

# **IMPLEMENTING INTERNATIONAL HUMANITARIAN LAW THROUGH HUMAN RIGHTS MECHANISMS: OPPORTUNITY OR UTOPIA?**

WORKING PAPER

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“The blurring of boundaries between different fields is a feature of modern international law.”<sup>1</sup>

“Any lawyer who gives advice, makes arguments or adjudicates cases concerning humanitarian problems must know all of the relevant rules of international law [...] that apply and must also understand their interplay as well as any related controversies in order to determine the answer international provides a given problem.”<sup>2</sup>

## INTRODUCTION

It seems almost redundant to state once again that, beyond the International Committee of the Red Cross (ICRC), international humanitarian (IHL) lacks mechanisms to strengthen its own compliance. If it undoubtedly remains an appropriate legal framework for regulating armed conflicts,<sup>3</sup> such structural flaw of its system has left victims of violations “in search of a forum”<sup>4</sup> and thus prompted a general recourse to the more-developed human rights machinery.<sup>5</sup> Dating back to the resolution on human rights in armed conflict included in the Final Act of the 1968 Teheran International Conference,<sup>6</sup> debate on the opportuneness of this tendency long preceded the current academic and intergovernmental discussions. Resulting from traditional legal research and informal interviews with experts,<sup>7</sup> this paper thus aims at providing a contemporary overview of an age-old debate, and

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<sup>1</sup> C. Byron, “A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies”, 47 *Virginia Journal of International Law* 4 (2007), p. 840.

<sup>2</sup> M. Sassóli, *International Humanitarian Law, Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham/Northampton, 2019, p. 422.

<sup>3</sup> Preambular paragraph 1 of resolution 2 of the 32<sup>nd</sup> International Conference of the Red Cross and Red Crescent (2015), which was adopted by consensus, explicitly stresses “the importance and continued relevance of international humanitarian law (IHL) for regulating the conduct of parties to armed conflicts, both international and non-international, and providing protection and assistance for the victims of armed conflicts”. The text of the resolution is available at: [http://rcrcconference.org/app/uploads/2015/04/32IC-AR-Compliance\\_EN.pdf](http://rcrcconference.org/app/uploads/2015/04/32IC-AR-Compliance_EN.pdf).

<sup>4</sup> The expression is borrowed from J.-M. Henckaerts, “Concurrent Application of International Human Rights Law and International Humanitarian Law: Victims in Search of a Forum”, 1 *Human Rights and International Legal Discourse* 1 (2007), p. 95-124.

<sup>5</sup> On the procedural differences between both legal regimes, see C. Droege, “Elective Affinities? Human Rights and humanitarian law”, 90 *International Review of the Red Cross* 871 (September 2008), p. 540-547. Other authors have also argued in favor of victims’ recourse to human rights bodies: see notably C. Byron, above footnote 1, p. 847; F. Hampson, “Using International Human Rights Machinery to Enforce the International Law of Armed Conflict”, 31 *Military Law and Law of War Review* 1-4 (1992), p. 138.

<sup>6</sup> Resolution XXIII, Human Rights in armed conflict, 12 May 1968, in Final Act of the International Conference on Human Rights, Teheran, 22 April- 13 May 1968, preamble and operational paragraph 2, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=378384ED19F0CFFAC12563CD0051D2B4>.

<sup>7</sup> In that regard, the author wishes to thank the 15 experts (practitioners and academics) who kindly agreed to share, off-the-record, their enlightening perspective on this topic.

identifying (transversal) issues that would deserve further academic and/or practical examination. Far from being exhaustive, this paper does not provide a detailed comparative assessment of all existing (international, regional or domestic) mechanisms having dealt with, examined or made pronouncements on IHL.<sup>8</sup> It nonetheless hopes to provide a useful background for discussion at the scientific colloquium of the 2019 Geneva Human Rights Week. For the sake of intellectual honesty, let us also clarify that our purpose is not to pass judgement on the above-mentioned trend – a trend so entrenched that would in any case prove hard to pause – but to contribute to its dispassionate assessment.

After a reminder on mechanisms established by the Geneva Conventions of 1949 and their additional Protocols of 1977, we will summarily frame the relationship between IHL and international human rights law. We will then assess the competence and practice of political mechanisms emanating from the Charter of the United Nations, as well as of universal and regional treaty-based mechanisms. We will finally derive (provisional) lessons-learned on the opportuneness of human rights bodies dealing with IHL.

## **A REMINDER ON MECHANISMS ESTABLISHED BY THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS<sup>9</sup>**

This section will not address the uncontroversial mandate and activities of the International Committee of the Red Cross (ICRC), which efficiently contribute to the protection of those affected by armed conflicts. However, it is worth recalling that the Geneva Conventions and their additional Protocols do provide for the other following mechanisms for the implementation of IHL, although they have hardly ever been employed.<sup>10</sup>

- Available during international armed conflicts, Protecting Powers are neutral States designated by parties to the conflict to safeguard their humanitarian interests vis-à-vis the adversary.

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<sup>8</sup> E. Debuf, *Evaluating Mechanisms for Investigating Attacks on Healthcare*, International Peace Institute, December 2017, available at: <https://www.ipinst.org/2017/12/attacks-on-healthcare>, usefully provides such comparative assessment, including through accompanying documents and factsheets. For another exhaustive catalogue of mechanisms dealing with IHL, see ICRC, *Report on Existing Mechanisms, Processes and Initiatives Dealing with IHL*, document prepared for the 2<sup>nd</sup> formal meeting of the Intergovernmental Process on strengthening compliance with IHL, 13 March 2017, available at: [https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/respect-ihl/2-Respect-IHL-Report-existing-mechanisms\\_en.pdf](https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/respect-ihl/2-Respect-IHL-Report-existing-mechanisms_en.pdf).

<sup>9</sup> Treaties on the regulation of weapons and on the protection of cultural property also establish mechanisms for monitoring their respective implementation. See ICRC, above footnote 8, p. 7-13. It is also worth mentioning that C. Byron, above footnote 1, p. 842, considers belligerent reprisals to be “the oldest method of enforcing humanitarian law”.

<sup>10</sup> For a (sometimes critical) assessment of these mechanisms, see for instance C. Byron, above footnote 1, p. 842-847; T. Pfanner, “Various mechanisms and approaches implementing international humanitarian law and protecting and assisting war victims”, 91 *International Review of the Red Cross* 874 (June 2009), p. 285-287; and M. Sassòli, “The Implementation of International Humanitarian Law: Current and Inherent Challenges”, 10 *Yearbook of International Humanitarian Law*, p. 52-53.

Designations are in practice valid upon mutual agreement.<sup>11</sup> Such mechanism was last used during the 1982 conflict over the Malvinas/Falklands islands.<sup>12</sup> The parties to the conflict may also entrust the duties of a Protecting Power to substitutes.<sup>13</sup>

- The Geneva Conventions allow each party to an international armed conflict to request a formal enquiry procedure into alleged violations.<sup>14</sup> Because parties to the conflict must agree on procedure (or on a designated umpire), all attempts at such an enquiry have failed.
- Created by article 90 of additional Protocol I and formally established in 1991, the International Fact-Finding Commission (IHFFC) is competent to (a) inquire into alleged grave breaches and other serious violations, and (b) to use its good offices to facilitate the restoration of an attitude of respect for IHL. States must accept the competence of the IHFFC to request its services and/or be subjected to an inquiry, and its work remains confidential unless they agree otherwise.<sup>15</sup> Although it regularly proposes its services, the IHFFC only conducted its first-ever mission in 2017 following an *ad hoc* agreement with Organization for Security and Co-Operation in Europe.<sup>16</sup> The IHFFC has also stated its readiness to operate in non-international armed conflicts with the consent of all concerned parties.<sup>17</sup>
- The depositary can convene meetings of High Contracting Parties based on article 7 of additional Protocol I.<sup>18</sup>
- Finally, any impartial humanitarian body may offer its services to the parties to the conflict.<sup>19</sup> Although the organization is explicitly mentioned in the Geneva Conventions, the undertaking

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<sup>11</sup> Article 8/8/8/9 common to the Geneva Conventions, and article 5 of additional Protocol I.

<sup>12</sup> Previous uses are referenced by M. Sassòli, A. Bouvier and A. Quintin, *How does Law Protect in War?*, Volume I, Third Edition, ICRC, Geneva, 2011, p. 366, footnote 352.

<sup>13</sup> Article 10/10/10/11 common to the Geneva Conventions, and article 5 of additional Protocol I.

<sup>14</sup> Article 52/53/132/149 common to the Geneva Conventions.

<sup>15</sup> The list of the 77 States having recognized the IHFFC's competence *ipso facto* pursuant to article 90(2)(a) of additional Protocol I is available at: [https://www.ihffc.org/index.asp?Language=EN&page=statesparties\\_list](https://www.ihffc.org/index.asp?Language=EN&page=statesparties_list).

<sup>16</sup> For an analysis of the legal basis of this investigation, see C. Azzarello and M. Niederhauser, "The Independent Humanitarian Fact-Finding Commission: Has the Sleeping Beauty Awoken?", blogpost on *Humanitarian Law & Policy*, 9 January 2018, available at: <https://blogs.icrc.org/law-and-policy/2018/01/09/the-independent-humanitarian-fact-finding-commission-has-the-sleeping-beauty-awoken/>.

<sup>17</sup> This raises the interesting question as to whether non-State armed groups could actually recognize the IHFFC's competence. Although she recommends to formally expand the IHFFC's mandate to non-international armed conflicts (through an amendment of the relevant provisions), E. Debuf, above footnote 8, does not deal with this specific issue.

<sup>18</sup> If such a meeting on general issues never took place, it is interesting to recall that the depositary convened three Conferences of High Contracting Parties to the Fourth Geneva Conventions (in 1999, 2001 and 2014, respectively) following mandates received from the United Nations General Assembly. For more information on these conferences, see P.-Y. Fux and M. Zambelli, "Mise en oeuvre de la quatrième convention de Genève dans les territoires palestiniens occupés : Historique d'un processus multilatéral (1997-2001)", 94 *International Review of the Red Cross* 847 (September 2002), p. 661-695 ; and M. Lanz, E. Max and O. Hoehne, "The Conference of High Contracting Parties to the Fourth Geneva Convention of 17 December 2014 and the duty to ensure respect for international humanitarian law", 96 *International Review of the Red Cross* 895/896 (2014), p. 1115-1133.

<sup>19</sup> Article 3(3) common to the Geneva Conventions, and article 9/9/9/10 common to the Geneva Conventions. For more information of the requirements to qualify as such an organization, see ICRC, updated commentary of article 3 common to the 1949 Geneva Conventions, para. 788-799, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC>.

of humanitarian activities, and *a fortiori* the implementation of IHL, is not the sole prerogative of the ICRC.

Because of their (almost complete) lack of practical significance, the role that the above-mentioned mechanisms could play in implementing international human rights law has rarely been examined.<sup>20</sup> Much of the academic and political attention focuses on the reverse issue: *i.e.* can the human rights apparatus contribute to the implementation of IHL? Better delving into the heart of the matter, it appears essential to go through the necessary yet thorny step of framing of the interaction between the legal regimes.

## A (BRIEF) FRAMING OF THE RELATIONSHIP BETWEEN INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW<sup>21</sup>

Despite some commonalities – chiefly an underlying rationale consisting in the fundamental protection of the human person – IHL and international human rights law originally constituted two distinct legal frameworks. Their main differences lie in their respective temporal scopes (armed conflict *v.* all times), addressees (parties to the conflict *v.* States), and substantive rights (impossibility of derogation *v.* some derogable rights).<sup>22</sup> However, since the pronouncement of the International Court of Justice (ICJ) in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*,<sup>23</sup> “all logically possible positions concerning a relation between the[se] two poles [...] have been defended in legal writings”.<sup>24</sup> Many contributions concerned the interpretation of the now famous terms *lex specialis*,<sup>25</sup> while others rejected the concept to the benefit of systemic integration (also called

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<sup>20</sup> See notably G. Gaggioli, *L'influence mutuelle entre les droits de l'homme et le droit international humanitaire à la lumière du droit à la vie*, A. Pedone, Paris, 2013, p. 206-231.

<sup>21</sup> For a general (historical and substantive) overview of the relationship, see R. Kolb, “Human Rights and Humanitarian Law”, in *Max Planck Encyclopedia of Public International Law*, 2013, available at: <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e811?rskey=iXgbq0&result=103&prd=MPIL>.

<sup>22</sup> See notably G. Gaggioli, above footnote 20, p. 153-155. To the contrary, R. Arnold and N. Quenivet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law*, Martinus Nijhoff, Leiden, 2008 p. 1, are amongst those arguing that these branches have now merged to form “human rights in armed conflict”.

<sup>23</sup> International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, para. 25. The ICJ also addressed the relationship between the two regimes in subsequent decisions: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2014, para. 106; and *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgement, 19 December 2005, para. 216.

<sup>24</sup> R. Kolb, above footnote 21, para. 27. M. Sassòli, above footnote 2, p. 435 and 438-442 offers another classification of doctrinal positions, and clarifies his own.

<sup>25</sup> Interestingly, the ICJ used the terms in two out of the three decisions referred to in footnote 12. Such omission in *DRC v. Uganda* prompted questions about the ICJ's motives. D. Murray, D. Akande, C. Garraway, F. Hampson, N. Lubell and E. Wilmhurst (eds), *Practitioners' Guide to Human Rights Law in Armed Conflict*, Oxford University Press, Oxford, 2016, p. 83, consider that it amounts to a refinement of the ICJ's position.

complementarity).<sup>26</sup> Interestingly, more often than not, both approaches lead to the same practical outcome.<sup>27</sup> A thorough discussion on the effective content of the *lex specialis* maxim, which undoubtedly lacks clarity, lies well beyond the scope of this paper.<sup>28</sup> For our present purpose, suffice it to state that the relationship between two branches of law has not been addressed in a systematic fashion by human rights mechanisms.<sup>29</sup> A more coherent approach – one that is fully cognizant of the reality of armed conflict, the distinctive features of each regime, and the specificity of a given situation – could therefore only contribute to a greater protection of individuals.<sup>30</sup>

## THE COMPLEX HUMAN RIGHTS MACHINERY: FROM THE UNITED NATIONS SECURITY COUNCIL TO THE FUTURE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS

Let us now turn to the analysis of the competence, and recent practice, of the complex human rights machinery examining, in turn, mechanisms emanating from the Charter of the United Nations (political in nature but also designating independent experts), as well as universal and regional treaty-body mechanisms (judicial or quasi-judicial in nature).<sup>31</sup>

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<sup>26</sup> See article 31(3)(c) of the Vienna Convention on the Law of Treaties. For references to such line of thought, see notably J. D'Aspremont and E. Tranchez, "The Quest for a Non-Conflictual Coexistence of International Human Rights Law and Humanitarian Law: Which Role for the *Lex Specialis* Principle?", in R. Kolb and G. Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law*, Edward Elgar, Cheltenham/Northampton, 2013, p. 235-238; and V. Todeschini, "The Impact of International Humanitarian Law on the Principle of Systemic Integration", 23 *Journal of Conflict & Security Law* 3, p. 359-382.

<sup>27</sup> M. Sassòli, above footnote 2, p. 440-441.

<sup>28</sup> For instance, do the terms in fact refer to a principle of interpretation, or to a method for solving conflict of norms? Do they refer to the relationship between the regimes as such or between specific rules applicable to a given situation? On these issues, see notably C. Droegge, above footnote 5, p.522-523; M. Sassòli, above footnote 2, p. 434, 437-438; G. Gaggioli, above footnote 20, p. 42-60; M. Milanović, "A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law", 14 *Journal of Conflict & Security Law* 3, p. 459-483.

<sup>29</sup> For an overview of their respective positioning of the issue, see notably F. Hampson, "The relationship between international humanitarian law and human rights from the perspective of a human rights treaty body", 90 *International Review of the Red Cross* 871 (September 2008), p. 549-572; D. Murray, D. Akande, C. Garraway, F. Hampson, N. Lubell and E. Wilmhurst (eds), above footnote 25, p. 83-84; and B. Bowring, "The Death of *Lex Specialis*? Regional Human Rights Mechanisms and the Protection of Civilians in Armed Conflict", in M. Lattimer and P. Sands, *The Grey Zone: Civilian Protection Between Human Rights and the Laws of War*, Hart, Oxford/London/New York/New Delhi/Sydney, 2018, p. 251-272.

<sup>30</sup> In that regard, F. Hampson and D. Murray, "Operationalising the Relationship Between the Law of Armed Conflict and International Human Rights Law", blogpost on *EJIL:Talk!*, 11 February 2016, available at: <https://www.ejiltalk.org/esil-international-human-rights-law-symposium-operationalising-the-relationship-between-the-law-of-armed-conflict-and-international-human-rights-law/>, argue in favor of moving away from *lex specialis* and towards (genuine) co-application. Others advocate for systemic interpretation under article 31(3)(c) VCLT, see V. Todeschini, above footnote 26, p. 382; and C. Landais and L. Bass, "Reconciling the rules of international humanitarian law with the rules of European human rights law", 97 *International Review of the Red Cross* 900 (2015), p. 1295-1311.

<sup>31</sup> This categorization stems from the distinct competences between mechanisms (see below p. 10 and 13).

## MECHANISMS EMANATING FROM THE CHARTER OF THE UNITED NATIONS

### BASIC FEATURES

Composed by member-States and thus dependent on their dynamics, United Nations bodies – the General Assembly<sup>32</sup>, the Security Council<sup>33</sup> and the Human Rights Council – are inherently political. The same goes for the *ad hoc* mandates of mechanisms that they have the power to set up through resolutions, such as Special Procedures, fact-finding missions and commissions of inquiry. However, “[...] the way [such mechanisms] are composed, staffed and operate ensure – in general – they can and do function independently from the mandating authority. [...] [I]n most cases, actual investigations and their outcomes ([the mechanisms’] findings and recommendations) are sufficiently insulated from the political process and dynamics to minimize the risk of political interference [...]”<sup>34</sup>

Glossing over their respective functions, for our present purpose of dealing with IHL:

- The General Assembly adopts either context-specific or thematic resolutions. These stem from the 1<sup>st</sup> (disarmament and international security), 3<sup>rd</sup> (social, humanitarian and cultural issues), 4<sup>th</sup> (special political and decolonization) and the 6<sup>th</sup> (legal issues) committees, respectively. In 2016, the General Assembly notably established the International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under international law committed in the Syrian Arab Republic since March 2011.<sup>35</sup>
- The Security Council adopts country-specific as well as thematic resolutions. It notably mandated commissions of inquiry and fact-finding missions. It also established a permanent monitoring and reporting mechanism on grave violations against children in situations of armed conflict.<sup>36</sup> Activated through the listing of an entity – State or non-State party – by the Secretary General in his corresponding annual report, such mechanism is unique in that it directly and pragmatically engages with concerned entities. Improved compliance with international law ultimately leads to de-listing.<sup>37</sup>
- Created by General Assembly resolution 60/251,<sup>38</sup> the Human Rights Council adopts (thematic and contextual) resolutions during regular or special sessions. These can result in the establishment of investigate mechanism such as commissions of inquiry, fact-finding missions, or, in the recent cases of Yemen and Myanmar, a Group of Eminent Experts and an ongoing Independent Investigate Mechanism (respectively).
- The Human Rights Council is also competent to conduct the Universal Periodic Review (UPR), which scrutinizes a State’s respect for its human rights obligations. As explicitly stated in the

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<sup>32</sup> Articles 9-22 of the Charter of the United Nations.

<sup>33</sup> Articles 24-26 of the Charter of the United Nations.

<sup>34</sup> E. Debuf, above footnote 8, p. 17-18.

<sup>35</sup> UNGA Res 71/248, 11 January 2017.

<sup>36</sup> UNSC Res 1612, 26 July 2005.

<sup>37</sup> More information on the MRM are available at <https://childrenandarmedconflict.un.org/tools-for-action/monitoring-and-reporting/>.

<sup>38</sup> UNGA Res 60/251, 3 April 2006.



corresponding establishment resolution, such review interestingly includes IHL obligations.<sup>39</sup> Finally, Special Procedures – *i.e.* independent experts or groups thereof reporting and advising on human rights from a specific perspective – are available to the Human Rights Council.<sup>40</sup>

Even if the above-mentioned mechanisms and their derivatives almost systematically refer to IHL when dealing with armed conflict, are they necessarily competent to do so?

## COMPETENCE

Based on a dynamic interpretation as suggested by G. Gaggioli, one can reasonably argue that the notion of “human rights and fundamental freedoms”<sup>41</sup> used throughout Charter of the United Nations has come to encompass IHL. The main organs of the United Nations can thus create and/or mandate subsidiary bodies dealing with that legal regime.<sup>42</sup> Some States, such as the United States and Turkey, have nevertheless challenged such interpretation.<sup>43</sup>

Because it remains the most contested and commented-upon political apparatus, the rest of this chapter (including the section on recent practice) will focus on the Human Rights Council.<sup>44</sup> As a subsidiary body of the General Assembly, it is competent to deal with IHL *intra vires* despite the silence of above-mentioned resolution 60/251.<sup>45</sup> With the notable exception of the UPR (and of some Special Procedures)<sup>46</sup>, the Human Rights Council has still failed to explicitly include this legal framework in the many mandates it created.<sup>47</sup> When confronted to armed conflict, most Special Procedures and investigative mechanisms have therefore simply interpreted a seemingly human rights-exclusive mandate in a manner that allowed them – in practice – to also report on serious violations of IHL.<sup>48</sup>

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<sup>39</sup> Article 1 al. 2 of the United Nations Human Rights Council: Institution-Building, annexed to HRC Res 5/1, 18 June 2007. For more information of the history and political debates behind such inclusion, see L. Zhu, “International Humanitarian Law in the Universal Periodic Review of the UN Human Rights Council”, 5 *Journal of International Humanitarian Legal Studies* (2014), p. 186-212.

<sup>40</sup> As of 1<sup>st</sup> August 2017, there are 68 special procedures divided between 44 thematic mandates and 12 country-specific mandates: <https://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx>.

<sup>41</sup> The notion is notably in used in articles 1 al. 3 (purposes), 13 (functions and powers of the General Assembly), and 55 (international economic and social cooperation) of the Charter of the United Nations.

<sup>42</sup> G. Gaggioli, above footnote 20, p. 162-164.

<sup>43</sup> See for instance W. Kälin, “Universal human rights bodies and international humanitarian law”, in R. Kolb and G. Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law*, Edward Elgar, Cheltenham/Northampton, 2013, p. 450; G. Gaggioli, above footnote 20, p. 162, footnote 805; and T. Meron. “The Humanization of Humanitarian Law”, 94 *The American Journal of International Law* 2, (April 2000), p. 270.

<sup>44</sup> “[T]he Human Rights Council [...] has become the main substitute for the lacking monitoring mechanisms under the Geneva Conventions and the Protocols additional to them.” W. Kälin, above footnote 43, p. 455. However, Kälin also warns that the Human Rights Council’s “[s]electivity is problematic in so far as the legitimacy and authority of IHL will be undermined in the long-run by non-sided criticism.”

<sup>45</sup> G. Gaggioli, above footnote 20, p.164. It is worth recalling that, of all the features of the Human Rights Council, the UPR is the only one whose mandate explicitly includes IHL as a basis of review.

<sup>46</sup> See for instance the mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions as reflected in HRC Res 35/15, 11 July 2017, preambular paragraph 3.

<sup>47</sup> As pointed out by E. Debuf, above footnote 8, p. 17, political dynamics – illustrated by States’ willingness to acknowledge that a given situation amounts to a non-international armed conflict – undoubtedly play a role in the negotiation of such mandates.

<sup>48</sup> Because many mandates are moving away from States’ responsibility and rather focusing on the future establishment of individual criminal accountability, they are framed in terms of international criminal law and

Examples of such broad reading include the works of the Independent International Commission of Inquiry on the Syrian Arab Republic (CoI Syria), the Independent International Fact-Finding Mission on Myanmar (FFM Myanmar), and the Group of Eminent Experts on Yemen (GEE Yemen) – which we will now turn to.

## SELECTED EXAMPLES OF RECENT PRACTICE<sup>49</sup>

If the present sections focuses on the most recent examples of investigative mechanisms created by the Human Rights Council, it is nonetheless worth noting that such body also dealt with IHL in instances such as:

- Country-specific and thematic resolutions, including resolution 25/22 on “ensuring use of remotely piloted aircraft and armed drones in counter-terrorism and military operations in accordance with international law, including international human rights and humanitarian law”<sup>50</sup>;
- The 2018 report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on armed non-State actors;<sup>51</sup>
- The 2013 report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health focusing on conflict situations;<sup>52</sup> and
- The 2003 and 2006 country reports of the Special Rapporteur on the right to food dealing with the occupied Palestinian territories and Lebanon, respectively.<sup>53</sup>

Established in 2011 by resolution S-17/1, the CoI Syria is mandated to “investigate all alleged violations of **international human rights law** since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated [...]”<sup>54</sup> In its first three reports, the CoI nonetheless proceeded to a thorough examination of the situation prevailing in Syria in order to decide on the applicability of IHL. It immediately stated its readiness to apply IHL but only classified the situation as a non-international armed conflict in mid-February

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encompass behaviors amounting to war crimes. For a broader reflection on that tendency, see E. Debuf, above footnote 8, p. 13-15.

<sup>49</sup> As previously explained, this section will focus on examples emanating from the Human Rights Council. For an overview of the practice of the General Assembly and the Security Council in relation to the protection of civilians and up until 2009, see T. Pfanner, “Various mechanisms and approaches for implementing international humanitarian law and protecting and assisting war victims”, 91 *International Review of the Red Cross* 874 (June 2009), p. 314-318. For a list of all UNSC resolutions since 1946 dealing with armed non-State actors and, *a fortiori*, with armed conflict, see J. Burniske with N. Mordizadeh and D. Lewis, *Armed Non-State Actors and International Human Rights Law: An Analysis of the Practice of the U.N. Security Council and U.N. General Assembly – Briefing Report with Annexes*, June 2017, Annex II.A.

<sup>50</sup> HRC Res 25/22, 15 April 2014. For all HRC resolutions dealing with armed non-State actors, and *a fortiori* armed conflict, between 2008 and 2015, see Geneva Academy, Academy in-Brief 7, *Human Rights Obligations of Armed Non-State Actors: an Exploration of the Practice of the UN Human Rights Council*, Geneva, December 2016, p. 39-46.

<sup>51</sup> A/HRC/38/44, 5 June 2018, para. 25-29.

<sup>52</sup> A/68/297, 9 August 2013.

<sup>53</sup> E/CN.4/2004/10/Add.2, 31 October 2003; and A/HRC/2/8, 29 September 2006.

<sup>54</sup> HRC Res S-17/1, 22 August 2011, operational paragraph 13, emphasis added.

2012.<sup>55</sup> It has consistently applied IHL since. To our humble knowledge, the CoI Syria does not seem to have been criticized for engaging in such a detailed exercise of classification. Interestingly, the timing of its conclusion does not differ much from those of the ICRC and the RULAC database – which both classified the situation in Syria as a non-international armed conflict in July 2012.<sup>56</sup> Other (more recent) determinations on IHL by the CoI Syria, such as the one on the evacuation of Eastern Aleppo, have received more scholarly attention.<sup>57</sup> They are illustrative of its tendency to sometimes conflate application of IHL with that of international criminal law. Indeed not all violations of IHL amount to war crimes, and the (subjective) elements required to prove the latter are more stringent.<sup>58</sup>

Per resolution 34/22, the mandate of the FFM Myanmar consists in the establishment of “[...] the facts and circumstances of **the alleged recent human rights violations** by military and security forces, and abuses, in Myanmar [...]”.<sup>59</sup> Although seemingly limited to human rights, its members interpreted it as allowing for the application of IHL.<sup>60</sup>

Finally, the GGE Yemen was created by resolution 36/31 “[...] to carry out a comprehensive examination of all alleged violations and abuses of international human rights **and other appropriate and applicable fields of international law** committed by all parties to the conflict since March 2014 [...]”.<sup>61</sup> It interpreted this mandate – and one could argue that it is rather explicit – as including not only IHL, but also international refugee law and international criminal law.<sup>62</sup> The most remarkable feature of the GEE Yemen’s reporting lies perhaps in its prudent analysis of the airstrikes conducted by the international coalition.<sup>63</sup> Contrary to other investigative mechanisms that have concluded to absolute violations, the GEE Yemen does not go further than raising “serious concerns about the targeting process”.<sup>64</sup> Such wording is most likely indicative of its awareness of the fact that determining respect for the principles of conduct of hostilities (and especially that of proportionality) requires an *ex ante* examination of the full targeting process. Patterns identified *a posteriori* can thus only be indicative of potential violations. Such sensitivity for IHL nuances could be attributable in part to the nomination of an expert with a strong military background as a member of the GEE Yemen.<sup>65</sup>

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<sup>55</sup> A/HRC/21/50, annex II, p. 45, para. 2-3. The necessary threshold of violence had not been achieved during the first reporting period (March-November 2011), and the CoI was then unsure about the level of organization of the Free Syrian Army for the purposes of article 3 common to the Geneva Conventions. On the CoI’s openness to IHL, see A/HRC/s-17/2/add.1, 13 November 2011, para. 97.

<sup>56</sup> See RULAC database, *Non-International Armed Conflict in Syria*, available at <http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-syria#collapse3accord>; and “Interview with Peter Maurer”, 99 *International Review of the Red Cross* 906 (2019), p. 876. To the contrary K. Huszti Orban and N. Kalandarishvili-Mueller, “Is it a Bird? Is it a Plane? Is it an Armed Conflict? -The Classification of the Situation in Syria”, 1 *Journal of International Law* (2012), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2045696](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2045696), shared the timing of the CoI’s determination.

<sup>57</sup> See notably E. Pothelet, “The Evacuation of Eastern Aleppo: Humanitarian Obligation or War Crime?”, blogpost on *EJIL:talk!*, 14 March 2017, available at <https://www.ejiltalk.org/the-evacuation-of-eastern-aleppo-humanitarian-obligation-or-war-crime/>.

<sup>58</sup> See notably M. Sassòli, above footnote 2, p. 448.

<sup>59</sup> HRC Res 34/22, 3 April 2017, para. 11, emphasis added.

<sup>60</sup> See notably A/HRC/42/50, 8 August 2019, para. 39.

<sup>61</sup> HRC Res 36/31, operational paragraph 12(a), emphasis added.

<sup>62</sup> A/HRC/39/43, 17 August 2018, para. 3.

<sup>63</sup> This angle was highlighted in many of the informal interviews conducted during our research.

<sup>64</sup> A/HRC/39/43, above footnote 61, para. 37-39; and A/HRC/42/17, 9 August 2019, para. 30.

<sup>65</sup> Charles Garraway’s biography is available at <https://www.ohchr.org/EN/HRBodies/HRC/YemenGEE/Pages/Members.aspx#Garraway>.

Although far from perfect, the three above-mentioned examples testify that investigative mechanisms' dealing with IHL has come a long way since previous reports. So much so that some argue that such mechanisms to substitute, at least to come extent, the underused IHFFC.<sup>66</sup> However, investigative mechanisms still tend to make absolute pronouncements on the illegality particular incidents without providing much supporting factual justification. Although it is most likely inherent to the brief format of their reporting, their limited means, their frequent lack of access to concerned territory and the nature of the relevant violations, such shortcoming opens their conclusions – especially those dealing with IHL – to continuous questioning.

## INTERMEDIATE CONCLUSION 1.0

The grasp of States' political dynamics on Special Procedures and investigative mechanisms (created by the General Assembly, the Security Council or the Human Rights Council) can largely be mitigated by their composition, staffing and operating procedures. However, such mechanisms still face recurrent criticisms – lack of coherence, mishandling of the legal framework, absence of sufficient details to support allegations, etc. – pertaining to their dealings with IHL, which many have off-the-record attributed to an inadequate nomination of experts. Despite their flaws, including that they cannot address victims' grievances directly, political mechanisms remain essential to triggering effective change in behaviors. The power of peer-pressure as well of “naming and shaming” should not be disregarded when compliance with IHL rests exclusively on States' willingness.

## GUIDING (LEGAL AND PRACTICAL) QUESTIONS

- Could the invocation/use of IHL in mechanisms emanating from the Charter of the United Nations constitute a way for States to comply with their obligation under article 1 common to the Geneva Conventions?<sup>67</sup> If so, does such invocation need to become systematic? In that latter regard, does the traditional distinction between Geneva and New York – General Assembly and Security Council v. Human Rights Council – still hold?
- Because of its unique mandate, does the UPR constitute the most appropriate political mechanism for dealing with IHL? Should States' remarks and recommendations address concrete instances of violations, or merely focus on national measures of implementation and dissemination?<sup>68</sup>
- Considering that (1) political mechanisms have the inherent competence to deal with IHL and (2) that their derivatives (Special Procedures and investigative mechanisms) actually deal with IHL even when not explicitly mandated to do so, why shouldn't IHL be systematically included in the latter's mandate when it relates to a situation of armed conflict? Wouldn't it positively influence the composition of such mechanisms?

<sup>66</sup> W. Kälin, above footnote 43, p. 452.

<sup>67</sup> W. Kälin, above footnote 43, p. 456; F. Hampson, above footnote 5, p. 137; and T. Pfanner, above footnote 10, p. 328, all answer in the affirmative.

<sup>68</sup> See notably W. Kälin, above footnote 43, p. 454-455.

- Does the principle of equality of belligerents require that resolutions (and resulting mandates) be perfectly balanced, *i.e.* systematically address all parties the conflict? Conversely, do uneven resolutions risk contributing to the erosion of the principle? Framed alternatively, could respect for the principle of equality of belligerents contribute to neutralizing the risk of politicization, especially with regards to the right against terrorism? How does one factor in the issue of armed non-State actors?
- Should one establish a platform (gathering all stakeholders) to discuss IHL knowledge-management, and foster synergies? When/after setting up new Special Procedures, fact-finding missions and commissions of inquiry, should IHL experts also be nominated at all hierarchical levels?
- Could the IHFFC (as an institution and/or through the nomination of individual members) increase its cooperation with Special Procedures, fact-finding missions and commissions of inquiry in order to reinforce IHL-knowledge within such mechanisms?
- Could traditional human rights non-governmental organizations appropriately influence States' positioning on IHL within political mechanisms?<sup>69</sup>

## TREATY-BODIES

Contrary to their political counterparts, mechanisms rooted in (universal and regional) human rights treaties are much better equipped to address victims' grievances directly. This section will examine, in turn, universal and regional mechanisms.

### UNIVERSAL INSTRUMENTS

#### Basic features

Each of the 9 core universal United Nations human rights conventions provides for an independent body tasked with monitoring its implementation.<sup>70</sup> Such treaty bodies (called "committees") are composed of independent experts, individually elected by States Parties and serving in their personal capacity. Their activities notably include reviewing of periodic reports from States parties (through concluding observations), holding of thematic debates, issuing of general comments on specific

<sup>69</sup> Noting that the ICRC is limited by its tradition of confidentiality, F. Hampson, above footnote 5, p. 136-137, considers that only NGOs such as Amnesty International can publicize evidence of breaches of IHL and thus pressure States towards better compliance. She however made the argument in relation to the Human Rights Committee.

<sup>70</sup> International Convention on the Elimination of All Forms of Racial Discrimination (1965); International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966); Convention on the Elimination of All Forms of Discrimination against Women (1979); Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (1984); Convention on the Rights of the Child (1989); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); International Convention for the Protection of All Persons from Enforced Disappearance (2006); and Convention on the Rights of Persons with Disabilities (2006).

provisions of their foundational instrument, and making observations in relation to individual complaints filed against a State.

## Competence

Treaty bodies' ability to engage with IHL is contingent upon their substantive legal framework. With the notable exceptions of the Convention on the Rights of Child and the Convention on the Rights of Persons with Disabilities,<sup>71</sup> it is limited to the monitoring of the implementation of their respective human rights treaties and does not allow for direct application of IHL.<sup>72</sup> When extraterritorially involved in armed conflict, some States – Israel and the United States – nonetheless invoke IHL to object to their monitoring by such bodies.<sup>73</sup>

## Practice

Not unlike political organs, treaty bodies may still to have deal with human rights in situations of armed conflict. In that regard, “[c]oncluding observations provide the richest material in quantitative terms to understand the [c]ommittees’ positions while general comments explain the doctrinal underpinnings of their approach to IHL.”<sup>74</sup> For instance, the Human Rights Committee (HRCtee) regularly uses concluding observations to insist on the extraterritorial applicability of human rights during armed conflict while the Committee on the Rights of the Child (CRC) calls on States to respect and ensure respect for IHL.<sup>75</sup> IHL has not yet been examined following individual communications although the CRC is set to consider complaints against France concerning children, whose parents are allegedly ISIS-affiliates, currently detained by the Kurds in northeast Syria.<sup>76</sup> Given the circumstances of such cases, it would be surprising that the CRC shy away from IHL.

The HRCtee is perhaps the only universal treaty body to have explained the doctrinal underpinnings of the relationship between IHL and human rights in its general comments. As a way of reminder, General Comment No. 31 states (1) that the International Covenant on Civil and Political Rights remains applicable during armed conflicts and (2) that “[w]hile [...] more specific rules of [IHL] may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”<sup>77</sup> Such general pronouncement was reproduced word for word in both General Comments No. 35 (right to liberty) and No. 36 (right to life).<sup>78</sup> If the latter documents contain more details about the articulation of specific rights in armed conflict, one could

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<sup>71</sup> Article 38 and article 11, respectively.

<sup>72</sup> See notably W. Kälin, above footnote 43, p. 447; and L. van den Herik and H. Duffy, “Human Rights Bodies and International Humanitarian Law: Common but Differentiated Approaches”, in P. Bluckley, P. Leach and A. Donald, *The Harmonisation of Human Rights Law* (forthcoming), available on SSRN at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2448146](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2448146), p. 4.

<sup>73</sup> *Ibid.*

<sup>74</sup> W. Kälin, above footnote 43, p. 443.

<sup>75</sup> W. Kälin, above footnote 43, p. 446. He provides an overview (p. 446-447) of relevant concluding observations from the Human Rights Committee, the Committee on the Rights of the Child, the Committee against Torture and the Committee on the Rights of Persons with Disabilities until 2013.

<sup>76</sup> Pending cases 77/2019 and 79/2019 against France, see <https://www.ohchr.org/Documents/HRBodies/CRC/TablePendingCases.pdf>.

<sup>77</sup> General Comment No. 31, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 11.

<sup>78</sup> General Comment No. 35, CCPR/C/GC/35, 16 December 2014, para. 64; and General Comment N. 36, CCPR/C/GC/36, 3 September 2019.

regret that they remain quite basic for practices – use of lethal force and deprivation of liberty – constituting the foundation of warfare.

Other treaty bodies, such as the Committee on the Elimination of Discrimination against Women, have also begun to deal with IHL but without proceeding to much (if any) precise legal argumentation.<sup>79</sup>

### Intermediate conclusion 2.0

Although their approach appears pragmatic, functional and often context-sensitive, mechanisms rooted in universal human rights treaties have also faced regular criticism concerning their dealings with IHL. However, their shortcomings should perhaps be connected to their limited competence, rather than being solely attributed to the lack of expertise of their members.<sup>80</sup>

Developments, ongoing debated and trends toward greater convergence between IHL and human rights are still likely to have a defining influence on the treaty bodies' approach in the future. They should not necessarily be expected to take the lead but may follow suits where regional mechanisms of judicial nature show the way.

### Guiding (legal and practical) questions

- If no single individual communication - with the above-mentioned exception before the CRC – has ever dealt with IHL, can one still argue that universal treaty bodies are better equipped to address victims' grievances?
- Does the contested applicability of international human rights law to armed non-State actors (and their limited jurisdiction in that regard) render universal treaty-bodies inadequate for dealing with grievances of victims in non-international armed conflict?
- Should one encourage universal treaty-bodies to make systematic pronouncements on the relationship between IHL and human rights? Should such pronouncements also concern/extend to the articulation of specific rights in situations of armed conflicts? Is one mean (concluding observation, general comment or individual communication) more appropriate than the others to do so?
- Should one establish a platform (gathering all stakeholders) to foster synergies between the treaty-bodies and thus ensure an overall coherent approach to IHL?
- Should States consider IHL-knowledge as a criterion when electing treaty-body members? Also, at the very least, should treaty-body members and their secretariat be systematically trained on IHL?<sup>81</sup>

<sup>79</sup> General Recommendation No. 30, CEDAW/C/GC/30, 1 November 2013, para. 20-21.

<sup>80</sup> See for instance C. Byron, above footnote 1, p. 883-884.

<sup>81</sup> F. Hampson, above footnote 29, p. 571.

- Should non-governmental organizations and/or academic institutions play a role in influencing universal treaty-bodies' pronouncements on IHL? Should such institutions be encouraged to participate in individual communication proceedings through third parties interventions? Could this contribute to counter-balancing lack of IHL-knowledge?

## REGIONAL INSTRUMENTS

Complementary to their universal counterparts, the three existing regional (European, Inter-American and African) systems are singular in that they are the only ones possessing full judicial powers.

### Basic features

- The European Court of Human Rights (ECtHR) rules on applications filed by either individuals or States alleging violations of human rights protected within the European system. Its jurisdiction comprises all cases concerning the interpretation and application of the provisions of the European Convention on Human Rights.<sup>82</sup> It is often requested to adjudicate cases stemming from situations of armed conflict.<sup>83</sup>
- The Inter-American Commission of Human Rights (IACnHR) notably takes action on petitions (submitted by individuals) or communications (submitted by a State) on alleged human rights violations.<sup>84</sup> As a complementary organ of the Inter-American system, the Inter-American Court of Human Rights (IACtHR) is competent to determine whether a State Party's laws and/or conducts are compatible with the American Convention on Human Rights. Its jurisdiction comprises all cases concerning the interpretation and application of the provisions of the American Convention on Human Rights.<sup>85</sup> Like States Parties, the above-mentioned IACnHR can submit a case to the IACtHR.<sup>86</sup> Both organs have regularly issued decisions on cases related to armed conflicts.
- The African Commission on Human and People's Rights (ACnHPR) exercises functions similar to those of the IACnHR with regards to the African Charter of Human Rights.<sup>87</sup> The complementary African Court of Human (ACTHPR) is competent to hear cases – filed by States, individuals or non-governmental organizations – pertaining to alleged violations of the African Charter of Human Rights and any other relevant human rights instrument ratified by the States

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<sup>82</sup> Articles 19 and 32-34 of the European Convention on Human Rights.

<sup>83</sup> For a factual and substantive overview of such cases up to September 2019, see the ECtHR's factsheet on armed conflicts available at [https://www.echr.coe.int/Documents/FS\\_Armed\\_conflicts\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf). The ECtHR is also expected to rule on several upcoming cases related to armed conflict, such as Georgia v. Russia (II) and Ukraine v. Russia (re Crimea).

<sup>84</sup> Articles 41 lit. 7 and 44-51 of the American Convention on Human Rights.

<sup>85</sup> Articles 52 (establishment) and 62 al. 3 (jurisdiction) of the American Convention on Human Rights. Add reference to Lixinski and IACtHR's jurisprudence on treaty interpretation?

<sup>86</sup> Article 61 al. 1 of the American Convention on Human Rights.

<sup>87</sup> Articles 30 and 45-59 of the African Charter on Human and People's Rights.



concerned.<sup>88</sup> Its (advisory and contentious) jurisdiction notably extends over the so-called Maputo Protocol, which notably call on its States Parties to respect and ensure respect for IHL.<sup>89</sup> Finally, the African system recently established the African Court of Justice and Human Rights which, once operational, will merge the functions of the ACtHPR and the African Court of Justice.<sup>90</sup>

## Competence

Just like their universal counterparts, regional treaty bodies' ability to engage with IHL is contingent upon their respective legal framework. Except for the above-mentioned Maputo Protocol, none of the relevant regional treaties refers to IHL as a source of law to be tapped into by existing commissions and courts. However, the future African Court of Justice and Human Rights will have jurisdiction over cases related to “any question of international law” and shall apply “international treaties, whether general or particular, ratified by the contesting States” as well as “international custom”.<sup>91</sup> Such broad jurisdiction will thus undeniably include IHL.

From a general standpoint, existing commissions and courts are therefore not competent to apply IHL directly (i.e. to engage State's responsibility for violations of the legal framework).<sup>92</sup> They can nonetheless apply it indirectly<sup>93</sup> and/or interpret their respective human rights treaties through its lens.<sup>94</sup> Some consider that the latter approach – which was most notably adopted by the Inter-American Court of Human Rights in 2000 – “appears to be the only way [...] to deal with the issues raised by the concurrent applicability of these two branches of law – IHL and [I]HRL [...]”<sup>95</sup>

## Snapshot of their practice

Despite the above-mentioned limitation to their competence, regional mechanisms have often dealt – at the two different stages of jurisdiction and merits – with human rights in situations of armed conflict.<sup>96</sup> Far from collecting / analyzing it in its entirety, the present section simply aims at providing a summary of the evolving trends in their respective practices.

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<sup>88</sup> Articles 3-5 and 7 of the Protocol to the African Charter on Human and People's Rights on the Establishment of and African Court on Human and People's Rights. For the record, only 9 States have made the declaration allowing individuals and NGOs to submit cases.

<sup>89</sup> Article 16 of Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.

<sup>90</sup> Articles 1-3 and 9 of the Protocol on the Statute of the African Court of Justice and Human Rights. So far only 7 States out of the 15 required for entry into force have ratified the Protocol. The list of ratification is available at [https://au.int/sites/default/files/treaties/36396-sl-protocol\\_on\\_the\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_human\\_rights.pdf](https://au.int/sites/default/files/treaties/36396-sl-protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights.pdf).

<sup>91</sup> Articles 28 lit. d and 31 al. 1 lit. (c)-(d) of Protocol on the Statute of the African Court of Justice and Human Rights.

<sup>92</sup> See notably, G. Gaggioli, above footnote 20, p. 194; and L. Moir, “Decommissioned? International Humanitarian Law and the Inter-American Human Rights System”, 25 *Human Rights Quarterly* 1 (February 2003), p. 211-212.

<sup>93</sup> G. Gaggioli, above footnote 20, p. 182-188 examines four options (*ouverture*) for indirect applicability of IHL by regional human rights mechanisms.

<sup>94</sup> *Ibid.*, p. 195-200.

<sup>95</sup> C. Landais and L. Bass, above footnote 30, p. 1297. See also S. Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, p. 503.

<sup>96</sup> By way of example, much of the jurisprudence of the ECtHR related to armed conflict concerned extraterritorial jurisdiction (such as the following cases: *Bankovic and al. v. Belgium*, *Jaloud v. Netherlands*, *Al-Saadoon and Mufdhi v. United Kingdom*, and *Hassan v. United Kingdom*).

- The ECtHR has traditionally avoided applying IHL in situations of armed conflict, including those of occupation.<sup>97</sup> In the absence of States' rare claims to derogation, it has preferred to focus on the "normal legal background" that is the European Convention of Human Rights.<sup>98</sup> Some have thus characterized the ECtHR's approach as "myopic, or at least opaque" for its lack of systematic and detailed engagement with IHL.<sup>99</sup> For instance, in a series of cases on Turkey and Chechnya, it used language reminiscent of that of Protocol I additional to the Geneva Conventions on conduct of hostilities.<sup>100</sup> By not clarifying its rationale for doing so, the ECtHR opened the door to speculations on its positioning vis-à-vis IHL.<sup>101</sup> Since the early 2000s, national courts' increased dealing with IHL – especially in the United Kingdom –<sup>102</sup> have somewhat isolated the ECtHR's in its reluctance towards IHL. Decided in 2014, *Hassan v. United Kingdom* constitutes the first decision where the ECtHR expressly considered the relationship between the European Convention of Human Rights (ECHR) and IHL. Marking an evolution in its approach, it held that, during armed conflicts, the rules of the ECHR "should be accommodated, as far as possible" with the relevant rules of IHL.<sup>103</sup> The decision, which was very much commented on, interestingly dealt with detention in international armed conflict by the British forces in Iraq.<sup>104</sup> It is worth noting that an *amicus curiae* brief submitted by F. Hampson and N. Lubell possibly influence the ECtHR's reasoning.<sup>105</sup> Perhaps the political and practical significance of larger issue at stake - could States involved in international armed conflicts (abroad) continue to undertake detention activities? – facilitated the ECtHR's rare willingness to engage with academia.
- Compared to its European and African counterparts, the Inter-American system (IACnHR and IACtHR) has always been the most overt about its application of IHL and the rationale for doing

<sup>97</sup> See notably C. Byron, above footnote 1, p. 851. Sicilianos, "L'Articulation entre droit international humanitaire et droits de l'homme dans la jurisprudence de la Cour européenne des droits de l'homme", 27 *Swiss Review of International and European Law* 1 (2017), p. 3-18 analyzes the evolution of the ECtHR's positioning with regards to IHL.

<sup>98</sup> The expression is borrowed from ECtHR, *Isayeva v. Russia*, Application No 57959/00, Judgment, 24 February 2005, para. 191.

<sup>99</sup> L. van den Herik and H. Duffy, above footnote 72, p. 22. They reach such conclusion after providing an overview of the ECtHR's jurisprudence related to armed conflicts until 2014, at p. 17-22.

<sup>100</sup> Notably *Ergi v. Turkey*, Application No 23818/94, Judgment, 28 July 1998; *Güleç v. Turkey*, Application No 21593/93, Judgment, 27 July 1998; *Isayeva v. Russia*, above footnote 97.

<sup>101</sup> See most notably, W. Abresch, "A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya", 16 *European Journal of International Law* 4, 2005, p. 741-767; and L. Moir, "The European Court of Human Rights and international humanitarian law", in R. Kolb and G. Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law*, Edward Elgar, Cheltenham/Northampton, 2013, p. 481-486.

<sup>102</sup> See for instance the case of *Serdar Mohammed v. Ministry of Defense* that has been moving up through UK courts for several years. For commentaries on the various decisions in that case, see the many blogposts on EJIL:Talk! available at <http://www.ejiltalk.org/?s=serdar>.

<sup>103</sup> *Hassan v. United Kingdom*, Application No 29750/09, Grand Chamber, Judgement, 16 September 2014, para. 104. B. Bowring, above footnote 29, p. 292, went as far as to state that "[...] the spectre of *lex specialis* has been definitely laid to rest by the Grand Chamber [...]"

<sup>104</sup> See notably B. Bowring, above footnote 29, p. 286-292; A.-L. Sicilianos, above footnote 97, p. 13-16; and L. Hill-Cawthorne, "The Grand Chamber Judgment in *Hassan v UK*", blogpost on *EJIL:Talk!*, 16 September 2014, available at <https://www.ejiltalk.org/the-grand-chamber-judgment-in-hassan-v-uk/>.

<sup>105</sup> *Amicus curiae* submitted by Prof. F. Hampson and Prof. N. Lubell of the Human Rights Centre of the University of Essex, October 2013, available at <http://repository.essex.ac.uk/9690/1/hampson-lubell-amicus-ecthr-oct-2013.pdf>.

so. Its practice started as early as the late 1970s.<sup>106</sup> In 1997, the IACnHR adopted its report in the now famous case of *Abella v. Argentina*, where it directly invoked IHL (specifically common article 3 to the Geneva Conventions) to decide upon the petitioners' claims that their right to life had been violated.<sup>107</sup> Although criticized by academia,<sup>108</sup> the IACnHR upheld such approach, and its far-reaching interpretation of its jurisdiction, in its subsequent practice until the early 2000s.<sup>109</sup> A shift in its attitude was indeed prompted by the IACtHR's first examination of the application of IHL in the case *Las Palmeras v. Colombia*. It found that the American Convention of Human Rights "(...) has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions."<sup>110</sup> Since then, the IACtHR has maintained such jurisprudence, and the IACnHR has reverted to the more-orthodox approach of interpreting the American Convention of Human Rights by reference to IHL.<sup>111</sup>

- Contrasting with the above-mentioned regional human rights systems, the African practice related to situations of armed conflict is relatively scarce. The ACnHPR has directly applied IHL in the one notable instance of *Democratic Republic of the Congo v. Burundi, Rwanda and Uganda*.<sup>112</sup> Whether it was competent to do so is unclear.<sup>113</sup>

Although it does not constitute case law, it is also worth mentioning that the ACnHPR recently adopted General Comment no. 3 where it notably considers the relationship between the African Charter and IHL in relation to the right to life.<sup>114</sup>

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<sup>106</sup> See notably C. Byron, above footnote 1, p. 856. C. M. Cerna, "The History of the Inter-American System's Jurisprudence as Regards Situations of Armed Conflict", 2 *International Humanitarian Legal Studies* (2011), p. 10-30, offers a very comprehensive overview of the Inter-American starting in 1978. See also H. Tigroudja, "The Inter-American Court of Human Rights and international humanitarian law, in R. Kolb and G. Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law*, Edward Elgar, Cheltenham/Northampton, 2013, p. 466-479; and C. Byron, above footnote 1, p. 856-864.

<sup>107</sup> IACnHR, *Juan Carlos Abella v. Argentina*, case 11.137, Report N°55/97, 18 November 1997, para. 152-189, available in English at <http://hrlibrary.umn.edu/cases/1997/argentina55-97a.html>.

<sup>108</sup> See most notably L. Zegveld, "The Inter-American Commission on Human Rights and international humanitarian law: A comment on the Tablada Case", 39 *International Review of the Red Cross* 324 (September 1998), p. 505-511.

<sup>109</sup> For subsequent decisions reached by the IACnHR by applying IHL and thus deciding whether a State's conduct was compatible with its standards, see C. Byron, above footnote 1, p. 856-860; L. van den Herik and H. Duffy, above footnote 71, p. 14, footnote 78; and S. Sivakumaran, above footnote 94, p. 501.

<sup>110</sup> Emphasis added. IACtHR, *Las Palmeras v. Colombia*, case 11.237, Report N° 67/00, Judgement on Preliminary Objections, 4 February 2000, para. 33, available in English at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_67\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_67_ing.pdf).

<sup>111</sup> See for instance IACtHR, *Bámaca-Velasquez v. Guatemala*, Series C No. 70, 25 November 2000, available in English at <https://opil.ouplaw.com/view/10.1093/law:ihrl/1453iachr00.case.1/law-ihrl-1453iachr00>.

<sup>112</sup> ACnHPR, *Democratic Republic of the Congo v. Burundi, Rwanda and Uganda*, Communication 227/99, May 2003, para. 70, 78 and 79-87, partially available in English at <https://casebook.icrc.org/case-study/achpr-democratic-republic-congo-v-burundi-rwanda-and-uganda>.

<sup>113</sup> See the discussion on the competence of regional mechanisms above p. 14.

<sup>114</sup> ACnHPR, General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), November 2015, para. 32-35. V. Todeschini, "The Relationship between International Humanitarian Law and Human Rights Law in the African Commission's General Comment on the Rights to Life", blogpost on *EJIL:Talk!*, 7 June 2016, available at <https://www.ejiltalk.org/the-relationship-between-international-humanitarian-law-and-human-rights-law-in-the-african-commissions-general-comment-on-the-right-to-life/>, offers a detailed analysis of the ACnHPR's approach in this regard.

### Intermediate conclusion 3.0

Their abundant case law have subjected regional mechanisms to much more scholarly scrutiny than their universal counterparts. If the Inter-American system never hesitated to clarify (and even to adjust) the theoretical underpinnings of its approach to IHL, the ECtHR waited until the now famous Hassan case to finally do so and yet its decision only concerns the law of international armed conflicts. Even so, critics denounce several shortcomings of the regional systems' dealing with IHL: a lack of coherence, at least in the ECtHR's jurisprudence (for instance on issues of extraterritorial jurisdiction in armed conflicts), as well as – unsurprisingly - the absence of sufficient judicial expertise to tackle issues of IHL.<sup>115</sup> However, in order to adequately assess the record of regional human rights mechanisms, one should not forget that they have limited competence to deal with IHL and that States' (and/or individual applicants') willingness or reluctance to argue based on IHL will influence their final decision.

### Guiding (legal and practical) questions

- Would a better understanding of regional mechanisms' competence contribute to better managing (States' and academia's) expectations about their capacity to deal with IHL? Is there a theoretical difference between dealing with IHL with regards to jurisdiction – *i.e.* determining that a mechanism is not competent because the issue at hand concerns only IHL – and with regards to merits? In other words, does the competence of regional mechanisms extend to the first instance but not the second?
- Should regional human rights mechanisms only deal with IHL if the applicant and/or the concerned State so requests, or at least gives specific consent?
- Could the discrepancy between the ECtHR's and the Inter-American approaches to IHL be linked to States' respective reluctance or openness to argue based on IHL? Similarly, when involved in armed conflict, should States be encouraged to systematically recourse to derogations in the European system?<sup>116</sup>
- What is the role of national jurisdictions, especially within regional systems requiring the exhaustion of domestic remedies?
- Could regional mechanisms learn from each other's approach to IHL? Should one establish a platform (gathering all stakeholders) to foster exchanges? Also, should one engage in a detailed comparative study of the practices of the different regional systems and thus contribute to moving the debate away from its current Western-centric approach?
- Does the contested applicability of international human rights law to armed non-State actors (and their limited jurisdictions in that regard) render regional mechanisms inadequate for dealing with grievances of victims in non-international armed conflict? Does such

<sup>115</sup> See for instance G. Gaggioli, above footnote 20, p. 236; and C. Byron, above footnote 1, p. 883-884.

<sup>116</sup> In that regard, see M. Milanović, above footnote 28, p. 483.

inequitable treatment breach the notion of equality of belligerents fundamental to IHL?<sup>117</sup>  
Could the potential perception of bias be counterbalanced?

- Should States consider IHL-knowledge as a criterion when nominating judges to regional mechanisms? Also, should judges be systematically trained on IHL?
- Should States be encouraged to intervene as third parties in relevant cases? Should non-governmental organizations and/or academic institutions also be encouraged to intervene in proceedings through *amici curiae*?<sup>118</sup> Could such interventions contribute to counterbalancing lack of IHL-knowledge?

## PROVISIONAL LESSONS-LEARNED

The following lessons-learned are of general nature and concern, to the extent possible, all types of human rights mechanisms examined in this paper. They shall be refined based on the discussions, suggestions and conclusions of the scientific colloquium of the 2019 Geneva Human Rights Week.

- A human rights mechanism's competence to deal with IHL remains contingent upon its foundational instrument and/or its mandating authority. If mechanisms emanating from the Charter of the United Nations (General Assembly, Security Council, Human Rights Council and their respective derivatives) can directly deal with IHL *intra vires*, the same does not hold true for mechanisms rooted in most universal and regional treaties.
- United Nations Special Procedures and investigate mechanisms deal with IHL regardless of whether that legal framework is explicitly included in their mandate. However, States fail (or choose) to include IHL in a mandate based on the prevailing political dynamics, not because they consider it inherent to such mandate.
- Mandates of United Nations investigative mechanisms are increasingly geared toward the establishment of individual criminal responsibility, thus creating the risk of conflating application of IHL with that of international criminal law.
- States should develop – as a matter of policy – a coherent and systematized positioning vis-à-vis the implementation of IHL by human rights mechanisms. Such positioning should take into account the specificities of each mechanism.
- All human rights mechanisms dealing with IHL are generally being criticized for their lack of coherent/systematic approach, insufficient expertise, and resulting standards that cannot be realistically applied on the battlefield. These critiques are perhaps stronger in relation to universal

<sup>117</sup> See notably C. Byron, above footnote 1, p. 883-884.

<sup>118</sup> For a reflection on the added value of scholarly *amici curiae* before various international and regional jurisdictions, see A. Kent and J. Trinidad, "International Law Scholars as *Amici Curiae*: An Emerging Dialogue (of the Deaf)?", 29 *Leiden Journal of International Law* (2016), p. 1081-1101. P. 1095-1097 are exclusively devoted to the ECtHR and the IACtHR.

and regional treaty-based mechanisms. To the contrary, commentators expect such shortcomings from their political counterparts.

- States' and individual applicants' readiness or reluctance to argue their cases coherently and effectively will influence pronouncements by regional mechanisms. When the case at hand concerns armed conflict, the respondent State should thus be encouraged to invoke IHL. For instance, States' refusal to engage with IHL has had little positive impact on the practice of ECtHR.