of the police force and the military”,⁸⁴ thus accepting that those facts were contextualized in a situation of non-international armed conflict. Like in *Bámaca Velásquez*, the Court found that the respondent State breached Article 4 ACHR, without relying on IHL to say how the right to life was infringed. The Court first reiterated its traditional position that “States must adopt the necessary measures not only to prevent and punish the deprivation of life as a consequence of criminal acts, bt [*sic*] also to prevent arbitrary executions by their own police force [...] The State must especially supervise that their police forces, which were attributed the use of legitimate force, respect the right to life of those under its jurisdiction”.⁸⁵ Then, relying on the 1990 UN *Basic Principles of the Use of Force and Fire Arms by Law Enforcement Officials*⁸⁶ (an instrument that – as it is evident from its text – is conceived for application in peacetime), the Court affirmed that police forces can make recourse to the use of lethal weapons only when “it is ‘strictly inevitable to protect a life’ and when less extreme measures result ineffective”.⁸⁷ In fact, due to the circumstances of the case and of the modalities of their action, the conduct of the Peruvian forces could not be justified on the basis of the “power and even the obligation of the State to guarantee security and maintain public order, especially within the prisons, using force if necessary”,⁸⁸ such a justification could instead exist if state agents had been forced to act the way they behaved by a “need of self defense, or an imminent [*sic*] danger of death or serious injuries against the police officers”.⁸⁹

In other cases, however, the IACtHR has adopted a different approach. This happened in particular in the case of the *Mapiripán Massacre*,⁹⁰ relating to a slaughter of civilians that took place in Mapiripán, Meta Department, in Colombia, perpetrated in July 1997 by a group of Colombian paramilitaries, namely the *United Self-Defense Forces of Colombia*. In this case the Court, in evaluating the international responsibility of the State, declared that it

⁸² See *Case of the Miguel Castro-Castro Prison v. Peru*, Series C No. 160, Merits, Reparations and Costs, Judgment of 25 November 2006, available at <http://www.corteidh.or.cr/docs/casos/articulos/seriec_160_ing.pdf> (last visited on 7 December 2009).

⁸³ *Ibid.*, para. 2.

⁸⁴ *Ibid.*, para. 197(1).

⁸⁵ *Ibid.*, para. 238.

⁸⁶ Available at <<http://www2.ohchr.org/english/law/firearms.htm>> (last visited on 7 December 2009).

⁸⁷ See *Case of the Miguel Castro-Castro Prison v. Peru*, *cit.*, para. 239.

⁸⁸ *Ibid.*, para. 240 ff.

⁸⁹ *Ibid.*, para. 245.

⁹⁰ *Case of the “Mapiripán Massacre” v. Colombia*, Series C No. 134, Merits, Reparations and Costs, Judgment of 15 September 2005, available at <http://www.corteidh.or.cr/docs/casos/articulos/seriec_134_ing.pdf> (last visited on 7 December 2009).

cannot set aside the existence of general and special duties of the State to protect the civilian population, *derived from International Humanitarian Law*, specifically Article 3 common of the August 12, 1949 Geneva Agreements and the provisions of the additional Protocol to the Geneva Agreements regarding protection of the victims of non-international armed conflicts (Protocol II). Due respect for the individuals protected entails passive obligations (not to kill, not to violate physical safety, etc.), while the protection due entails positive obligations to impede violations against said persons by third parties. Carrying out said obligations is significant in the instant case, insofar as the massacre was committed in a situation in which civilians were unprotected in a non-international domestic armed conflict.⁹¹

As a consequence, in the words of the Court,

[t]he obligations derived from said international provisions must be taken into account, according to Article 29.b) of the Convention, because those who are protected by said treaty do not, for that reason, lose the rights they have pursuant to the legislation of the State under whose jurisdiction they are; instead, those rights complement each other or become integrated to specify their scope or their content. 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.⁹²

This attitude was confirmed by the Court in a subsequent case concerning other massacres, perpetrated between 1996 and 1997 by the Colombian Army in two municipal districts located in the Municipality of Ituango, Department of Antioquia, in Colombia, by means of successive armed raids featuring the assassination of defenseless civilians, deprivation of property, terror and displacement.⁹³ Having proven the existence of an internal armed conflict in Colombia,⁹⁴ the Court stressed that it was useful and appropriate that the scope of the provisions of the ACHR (with respect in particular to Article 21, protecting the right to property) was examined through using “international treaties other than the American Convention, such as *Protocol II of the Geneva Conventions of August 12, 1949*, relating to the protection of victims of non-international armed conflicts, to interpret its provisions in accordance with the evolution of the inter-American system, taking into account the *corresponding developments in international humanitarian law*”.⁹⁵ In particular, according to the Court, the following provisions were breached:

Articles 13 (Protection of the civilian population) and 14 (Protection of the objects indispensable to the survival of the civilian population) of Protocol II of the Geneva Conventions[, which] prohibit, respectively, ‘acts or threats of violence the primary purpose of which is to spread terror among the civilian population,’ and also ‘to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population’.⁹⁶

⁹¹ *Ibid.*, para. 114 (emphasis added).

⁹² *Ibid.*, para. 115 (emphasis added, footnotes omitted). According to Article 29 ACHR, “[n]o provision of this Convention shall be interpreted as: [...] b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party [...]”.

⁹³ See *Case of the Ituango Massacres v. Colombia*, Series C No. 148, Preliminary Objections, Merits, Reparations and Costs, Judgment of 1 July 2006, available at <http://www.corteidh.or.cr/docs/casos/articulos/seriec_148_ing.pdf> (last visited on 6 December 2009).

⁹⁴ *Ibid.*, para. 125.

⁹⁵ *Ibid.*, para. 179 (emphasis added).

⁹⁶ *Ibid.*, para. 180.

In addition, the Court noted that, as it,

has been proved [that] [...] the facts of this case took place in a widespread situation of internal forced displacement that affected Colombia as a result of the internal armed conflict. Consequently, before deciding whether these facts constituted a violation by the State of Article 22 of the Convention [on freedom of movement and residence] to the detriment of the persons allegedly displaced [...] the Court finds it necessary to examine [...] the problem of forced displacement in light of international human rights law and *international humanitarian law* [...] [G]iven the situation of internal armed conflict in Colombia, the displacement regulations contained in Protocol II to the 1949 Geneva Conventions are also particularly useful. Specifically, Article 17 of Protocol II, which prohibits ordering the displacement of the civilian population for reasons connected with the conflict, unless the security of the civilians involved or imperative military reasons so demand. And, in that case, ‘all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition’.⁹⁷

In these two cases, therefore, the Court eventually used IHL as a parameter for the interpretation of the provisions of the ACHR. However, it is to be noted that in the practice of the IACtHR IHL is considered only to the extent that it plays a *positive* role, consisting in enhancing the content of the norms of the American Convention in making them applicable to armed conflicts. On the contrary, in the cases in which IHL would contemplate a lesser protection than HRL on account of the situation of emergency existing in wartime, it cannot be used to hinder the full applicability of the provisions of the Convention. This is implicitly confirmed by the Court in stressing that it

appreciates the difficult circumstances that Colombia is experiencing, in which its population and its institutions are endeavoring to achieve peace. Nevertheless, the country’s situation, however difficult, does not liberate the State Party to the American Convention from its obligations under this treaty, which subsist particularly in cases such as this one.⁹⁸

Finally, it is to be noted that, in both *Mapiripán Massacre* and *Ituango Massacres*, the Court considered respect for, and correct application for, IHL a necessary condition to ensure due respect for human rights. In fact, among the measures of reparation to be taken by the respondent States the Court included, in the context of human rights education, the obligation to “provide training to members of its armed forces and its security agencies on the principles and norms of human rights protection and international humanitarian law”.⁹⁹

In sum, the IACtHR, with some initial hesitation, has affirmed its competence to use – and has used – IHL as an interpretative tool of the provisions of the ACHR, to the extent that these provisions need to operate in the context of armed conflicts. At the same time, however, the Court, except in *Las Palmeras*, has constantly affirmed its competence to deal with human rights breaches occurring in time of war, also emphasizing the fact that the scope of the provisions of the ACHR – at least with respect to those that, according to Article 27(2),¹⁰⁰ cannot be suspended even in time of emergency –

⁹⁷ *Ibid.*, para. 208 f. (emphasis added).

⁹⁸ *Ibid.*, para. 300.

⁹⁹ *Ibid.*, para. 409. See also *Case of the “Mapiripán Massacre” v. Colombia, cit.*, para. 316.

¹⁰⁰ Article 27 ACHR reads as follows: “1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin. 2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from *Ex Post Facto* Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to

cannot be limited on account of the inherent difficulties usually faced by States in granting their application in the presence of difficult situations like those usually characterizing armed conflicts. In doing this, the Court has certainly been facilitated by the approach of the respondent States, which, except in *Las Palmeras*, did not raise any objection concerning the possible applicability of HRL in time of war, as well as, *a fortiori*, concerning the competence of the Court to deal with situations of breaches of human rights occurred in the context of an armed conflict.

B. The Practice of the African Commission on Human and Peoples' Rights

A regional human rights monitoring body that has shown no hesitation in considering HRL fully applicable to situations taking place in the event of armed conflict is undoubtedly the ACHPR. In adopting this approach, the African Commission has certainly been facilitated by the fact that no general provision exists in the African Charter on Human and Peoples' Rights of the kind of Article 15 of the European Convention of Human Rights (ECHR) or Article 27 ACHR, *i.e.* allowing derogation of most rights recognized by these instruments in situations of emergency (which certainly include armed conflicts). Thus, the ACHPR has explicitly affirmed that, since

[t]he African Charter, unlike other human rights instruments, does not allow for states parties to derogate from their treaty obligations during emergency situations [...] *even a civil war [...] cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter.*¹⁰¹

In the instant case, therefore, the Commission found the respondent State responsible for the breach of a number of provisions of the African Charter due to the massive violations of human rights perpetrated by the security services of Chad during the civil war against anti-government groups.

This position has subsequently been refined by the ACHPR. In particular, in a case concerning the *incommunicado* detention without trial of a number of journalists in Eritrea, starting from September 2001, the Commission affirmed that

[t]he existence of war, *international or civil*, or other emergency situation within the territory of a state party cannot [...] be used to justify violation of any of the rights set out in the Charter, and *Eritrea's actions must be judged according to the Charter norms, regardless of any turmoil within the state at the time.*¹⁰²

In addition, the ACHPR also specified that

[e]ven if it is assumed that the restriction placed by the Charter on the ability to derogate goes against international principles, there are certain rights such as the right to life, the right to a fair trial, and the right to freedom from torture and cruel, inhuman and degrading treatment, that cannot be derogated from for any reason, in whatever circumstances [...] [t]he existence of war in Eritrea cannot therefore be used to justify excessive delay in bringing the detainees to trial.¹⁰³

According to the Commission's approach, therefore, the application of HRL in the event of armed conflict – even of international character¹⁰⁴ – is total and unconditioned, although the caveat included

(*Contd.*) _____

Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights”.

¹⁰¹ See Communication No. 74/92, *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, available at <<http://www1.umn.edu/humanrts/africa/comcases/74-92.html>> (last visited on 9 December 2009), para. 21 (emphasis added).

¹⁰² See Communication No. 275/2003, *Article 19 v. Eritrea*, AHRLR, 2007, p. 73, para. 87 (emphasis added).

¹⁰³ *Ibid.*, para. 98 f.

¹⁰⁴ See *supra*, text corresponding to note 104.

by the Commission in paragraph 98 of *Article 19 v. Eritrea*¹⁰⁵ could lead one to maintain that such a rule is limited to fundamental rights. In any event, even if one were to adopt this more restrictive approach, it is undeniable that, according to the ACHPR, the human rights that are usually recognized as non-derogable in time of emergency apply fully and unconditionally in the event of armed conflict, irrespective of the existence of the *lex specialis* represented by IHL.

C. *The Practice of the European Court of Human Rights*

A more laborious practice, with respect to the issue in point, has been developed by the ECtHR. At first, to use the words of a distinguished scholar, the European Court, in “[b]ypassing the *lex specialis* application of humanitarian law to directly apply human rights law to internal armed conflicts”, developed *sic et simpliciter* a “human rights law of internal armed conflict”.¹⁰⁶ This approach, however, has ultimately shifted to a more sophisticated approach, according to which IHL is actually recognized a role in shaping the scope of the provisions of the ECHR as applicable in situations taking place during armed conflicts.

The Court was first offered the opportunity to deal with the issue of applicability of the ECHR in the event of armed conflict by a number of cases concerning human rights breaches occurred during the War in the North Caucasus, launched in Chechnya by the Russian Army in August 1999, as a response to the invasion of the Russian Republic of Dagestan by the Chechnya-based *Islamic International Peacekeeping Brigade*. The conflict, which ended the *de facto* independence of the Chechen Republic of Ichkeria and restored control on the territory by the Russian Federation, is to be considered a non-international armed conflict, although it attracted a wide number of foreign fighters, especially of Muslim origin. The War in the North Caucasus, which was officially ended on 16 April 2009, was characterized by widespread human rights atrocities perpetrated by both the Russian Army and rebel forces: it is estimated that a number of casualties or disappearances ranging from 25,000 to 50,000 occurred, most of them civilians living in Chechnya.¹⁰⁷

The first two judgments concerning the Chechen civil war were released by the ECtHR on 24 February 2005. In *Isayeva, Yusupova and Bazayeva v. Russia*,¹⁰⁸ – decided unanimously – the Court neither addressed the problem of its competence to extend its authority over human rights breaches taking place in the event of armed conflict nor raised any doubt on the applicability of human rights norms in such an event, without devoting any consideration to the “competence” of IHL to regulate the events occurring in wartime. With respect to the killing of some civilian persons (including two children) and the wounding of others, resulting from an aerial missile attack by the Russian forces over a convoy of civilians who were trying to escape from the fighting in Grozny, the Court rebutted the Government’s argument according to which “the attack and its consequences were legitimate under Article 2 § 2(a), i.e. they had resulted from the use of force absolutely necessary in the circumstances of protection of a person from unlawful violence”.¹⁰⁹ According to the Court,

¹⁰⁵ See *supra*, text corresponding to note 105.

¹⁰⁶ See W. ABRESCH, “A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya”, 16 *EJIL*, 2005, p. 741 ff.

¹⁰⁷ See <http://en.wikipedia.org/wiki/Second_Chechen_War> (last visited on 19 December 2009).

¹⁰⁸ Applications nos. 57947/00, 57948/00 and 57949/00, judgment of 24 February 2005.

¹⁰⁹ *Ibid.*, para. 160. Article 2 ECHR reads as follows: “1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 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 escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection”.

Article 2 covers not only intentional killing but also the situations where it is permitted to ‘use force’ which may result, as an unintended outcome, in the deprivation of life [...] Any use of force must be no more than ‘*absolutely necessary*’ for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c). This term indicates that a *stricter and more compelling test of necessity* must be employed than that normally applicable when determining whether State action is ‘necessary in a democratic society’ under paragraphs 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be *strictly proportionate* to the achievement of the permitted aims.¹¹⁰

In the instant case, therefore, as Russia “failed to produce convincing evidence” that the measures adopted by its army “were no more than absolutely necessary for achieving [one of those purposes]”,¹¹¹ the Court found that a breach of Article 2 had occurred, since, “even assuming that the military were pursuing a legitimate aim in launching [the aerial missile attack] [...], the Court does not accept that [such an] operation [...] was planned and executed with the requisite care for the lives of the civilian population”.¹¹² In addition, a violation of Article 2 ECHR *also* occurred on account of the fact that the Russian authorities had “failed to carry out an effective investigation into the circumstances of the attack”.¹¹³

The same approach was taken by the ECtHR in *Isayeva v. Russia*¹¹⁴ – concerning a bombing by the Russian military of the village of Katyr-Yurt, in Chechnya, on 4 February 2000, as a result of which the applicant’s son and three nieces were killed – as well as in *Khatsiyeva and Others v. Russia*¹¹⁵ and *Mezhidov v. Russia*,¹¹⁶ both decided in 2008. To summarize the ECtHR’s approach, in order to demonstrate that taking of life is justified in light of paragraph 2 of Article 2 ECHR the test of *absolute necessity* must be passed, which translates into the need that the kind of force used is *strictly proportionate* to the permitted aim pursued. This goes much beyond than the test of proportionality that is ordinarily required for a taking of life to be legitimate pursuant to IHL, *i.e.* that incidental loss of life is not excessive in relation to the military advantage that is intended to be won.¹¹⁷

The relevant practice of the ECtHR, however, is not oriented towards completely ignoring the role that can be played by IHL in the context of human rights breaches taking place in the event of armed conflict. In a recent case, concerning the disappearance in life-threatening circumstances of nine men during the Turkish military operations in northern Cyprus in July and August 1974, the Third Section of the Court did in fact declare that,

[a] zone of international conflict where two armies are engaged in acts of war *per se* places those present in a situation of danger and threat to life. Circumstances will frequently be such that the

¹¹⁰ *Ibid.*, para. 169 (emphasis added); in reaching this conclusion the Court reiterated what it had already stressed in previous judgments (see, in particular, *McCann and Others v. the United Kingdom*, Appl. No. 18984/91, judgment of 27 September 1995, para. 149 f.; *Ergi v. Turkey*, Appl. No. 23818/94, judgment of 28 July 1998, para. 79).

¹¹¹ See *Isayeva, Yusupova and Bazayeva v. Russia*, *cit.*, para. 179 ff.

¹¹² *Ibid.*, para. 199.

¹¹³ *Ibid.*, para. 225.

¹¹⁴ Application No. 57950/00, judgment of 24 February 2005; see, in particular, paras. 173, 200 and 224 (corresponding, respectively, to paras. 169, 199 and 225 of the judgment concerning the case *Isayeva, Yusupova and Bazayeva v. Russia*).

¹¹⁵ Application No. 5108/02, judgment of 17 January 2008. The case concerned an helicopter bombing launched against the village of Arshty, in the Sunzhenskiy District of the Republic of Ingushetia, on 6 August 2000, as a result of which two persons were killed and one wounded; see, in particular, para. 129 of the judgment (corresponding to para. 169 of the judgment concerning the case *Isayeva, Yusupova and Bazayeva v. Russia*).

¹¹⁶ Application No. 67326/01, judgment of 25 September 2008. The case concerned the bombing by the Russian artillery of the village of Znamenskoye, in Chechnya, which took place on 5 October 1999, as a result of which the applicant’s parents, brother and sisters were killed by a shell; see, in particular, para. 56 of the judgment (corresponding to para. 169 of the judgment concerning the case *Isayeva, Yusupova and Bazayeva v. Russia*).

¹¹⁷ See *supra*, Section 3.

events in issue lie wholly, or in large part, within the exclusive knowledge of the military forces in the field, and it would not be realistic to expect applicants to provide more than minimal information placing their relative in the area at risk. *International treaties, which have attained the status of customary law, impose obligations on combatant States as regards care of wounded, prisoners of war and civilians*; Article 2 of the Convention certainly extends so far as to require Contracting States to take such steps as may be reasonably available to them to protect the lives of those not, or no longer, engaged in hostilities [...] Disappearances in such circumstances thus attract the protection of that provision.¹¹⁸

The Court therefore concluded that a continuing violation of Article 2 took place, “on account of the failure of the authorities of the respondent State to conduct an effective investigation aimed at clarifying the whereabouts and fate of the nine men who went missing in 1974”.¹¹⁹ In addition, a continuing violation of the prohibition of inhuman treatment, contemplated by Article 3 ECHR, was also found, on account of the “level of severity” of the pain suffered by the relatives of the disappeared persons on account of the silence of the authorities of the respondent State on their fate.¹²⁰ Of special significance for the present assessment is the circumstance that, in the paragraph of the judgement just reproduced, with respect to the reference to international treaties that impose obligations on fighting States as regards care of wounded, prisoners of war and civilians, a footnote is included which explicitly mentions a series of IHL treaties, namely the four Geneva Conventions of 1949, the two Additional Protocols of 1977 and the Third Additional Protocol of 2005.¹²¹

However, it is not explicitly clear, in the words of the Court, what is the role played by these treaties in the context of the application of Article 2 ECHR. This point was later clarified in its review in the Grand Chamber:

Article 2 must be *interpreted* in so far as possible in light of the general principles of international law, including the *rules of international humanitarian law* which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict [...] The Court therefore concurs with the reasoning of the Chamber in holding that in a zone of international conflict Contracting States are under obligation to protect the lives of those not, or no longer, engaged in hostilities. This would also extend to the provision of medical assistance to the wounded; where combatants have died, or succumbed to wounds, the need for accountability would necessitate proper disposal of remains and require the authorities to collect and provide information about the identity and fate of those concerned, or permit bodies such as the ICRC to do so.¹²²

The Grand Chamber, therefore, finally made explicit reference to international humanitarian law as a tool for the interpretation of a provision of the ECHR, following the approach previously embraced by the IACtHR. The Grand Chamber then confirmed the finding of the Third Section according to which, although in the instant case there was no proof demonstrating that any of the disappeared persons had been unlawfully killed, a continuing violation of Article 2 had taken place, on account of the failure of the respondent State “to provide for an effective investigation aimed at clarifying the fate” of the nine

¹¹⁸ See *Varnava and Others v. Turkey*, applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Third Section, judgment of 10 January 2008, para. 130 (emphasis added; footnotes omitted).

¹¹⁹ *Ibid.*, para. 133.

¹²⁰ *Ibid.*, para. 138.

¹²¹ *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem* (Protocol III), available at <<http://www.icrc.org/ihl.nsf/FULL/615?OpenDocument>> (last visited on 19 December 2009).

¹²² See judgment of 18 September 2009, para. 185 (emphasis added; footnotes omitted). A footnote is included in the paragraph in point making explicit reference to the same treaties previously quoted by the Third Section in its judgment (see *supra*, text preceding footnote 123).

disappeared men.¹²³ In addition, it also confirmed that – as “[t]he phenomenon of disappearances imposes a particular burden on the relatives of missing persons who are kept in ignorance of the fate of their loved ones and suffer the anguish of uncertainty”¹²⁴ – a breach of Article 3 had occurred, in consequence of the “length of time over which the ordeal of the relatives has been dragged out and the attitude of official indifference in face of their acute anxiety to know the fate of their close family members [which] discloses a situation attaining the requisite level of severity”.¹²⁵

The ECtHR went even further. In the recent case of *Kononov v. Latvia*,¹²⁶ the Court did in fact *apply IHL incidenter tantum*. In this case the applicant was convicted for war crimes by Latvian courts, as a result of his participation in a punitive military expedition taking place on 27 May 1944 (in the course of the Second World War), by virtue of a law approved in Latvia in 1993 that criminalized acts such as genocide, crimes against humanity or peace, war crimes and racial discrimination. The final guilty verdict in a prosecution which began in 1998, was released by the Latvian Supreme Court Senate on 28 September 2004. The applicant complained before the ECtHR that he had been victim of retroactive application of criminal law, and that the respondent State had therefore infringed the principle of *nullum crimen, nulla poena sine lege* enshrined in Article 7 ECHR.¹²⁷ The Court – by a majority of one (4-3) – found Latvia responsible of a violation of Article 7 for applying criminal law retroactively, since at the time of the relevant facts no provision of national or international law existed, according to the Court, which qualified the acts committed by the applicant as war crimes. The ECtHR considered the Regulations annexed to the Hague Convention of 1907 pertinent to its assessment,¹²⁸ as well as customary IHL.¹²⁹ However, the Court concluded that it had “not been adequately demonstrated that the attack on 27 May 1944 was *per se* contrary to the laws and customs of war as codified by the Regulations appended to the Hague Convention of 1907”¹³⁰ and that there was “no plausible legal basis” neither in international law¹³¹ nor in domestic law¹³² on the basis of which the applicant could be lawfully convicted for the acts of which he was accused. The reason for this was, according to the Court, that “the applicant could not reasonably have foreseen on 27 May 1944 that his acts amounted to a war crime under the *jus in bello* applicable at the time”.¹³³ In fact,

even supposing that the applicant committed one or more offences under the general law on 27 May 1944, [...] their prosecution has been definitively statute barred since 1954 and [...] it would be contrary to the principle of foreseeability inherent in Article 7 of the Convention to punish him for these offences almost half a century after the expiry of the limitation period.¹³⁴

¹²³ *Ibid.*, para. 194.

¹²⁴ *Ibid.*, para. 200.

¹²⁵ *Ibid.*, para. 202.

¹²⁶ Application No. 36376/04, judgment of 24 July 2008. On 26 January 2009 the case was referred to the Grand Chamber.

¹²⁷ Article 7 ECHR reads as follows: “1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations”.

¹²⁸ See *Kononov v. Latvia*, *cit.* para. 118. The Court excluded that other instruments of IHL were pertinent to its assessment only on the basis of the fact that at the time in which the relevant facts occurred they did not yet exist and were in force (see *ibid.*).

¹²⁹ *Ibid.*, para. 120 ff.

¹³⁰ *Ibid.*, para. 137.

¹³¹ *Ibid.*

¹³² *Ibid.*, para. 148.

¹³³ *Ibid.*

¹³⁴ *Ibid.*, para. 146.

Leaving aside the possible doubts with respect to the finding of the Court concerning the substance of the case (now pending before the Grand Chamber),¹³⁵ what is of special significance for the present paper is that the Court was obliged to resolve the *question préjudicielle* of the existence, content and legal status of IHL at the time in which the crimes attributed to the applicant were perpetrated. Therefore, the ECtHR used a hermeneutic interpretation, preventing IHL from being considered mere fact. On the contrary, in the dynamics of the case in point, it must be thought of as a set of legal rules used by the Court to extend its competence.¹³⁶ As a consequence, the Court did *de facto* apply IHL (as well as international criminal law and Latvian domestic law). In the instant case, however, the Court was expressly “authorized” to carry out this operation by the text of Article 7 ECHR. This provision, in fact – through making explicit reference to “act or omission which did not constitute a criminal offence *under national or international law* at the time when it was committed”¹³⁷ – requires the Court *incidenter tantum* to evaluate and interpret the content of relevant domestic and/or international law in order to ascertain whether or not a breach of the principle of non-retroactivity of criminal law did actually take place.

The explicit recognition of said competence for the ECtHR, according to one doctrine, would pave the way for allowing the Court to apply IHL also in the context of the application of Article 2, “when deciding whether a particular instance of deprivation of life in the context of an armed conflict resulted from a ‘lawful act of war’, or was instead a violation of the right to life”.¹³⁸ The thesis advocating this operation is based on the reasoning that,

[t]he ECHR, although formally applicable in times of armed conflict, is not designed to regulate such exceptional situations. Instead humanitarian law, which is the applicable *lex specialis*, is better tailored to regulate the belligerents’ behaviour on the battlefield.¹³⁹

This is certainly a reasonable position, especially in light of the fact that paragraph 2 of Article 15 ECHR, in establishing that no derogation is possible with respect to Article 2 of the Convention even in time of war or other public emergency threatening the life of the nation, provides that this rule does not apply to “deaths resulting from lawful acts of war”. In this respect, IHL being the body of law specially designed to establish the conditions according to which taking of life is to be considered lawful in war, it would naturally follow that even the ECtHR should rely on IHL itself in interpreting the exception in point.

On the other hand, however, one should consider that, in such an event, the ECtHR should be forced to accept that in time of war a level of protection of the human life would exist that is *lesser* than in time of peace. This would represent a clear step back with respect to the present practice of the regional monitoring bodies in terms of effectiveness of human rights as well as in the more general context of the progressive humanization of the conduct of armed conflicts.¹⁴⁰

¹³⁵ For a critic comment on the reasoning developed by the Court in the case of *Kononov v. Latvia* see G. PINZAUTI, “The European Court of Human Rights’ Incidental Application of International Criminal Law and Humanitarian Law: A Critical Discussion of *Kononov v. Latvia*”, 6 *Journal of International Criminal Justice*, 2008, p. 1043 ff.

¹³⁶ *Ibid.*, p. 1049.

¹³⁷ See *supra*, note 129 (emphasis added).

¹³⁸ See PINZAUTI, *cit.*, p. 1059.

¹³⁹ *Ibid.*, p. 1060.

¹⁴⁰ The latter idea is substantially shared by ABRESCH, *cit.*, p. 767, who emphasizes that “[through directly applying human rights law to the conduct of hostilities in internal armed conflicts,] the ECtHR has taken a new approach, and one that shows great promise. It is providing rules for the conduct of hostilities where, as it applies to internal armed conflicts, the humanitarian law that is accepted as legally binding is inadequate and seldom obeyed. Moreover, with rules that treat armed conflicts as law enforcement operations against terrorists, the ECtHR has begun to develop an approach that may prove both better protective of victims and more politically viable than that of humanitarian law”.

5. The Significance of the Practice of Regional Monitoring Bodies for the Application of HRL to PMSCs' Activities Performed in the Event of Armed Conflict

In light of the practice examined in the previous Section, the full application of human rights – with respect, at least, to those rights that cannot be derogated from in time of emergency – is not hindered in the event of armed conflict, while IHL remains at best an interpretative tool for better defining the scope of application of the relevant human rights provisions in time of war. This implies that, in the event of breaches of fundamental human rights perpetrated by members of the State Army or other personnel under the control of the State, the latter cannot escape its responsibility through simply demonstrating that a breach of human rights occurred incidentally, and was not excessive, in relation to the military advantage sought. On the contrary, a far more severe test applies – especially with respect (but not limited) to takings of life – on the basis of which a breach can only be justified if it was absolutely necessary and strictly proportionate to the aim pursued, and this aim was worth safeguarding in terms of balance between competing rights.

This conclusion certainly applies to PMSCs' personnel, as long as the company concerned is under the control of the State. This was epitomized by the IACtHR in the case of *Bámaca Velásquez*, in which the Court emphasized that:

[b]ased on [...] the [ACHR], the Court considers that Guatemala is obliged to respect the rights and freedoms recognized in it and to organize the public sector so as to guarantee persons within its jurisdiction the free and full exercise of human rights. This is essential, independently of whether those responsible for the violations of these rights are agents of the public sector, individuals or groups of individuals, because, according to the rules of international human rights law, the act or omission of any public authority constitutes an action that may be attributed to the State and involve its responsibility.¹⁴¹

The effective existence of this responsibility is however conditioned by the Court with the double requirement that the State concerned is aware of the existence “of a situation of real and imminent risk

¹⁴¹ See *Case of Bámaca Velásquez v. Guatemala*, *cit.*, para. 210 (footnotes omitted). See also *Case of the “Mapiripán Massacre” v. Colombia*, *cit.*, para. 111: “[...] international responsibility may also be generated by acts of private individuals not attributable in principle to the State. The States Party to the Convention have *erga omnes* obligations to respect protective provisions and to ensure the effectiveness of the rights set forth therein under any circumstances and regarding all persons. The effect of these obligations of the State goes beyond the relationship between its agents and the persons under its jurisdiction, as it is also reflected in the positive obligation of the State to take such steps as may be necessary to ensure effective protection of human rights in relations amongst individuals. The State may be found responsible for acts by private individuals in cases in which, through actions or omissions by its agents when they are in the position of guarantors, the State does not fulfill these *erga omnes* obligations embodied in Articles 1(1) and 2 of the Convention” (footnotes omitted). This principle is generally followed at the international level; for instance, the Human Rights Committee has clarified that “the positive obligations on States Parties to ensure [the] rights [recognized by the ICCPR] will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities”; as a consequence, States parties are bound to take “appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities [...] [as well as] to provide effective remedies in the event of breach” (see General Comment No. 31[80], “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, U.N. Doc. CCPR/C/21/Rev.1/Add.13 of 26 May 2004, para. 8). Similarly, according to the ACHPR, the provisions included in the African Charter on Human and Peoples' Rights impose a four-layer obligation on States parties, *i.e.* the obligation to *respect* the relevant rights (entailing “that the State should refrain from interfering in the enjoyment of all fundamental rights”), the obligation to *protect* “right-holders against other subjects by legislation and provision of effective remedies”, as well as the “tertiary obligation” of the State to *promote* “the enjoyment of all human rights”, as well as the obligation to *fulfil* “the rights and freedoms it freely undertook under the various human rights regimes” (see *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96, available at <<http://www1.umn.edu/humanrts/africa/comcases/155-96.html>>, last visited on 19 December 2009), para. 45 ff. Finally, with respect to the pertinent practice of the ECtHR see C. HOPPE, *Positive Human Rights Obligations of the Hiring State in Connection with the Provision of Coercive Services by a PMSC*, EUI Working Paper AEL 2009/19, 2009, p. 4 ff.

for a specific individual or group of individuals” and a “reasonable possibility of preventing or avoiding that danger” exists.¹⁴² However, these two conditions are clearly fulfilled in the case of PMSCs’ activities, since: a) the awareness of the risk is in *re ipsa*, as either the hiring State or the host State cannot be reasonably unaware that such a risk is inherent in the activities of a PMSC; b) in the event that the State concerned is objectively unable to keep the activity of a PMSC under control, the prevention of the danger by such a State is in any case possible through avoiding the hire of a PMSC (as concerns the responsibility of the hiring State) or by refusing to allow its presence in the national territory (in relation to the responsibility of the host State).

Even in the event that PMSCs act outside of any State control, in principle, the perspective exists that human rights breaches are subject to profiles of accountability other than State responsibility (particularly direct accountability of the Company),¹⁴³ and that, therefore, they do not remain unpunished, at least in terms of reparation for victims. This perspective represents one of the most positive implications – particularly with respect to the situation of PMSCs – arising from the practice of regional monitoring bodies consisting in considering human rights fully applicable even during war, which would certainly remain unrealistic if those bodies consider IHL as law applying exclusively to human rights breaches in the context of armed conflict.

6. Conclusion

The recent practice of the regional monitoring human rights bodies has paved the way for a highly promising development in the long process of humanization of armed conflicts that represents the essential rationale of IHL. In fact, especially with respect to protection of the paramount right to life, the approach consisting in considering HRL fully applicable to hostilities, if crystallized, would facilitate the grant of a higher level of protection for human life than can be inherently ensured by IHL. Of course, from a technical perspective the practice in point can raise a problem of coherence with some legal principles that are generally accepted within the system of international law, particularly the principle according to which *lex specialis derogat leges generalis*. In fact, once IHL is considered as the *lex specialis* competent to regulate the conduct of hostilities, it should be applied in place of HRL to situations taking place in the event of armed conflict. However, this problem of legal theory could be easily resolved if the practice of the regional monitoring human rights bodies investigated in this paper were seen as the latest step in the development of IHL, finally leading the rules belonging to this body of law substantially to coincide with human rights principles and, by extension, notably improving the outcomes of the process of humanization of war which began in the nineteenth Century. The fact that this is something more than a “romantic” inference, is demonstrated by the circumstance that – with the only exception of the very first case of the IACtHR – no State involved in the relevant cases before the regional monitoring bodies has ever disputed neither their competence to address situations occurring in wartime nor the applicability of HRL with respect to these situations, showing that an *opinio juris* has developed supporting and complementing the practice of these bodies.

¹⁴² See *Case of the Pueblo Bello Massacre v. Colombia*, Series C No. 140, Merits, Reparations and Costs, Judgment of 31 January 2006, available at <http://www.corteidh.or.cr/docs/casos/articulos/seriec_140_ing.pdf> (last visited on 19 December 2009), para. 123; *Case of Valle Jaramillo et. Al. v. Colombia*, Series C No. 192, Merits, Reparations and Costs, Judgment of 27 November 2008, available at <http://www.corteidh.or.cr/docs/casos/articulos/seriec_192_ing.pdf> (*ibid.*), para. 78.

¹⁴³ See S. MACLEOD, with contributions from S. MCARDLE, *International Initiatives for Holding Corporations to Account and their Viability with regard to PSMCs*, EUI Working Paper AEL 2009/29, 2009.